



EUROPEAN CENTRAL BANK
EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 13 September 2022

on the enhancement of individual accountability and governance relating to senior executives in the Irish financial services industry

(CON/2022/32)

Introduction and legal basis

On 15 July 2022 the European Central Bank (ECB) received a request from the Irish Minister for Finance for an opinion on the Central Bank (Individual Accountability Framework) Bill 2022 (hereinafter the ‘draft law’).

The ECB’s competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the third and sixth indents of Article 2(1) of Council Decision 98/415/EC¹, as the draft law relates to the Central Bank of Ireland (CBI), rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets, and the ECB’s tasks concerning the prudential supervision of credit institutions pursuant to Article 127(6) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

- 1.1 The purpose of the draft law is to confer powers on the CBI to strengthen and enhance individual accountability and responsibility of senior executives in the Irish financial services industry.
- 1.2 The draft law arises out of recommendations made in a report by the CBI² to the Minister for Finance on the behaviour and culture of the Irish retail banks. The recommendations in the CBI’s report include that it be given the power under legislation to introduce an enhanced individual accountability framework, that would apply to credit institutions and other regulated financial service providers³ (hereinafter ‘firms’), and would include: (1) a ‘senior executive accountability regime’ which would ensure clearer accountability by placing obligations on firms and senior individuals within them to set out clearly where responsibility and decision-making lies for their business, (2) standards of behaviour for firms and individuals working for those firms, and (3) an enhancement of the existing legislative framework in relation to fit and proper matters, and administrative sanctions.

¹ Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

² See Central Bank of Ireland, Behaviour and Culture of the Irish Retail Banks (July 2018) available on the Central Bank of Ireland’s website at centralbank.ie. The report was prepared by the CBI in collaboration with De Nederlandsche Bank.

³ ‘Regulated financial service provider’ is defined in Section 2(1) of the Central Bank Act 1942.

- 1.3 The draft law introduces a comprehensive set of amendments to three pieces of Irish legislation⁴. In particular, the draft law proposes that the CBI be granted the power to prescribe the senior executive accountability regime by way of regulation. It is intended that the senior executive accountability regime would apply to credit institutions, including significant credit institutions subject to prudential supervision by the ECB within the framework of the Single Supervisory Mechanism (SSM), as well as certain insurance undertakings and investment firms, and incoming third country branches of all three types of entities. The senior executive accountability regime would allow the CBI to prescribe inherent responsibilities which are inseparable from and inherent to the functions of a senior function holder⁵. The CBI would have the power to prescribe ‘allocated responsibilities’ that the firm must allocate to its senior function holders. Firms would have obligations to prepare and maintain statements of responsibilities for each senior function holder, and to establish and maintain a ‘management responsibilities map’ documenting key management and governance arrangements in the firm⁶.
- 1.4 The draft law introduces a legal duty for individuals performing senior functions in firms that are within the scope of the senior executive accountability regime to take any steps that are reasonable in the circumstances to avoid the firm committing or continuing to commit contraventions of laws, including any regulations that may be made by the CBI, in relation to the areas of the business for which they are individually responsible.
- 1.5 Apart from the senior executive accountability regime, the draft law also provides for a regulation-making power that allows the CBI to impose conduct standards for businesses that would apply to all firms⁷. The draft law also provides the CBI with the power to set individual common conduct standards and additional conduct standards of behaviour for certain individuals⁸ and senior executives in firms. Furthermore, the draft law introduces a legal duty requiring that the relevant individuals and senior executives take any steps that are reasonable in the circumstances to ensure that these standards are met.
- 1.6 To ensure individuals are held accountable for their actions, the draft law⁹ breaks the existing ‘participation link’ requiring wrongdoing by a firm to be demonstrated before enforcement action can be taken against those persons involved in the management of the firm who participated in that wrongdoing. In this respect, the draft law¹⁰ proposes a series of amendments, in particular regarding the CBI’s administrative sanctions procedure, to make the changes necessary to break the participation link, and therefore facilitate enhanced individual accountability. The effect of the draft law is that the CBI can pursue individuals directly for their misconduct rather than only where they have participated in a firm’s wrongdoing.

