



**Irish Banking Culture Board Submission on the General Scheme of the Central Bank (Individual Accountability Framework) Bill 2021 to Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach**

**15 October 2021**

**Introduction**

The purpose of the Irish Banking Culture Board (IBCB) is to work with our five member banks<sup>1</sup> and wider stakeholders to build trustworthiness, in order to assist the banking industry in regaining the public trust so badly damaged in recent times. We proceed from the proposition that a robust and trusted banking sector is essential to the future prosperity of Ireland. The Irish people deserve nothing less.

Individual accountability is a cornerstone of positive behaviour and culture. To regain trust, it is imperative that stakeholders recognise that the banking industry's commitment to behavioural and cultural change is more than just words, but rather a real commitment that involves changes to how business is done and is underpinned by a framework which enables individuals, as well as organisations, to be held to account. In addition to enhancing trust with stakeholders, the introduction of the individual accountability regime has the potential to yield further positives for those institutions subject to it, via clearer decision-making and overall governance processes, and, by extension, better and more transparent risk management.

In this context, the IBCB and each of our five member banks are strong advocates for the introduction of an effective accountability regime in Ireland, similar to that in successful operation in many other jurisdictions globally.

We therefore welcome the publication of the General Scheme of the Central Bank (Individual Accountability Framework) Bill 2021 ('the Bill') and we are committed to contributing to the consultation process and wider debate around its content and application to the banking industry in Ireland, to assist with its effective implementation within the sector.

In that context, we thank the Joint Committee for inviting us to provide a submission to assist the Committee in its consideration of the General Scheme of the Bill. We have noted the particular issues on which the Committee is seeking views and we have included reference to these, where relevant to the role of the IBCB, within our submission.

Our submission emphasises, in particular:

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<sup>1</sup> Allied Irish Banks, Bank of Ireland, KBC Bank Ireland, Permanent TSB, Ulster Bank



- the importance in ensuring that the introduction of the Individual Accountability Framework (IAF) be framed as primarily positive development contributing to good behaviour rather than focussing only on the punitive aspects;
- the importance of consultation and engagement between the regulator and the regulated to ensure sufficient transparency and confidence in the IAF which will be critical to its success;
- the opportunity for the IAF to contribute to the restoration of trust in financial services, and particularly in banking; and
- the need to reflect on the appropriate internal methods to be used by firms to both incentivise the right behaviours and penalise those that are inappropriate.

This submission draws on issues raised via an internal IBCB Working Group on the IAF composed of subject matter experts drawn from across our member banks; a Roundtable of academics, practitioners and representatives of various stakeholders we organised with the Law School in Trinity College Dublin in March 2021; and a paper on 'Senior Executive Accountability and Responsibility in Financial Institutions'<sup>2</sup> by Professor Blanaid Clarke of Trinity College Dublin and Deputy Chair of the IBCB.

Given our membership and remit, it should be noted that this submission focusses primarily on issues of relevance to retail banking, with some reference to the wider Financial Services sector.

As noted in the accompanying letter from our Chairman Mr. Justice John Hedigan and CEO Marion Kelly to the Chair of the Committee, Deputy McGuinness, we would be very happy to attend a future meeting of the Committee in due course to discuss this submission, and wider issues relating to the work of the IBCB on behavioural and cultural change in banking.

### **The policy rationale for the Bill**

As noted above, the IBCB considers that individual accountability is a cornerstone of positive behaviour and culture and is a key element in the rebuilding of trust in the Irish banking sector. This perspective is in line with international leading practice as reflected by a range of national and international regulators and academics, in particular the Financial Stability Board's (FSB) 2018 report '*Strengthening Governance Frameworks to Mitigate Misconduct Risk: A Toolkit for Firms and Supervisors*'<sup>3</sup> which advocates the need for a multifaceted approach to the problem of misconduct risk in financial services.

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<sup>2</sup> Blanaid Clarke "Senior Executive Accountability and Responsibility in Financial Institutions" Irish Jurist (Vol LXVI, 2021) forthcoming

<sup>3</sup> Financial Stability Board, *Strengthening Governance Frameworks to Mitigate Misconduct Risk: A Toolkit for Firms and Supervisors* (2018) available at <https://www.fsb.org/wp-content/uploads/P200418.pdf>.

