

Financial Services Compliance 2021

Contributing editor
Zachary J Zweihorn



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between January and March 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021
No photocopying without a CLA licence.
First published 2018
Fourth edition
ISBN 978-1-83862-659-4

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Financial Services Compliance 2021

Contributing editors

Zachary J Zweihorn

Davis Polk & Wardwell LLP

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Financial Services Compliance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Egypt, Indonesia, Ireland and Italy.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Zachary J Zweihorn of Davis Polk & Wardwell LLP, for his assistance with this volume.



London
March 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2021
For further information please contact editorial@gettingthedealthrough.com

Contents

Introduction	3	Japan	61
Zachary J Zweihorn Davis Polk & Wardwell LLP		Kunihiko Morishita, Takaharu Totsuka, Daisuke Tanimoto and Takahiko Yamada Anderson Mōri & Tomotsune	
Australia	5	Netherlands	68
Peter Reeves, Simon Barnett and Catherine Collins Gilbert + Tobin		Tim Alferink and Martijn Stolze Baker McKenzie	
Brazil	14	Portugal	74
José Luiz Homem de Mello and Ana Clara Pessoa Mello de L Castro Pinheiro Neto Advogados		Miguel Stokes and Bruno Silva Palhão Uría Menéndez	
Canada	22	Spain	79
Michael Garellek Gowling WLG		Isabel Aguilar Alonso Uría Menéndez	
Egypt	31	Switzerland	84
Dina Salah Soliman, Hashish & Partners		François Rayroux, Patrick Schleiffer, Laurence Vogt Scholler, Patrick Schärli and Sarah Bechaalany Lenz & Staehelin	
Hong Kong	35	United Kingdom	90
Joyce Chow and Karen Chan Davis Polk & Wardwell LLP		Jennifer Duffy, Mark Chalmers and Simon Witty Davis Polk & Wardwell LLP	
Indonesia	43	United States	95
Elsie F Hakim, Giffy Pardede and Monic Nisa Devina ABNR		Annette L Nazareth, Mark A Sater and Zachary J Zweihorn Davis Polk & Wardwell LLP	
Ireland	49		
Keith Waine and Laura Twomey Dillon Eustace			
Italy	56		
Marco Penna, Giovanna Tassitano and Marylisa Izzo Legance – Avvocati Associati			

Ireland

Keith Waine and Laura Twomey

Dillon Eustace

REGULATORY FRAMEWORK

Regulatory authorities

1 | What national authorities regulate the provision of financial products and services?

The Central Bank of Ireland (CBI) is the primary authority responsible for the regulation of financial services firms in Ireland. The statutory objectives of the CBI include the maintenance of price and financial stability, the resolution of financial difficulties and the oversight of the regulation of financial services firms and markets while ensuring the interests of consumers of financial products are protected. In addition to being responsible for the authorisation and supervision of financial services firms in Ireland, the CBI also has powers of investigation and enforcement of breaches of financial services law by firms and individuals.

The European Central Bank (ECB) is the competent authority responsible for the authorisation and prudential supervision of banks in Ireland, following the introduction of the Single Supervisory Mechanism on 4 November 2014. Banks designated as 'significant' are supervised directly by a 'joint supervisory team' led by the ECB, comprising staff from the ECB and the CBI. Banks designated as 'less significant' are supervised directly by the CBI with oversight from the ECB.

2 | What activities does each national financial services authority regulate?

As the sole financial services regulator in Ireland, the CBI regulates a wide range of financial service activities, including accepting deposits, granting credit to consumers, payment services, issuing and distributing electronic money, reception and transmission of orders in financial instruments, execution of orders in financial instruments, dealing on own account, portfolio management, investment advice, underwriting of financial instruments or placing of financial instruments on a firm commitment basis (or both), placing of financial instruments without a firm commitment basis, operation of certain trading facilities, acting as a deposit agent or deposit broker, the administration of collective investment schemes, and custodial operations involving the safekeeping and administration of investment instruments.

It should be noted that lending to companies or other incorporated bodies is an activity that does not require regulatory authorisation in Ireland. It is, therefore, permitted to advance credit to Irish companies without authorisation and such lending is not subject to the main body of legal and regulatory requirements that apply to banks and other authorised lenders. There is however a statutory prohibition on carrying out banking business, holding oneself out as a banker or using the terms 'bank', 'banker' or 'banking' in one's name or marketing materials.

