

FINANCIAL REGULATION
& INVESTIGATIONS

The Individual Accountability Framework and SEAR

What you need to know and what next



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THE NEW LANDSCAPE

The Central Bank of Ireland's (Central Bank) Individual Accountability Framework will be one of the most impactful regulatory changes of recent years.

While much of the focus has been on the Senior Executive Accountability Regime (SEAR), this is just one element of the overall Individual Accountability Framework.

Even though the proposals are at General Scheme stage, it is important that all regulated firms take steps now to assess the impact on their compliance and governance arrangements and their business.

This Guide summarises what you need to know and what you need to do.

We will be updating our insights as the legislation and regulatory guidance develops.



There are six parts to the Individual Accountability Framework, some of which apply to all Regulated Financial Services Providers (RFSPs) and others apply only to credit institutions and certain types of insurers and investment firms:

- The introduction of the SEAR
- A new 'Duty of Responsibility' for individuals within the scope of SEAR
- New Common Conduct Standards applicable to all persons in 'controlled function' roles in all RSFPs
- Additional Conduct Standards for individuals in senior positions in all RSFPs
- New Business Conduct Standards applying to all RFSPs
- Enhancements to the Fitness and Probity regime
- Enhancements to the Central Bank's enforcement investigations and inquiries processes

This suite of reforms is designed to:

- Clarify the roles and responsibilities of senior individuals within RFSPs 'in scope' for SEAR
- Provide for the direct enforceability of common conduct standards against senior individuals in all RFSPs
- Make it easier for the Central Bank to engage in enforcement investigations against individuals
- Set a benchmark of general conduct standards for all regulated firms which can be directly enforced

We have a host of resources on our dedicated [webpage](#) and you can request access to our [webinar](#) on the subject.

01/ CONTEXT TO THE REFORMS

Why now?

On 27 July 2021 the long awaited General Scheme of the Central Bank (Individual Accountability Framework) Bill 2021 (the General Scheme) was published.

The proposals were first outlined in the Central Bank’s report into Behaviour and Culture of the Irish Retail Banks Report (the Culture Report) in July 2018. This followed the regulator’s intervention into consumer issues such as the Tracker Mortgage Examination. Since then, the Central Bank has taken similar intrusive supervisory approaches in other areas such as the Insurance and Investment Funds sectors. The proposals reflect the regulator’s evolving toolkit in monitoring regulatory compliance across the supervisory and enforcement spectrum. This context is an important backdrop when addressing these new requirements.

How does this compare with other jurisdictions?

At a high level there are many similarities between the proposed Individual Accountability Framework and the existing regulatory regime in other jurisdictions (e.g. the UK Senior Managers and Certification Regime (SMCR)). However, the Irish proposals are in some respects broader, such as the requirement to conduct business sustainably and the scope of the general duty to avoid conflicts of interest. Other differences arise from the underlying regulatory and constitutional landscape in Ireland. Firms intending to ‘drag and drop’ their processes from other jurisdictions with Individual Accountability regimes must assess these differences carefully before taking their next step.

Is there a broader change in regulatory approach in Ireland?

The UK’s Financial Conduct Authority (FCA) operates principle-based regulation whereas the Irish regulator has traditionally operated a rules-based system, under which the Central Bank prescribes contraventions and specifies required conduct. Aspects of the Individual Accountability Framework, such as the Common Conduct Standards for individuals

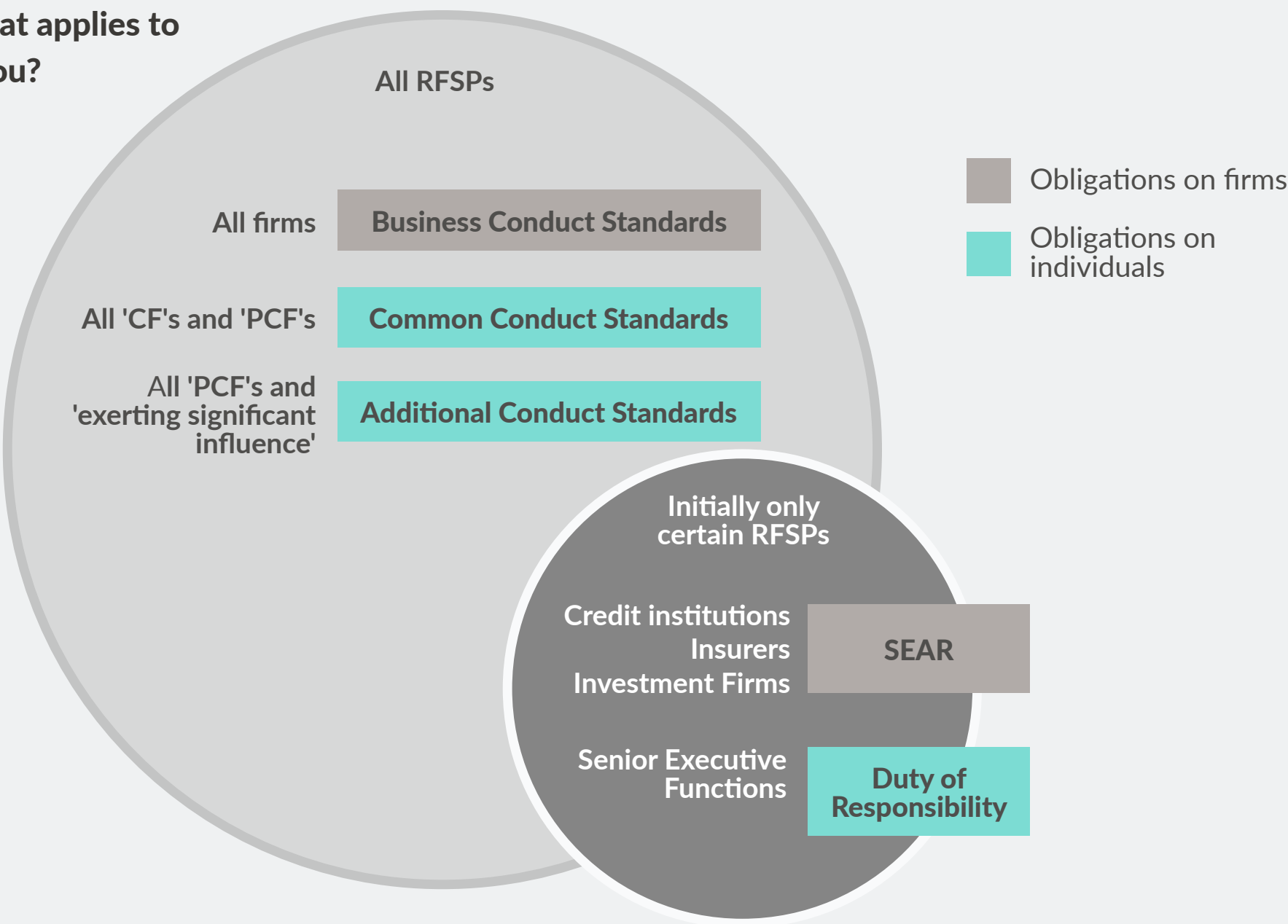
and the Business Conduct Standards for RFSPs, read more like ‘general principles’. This potentially represents a significant shift in both supervision and enforcement in Ireland, not just for senior individuals but for all regulated firms. This needs to be reflected in a firm’s implementation plans.