4 See Central Bank Act 1942, Central Bank Reform Act 2010 and Central Bank (Supervision and Enforcement) Act 2013.

5 Persons performing a ‘pre-controlled function’ within the meaning of Section 18 of the Central Bank Reform Act 2010.

6 Part 2, Chapter 1 of the draft law.

7 Part 3 of the draft law.

8 Persons performing a ‘controlled function’ within the meaning of Section 18 of the Central Bank Reform Act 2010.

9 Part 2 of the draft law.

10 Part 4 of the draft law.

- 1.7 The draft law includes a significant number of amendments to investigation and enforcement processes relating to the administrative sanctions procedure and the fitness and probity regime¹¹. The draft law extends the CBI's fit and proper regime to holding companies and individuals in those holding companies to which it did not previously apply. The draft law also includes new requirements in respect of certification by a firm so that it shall not permit a person to perform a controlled function in relation to it unless a certificate of compliance with standards of fitness and probity is in force in relation to the person¹². The draft law also amends existing powers in respect of persons carrying out controlled functions¹³. Additionally, the draft law incorporates amendments relating to fair procedures and the administration of justice more generally.
- 1.8 The draft law provides that a significant institution within the meaning of the SSM Regulation¹⁴ shall not appoint a person: (a) to its management body, or (b) to perform a prescribed 'pre-approval controlled function' in relation to it, unless the CBI has notified the significant institution in writing that the ECB has approved the appointment¹⁵. A pre-approval controlled function is a feature of the national regulatory regime whereby the CBI has a power to prescribe functions as a pre-approval controlled function if the function may allow a person to exercise a "significant influence on the conduct of a regulated financial service provider's affairs"¹⁶. The full list of pre-approval controlled functions in the domestic regime is not limited to members of the management body and key function holders; these functions can be regarded as a subset of the overall list of pre-approval controlled functions¹⁷. Depending on whether a firm is a significant institution or not, either the CBI or ECB may be competent for the purposes of providing prior approval in writing for the appointment of a person to perform a pre-approval controlled function in that firm.
- The draft law provides an additional regulation-making power for the CBI which would allow it to prescribe a pre-approval controlled function if it appears to the CBI that the approval for the appointments to that function is subject to the exclusive competence of the ECB pursuant to Article 4(1)(e) of the SSM Regulation¹⁸.

2. Observations

- 2.1 The ECB strongly welcomes the measures envisaged by the draft law regarding the individual responsibilities of senior persons, including management board members and key function holders. Cultural failings within the banking sector were considered to be a significant contributory factor in

11 Parts 4 and 5 of the draft law.

12 Section 10 of the draft law replacing Section 21 of the Central Bank Reform Act 2010.

13 Section 16 and 27 of the draft law amending Section 26 and 43 of the Central Bank Reform Act 2010.

14 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

15 Section 13 of the draft law replacing section 23A of the Central Bank Reform Act 2010.

16 See Section 22(2) of the Central Bank Reform Act 2010.

17 See the CBI's website for a full list of PCFs: <https://www.centralbank.ie/docs/default-source/regulation/how-we-regulate/fitness-probity/regulated-financial-service-providers/list-of-54-pre-approval-controlled-functions.pdf?sfvrsn=6>.

18 Section 13 of the draft law.

Ireland's financial crisis¹⁹. Weaknesses in risk culture are often considered a root cause of the global financial crisis²⁰. Weaknesses in corporate governance in a number of institutions have contributed to excessive and imprudent risk-taking in the banking sector which has led to the failure of individual institutions and systemic problems in Member States and globally²¹.