3 | What products does each national financial services authority regulate?

The CBI is the competent authority in respect of the regulation of all regulated products in Ireland, including:

- deposits (including structured deposits)
- loans (including mortgage loans)
- electronic money;
- shares, bonds and other securities;
- money-market instruments;
- units in collective investment undertakings;
- options;
- futures;
- swaps;
- forward rate agreements
- derivative instruments;
- contracts for differences; and
- emission allowances.

Authorisation regime

4 | What is the registration or authorisation regime applicable to financial services firms and authorised individuals associated with those firms? When is registration or authorisation necessary, and how is it effected?

Financial services firms must be authorised to carry on regulated activities in Ireland. Banks, broker-dealers, asset managers, payments services firms, e-money institutions, retail intermediaries, credit servicing firms and fund service providers each have dedicated authorisation processes. In each case, applications are submitted to the CBI.

The ECB is the competent authority responsible for the authorisation and supervision of banks in Ireland. Applications are submitted to the CBI but the ultimate decision whether to grant a banking licence is made by the ECB. An authorisation will only be granted where the applicant complies with all of the authorisation requirements.

A bank headquartered in a non-EEA country may seek authorisation to carry out banking activities in Ireland through a 'Third Country Branch.' The CBI is the competent authority for the authorisation of Third Country Branches. The authorisation application is submitted to the CBI, which will determine whether to grant authorisation.

An investment firm may seek authorisation pursuant to the European Union (Markets in Financial Instruments) Regulations 2017 (as amended) (MiFID II Regulations). Where the applicant's proposed activities fall outside the scope of the MiFID II Regulations, the applicant may seek authorisation under the Investment Intermediaries Act 1995 (as amended). The authorisation application in both cases is submitted to the CBI.

The CBI has put in place a Fitness and Probity Regime to ensure that individuals in key and customer-facing positions within regulated firms are competent and capable, act honestly, ethically and with

integrity, and are financially sound. These are known as 'controlled functions.' CBI approval must be obtained prior to the appointment of certain key controlled functions, known as 'pre-approval control functions (PCFs)', which may involve an in-person interview.

The principal areas assessed by the CBI in considering an application for authorisation include:

- organisation of the applicant;
- business plan;
- financial Information, initial capital and own funds;
- nature of the services proposed;
- operational procedures and processes;
- outsourcing arrangements and oversight;
- internal governance, controls and risk management;
- directors and managers;
- shareholders; and
- regulatory background.

The CBI will expect effective control of the entity to lie within Ireland. There are no definitive guidelines as to what this entails but it is generally understood as requiring decision-making at board and committee level to take place within Ireland together with significant senior management presence with responsibility for financial control, compliance and risk management.

Legislation

5 | What statute or other legal basis is the source of each regulatory authority's jurisdiction?

The Central Bank Acts 1942–2018 (as amended) provide the legislative basis for the CBI's jurisdiction.

The Central Bank Reform Act 2010 created a new structure for financial regulation in Ireland and introduced new standards of fitness and probity applicable to key individuals in financial services firms. The CBI's enforcement powers were enhanced through the Central Bank (Supervision and Enforcement) Act 2013.

Under the Single Supervisory Mechanism Regulation (Regulation (EU) No. 1024/2013), the ECB is the competent authority for the authorisation and supervision of credit institutions (banks) in Ireland. Banks designated as 'significant' are supervised directly by a 'joint supervisory team' led by the ECB, comprising staff from the ECB and the CBI. Banks designated as 'less significant' are supervised directly by the CBI with oversight from the ECB.

The CBI is the competent authority for the authorisation and supervision of MiFID II authorised investment firms, pursuant to the European Union (Markets in Financial Instruments) Regulations 2017 (as amended). The CBI is also the competent authority for the authorisation and supervision of certain 'non-retail' investment firms, pursuant to the Investment Intermediaries Act 1995.

The CBI is the competent authority in Ireland for the regulation of payments services, pursuant to the European Union (Payment Services) Regulations 2018 (as amended). The CBI is also the competent authority in Ireland for the regulation of e-money institutions (ie, a firm that has been authorised to issue e-money) pursuant to the European Communities (Electronic Money) Regulations 2011 (as amended).