Constitutional issues?

Individuals enjoy a number of rights under the Irish constitution, including the right to fair procedures and natural justice, the right

to their good name and the right to earn a livelihood. The Irish Minister for Finance has referred to the need to legislate consistently with these constitutional rights. This is a key difference with, for example, the UK legal backdrop. The interaction between the current ‘Fitness and Probity’ regime and employment and constitutional rights of individuals has historically been challenging for Irish regulated firms as regulatory or compliance contraventions are identified and addressed. These issues will require even more care under the new regime.

At a glance: What applies to your firm and you?



02/ SENIOR EXECUTIVE ACCOUNTABILITY REGIME

Applies to:

- Credit Institutions (excluding credit unions)
- Insurance undertakings (excluding reinsurance undertakings, captive (re)insurance undertakings and insurance special purpose vehicles)
- Investment firms (which underwrite on a firm commitment basis and/or deal on own account and/or are authorised to hold client monies/ assets)
- Third country branches of any of the above (other sectors may be brought within the scope of SEAR in the future by further regulations)

Individuals within the scope of SEAR are 'Senior Executive Functions' (SEFs), defined as equivalent to Individuals conducting pre-approval controlled functions (PCFs) under the current Fitness and Probity regime.

Summary of the SEAR

The SEAR will clarify senior individuals' roles and responsibilities and will enhance the Central Bank's ability to hold individuals to account for regulatory breaches in the area for which they are responsible.

RFSPs will be required to take a number of compliance steps to implement the regime, including:

- **Allocated responsibilities:** The current General Scheme indicates that the Central Bank will list out in separate regulations:
 - » 'prescribed responsibilities' which all in scope RFSPs must allocate to an SEF in their organisation
 - » 'inherent responsibilities' which are inherent to a particular role, such as the Chief Executive Officer or Chair of the Board
- **Statements of responsibility:** RFSPs will be required to prepare 'statements of responsibilities' for each SEF setting out clearly which activities and areas that SEF is accountable for
- **Responsibility maps:** RFSPs will be required to prepare 'management responsibility maps' including governance arrangements for the Board, Board committees and other decision making committees or groups, and reporting lines for SEFs

» 'other' responsibilities which RFSPs may be required to assign to an SEF

This will ensure that specific conduct or prudential risks are ultimately allocated to a particular SEF

“Every single member of an organisation should be clear as to what is expected of them and the consequences of deviating from such standards.”

Central Bank of Ireland Report:
Behaviour and Culture of the Irish Retail Banks
– July 2018.

Key issues

- SEAR currently appears to capture all pre-approval controlled functions (PCFs), such as Non Executive Directors (NEDs) including Independent Non Executive Directors, with no exceptions to the obligations placed on them by the regime. This would be in contrast to other regimes, such as the UK SMCR under which NEDs are only in scope on a more limited basis (e.g. if acting as chair of a relevant board committee).
- The issue of whether in-house lawyers fall within the regime, which was debated in the UK reforms, is not expressly dealt with but they appear unlikely to fall within scope unless they also hold PCF functions or ‘exercise significant influence’ on their firm’s affairs.
- ‘Responsibility maps’ are expressly required to include reporting outside, as well as within, Ireland and to outline how local Irish governance arrangements interact with group arrangements. This could be complex in organisations with direct, indirect or ‘dotted line’ / matrix reporting. The requirement reflects the importance placed by the regulator on Irish RFSPs having their ‘hearts and minds’ within Ireland as an independent regulated entity.
- It remains to be seen how the Central Bank will apply the regime where a single regulatory contravention arises from failures in a number of areas (e.g. errors in financial reporting arising from both inaccurate financial data and errors in regulatory reporting compilation). In other jurisdictions, concepts of ‘shared’ and ‘split’ responsibilities are used to clarify SEF’s accountability. The position for interim role changes will need to be considered in practice if not in further guidance.
- Third country branches of credit institutions, in-scope insurance undertakings or in-scope investment firms have to date been required to apply the Fitness and Probity regime to e.g. the branch manager as a PCF role holder. The extension of the SEAR to these branches will require a significant overhaul of governance arrangements to support those individuals in complying with the common conduct standards, additional conduct standards and the ‘Duty of Responsibility’ for SEFs.

Key actions

- Identify your firm’s population of ‘in scope’ SEFs and understand how this compares with your current ‘fitness and probity’ population.
- Accurately documenting SEFs’ responsibilities and creating responsibility maps requires careful and detailed diligence of your firm’s ‘as is’ position before devising the ‘to be’ position.
- Records of SEF’s current responsibilities often overlap or may have become out of date over time. They are often documented in different ways (job descriptions, employment contracts, committee terms of reference, team charters). RFSPs should start this diligence exercise now.
- Allocating prescribed, inherent and ‘other’ responsibilities must be done ‘holistically’. This also involves consultation with the SEFs involved. Methodological allocation of responsibilities, based on detailed diligence, will help avoid ‘overlaps’ and ‘underlaps’ between responsibilities and maximise clarity.
- Consider how your firm will ‘arbitrate’ any differences of views between SEFs as to their respective responsibilities.
- Producing responsibility maps presents an opportunity to review and update governance arrangements (e.g. reporting lines, interactions between board and other committees, group fora and other group entities).
- Consider how your implementation of the new regime overlaps with other internal processes (e.g. legal authority delegation, outsourcing arrangements etc).

03/ DUTY OF RESPONSIBILITY

Applies to:

SEFs in RFSPs within the SEAR.

Summary of the Duty of Responsibility

SEFs will have a Duty of Responsibility to take reasonable steps to avoid the relevant RFSP from committing or continuing to commit a prescribed contravention (an enforceable regulatory breach) in the area of the business for which they are individually responsible.

If the RFSP commits a regulatory breach, the Central Bank will assess whether the relevant SEF took reasonable steps to avoid that breach. They will have to consider various factors such as:

- The nature, scale and complexity of the business
 - The responsibilities of the function held by the SEF
 - The level of knowledge and experience to be expected of a person performing the relevant SEF (an objective standard)
 - The level of knowledge and experience of the relevant SEF (a subjective standard)
 - Whether the SEF acted in accordance with statutory, common law and other legal obligations
- In assessing whether an SEF took 'reasonable steps' to prevent the relevant contravention the General Scheme refers to the following non-exhaustive list:
- Ensuring effective and appropriate systems, controls and governance arrangements are in place
 - Ensuring the effective oversight of any delegation of responsibility and the implementation of effective safeguards against inappropriate delegation
 - Implementing appropriate and effective procedures to identify and remediate problems that could arise
 - Applying systems, controls, arrangements, safeguards and procedures

Enforcement

The Central Bank may enforce failure to comply with the Duty of Responsibility directly against an SEF through the Administrative Sanctions Procedure.

