

Subject: EMA responses to the IAF Consultation Paper 153

Date: 13 June 2023

Q1. What are your views and comments on the draft SEAR Regulations and related draft guidance?

- The EMA note that the CBI say it is “designed to improve governance, performance, and accountability in firms providing financial services to individuals and businesses” and agree that the introduction of SEAR should improve governance, performance and accountability.
- We note that the Draft Guidance is required to be lengthy due to the nature and scope of implementation that it is required to cover.

Q2. Do you agree with our proposed approach to the Inherent Responsibilities?

- The EMA note that the Inherent Responsibilities for all firm type PCF role holders are described at a high-level, which is appropriate in order to remain relevant for all RFSP sectors.
- We have no concern on the initial 19 PCF role holder Inherent Responsibilities outlined in the Draft Regulations.
- It is appropriate to retain the Inherent Responsibilities for NEDs and INEDs as “Overseeing and monitoring” as this reflects the nature of their oversight role.

Q3. Do you agree with our proposed approach to the Prescribed and Other Responsibilities?

- The EMA note the high volume of General Prescribed Responsibilities. Although they may be necessary, we highlight that for smaller firms, particularly as SEAR is extended to other sectors, it is likely that key PCF role holders will have responsibility for numerous Prescribed Responsibilities.
- We strongly support the principle of proportionality, and welcome the flexibility being offered to firms to determine where these Prescribed Responsibilities will fall, both throughout the initial implementation phases, and as SEAR rolls out across other sectors. There are many Prescribed Responsibilities which are likely to be held by different firm departments depending on the type of firm, even within the same sector. This is the case even when the likely ‘home’ for the responsibility lies with a member of the Board/SMT. A good example of this could be ‘PR5; Responsibility for adopting the firm’s culture in the day-to-day operation of the firm.’
- We also consider that the responsibilities on senior individuals for many Prescribed Responsibilities could, in fact, result in the chilling effect concerns raised in the Consultation, and have a deterrent effect in relation to the recruitment and retention of high-quality individuals to important roles in the financial system. Although the CBI do

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not consider this to be of concern for the more established financial sectors in Ireland, it is likely that a CEO/Board member may have concerns regarding, for example, PR9 (internal audit), PR10 (compliance) and PR11 (risk) falling within their remit. This is particularly acute in the case of smaller firms where one individual holds all such responsibility. Safeguarding the independence of the relevant function, its oversight, and the relevant Head of function, could be a worrying amount of individual responsibility for a potential CEO to take on.

- The circumstance specific Responsibilities as well are noted.

Q4. Do you agree with our proposed approach to the sharing of roles and responsibilities including job sharing?

- We note that, where job sharing occurs, the default position will be that each job sharing individual will have full accountability for the relevant responsibility; this will be discharged where s/he can demonstrate that s/he took reasonable steps to discharge the responsibility.

- It is noted that the Statement of Responsibility is required to include a description of how a Prescribed Responsibility or an Other Responsibility is being shared in the context of job sharing. We deem this to be important because those sharing roles will be nervous to be deemed to accept 'full responsibility' otherwise.

- We do think it will make job sharing more challenging, in that individuals will be less likely to want to 'take the risk.'

Q5. Do you agree with our proposed approach to the inclusion of INEDs/NEDs within scope of SEAR?

- We agree that NED/INED roles are considered essential roles in the effective governance of firms, so there are important expectations that must be met by those individuals, and thus including them within the scope of SEAR is understandable.

- However, we would continue to stress the importance of a proportionate approach; NEDs/INEDs are highly valued and important for the operation of a firm, so it is imperative that responsibilities falling on these role-holders are kept in line with their "overseeing" role.

- As above, we think it is appropriate to keep the Inherent Responsibilities for NEDs and INEDs as "Overseeing and monitoring" because we think it properly reflects the nature of their oversight role.