The CBI is the competent authority for monitoring compliance with anti-money laundering and countering the financing of terrorism legislation by financial services firms, and derives its authority in this respect from the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended).

6 | What principal laws and financial service authority rules apply to the activities of financial services firms and their associated persons?

Financial services firms are obliged to comply with the Central Bank Acts 1942–2018 (as amended), domestic Irish legislation, EU legislation, the various pieces of secondary legislation and codes issued under the Central Bank Acts 1942–2018 (as amended), and guidance issued by EU bodies such as the European Supervisory Authorities. The CBI also issues guidelines to assist financial services firms comply with their obligations. Regulatory expectations are set out in letters to industry, speeches and thematic review reports.

The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended) is the primary legislation governing anti-money laundering in Ireland and implements the EU Money Laundering Directives.

Both banks and investment firms are obliged to comply with Directive 2013/36/EU (Capital Requirements Directive) and Regulation (EU) 575/2013 (Capital Requirements Regulation or CRR) (collectively CRD IV). The European Union (Capital Requirements) Regulations 2014 and the European Union (Capital Requirements) (No. 2) Regulations 2014 (collectively the Irish Capital Regulations) transposed CRD IV into Irish law.

Investment firms carrying out certain investment activities must comply with MiFID II Regulations. The CBI also regulates services provided by investment firms that fall outside of the scope of the MiFID II Regulations under the Investment Intermediaries Act 1995. Investment firms are also required to comply with the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2017.

Firms providing payment services must comply with the European Union (Payment Services) Regulations 2018 (as amended) and firms that issue e-money must comply with the European Communities (Electronic Money) Regulations 2011 (as amended).

Scope of regulation

7 | What are the main areas of regulation for each type of regulated financial services provider and product?

Financial services firms must be authorised in order to carry on regulated activities in Ireland. Depending on the type of authorisation granted, the regulatory requirements and conditions of authorisation will vary.

The CBI's Fitness and Probity Regime ensures that individuals appointed to key positions within a regulated financial services firm are competent and capable. The CBI assesses applications for approval of individuals under this regime.

The CBI is responsible for the conduct of business supervision for financial services firms. There are numerous pieces of secondary legislation and statutory codes of conduct setting out conduct of business rules addressing topics such as consumer protection, client assets, investor money, business lending to SMEs, mortgage arrears and minimum competencies of consumer-facing staff.

The vast majority of regulated firms are obliged to hold a minimum level of capital as specified in the relevant EU and domestic legislation. They are also required to submit capital returns to the CBI on a periodic basis.

The CBI monitors compliance of prudential standards by the imposition of reporting requirements, regular review meetings and on-site inspections, the form and frequency of which varies depending on the type of authorisation held by the firm and the risk categorisation assigned to it by the CBI.

The CBI is the competent authority for monitoring compliance with anti-money laundering and countering the finance of terrorism legislation by financial services firms.

Additional requirements

- 8 | What additional requirements apply to financial services firms and authorised persons, such as those imposed by self-regulatory bodies, designated professional bodies or other financial services organisations?

Regulated financial services firms and their directors and employees, in addition to being subject to the oversight of the CBI, are also subject to the oversight of a number of Irish regulatory bodies including the Data Protection Commission, the Financial Services and Pensions Ombudsman, the Competition and Consumer Protection Commission, the Advertising Standards Authority for Ireland and professional regulatory bodies such as the Law Society, the Irish Auditing and Accounting Supervisory Authority, the Institute of Banking and the Association of Compliance Officers in Ireland.

ENFORCEMENT

Investigatory powers

- 9 | What powers do national financial services authorities have to examine and investigate compliance? What enforcement powers do they have for compliance breaches? How is compliance examined and enforced in practice?

The Central Bank of Ireland (CBI) aims to operate an assertive risk-based approach to supervision supported by a credible threat of enforcement. The CBI's enforcement strategy is aimed at promoting principled and ethical behaviour in regulated entities and those that work in such entities. The CBI's enforcement division liaises closely with its supervisory divisions, advises on appropriate outcomes and takes enforcement action where required.

