



INSTITUTE OF DIRECTORS
IN IRELAND

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12th June 2023

Re: Consultation Paper 153 (“CP153”) - Enhanced governance, performance and accountability in financial services, Regulation and Guidance (IAF Regulation and IAF Guidance) under the Central Bank (Individual Accountability Framework) Act 2023 (IAF Act)

To whom it may concern,

Thank you for the opportunity to respond to the proposed approach as set out in CP153, the draft IAF Regulations and the draft IAF Guidance. The Institute of Directors (IoD) in Ireland understands the historical and social context behind the regulatory objectives of the IAF Act, IAF Regulations and the IAF Guidance and, specifically, lessons learnt from the global financial crisis when governance deficiencies and insufficient accountability were revealed.

The Institute of Directors (IoD) in Ireland is a not-for-profit organisation. We are the leading membership body for directors and business leaders, with membership across all sectors and industries, but predominantly the financial services sector (31%). Our Vision is for Ireland to be an exemplar of corporate governance. Our Purpose is to instil stakeholder trust and confidence in organisations by educating, informing, and supporting directors and business leaders to lead successfully. Being the voice of directors and an advocate for the highest standards of corporate governance in Ireland is a core strategic pillar for IoD. The IoD has detailed knowledge of best practice standards, codes of practice and the techniques and processes associated with high performing boards.

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Directors: J Reynolds CDir (President), T McWade CDir,
H Nolan, B O’Sullivan CDir, I Reynolds CDir, M Shanahan, F Tierney CDir

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Why is IoD Ireland Responding to this Consultation?

We are responding to this consultation as the representative body for directors in Ireland. To inform our response, we conducted research with our members (survey and virtual discussions) to garner their views of the proposed IAF Regulation and IAF Guidance.

- The IoD reviewed CP153 and the draft IAF Regulations and draft IAF Guidance through the lens of our Vision and Purpose and the core tenets of corporate governance which we believe in and promote through our work: clarity of purpose to inform corporate strategy; principle of collective responsibility within a unitary board; division of responsibility to ensure no one person has unfettered control including the separation of the roles of CEO and board Chair; the benefits of independent non-executive director representation on boards; robust systems of internal governance; transparency; integrity. These core tenets are espoused by the UK Corporate Governance Code (2018) which has been adopted for many years by Euronext in Ireland (and formerly the Irish Stock Exchange). The UK Corporate Governance Code (which evolved from the 1992 Cadbury Code) has influenced many subsequent codes in other jurisdictions as well as sector specific codes such as Code of Best Practice for the Governance of State Bodies, the Charities Governance Code. Its core tenets are evident in the Central Bank of Ireland's (CBI's) Corporate Requirements for Credit Institutions, Insurance Undertakings and Investment Firms, requirements which the IoD fully endorse. Our objective in this response is to seek clarifications and/or assurance on aspects of the IAF and to raise concerns, as appropriate, regarding the evolution of corporate governance in financial services in Ireland under the IAF.
- The comments and observations provided focus predominately on the potential implications of the IAF on the functioning of the board. Given the responsibility of the board in ensuring the effectiveness of the system of internal governance beyond the boardroom, we have commented on aspects of IAF which we believe will impact on the boards ability to do so.
- We have also identified several areas of definitions and terminology that could be tidied up to avoid ambiguity.
- A specific online survey on the IAF consultation was issued to IoD Ireland members from 13th April-12th May 2023. The survey was directed to members specifically who work in the financial services sector, which is 31% of the overall IoD membership. The members who responded to the survey hold board or senior executive positions. Of the respondents, 57% noted that their organisation would be in scope in the first wave of the Senior Executive Accountability Regime (SEAR). As part of the research, one to one discussions were held with 10% of respondents to explore perspectives in more detail. We have endeavoured to extrapolate the dominant member perspectives from this consultation to ensure that their voice is represented.

Appendix 1 represents our detailed responses to the specific questions raised in CP153. The responses incorporate member perspectives from our consultation with our members. Included below is a summary of our main observations.

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Summary of Main Observations

Benefits of IAF

We asked our members to opine, through the lens of their board/individual directors, on the perceived benefits of IAF. Of the responses provided, the common perceived benefit cited was clarity of executive responsibilities and accountability and a reduction in the risk that executive responsibilities would “fall within the cracks” of a system of governance. Some members noted that the IAF should discourage the negative behaviour of a few bad actors and engender a greater focus on the consumer within the business. One member noted that placing more of an onus on management to do the right thing implied, in their view, a reduction in risk for non-executive directors. Another member noted that the IAF framework will raise awareness of local regulatory requirements at group level for subsidiaries operating in Ireland.

Concerns Regarding IAF

1. IAF versus Collective Board Responsibility and Strength

Underpinning our consideration of the proposed IAF Regulation and IAF Guidance is IoD’s commitment to the principle of individual and collective board responsibility and related board strength with executive directors and non-executive directors working together in the interest of the financial service provider (“FSP”) to generate long-term sustainable success. We note the several assertions within the CP153 document and the IAF Guidance of the CBI’s commitment to collective board responsibility and strength within the IAF, but we are challenged in reconciling conceptually and philosophically how individual accountability and collective board responsibility can sit side by side within the boardroom. In terms of concerns identified by our members within our consultation, this challenge emerged as one of the prominent concerns.

Non-executive directors, unlike their executive director colleagues, are not involved in the day-to-day management of the FSPs on whose board they sit but share the same legal duties owed primarily to the FSP with their colleagues. The composition of the board in terms of diversity of skill, expertise, approach and thinking significantly influences the board’s effectiveness and, de facto, the success of the FSP. Each director, owing a duty to act in the interest of the company, brings a degree of skill that might reasonably be expected from a person of the director’s knowledge and experience. No one director brings every skill required by the company to the boardroom. If they did, there is a risk that the boardroom would not enjoy the cognitive diversity so critical to avoid group think and to promote effective decision-making in a world of uncertainty.

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The Chair of the board has the task of creating the conditions for overall board and individual director effectiveness, leveraging the collective skills of the board, setting clear expectations concerning the style and tone of board discussions, ensuring the board has effective decision-making processes and applies sufficient challenge to major proposals. One director might have a stronger experience in a particular domain and the Chair will leverage this skill while ensuring input from the entire board. The Chair should minimise the risk of dominance by a domain expert. When it comes to making decisions reserved for the board, a Chair might strive for consensus, but it is not always possible or indeed necessary. It is critical, however, that when the directors leave the boardroom, they are collectively willing to oversee the execution of the decision and that the ability of any director to do so isn't compromised.

Collective board responsibility and related strength is not a veil for directors to hide behind. It integrates the system of governance in a forum that requires the business and risk judgement of the board, leveraging off the individual skill sets and the objectivity that comes via the non-executive directors by virtue of the fact that they are not involved in day-to-day management. **We are concerned that the regulatory philosophy of prescribed responsibilities being allocated to individual directors (especially given that several of these responsibilities are being assigned to non-executive directors (NEDS)/independent non-executive directors (INEDs)) is not consistent with the best practice approach described above. We are also concerned that SEAR will create a more siloed approach to role execution which negates the benefit of NED/INED representation on boards and adds risk to individual FSPs and the sector as a whole. We recommend further consideration of the allocation of prescribed responsibilities to individual directors (NEDs and INEDs specifically) under SEAR.**

In the context of the way decisions are made in practice and the fact that decisions can be made in good faith without full consensus across the board, we are concerned that the pivotal role of the board Chair has the potential to be compromised or even hamstrung. Section 5.3.10 of the IAF Guidance states that: *"Where an individual considers a decision may not be in the best interests of customers based on facts and the information at hand on the matter and following appropriate and effective challenge, they should take appropriate follow-up action, including reporting to relevant regulatory bodies where required"*. Given this requirement, will the Chair continue to be safely able to make a call on a board decision absent a consensus, as is best practice, or can the view of one director who has responsibility for a particular prescribed responsibility in their PCF role hold things up or force the board into an alternative decision for fear of regulatory scrutiny. Equally, a non-director PCF may make a recommendation that the board (or the majority of the board) do not agree with. What is the Chair and/or the board's position in this case? Members are particularly concerned given the absence of case law on such matters. In addition, what if reasonable steps turn into a consistent veto on all risk-taking activities by PCFs?

We would welcome the CBI's further consideration of the challenges these type of scenarios create for the Chair and the board.

