

TRAINING & DEVELOPMENT PROGRAMME

Knowledge Network

Webinar Series

The Individual Accountability Framework and Senior Executive Accountability Regime

Wednesday, 6 October 2021 | 8.30 am to 9.30 am



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Agenda

- The Individual Accountability Framework

- What is SEAR and how will SEAR work?

- Other elements of the Individual Accountability Framework
 - New Conduct Standards
 - Enhancements to Fitness and Probity
 - Improved enforcement powers for the Central Bank of Ireland (CBI)

- Timing for implementation and what RFSP's can do at this stage.

- Implications for RFSPs

- Should SEAR provide an exclusive focus for relevant senior executives?

The Individual Accountability Framework

- The Individual Accountability Framework, currently mapped-out in the General Scheme of the Central Bank (Individual Accountability Framework) Bill 2021, will be comprised of four parts:
 - SEAR
 - The introduction of new individual and business conduct rules
 - Enhancements to the Fitness & Probity Regime
 - Enhancements to the Central Bank of Ireland's powers.
- The Individual Accountability Framework, including SEAR, is a national initiative: it is not mandated by EU law.
- It bears some similarity to the Senior Managers and Certification Regime introduced in the UK in 2016, though is not identical.
- SEAR and the Individual Accountability Framework will be introduced by means of: a new Act (the Central Bank (Individual Accountability Framework) Bill), new regulations that the Bill will empower the CBI to make, and CBI guidance



SEAR – what is it, and how will it operate?

- The proposed “Senior Executive Accountability Regime” (“**SEAR**”) is a key element of the incoming Individual Accountability Framework.
- SEAR will be implemented on phased basis, and initially apply to credit institutions (excluding credit unions), certain insurance undertakings and investment firms, and third country branches of such firms.
 - Other sectors may be included in the future.
- SEAR will apply primarily to those performing any “senior executive function” in a relevant regulated financial services provider (an “**RFSP**”) and to the relevant RFSP itself
 - A “senior executive function” means a pre-approval controlled function (a “**PCF**”) carried on by, for, or on behalf of an RFSP to which SEAR applies

SEAR – what is it, and how will it operate?

SEAR will require every in-scope RFSP to set out clearly where responsibility and decision-making lies within the organisation.

This will involve:

1. Responsibility allocation

- ‘Prescribed responsibilities’ will be identified by the CBI, and these must be assigned to senior executives in each RFSP.
- RFSPs will also be obliged to ensure that other, ‘inherent’, responsibilities’ (such as those typically assigned to a CEO) are appropriately and clearly allocated.

SEAR – what is it, and how will it operate?

2. Statements of Responsibility

- RFSPs will need to put a “statement of responsibility” in place for each senior executive within that RFSP, clearly setting out their role and the areas of the business for which they are accountable.
- These statements are intended to promote ‘clarity, transparency, and accountability’, and *‘will enhance the Central Bank’s ability to hold individuals to account for regulatory breaches in the area for which they are responsible’* – General Scheme.

3. Responsibility Maps

- RFSPs will be obliged to prepare a “management responsibility map” for the entire organisation, illustrating where each of the RFSP’s senior executives fits within the RFSP’s management and governance structures and the reporting lines to which each senior executive is subject.
- The Responsibility Map will be a single source of reference for governance arrangements within the RFSP.

SEAR – what is it, and how will it operate?

The “**Duty of Responsibility**” for Senior Executives within SEAR

- Head 5 of the General Scheme indicates that there will be a legal duty on those individuals within SEAR to take reasonable steps to avoid their firm committing or continuing to commit a ‘prescribed contravention’ (i.e. an enforceable regulatory breach).
- An individual will breach this duty where:
 - at a time when the individual was performing a senior executive function, the RFSP committed/continued to commit a prescribed contravention;
 - the individual was, at the time, responsible for the relevant business area; and
 - the individual did not take reasonable steps to avoid the contravention.

SEAR – what is it, and how will it operate?

All relevant factors should be considered in assessing whether ‘reasonable steps’ have been taken, including:

- The nature, scale and complexity of the RFSP;
- The relevant senior executive function and its responsibilities;
- The level of knowledge of the relevant executive, and the level of knowledge that they could reasonably be expected to have;
- Whether the executive took steps
 - to ensure effective controls, systems and governance;
 - to ensure effective oversight of delegated responsibilities;
 - implemented remediation procedures as appropriate; and
 - applied such systems, controls, arrangements, safeguards and procedures as appropriate.
- And whether the executive acted in accordance with any statutory or other legal obligations.

