

Irish Fund Directors Association response to Consultation Paper 153¹ Enhanced governance, performance and accountability in financial services Regulation and Guidance under the Central Bank (Individual Accountability Framework) Act 2023 (March 2023)

Dear Sir, Madam

We welcome the publication of the Central Bank's paper entitled Consultation Paper 153 Enhanced governance, performance and accountability in financial services Regulation and Guidance under the Central Bank (Individual Accountability Framework) Act 2023 and the related draft Regulations and draft Guidance on the Individual Accountability Framework ("CP153") and we appreciate the opportunity to provide feedback on this paper.

By way of background, the Irish Fund Directors Association ("IFDA") is the independent representative body for board directors within the Irish funds industry and our purpose is to represent the interests of our members to other key stakeholders in the industry and to advocate industry best practice in corporate governance and board oversight and to encourage continuous professional development for fund directors.

IFDA has reviewed the paper, draft Regulations and Guidance and the potential impacts for directors on Fund boards. We wish to clarify that we have limited the scope of our feedback to the perspective of directors of Collective Investment Schemes ("CIS") at this point (with the exception of one request for clarification as set out in Annex 1 – Question 7) .

From our members' perspective, we make the following general comments.

CP153 and Irish Regulated Investment Funds/Collective Investment Schemes including any subsidiaries "CIS")

We appreciate the intention is that CP153 will apply in time across certain other sectors.

We have outlined below IFDA's understanding of the unique characteristics of CIS and as a result we believe the SEAR Regulations should not apply to CIS on the rationale that CIS should be distinguished from other regulated firms, FMCs and fund service providers (IFDA notes that the enhancements to the Fitness & Probity regime and the Conduct Standards will apply to all regulated firms from 31 December 2023). We would greatly appreciate feedback from the CBI in the context of CIS and the CP153 consultation paper and in particular in respect of the following points :

CISs are regulated investment products, typically set up under a corporate structure, offering their securities for sale to investors. Whilst CIS are regulated pursuant to investment funds legislation (i.e., Companies Acts, 2014, the ICAV Act, and ILP) and are subject to product rules set out in (inter alia) the UCITS Regulations and the AIF Rulebook, they are not themselves regulated financial services firms offering regulated financial services to clients. Accordingly, CIS typically² operate on a delegation model and by their very nature do not retain day-to-day executive functions and outsource such activities to service providers. The Board, or governing body of the CIS, is responsible for the

¹ IFDA notes that the enhancements to the Fitness & Probity regime and the Conduct standards will apply to all regulated firms from 31 December 2023

² Except for self-managed investment companies (SMICs)

prospectus and has a fiduciary duty to the underlying investor to ensure that the CIS is managed in accordance with the terms of the Prospectus.

Exclusion of CIS from the application of the SEAR Regulations

As set out above, CIS Boards delegate management, administration and investment management activities to regulated third party service providers in the most part³ and appoint depositaries to carry out safekeeping duties (collectively “OSPs”). OSPs are appointed following a rigorous due diligence process. Further, the CIS Board relies on the regulated status of the OSPs, which are in turn subject to regulatory authorisation and prudential supervision. We assume that OSPs will in time be subject to all aspects of CP153, including the SEAR Regulations. CIS Boards conduct appropriate due diligence on its delegates and ensure that the documentation, policies and procedures reflect their respective responsibilities and accountabilities.

This position of CIS contrasts to that of regulated financial services firms offering financial services to clients. The latter are authorised based on their organisational and operational set up as prescribed by the Central Bank and they can, at their discretion, choose their optimal set-up and the types of regulated services they wish to provide to customers. CIS have unique characteristics in that they operate on a delegated/outsourcing model and as such, the risks that are disclosed in a fund’s Prospectus are overseen by OSPs on a day-to-day basis. This is fully disclosed in the Prospectus and the CIS is not set up with the intention nor the human resources nor technical capacity to carry out executive functions itself. We suggest this distinction be reflected in the guidance and, as a result, SEAR Regulations be disapplied to CIS.

Application of the SEAR Regulations to Independent Non-executive Directors (“INEDs”)

We note that CP153 proposes to apply the provisions of SEAR to all INEDs and NEDs at in-scope firms on the basis that INEDs/NEDs are a critical component and an integral safeguard to the corporate governance framework of firms. The role of INEDs is clearly distinct from that of the executive members of in-scope firms and from management more broadly. All INEDS are required to exclude themselves from executive control of in-scope firms. IFDA is of the view that INEDs should be excluded from the scope of SEAR. This is on the basis that INEDs are not involved in the day-to-day management of a firm and play an important and distinctive oversight role from the executives within a firm. Both investors in CIS and the Central Bank rely on the independent function of the INEDs. IFDA is of the view that the application of SEAR to all INEDs would undermine their effectiveness in providing independence and challenge, result in their involvement in executive function by involving them to direct day to day management of the firm, thereby undermining their independence.

In addition, the non-executive oversight and monitoring activity referenced in CP153 are already embedded in legislation, common law and in governance codes and including INEDs within scope of SEAR is duplicative.

Please see Annex I attached in which we have, to the extent relevant, set out responses to the questions raised in CP153.

³ Except for self-managed investment companies (SMICs)

Other than as set above and in Annex I, we support the guidance as it will enhance robustness and transparency of the governance regimes in regulated firms and ensure that they apply the new enhanced standards to their new and existing organisational set up.

For the reasons noted above, and given the importance of the fund industry in Ireland, we would appreciate consideration of our feedback in the next iteration of your draft guidance.

