A&L Goodbody

FINANCIAL REGULATION & INVESTIGATIONS

IAF update:
Publication of amended IAF Bill

As previously highlighted, the Central Bank (Individual Accountability Framework) Bill 2022 (**IAF Bill**) was published in July of this year, and is continuing to progress through the legislative process.

The most recent Dáil Select Committee debates from 30 November and 7 December included a number of discussion points as to how the legislation is intended to operate in practice.

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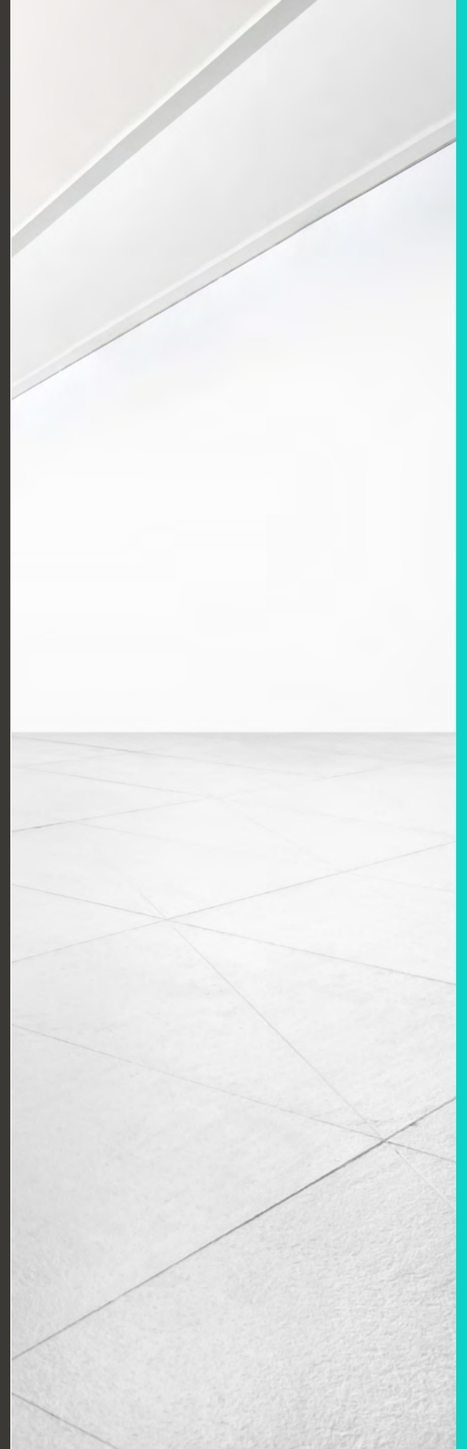
These included, for example, open discussions regarding whether 'planning' to contravene designated enactments (i.e. to commit sanctionable regulatory breaches), and/or to frustrate any regulatory investigation were adequately caught under the current regulatory enforcement framework. The discussion was also set against the backdrop of ongoing debate regarding the regulation of remuneration in financial services, and other aspects of the regulatory toolkit and landscape which impact on the culture and conduct of senior executives.

The recent updated Regulatory Impact Assessment for the IAF Bill also clarified a number of aspects of the Senior Executive Accountability Regime (**SEAR**). For example, this recognised that not all 'prescribed responsibilities' will be relevant to every firm, and that there will therefore be a general list of prescribed responsibilities applicable to all firms, with tailored lists for industry sectors and based on firms' scale and complexity.

In the latest development, further to review by the Dáil Select Committee, an updated IAF Bill has now been published with some further amendments compared to the initial draft Bill. Below we set out the key amendments and look ahead to future developments, which firms should have regard to in their IAF/SEAR implementation plans.



Amendments to the fitness and probity (F&P) regime

ECB's competence in appointments to PCFs in SSEs

Section 23A of the Central Bank Reform Act 2010 (**2010 Act**) is amended such that a significant supervised entity (**SSE**) shall not appoint a person whose appointment is subject to European Central Bank (**ECB**) approval, unless the SSE has been notified in writing by the ECB that it has approved the appointment.