The premise of the FSB report is that fines, which tend to be imposed on firms rather than individuals, may act as a deterrent to misconduct but they may not be sufficient. The FSB described a lack of accountability for misconduct as a key cultural driver of such behaviour and it recommended the adoption of a toolkit for firms and supervisors to strengthen governance frameworks by improving corporate culture, clarifying individual responsibility and accountability and preventing employees with a history of misconduct from moving within or between firms. The FSB correctly emphasised the need for a holistic response to these challenges. In terms of the responsibility and accountability framework, it suggested that national authorities should develop and monitor a system: to identify key responsibilities for individuals in the firm; allocate those responsibilities to named individuals; and then hold those individuals accountable for these responsibilities.

The framework as set out in the Bill is founded on the FSB's work and offers the opportunity to build on the existing Central Bank of Ireland's (CBI) Fitness and Probity regime introduced in 2011 as well as the protections offered under its Consumer Protection Code and Administrative Sanctions Regime to strengthen the mitigation against misconduct risk for banks and other financial services providers operating in Ireland.

In that context, the IBCB considers that the introduction of an IAF, presents an unprecedented opportunity to place culture and behaviour at the heart of the operations of financial services in Ireland. In that regard, we consider it critical that the IAF be presented and implemented in a manner which focusses on the positive aspects of cultural and behavioural change underpinned by accountability for the Irish industry, its customers and wider stakeholders as well as for Ireland as a location for global financial services, rather than exclusively through the punitive lens of sanctions and penalties.

There is no doubt that the IAF will strengthen the accountability of senior executives. Firstly, it will be easier to identify the individual accountable for an act or omission constituting the misbehaviour as their name will be on the Statement of Responsibilities. At present it can be "a painstaking, complex exercise for investigators to review documents and conduct interviews to determine the precise narrative and evidence trail to assign responsibility"<sup>4</sup>. Secondly, by removing the existing requirement to prove individuals have "participated" in a regulatory breach by the firm and imposing a responsibility duty upon them, it will be easier for the CBI to use their existing powers to sanction individuals.

From the perspective of the IBCB, the most important dimension of the IAF will be the opportunity it presents to focus on preventing misbehaviour or mismanagement rather than punishing it. As Mark Steward, the Director of Enforcement and Market Oversight at the UK Financial Conduct Authority (FCA) has noted in relation to the UK's Senior Managers and Certification Regime (SMCR): "By imposing personal liability, the regime uses self-interest – in this case the senior manager's self-interest in avoiding liability – to avoid the bear pit of enforcement. This is a virtuous circle: what protects senior management from liability also reduces (though cannot guarantee) the risk of non-compliance more

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<sup>4</sup> Seana Cunningham, Director for Enforcement "Individual accountability – our approach" Speech 27 August 2018 available at <https://www.centralbank.ie/news-media/press-releases/individual-accountability-our-approach---seana-cunningham-director-of-enforcement-and-anti-money-laundering>

generally within firms.”<sup>5</sup> Analysis of the Australian equivalent of the IAF is also instructive - it is considered that the introduction of an accountability regime will assist regulated entities in improving their internal processes and make the jobs of board members and individuals performing risk, compliance and internal audit functions easier. When problems arise in these areas, by identifying the persons responsible, it will be easier to “help move towards resolution”.<sup>6</sup>

### **The technical, legal and drafting aspects of the Bill**

The necessary detail and guidance to ensure transparency and the effective operation of the IAF will need to be set out in a combination of secondary legislation and guidance.

We consider that the availability of appropriate guidance, in particular, will be critical to the success of the IAF. The IAF references a number of concepts which, of their very nature, are nebulous and prone to subjectivity. For example, the Conduct Standards within the Bill include reference to honesty, ethics, integrity and acting without bias. Although the existing Fitness & Probity regime refers to these same attributes, it will be important that the CBI provides guidance in relation to how it intends to assess these standards in this context and provides some insight on what ‘good looks like’ based on its supervisory experience in Ireland and insights from regulators in other jurisdictions.

