

Central Bank of Ireland
New Wapping Street
North Wall Quay
Dublin 1

12 June 2023

Re: Central's Bank's CP153 on Enhanced governance, performance and accountability in financial services/Regulation and Guidance under the Central Bank (Individual Accountability Framework) Act 2023

Dear Sir/Madam

The Irish MiFID Industry Association ("IMIA") was set up in 2018 to provide central representation to the Central Bank of Ireland and other regulatory bodies on behalf of its members; promote good industry practices on regulatory requirements; host educational events on MiFID regulations and other regulatory issues impacting MiFID firms and to promote networking and peer interaction.

We thank the Central Bank for the invitation to submit feedback on the Central Bank (Individual Accountability Framework) Act 2023 and the accompanying guidance. The Framework reflects considerable work by the Central Bank, is well-structured with a lot of well-considered features. The IMIA are in broad support of the proposals but would like to seek clarification from the Central Bank on a number of points.

Responses to Questions in CP153

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 What are your overall views and comments on the draft SEAR Regulations and related draft guidance?

We note the Central Bank considers it unlikely that the IAF framework will have a chilling effect on individuals considering employment in in-scope roles. Conversely, IMIA member firms have observed increasing reluctance on the part of employees to be promoted to PCF roles. Firms have also noted increasing salary demands in the recruitment market, to compensate for the increasing personal risk of sanctions arising from the IAF. We also anticipate that existing PCF Role Holders may be reluctant to accept prescribed responsibilities where such responsibilities have not been previously allocated to PCF role holders.

We also consider that the IAF will require firms to extend their Professional Indemnity and Directors & Officers Liability insurance coverage. We believe that the Central Bank should consider the impact of these additional costs on the end-client before extending the SEAR regulations to all regulated firms.

The Consultation Paper states "*..there is much in the spirit of the SEAR that firms not initially falling within scope should consider as aligned with good quality governance and which will support firms and senior management in implementing an effective governance framework..*"¹ This appears to create an expectation that SEAR will be the de facto standard applied by the Central Bank to assess governance at all firms, and firms may feel obliged to implement SEAR regardless of whether they

¹ CP153 page 27

are initially in scope. We would appreciate clarification as to whether this aligns with the Central Bank's intentions.

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

The draft regulations do not state that PCF-52 (Head of AML & CFT) should report to the Board, unlike PCF-12 (Head of Compliance). This is not consistent. Further clarification is required regarding PCF-52 reporting to the Board (or in the case of Branches, to the Branch Manager) as currently it could imply that the PCF-12 (or other PCF) is expected to report to the Board on AML matters.

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

While we do not recommend extending the current list of PCF roles, we note that certain prescribed responsibilities are currently allocated by firms to non-PCF roles. For example, PR2 (Obligations under F&P) and PR29 (Diversity & Inclusion) may be allocated to a Head of Human Resources. Firms may have appointed a Chief Sustainability Officer responsible for PR28 (managing climate-related and environmental risks), or a Head of Outsourcing responsible for PR21. We anticipate that reallocating such responsibilities to PCF role holders will have undue impact on firms' organisations structures and individual personnel.

We note that the Fitness & Probity Guidance 5.2 allows PCF roles to be outsourced to another regulated entity, without the requirement to appoint a PCF. The guidance states "*a person benefitting from this exclusion from the requirement to obtain the Central Bank's prior written approval to appointment as a PCF is a CF*". This appears to conflict with the requirement to allocate all Prescribed Responsibilities to a PCF. Please clarify whether the Central Bank's intention is to allow Prescribed Responsibilities to be allocated to an outsourced PCF-exempt CF, or to a PCF within the firm. For example, may a firm outsourcing its internal audit function to a group company allocate PR27 (internal audit) to an outsourced Head of Internal Audit (i.e. a CF), or should it be allocated to the PCF-4 Chair of the Audit Committee?

In relation to PR1 (obligations under SEAR), we note that the responsibility for the initial implementation of SEAR may differ from the responsibility for ongoing performance of a firm's obligations.

We suggest that PR5 be amended as follows: "*Responsibility for overseeing the adoption of the firm's culture in the day-to-day management of the firm*".