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2. Decision-Making Under Uncertainty: Boardroom and Beyond

The challenge of any board and for the Chair is managing the often-differentiated expectations of a range of stakeholders. In addition, boards must make decisions and judgements armed with the information they have at the time and underpinned by assumptions related to the macro-economic environment, an interpretation of policy and/or regulation, and consumer behaviour. Equally, at various layers within a system of governance, management have to make decisions armed with incomplete information and using assumptions as indicated above.

It is both possible and probable, that the board and management might take decisions that, with the benefit of hindsight, they might not have made. We welcome the CBI's assertion that it will not apply a "benefit of hindsight lens" to any investigations and enforcement actions but wish to highlight the concerns of our members in this regard, notwithstanding this assertion. There is an added risk that this concern will impact on executive and non-executive directors' and indeed PCFs' appetite to take risks. Given the relationship between IAF and the ASP and our members' concerns, we consider it unhelpful that the two consultations were not run in tandem.

In Appendix 1, we have requested that any investigation undertaken by the CBI clearly outlines what steps have been taken by supervisors to negate the risk of cognitive bias towards the benefit of hindsight. Further, where PCFs can demonstrate that the benefit of hindsight is being applied by the CBI, we request that this view and supporting evidence be included in any report presented in advance of taking an enforcement action.

3. No one Person having Unfettered Control

The Senior Executive Accountability Regime (SEAR) requires in-scope firms to set out clearly and fully where responsibility and decision-making lie within the firm's senior management with the aim of providing clarity to the CBI as to who is responsible for what within the firm. Underpinning our consideration of the documents is IoD's commitment to the principles of one person not having unfettered control in the company, a core tenet of corporate governance best practice since the original guidance drafted by Sir Adrian Cadbury in the UK. This principle has manifested in corporate governance codes and requirements via provisions on the separation of roles of chair and CEO and the introduction of independent board structures.

It is critical, however, that this philosophy permeates throughout the organisation. Management forums rather than individuals should be responsible for tactical decision-making and for making recommendations on strategic and risk appetite/management aspects to the board. Our view is that a system of governance should have at its core that one person does not have 'control' over decision-making and that the system includes forums for decision making with the board being the ultimate forum with regard to matters reserved for its decision. It is these forums that should form the basis of check and challenge. Individuals, in particular PCF and indeed CF roles, are responsible for convening

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these forums and for creating a culture of managerial check and challenge critical to an effective system of governance. The board must look down through the organisation and ensure that the system of internal governance within the organisation is designed and operating effectively to execute strategic objectives within the risk appetite articulated by the board and in compliance with regulatory requirements. Within the system of internal governance, it is again **critical that no one person has unfettered control**. This does not mean that management will always achieve a consensus on a recommendation that must go to the board.

We are concerned that the emphasis on individual accountability is misaligned with this philosophy and could compromise the effectiveness of these forums.

In Appendix 1, we recommend that the CBI clarify within the IAF Guidance how important these governance forums are and clearly opine on their relevance to the demonstration of reasonable steps.

4. Board Diversity and Inclusion

We note that in its review of behaviour and culture in Irish retail banks in 2018, the CBI conducted Diversity and Inclusion Assessments of the five banks operating in Ireland at the time reflecting the importance of diversity and inclusion to fostering effective culture. The CBI concluded that banks had more work to do in terms of ensuring their organisations are sufficiently diverse and inclusive, particularly at senior level, to prevent group-think, guard against over-confidence, and promote internal challenge. In the spirit of this finding at board level, we consider that the allocation of prescribed responsibilities to NEDs/INEDs in Table 1 of Annex 2 (IAF Guidance) will narrow the gate for NEDs/INEDs/ interested in operating in the financial services space. To note, 67% of respondents to our survey consider that the introduction of SEAR (a pillar of IAF) is likely to discourage senior professionals from applying for or remaining in INED roles in in-scope firms.

In addition, we are concerned that boards will be inevitably bounded in composition terms to have directors with the specific competencies related to prescribed responsibilities included in Table 1 of Annex 2. These are competencies that are currently achieved on a collective basis.

We are also concerned with the risk that what is proposed will create significant concentration of NEDs/INEDs with a specific financial background which we consider to be contrary to what the CBI is trying to achieve in terms of cognitive diversity on boards. This will also increase the risk of dominance in the boardroom by a domain expert.

In Appendix 1, we recommend that the CBI reconsider the inclusion of NEDs/INEDs within SEAR.

5. Independent Non-Executive Directors

Promoting widely within best practice governance, INEDs, as an integral component of the board, represent a key layer of oversight of the activities of a financial services organisation. INEDs bring an independent viewpoint to the deliberations of the board that is objective and independent of the

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activities of the management and of the FSPs. While company law does not distinguish between executive directors and non-executive directors, the distinction is prominent in corporate governance codes and guidance, including the CBI's Corporate Governance Requirements for Credit Institutions/Insurance Undertaking/Investment Firms. We consider that the proposed guidance does not acknowledge this distinction in ideological or practical terms. Several of our observations in Appendix 1 relate to this issue. IoD Ireland would be delighted to discuss this further with the CBI.

In Appendix 1 we raise concerns regarding a perceived, existing expectations gap between industry and the CBI on the execution of oversight by non-executive directors. The CBI uses certain proxies for NED/INED effectiveness and contribution that industry considers to be very narrow and inaccurate proxies for their contribution. We consider that arising from this expectations gap, the industry is not starting from a positive position in terms of IAF.

There is further concern that within an IAF world, this will result in granular and managerial type discussions at board meetings given the understandable concerns of NEDs/INEDs to meet CBI's current expectations of demonstrating effectiveness. Related to this, governance support and guidance provided outside the boardroom by NEDs/INEDs may become redundant and for reputational risk reasons move to a more formal forum which, we consider, would be a very unfortunate governance outcome of IAF.

If, following this consultation, NEDs and INEDs are retained in scope under SEAR, it is critical that supervision is conducted in as consistent a manner as possible and in line with the practical realities of being a non-executive director.

In Appendix 1, we recommend that the CBI reconsider the inclusion of NEDs/INEDs within SEAR.

We strongly recommend explicit acknowledgement of the operational distinction between NEDs/INEDs and executive directors if the CBI decides to retain NEDs/INEDs within scope as currently proposed.

With regard to the expectations gap, we recommend that work be undertaken to eliminate the gap and alleviate industry concerns. This should include engagement with professional/membership bodies such as IoD Ireland to agree a common philosophy and understanding of the practical realities of being a non-executive director and related CBI expectations on role execution. We consider this to be fundamental to engendering confidence in the IAF and the existing Fitness and Probity regime. We request that this work be undertaken whether or not NEDs/INEDs are included within SEAR.

6. Subsidiary Governance

In Appendix 1, we have identified concerns regarding aspects of the inherent and prescribed responsibilities. Our overarching observation is that the allocation of several of these responsibilities within a SEAR framework may be difficult for subsidiaries of large, global organisations that operate an integrated global system of governance. Members are concerned with how subsidiary companies and boards can synchronise SEAR allocated responsibilities in a group matrix structure where the equivalent role within group does not have IAF responsibilities. To note, 57% of respondents to our survey either

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agreed or strongly agreed that the introduction of the IAF would be challenging for subsidiaries of global organisations operating in Ireland. While we note the intention of the CBI not to be prescriptive on the allocation of prescribed responsibilities, we consider that the requirement on firms to allocate these responsibilities will create challenges and have unintended consequences for governance efficiency.

We recommend that the CBI evolve the guidance to include scenarios within this context to provide clarity to the PCFs in subsidiary companies as to how the CBI will interpret their responsibilities.

7. System of Internal Governance

In adopting the Corporate Governance Requirements for Credit Institutions/Insurance Undertaking/Investment Firms along with the various European Supervisory Authority publication on systems of governance (including the three lines of defence model), large financial services firms already have access to best practice guidance. Matters reserved for board decision, terms of reference for board and managerial committees, business plans and/or programmes of activity, among other governance elements, are embedded in governance frameworks. CP153 states that the CBI does not intend the governance arrangements of regulated entities to change significantly noting that the key change is in relation to the allocation of responsibilities and the ability of the CBI to hold individuals to account.

We consider this to be an issue of interpretation of what corporate governance is. Corporate governance is the system by which companies are directed and controlled. The CBI states that the framework seeks to align with the way that firms have chosen to structure themselves (what IoD calls the system of company direction and control). Our concern, however, is that the rigidity of individual responsibility will actually impact on a board's discretion in designing and evolving the optimal system of governance for a specific FSP, particularly but not exclusively where the organisation is part of a larger group.