The CBI will usually gather information from the relevant entity or individual, when investigating compliance. It may seek this information on a voluntary basis, or use its compulsory information gathering powers that are contained in the Central Bank (Supervision and Enforcement) Act 2013 (2013 Act), or some other piece of sectoral legislation. The 2013 Act contains wide-ranging powers that the CBI or its Authorised Officers may use, including the power to call individuals in for interview, to search and inspect premises and to copy or seize documents found at a premises, and to require specified records to be provided.

Where a breach is uncovered, the CBI has various options open to it, depending on how serious the matter is. It may decide to take no further action (eg, where the matter is minor and immediate remedial action has been taken) or to use some of its supervisory powers, such as issuing a direction or a supervisory warning to the firm, or imposing a condition on its licence. If the CBI is concerned about potential individual wrongdoing it may commence a fitness and probity investigation, the outcome of which could potentially result in an individual being prohibited from performing certain or any roles in a regulated entity for a certain time frame or indefinitely.

The CBI can also impose administrative sanctions on firms and individuals for certain regulatory breaches under its Administrative Sanctions Procedure (ASP) and also under its 'securities markets regulations assessments' regime. The sanctions available include significant monetary penalties, as well as periods of disqualification from being involved in the management of a regulated entity for individuals.

Some sectoral legislation allows the CBI to take summary criminal prosecutions for contraventions that give rise to a criminal offence. However, in such a scenario, the CBI would likely refer the matter to the Irish police force for them to investigate the matter further.

In practice the CBI monitors compliance through its day-to-day dealings with a regulated entity (eg, through the review of returns,

through on-site inspections or through the regulated entity informing the CBI of a breach).

Where the CBI commences an investigation under its ASP, the matter will usually be resolved by way of settlement, resulting in a monetary penalty being imposed on the firm or individual and a detailed public statement being published on the CBI's website. The CBI can decide to refer an ASP case to Inquiry, which is a formal mechanism used to decide whether a breach has occurred, and if so, what sanction to impose (if any). The CBI may also enter into settlements under its 'securities markets regulations assessments' regime or refer a case for assessment for an assessor to decide whether there has been a breach, and if so, what sanction (if any) to impose.

Disciplinary powers

- 10 | What are the powers of national financial services authorities to discipline or punish infractions? Which other bodies are responsible for criminal enforcement relating to compliance violations?

The CBI can impose administrative sanctions on firms and individuals for certain regulatory breaches under its ASP and also under its 'securities markets regulations assessments' regime. The range of sanctions available include significant monetary penalties, as well as periods of disqualification from being involved in the management of a regulated entity for individuals. Both the ASP regime and the 'securities markets regulations assessments' regime allow the CBI to enter into settlements to resolve the suspected regulatory breaches instead of using formal assessment processes to adjudicate on whether a breach was committed and if so, to decide what sanction (if any) should be imposed. The CBI generally publishes details of any settlements reached under either regime on its website.

If the CBI has concerns about potential wrongdoing by an individual, it may commence a fitness and probity investigation and ultimately prohibit the individual from performing certain or any roles in a regulated entity for a certain timeframe or indefinitely.

Certain legislation gives the CBI the power to initiate summary criminal prosecutions, in respect of infringements that are designated as criminal offences under the legislation. However, in practice if the criminal offence is something that can also be pursued under the ASP, the CBI tends to use its sanctioning powers under that regime instead.

The Irish police force is tasked with investigating crimes and may take a decision to prosecute in less serious crimes. For more serious crimes (ie, indictable offences) the Irish police force will send a file to the Director of Public Prosecutions, who will decide whether to prosecute the case before the Irish criminal courts. If the CBI comes across information in the course of its supervision that leads it to suspect that a regulated firm may have committed a criminal offence, it is required (subject to certain exceptions) to report the matter to the Irish police force.

Tribunals

- 11 | What tribunals adjudicate financial services criminal and civil infractions?

All criminal matters – including those relating to financial services criminal offences, are prosecuted before the Irish criminal courts.

Under the CBI's ASP and under the 'securities markets regulations assessments regime' the CBI can impose administrative sanctions for certain regulatory breaches.

Under the ASP regime the CBI can convene an 'Inquiry' to decide whether a breach has been committed and if so, to determine what sanction (if any) should be imposed. A decision made by an Inquiry can be appealed to the Irish Financial Services Appeals Tribunal (IFSAT). IFSAT

is an independent tribunal that hears appeals from aggrieved parties against certain decisions of the CBI, including those made by an Inquiry. The decision of IFSAT may be further appealed to the High Court.