Key issues

- Complexities can arise where more than one SEF was responsible for several business areas which were 'relevant' to an RFSP's prescribed contravention. This emphasises the importance of clarity of responsibilities in business areas where several functions collaborate to achieve an outcome or product (e.g. regulatory reporting, product development etc). Similar issues arise with 'dual-hatting' arrangements.
- In other jurisdictions significant guidance has been issued as to the regulators' expectations of SEFs in complying with this duty. These discuss factors relevant to good delegation and oversight; receiving and interrogating appropriate management information; commissioning and reviewing investigations or second line reviews into the business area for which the SEF is responsible; and implementing, policing and reviewing appropriate compliance processes. Other regulators have issued guidance on effective delegation (as to which see 'Key actions').
- The General Scheme refers to SEFs taking 'reasonable steps' to prevent RFSPs committing prescribed contraventions. This contrasts with the Culture Report which referred to the proposals requiring the taking of 'all' reasonable steps (language similar to other compliance legislation such as the Criminal Justice (Corruption Offences) Act 2018).

Key actions

- Socialise the concept of the Duty of Responsibility with individuals who may be SEFs under the regime. This will be important to enable SEFs to understand the scope of their obligations arising from proposed statements of responsibility developed during your implementation project and what steps they must take to comply.
- Consider what support your firm will provide to SEFs to comply with this duty: training, workshops or more detailed 'reasonable steps' frameworks and formal documentation of delegated activities and delegation procedures.
- These supports can cover e.g. accountability, governance, supervision and escalation, change control, BAU risks and management information. The nature and detail of support can vary by business area or SEF role and can include SEFs alone or include their direct reports or teams.
- These supports can include formal written delegation procedures and documenting which areas or individuals an SEF is relying on for the performance of specific activities within the business area they are responsible for, and how matters should be escalated to and addressed by, the SEF.
- Consider specifically how your firm will support INEDs/Non-Executives in complying with any duties in the context of collective decision making e.g. documenting their roles in certain collective decisions; assessing the quality of management information; assessing the frequency and circulation of incident/escalation reports; and the appropriate sequencing and documentation of collective decision making fora.



04/ COMMON CONDUCT STANDARDS

Applies to:

All persons performing controlled functions (CFs) and pre-approval controlled functions (PCFs) in all RFSPs regardless of sector.

“change in culture, while essential, is not a substitute for effective regulation, supervision and enforcement. Legal changes and cultural change have to work together...”

Paschal Donohoe at the launch of the Banking Culture Board's Surveys of Culture and Trust in the Banking Sector.



Summary of the Common Conduct Standards

The Common Conduct Standards require that CFs and PCFs, in respect of conduct relating to the activity of RFSPs, shall:

- Act honestly, ethically and with integrity
- Act with due skill, care and diligence
- Be cooperative with the Central Bank and other regulators or authorities and deal with them in good faith and without delay
- Act in the best interests of customers and treat them fairly and professionally
- Observe proper standards of market conduct

RFSPs will likely have obligations to:

- Notify CFs and PCFs that these standards apply to them
- Provide suitable training to staff on the standards
- Report to the Central Bank in a timely manner any disciplinary action arising from breaches of these standards
- Establish and maintain policies setting out how RFSPs will 'embed' the common conduct standards throughout their organisation

The General Scheme contains a detailed but non-exhaustive list of examples of expected behaviours relating to each of the five Common Conduct Standards. These are listed in an annex to this guide.

The Central Bank will issue further guidance on the Common Conduct Standards so individuals are aware of the regulator's expectations.

Enforcement

The Central Bank may enforce a failure to comply with any of the Common Conduct Standards directly against an individual through the Administrative Sanctions Procedure. It will be a defence if the individual can show they acted reasonably in all of the circumstances of the case.

Failure by an RFSP to comply with these requirements e.g. to establish policies embedding the Common Conduct Standards, can also be enforced directly against the RFSP through the Administrative Sanctions Procedure.

The Central Bank will take into account a range of factors in considering a proportionate sanction, including the nature, seriousness and impact of the contravention; the conduct of the individual during and after the contravention; the individual's previous record and their financial position.

Key issues

- These standards comprise general principles (similar to the General Principles of the Central Bank's Consumer Protection Code). Although the General Scheme also includes non-exhaustive examples of expected behavior, all individuals subject to these standards will need to keep up to date on the regulator's expectations regarding compliance with these principles.
- The non-exhaustive list of examples of conduct expected in acting with integrity sets out generic regulatory expectations e.g:

» It includes participating appropriately in collective decision making. The similar list relating to acting with due skill, care and diligence also refers to exercising sound judgment in decision making. This emphasises the importance of these standards to NEDs and INEDs and the need to assess supports, such as training, reporting lines, management information provided to non-executives and the sequencing of board / committee business so related topics are considered in context.

» It also refers to compliance with obligations and standards set out in professional standards of an applicable professional regulatory body. This highlights the importance of other guidance beyond legislative requirements.

- The non-exhaustive list of examples of conduct expected in acting with due skill, care and diligence also codifies generic regulatory expectations e.g:

» It refers to adequately overseeing and controlling delegated responsibilities and, where appropriate, challenging information provided by persons to whom such responsibilities have been delegated. Even if an individual is not an SEF within SEAR, there appears to be an expectation that they delegate effectively.

- The non-exhaustive list of examples of conduct expected regarding cooperating with the Central Bank and other authorities overlays current statutory provisions e.g:

» This list prohibits directly or indirectly providing false, inaccurate or misleading information, records or explanation to such authorities. Current statutory provisions¹ provide for criminal offences only where information provided was knowingly false in a material particular.

- The non-exhaustive list relating to acting in the best interests of customers and observing proper standards of market conduct also provide a general overlay to more specific regulatory obligations e.g:

» A generic requirement to act in the best interest of customers introduces a more flexible tool potentially enabling the Central Bank to consider enforcement action against individuals for taking decisions, or acting contrary to the regulator's view of what would have been in the best interests of customers, in any particular case.

- The obligation on the RSFP to notify the Central Bank of any disciplinary action relating to these standards highlights the continuing difficulties in overlap between fitness and probity, regulatory and employment law/ constitutional obligations.
- The General Scheme also provides that a contravention of these standards may form the basis for the Central Bank to suspect or conclude that a person is not fit and proper to perform a CF/PCF. This potentially engages both the Administrative Sanctions Procedure or the separate Fitness and Probity investigation regime under the Central Bank Reform Act 2010.

