

# FINANCIAL SERVICES COMPLIANCE

## Ireland



# Financial Services Compliance

Consulting editors

**Zachary J. Zweihorn**

*Davis Polk & Wardwell LLP*

---

Quick reference guide enabling side-by-side comparison of local insights, including into the regulatory framework; registration and authorisation regimes; enforcement; compliance programmes; cross-border regulation and international standards; and other recent trends.

---

Generated 04 April 2022

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2022 Law Business Research

# Table of contents

## REGULATORY FRAMEWORK

Regulatory authorities  
Authorisation regime  
Legislation  
Scope of regulation  
Additional requirements

## ENFORCEMENT

Investigatory powers  
Disciplinary powers  
Tribunals  
Penalties

## COMPLIANCE PROGRAMMES

Programme requirements  
Gatekeepers  
Directors' duties and liability  
Private rights of action  
Standard of care for customers  
Rule-making

## CROSS-BORDER ISSUES

Cross-border regulation  
International standards

## UPDATE AND TRENDS

Key developments of the past year

## Contributors

### Ireland



**Keith Waine**

keith.waine@dilloneustace.ie

*Dillon Eustace LLP*



**Laura Twomey**

laura.twomey@dilloneustace.ie

*Dillon Eustace LLP*

## REGULATORY FRAMEWORK

### Regulatory authorities

#### 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 that 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 commencement 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.

*Law stated - 17 January 2022*

#### 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 services 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;
- 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.

*Law stated - 17 January 2022*

## 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;
- payment instruments;
- 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.

*Law stated - 17 January 2022*

## Authorisation regime

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 of 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 country outside of the European Economic Area 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 determines whether to grant authorisation.

An investment firm may seek authorisation pursuant to the European Union (Markets in Financial Instruments) Regulations 2017 (as amended) (the 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', which may involve an in-person interview.

The principal areas assessed by the CBI in considering an application for authorisation by a financial services firm 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 levels to take place within Ireland together with a significant senior management presence with responsibility for financial control, compliance and risk management.

*Law stated - 17 January 2022*

## Legislation

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

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

The Central Bank Reform Act 2010 (as amended) 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 (as amended).

Following the commencement of the Single Supervisory Mechanism on 4 November 2014, 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 investment firms authorised under the Markets in Financial Instruments Directive (2014/65/EU) (MiFID II), pursuant to the MiFID II Regulations. 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).

## 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, domestic Irish legislation, EU legislation, the various pieces of secondary legislation and codes issued under the Central Bank Acts 1942–2018, and guidance issued by EU bodies such as the European Supervisory Authorities. The CBI also issues guidelines to assist financial services firms to 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.

Investment firms carrying out certain investment activities must comply with the MiFID II Regulations.

On 21 September 2021, the European Union (Investment Firms) Regulations 2021 and the European Union (Investment Firms) (No. 2) Regulations 2021 entered into force. These regulations give partial effect in Irish law to Directive (EU) 2019/2034 on the prudential supervision of investment firms (IFD) and give full effect to Regulation (EU) 2019/2033 on the prudential supervision of investment firms (IFR), respectively. The IFD and the IFR put in place a new prudential framework for investment firms authorised under the MiFID II.

The IFR and the IFD, for most existing investment firms, replace the existing prudential requirements for investment firms set out in the Capital Requirements Regulation (575/2013) (CRR) and Directive 2013/36/EU (CRD IV). Under the new 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 CRR and the CRD IV. All other investment firms (ie, those that are not considered systemic) will be subject to the new tailored regime with bespoke prudential requirements.

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

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

Financial services firms must be authorised 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 that set out conduct of business rules addressing topics such as consumer protection, client assets, investor money, business lending to small and medium-sized enterprises,



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 financing of terrorism legislation by financial services firms.

*Law stated - 17 January 2022*

### **Additional requirements**

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.

*Law stated - 17 January 2022*

## **ENFORCEMENT**

### **Investigatory powers**

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 firms and those that work in such firms. 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 (as amended) (the 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, 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 and 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 a 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.

*Law stated - 17 January 2022*

## **Disciplinary powers**

**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 make a decision to prosecute 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.

*Law stated - 17 January 2022*

## Tribunals

### 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'. IFSAT decisions 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 a settlement. Most cases are resolved by settlement, instead of the formal adjudication mechanisms described above.

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 the 2013 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 Financial Services and Pensions 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.

*Law stated - 17 January 2022*

## Penalties

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

Under the CBI's ASP, monetary penalties are the most common 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 firms 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, although some sectoral legislation modifies these sanctions.

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 2021, the CBI had published details of 144

settlements under the ASP on its website.

The CBI may also impose administrative sanctions for certain regulatory breaches under its 'securities markets regulations assessments' regime. The sanctions that may be imposed (which include monetary penalties) are set out in the underlying sectoral legislation. As at 31 December 2021, 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, who can make a decision on whether to prosecute the matter before the criminal courts.

*Law stated - 17 January 2022*

## COMPLIANCE PROGRAMMES

### Programme requirements

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, and 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.

*Law stated - 17 January 2022*

### Gatekeepers

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 European Central Bank.

The CBI's increased focus on culture in regulated firms in recent years has led to it advocating for legislative change to assign regulatory responsibility to individuals working in regulated firms. On 27 July 2021, the Irish Department of Finance published the General Scheme of the Central Bank (Individual Accountability Framework) Bill 2021 (the General Scheme). The General Scheme provides for the establishment of the Individual Accountability Framework (IAF), which includes the Senior Executive Accountability Regime (SEAR).