PR 6 (responsibility for overseeing the development of, and embedding positive culture ... and conduct risk into, the firm's remuneration policies and practices) is somewhat vague and we would welcome additional clarity on what constitutes a positive ethical culture.

We would like clarification as to whether the allocation of PR23 (Responsibility for the firm's compliance with client asset requirements) applies only to firms which are authorised to hold client assets. The current wording of draft regulation 5.2 and 5.4 ("*allocate each responsibility in the Table in Schedule 2*") suggests that this responsibility should be allocated in all firms, including an investment firm which deals on own account but does not hold client assets.

PR 28 (climate related and environment risks) requires one individual to be allocated 'responsibility for managing the firm's approach to identifying, assessing and managing climate related and environmental risks across the firm'. This is extremely broad and in practice, this responsibility may

be allocated across a number of senior managers in an organisation, not all of whom will be PCFs. We note that the equivalent responsibility under the UK's SMR is limited to "managing **financial risks** from climate change" which enables clear allocation of Senior Manager responsibility and reasonable steps to be defined and monitored.

PR 29 (responsibility for overseeing the adoption of the firm's policy on diversity and inclusion) is broad and hard to allocate to one PCF. As an example, aspects will touch on HR, the line of business recruitment lead, and the Boards or Branch Manager who are responsible for setting the culture from the top. The CP confirms that these allocations shouldn't materially change the operating model of the firm but there are some instances where this would have to be the case. We note that the UK SMR does not have Senior Manager accountability for D&I.

We note that persons holding the Significant Influence - CF1 role have the ability to exercise a significant influence on the conduct of the affairs of a regulated financial service provider but cannot be allocated any of the prescribed responsibilities. We propose that prescribed responsibilities may be allocated to a CF1, and not restricted solely to PCF role holders.

In relation to Other Responsibilities, we would appreciate further guidance on the materiality threshold; and on circumstances when the allocation of Other Responsibilities may be made to a single individual within a Group of firms, rather than to individuals at each firm (e.g. responsibility for delivering a material group-wide project).

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

We agree with the approach articulated in the Guidance, but member feedback suggests that job sharing for PCF roles may be difficult to implement in practice and would welcome further guidance from the Central Bank in this area.

We note that Guidance 2.3.1 "*sharing or splitting of PCF roles amongst individuals is not permitted under the SEAR, other than in the case of job sharing*" appears to conflict with Regulation 6(3)(e) – "*Where the firm has allocated an allocated responsibility to more than one PCF holder, the firm shall explain its rationale for doing so, together with the arrangements for the effective operation of that joint allocation of responsibility.*" and we would appreciate further clarification.

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

We agree with the proposed approach. For the avoidance of doubt, we would appreciate if, in the context of Regulation 5.4, the regulations or guidance could state explicitly whether or not low impact firms must allocate the responsibilities PR4 and PR10 to a non-executive director (NED) or independent non-executive director (INED), as is the case for other firms.

A clearer differentiation between the expectations of NEDs and INEDs would be valuable, given that INEDs, consistent with their independent status, will have less in-depth knowledge of the ongoing operations of the firm than a NED.

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

We have no objections to the proposed approach to the Statements of Responsibilities, and suggest the following enhancements to the guidance:

- Please indicate if the Central Bank expects Statements of Responsibilities to be approved by the Board, or whether another governance forum is acceptable.
- The Statement of Responsibility template requires PCF role holder and Approver signature – please provide guidance on the regulatory expectation with respect to the approver
- Please confirm whether wet-ink/digital signature is required or whether an email approval suffice?
- What is the regulatory expectation of “Regularly updated”? Would an annual review be considered acceptable in terms of the Statement of Responsibility being reviewed unless there was a material change i.e. a change to their regulatory responsibilities?
- Examples of “Other Responsibilities” would be welcomed.
- We believe that newly appointed PCF role holders should have the opportunity to view their predecessor’s Statement of Responsibility and the draft Guidance should advocate this; this could be enhanced with a formal handover requirement.
- We suggest that the PCF Application IQ template be amended to include an acknowledgment of the candidate’s understanding of the role’s Statement of Responsibility.