- We also note concern on any possible chilling effect that might occur. In the limited financial services landscape in Ireland, and with high growth in recent years, it is imperative that firms can source appropriate NEDs/INEDs, thus the potential for chilling effect must be kept at the forefront of consideration as the framework is developed.

Q6. Do you agree with our proposed approach to the Statements of Responsibilities?

- We believe that the Statement of Responsibilities outlining for each individual the Inherent, Prescribed and Other Responsibilities falling under their remit is appropriate.
- We agree that each PCF role holder should only have one SOR per firm, where multiple PCF role holdings will be documented on one SOR.

- We note the requirements for a Statement of Responsibilities per 2.5.6, and agree with these:
 - (i) kept up-to-date, contain the date and version control and signed by the PCF role holder;
 - (ii) reviewed on a regular basis by firms;
 - (iii) approved on initial implementation and when it is updated; and
 - (iv) available to the Central Bank on request.

- We note that 'regular basis' is not determined, and would agree with this approach of not having a regular basis prescribed in the Regulations/Guidance. Firms will likely provide a rationale for their formal review timeframe, and review the SOR's otherwise if a trigger event occurs (e.g. responsibilities change, or the PCF role expands, or the PCF role holder takes on a new PCF position, thus their SOR must be updated) and we presume this would be deemed appropriate by the Regulator.

- We agree with the Statements of Responsibilities to be made 'available on request' for the CBI, rather than being required to be formally submitted.

- We believe that the requirements for Statements of Responsibilities to be retained for 10 years after the cessation of that role-holder position, per 2.5.13 of the Draft Guidance, and section 11 of Draft Regulations, may be an unnecessarily excessive time period for the retention of such data. We cannot see any rationale for the holding of data for such a time period.

- We would also appreciate clarity on whether the Statement of Responsibilities must be updated each time a PCF role holder takes on a short-term project outside their prescribed responsibilities, as it could be considered an excessive and overly burdensome requirement for very short-term projects within fast moving organisations. Ultimately, it seems the benefit would be that the Statement of Responsibilities should reflect their core responsibilities required within their PCF role

Q7. Do you agree with our proposed approach to the Management Responsibilities Map?

- We agree per 2.6.3 of the Draft Guidance that the Management Responsibilities Map should identify the individuals in PCF roles at in-scope firms (and therefore the related Inherent Responsibilities) as well as the allocation of Prescribed Responsibilities and Other Responsibilities among individuals in PCF roles at in-scope firms, to demonstrate that there are no gaps in responsibilities across the firm. The Management

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Responsibilities Map should be utilised by firms in the embedding of an effective governance framework.

- Per 2.6.5. for new sector or smaller firms seeking authorisation in the market, having to prepare and submit a Management Responsibilities Map as part of application process could be burdensome for many firms.

- We agree that it is left to firms themselves to determine how best to document their Management Responsibilities Map.

- We also agree that the Management Responsibilities Maps should be 'available on request' for the CBI, rather than being required to be formally submitted.

- We note the list of what the Management Responsibilities Map must include at 2.6.6, and have no concerns with these high level noted requirements:

- I. kept up-to-date, contain the date and version control;
- II. reviewed on a regular basis by firms;
- III. approved on initial implementation and when it is updated; and
- IV. available to the Central Bank on request. (Draft Guidance typos not altered)

- Again, it is noteworthy that what is deemed to be a 'regular basis' is not specified, and that the Guidance says at 2.6.16 that the Map should be treated "as live documents that are continually edited and updated as appropriate." We would suggest that, once firms have a rationale for their determined formal review timeframe, this will be agreeable to the Regulator upon inspection of the Management Responsibilities Map. 'Trigger' occurrences requiring formal review of the Map of course should result in a review of the Map occurring.

- We believe that the requirement for previous versions of Maps to be retained for 10 years, per 2.6.17 of the Draft Guidance, and section 11 of Draft Regulations, may be an unnecessarily excessive time period.

Q8. Do you agree with our proposed approach to submission of documents?