We recommend that the CBI reflects further on the challenges that the allocation of responsibilities will have for financial service providers. We request that the CBI considers this observation and seeks in the final AIF Guidance to provide the necessary assurance required by industry and particularly subsidiary FSPs.

Other Concerns

1. Confidence

From our member research, there appears, as things stand, to be quite a low level of confidence within the financial services sector for certain of the CBI supervisory processes, such as PCF approval, since the introduction of the Fitness and Probity Regime. The CBI is also considered by many to be unapproachable. This has not engendered confidence amongst industry participants that the IAF will be proportionate, fair, and sufficiently transparent. There is a significant perception of reputational risk which (more so than IAF on its own) has the potential to encourage an exit from the sector by NEDs /

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INEDs and discourage current executives from moving into the NEDs/INEDs space or accepting PCF roles. Several of our members have reflected the reputational risk concerns of colleagues domiciled outside Ireland who sit on subsidiary boards in Ireland (NEDs).

We strongly recommend that the CBI reflect on this issue so that IAF can be implemented from a position of mutual respect and cooperation based on confidence in the supervisory process.

2. Financial Services Talent Pool

We note your comment on Page 19 of CP153 on the risk of *“detering effect in relation to the recruitment and retention of high-quality individuals to important roles in the financial system”* and that you *“consider the framework to be well designed and balanced and unlikely to produce such effects”*. Having reviewed the framework design, our membership has expressed concern that employees within the financial services sector will be discouraged from talking on PCF roles in the future arising from the perceived reputational and financial risk inherent in doing so. 59% of respondents to our member survey consider that the introduction of SEAR (a pillar of IAF) is likely to discourage senior professionals from applying for PCF roles in in-scope firms. (Please note only 3% of respondents noted it would encourage employees to apply for senior executive, PCF roles). We are aware that the Senior Management Regime has been operational in the UK since 2016 but we are conscious that there is limited case law from which financial services employees can draw comfort. In fact, the recent enforcement action against a senior executive in a UK bank who was deemed to have acted honestly and in good faith, has exacerbated the concern of employees and of boards as regards their ability to attract talent to PCF roles.

We would welcome assurance on any comprehensive impact assessment undertaken on this issue and request that this concern be noted by the CBI. Please also see our comments in the subsequent paragraph with regard to enforcement.

3. Enforcement and the Rights of the Employee

A significant change will be the Central Bank’s ability to take enforcement action under the Administrative Sanctions Procedure (“ASP”) directly against Individuals for alleged breaches of their obligations rather than only for their participation in breaches committed by a firm. We are concerned that the IAF exposes individuals to personal, professional, and financial costs in circumstances where (i) they are not supported by their organisation if the CBI instigates an investigation or (ii) they have left the company when a CBI investigation is instigated and are not entitled to support from their former employer. **The draft IAF Regulations and Guidance are silent on this matter, and, in Appendix 1, we request that this be addressed.**

In circumstances where a PCF or CF has, in the opinion of their employer, been in breach of one or more conduct standards but, in the opinion of the employer, the breach is not deemed to be a termination offence, what are the rights of the PCF / CF where he/she/they applies for a more senior role within the

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FSP or with another FSP that requires CBI approval. We ask this question in the context of an individual's constitutional right to make a living. **The draft IAF Regulations and Guidance are silent on this matter, and, in Appendix 1, we request that this be addressed.**

Further, in circumstances where an individual that is subject to an investigation has left the FSP at which the alleged incident arose, what rights does that individual have to access to information pertinent to his/her/their case from their former employer and what legal obligation does an employer have to provide it? We note that the Central Bank intends to launch a separate public consultation on the changes to the ASP in mid-2023 and that this consultation package will include the revised ASP Outline, ASP Inquiry Guidelines and ASP Sanctions Guidance for consideration by all relevant stakeholders. Given the relationship between IAF and the ASP, we consider that the two consultations should have been run in tandem. **We request that the CBI incorporate their process for safeguarding individuals within the appropriate guidance. We request that the guidance be as clear and transparent as possible to enable a full understanding by stakeholders of what they can expect from the ASP in an IAF in terms of steps, parties involved, independence and objectivity of the process, timing etc.**

4. ECB Supervision versus CBI Supervision under IAF

We note that Section 23A of the 2010 Act is amended to reflect that the European Central Bank (ECB) has competence for the pre-approval of individuals who are proposed for certain PCF roles in 'Significant Institutions' which are subject to the exclusive competence of the ECB under Article 4(1)e of the SSM Regulation (Regulation (EU) 468/2014) and not just members of the management body of 'Significant Institutions'.

Can the CBI please provide an overview of how the ECB and the CBI will interact on AIF?

Thank you again for the opportunity to present our observations. We would welcome the opportunity to discuss our response with you. In circumstances where the CBI does not accept our comments and related requests above and within Appendix 1, we would appreciate a response in writing outlining the CBI's rationale.

Yours sincerely



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Chief Executive Officer
Institute of Directors in Ireland**



**Mr John Reynolds CDir
President
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Appendix 1: Detailed Response from IoD Ireland

CP153 Question	Observations / Questions / Requests
<p>Q1. What are your overall views and comments on the draft SEAR Regulations and related draft guidance?</p>	<p><u>Draft SEAR Regulations</u></p> <ol style="list-style-type: none"> 1. We suggest that capital letters are used for defined terms to avoid confusion within the text. 2. We consider that the implementation timeline for SEAR is too tight. We recommend that this be extended to 31 December 2024. <p><u>Draft SEAR Guidance (Annex 2, Part B)</u></p> <p>Please note that many of our observations pertaining to the draft SEAR Guidance are outlined in our response to subsequent questions below. Please find below additional comments:</p> <p>1. Page 6: Glossary of Terms</p> <p>(i) Allocated responsibilities: Second sentence of definition should be re-worded/simplified with the components of allocated responsibilities clearly set out (suggest using bullets) and with the components having defined terms with capital letters that are used throughout the Guidance.</p> <p>(ii) Allocated responsibilities: Third sentence is confusing. What about “Inherent Responsibilities”?</p>

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	<p>2. Group Companies</p> <p>Paragraph 2.6.15 of Annex 2 (in relation to the Management Responsibilities Maps) asks: <i>“If there are key group level individuals with influence over the firm (e.g. Group NEDs) are they identified and does the Management Responsibilities Map show how these key group level individuals connect with key individuals and governance bodies of the firm? If the firm relies on group-level governance committees are these shown, and can the reader understand how these relate to each other and to the formal governance of the firm (e.g., its board of directors)?”</i></p> <p>For a large Group operating a subsidiary in Ireland, the parent board will be mindful of ensuring a consistency in strategic objectives, risk appetite, systems of risk management and internal control across the organisation. Indeed, this approach is consistent with internal governance guidelines from the EBA and EIOPA. Where the firm relies on group-level governance committees or forums, what does this mean for PCFs who have been allocated prescribed responsibilities related to the very issues these committees are responsible for?</p> <p>Can you explain in the final Guidance how the operation of Group governance committees will interact with SEAR and Prescribed Responsibilities from an accountability and reasonable steps perspective?</p> <p>3. Systems Error and Individual Conduct</p> <p>Page 3 of CP153 (Objectives) states: <i>“It is essential to be clear on roles and responsibilities in firms, particularly large and complex institutions where things can and do go wrong through <u>systems error</u> and individual conduct”</i>.</p> <p>We consider that the draft IAF Regulation and Guidance does not make a sufficient distinction between human or operational errors and misconduct throughout and the extent to which the former (i.e. human or operational errors) could be perceived as a failure of a duty of responsibility under the SEAR regime or a breach of conduct standards. This is a cause of concern for the employees within the sector and should be clarified. We are assuming that the former (i.e., a human or operational error by a PCF or a CF or by someone to whom a PCF has delegated day to day responsibility) does not constitute a failure of a duty of</p>

