

Introduction

By way of background, the Irish MiFID Industry Association (“IMIA”) was established in 2018 to provide representation on behalf of its member firms that are authorised under the Markets in Financial Instruments Directive (“MiFID”). The IMIA currently represents 65 member firms and aims to promote industry best practice by providing regulatory updates and hosting peer discussions.

The IMIA supports the effort to simplify the Fitness and Probity regime and commends the Central Bank on its efforts to implement the findings of the Enria Report. Since the establishment of the Fitness and Probity Unit earlier this year, our member firms have reported a more streamlined process for the approval of Pre-Approval Controlled Function (“PCF”) holders. The IMIA welcomes the Central Bank’s commitment to being open and engaged and welcomes the opportunity to provide feedback on the Consultation Paper to the Amendments to the Fitness and Probity Regime (“CP-160”).

Consultation Questions

1. (a) Do you agree with the proposed revision to the draft Guidance?

Members were in general agreement that the proposed revision to the draft guidance is welcome. However, a number of clarifications are required, as illustrated in section 2 (b) below.

1. (b) Are the enhancements to the draft Guidance useful to you?

The draft guidance is well thought out, easy to navigate, and straightforward. In particular, the consolidation of all guidance related to Fitness and Probity is useful.

1. (c) What other elements could the Central Bank include within the draft Guidance?

(i) Revisions to the Minimum Competency Code

More flexibility could be granted in the Minimum Competency Code (MCC). The use of a prescribed list of qualifications, restricted to Irish educational institutions, prevents applicants from other countries from applying for roles. For areas like MiFID services, subject to harmonised regulation across the EU, this is an unnecessary barrier to the movement of skills and people.

(ii) Register of PCF holders

We note that the Central Bank recognises the value of overseas regulators' websites when conducting due diligence. For example, the FCA publishes a register of approved persons and their approval histories, including disciplinary action. In contrast, the Central Bank only publishes information about persons who are subject to public sanctions notices. We propose that the Central Bank consider maintaining a similar register of authorised persons and their approval histories, which would greatly assist firms with their due diligence efforts.

2. (a) Do you agree with the proposed revisions to the PCF list?

The Central Bank's proposal to remove the sector-specific categorisations has unclear benefits. For example if a non-banking sector firm currently has Treasury activities, it's not clear in what circumstances the PCF-21 (Head of Treasury) would become applicable. Similarly, PCF-39B (Designated Person with responsibility for Operational Risk Management) which was previously specific to Fund Management Companies, could be considered relevant to all firms. The Central Bank should provide clear guidance on the extent to which it expects firms to assess whether these roles are relevant and the form this assessment should take.

(b) Have you identified any issues with this revision?

There are several issues that the IMIA has identified with this revision, outlined below. Many of these concerns were echoed by other industry participants at the event which the Central Bank hosted on 30th May.

(i) Version Control

It would be helpful if the Central Bank could confirm if previous versions of the Fitness and Probity Guidance including the Q&As are still applicable. For example, in Section 3.10 of the previous Q&A¹, the Central Bank has explicitly stated that a Company Secretary is CF-1, however the revised guidance does not specifically mention Company Secretary.

The Central Bank has recognised the need to consolidate all guidance relating to Fitness and Probity, and a consistent approach must be taken.

¹ Fitness and Probity – Frequently Asked Questions 2018
<https://www.centralbank.ie/docs/default-source/regulation/how-we-regulate/fitness-probity/fitness-and-probity---frequently-asked-questions-2018.pdf>

(ii) *Temporary Officers*

Members noted a difference in Central Bank practice for the appointment of temporary officers. The majority of IMIA members felt that more flexibility should be granted for the appointment of temporary officers and that the Central Bank should take a broader view of unforeseen circumstances. In particular, smaller firms' succession planning is more likely to be dependent on new hires than on promoting an internal candidate.

We note that the current approach can leave PCF roles vacant for a period of time, which in turn can result in a lack of clearly-allocated responsibilities, contrary to the goals of the Individual Accountability Framework.

The Central Bank could consider adopting a 12-week rule similar to the Senior Managers and Certification Regime ("SMCR") in the UK which allows an individual to cover for a senior manager without being approved where the absence is temporary or reasonably unforeseen.

(iii) *Allocation of CF designations to PCF folders*

The rationale for allocating CF-1 and / or CF-2 responsibilities to PCF role holders is unclear. IMIA Members are concerned that this adds unnecessary administrative burden as the previous understanding was that a PCF holder was a CF holder by default.

Members feel that designating all PCF holders as CF-1s blurs the distinction between the 1st and 2nd lines of defence. We propose that the guidance be amended to state that Compliance, Risk and Internal Audit PCF roles should be classified as CF-2, with the remainder classified as CF-1.

(iv) *Outsourced internal audit function*

Firms that have an Outsourced Internal Audit function and have a nominated PCF Head of Internal Audit question whether the Central Bank expects other members of the Outsourced Internal Auditor to be nominated as CF-2. This approach will cause practical difficulties in conducting due diligence when the audit team may vary from audit to audit.

(v) *Criminal, Civil and Regulatory Actions*

The introduction of the ten-year look-back period for actions may require some revisions to the Individual Questionnaire ("IQ"). At present, the questions in section 5 of the IQ do not reflect this time limit.

The IMIA has concerns on requesting personal data beyond 10 years, when such non-custodial data will not influence the outcome of the due diligence assessment. We are concerned that obtaining such data may breach Article 5.1(c) of GDPR, namely the Data Minimisation Principle.

(vi) *Interaction with SEAR*

Under Section 4.34 of the draft F&P guidance the Central Bank considers Inherent Responsibilities for PCFs under the Senior Executive Accountability Regime (SEAR) ‘relevant for all such roles across all sectors’. This expands the SEAR beyond its original scope to all PCF roles, including PCF roles in regulated financial service providers (RFSPs) not subject to SEAR.

(vii) *Independence of mind*

We note that the Guidance expects firms to assess independence in accordance with Art. 4.31. However, Guidance 4.29 states: *The fact that a member is considered as “being independent” does not mean that the member of the board should automatically be deemed to be “independent of mind” as the member might lack the required behavioural skills cited above.*

This article 4.29 goes beyond the criteria of 4.31, and in practical terms is difficult to assess, given that the persons performing the assessment may not be in a position to witness the relevant behavioural skills of the director.

(viii) *PCF Time Commitments*

Where firms operate a global or regional operating model, a PCF role holder often carries out Line of Business or Functional responsibilities in addition to their PCF role. This supports a broader understanding of the business and emerging risks, which in turn enhances their PCF effectiveness. Allocating 220 days for the discharge of PCF responsibilities is not realistic and does not reflect the reality of working in a global firm.

The guidance states, “*Noting that the majority of executive PCF roles are considered to be full-time roles in their own right, the Central Bank expects such approvals to be relatively limited, taking into account the nature, scale and complexity of the firm*”. The presumption that a PCF role must be a full-time undertaking overlooks the diversity among enterprises in the sector, as well as the potential for synergies from group arrangements and the evolving nature of roles.