This amendment removes the Central Bank of Ireland (**Central Bank**) from the approval process for appointments to pre-approval controlled functions (**PCFs**) in SSEs, where such approval falls within the exclusive competence of the ECB. It also removes the role of the Central Bank in notifying the SSE of the ECB's approval of the proposed appointment.

This amendment is in response to the ECB's recently published Opinion on the IAF Bill. Whilst strongly welcoming the measures envisaged by the IAF Bill, the ECB cautioned against conferring regulatory authority and tasks on the Central Bank, which may impinge upon the ECB's exclusive competence to approve PCF positions in the case of SSEs. The ECB therefore asked that section 23A of the 2010 Act be clarified, so that the role of the ECB in respect of the supervision of SSEs is maintained.

F&P suspension notices

Further amendments are also made to the separate process under the F&P regime for the suspension of an individual from performing a controlled function (**CF**).

Section 26 of the 2010 Act is amended such that the Central Bank may now issue a suspension notice where it has imposed a prohibition on the person from carrying out a CF, or part thereof. This suspension notice may issue whether or not there has been an investigation into the person's fitness and probity pursuant to section 25 of the 2010 Act, and may issue pending High Court confirmation of the prohibition itself. This is in addition to the Central Bank's previous power to issue a suspension notice where the person's fitness and probity is or has been the subject of a Central Bank investigation.

In effect, this amendment clarifies that the Central Bank may ultimately suspend an individual from performing a CF role even if that individual intends to challenge the issuing of the prohibition notice before the High Court. This appears intended to clarify the regulator's powers to remove an individual from performing a specific role if they have significant concerns regarding, for example, potential impact on clients or consumers, even while the formal prohibition process is running its course.

Amendments to the administrative sanctions procedure (ASP)

Confidentiality of information provided to third parties

The newly inserted section 33ANL of the Central Bank Act 1942 (**1942 Act**) includes a further bespoke confidentiality provision in respect of confidential information provided for the purposes of an investigation and/or an investigation report. Where the Central Bank provides such information to a third person, that third person is now expressly prohibited from disclosing that information to anyone other than their legal representative, unless authorised to so by the Central Bank in writing, or required to do so by law.

Upon debate of this amendment, a concern was raised that this would prevent a person sharing relevant information, in particular an investigation report, with, for example, a trade union representative. In response, Deputy Donohoe confirmed that, whilst it would prohibit a person from sharing confidential information with a trade union representative, there would be no barrier to sharing information that the Central Bank does not in fact deem to be confidential. This presumably arises because the new section 33ANL refers to 'confidential information' including information which was expressly notified to the recipient by the Central Bank as actually comprising confidential material.

This may simply be an administrative amendment following on from the IAF Bill as issued in July, which also included amendments clarifying the scope of confidentiality obligations placed on recipients of confidential information from the Central Bank. These amendments may in turn have been considered necessary because the 'underlying' confidentiality obligations, which are purported to be imposed on recipient third parties under the current 1942 Act, are based in legislation which is expressed to apply only to regulatory authorities and connected parties.

However, all such clarifications are very helpful both for firms and individuals engaging with the Central Bank regarding the disclosure, or receipt, of confidential information in the context of an enforcement investigation going forwards. They are of particular help to firms wishing to ensure the confidentiality and/or privileged nature of material to which the Central Bank has been granted access during an investigation.

'Disqualification' sanction against individuals

The newly expanded disqualification sanction under section 33AQ of the 1942 Act, which disqualifies a person from performing any CF and/or imposing conditions in the performance of that CF, has now been narrowed.

It is now proposed to apply only to wrongdoing which occurs post-commencement of the IAF Bill. The original disqualification sanction as already provided for in the 1942 Act, which permits the disqualification of a person from being concerned in the management of a regulated financial service provider, will continue to apply to wrongdoing which occurs pre-commencement of the IAF Bill.