Key actions

- Consider appropriate training for all in scope CFs and PCFs, not only on the terms of the Common Conduct Standards but also the Central Bank's expectations of how these should be complied with.
- Consider how your firm will support CFs and PCFs to track any updated guidance issued by the Central Bank on their expectations on how these standards should be complied with e.g. thematic reviews, Dear CEO letters, AML Bulletins etc.
- Consider how in practice the Common Conduct Standards will not only be communicated to CFs and PCFs but how in practice they will be 'embedded' in your organisation.
- Collate, review and assess your HR policies and employment documentation (e.g. offer letters and onboarding procedures, employment contracts, codes of conduct, performance assessments, disciplinary procedures, regulatory remuneration policies) so they reflect these standards and provide your firm with appropriate measures to deal with any non-compliance by individuals.
- Assess your whistle blowing procedures to ensure they capture all conduct within scope of the Common Conduct Standards.

¹such as the information gathering powers under the Central Bank (Supervision and Enforcement) Act 2013



05/ ADDITIONAL CONDUCT STANDARDS FOR INDIVIDUALS IN SENIOR POSITIONS

Applies to:

Individuals performing PCF roles and other persons who ‘exercise significant influence’ on the conduct of the affairs of all RFSPs (whether in or out of SEAR) (**Persons in Senior Roles**). This is broader than the SEF population subject to SEAR.

Summary of the Additional Conduct Standards

The Additional Conduct Standards require Persons in Senior Roles to:

- Ensure the business of the RFSP for which the person is responsible is controlled effectively
- Ensure that the business of the RFSP for which the person is responsible complies with relevant regulatory requirements
- Ensure that any delegation of tasks for which

they are responsible is to an appropriate person and that they oversee the discharge of the delegated task effectively

- Disclose promptly, proactively and appropriately to the Central Bank any information of which the Central Bank would reasonably expect notice
- Participate effectively in collective decision making

RFSPs will likely have obligations to:

- Notify Persons in Senior Roles that these standards apply to them
- Provide suitable training to to Persons in Senior Roles
- Report to the Central Bank in a timely manner any disciplinary action arising from breaches of these standards
- Establish and maintain policies setting these standards out and how RFSPs will ‘embed’ throughout their organisation

Enforcement

The Central Bank may enforce failure to comply with any of the Additional Conduct Standards directly against an individual through the Administrative Sanctions Procedure.

It will be a defence if the individual can show they acted reasonably in all of the circumstances of the case (a non-exhaustive list of factors relevant to assessing whether a person acted reasonably is to be provided and will be published in due course).

Key issues

- There appears to be significant overlap between SEAR and the obligations under the Additional Conduct Standards (e.g. there is some overlap between the SEAR Duty of Responsibility, at least as regards delegation, and the requirements regarding delegation in the Additional Conduct Standards).
- Whilst RFSPs not in scope of SEAR are not technically required to produce statements of responsibilities and responsibility maps, such frameworks will assist Persons in Senior Roles to understand their respective responsibilities and therefore aid compliance with the Additional Conduct Standards.
- RFSPs not in scope of SEAR should still consider what further supports set out in Section 3 above should in practice be put in place to support Persons in Senior Roles (see Key actions).
- In due course regulatory guidance on steps expected to comply with e.g. the Duty of Responsibility in SEAR may be a useful reference point for RSFPs supporting Persons in Senior Roles, although this guidance should not take precedence over what, in practice, can be reasonably required of Persons in Senior Roles in their own firms, roles and circumstances.
- As with the Common Conduct Standards, the General Scheme provides that a contravention of these standards may form the basis for the Central Bank to suspect or conclude that a person is not fit and proper to perform a CF/PCF, potentially engaging both the Administrative Sanctions Procedure or the separate Fitness and Probity investigation regime.

“Experience has shown that in order for a regulatory framework to work well, it should stimulate strong and effective governance within firms”.

Central Bank of Ireland Statement
on the General Scheme 27 July 2021

Key actions

- Whether or not your firm is in scope for SEAR:
 - » Consider processes to support Persons in Senior Roles to ensure relevant business areas are controlled effectively (e.g. second and third line structures and reviews, adequate resourcing and training).
 - » Consider what additional support is required to support Persons in Senior Roles to ensure that the business for which they are responsible complies with relevant regulatory requirements (e.g. access to second line, legal and compliance; training on regulatory requirements and expectations; reporting lines and appropriate management information; second line reviews).
 - » Consider what additional support is required for Persons in Senior Roles to ensure they can delegate effectively (e.g. written delegation frameworks, reporting lines and appropriate management information, formal and informal team meetings).



06/ BUSINESS CONDUCT STANDARDS

Applies to:

All RFSPs regardless of sector.

Summary of the Business Conduct Standards

Obligations will be imposed on all RFSPs to:

- Conduct their business professionally, honestly, ethically and with integrity
- Conduct their business with due skill, care and diligence, and take appropriate steps to prevent or effectively manage conflicts of interest
- Act in the best interests of customers and treat them fairly and professionally
- Maintain adequate financial resources and control and manage its affairs and systems sustainably, responsibly, and in a sound and prudent manner

- Arrange adequate protection for clients' assets when it is responsible for them
- Deal with its regulators in good faith and in an open and cooperative way, and disclose to the Central Bank promptly, proactively and appropriately, anything relating to the firm of which the Central Bank would reasonably expect notice

The Central Bank may make regulations specifying additional detail regarding these requirements.

Enforcement

Failure by an RFSP to comply with these requirements can be enforced directly against the RFSP through the Administrative Sanctions Procedure.

Key issues

- This represents a potentially material change in supervision and enforcement for all RFSPs. The Business Conduct Standards comprise general requirements and represent a shift from 'rules based' to 'principles based' regulation.
- General principles of this kind have been deployed by the Central Bank in certain spheres (e.g. the application of the General Principles of the Consumer Protection Code in retail banking and consumer insurance contexts) and potentially provide the Central Bank with a broader toolkit to take enforcement action when an RFSP's engagement with customers or clients does not meet regulatory expectations.
- The text of the Business Conduct Standards contain more detail and are potentially broader than the initial proposals in the Culture Report, e.g. incorporating references to sustainability in parallel with the ongoing regulatory dialogue regarding ESG.
- There may be some initial differences between these Business Conduct Standards and those in other jurisdictions. e.g. the UK FCA's Principles for Business refer to managing conflicts fairly rather than preventing conflicts. The General Scheme also includes an additional layer requiring RFSPs to act in the best interest of customers.
- The Business Conduct Standards now codify an obligation similar to the UK FCA's 'Principle 11' requiring the disclosure of any information of which the regulator would reasonably expect notice. Although this has been the regulatory expectation in most sectors for some time, previously some firms were not under such a broad formal legal obligation of disclosure.
- The scope of the criterion that an SEF 'exercises significant influence' on an RFSP's affairs will require careful consideration and application in any particular case (including e.g. the realities of intra-group or international reporting lines).