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

We have no objections to the proposed approach to the Management Responsibilities Map. Guidance 2.6.6 states that the Management Responsibilities Map must be approved on initial implementation and when it is updated. Please indicate if the Central Bank expects the Management Responsibilities Map to be approved by the Board / CEO / Branch Manager, or whether another governance forum is acceptable. Please also provide guidance on whether approval is required only for material changes and/or as part of the annual review.

Further clarification is sought on what information is required in the Map for the CF1 role. Given that CF1s are not allocated prescribed responsibilities, we would appreciate further guidance on the type of other responsibilities, not allocated to PCFs, that the Central Bank expects to see on Responsibility Maps. For example, are all outsourced PCF-exempt CFs to be noted on the Responsibilities Map?

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

We agree with the proposed approach to submission of documents.

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

We agree with the proposed approach to outsourcing in the context of SEAR. We request that the Central Bank clarifies whether the terms “regulated” and “unregulated” apply only with respect to entities regulated by the Central Bank, or whether an entity regulated by an overseas supervisory authority is deemed to be “regulated”, consistent with 5.2(2) of the Guidance on Fitness & Probity Standards.

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

We anticipate practical difficulties in complying with the Central Bank's proposed Guidance.

We believe that newly appointed PCF and CF role holders will have limited ability to assess arrangements in place prior to taking up a role.

The ability of newly-appointed PCFs to formally review governance, operational and risk management arrangements within their remit will be constrained by day-to-day obligations and the individual's need to broaden their understanding of the role, the firm and its structure.

We are concerned that the proposed guidance 3.11.1 suggests that the Central Bank expects newly appointed PCFs/CFs to perform and retain evidence of a formal review of arrangements in their areas of responsibility, which is not practical. Firms may need to consider what type of assistance is needed to support PCFs/CFs in the provision and retention of documentary evidence to demonstrate that they have taken reasonable steps to meet their obligations under the new conduct standards. This may include for example implementing delegation procedures, enhancing meeting minutes for collective decision making, revising the firms' record retention policy for emails in line with new CBI regulatory requirements, and providing both initial and ongoing training, education, and awareness of the new requirements for their role.

Further guidance is also requested on the reasonable steps for the prescribed responsibilities - especially for firms which may be part of a group structure outside of Ireland.

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?

We consider the guidance to be of assistance in understanding the Duty of Responsibility and the non-exhaustive list of factors to be considered with regard to reasonable steps.

We consider that certain constraints with regard to reasonable steps should be taken into consideration by the Central Bank, including the preservation of legal privilege, a right to avoid self-incrimination, compliance with court orders, and the time required for role holders to perform reasonable steps while in situ.

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

We believe the Central Bank should amend Guidance 5.6.6, to avoid ambiguity:

"CF role holders should comply with industry Codes of Conduct/Practices related to the firm's activities where the firm has documented its commitment to adhere to the codes /practices and has internal policies, procedures and controls in place to meet this commitment."

We would like the Central Bank to confirm that this provision does not apply in a situation where an overseas parent company announces a group commitment to a foreign code which is not implemented in the Irish regulated subsidiary.

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

We are broadly supportive of the guidance in relation to obligations on the firm in respect of Conduct Standards.

However, we note that under the new Regulation, the firm must establish and implement policies for integrating the Common Conduct Standards into its culture and conduct. Additionally, the IAF

requires the firm to notify the CFs of the Common Conduct Standards and individuals in PCF / CF1 roles of the applicable Additional Conduct Standards, and to provide suitable training to ensure compliance with the new standards. This will present a significant challenge to firms with respect to the proposed implementation timeline. This is compounded by the fact that the final rules will not be released until later in the year.

For these reasons, we recommend that the Central Bank does not set mandatory training requirements with regard to content or timelines.

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

We are supportive of the proposed approach to temporary appointments within the scope of SEAR and the Conduct Standards. However, feedback from our members suggests that the Fitness & Probity guidance and PCF Approval Process is not fully aligned with the approach expressed in SEAR and the Conduct Standards, and that in most cases the Central Bank has not allowed individuals to carry out PCF roles on a temporary basis.