In addition, the Bill references the concept of ‘reasonable steps’. It will be important for the CBI to provide clear guidance on its expectations as to the behaviour of senior managers, the steps it considers reasonable in the circumstances and the type of evidence that will be required to be maintained to demonstrate such steps were taken. A further issue where guidance will be very necessary relates to the issue of ‘prescribed contraventions’, in particular in relation to the consistent reporting of same and associated thresholds.

However, while the provision of guidance will be critical we would also recommend that the CBI adopts an approach similar to that adopted by the FCA in the UK, where it has avoided being overly prescriptive and seeks rather to ensure sufficient flexibility is imbued in the process to accommodate each firm’s particular governance arrangements whilst still ensuring a proper standard of behaviour. This should not lead to uncertainty - to the contrary, it should avoid it. As was observed in the context of the EU’s recent Sustainable Corporate Governance Report “Whenever a statutory provision is added a new layer of detail, lawyers wonder what has been left out and why, thus adding to the uncertainty”<sup>7</sup>. In addition, it

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<sup>5</sup> “Compliance, Culture and Evolving Regulatory Expectations” Speech 26 April 2021 available at <https://www.fca.org.uk/news/speeches/compliance-culture-and-evolving-regulatory-expectations-mark-steward>.

<sup>6</sup> Elizabeth Sheedy and Dominic Canestrari-Soh “Regulating Accountability: An Early Look at the Banking Executive Accountability Regime (BEAR)” available at <https://ssrn.com/abstract=3775275>.

<sup>7</sup> Paul Krüger Andersen, Rolf Skog et al “Response to the Study on Directors’ Duties and Sustainable Corporate Governance by Nordic Company Law Scholars” (2020). *Nordic & European Company Law Working Paper* No. 20-12, available at <https://ssrn.com/abstract=3709762>

is important that this guidance reassures the market that the IAF will be executed in such a way as to enable firms to operate efficiently and to make decisions quickly, where necessary, and in accordance with their responsibilities to all stakeholders. This will also involve allowing sufficient time for the guidance to be embedded into firms' decision-making frameworks before enforcement actions commence and also for clarity and transparency in the communication of the CBI's own decisions and rationales. In this context too, trust is paramount – in this case, trust by those firms subject to the IAF in the CBI's willingness and ability to execute the framework appropriately and in good faith will be paramount in order to reap many of its potential benefits.

A key means of securing this trust will be for the regulator to engage in open, transparent and legitimate consultation with those firms that will be in-scope of the IAF as well as wider industry stakeholders. The IBCB is aware that the successful implementation of comparable regimes in other jurisdictions, most notably the UK, has been characterised by this form of consultation, which indeed has continued post the commencement of the SMCR to ensure that lessons are learned on an ongoing basis via regular industry dialogue.

### **Possible implications/consequences arising from the Bill**

The introduction of an IAF in the UK and Australia is generally perceived as having had a positive impact on culture and conduct within regulated entities.<sup>8</sup> However drafting appropriate legislation (primary and secondary) and guidance is a significant undertaking and the proposed powers and sanctions are significant and far-reaching. In addition to the private and public law rights and obligations relevant in the UK and Australia, the existence of rights protected by the Irish Constitution, and by European and international human rights instruments must be considered. Introducing and implementing an IAF will involve resolving complex legal and practical problems including: avoiding bureaucratic, formulaic and protracted decision-making processes; managing investigatory/disciplinary actions; clarifying the relationship between individual and collective responsibility; unpacking fully the nature of the duty of responsibility; providing guidance to non-executive directors; determining responsibility and accountability for the use of Artificial Intelligence and Machine Learning; undertaking due diligence; managing outsourcing; and embedding new Standards and responsibilities into firms' policies and contracts. It will also be necessary to ensure appropriate consideration to proportionality in the application of the IAF to smaller financial services players to ensure balanced and appropriate

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<sup>8</sup> See PRA, *Evaluation of the Senior Managers and Certification Regime* (December 2020) available at [www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/report/evaluation-of-smcr-2020.pdf?la=en&hash=151E78315E5C50E70A6B8B08AE3D5E93563D0168](http://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/report/evaluation-of-smcr-2020.pdf?la=en&hash=151E78315E5C50E70A6B8B08AE3D5E93563D0168) and UK Finance, *SMCR: Evolution and Reform* (September 2019) available at <https://www.ukfinance.org.uk/system/files/SMCR%20-%20Evolution%20and%20Reform.pdf> for research on the UK IAF and Elizabeth Sheedy and Dominic Canestrari-Soh "Regulating Accountability: An Early Look at the Banking Executive Accountability Regime (BEAR)" available at <https://ssrn.com/abstract=3775275> for research on the Australian IAF.

application. The IBCB looks forward to engaging with the Department of Finance, the CBI and other relevant stakeholders further on these complex issues.