“The [Individual Accountability Framework]... achieve[s] the ultimate goals of better outcomes for consumers and a more sustainable financial system by driving higher standards of behaviour for individuals in financial services firms.

Central Bank of Ireland Statement on the General Scheme 27 July 2021

Key actions

- Prepare content and controls to ensure all first and second line teams are trained on the content of, and Central Bank's expectations regarding compliance with, the Business Conduct Standards.
- Consider what sales, execution or other processes and/or policies and procedures may require review and updating to ensure compliance with the general nature of the Business Conduct Standards.
- Consider how your firm will track any updated guidance issued by the Central Bank on their expectations on how these standards should be complied with e.g. thematic reviews, Dear CEO letters, AML Bulletins, etc.
- Consider what additional steps your procedure for communicating with the regulator may need in order to achieve consistency in communications, appropriate escalation of regulatory communications and to ensure that appropriate disclosures to the Central Bank will be made in all circumstances (e.g. a central regulatory relations office; recording all regulatory communications through regulatory contact logs; collating centrally all regulatory communications for consistency of approach).

07/ FITNESS AND PROBITY CERTIFICATION REQUIREMENT

Applies to:

All RFSPs currently in the Fitness and Probity regime regardless of sector.

Summary of certification requirement

All RFSPs will now be required to certify in writing that they are satisfied that a person complies with the applicable standards of fitness and probity before appointing them to a CF or PCF role.

The Central Bank may make regulations specifying requirements:

- in relation to certification and the due diligence that firms must undertake prior to certifying persons in controlled function roles
- relating to the period of validity of such certification
- regarding the adoption of fitness and probity policies and procedures
- relating to the reporting of related information to the Central Bank

Enforcement

Breaches of this requirement will be enforceable against the RFSP through the Administrative Sanctions Procedure.

Key issues

- The Central Bank has set out various expectations regarding the processes for, and quality of, due diligence when assessing the fitness and probity of individuals to perform CF roles and in preparing applications for approval for PCF roles (e.g. through its [Dear CEO letters](#) and [Guidance on Fitness and Probity Interviews](#)). Any further regulations specifying diligence required by the certification requirement will add to this guidance.
- The General Scheme does not go so far as providing for a ‘regulatory reference’ regime as in for example the UK. This may be due to constitutional concerns. However, in practice the level of due diligence required by any additional regulations issued by the Central Bank could place an onus on RFSPs to engage proactively with former employers of individuals proposed for CF or PCF roles.

Key actions

- Consider alignment of SEAR and Fitness and Probity compliance frameworks including e.g. training modules; due diligence processes pre-appointment to ‘in scope’ roles; second line support for individuals under either regime; escalation and review processes for concerns regarding compliance with either regime.
- RFSPs have recently been assessing the Central Bank’s publications on the operation of the Fitness and Probity regime, and in particular the due diligence requirements, oversight at board level and remediating issues where necessary. Any remediation or enhancement projects should now take account of this likely additional certification requirement.

08/ ENHANCEMENTS TO THE FITNESS AND PROBITY REGIME AND OVERLAP WITH THE INDIVIDUAL ACCOUNTABILITY FRAMEWORK

Applies to:

All RFSPs currently in the Fitness and Probity regime regardless of sector.

Summary of enhancements

- The Fitness and Probity regime will be expanded to apply to financial holding companies established in Ireland.
- Amendments are made confirming that the Central Bank may investigate persons who formerly performed CF or PCF roles regardless of whether they still perform these or other roles in the Fitness and Probity regime.
- Additional information-gathering powers are granted to the Central Bank to request information from firms who are in the process of applying for an authorisation.
- The Central Bank can already apply suspension notices and apply for a prohibition order prohibiting an individual from performing a CF or PCF role. The period of suspension possible will be increased from three months to six months. A process will be provided for a person who is the subject of a prohibition order to apply for a discontinuance or variation of the order at a future date.



Key issues

- The amendment to enable the Central Bank to investigate persons who formerly performed controlled functions will have consequences for staff who are moving on and may wish to ensure continued access to files and ongoing insurance cover.
- It is unclear at present what term of limitation will be applied, if any, in relation to actions under the Individual Accountability Framework. This will have ramifications for e.g. document retention and D&O insurance run-off cover.

Key actions

- Whilst the Common Conduct Standards and Additional Conduct Standards are still draft proposals, RFSPs should consider whether they are particularly relevant to assessments of fitness and probity of particular CF or PCF candidates in their organisation before these standards come into full effect.
- Assess what, if any, supports your firm does, or intends to provide to senior individuals after they have fulfilled CF or PCF roles in your organisation regarding their conduct whilst operating within the fitness and probity regime.



09/ ENFORCEMENT INVESTIGATIONS AND INQUIRIES

Summary of enhancements

The Individual Accountability Framework makes various amendments to the Central Bank enforcement investigations process.

A key proposal involves removing the current requirement that the Central Bank prove that an individual who is ‘concerned with the management’ of the relevant RFSP ‘participated’ in a regulatory contravention by the firm. This will be replaced by the powers, outlined above, for the Central Bank to enforce directly against individuals who are responsible, either under the SEAR or under the Common or Additional Conduct Standards, in respect of a regulatory contravention.

Further amendments are procedural in nature and seek to address investigatory issues that the Central Bank has encountered over the last number of years, such as disclosure of privileged material, as well as addressing the presentation of evidence and reports at an inquiry.

The suite of reforms to the Administrative Sanctions Procedure and the inquiry process reflect many issues that we at A&L Goodbody have encountered in our extensive investigations practice. The Central Bank have clearly engaged extensively with the legislature to address procedural issues encountered over the years during these investigations.

Care and advice will still need to be taken in how these procedures are engaged, such as the attempt to codify the provisions of ‘limited waiver agreements’ relating to the disclosure to the regulator of privileged material. These raise complex legal issues and will still require an assessment of all associated risks on a case by case basis.

“The Central Bank's approach to enforcement action will remain... proportionate and risk-based... [including] the extent to which such action will promote compliance by the regulated entity and within the industry or sector.

General Scheme published on 27 July 2021



10/ NEXT STEPS

Legislative and consultation processes

The legislation will progress through the Dáil in the autumn and RFSPs should be conscious of complying with lobbying requirements during the legislative process. It is interesting to note that certain issues in other jurisdictions (such as the treatment of in-house lawyers and non-executive directors in the UK) changed during the legislative process.