The Central Bank expects firms to limit temporary appointments to exceptional circumstances. This does not reflect how RFSPs operate in practice. Typically, the time required to identify and recruit a permanent replacement PCF externally will exceed the incumbent's notice period by a number of months. Thus there is a more frequent need for temporary appointments and this needs to be recognized in the guidelines and greater clarity provided.

While such temporary appointments are in effect, and the pre-approved individual is subject to the conduct standards, the assessment of reasonable steps should take into account their specific circumstances.

It would be helpful to have additional guidance on how the Central Bank expects firms to comply with conduct standards in this context. For example, should firms document the reasonable steps that are applicable to the temporary role holder's responsibilities with respect to a breach of the conduct standards where the previous holder left the role suddenly without a formal hand-over; e.g. will the Central Bank expect to see documentation on additional oversight and / or an active learning plan for any knowledge gaps?

We note that firms operating as part of a foreign group may rely on the temporary secondment of employees of other group companies and suggest that the Central Bank consider a term limit (similar to the FCA's 30 day travel rule) within which the SEAR/IAF will not apply.

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

We would appreciate clarification in relation to the practical application of the certification regime:

- Confirm that the certificate may be issued in electronic form (in a durable medium)
- Please confirm whether PCF/CF role holders may complete their declarations in electronic form
- Please state the maximum time that may elapse between the performance of due diligence and the issuance and validity of the certificate. Firms currently perform annual F&P due diligence processes over a period of weeks, but typically work to an annual sign-off on a single date.
- Please confirm (regulation 6g) that the obligation to issue a certificate and perform the associated due diligence will be aligned with firms' existing annual PCF sign-off obligations.
 - Please confirm whether the initial certificate is to be issued by the implementation date or after the implementation date of the regulations.
 - Please confirm whether the certificate should include an assessment of any breaches in conduct standards for the CF/PCF role holder, and if so, the expected timeline for completion of this assessment.

RFSPs in Ireland have historically faced challenges in balancing the F&P regime with individual employment rights when assessing performance issues or concerns, and this becomes more challenging under the new regime. There may be a scenario where certain issues have come to light but are subject to further assessment / investigation before a determination can be made, during which time the individual may be subject to re-certification under the enhanced F&P Regime. What are the expectations of the Central Bank where such a review is ongoing during the recertification timeline?

The Central Bank has authority to investigate individuals who previously held CF or PCF roles up to six years prior to the investigation. This is regardless of whether they currently hold such roles or any other roles within the F&P Regime. This may put former PCF/CF role holders at a disadvantage, as their ability to retain evidence of their actions will be limited, given that it will be held on company systems. This needs further consideration and clarification.

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

We do not agree with the proposed approach to roles prescribed as PCF roles for holding companies in the draft Holding Companies Regulations. We believe that their application to holding companies will indiscriminately extend elements of the regulatory regime to individuals who do not have direct responsibility for regulated financial products and services.

We believe that the Central Bank already has sufficient regulatory tools, including the authorisation process for firms, the regime for notification and approval of acquisitions of regulated firms, and firms' obligation to identify persons holding the CF1 Significant Influence Function, to ensure that shareholders and persons with significant influence on regulated firms are subject to adequate scrutiny.

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

We generally agree with the proposed approach for reporting disciplinary actions, but request clarification on the following:

- Does the Central Bank expect to be notified of disciplinary actions that do not reach a conclusion, e.g. when employees involved in the action voluntarily leave the firm?
- If an employee appeals subsequent to the breach of conduct standard being reported, what is the timeframe for reporting the appeal post initial reporting and what information should be provided?
- When does the 5-day timeline commence?

We also recommend that persons who are the subject of a disciplinary action reported to the Central Bank should be afforded the opportunity to present their case directly to the Central Bank.

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

When introducing the Head of Material Business Line role for investment firms, we would like the Central Bank to express quantitative thresholds, in order to avoid bringing in scope employees of smaller firms, whose Business Lines are material to their firm but insignificant in comparison to large financial institutions.

Yours sincerely

The Chair