- We agree that submitting Statements of Responsibilities and Management Responsibilities Maps when requested by the Regulator, as part of their firm reviewing process, is preferable to requiring submission by all firms subject to SEAR. The SOR is a live document, and may be updated on an ongoing basis, so providing the most up-to-date SOR on request is the most sensible approach.

- We note that submitting SOR's for proposed PCF role holders, alongside the IQ, could be challenging initially, especially for smaller firms with less resources. However, we note that once PCF role holder responsibilities are initially detailed in a SOR, it will be easier to retain this and make amendments, and certainly to submit it to the Regulator if a new PCF individual is seeking approval.

- We would also note that, per section 10 of the Draft Regs, *Submission of information to the Bank*, the 'period of time' for submission of requested Statements of Responsibilities and Management Responsibilities Maps should be a reasonable period of time.

Q9. Do you agree with our proposed approach to outsourcing in the context of SEAR?

- We agree that responsibility for outsourced responsibilities should lie within the firm, ie. a PCF role holder responsible for all outsourcing arrangements.
- It is also noted that when a PCF role itself is outsourced, that role-holder must fall under the oversight of a PCF role holder within the entity. A PCF role holder bearing responsibility for outsourced role functions in the firm will require getting used to by firms, especially as it rolls out across different, perhaps less mature, sectors.
- Oversight of outsourcing could in some cases be challenging to manage; for example in the case of the use of an external auditor, reporting ultimately being to the CEO could be considered to potentially compromise their independence.
- A PCF role holder bearing responsibility for all company outsourcing could be of concern from a risk management perspective, and might deter potential candidates from taking on such a role. Such responsibility should be spread across the firm's PCF role holders, according to areas of responsibility.

Q10. Do you agree with our proposed approach to reasonable steps in respect of SEAR and the Conduct Standards?

- It seems reasonable that PCF role holders will be responsible for ensuring that the area they are responsible for, within the firm, conforms to legislative and regulatory requirements. This should be supported by an understanding that if the PCF role holder has raised concerns to the Board, this is deemed sufficient to evidence their efforts towards full conformance with all requirements. A 'reasonable' amount of time then should then be afforded to evidence conformance, based on the resourcing and skills available to that PCF role holder and the team. Please note that in sectors experiencing fast growth, such as the Fintech sector, there may be slight delays between the notification of concerns related to increased risk associated with that growth, and the efforts of the firm to manage and mitigate those risks.
- When determining the circumstances that are relevant for consideration in respect of "reasonable steps" under the Duty of Responsibility and the Conduct Standards, we welcome the "range of matters" to be considered, particularly the business type, scale and complexity, the knowledge and experience of the role holder and the existence (or otherwise) of appropriate and effective systems available, with effective oversight in place, and whether the role holder had any influence in these. For the fintech sector, it is helpful for scale and complexity of business operations to be taken into consideration, as they often present lower risk, low value, no credit payment products.
- We welcome the CBI's proposed approach in the Guidance to consider "the overall circumstances and environment, as they existed at the time", [3.5 on page 55] which is preferable to viewing circumstances "with the benefit of hindsight." If an individual can properly evidence their reasoned 'judgement' at the time, that seems a fair and reasonable approach.

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?

- The Guidance does give direction on understanding the Duty of Responsibility and the non-exhaustive list of factors to be considered with regard to reasonable steps. In particular, we welcome the inclusion of firm type (nature, scale and complexity of offering) as a consideration in terms of the expectation on role holders to fulfil their obligations of reasonable steps.

- We welcome the CBI's acknowledgement that individuals moving into a more senior/different role will likely "be on a learning curve." This is particularly evident in the fintech sector where individuals are growing and learning in fast-paced environments, and may move into more senior positions more quickly in smaller, less complex firms, compared to other large complex financial institutions. The benefit that these smaller fintech firms provide is that individuals can have much more visibility across the business, and thus can develop within the business or within the sector at a faster pace.