Yours sincerely,

IFDA

Annex I

Questions and IFDA answers

Q1. What are your views and comments on the draft SEAR Regulations and related draft guidance?

We refer you to our letter and would be grateful for if the Central Bank could clarify in its guidance that the SEAR Regulations do not apply to CIS.

Q2. Do you agree with our proposed approach to the Inherent Responsibilities?

Yes generally. However, we refer you to our letter which sets out IFDA's view on the application of the SEAR Regulations to INEDs.

Further, we note the proposed responsibility for PCF3 Chair of the Board, chairing meetings of the Board, leading and overseeing its performance. A Board is collectively responsible for the activities of the company and for the boards performance. The role of the Chair is to chair, lead and manage the meetings. Under the CP86 framework, where the Chair often performs the role of Director for Organisational Effectiveness ("OED"), the Chair has other responsibilities such as oversight of the board effectiveness evaluation but we submit that assigning a responsibility for overseeing the performance of the board is at odds with the principle under company law of the board's collective responsibility for the activities of the company, unless it is intended to review the role of the OED.

Q3. Do you agree with our proposed approach to the Prescribed and Other Responsibilities?

What is the rationale for having both PR 12 & PR 14? Why not just one person responsible for this item to cover both the Board and Staff?

Q4. Do you agree with our proposed approach to the sharing of roles and responsibilities including job sharing?

We have no specific comment on the proposed approach.

Q5. Do you agree with our proposed approach to the inclusion of INEDs/NEDs within scope of SEAR?

We submit that INEDs/NEDS of FMCs and CIS should be excluded from the scope of SEAR. This is on the basis that INEDs/NEDs do not participate in day-to-day activities and prescribing responsibilities is more appropriate for personnel acting in an executive capacity. The role of INEDs is clearly distinct from that of the executive members of in-scope firms and from management more broadly. All INEDS are required to exclude themselves from executive control of in-scope firms. IFDA is of the view that INEDs should be excluded from the scope of SEAR. This is on the basis that INEDs are not involved in the day to day management of a firm and play an important and distinctive oversight role from the executives within a firm. Both investors in CIS and the Central Bank rely on the independent function of the INEDs. IFDA is of the view that the application of SEAR to all INEDs would undermine their effectiveness in providing independence and challenge and result in their involvement in executive function by involving them to direct day to day management of the firm, thereby undermining their independence.⁴

⁴ A board has collective responsibility for overseeing the strategy and management of the firm per Table 5 Inherent Responsibilities however an INED does not have control over allocation of resources or

In addition, the oversight and monitoring activity referenced in CP153 are already embedded in legislation, common law and in governance codes. We would also note that under the SMCR regime in the United Kingdom, NEDs/INEDs are not in scope (with some exceptions for chair of audit committees and remuneration committees) and would suggest that a similar approach is appropriate here.

Q6. Do you agree with our proposed approach to the Statements of Responsibilities?

We have no issue in principle with the proposed approach but as per our letter we submit that SEAR should not apply to CIS or INEDs for the reason stated above.

Q7. Do you agree with our proposed approach to the Management Responsibilities Map?

We have no issue in principle with the proposed approach but we would be grateful for feedback on the point below.

In the context of FMCs, the organisational effectiveness director assumes responsibilities which are not a designated PCF function under the current regime and may not fully align to the non-executive prescribed responsibilities as set out in Annex 2 to CP 153. We request that consideration be given to the future role of the OED and its relevance in the context of IAF and SEAR.

Q8. Do you agree with our proposed approach to submission of documents?

A 10 year timeframe for retention of records would appear onerous. We would query why the Central Bank would not consider a 5/6 year timeframe in line with other legislative and regulatory provisions applicable to regulated firms, e.g. Commission Directive 2010/43/EU, MiFID Regulations anti-money laundering legislation, etc.

Q9. Do you agree with our proposed approach to outsourcing in the context of SEAR?

We have no specific comments on the proposed approach.

Q10. Do you agree with our proposed approach to reasonable steps in respect of SEAR and the Conduct Standards?

We have no specific comment on the proposed approach.

Q11. Does the guidance assist you in understanding the Duty of Responsibility and the non-exhaustive list of factors to be considered with regard to reasonable steps?

We have no specific comment on the proposed approach.

Q12. What are your views and comments regarding the guidance on the Common Conduct Standards and Additional Conduct Standards?

We have no specific comment on the proposed approach.

“implementation of effective” policies and procedures (Table 1 General Prescribed Responsibilities PR12) to the extent of embeddedness, as oppose to Table 1 Non-Executive Prescribed Responsibilities “effective” implementation of same.

Q13. What are your views and comments on the guidance in relation to obligations on the firm in respect of Conduct Standards?

We have no specific comment on the proposed approach.

Q14. Do you agree with our proposed approach to temporary appointments within scope of SEAR and the Conduct Standards?

At present there is no definition of a 'temporary appointment'. Clarification on what constitutes a temporary appointment would be welcomed.

Q15. What are your views and comments on the draft Certification Regulations and related guidance?

We have no specific comment on the proposed approach.

Q16. Do you agree with our proposed approach to roles prescribed as PCF roles for holding companies in the draft Holding Companies Regulations? Not specifically relevant to IFDA INEDs – Yes as a general principle

We have no specific comment on the proposed approach.

Q17. Do you agree with our proposed approach to reporting of disciplinary actions?

Our view is that the reporting of disciplinary actions should only be required where they relate to a breach of the F&P standards and the Conduct standards.

Q18. Do you agree with our proposed approach to introducing the Head of Material Business Line role for insurance undertakings and investment firms?

We have no specific comment on the proposed approach.