Under the 'securities markets regulations assessments regime' the CBI can decide to appoint one or more assessors to carry out an 'Assessment' to decide whether a breach has occurred and if so, what sanctions to impose. An adverse assessment (ie, where an assessor has concluded that a breach has been committed) can be appealed to the High Court.

Instead of convening an Inquiry or appointing an assessor to carry out an Assessment, the CBI may resolve the matter by way of settlement. Most cases are resolved by settlement, instead of the formal adjudication mechanisms described above.

Under the Central Bank (Supervision and Enforcement) Act 2013, the CBI can seek an enforcement order from the High Court where a regulated entity has not complied with a direction that has been imposed on it under section 45 of that Act.

Private individuals or companies may litigate issues concerning financial services that are not criminal in nature before the Irish civil courts.

An individual may make a complaint to the Financial Services and Pensions Ombudsman. If a complaint is upheld, the Ombudsman may direct the firm to pay compensation to the complainant or may direct the firm to rectify the issue. The decision may be appealed to the High Court.

Penalties

12 | What are typical sanctions imposed against firms and individuals for violations? Are settlements common?

Under the CBI's Administrative Sanctions Procedure (ASP), monetary penalties are the most usual sanctions imposed. In serious cases concerning individuals, they may be disqualified from being involved in the management of a regulated financial services firm for a certain period (potentially in addition to a monetary penalty).

Generally, monetary penalties of up to €10 million or 10 per cent of turnover in the preceding financial year – whichever is the greater – may be imposed on regulated entities under the ASP, or of up to €1 million on individuals (with some exceptions). The range of sanctions that can be imposed by the CBI following an inquiry are set out at section 33AQ of the Central Bank Acts 1942–2018 (as amended), although some sectoral legislation modifies these.

Most cases that are initiated under the ASP end up in settlement, with a public statement containing details of the case being subsequently published on the CBI's website. As at 31 December 2020, the CBI had published details of 139 settlements under the ASP on its website.

The CBI may also impose administrative sanctions for certain regulatory breaches under its 'securities markets regulation assessments' regime. The sanctions that may be imposed (which include monetary penalties) are set out in the underlying sectoral legislation. As at 31 December 2020, the CBI had only published details of six settlements under this regime, all of which related to breaches of market abuse law.

Some pieces of sectoral legislation give the CBI the power to initiate summary criminal proceedings before the criminal courts, where the provision breached gives rise to a criminal offence. However, in practice the CBI would likely refer any potential criminal matters to the Irish police force for them to investigate the matter and to decide whether to prepare a file for the Director of Public Prosecutions, to make a decision on whether to prosecute the matter before the criminal courts.

COMPLIANCE PROGRAMMES

Programme requirements

13 | What requirements exist concerning the nature and content of compliance and supervisory programmes for each type of regulated entity?

Requirements in relation to compliance programmes will vary depending upon the type of authorisation held by the firm and the nature, scale and complexity of the firm's business. The applicable regulatory requirements are set out in domestic Irish legislation, EU legislation, guidance issued by EU bodies such as the European Supervisory Authorities and the various guidelines, standards and codes issued by the Central Bank of Ireland (CBI). Regulatory expectations are set out in letters to industry, speeches and thematic review reports.

As part of the supervisory process, the CBI conducts inspections and review meetings. The inspections confirm compliance with regulatory requirements, assess corporate governance structures, outsourcing arrangements, internal controls and risk management systems. Review meetings cover compliance issues and outstanding issues from previous inspections.

The CBI also undertakes themed inspections of regulated financial services firms. Themed inspections focus on a specific topic or product, rather than on a specific institution. The CBI disseminates the findings of the inspections to industry through publication on their website, providing guidance for best practice.

The CBI issues Risk Mitigation Programmes (RMPs) to financial services firms to mitigate unacceptable risks in firms. The Probability Risk Impact System (commonly known as PRISM) is the CBI's risk-based framework for the supervision of regulated firms. Risk issues identified under this framework form the basis for RMPs. Regulated firms can engage with their supervisors at the CBI regarding the implementation of the RMPs.

Gatekeepers

14 | How important are gatekeepers in the regulatory structure?