### **Aspects of the IAF of particular interest to the IBCB**

#### ***Restoration of trust***

The business of banking is founded on trust. Much of the future success of the sector will be impacted by trust levels in the sector vis a vis its competitors– the trust of customers, staff, and wider society.

It is clear from the recent IBCB éist surveys of bank customers and stakeholders that despite significant positive progress on internal bank culture, the level of trust in the Irish banking sector continues to be very low. Our survey of public trust in Irish banking published in May 2021<sup>9</sup> measured public sentiment on the basis of four key drivers of trust; integrity, ability, purpose, and dependability. While 42% of those surveyed believe banks will play a critical role in Ireland’s economic recovery from the Pandemic, and respondents expressed faith on specific issues such as staff competency and handling of customer data, it was noteworthy that 43% indicated that their perception of banks has worsened since the Banking Crisis of 2008. The challenge ahead is to positively influence the 43% and convince them that the sector is indeed worthy of their trust. People understand the role of banks; the challenge and opportunity for banks is to display behaviours that convince the public that they can be a positive force in society.

The introduction of individual accountability legislation will rightly result in more focus on the responsibilities and accountabilities of those working in banks, and as a result should improve the perception of dependability within an organisation by making it clear there is an effective system to incentivise key staff to meet their responsibilities and to hold them accountable when they fail to do so.

Furthermore, the introduction of an individual accountability regime which is embraced by the industry will be an important indication of the industry’s willingness to learn the lessons from the past, and commit to participating in a legislative and regulatory framework which places positive behaviour and culture at its heart going forward.

#### ***Holding to account and promoting the right behaviours***

As noted above, much of the focus and debate to date in relation to the introduction of the IAF has been on the importance of holding individuals to account for their behaviour and the penalties which will be available to the regulator when it is proven that such behaviour has been inappropriate. This is understandable in the context of past misbehaviour in Irish financial institutions and the difficulties in

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<sup>9</sup> The Irish Banking Culture Board 2021 *Public Trust in Banking Survey* (2021) available from [www.ibcb.ie](http://www.ibcb.ie)



holding individuals to account in that regard. However, it is also important to focus on the positive aspects of the IAF, and how it can be used to promote and underpin the right behaviours and decision-making via embedding and promoting the regime internally with bank staff. An aspect of this which requires fair and balanced consideration, and which the IBCB will be considering further in the coming period, relates to the internal methods and tools which can be used by firms to both incentivise the right behaviours and penalise inappropriate behaviours.

### ***Conduct Standards***

In the coming period, the IBCB intends to focus in particular on working with our member banks on the specific Conduct Standards referenced within the Bill of honesty, ethics, integrity and acting without bias. These are areas that are core to the IBCB's purpose and on which we have been focussing since our establishment in 2019. In this regard, our work to date on surveying bank staff on their experience of internal culture, promoting good 'Speaking Up' practices and on ethics via our DECIDE decision-making framework and the ethical challenges associated with the use of Artificial Intelligence will provide a good basis for our activities.

The Bill references the internal training obligations on in-scope firms in relation to the Conduct Standards. It will be critical that this training is designed and implemented correctly, with a particular focus on the positive aspects of the regime to engender cross organisational buy-in. We intend to work closely with our member banks and wider stakeholders to ensure the development of training materials which will be useful in this context.

### **Conclusion**

The introduction of the IAF in Ireland is to be welcomed. It offers a real opportunity to assist both the regulated, the regulator and wider Irish society to work cooperatively and positively together in moving forward into a new phase of engagement founded on mutual respect and trust, informed by the lessons from the past. It is in all of our interests that its finalisation and implementation is done correctly and in consultation. Thank you again to the Committee for inviting our comments.