Scope of 'authorised officer' in enforcement investigations

Section 33AN of the 1942 Act is now amended to extend the definition of an 'authorised officer' to include all instances where the Central Bank has the power to appoint an authorised officer. Prior to this amendment, only those authorised officers appointed under the Central Bank (Supervision and Enforcement) Act 2013 were authorised officers for the purposes of the operation of the Central Bank's ASP. This amendment widens the operation of the Central Bank's ASP to capture authorised officers appointed under a number of sector specific legislative regimes, such as MiFID II and SFTR.[1]

Responses to draft investigation reports

Section 33ANK of the 1942 Act is also consequentially amended to provide that, prior to drafting an investigation report, a responsible authorised officer shall consider any relevant information or evidence gathered or received by an authorised officer in the course of an investigation.

As noted in our updated publication on the IAF Bill from July this year, the IAF Bill in its initial form included significant amendments to the Central Bank's ASP in response to the *Zalewski*[2] judgment. These further amendments appear to continue this trend, by emphasising the obligation on the Central Bank to take account of all relevant information or evidence provided in response to any formal draft investigation report.

The provision for the issuing of a draft investigation report earlier in the ASP (in contrast to the current procedure where this is only strictly required to establish an Inquiry process, and therefore only after the conclusion of the Central Bank's investigation and potentially the running of without prejudice settlement discussions) continues to be a very welcomed amendment. This will place more formality as to the nature, scope and detail of explanations of any prescribed contraventions which are suspected, and the specific evidence on which the Central Bank believes there are reasonable grounds to suspect that they occurred.

[1] *For example, authorised officers may be appointed under the European Union (Markets in Financial Instruments) Regulations 2017 [SI No 375 of 2017] and the European Union (Securities Financing Transactions) Regulations 2017 [SI No 631 of 2017]*

[2] *[2021] IESC 24*

Looking ahead

The Select Committee debates of the IAF Bill provide some further insight on future developments, as follows:

- As expected, the Central Bank will consult with the financial services sector on the IAF Bill prior to commencement; however, we now have clarity that Central Bank guidelines on the implementation of the IAF Bill are expected to issue within six-months of the legislative consultation period ending.
- Further amendments may of course be made to the IAF Bill as it progresses through the legislative process. In particular, further consideration has been indicated of the IAF Bill's reference to resources as a reason for discontinuance of a Central Bank investigation, and whether the six-year 'look back' period in respect of a Fitness and Probity investigation, which will now be able to focus on an individual's fitness and probity up to six years after they have ceased the relevant controlled function role, should be extended even further.

Currently, the IAF Bill is not scheduled for further consideration in advance of the Dáil's Christmas recess, which runs from 17 December 2022 until 18 January 2023.

We are therefore not expecting further developments and/or enactment of the IAF Bill until early next year.

Next steps

A&L Goodbody has been preparing for the IAF and SEAR for some time, developing systems and processes to assist clients in assessing their current frameworks and understanding and implementing the requirements in the proposals. We have also been working closely with clients on commencing implementation projects and considering key issues to input into upcoming consultation processes. We will publish further insights as the legislation, guidance and consultation process develops.

For further information on the IAF and SEAR, and how ALG can assist your business, please contact Dario Dagostino, Partner, Mark Devane, Partner, Patrick Brandt, Partner, Kevin Allen, Partner, Sian Langley, Knowledge Lawyer, Duncan Inverarity, Partner, Noeleen Meehan, Partner, Michael Doyle, Partner, James Grennan, Partner, Laura Mulleady, Partner, Sinéad Lynch, Partner, Emma Martin, Of Counsel, Kerill O'Shaughnessy, Partner, Charlie Carroll, Partner, Gillian McDonald, Partner, or your usual contact on the ALG SEAR team.

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