- It is noted that the role holder will be expected to have "assessed, monitored and reviewed the adequacy and effectiveness of the governance, operational and risk management arrangements in place." We would expect that the timeframes within which these assessments take place should be based on what may be deemed reasonable for the firm type and complexity, and the role being held; as long as the individual's rationale is evidenced and 'makes sense', this time period for assessment of the environment will be deemed appropriate.

- Under 3.11.2, "How they informed themselves of material changes to risks in a timely manner and verified, challenged and considered any broader implications and where an actual or suspected issue was identified what action the individual took to rectify and mitigate the issue and ensure its resolution." We suggest that the forthcoming or timely nature of other business stakeholders in informing the relevant role holder should also be accounted for. Presumably, an individual would not be deemed to have failed to take reasonable steps where the documented processes in place requires notification to them, where other stakeholders have failed in properly informing in the required manner. Of course the role holder would be expected to have "adequate and effective systems and controls to comply with the relevant regulatory requirements and standards" per 3.11.3.

- We agree with the responsibilities arising under delegated responsibilities; however these expectations should be balanced with the need for the role holder to allow their qualified delegates to proceed to get the job done, and not require micro-management.

- With regards to adequate resourcing, and the specific reference to "including for risk and control functions", [3.13.2] we would like to highlight that there may be a shortage of qualified individuals in a particular sector, especially growing sectors such as fintech. This expertise resourcing issue can affect roles being filled in a timely manner, thus it is expected that evidence that a role holder has conducted proper attempts at proper and adequate resourcing would be taken into considered.

- Similarly, smaller firms may experience disruptions in staffing levels more frequently, with departures, vacancies or illness having a greater overall impact. Specifically, in a fast-

growing sector in Ireland, competent staff are highly sought after, and staff may therefore move quickly between firms where a more attractive benefits package can be offered by those firms with greater resources. This can mean fledgling (lower risk) firms struggle to secure and maintain such expertise at those earlier stages of the business. This has been a long-standing concern of the EMA.

Q12. What are your views and comments regarding the guidance on the Common Conduct Standards and Additional Conduct Standards?

- We agree with there being in place guidance outlining the Common Conduct Standards and Additional Conduct Standards.
- We note that a CF role holding individual should [per 4.6 and 5.1.3 of the Guidance] “take the steps that it is reasonable in the circumstances for the individual to take to ensure that the Common Conduct Standards are met.” We welcome the concept of reasonable steps being acceptable once in line with the reasonable steps guidance covered in Chapter 3, and [per 5.1.3] that they “should be interpreted in the context of the level of seniority of the roles in scope”.
- We have no additional comments on Chapter 5 covering the Common Conduct Standards and Chapter 6 outlining the Additional Conduct Standard requirements.

Q13. What are your views and comments on the guidance in relation to obligations on the firm in respect of Conduct Standards?

- The EMA has reviewed the requirements arising as firms integrate the Conduct Standards into their framework. Given the level of new obligations and changes to implement, and the short window likely between the publishing of the final version Regulations and Guidance, towards the end of 2023, we consider that the deadline for implementation of the Conduct Standards should be extended until July 2024, when SEAR becomes effective for the determined in-scope firms. This will allow all RFSPs, especially those in less-mature sectors, to ensure their fuller business frameworks are properly prepared to implement the requirements, notably the documenting of how the Conduct Standards are integrated and to adequately develop the training and wider supporting requirements. Firms in the payments sector for example are currently managing several other competing new legal and regulatory requirements, and have limited resources available to manage and implement the changes.
- With regards to the training being required to be delivered at the onset of a role holders induction (or when this requirement comes into force), and then “on an ongoing basis,” it is expected that an ‘ongoing basis’ should be determined by the firm, based on the firm type and complexity, as long as the rationale is documented and reasonable.

Q14. Do you agree with our proposed approach to temporary appointments within scope of SEAR and the Conduct Standards?

- We agree that a Temporary Officer to a PCF role under Regulation 11 of the PCF Regulations would be expected to comply with the Conduct Standards, but that the “reasonable steps” consideration will reflect the temporary nature of the role holding appointment.

