The re-started SEAR regime: fostering accountability and safeguarding against scapegoating

The year ahead promises to see the first real steps to implement the long heralded Senior Executive Accountability Regime ("SEAR") in Ireland, and in this piece, regulatory experts Joe Gavin and Damien McShane from leading law firm ByrneWallace give an overview of why it has being instituted, what it is likely to involve, and what organisations - and executives - can do to ensure that they are ready when it's imposed.

The proposed Senior Executive Accountability Regime, intended to apply to those occupying senior roles across the financial sector, has had a long gestation. It was originally flagged by the Central Bank of Ireland (the "Central Bank") policy-makers as early as 2017, with the Government planning to publish Heads of a Bill in late 2019. However, much has happened in the period since then and no full-scale overview of the initiative has yet emerged.

What is clear from pronouncements from both regulators and Government policy-makers is that the UK's Senior Managers Regime (technically the Senior Managers and Certification Regime) is considered an attractive model for regulators in Ireland. It is thought that with some additional international influences and amendments to take account of constitutional imperatives, the principles and broad framework of the British regime will heavily influence what ultimately makes its way into law here.

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In Ireland, those holding senior positions in the financial sector, and those advising them, will be aware of the stringent, nuanced, and enforced set of requirements stemming from the Central Bank Reform Act and various implementing regulations, codes, and guidance which come together to form a fairly rigorous set of standards, generally referred to as the PCF/Control Function "Fitness & Probity" Regime. This imposes requirements on both organisations and personnel in terms of ensuring their

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fitness, probity, and soundness, while mandating that Central Bank approval must be obtained prior to appointments to a specified list of key roles. It also provides for Central Bank investigations and penalties in certain circumstances, and may result in persons being barred from occupying certain roles in the financial sector for a significant period.

Compared with what preceded it, the Fitness & Probity Regime is seen as a key tool in overseeing the sector by many Central Bank officials, and its utility has been demonstrated on a number of occasions where investigations have taken place and penalties have been issued. That being so, when considered against the requirements HMT, the PRA and FCA have worked on and which have been imposed in the United Kingdom since 2016, regulators and policy-makers here consider the Central Bank's regulatory armoury could, and should, be added to.

In particular, the Central Bank is proposing that the Fitness & Probity Regime be added to by requiring regulated organisations to draft up responsibility maps which apportion regulated activities between responsibilities retained by the Board; those of each of its senior executives, and those for other persons (where appropriate).

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Going a level further, senior executives will have their own prescribed list of functions which clarify who has responsibility for which activities within the organisation, and thus, in theory at least, issues of unclear or ambiguous responsibility and fault will be very much reduced, leaving the Central Bank able to focus on conduct and prudential issues arising with respect to particular roles.

Together with other proposals, including imposing industry-wide standards for conduct and breaking the "participation link" which requires that wrongdoing is proven on the part of an organisation before wrongdoing may be determined with respect to an individual, it is clear that

Government and regulators wish to make all those working in financial services, and in particular senior management, responsible for conduct in the sector.

As Paschal Donohue summarised: “This will foster a culture of personal accountability, and also safeguard against scapegoating if something goes wrong. Every senior executive will be obliged, in the area for which he or she is responsible, to take such steps as could reasonably be expected to avoid a contravention of financial services legislation.”

When legislation is brought before the Oireachtas and, presumably, passed into law, we expect that regulations, codes, and guidelines will be necessary to bring it into force, as much of the detail will not be a matter for the primary legislation. Organisations can also expect a graduated introduction, with not all sectors being in scope on "Day 1", as was the case in Britain and with the existing Fitness & Probity Regime. To that end, organisations should expect a phased roll-out of the Regime as opposed to a big bang, although compliance will be expected early given that many of the standards considered are expected to be well established in the sector and the Central Bank has signalled its intentions for some time.

Given much of what can be expected from the legislation and associated requirements has been well-flagged, and in many ways marks good practice, proactive management teams can prepare for SEAR by ensuring that they will meet the requirements from the outset and demonstrate their commitment to good governance and stakeholder engagement by seeking to put in place accountability maps, statements of responsibility, etc., now, and revise those as part of a mature operating model when relevant obligations do, ultimately, come into force.

For individuals, preparation is perhaps as important as it is for organisations, and experience from across the Irish Sea shows that demarcation of responsibilities is not always an easy or uncontested process. Indeed, issues of remuneration, professional reputation, and recognition have become associated with the Senior Manager Regime, with the effect that managers and their employers will need to work carefully to ensure that responsibilities are allocated fairly and rewarded appropriately. Individuals should consider taking steps now to ensure that is the case, as opposed to facing difficult conversations in some months’ time when the opportunity to revise or reconsider allocation of responsibility is constrained by an approaching regulatory deadline. This is especially the case where individuals are appointed to new roles, take on additional tasks, or are in "acting up" arrangements, and an opportunity arises to document responsibilities taken on.

All in all, SEAR promises to produce much work within the sector, and perhaps more so than when the Fitness and Probity was imposed in its current form nearly 10 years ago. If this results in demonstrable progress in achieving the Central Bank and Government’s role in terms of driving cultural improvement across the sector, it may well be worth the effort involved. Either way, the initiative promises to raise some important issues for organisations and their personnel, and the delay in implementation should be taken as an opportunity to tackle awkward questions by all.

For further information on the consultation process, or for general advice on investment funds, contact partners Joe Gavin or Damien McShane the ByrneWallace Financial Services team.