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CP153 Question	Observations / Questions / Requests
	<p>responsibility under SEAR or a breach of conduct standards. Human errors will inevitably occur, and it is the identification of errors within the system of governance (e.g., through the work of internal audit) and the subsequent enhancements to controls that is critical from a governance perspective.</p> <p>We request that the CBI confirm that this interpretation is correct.</p>
<p>Q2. Do you agree with our proposed approach to the Inherent Responsibilities?</p>	<p>Regulation 4 and Schedule 1 (Inherent Responsibilities)</p> <p>1. We note and welcome the approach that the roles to which the SEAR applies at in-scope firms align with those PCFs to which the F&P Regime applies in those firms.</p> <p>2. We consider that the inherent responsibilities allocated to PCF1, PCF2A and PCF2B to be the responsibilities of the entire board and that delineating them in this way is not consistent with the core tenets of corporate governance, including the requirements of the Corporate Governance Requirements for Credit Institutions and Insurance Undertakings¹ (for simplicity, “the Code”).</p> <p>While we note the CBI’s statement at Paragraph 2.4.15 of Annex 2, we would welcome the CBI’s response to this concern and an explanation for how the inherent responsibilities as allocated to PCF1, PCF2A and PCF2B aligns in practice with the Role of the Board per the Code (presented below):</p> <p>13. Role of the Board</p> <p><i>13.1 The board of each credit institution is responsible for the effective, prudent, and ethical oversight of the credit institution. The board is responsible for, among other things, <u>setting and overseeing</u>:</i></p> <p><i>a) the business strategy for the credit institution.</i></p>

¹ **Corporate Governance Requirements:** The Central Bank Corporate Governance Requirements for Credit Institutions 2015, the Central Bank Corporate Governance Requirements for Insurance Undertakings 2015, the Central Bank Corporate Governance Requirements for Investment Firms and Market Operators 2018, and other domestic and international governance requirements applicable to firms, as relevant. For illustrative purposes we are referencing the Corporate Governance Requirements for Credit Institutions and the Corporate Governance Requirements for Insurance Undertakings as they are more detailed and prescriptive than the Corporate Governance Requirements for Investment Firms and Market Operators.

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A company limited by guarantee, registered in Ireland number 197643

CP153 Question	Observations / Questions / Requests
	<p><i>b) the amounts, types and distribution of both internal capital and own funds adequate to cover the risks of the credit institution.</i></p> <p><i>c) the strategy for the on-going management of material risks including, inter alia, liquidity risk.</i></p> <p><i>d) a robust and transparent organisational structure with effective communication and reporting channels.</i></p> <p><i>e) a remuneration framework that is in line with the risk strategies of the credit institution; and</i></p> <p><i>f) an adequate and effective internal control framework, that includes well-functioning risk management, compliance, and internal audit functions as well as an appropriate financial reporting and accounting framework.</i></p> <p>3. We recommend an alternative inherent responsibility for PCF1 (Executive Directors) as follows: Executive responsibility for day-to-day direction of the firm.</p> <p>4. We recommend an alternative inherent responsibility for PCF8 (CEO) as follows: Overall executive responsibility for managing and steering the business activities of the firm on a day-to-day basis.</p> <p>5. Please also refer to our response to Question 5 below regarding inclusion of INEDs/NEDs within SEAR.</p> <p>6. For a large domestic organisation and a global organisation operating in Ireland, the nature and scale of operations will generally require a sharing of the Inherent Responsibilities that the CBI propose to allocate to PCFs such as PCF 12, PCF13, PCF14, PCF30, PCF49 and particularly PCF42.</p> <p>We recommend that the CBI reconsider its stance on the sharing of inherent responsibilities allocated to management.</p>
Q3. Do you agree with our proposed approach to the	<p>Regulation 5 and Schedule 2 (Prescribed Responsibilities²)</p> <p>1. We welcome the flexibility afforded to firms to allocate responsibilities in a manner that accommodates different business models and organisational structures. We assume this empowers boards to document</p>

² Our comments herein reflect Part 1 of Schedule 2, but we request that you consider these comments in the context of Parts 2 and 3 also.

Part of the IoD International Network
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CP153 Question	Observations / Questions / Requests
<p>Prescribed and Other Responsibilities?</p>	<p>the rationale for the allocation of responsibilities based on their judgement regarding organisational context and related business model.</p> <p>Can the CBI please opine on whether this assumption is correct?</p> <p><i>2. Paragraph (3): A firm shall allocate the items listed in points (4), (6), (9), (10), (11), (12) and (13) of the table in Schedule 2, Part 1 to a PCF holder of the type referred to in point (2) or point (3) of the table in Schedule 1.</i></p> <p>We consider that the prescribed responsibilities allocated to PCF2A and PCF2B to be the responsibilities of the entire board and that delineating them in this way is inconsistent with best practice corporate governance and the philosophy of collective board responsibility and strength.</p> <p>[Assigning these prescribed functions to NEDs is also, in our view, inconsistent with the concept of being non-executive. Please see our comments in response to question 5 below.]</p> <p>We would welcome the CBI’s response to this concern and an explanation for how the prescribed responsibilities as allocated to PCF2A and PCF2B in Table 1 of Annex 2 aligns, in practice, with the Role of the Board per the Code (presented above).</p> <p>3. PR9 typically forms part of the terms of reference of an audit committee, albeit it is the ultimate responsibility of the board.</p> <p>We would welcome the CBI’s response to this observation and to how the allocation of PR9 to one PCF holder aligns in practice with Section 22 of the Code.</p> <p>We recommend that the CBI reconsider the inclusion of PR9 as a prescribed responsibility allocated to one PCF.</p> <p>4. PR11 typically forms part of the terms of reference of a risk committee, albeit it is the ultimate</p>

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A company limited by guarantee, registered in Ireland number 197643

CP153 Question	Observations / Questions / Requests
	<p>responsibility of the board.</p> <p>We would welcome the CBI’s response to this observation and to how the allocation of PR11 to one PCF holder aligns in practice with Section 23 of the Code.</p> <p>We recommend that the CBI reconsider the inclusion of PR11 as a prescribed responsibility allocated to one PCF.</p> <p>5. PR12 typically forms part of the terms of reference of a nominations committee, albeit it is the ultimate responsibility of the board.</p> <p>We would welcome the CBI’s response to this observation and to how the allocation of PR12 to one PCF holder aligns in practice with Section 25 of the Code.</p> <p>We recommend that the CBI reconsider the inclusion of PR12 as a prescribed responsibility allocated to one PCF.</p> <p>6. The spirit of PR6 typically forms part of the terms of reference of a remuneration committee, albeit it is the ultimate responsibility of the board³.</p> <p>We would welcome the CBI’s response to this observation and to how the allocation of PR6 to one PCF holder aligns in practice with Section 24 of the Code and specifically sub-paragraph 24.4 which refers to best practice.</p> <p>We recommend that the CBI reconsider the inclusion of PR6 as a prescribed responsibility allocated to one PCF.</p>

³ Indeed, in a financial services environment, drawing on the lessons learned from the global financial crisis, determining a remuneration policy is a vital role of a group board given its clear impact on company culture.

CP153 Question	Observations / Questions / Requests
	<p>7. We consider that PR1 should be the responsibility of the entire board as is the case for a company's legal duties and for tax and financial services regulation to which the company must comply.</p> <p>We would welcome clarification from the CBI as to why a different approach is being adopted for SEAR.</p> <p>We recommend that the CBI reconsider the inclusion of PR1 as a prescribed responsibility allocated to one PCF.</p> <p>8. For firms in scope of SEAR, an individual must be assigned PR 3 <i>'Responsibility for embedding the conduct standards throughout the firm'</i>. We consider that PR3 should be the responsibility of the entire board.</p> <p>We would welcome clarification from the CBI as to why a different approach is being adopted for SEAR.</p> <p>We recommend that the CBI reconsider the inclusion of PR3 as a prescribed responsibility allocated to one PCF.</p> <p>9. We consider that PR17 has to be the responsibility of the entire board.</p> <p>We recommend that the CBI reconsider the inclusion of PR17 as a prescribed responsibility allocated to one PCF.</p> <p>10. We have a concern in relation to circumstances where prescribed responsibilities are in practice and by necessity the responsibility of more than one individual. While we note the CBI's assertion that it understands the challenges of a matrix structure within a larger organisation, we are concerned that the prescribed responsibilities will create challenges and conflicts for individuals with dual reporting lines and/or operating within a matrix structure. These challenges have already been experienced within the existing F&P, but concern is heightened in the context of IAF. We consider that the rigidity of individual responsibility will actually impact on a board's discretion in designing and evolving the optimal system of governance for a specific financial services organisation, particularly but not exclusively where the</p>

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A company limited by guarantee, registered in Ireland number 197643