New Business and Conduct Rules

- New conduct standards will have wider application within RFSPs, beyond the senior executives to which SEAR will apply.
 - **“Standards for Business”**: These will apply to the RFSP itself (and will inform how it is managed and governed).
 - **“Common Conduct Standards”**: These will apply to every Controlled Function (“CF”) in an RFSP and not merely to PCFs. As every obligation of a CF applies also to a PCF, PCFs too will be subject to the Common Conduct Standards. In-scope RFSPs will have to establish and maintain policies setting out how the RFSP will embed the Common Conduct Standards throughout the RFSP.
 - **“Additional Conduct Standards”**: These will apply to every PCF in every RFSP (irrespective of whether the relevant RFSP is within the SEAR regime) and to every other person *“who exercises significant influence on the conduct of an RFSP’s affairs”*.

It will be a defence to any enforcement action in relation to a breach of the Common Conduct Standards or of the Additional Conduct Standards if the person can show that she or he acted reasonably in all of the circumstances of the case.

New Business and Conduct Rules

- Examples of conduct standards can be found in the General Scheme but further detail and guidance will be needed.
- Key themes arising across the standards in the General Scheme are the obligations:
 - to act honestly, ethically, and with integrity;
 - to act with due skill, care and diligence;
 - to act in the best interest of the customer;
 - to avoid conflicts of interest
 - to maintain and follow adequate controls and procedures, and
 - to engage with the regulator openly and in good faith.
- Individuals will also be required to participate effectively in collective decision making.
- Standards are broad – *‘honestly, ethically and with integrity’*
 - Could capture a wide range of conduct.
 - Non-Financial Misconduct, such as discriminatory conduct or sexual harassment, is an area of particular interest in the UK.





New Fitness and Probity Certification Requirements

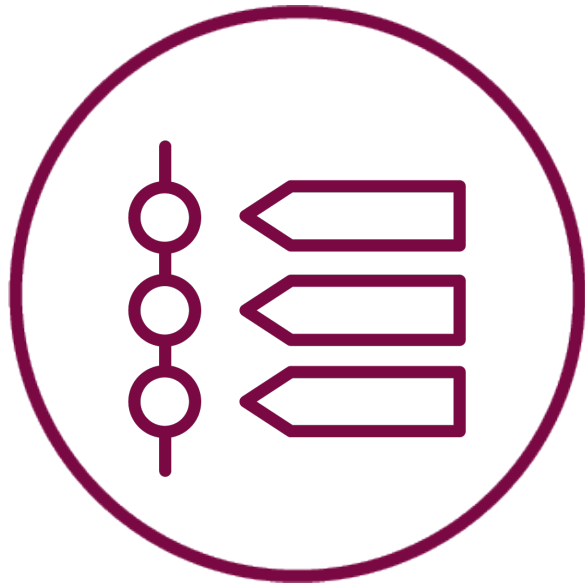
In parallel with the introduction of SEAR, the CBI's **Fitness and Probity regime** will be updated to introduce certification, due diligence and reporting obligations in respect of the fitness and probity of persons in CF and PCF roles.

The certification obligation in respect of CFs may be periodic, most likely annual, so that:

- an RFSP must not permit a person to perform a CF (which would include a PCF) unless the particular RFSP has certified in writing that it is satisfied that the person complies with the applicable standards of fitness and probity; and
- the CBI may make regulations specifying requirements in relation to certification, the due diligence that RFSPs must undertake prior to certifying persons in CF roles, the adoption of fitness and probity policies and procedures, etc.

The CBI will also have the power to investigate former CF or PCF holders, even where they no longer perform CF/PCF functions.

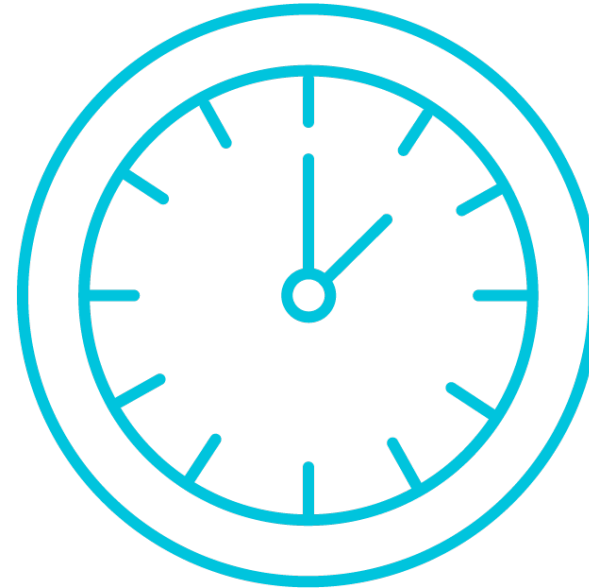
Enhanced Enforcement Capabilities



- Commentary from the CBI indicates that the legislation will remove the so-called “participation link” so that the CBI will no longer have to first find that an RFSP has committed a regulatory breach before it can take enforcement action against any individual in that RFSP.
- The legislation will also amend the CBI’s Administrative Sanctions Regime and the Fitness and Probity Standards, so that breach of the new Conduct Standards will be a prescribed contravention of financial services legislation, such that the CBI will be able to take action against the individual(s) who are accountable.
- The General Scheme confirms that the CBI’s approach to making a decision to take enforcement will remain unchanged, and that it will be ‘proportionate and risk-based’.
- Focus will be on individuals, as well as the RFSP itself.