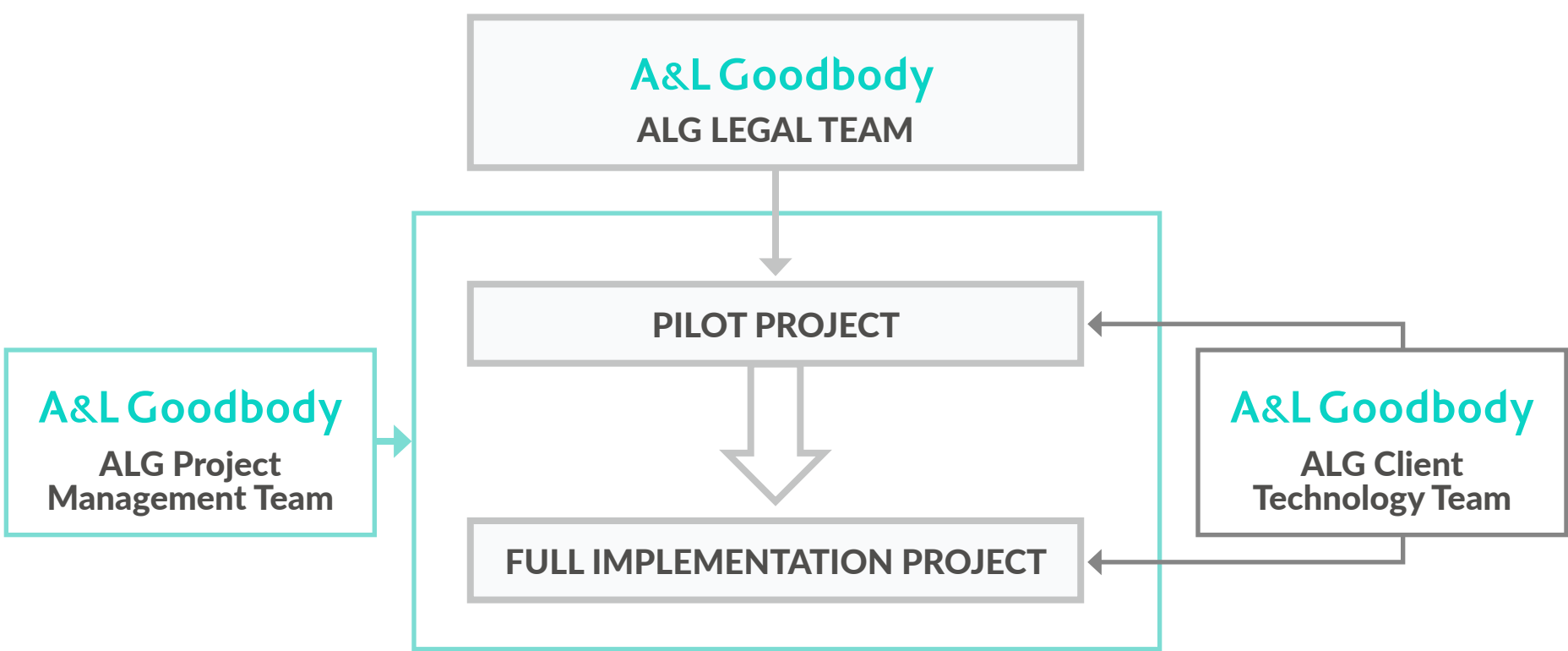
A Central Bank consultation process has been indicated and firms will have an additional opportunity at that stage to feed in to the development of the guidelines.

We have followed closely the Irish proposals and similar regimes in other jurisdictions to identify the practical impact on your firm's processes and governance arrangements.

11/ HOW CAN A&L GOODBODY HELP?

Your ALG SEAR team combines specialists from our Financial Regulation & Investigations Group and experts from our Employment, Corporate Governance, Banking, Insurance and Investment Funds Groups to provide a holistic approach to implementing SEAR.

Our ALG Regulatory specialists, Legal Project managers and Client Technology teams are working seamlessly to design, oversee and progress implementation plans for firms to get ahead of the reforms.



“Our practice area specialists and Legal Project Management teams are ready to plan, advise on and oversee your implementation project end to end.

- Planning and scoping your project
- Collating current contractual, governance, HR and compliance materials
- Assessing current practices and gaps
- Employment, corporate governance and regulatory compliance advice
- Reviewing governance structures, reporting lines, senior responsibilities
- Amending HR documents, policies and procedures
- Preparing SEAR documentation
- Designing SEAR processes to support senior executives (e.g. delegation and oversight)
- Board, senior executive and staff training
- Updates on regulatory framework and SEAR best practice



STEP 1: YOUR PILOT PROJECT

We have already been assisting clients in designing and running 'pilot projects' across a sample of their business or senior executives to get ready for the new requirements. The objectives of a pilot project can include:

- Assessing the size and resources required by your implementation project
- Assessing the comprehensiveness and accuracy of the key documents which set out individuals' reporting lines, current responsibilities and areas of the business to which those responsibilities apply
- Identifying key issues which may arise in applying the framework to your own business and therefore informing points your organisation may wish to raise during regulatory consultation
- Informing the ultimate project plan and resource requirements for your full implementation of the SEAR



Scope your pilot project

- Form steering group
- Socialise project with key stakeholders and board
- Consider current proposals and 'lessons learned' from e.g. UK
- Agree scope and objectives of any 'pilot project' - this is recommended now
- Conduct 'gap analysis' between current General Scheme and any 'pilot project' you have already conducted



"Sandbox" diligence now

- Identify potentially in scope senior executives to assess project size
- Collate current documented responsibilities (e.g. employment contracts/letters of appointment for individuals, terms of reference for committees) to assess scale of project
- Understand what happens in practice today vs documented responsibilities to assess readiness
- Collate current conduct standards and staff training (e.g. employee handbook, codes of conduct, current training modules) to assess scope of HR change
- Interview a small sample of senior executives to understand current processes for delegation and monitoring to assess current best practice



Get 'regulation ready'