CP153 Question	Observations / Questions / Requests
	<p>organisation is part of a larger group.</p> <p>We note that the CBI contends that systems of governance in firms should not change as a result of SEAR but we recommend that the CBI reflects further on the challenges that the allocation of responsibilities will have for financial service providers.</p> <p>Regulation 7 (Other Responsibilities) Paragraph (2): <i>“Without prejudice to paragraph (1), where in the interests of the proper and orderly regulation of a firm, the Bank forms the view that a responsibility in respect of an activity, business area or management function is <u>another responsibility</u>, it may declare by notice in writing served on the firm that the matter is <u>another responsibility</u> in that firm for the purposes of these Regulations”.</i></p> <p>11. We recommend that capital letters are assigned to defined terms (in the case of Regulation 7(2), “Other Responsibilities”) to avoid confusion.</p> <p>12. We recommend that as part of firms’ preparation for SEAR, that firms present their interpretation of responsibilities that fall into the category of “Other Responsibilities” to the CBI in advance of 1 July 2024 and that this interpretation be signed off by the CBI as complete before the application of SEAR.</p>
<p>Q4. Do you agree with our proposed approach to the sharing of roles and responsibilities including job sharing?</p>	<p>In the AIF Guidance, Paragraph 2.3.1 states: <i>“Inherent and Prescribed Responsibilities are integral to the relevant PCF role, as such sharing or splitting of PCF roles amongst individuals is not permitted under the SEAR, other than in the case of job sharing.”</i></p> <p>Per Paragraph 2.1.3: “A new <i>statutory Duty of Responsibility</i> applies to all PCF role holders at in-scope firms to take any steps that it is reasonable in the circumstances for them to take to avoid a contravention by their firm of its obligations under financial services legislation in relation to an aspect of the firm’s affairs for which the PCF role holder is responsible under SEAR”.</p> <p><i>1. We welcome that the Central Bank recognises the importance of job sharing from a diversity and inclusion perspective and proposes a pragmatic approach to the allocation of responsibilities in this</i></p>

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A company limited by guarantee, registered in Ireland number 197643

CP153 Question	Observations / Questions / Requests
	<p><i>context. We challenge, however, why a similar principle cannot be applied more generally and allow sharing of responsibilities that are significant in nature across individuals.</i></p> <p>We recommend that the CBI reconsiders its stance on the sharing of prescribed responsibilities allocated to management.</p> <p>2. For a global organisation, the sheer scale of operations could lend itself to a sharing of the inherent responsibility allocated to PCF 12, PCF13, PCF14, PCF30, PCF49 and particularly PCF42.</p> <p>3. We consider that certain of the prescribed responsibilities that will be allocated to management are of such significance that they <u>should</u> be shared. We bring particular attention to PR15, PR22, PR25 and PR28 which are significant responsibilities, potentially well beyond the capacity of one PCF/individual in the context of an IAF. In the context of Paragraph 2.4.10 of Annex 2, it will be challenging for firms to meet the expectation that prescribed responsibilities are allocated to individuals with “<i>appropriate levels of seniority</i>” while at the same time not “<i>over-allocating</i>” these responsibilities to one individual without distorting existing systems of governance.</p> <p>We recommend that the CBI reconsiders its stance on the sharing of prescribed responsibilities allocated to management.</p>
<p>Q5. Do you agree with our proposed approach to the inclusion of INEDs/NEDs within scope of SEAR?</p>	<p>Section 2.4.10 of Annex 2 states: “<i>In allocating a Prescribed Responsibility to an individual in a PCF role, the nature of the Prescribed Responsibility being allocated must also be considered. Specifically, where the <u>Prescribed Responsibilities are non-executive in nature (list provided), these must be allocated to NEDs.</u> Such an approach eliminates any potential misallocation of executive or non-executive Prescribed Responsibilities</i>”.</p> <p>Paragraph 2.8.7 of Annex 2 states that “<i>the IAF Act does not distinguish between executive and non-executive senior management in relation to the Duty {of Responsibility}</i>”.</p> <p>1. We consider that the AIF guidance at a minimum should distinguish between and define non-executive</p>

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A company limited by guarantee, registered in Ireland number 197643

CP153 Question	Observations / Questions / Requests
	<p>directors who are executives in a wider group structure (Group NEDs); non-executive directors who are not executives in a wider group structure, are not involved in day to day management but do not meet the typical independence criteria (NEDs) and non-executive directors who are not executives in a wider group structure, are not involved in day to day management but do meet the typical independence criteria (INEDs).</p> <p>2. We fully accept and endorse that INEDs/NEDs have existing responsibilities under the corporate governance framework.</p> <p>We do NOT agree, however, with the inclusion of NEDs and INEDs (as defined above) in SEAR for the following reasons.</p> <p>(i) It is counter-intuitive that a senior executive accountability regime includes NEDs and INEDs who are not executives of the financial service provider (“FSP”). Paragraph 2.8.7 of Annex 2 states that “<i>the IAF Act does not distinguish between executive and non-executive senior management in relation to the Duty {of Responsibility}</i>”. NEDs and INEDs are not senior management. The idea of “<i>Prescribed Responsibilities</i>” (as distinct from having legal responsibilities to the company) that are “non-executive in nature” runs contrary, in our view, to the concept of being a non-executive director.</p> <p>(ii) Corporate governance codes and requirements include an important role for INEDs while recognising that they are not involved in the day-to-day activities of the business. As such, there is an inevitable information asymmetry situation that is a characteristic of being non-executive. In fact, it is this information asymmetry that supports the very objectivity that INEDs should bring to the boardroom. We consider that the Code aptly reflects this unique role of the INED and NEDs generally:</p> <p>10. Independent Non-Executive Directors</p> <p>10.1 As an integral component of the board, independent non-executive directors represent <u>a key layer of oversight of the activities of a credit institution</u>. It is essential for independent non-executive directors to bring an independent viewpoint to the deliberations of the board that is objective and independent of the activities of the management and of the credit institution.</p>

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A company limited by guarantee, registered in Ireland number 197643

CP153 Question	Observations / Questions / Requests
	<p>11. Non-Executive Directors and Executive Directors</p> <p>11.1 The role of the non-executive directors, under the Chairman’s leadership is, inter alia:</p> <ul style="list-style-type: none"> • To ensure that there is an effective executive team in place; • To participate actively in constructively challenging and developing strategies proposed by the executive team; • To participate actively in the board’s decision-making process; • To participate actively in board committees (where established); and • To exercise appropriate oversight over execution by the executive team of the agreed strategies, goals and objectives and to monitor reporting of performance. <p>Given Code provisions, we challenge why INEDs and NEDs are included in SEAR and argue that their inclusion is not fully consistent with the Code.</p> <p>(iii) As regards the proposed approach to the inclusion of NEDs and INEDs, we consider that the prescribed responsibilities attributed to NEDs (Table 1, Annex 2) are overall board responsibilities and that delineating them in this way is inconsistent with the core tenet of collective board responsibility and best in class corporate governance. The board is made up of individual directors, each owing a fiduciary duty and a duty of care to the company (not inconsistent with the Conduct Standards proposed). The directors, working together through this legal lens, should ensure that the inherent responsibilities (which we consider to be pivotal to company sustainability) are executed.</p> <p>While the inherent responsibilities are not inconsistent with the Code, we disagree that the prescribed responsibilities are consistent with NEDs/INEDs existing responsibilities under the corporate governance framework and argue that they should be viewed as collective responsibilities of the board.</p> <p>(iv) In Paragraph 2.4.12 of Annex 2, it states that “<i>under the Central Bank's F&P Regime, NEDs and INEDs have been prescribed as PCFs capable of exercising a significant influence on the conduct of a firm's affairs</i>”.</p> <p>We don’t dispute this statement but argue that no-one should have unfettered control within a system</p>

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A company limited by guarantee, registered in Ireland number 197643