Timeframe

It is expected that SEAR will be phased in, for certain types of RFSPs initially, from a date in Q3 or Q4 2022.



Implementing SEAR

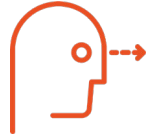
- Implementing SEAR will be a significant undertaking for many RFSPs, and will involve considerable management time.
- Developing a Responsibility Map and Statements of Responsibility for individuals carrying out senior executive functions will require many RFSPs to rethink their decision making and governance arrangements. Look at this as an opportunity.
- Large scale variation of contracts of employment and changes in HR policies and procedures will likely be required. This will require consultation with relevant employees.
- SEAR and the Individual Accountability Framework will likely mark the death-knell for informal decision making.
 - RFSPs will need to consider how they can continue to make effective decisions promptly, while ensuring that ‘reasonable steps’ are taken to ensure that Conduct Standards are complied with.
- Training, at all levels, will be key to embedding new Conduct Standards in the culture of each RFSP.

What can RFSP's do now to prepare?

1. Establish a cross-functional SEAR implementation group (regulatory, compliance, legal, HR, and other relevant stakeholders) with board access.
2. Identify those carrying senior executive functions in your organisation and prepare an initial Responsibility Map based on existing job descriptions. This will help you to identify any existing gaps in responsibilities or any activity for which no identified role is currently responsible.
3. Collate your existing template contracts of employment and HR policies and identify areas that will need to be updated during the course of your SEAR Project (e.g. Fitness and Probity contract provisions, disciplinary procedures, and the introduction of new policies such as Breach Reporting Policy).
4. Raise awareness regarding SEAR, and its implications and timeline, within the RFSP, initially within the leadership team
5. Consider the RFSP's Directors & Officers insurance cover and whether, properly construed, it would include SEAR-related considerations such as SEAR-related CBI investigative and enforcement activity.

What Consequences might SEAR Have?

- Minister Donohoe has said that, when implemented, SEAR and related amendments will “put individual accountability at the centre of decision-making in financial services organisations”
- Other possible consequences may include:
 - more defensive approaches to governance and decision-making within RFSPs, with implications for risk-taking within RFSPs (while excessive, unreasonable and reckless risk-taking should be eliminated, some risk-taking is appropriate in order to foster innovation)
 - with the introduction of new Conduct Standards and the breaking of the “participation link”, a practical consequence might be more frequent enforcement procedures against individuals, in advance of or in tandem with procedures against the relevant RFSP.
 - increased use of SpeakUp and Whistleblowing policies is likely.
 - it also seems likely that enforcement of Conduct Standards (whether internally, through the CBI Administrative Sanctions Regime or through criminal prosecution) will cast up employment law, constitutional and fair procedures issues.



Should SEAR be Senior Executives' only Focus?

Important though SEAR will be, it will only be one feature of the compliance landscape.

Especially in the case of a senior executive at board level, a director is (with every other director) collectively responsible for the governance, conduct and legal and regulatory compliance of the company overall, in every area of activity, and not merely for responsibilities that happen to be mapped to her or to him under SEAR.

Also, senior executives (those performing a PCF) have existing obligations:

- to alert the Central Bank if the senior executive has reasonable grounds to believe that an offence under financial services legislation may have been or is being committed, or a prescribed contravention has occurred or is occurring (*Central Bank (Supervision and Enforcement) Act 2013*), and
- to alert gardai in the event that the any of a range of offences (including offences of dishonesty such as theft and false accounting) has been or is being committed (*Criminal Justice Act 2011*).

Conclusion

- Individual Accountability Framework and SEAR proposals are still in at an early stage.
 - A bill is being drafted
 - The legislation is likely to be accompanied by regulations and CBI guidance
- Implementation will be a significant undertaking for RFSPs, involving inputs from throughout the business. Steps can be taken now to get ahead.
- Key however at this stage is awareness. RFSPs and senior executives need to be aware that this is happening, so that they can take steps to ensure that their organisational controls are fit for purpose when the new regime and Conduct Standards come into effect.

Abbreviations

- “**CBI**” – Central Bank of Ireland
- “**CF**” – Controlled Function
- “**PCF**” – Pre-Approved Controlled Function
- “**RFSP**” – Regulated Financial Services Provider
- “**SEAR**” – Senior Executive Accountability Regime



Questions?



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