The CBI Fitness and Probity Regime seeks to ensure that individuals in key and customer-facing roles are competent and capable, act honestly, ethically and with integrity and are financially sound. The regime requires that a person performing a controlled function (CF) must have a level of fitness and probity appropriate to the performance of that particular function. A person performing a pre-approval controlled function (PCF) requires prior approval of the CBI before appointment. Individuals performing a CF or a PCF are obliged to comply with the Fitness and Probity Standards for Regulated Firms. Where the key function relates to a bank classed as a 'significant institution', the assessment is the responsibility of the ECB.

The CBI's increased focus on culture in regulated firms in recent years has led to it advocating legislative change to assign regulatory responsibility to individuals working in regulated entities. In particular, the CBI has proposed the introduction of a Senior Executive Accountability Regime (SEAR), which will initially apply to banks, insurers and certain investment firms. Under the SEAR, certain prescribed responsibilities would be assigned to individuals performing senior executive functions (ie, board members, executives reporting directly to the board and heads of critical business areas). Each individual holding a senior executive function will be required to have a documented statement of responsibilities clearly setting out their role and areas of responsibility. The intention is that all key conduct and prudential risks will be assigned to one or other of the senior executive functions and will therefore be the responsibility of the relevant individual holding the role. The purpose of the SEAR is to provide for a more targeted assessment of the fitness

and probity of the relevant individuals by allowing their competence to be measured against the responsibilities they have been allocated. The SEAR will also make it easier to hold individuals to account by making it more difficult for them to claim that culpability for wrongdoing lies outside their sphere of responsibility.

The CBI has also proposed to strengthen its existing Fitness and Probity Regime. Under the proposals, firms will be required to certify, on an annual basis, that the individuals performing prescribed 'controlled functions' within the firm meet the CBI's fitness and probity requirements.

The CBI's Minimum Competency Code and Regulations (2017) prescribe minimum professional standards for firms providing certain financial services, in particular when dealing with consumers.

The European Banking Authority Guidelines on the assessment of the suitability of members of the management body and the Guidelines on internal governance under CRD IV are also applicable to key individuals in banks and investment firms.

Directors' duties and liability

15 What are the duties of directors and senior managers, and what standard of care applies to the boards of directors and senior managers of financial services firms?

A senior manager performing certain key and customer-facing duties may be deemed to be performing a CF or PCF. By performing a CF or PCF, a senior manager will be subject to the CBI Fitness and Probity Regime, which seeks to ensure that individuals in such roles are competent and capable, act honestly, ethically and with integrity and are financially sound. A senior manager performing a CF or PCF is obliged to comply with the CBI's Fitness and Probity Standards for Regulated Firms.

The roles of executive director, non-executive director, chairman of the board and various board committee chairs are deemed to be PCF functions and directors are obliged to comply with the standards imposed under the CBI's Fitness and Probity Regime accordingly.

Duties of directors of regulated financial services firms also arise under the Companies Act 2014 (as amended) and Irish common law. The Companies Act 2014 (as amended) codified existing common law duties, duties previously developed by case law and existing statutory duties. The duties that directors owe to the company in the performance of their role include: the duty to act in good faith, to act honestly and responsibly, to act within their powers, to avoid conflicting interests, to act with due care, skill and diligence, to keep adequate accounting records and to prepare annual financial statements.

The standard of care applicable is that a director must exercise the care, skill and diligence that would be exercised in the same circumstances by a reasonable person having the knowledge and experience that may reasonably be expected of a person in the same position as the director; and who also possesses the equivalent level of knowledge and experience that the director has.

16 When are directors and senior managers typically held individually accountable for the activities of financial services firms?

Under the Fitness and Probity Regime, the CBI has the power to investigate the fitness and probity of a person to perform a CF or a PCF where there is a reason to suspect the person's fitness and probity to perform the relevant function.

Various matters may be taken into account by the CBI including the suspicion that the person does not have the experience, qualifications or skills necessary to effectively perform the CF/PCF (or part of it), that the person does not satisfy the Fitness and Probity Standards issued by the CBI, or that the person has participated in serious misconduct in relation to the business of a regulated financial services firm.