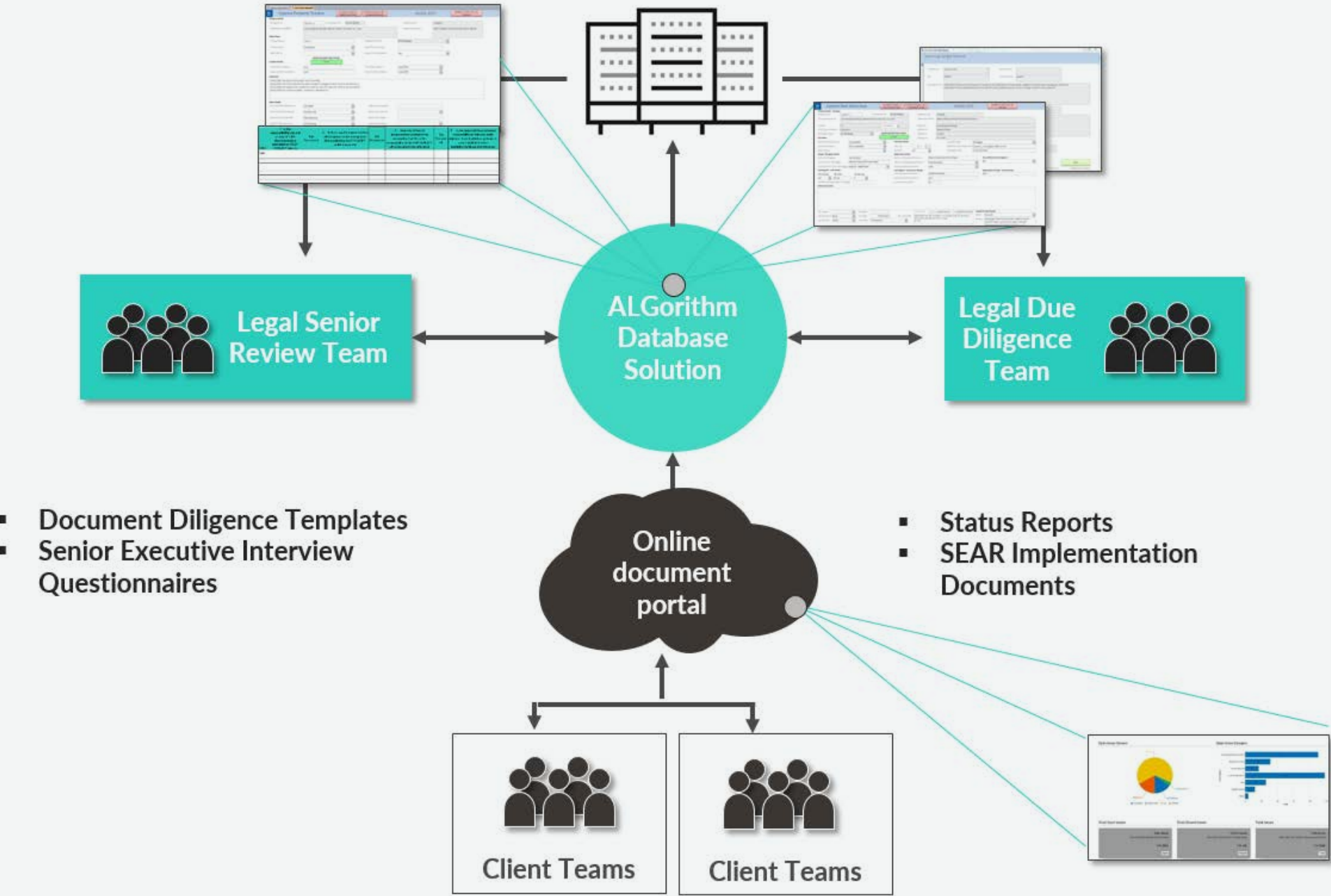
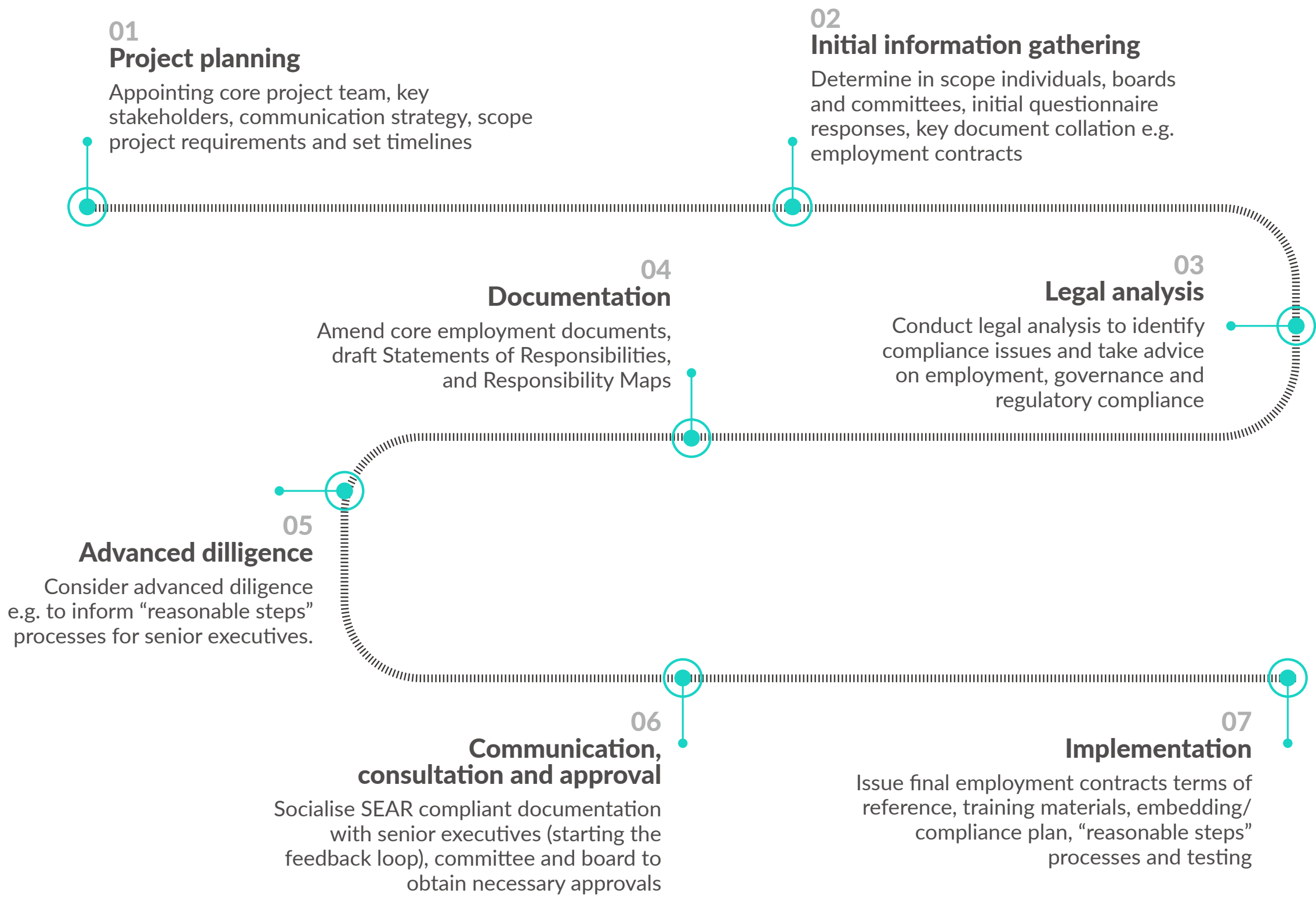
- Assess your resource, timing and stakeholder requirements
- Identify key issues for your business ahead of any consultation or regulatory engagements
- Socialise potential key changes with internal stakeholders
- Understand what work elsewhere in your organisation (e.g. in other jurisdictions) could help and what won't translate



How can A&L Goodbody help?