- 2.2 Within the SSM, the draft law's measures will support suitability assessments and enable a better and more accurate grounding when material concerns lead to the need for ancillary provisions, negative outcomes or reassessments, in line with the ECB Guide to fit and proper assessments²². The draft law's measures will reinforce the governance framework of credit institutions. The behavioural patterns exhibited by management, as well as the drivers that underpin that behaviour, are elements that determine how robust a credit institution's governance framework is. It is imperative to adequately address unwarranted behaviour by individual senior managers at a credit institution who decide to take on too much risk, putting the immediate interests of a credit institution before its longer-term interests, or even breaking the law. If such acts have no apparent consequence, that will be noticed by staff in the credit institution, leading to the development of a new group norm. The overriding behaviour and culture within a credit institution are thus the product of both individual behaviour and the underlying culture that acts as a breeding ground for that behaviour. It is important for a credit institution to identify and be aware of the structures, beliefs and group dynamics which echo throughout the entire institution and which may pose a risk to its performance and stability. Credit institutions' management bodies should be attentive to these intangible but real underlying drivers of behaviour and, if warranted, acknowledge the need to shift the paradigm before it is too late and negative practices become the norm²³.
- 2.3 Regarding the proposed power to be granted to the CBI to prescribe by regulations a pre-approval controlled function, it is recalled that, in the case of significant credit institutions, the approval of appointments to that function is subject to the exclusive competence of the ECB under Articles 4(1)(e) and 9 of the SSM Regulation. The prudential power to grant and notify the supervisory approval to carry out pre-approval functions is an exclusive competence of the ECB under Articles 4(1)(e) and 9 of the SSM Regulation. The consulting authority is invited to refrain from conferring regulatory authority and tasks on the CBI under Irish law which may impinge upon this exclusive competence. In this respect, Section 23A of the Central Bank Reform Act 2010 should be clarified so that the role of the ECB in respect of the supervision of significant supervised entities is maintained in line with the SSM Regulation.

19 See Commission of Investigation into the Banking Sector in Ireland, *Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland* (2011), as referred to in the Central Bank of Ireland's report, *Behaviour and Culture of the Irish Retail Banks* (July 2018), p. 3.

20 See Financial Stability Board (FSB), *Guidance on Supervisory Interaction with Financial Institutions on Risk Culture* (7 April 2014), p.1, available on the FSB's website at www.fsb.org.

21 See recital 53 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance (OJ L 176, 27.6.2013, p. 338).

22 Available on the ECB's website at www.bankingsupervision.europa.eu

23 See Frank Elderson, Member of the Executive Board and Vice-Chair of the Supervisory Board of the ECB, *Supervising banks' governance: structure, behaviour and culture* (11 June 2022), available on the ECB's website at www.ecb.europa.eu; see also FSB, *Guidance on Supervisory Interaction with Financial Institutions on Risk Culture* (7 April 2014), pp. 3-4; De Nederlandsche Bank (DNB), *Behaviour and culture in the financial sector*, available on DNB's website at www.dnb.nl.

- 2.4 In line with Articles 4 and 9 of the SSM Regulation, where there is a power of the CBI in Irish legislation falling within the tasks conferred on the ECB and underpinning supervisory functions, the ECB would be the authority responsible for the exercise of that power in respect of a significant supervised entity. Consistent with this, the Irish regulations adapting Irish law to the SSM Regulation²⁴ provide that the functions (other than a power to bring and prosecute proceedings for an offence) of the CBI under Irish financial services legislation shall, in addition to being performable by the CBI, be performable by the ECB to the extent only that their performance is necessary for the performance of functions conferred on the ECB by the SSM Regulation and, accordingly, references to the CBI shall, insofar as they relate to a function so conferred, be construed as including references to the ECB. In addition, the ECB understands that the process for making applications to the Irish High Court to, inter alia, confirm, vary or revoke prohibition notices under the applicable legislation²⁵ operates without prejudice to the jurisdiction of the Court of Justice of the European Union so far as concerns the tasks conferred on the ECB and underpinning supervisory functions. It might be useful, for the avoidance of doubt, that this jurisdictional point be explicitly clarified in the Irish regulations adapting Irish law to the SSM Regulation.
- 2.5 Insofar as the draft law aims at implementing Directive 2013/36/EU of the European Parliament and of the Council, it is recalled that, when Member States implement this Directive, the implementing provisions should contain or be accompanied by a reference to this Directive²⁶.

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main, 13 September 2022.



The President of the ECB

Christine LAGARDE

²⁴ See Article 3(1) of the European Union (Single Supervisory Mechanism) Regulations 2014 (S.I. No. 495 of 2014).

²⁵ See sections 45, 45A and 46 of the Central Bank Reform Act 2010, as amended by sections 29-31 of the draft law.

²⁶ See Article 162(4) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).