The CBI, following the conclusion of its investigation, will issue a report and advise whether a Prohibition Notice will be issued. A Prohibition Notice can prohibit the subject from carrying out the CF/PCF, or part of it, for the period specified in the notice, or indefinitely.

Currently, the CBI can only pursue an individual concerned in the management of a firm where: (1) a case has first been proven against the firm; and (2) the CBI can prove that the individual participated in a breach by the firm. Changes are proposed to the CBI's enforcement process to remove current complexity and to break this 'participation link'. Breaking the 'participation link' will make it easier for the CBI to hold individuals to account for their own actions by pursuing them directly. It is also proposed that a breach of new conduct standards (to be defined) will be a ground for direct enforcement action against the individual.

Under the CBI's proposed new Senior Executive Accountability Regime (SEAR), certain senior executive functions (ie, board members, executives reporting directly to the board and heads of critical business areas) will have prescribed responsibilities inherent to their role. These statements are designed to make it easier to hold individuals to account by making it more difficult for them to claim that culpability for wrongdoing lies outside their sphere of responsibility.

Private rights of action

17 Do private rights of action apply to violations of national financial services authority rules and regulations?

A customer of a regulated firm who suffers loss or damage as a result of the failure by the firm to comply with any obligation under financial services legislation has a statutory cause of action for damages against the firm. The customer may also obtain a statutory injunction.

An individual may make a complaint to the Financial Services and Pensions Ombudsman. If a complaint is upheld, the Ombudsman may direct the firm to pay compensation to the complainant or may direct the firm to rectify the issue. The decision may be appealed to the High Court. An individual can also make a complaint to the Competition and Consumer Protection Commission regarding a breach of consumer law.

Standard of care for customers

18 What is the standard of care that applies to each type of financial services firm and authorised person when dealing with retail customers?

The Consumer Protection Code (2012) sets out the standard of care that applies to regulated firms when dealing with retail customers.

The Code states that regulated entities, in all of their dealings with customers (whether retail customers or otherwise) within the scope of their authorisation must, among other obligations:

- act honestly, fairly and professionally in the best interests of its customers and the integrity of the market;
- act with due care, skill and diligence in the best interests of its customers;
- not negligently or deliberately mislead a customer as to the real or perceived advantages or disadvantages of any product or service;
- make full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer;
- seek to avoid conflicts of interest;
- correct errors and handles complaints speedily, efficiently and fairly; and
- not exert undue pressure or undue influence on a customer.

19 Does the standard of care differ based on the sophistication of the customer or counterparty?

The European Union (Markets in Financial Instruments) Regulations 2017 distinguish between eligible counterparties, professional clients and retail clients. Each category of client is afforded different levels of protection with retail (or consumer) clients afforded the highest level of protection.

More generally, consumers are afforded an array of enhanced protections under various EU and Irish regulations, including those relating to mandatory disclosures, provision of information, distance marketing, the management of arrears, complaints handling, unfair contract terms and competency requirements for consumer-facing staff, among others.

Rule making

20 How are rules that affect the financial services industry adopted? Is there a consultation process?

The financial services regulatory framework is made up of domestic Irish legislation, EU legislation, guidance issued by EU bodies such as the European Supervisory Authorities and guidelines, standards and codes issued by the CBI.

EU Directives must be transposed into Irish law before they take effect, generally by way of primary legislation or statutory instrument. EU Regulations have direct effect in Ireland and throughout the EU without the necessity for domestic implementing legislation.

When developing proposed policy responses, guidelines, standards or codes the CBI consults stakeholders including industry and consumer representatives, and the Department of Finance. All public consultations are announced on the CBI's website.

CROSS-BORDER ISSUES

Cross-border regulation

21 How do national financial services authorities approach cross-border issues?

Under EU law, financial services firms authorised in Ireland can passport their services to customers in European Economic Area member states. This is facilitated either under the right of establishment (ie, establishing a branch in a member state) or the freedom to provide services on a cross-border basis without establishing a presence in the other member state.

Third-country banks can carry out activities in Ireland by establishing a branch in Ireland and obtaining authorisation from the Central Bank of Ireland (CBI). However, a third-country branch cannot passport its activities throughout the EEA. Third-country investment firms can carry out certain activities in Ireland, mainly for professional clients or, in limited circumstances, on a reverse solicitation basis.

