

Briefing
May 2019

Accountability for Senior Executives – Update on Central Bank Proposals

Most Inclusive Law Firm 2019
Managing Partners' Forum Awards

Ireland M&A Legal Adviser of the Year 2018
Mergermarket European M&A Awards

Ireland Client Service Law Firm of the Year 2018
Chambers Europe Awards

Ireland Law Firm of the Year 2018
International Financial Law Review (IFLR)
Europe Awards

Advised on Equity Deal of the Year 2018 – Allied Irish Banks IPO
International Financial Law Review (IFLR)
Europe Awards

Ireland Law Firm of the Year 2018
Who's Who Legal

Ireland Law Firm of the Year 2017
Chambers Europe Awards

Best Firm in Ireland 2018, 2017 & 2016
Europe Women in Business Law Awards

Best National Firm for Women in Business Law 2018, 2017 & 2016
Europe Women in Business Law Awards

Best National Firm Mentoring Programme 2018, 2017 & 2016
Europe Women in Business Law Awards

Best National Firm for Minority Women Lawyers 2018
Europe Women in Business Law Awards

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

The Central Bank's proposals for a Senior Executive Accountability Regime, as part of its focus on 'behaviour and conduct', are moving ahead.

"...the Central Bank is a strong advocate for individual accountability – our regulatory focus in this area reflects our concern that a lack of individual accountability is a key cultural driver of misconduct"¹

BACKGROUND

In December 2017, as part of its [Response to the Law Reform Commission Issues Paper "Regulatory Enforcement and Corporate Offences"](#), the Central Bank outlined the enforcement tools at its disposal (in particular, its Administrative Sanctions Regime) and the 'gatekeeper' element of its Fitness and Probity Regime, under which its prior approval is required before appointments to 46 different types of 'pre-approval controlled functions' (PCFs) in regulated firms. It also recommended a number of enhancements to the enforcement tools at its disposal, and in particular *"strongly recommend[ed] that reforms assigning responsibility to senior personnel be adopted in [Ireland]. Such reforms should be modelled*

on the Senior Managers and Certification Regime in the UK..."

This recommendation was underpinned by a desire on the part of the Central Bank to find a way to assign regulatory responsibility to individuals, and to reduce the ability of those individuals to "claim that the responsibility for wrongdoing lay outside their sphere of responsibility."

Having signalled its desire to assign regulatory responsibility to senior individuals in regulated financial services providers (RFSPs), seven months later, in its [Report to the Department of Finance on "Behaviour and Culture of the Irish Retail Banks"](#), the Central Bank formally recommended the introduction of an Individual Accountability Framework comprising:

- » A Senior Executive Accountability Regime (SEAR)
- » Conduct Standards
- » Enhancements to the existing Fitness and Probity Regime
- » Enhancements to the existing Administrative Sanctions Regime

¹ Seana Cunningham, Central Bank of Ireland Director of Enforcement and Anti-Money Laundering, 27 August 2018.

While this briefing focuses on the proposed SEAR, that proposal is closely linked to proposals for:

Conduct Standards

These will comprise:

- » common conduct standards for all staff in RFSPs, requiring those staff to act honestly and with skill, care and diligence, to treat customers fairly, and to cooperate with the Central Bank;
- » additional conduct standards for PCFs/senior executives, reflecting their level of influence over the RFSPs business; and
- » business standards for the RFSPs themselves, which reflect and build on obligations set out in the Central Bank's existing Consumer Protection Code.

Enhancing the existing Fitness and Probity Regime

The Central Bank also proposed the introduction of a certification requirement, obliging RFSPs to certify, on an annual basis, that the individuals performing controlled functions in that

RFSP are fit and proper persons.

In April 2019, the Central Bank wrote to RFSPs, reminding them of their obligations under the existing Fitness and Probity Regime (read our recent briefing for more details: [Fitness and Probity: Central Bank 'Dear CEO' Letter](#)).

Enhancing the Administrative Sanctions Regime

The Central Bank also proposed that it be allowed to pursue individuals directly for their misconduct rather than having to wait until it has been proven that they have participated in wrongdoing by the relevant RFSP, and to allow enforcement action to be taken for a breach of the new Conduct Standards.

THE SEAR PROPOSAL – DOCUMENTING AND MAPPING RESPONSIBILITIES

Scope

The Central Bank has suggested that, initially, a SEAR be introduced for the following:

- » credit institutions (excluding credit unions);
- » insurance undertakings (excluding

reinsurance undertakings, captive (re)insurance undertakings and insurance special purpose vehicles);

- » investment firms that underwrite on a firm commitment basis and/or deal on own account and/or are authorised to hold client monies/assets; and
- » third country branches of the above.

It is likely that the SEAR will, over time, be extended to other firms regulated by the Central Bank (such an extension is already taking place this year in the UK, where the scope of its Senior Managers and Certification Regime (which closely resembles the proposed SEAR) is being widened).