CP153 Question	Observations / Questions / Requests
	<p>of governance (including at board level), hence the importance of independent director representation, separation of the roles of Chair and CEO and collective board strength.</p> <p>(v) In Paragraph 2.14.13 of Annex 2 it states that <i>“The oversight and challenge provided by NEDs and INEDs goes to the heart of the culture of the firm”</i>.</p> <p>We fully agree that the nature of engagement by NEDs and INEDs at board meetings influences the culture of the boardroom and can make or break the respect of management for the vital role of the board. The accountability created in the boardroom with regard to cultural characteristics espoused by the board is also pivotal to cultural objectives permeating from the board via management through the organisation. It is, however, what occurs outside the boardroom that has the dominant impact on company culture. We consider that this statement, therefore, places an unrealistic expectation on NEDs and INEDs with regard to the extent of their influence. It is much more complicated than this. The CEO and the executive management team are the dominant influencers on corporate culture.</p> <p>(vi) We refer you also to our response to Q10 below regarding reasonable steps.</p> <p>Based on the points above, we request that the CBI reconsider including NEDs and INEDs within the scope of SEAR. We recommend that NEDs and INEDs are NOT included within the scope of SEAR.</p>
<p>Q6. Do you agree with our proposed approach to the Statements of Responsibilities? (see Appendix 3 of IAF Guidance)</p>	<p>1. As stated above, we recommend that “Other Responsibilities” (as allocated within the Statement of Responsibilities) should be signed off as complete by the CBI for each firm before allocation of these responsibilities to an existing or new PCF.</p>
<p>Q7. Do you agree with our proposed approach to the Management Responsibilities Map?</p>	<p>Regulation 6 (<i>Identification of Areas of Responsibility and Management Responsibilities Maps</i>)</p> <p>1. Do Section 6 (1) to (3) ultimately require a re-write of the programme of activities (PoA) or business plans for FSPs? Should firms re-write the PoA / business plans to reflect the requirements therein?</p>

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H Nolan, B O’Sullivan CDir, I Reynolds CDir, M Shanahan, F Tierney CDir

A company limited by guarantee, registered in Ireland number 197643

CP153 Question	Observations / Questions / Requests
	<p>2. Does Section 6(e) refer only to a job-sharing situation or does a board have the capacity under the Regulations to allocate responsibility to more than one PCF holder? Suggest that the term “allocated” is not used twice in one sentence as it is confusing. See comment above regarding terminology/definition.</p>
<p>Q8. Do you agree with our proposed approach to submission of documents?</p>	<p>No comment.</p>
<p>Q9. Do you agree with our proposed approach to outsourcing in the context of SEAR?</p>	<p>1. We consider that the proposal that, where there is outsourcing of a PCF role, the role-holder should fall under the oversight of a PCF role holder within the entity, might be challenging in a global organisation where roles are internally outsourced. This might result in PCF role holders in an Irish based entity being responsible for an activity that, other than due diligence and on-going oversight, is out of his/her/their domain of influence on a day-to-day basis and thus imposes unrealistic expectations on the PCF. The allocation of these responsibilities within a SEAR framework may be difficult for subsidiaries of large, global organisations that operate an integrated global system of governance. From our engagement with IoD Ireland members (via an online survey and in-depth phone calls), members are concerned how subsidiary companies and boards can synchronise SEAR allocated responsibilities in a group matrix structure where the equivalent role within group does not have IAF responsibilities. While we note the intention of the CBI not to be prescriptive on the allocation of prescribed responsibilities, we consider that the requirement on firms to allocate these responsibilities will create challenges and have unintended consequences for governance efficiency.</p> <p>We recommend that the CBI reconsider the practicalities and fairness of this approach. We recommend that the CBI evolve the guidance to include scenarios within this context to provide clarity to the PCFs in subsidiary companies as to how the CBI will interpret their responsibilities.</p>
<p>Q10. Do you agree with our proposed approach to reasonable steps in respect of</p>	<p>Page 32, CP153: <i>“In assessing the steps that an individual took, the Central Bank will consider what steps an individual, in that position, could reasonably have been expected to take at that point in time.... Mindful</i></p>

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A company limited by guarantee, registered in Ireland number 197643

CP153 Question	Observations / Questions / Requests
SEAR and the Conduct Standards?	<p><i>that regulatory expectations evolve, this will depend on the overall circumstances and environment as they existed at the time rather than applying standards retrospectively”.</i></p> <p>1. We welcome the approach of taking account of whether the individual is a recent appointment to the role and their overall level of experience in the context.</p> <p>2. The IAF Act refers to ‘any steps that it is reasonable in the circumstances for the person to take’ which has been abbreviated to ‘reasonable steps’ for the purpose of the IAF Guidance. We note that the CBI do not want to be too prescriptive on reasonable steps. The guidance on reasonable steps contained in Annex II of the consultation (Paragraphs 3.3, 3.9 to 3.15) includes steps that may be feasible within an entire system of governance (board interacting across a three lines of defence) but we challenge the expectation that an individual PCF holder can satisfy the degree of audit trail required to satisfy the CBI in circumstances of an ASP.</p> <p>We request that the CBI reflect on this challenge.</p> <p>Can the CBI opine on the position of a PCF holder in circumstances where he/she/they have met some but not all of the steps included in Paragraphs 3.3, 3.9 to 3.15?</p> <p>3. We welcome that the CBI will be mindful to avoid applying standards retrospectively. Notwithstanding this assertion and the guidance on reasonable steps contained in Annex II of the consultation (Paragraphs 3.3, 3.9 to 3.15), we remain concerned as to the subjectivity of the supervisory assessment and the risk (albeit unintended) of supervisors applying a benefit of hindsight interpretation to actions or events. It is very important that PCFs aren't victims of the benefit of hindsight. The probability of this being the case will, in our opinion, be an important influence on whether “<i>a flight from the sector</i>” manifests.</p> <p>We request that in any investigation undertaken by the CBI, the steps taken by supervisors to negate the risk of cognitive bias towards the benefit of hindsight be clearly documented. Further, where PCFs can demonstrate that the benefit of hindsight is being applied by the CBI, we request that this view and supporting evidence be included in any report presented in advance of taking an enforcement action.</p>

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A company limited by guarantee, registered in Ireland number 197643

CP153 Question	Observations / Questions / Requests
	<p>4. Can we assume that the Board, as a matter of board policy, can determine what reasonable steps are and that if this is reflected in board policies (e.g. the use of governance forums) and related management procedures on which the board gains assurance across the 3 lines of defence, that this will be sufficient to protect individuals with regard to the adoption of reasonable steps (assuming the procedures are adhered to).</p> <p>We would welcome the CBI’s opinion on this approach.</p> <p>5. On the basis that 4. is acceptable, if the board deems a process to reflect reasonable steps and a PCF follows this process which is subsequently challenged by the CBI, is it the board or the PCF that could be subject to CBI investigation and/or enforcement?</p> <p>We would welcome the CBI’s opinion on this scenario.</p> <p>6. We note the comment on Page 35 of CP153: <i>“Proportionality means that we seek to bring enforcement action only for those cases where such significant action is merited, considering all of the circumstances, including the seriousness of the suspected breach and the harm or potential harm involved”</i>.</p> <p>Is it possible to distinguish in the AIF guidance between cases that will be investigated in the first instance and cases that move to enforcement action in the context of the proportionality principle? (For example, will you distinguish between pure human error (e.g., non-adherence to a company procedure in error), errors of judgement made in good faith versus a deliberate attempt to cause harm to the company and/or its customers and/or to mislead the CBI (e.g., destroying documents) before deciding to investigate a CF? It would be useful to see examples of how the CBI might respond in each context. We raise this question as even investigations that do not lead to enforcement can cause significant stress and reputational damage for individuals.</p> <p>7. With regard to acting openly with the CBI particularly where an individual/company is gathering</p>

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A company limited by guarantee, registered in Ireland number 197643

CP153 Question	Observations / Questions / Requests
	<p>intelligence or data on an issue, will the CBI take the following into account in investigations of individuals:</p> <p>(i) the rationale for the timing of disclosure / communication, (ii) any advice received from external counsel on the timing of disclosure and (iii) as appropriate, board approval for the timing?</p> <p>In other words, do senior management and the board have the power under the Regulations to make a call on the timing of disclosure in good faith?</p> <p>Non-Executive Directors and Independent Non-Executive Directors</p> <p>8. We refer you to our response to Question 5 above with regard to NEDs/INEDs inclusion in SEAR.</p> <p>9. In Paragraph 2.14.13 of Annex 2 it states that “considerations <i>in respect of reasonable steps will be limited to what should be reasonably be expected of individuals (i.e., NEDs and INEDs) in that context</i>”. On Page 17 of CP153, the CBI state: “<i>The responsibilities for which INEDs/NEDs are accountable will be <u>limited to their non-executive oversight responsibilities</u></i>”.</p> <p>We reiterate our opinion that NEDs and INEDs should not be within scope of SEAR.</p> <p>We consider the two statements above, however, to be key in circumstances where NEDs and INEDs are retained in scope of SEAR. It is imperative that there is a consistency of understanding within the CBI and across the sector on what “oversight” means in practice. In determining this, consideration must be given to what is practical in the context or “circumstance” of “being a non-executive director” and also in the context of cognitive limitations when operating in a non-executive capacity. This is important as it directly impacts the CBI’s interpretation of “reasonable steps” taken by NEDs and INEDs. In addition, any ambiguity around this will have implications for the appetite of individuals to accept or stay in NED/INED roles. It will also have implications for boardroom dynamics, the capacity of the Chair to do his/her/their job and ultimately for the effectiveness of the board.</p> <p>We have identified through our member consultation a perceived “expectations gap” between industry</p>