The purpose of the IAF is to create a framework to facilitate individual accountability and responsibility, particularly for individuals performing senior executive functions (SEFs) within Irish-regulated firms. The General Scheme also aims to remove the existing participation link, whereby regulators must first find that a financial firm committed regulatory breaches before they may impose sanctions on individuals for regulatory contraventions. Part 2 of the IAF implements the SEAR, which will mandate regulated firms to enhance their internal processes by clarifying the roles of their SEFs. This will be achieved by the creation of individual statements of responsibility, together with a management responsibility map documenting the regulated firm's wider governance and management arrangements. The CBI will be empowered to take enforcement action and impose administrative sanctions where there is a breach of the duty of responsibility imposed on an individual performing a SEF within a regulated firm.

The SEAR will be rolled out on a phased basis, with the initial scope extending only to credit institutions, insurance undertakings (except reinsurance, captive (re)insurance and insurance special purpose vehicles), certain investment firms and any third-country branches of such firms. Additional sectors may, and likely will, be brought within the scope of the SEAR in the future.

The General Scheme also strengthens the CBI's existing Fitness and Probity Regime. Under the General Scheme, a regulated firm will be required to certify, on an annual basis, that it is satisfied that any individual performing a PCF or a CF role meets the requirements under this regime.

As at January 2022, the Central Bank (Individual Accountability Framework) Bill is being drafted on the basis of the General Scheme. Following publication of the draft bill, it must pass through a number of stages in both houses of the Irish parliament before it becomes law.

The joint European Securities and Markets Authority and European Banking Authority 'Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU' are also applicable to key individuals in banks and investment firms.

*Law stated - 17 January 2022*

## **Directors' duties and liability**

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

A senior manager that performs certain key and customer-facing duties may be deemed to be performing a CF or a PCF. By performing a CF or a 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 a 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:

- 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 who has 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.

*Law stated - 17 January 2022*

### When are directors 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 is not adequate.

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 or the 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 or the PCF, or part of it, for the period specified in the notice or indefinitely.

The CBI's increased focus on culture in regulated firms in recent years has led to it advocating for legislative change to assign regulatory responsibility to individuals working in regulated firms. The General Scheme aims to remove the existing participation link, whereby regulators must first find that a financial firm committed regulatory breaches before they may impose sanctions on individuals for regulatory contraventions. Under the CBI's proposed new SEAR, regulated firms will be mandated to enhance their internal processes by clarifying the roles of their SEFs. This will be achieved by the creation of individual statements of responsibility, together with a management responsibility map documenting the regulated firm's wider governance and management arrangements. In addition, a legal duty of care is imposed on individuals while performing SEFs within regulated firms. Such SEFs are required 'to take reasonable steps to avoid their firm committing, or continuing to commit, a "prescribed convention" in relation to the areas of the business for which they are individually responsible'. The CBI will be empowered to take enforcement action and impose administrative sanctions on individuals who breach their duty of responsibility.

*Law stated - 17 January 2022*

## Private rights of action

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 Financial Services and Pensions 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.

*Law stated - 17 January 2022*

## Standard of care for customers

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

The 2012 Code states that regulated firms, 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 handle complaints speedily, efficiently and fairly; and
- not exert undue pressure or undue influence on a customer.

*Law stated - 17 January 2022*

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

The European Union (Markets in Financial Instruments) Regulations 2017 (as amended) 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.

*Law stated - 17 January 2022*

## **Rule-making**

**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 European Union 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.

*Law stated - 17 January 2022*

## **CROSS-BORDER ISSUES**

### **Cross-border regulation**

**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 another 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 European Economic Area. Third-country investment firms are permitted to carry out certain activities in Ireland for professional clients provided certain conditions are met, relying upon what is known as the Irish 'safe harbour'. In very limited circumstances, third-country firms may be able to provide services to retail clients by relying upon reverse solicitation.

*Law stated - 17 January 2022*

### **International standards**

**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 that supplement 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 Financial Consumer Protection Organisation



and international tax conventions, such as the Organisation for Economic Co-operation and Development's Common Reporting Standards as well as the US Foreign Account Tax Compliance Act.

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

*Law stated - 17 January 2022*

## UPDATE AND TRENDS

### Key developments of the past year




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

On 18 March 2021, the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021 (the 2021 Act) was signed into law. The purpose of the 2021 Act is to transpose the criminal justice elements of Directive (EU) 2018/843 (known as the Fifth Money Laundering Directive). The 2021 Act extends 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 2021 Act 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 cooperation with other EU member states.

Further changes to Ireland's anti-money laundering framework are expected following publication by the European Commission, in July 2021, of a set of four legislative proposals with the aim of strengthening the European Union's anti-money laundering and countering the financing of terrorism rules (the AML Legislative Package). The proposals include a new EU Regulation on anti-money laundering, which will replace existing EU Directives and have direct effect in all member states. A new EU-wide anti-money laundering supervisory authority is also proposed. Publication of the AML Legislative Package follows the launch 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.

*Law stated - 17 January 2022*

## Jurisdictions

	<b>Australia</b>	Herbert Smith Freehills LLP
	<b>Brazil</b>	Pinheiro Neto Advogados
	<b>Egypt</b>	Soliman, Hashish & Partners
	<b>Hong Kong</b>	Davis Polk & Wardwell LLP
	<b>Indonesia</b>	ABNR
	<b>Ireland</b>	Dillon Eustace LLP
	<b>Japan</b>	Anderson Mōri & Tomotsune
	<b>Luxembourg</b>	AKD
	<b>Netherlands</b>	Baker McKenzie
	<b>Russia</b>	EMPP
	<b>Switzerland</b>	Lenz & Staehelin
	<b>United Kingdom</b>	Davis Polk & Wardwell LLP
	<b>USA</b>	Davis Polk & Wardwell LLP