Q15. What are your views and comments on the draft Certification Regulations and related guidance?

- As per 7.2.4 of the Guidance, “Section 21 of the 2010 Act, as amended by the IAF Act, and the Certification Regulations require that where a firm/holding company is satisfied on reasonable grounds that a person performing a CF role, (i) complies with any standard of fitness and probity issued by the Central Bank under section 50 of the 2010 Act; and (ii) agrees in writing to comply with such standard of fitness and probity and to notify the firm/holding company without delay if for any reason he or she no longer complies with such standard of fitness and probity, the firm/holding company is required to certify that the individual complies with such standards of fitness and probity.

- It is noted that for new firms or holding companies, “the steps required to certify individuals in CF roles will be completed as part of the authorisation process.”

- The requirements arising in 7.2.6 include a certification process, and we again reiterate the request for the application of these requirements to be extended to July 2024 to ensure that firms, particularly those growth firms in newer sectors, can properly ensure full compliance by the implementation deadline. This will also ensure that there is accuracy in compiling registers of individuals holding roles.

- The annual certification requirement is also noted. We agree that only certification of PCF role holders needs to be submitted to the Central Bank, and that confirming the completion of the certification process in respect of all other CF role holders each year is appropriate.

- We encourage the Central Bank to publish a draft format for the certification forms, as this will assist firms in ensuring all requirements are met, as well as speeding up the implementation process. However, we would request a level of flexibility for slight altering to the format, as required, if for some reason the prescribed template is not fit for purpose for all firms making the required submission. We would suggest an approach along the lines of that used for the section 21 form provided in Appendix 2 of the [Guidance on Fitness & Probity Standards 2018](#), with the Guidance noting that this is “suggested wording” rather than being a prescribed format / mandatory wording, thus allowing flexibility that may be required.

Q16. Do you agree with our proposed approach to roles prescribed as PCF roles for holding companies in the draft Holding Companies Regulations?

No response.

Q17. Do you agree with our proposed approach to reporting of disciplinary actions?

- We agree with the requirement for a firm to report to the CBI [per 4.35 of draft Guidance] “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/CFI roles relating to breaches of the Additional Conduct Standards.” This is on the premise of ‘disciplinary action’ as set out under Certification Regulations, meaning “a formal written warning or

the suspension/dismissal of the individual or the reduction or recovery of any of the individual's remuneration." We believe that disciplinary action to this level is appropriate to be communicated to the CBI.

- We agree that firms who are currently not in scope of SEAR can determine who is responsible for such reporting to the Central Bank.

- We agree with "timely manner" or reporting being done "as soon as practicable and in any case, within five business days from when the disciplinary action has been concluded." [4.38 on page 78] However, we note there may be sensitivities when reporting an individual who is subject to disciplinary action, where that role holder has not yet had an opportunity to appeal.

- Paragraph 4.41 states "If the firm takes disciplinary action as a result of a breach of a Conduct Standard but the individual has appealed or plans to appeal, the firm should still report the disciplinary action but should include details of the appeal in the report and in due course update the Central Bank on the outcome of any appeal." In such cases, it may be more appropriate to submit the report of disciplinary actions after the appeal period has ended, to give adequate time for the disciplined individual to make their appeal. It seems that, if an appeal is upheld, that role holder may be concerned that the submitted report remains on the CBI's records, which they may fear could affect their ability to secure a PCF role into the future, regardless of the fact that they were ultimately found not to have breached the F&P Standards, Common Conduct Standards or Additional Conduct Standards.

- We would reiterate the request for an extension to the deadline for the implementation of the Conduct Standards and associated reporting requirements to July 2024, to ensure that the frameworks to comply with these reporting obligations will be effectively implemented by all firms across all sectors.

Q18. Do you agree with our proposed approach to introducing the Head of Material Business Line role for insurance undertakings and investment firms?

No response.