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A company limited by guarantee, registered in Ireland number 197643

CP153 Question	Observations / Questions / Requests
	<p>participants and the CBI on what “oversight” means which is a cause for concern. This gap is epitomised, among other things, by the level of detail (often managerial in nature) that management feel compelled to provide to boards as well as the CBI’s emphasis on the level and depth of evidence of challenge in a set of board minutes as a proxy for INED effectiveness. In a pre-IAF world, both are a cause of concern amongst directors.</p> <p>We request that the CBI explores this “expectations gap” and addresses it prior to the implementation of SEAR. We would be delighted to engage further with the CBI on this important issue.</p>
<p>Q11. Does the guidance assist you in understanding the Duty of Responsibility and the non-exhaustive list of factors to be considered with regard to reasonable steps?</p>	<p>Duty of Responsibility Annex 2, Paragraph 1.2: <i>“The (statutory) Duty of Responsibility applies to all PCF role holders at in-scope firms to take any steps that it is reasonable in the circumstances for them to take to avoid a contravention by their firm of its obligations under financial services legislation in relation to an aspect of the firm’s affairs for which the PCF role holder is responsible under SEAR”.</i></p> <p>Annex 2, Page 8: Reasonable Steps: <i>“the IAF Act refers to ‘any steps that it is reasonable in the circumstances for the person to take’ which has been abbreviated to ‘reasonable steps’ for the purpose of this IAF Guidance”.</i></p> <p>Annex 2, Chapter 3 provides guidance on Reasonable Steps.</p> <p>Paragraph 2.8.14 of Annex 2 states that <i>“it is possible that more than one PCF role holder will be responsible under SEAR for an aspect of the firm’s affairs in relation to which a contravention has occurred. In such circumstances, the Central Bank will consider whether it is appropriate to take enforcement action under the Duty against one, some or all such individuals”.</i></p> <p>1. We find it challenging to reconcile the idea of <i>“an aspect of the firm’s affairs for which the PCF role holder is responsible under SEAR” (Paragraph 1.2)</i> with the safeguarding of collective board responsibility and strength.</p>

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A company limited by guarantee, registered in Ireland number 197643

CP153 Question	Observations / Questions / Requests
	<p>2. Based on our review, there are two dimensions to the Duty of Responsibility as follows:</p> <ul style="list-style-type: none"> ▪ avoiding a contravention by their firm of its obligations under financial services legislation in relation to an aspect of the firm’s affairs for which the PCF role holder is responsible under SEAR. ▪ taking any steps that it is reasonable in the circumstances to ensure 1 (addressed in Question 10). <p>Avoiding a contravention by their firm of its obligations under financial services legislation in relation to an aspect of the firm’s affairs for which the PCF role holder is responsible under SEAR.</p> <p>(i) This first dimension of the Duty is very broad and seems to assume, intentionally or otherwise, that elements of “<i>obligations under financial services regulations</i>” can fall neatly within Allocated Responsibilities. We note the statement in Paragraph 3.10.1 of Annex 2 that PCFs “<i>should be satisfied with the quality of any input provided by another area of the firm that is required for them to carry out their responsibilities</i>”. Financial services organisations and their activities are complex with “<i>obligations under financial services regulations</i>” spanning many functions and individuals with interdependencies. Indeed, in a large organisation where a PCF, and the function he/she/they are involved with, leverages off Group support such as legal, this is very challenging and could put a PCF at risk of breaching this Duty of Responsibility arising from actions in a different function and by another individual. We consider this to be imposing an unrealistic expectation on PCFs.</p> <p>By way of illustration, there should be several functions involved in the process of product governance in a credit institution. If a mortgage product is deemed by the CBI to be misrepresented in terms of its green credentials by a credit institution and several functions were involved in bringing the product to market, which PCF would be the target of investigation for a breach of their Duty of Responsibility?</p> <p>How will the CBI take this account and protect individuals from this risk?</p> <p>(ii) We recommend that the guidance indicate the degree or nature of a contravention by a firm of its obligations under financial that would lead to an investigation of the reasonable steps taken. For example, would an inadvertent breach of an investment restriction attached to a wealth management</p>

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CP153 Question	Observations / Questions / Requests
	<p>product that is identified and corrected be considered a contravention? Is it possible to be more specific within the guidance on what would lead to an investigation by the CBI within the guidance itself.</p> <p>Non-exhaustive list of factors</p> <p>3. As the list of factors to be considered is, as stated, non-exhaustive, it is not possible to say with any form of confidence that we understand what is deemed reasonable steps.</p> <p>4. We recommend that within the section on reasonable steps, the CBI make explicit the importance of effective forums of decision making potentially, chaired by the relevant PCF holder, with these forums demonstrating a check and challenge process with assumptions and outcomes clearly documented. We suggest incorporating Paragraphs 3.15.3 and Paragraphs 5.3.7 to 5.3.9 in this regard.</p>
<p>Q12. What are your views and comments regarding the guidance on the Common Conduct Standards and Additional Conduct Standards?</p>	<p>1. We reiterate our comments with regard to reasonable steps as outlined in response to Question 10.</p> <p>Duty of due skill, care, and diligence</p> <p>2. Paragraph 5.3.1 of Annex 2 replicates Section 53E (1) of the 2010 Act as amended by the IAF Act (b) regarding the duty of a person to act with due skill, care, and diligence. Sub-paragraph (ii) states that this includes “having appropriate knowledge of the legal and regulatory framework, including any legal obligation or standard imposed on the regulated financial service provider, relevant to the controlled function”.</p> <p>As the term “<i>appropriate</i>” is vague, we would be grateful if further clarity could be provided on what is deemed appropriate knowledge of “<i>any legal obligation or standard imposed</i>”?</p> <p>We are concerned regarding any gaps in interpretation between a PCF holder (executive management, executive directors, NEDs and INEDs) and the CBI with regard to appropriate knowledge. We are particularly concerned for NEDs and INEDs who have essential non-industry skills but may not be deemed to have the “appropriate” knowledge legal obligations for the various prescribed responsibilities.</p>

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CP153 Question	Observations / Questions / Requests
	<p>We would welcome the CBI’s views on our observations/concerns.</p> <p>3. We also note paragraph 5.3.2 of Annex 2 which states that <i>“this does not represent a standard of perfection- errors of judgment, or omissions, which are not deliberate, may happen. In this regard, an individual is not expected to exhibit in the performance of their role/function a greater degree of skill, care and diligence than might reasonably be expected from an individual in the relevant role with the relevant qualifications, knowledge, and experience”</i>.</p> <p>Directors are used to the duty of care owed under the Companies Act 2014 which is both objective (there is a minimum level of what is reasonable to expect of a director) <i>and</i> subjective (having regard to the particular experience of the director). We are concerned, however, that the allocation of prescribed responsibilities to NEDs and INEDs will narrow the gate for NEDs and INEDs interested in operating in the financial services space. We are also concerned that it will create significant concentration of directors with a financial services background deterring individuals with other essential experience such as technology and ESG from applying for roles. Given the prescribed responsibilities allocated to NEDS and INEDs in Table 1 of Annex 2, we consider that boards will be inevitably bounded in composition terms to have directors with these specific competencies.</p> <p>We would welcome the CBI’s views on our observations/concerns. We reiterate our recommendation that NEDs and INEDS are NOT included within scope for SEAR.</p> <p>4. Under Paragraph 4.14 of Annex 2, <i>“An individual may breach a Conduct Standard but still comply with the F&P Standards in relation to a role, however a past breach of a Conduct Standard may be relevant to their ongoing suitability for a role. Conversely, an individual may fail to comply with the F&P Standards in relation to their role despite not having breached the Conduct Standards”</i>.</p> <p>In circumstances where such a breach has occurred but does not necessitate the termination of an individual’s job, what position does this place said individual in with regard to future opportunities inside or outside the organisation that requires CBI approval? In particular, how will the rights of the</p>