International standards

22 What role does international standard setting play in the rules and standards implemented in your jurisdiction?

Regulated financial services firms in Ireland are subject to EU legislation applicable to the provision of their services. The CBI also implements standards formulated by sector specific European bodies such as the European Banking Authority and the European Securities and Markets Authority, which assist with the development of technical standards and guidelines supplementing financial services legislation.

At an international level, the CBI is cognisant of standards issued by the Basel Committee on Banking Supervision, the Financial Stability Board, the Financial Action Task Force, the International

DILLON EUSTACE

Keith Waine

keith.waine@dilloneustace.ie

Laura Twomey

laura.twomey@dilloneustace.ie

33 Sir John Rogerson's Quay

Dublin 2

Ireland

Tel: +353 1 667 0022

www.dilloneustace.com

Financial Consumer Protection Organisation; and international tax conventions such as the Organisation for Economic Co-operation and Development's Common Reporting Standards and The Foreign Account Tax Compliance Act.

The CBI is an active participant in policymaking and seeks to influence outcomes at both European and international level.

UPDATE AND TRENDS

Key developments of the past year

23 Are there any other current developments or emerging trends that should be noted?

Following the end of the Brexit transition period, UK authorised financial services firms can no longer passport their services to Irish customers. The UK and the EU intend to conclude a memorandum of understanding in March 2021 codifying a framework for regulatory cooperation on financial services going forward but it appears unlikely that this framework will provide widespread or unfettered access for UK firms to EU markets.

As a result of Brexit, a large number of UK-based banks, asset managers, payments firms and other financial service providers have established and obtained authorisation in Ireland in recent years. This has increased the scale and complexity of the Irish financial services industry and the demand for regulatory and compliance professionals, both within industry and within the Central Bank of Ireland (CBI).

The CBI has proposed the introduction of a Senior Executive Accountability Regime (SEAR), which would apply to certain regulated entities. Under the SEAR, certain prescribed responsibilities would be assigned to individuals performing Senior Executive Functions. It is proposed that each individual would hold a 'statement of responsibilities' clearly setting out his or her role and area of responsibility.

A new EU-wide prudential regulatory framework for investment firms is expected to come into force in Ireland in late June 2021. The new framework comprises the Investment Firms Directive (IFD) and the Investment Firm Regulation (IFR). Under the new proposed regulatory regime, certain systemically relevant investment firms that engage in 'bank-like' activities and services will be reclassified as 'credit institutions' and will be subject to the prudential requirements laid down in the Capital Requirements Regulation and the Capital Requirements Directive. All other investment firms (ie, those that are not considered systemic) will be subject to a new tailored regime with bespoke

prudential requirements. There are a small number of provisions within the IFD and the IFR that allow member states exercise a national discretion (for example regarding variable remuneration requirements). The CBI is currently conducting a consultation seeking stakeholder views on many of the national discretions.

Ireland is currently in the process of implementing the EU's Fifth Money Laundering Directive. The new legislation will extend the scope of anti-money laundering requirements to new categories of businesses, including virtual asset service providers, custodian wallet providers, letting agents and art dealers. The Fifth Directive also makes a number of targeted enhancements to the legislative framework in areas such as anonymous prepaid cards, due diligence on high-risk third countries and co-operation with other EU member states. Ireland has already implemented central registers of beneficial ownership of corporates and certain investment fund vehicles. A central register of beneficial ownership of trusts is expected to be established later this year.

Further changes are expected on foot of the European Commission's action plan for a comprehensive EU policy on preventing money laundering and terrorist financing, which was adopted in May 2020.

24 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The CBI introduced prudential regulatory flexibility measures in certain areas. Banks directly supervised by the European Central Bank (ECB), in line with ECB announcements, were granted flexibility in meeting certain capital and liquidity requirements, including measures postponing the payment of dividends and the extension of remittance dates for certain regulatory returns. Banks directly supervised by the CBI were granted similar supervisory relief measures.

Investment firms were also granted flexibility regarding revised submission deadlines for certain regulatory remittances and submission of assurance reports regarding the safeguarding of client assets. The CBI also encouraged firms to engage directly with their supervisor where difficulties in relation to meeting specific Risk Management Programme submission dates were anticipated.

The CBI also introduced payment breaks on mortgages, personal loans and business loans for customers facing financial difficulties due to covid-19.

Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security			
Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)