STEP 2: YOUR FULL IMPLEMENTATION PLAN

Implementation will involve a number of key phases and will require cooperation between legal, compliance, HR, Co Sec and executive teams. A&L Goodbody's combined SEAR team is experienced in steering your firm's own multidisciplinary team through key legal and regulatory issues and project managing your implementation plan.



ALGORITHM

Our Client Technology and Legal Project Management Services teams have worked with our Financial Regulatory & Investigations team to develop our ALGORITHM system for SEAR implementation. ALGORITHM combines a document transfer portal with a customised relational database solution to:

- Collate centrally all documentation ‘artefacts’, information in response to questionnaires and the outcome of senior executive interviews
- Facilitate a holistic review of these materials
- Ensure a consistent approach to drafting responsibility statements, maps and associated regulatory and HR documentation changes

Using ALGORITHM, our SEAR team can identify overlaps and underlaps whilst providing an end to end audit trail, gap analysis and progress reporting in a cost efficient project.

Your SEAR team

Our Financial Regulation & Investigations, Employment and Client Technology and Legal Project Management Services teams are already working closely with our experts in our Banking, Insurance and Investment Funds Groups across industry to help firms prepare for SEAR.

Financial Regulation & Investigations



Dario Dagostino
Partner



Patrick Brandt
Partner



Mark Devane
Partner



Kevin Allen
Partner

Employment



Duncan Inverarity
Partner



Noeleen Meehan
Partner



Michael Doyle
Partner

Banking



Peter Walker
Partner



Seamus O'Croinin
Partner

Asset Management & Investment Funds



Kerill O'Shaughnessy
Partner



Laura Butler
Partner

Insurance



James Grennan
Partner



Laura Mulleady
Partner



Sinead Lynch
Partner



Emma Martin
Of Counsel

Client Technology and Legal Project Management



Charles Carroll
Partner



Gillian McDonald
Partner, Legal Project Management



David Lucas
Senior Project Manager

ANNEX: NON EXHAUSTIVE EXAMPLES OF REQUIREMENTS UNDER THE COMMON CONDUCT STANDARDS

01. Acting honestly, ethically and with integrity can be demonstrated:

- by operating in compliance with the firm's systems and controls, processes, policies and procedures
- by participating appropriately in any decision-making, including collective decision making, that the relevant person may perform or contribute to
- by acting without bias
- by weighing only legitimate interests of the regulated financial services provider, its staff, customers and other persons with whom it is engaged, in decision making and actions taken
- by taking appropriate steps to identify and prevent or appropriately manage conflicts of interest
- by adhering to ethical standards of the regulated financial service provider
- by providing, information, records, opinions, advice or explanations which are correct and accurate and which do not mislead
- by not misusing or misappropriating, directly or indirectly, assets or information of the firm, customers or any other person
- in complying with all obligations and standards imposed by or under law, or set out in the professional standards of an applicable professional regulatory body
- by avoiding causing detriment or damage to customers, the regulated financial service provider and its related undertakings, and the financial system
- by appropriately escalating or reporting, and by not impeding others from escalating or reporting, improper conduct or matters adversely affecting the activities or interests of the regulated financial service provider and its related undertakings, customers, the financial system and relevant stakeholders.

02. Acting with due skill, care and diligence can be demonstrated:

- by taking appropriate steps to identify and prevent or appropriately manage conflicts of interest
- by exercising sound judgment in any decision-making, including collective, that the relevant person may perform or contribute to, and by ensuring that such decisions are properly informed
- by adequately overseeing and controlling delegated responsibilities and, where appropriate, challenging information provided by persons to whom such responsibilities have been delegated
- by the relevant person ensuring he or she has appropriate knowledge of the firm's business activities, the legal and regulatory framework applicable to those activities, and the risks associated with those activities
- by complying with all obligations and standards imposed by or under law, when operating and complying with the firm's systems and controls, processes, policies and procedures
- by appropriately escalating or reporting, and by not impeding others from escalating or reporting, improper conduct or matters adversely affecting the activities or interests of the regulated financial service provider and its related undertakings, customers, the financial system and relevant stakeholders
- by providing information, records, opinions, advice or explanations which are correct and accurate and which do not mislead.

03. Cooperating with the Central Bank and other regulators or authorities and dealing with them in good faith and without delay can be demonstrated:

- by not directly or indirectly providing false, inaccurate or misleading information, records or explanations to the Central Bank or other regulators or authorities
- by responding to requests and requirements of the Central Bank and other regulators or authorities in an open and timely manner
- by disclosing all relevant information or records when requested or required to do so by the Central Bank and other regulators or authorities and doing so in an open and timely manner
- by not directly or indirectly destroying, withholding, hiding or putting beyond the reach of the Central Bank and other regulators or authorities information or records which has been requested or required or which may be relevant to the performance of their functions
- by not engaging in evasive, misleading or obstructive conduct in the course of their engagement and dealings with the Central Bank and other regulators or authorities
- by complying with any obligations imposed pursuant to legislation by the Central Bank or by other regulators and authorities and doing so in a timely manner and in any event within any reasonable specified time periods
- by attending for any meetings and/or interviews that have been requested or required by the Central Bank and other regulators or authorities and answering any questions and providing any information requested or required during the course of those meetings and/or interviews.

02. Acting in the best interests of customers and treating them fairly and professionally, can be demonstrated:

- by not directly or indirectly causing detriment, damage to or an unfair outcome for customers
 - by complying with all obligations and standards imposed by or under law in relation to the treatment of and dealings with customers
 - by providing, and by not impeding the provision of material information to customers in a way that seeks to inform customers, where the person is aware, or ought to be aware, of such material information, and of the fact that such information should be provided to customers
 - by providing customers with clear, accurate, up to date and adequate information, and by providing this information on a timely basis having regard to the urgency of the situation and the time necessary for the customer to absorb and react to the information provided
 - by ensuring any advice given or recommendations made to customers regarding financial services and products are suitable for the relevant customer
- having regard to their characteristics, their circumstances, their sophistication or vulnerability and the range of choices available to the customer
 - by not misleading customers in relation to the real or perceived advantages of any product or service
 - by ensuring that any conflict of interest does not result in damage or detriment to or an unfair outcome for customers
 - by not exerting undue pressure or undue influence on a customer
 - by providing adequate protection of, and control over, a customer's assets
 - by acknowledging, and seeking to resolve, any complaints received from customers
 - by effectively handling errors or mistakes which affect customers, and by seeking to disclose and resolve same in a timely manner.

05. Observing proper standards of market conduct can be demonstrated by complying with relevant market codes and trading venue rules, and by not engaging in or permitting a breach of any obligations or standards imposed by or under law in relation to market conduct.