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CP153 Question	Observations / Questions / Requests
	<p>individual be protected in circumstances where they apply for a more senior role in financial services thereafter?</p> <p>5. Paragraph 5.3.10 of Annex 2 states that <i>“Where an individual considers a decision <u>may</u> not be in the best interests of customers based on facts and the information at hand on the matter and following appropriate and effective challenge, they should take appropriate follow-up action, including reporting to relevant regulatory bodies where required”</i>.</p> <p>Management is required to make decisions often requiring judgement calls on what is in the best interests of consumers. This may require making a recommendation to the board. The board are required to make judgement calls in the interests of the company (under Company law) and in the best interests of consumers (under CCS). In a collective decision-making environment, it is not always possible for there to be full consensus at management level. We are concerned that arising from the requirement under paragraph 5.3.10, CFs and PCFs might feel compelled to notify the CBI whenever consensus is not reached, particularly where they are a PCF with allocated responsibility for the area under discussion. This may also lead to unintentional risk aversion across management which ultimately will impact collective decision-making processes at board level.</p> <p>We request that paragraph 5.3.10 be amended to reflect circumstances where an individual is fully confident that a decision means a company is seeking to mislead or defraud a consumer or misrepresent a product to a consumer. It is important for the orderly function of business that there is absolute clarity on this requirement.</p> <p>Best Interests of Consumers</p> <p>6. Clearly interpretation of what is in the best interests of consumers is fundamental to management and board compliance with the Conduct Standards. As noted earlier, the board is required under company law to act in the interests of the company itself. Paragraph 5.5.3 states that: <i>“In deciding what it means to ‘act in the best interests of customers’, a key determinant is the legitimate expectations of those customers”</i>.</p> <p>We are concerned with the subjectivity of <i>“legitimate expectations of customers”</i>, particularly in the</p>

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CP153 Question	Observations / Questions / Requests
	<p>context of the prudential rules within which FSPs operate. We hope that any consideration of a breach in Conduct Standards will fully consider the legal obligations of directors to the company itself, the prudential rules within which FSPs operate, and the reciprocity in communication and engagement needed from the consumer.</p> <p>We recommend that the key determinant in deciding what it means to act in the best interests of customers be changed to compliance with the Consumer Protection Code as interpreted by the board and management and reflected in board policies and management procedures.</p> <p>Additional Conduct Standards</p> <p>7. Paragraph 6.1.3 states that: <i>“It is recognised that NEDs and INEDs individually do not manage a firm’s business in the same way as executive directors. The responsibilities for which NEDs and INEDs are accountable are more limited, relating to their role in respect of governance, oversight, and challenge, therefore they are not expected to assume executive responsibilities. The standards to be met by these individuals in their role as NEDs and INEDs will relate purely to their non-executive, oversight functions and will be limited to what should reasonably be expected of individuals in that context”</i>.</p> <p>Our comments above related to NEDs and INEDs in the context of SEAR apply equally in relation to Additional Conduct Standards.</p> <p>Employees working in an organisation are operating within an internal system of governance that the board is responsible for, which the board oversees and on the effectiveness of which it seeks assurance (e.g., through the operation of internal audit). Each individual has a place within that system of governance and relies on its effective operation. Paragraphs 6.2.4 and 6.2.5 (related to the duty to ensure that the business of the regulated FSP is controlled effectively) appear to suggest that this system is the responsibility of the individual. All PCFs work together as a system of governance. We consider that the descriptions included in these paragraphs are the collective responsibility of the board and that it is impractical to put this onus on individual PCFs.</p> <p>8. We consider that the implementation of SEAR and the Conduct Standards should happen in tandem.</p>

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CP153 Question	Observations / Questions / Requests
	<p>We recommend that the Conduct Standards and SEAR should not apply until 31 December 2024 at the earliest.</p>
<p>Q13. What are your views and comments on the guidance in relation to obligations on the firm in respect of Conduct Standards?</p>	<p>See comments under Question 17 below.</p>
<p>Q14. Do you agree with our proposed approach to temporary appointments within scope of SEAR and the Conduct Standards?</p>	<p>We note that during the temporary occupancy of a PCF role whereby an individual has been pre-approved, while the SEAR and Duty of Responsibility (if applicable) and Conduct Standards will apply, the consideration of reasonable steps will reflect the particular circumstances of the individual.</p> <p>Given the subjectivity of reasonable steps and particular circumstances assessments, we would not agree with this approach.</p> <p>We recommend that in such circumstances the SEAR and Duty of Responsibilities should not apply to the individual. We would have no difficulty with a time limit being set for non-application.</p>
<p>Q15. What are your views and comments on the draft Certification Regulations and related guidance?</p>	<p>No Comments</p>
<p>Q16. Do you agree with our proposed approach to roles prescribed as PCF roles for holding companies in the draft Holding Companies Regulations?</p>	<p>1. The IAF Act amends the 2010 Act such that the F&P Regime is extended to apply to holding companies established in Ireland. The change means that individuals proposed for PCF roles in holding companies will be assessed by the Central Bank under the existing F&P Regime in the same way as individuals proposed for PCF roles in firms are assessed. In addition, all CFs in holding companies will be required to comply with the F&P Standards. Individuals who are performing CF roles at a holding company level only will not</p>

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CP153 Question	Observations / Questions / Requests
	<p>be subject to the Conduct Standards given that the holding company is not itself a regulated financial service provider.</p> <p>Can the CBI opine on why, if holding companies are not regulated financial service providers, that the F&P Regime is being applied?</p>
<p>Q17. Do you agree with our proposed approach to reporting of disciplinary actions?</p>	<p>Reporting of disciplinary actions to the Central Bank</p> <p>1. Paragraphs 4.35 states that: <i>“Under the Certification Regulations a firm must report to the Central Bank disciplinary action taken against an individual performing a CF role where that disciplinary action is relevant to compliance with the F&P Standards, including disciplinary action in respect of individuals in CF roles relating to breaches of the Common Conduct Standards and in respect of individuals in PCF/CF1 roles relating to breaches of the Additional Conduct Standards. As defined in the Certification Regulations ‘disciplinary action’ in relation to an individual means the issuing of a formal written warning or the suspension/dismissal of the individual or the reduction or recovery of any of the individual’s remuneration”.</i></p> <p>Paragraph 4.36 states that: <i>“The Central Bank requires that disciplinary actions, as defined above, be reported. The Central Bank expects firms to apply due process in concluding disciplinary actions. The Central Bank would expect to have already received the facts forming the basis of this disciplinary action where the firm or individual has already reported, under separate obligations, a suspected prescribed contravention to the Central Bank, in respect of the underlying breach of the relevant Conduct Standards.”</i></p> <p>Paragraph 6.5.1 states: <i>“An individual should act in an open and co-operative manner and disclose, promptly and appropriately, any information of which the Central Bank would reasonably expect notice, including making a disclosure in the absence of a specific request or query from the Central Bank where relevant matters come to their attention. This includes providing complete and adequate information on a timely basis to an appropriate contact at the Central Bank to facilitate an understanding of the matter and its potential implications. By virtue of their position, they are expected to have access to information of potential regulatory significance and to have the expertise to recognise when this is something which the Central Bank would reasonably expect notice of”.</i></p> <p>These requirements require firms and/or PCFs to make subjective, judgement calls on what should be</p>

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CP153 Question	Observations / Questions / Requests
	<p>disclosed to the CBI and when. We are concerned that this will impose a significant pressure on firms and/or PCFs and that this may expose other individuals to investigations that do not end up in enforcement actions. In the interim, the process has the capacity to impose significant stress and reputational damage on both the PCF and the individual.</p> <p>We recommend that consideration be given to more specific timelines for reporting that reflect the practical realities of conducting internal investigations and the necessity to protect staff and give them the right to a proper internal review and avoiding the stress of having the CBI notified without proven cause.</p>
<p>Q18. Do you agree with our proposed approach to introducing the Head of Material Business Line role for insurance undertakings and investment firms?</p>	<p>1. We consider that the responsibilities described therein are simply the day-to-day responsibilities of the CEO and COO.</p> <p>2. We recommend that the CBI obtains feedback from credit institutions as to how the introduction of the role has enhanced governance within firms before applying this approach for insurance undertakings and investment firms.</p>

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