Senior Executive Functions

In-scope functions would include board members, executives that report directly to the board, and heads of critical business areas. These should broadly correspond to those who carry out PCF roles under the Fitness and Probity Regime. For those carrying out Senior Executive Functions, and their in-scope RFSPs, there are three key elements of the SEAR:

MANDATORY RESPONSIBILITIES

Each person carrying out a Senior Executive Function will have role-related responsibilities and, under the SEAR, the Central Bank would also prescribe mandatory responsibilities for RFSPs (tailored to type of firm, and industry sector) to allocate to those carrying out Senior Executive Functions.

This is with a view to ensuring that every key conduct risk and prudential risk is the responsibility of someone carrying out a Senior Executive Function.

COMPREHENSIVE STATEMENTS OF RESPONSIBILITIES

Each person carrying out a Senior Executive Function would be required to have a documented Statement of Responsibilities, setting out their role and responsibilities.

The Central Bank's intention is to ensure that the experience, qualifications, knowledge and competence of each such person can be measured against the responsibilities allocated to them.

RESPONSIBILITY MAPS

Each in-scope RFSP would also be required to draw-up Responsibility Maps, setting out their key management and governance arrangements.

These maps would need to include matters reserved to the board, the terms of reference for committees, and reporting lines for all those carrying out Senior Executive Functions.

The RFSP would be required to submit these Responsibility Maps to the Central Bank.

PROMOTING POSITIVE BEHAVIOURS AND CULTURAL CHANGE

The purpose underpinning the Central Bank's proposals is to "act as a driver for positive behaviours and the recognition of responsibilities by individuals."²

As mentioned at the start of this briefing, the Central Bank wants the new SEAR to be very similar to the Senior Managers and Certification Regime in the UK, and the skeleton of the regime already outlined by the Central Bank certainly very closely resembles the UK regime. In terms of the initial effectiveness of the UK regime, in their Fair and Effective Markets Review - Progress Report (May 2018), HM Treasury, the Bank of England, and the Financial Conduct Authority observed that "[a]necdotal evidence suggests that the Accountability Regimes are encouraging positive behavioural changes through a

clear allocation of individual responsibilities to key decision-makers, increasing effective challenge by non-executive directors (NEDs) and more formalised legal entity governance within groups."

In a recent speech³, the Central Bank's Director General, Financial Conduct, Derville Rowland, outlined how senior accountability and 'tone from the top' impacts culture within banks, noting the importance of:

- » leadership teams championing the RFSP's values and conduct in a highly visible manner;
- » formalising accountability for consumer protection at both board/committee level, and at individual level; and
- » sanctioning employees for behaviour that is not aligned with consumer protection.

2 Seana Cunningham, Central Bank of Ireland Director of Enforcement and Anti-Money Laundering, 27 August 2018.

3 Derville Rowland, Central Bank of Ireland Director General, Financial Conduct, 2 May 2019.

WHAT HAPPENS NEXT?

Legislative change will be needed in order for the SEAR, the related Conduct Standards, and the enhancements to the Fitness and Probity Regime and the Administrative Sanctions Regime, to come into force.

It was recently confirmed that Heads of Bill are currently being drafted by the Department of Finance in conjunction with the Office of the Attorney General, and the Central Bank is expected to publicly consult on the proposals in late 2019 / early 2020.

While finalising the legislation and consulting on and finalising the terms of related Central Bank guidance and codes to implement the SEAR may take some time, it is clear that the Central Bank is very focused on 'behaviour and culture' related issues. Firms should therefore continue to monitor and review speeches and presentations made by senior Central Bank officials to understand the Central Bank's latest thinking on this evolving area.

KEY CONTACTS



ORLA O'CONNOR
PARTNER,
FINANCIAL REGULATION
+353 1 920 1181
orla.oconnor@arthurcox.com



ROBERT CAIN
PARTNER,
FINANCIAL REGULATION
+353 1 920 1050
robert.cain@arthurcox.com



MAEDHBH CLANCY
OF COUNSEL, FINANCE
+353 1 920 1225
maedhbh.clancy@arthurcox.com



ELIZABETH BOTHWELL
PARTNER, INSURANCE AND
REINSURANCE
+353 1 920 1670
elizabeth.bothwell@arthurcox.com



JENNIFER MCCARTHY
PARTNER, INSURANCE AND
REINSURANCE
+353 1 920 1167
jennifer.mccarthy@arthurcox.com

arthurcox.com

Dublin

+353 1 920 1000
dublin@arthurcox.com

Belfast

+44 28 9023 0007
belfast@arthurcox.com

London

+44 207 832 0200
london@arthurcox.com

New York

+1 212 782 3294
newyork@arthurcox.com

Silicon Valley

+1 650 943 2330
siliconvalley@arthurcox.com