



Paschal Donohoe, TD
Minister for Finance

By email to minister@finance.gov.ie

17 December 2021

Re: General Scheme of the Central Bank (Individual Accountability Framework) Bill 2021 (the “General Scheme”)

Dear Minister,

The Society noted publication of the General Scheme (incorporating the Individual Accountability Regime (“IAR”)) in July of this year. While the Society is supportive of the IAR and the benefit from higher standards of behaviour within financial service firms, we are concerned that conflict could arise between the IAR Conduct Standards and legal professional privilege (“LPP”).

Potential Impact on LPP

Under the IAR, common conduct standards are proposed to be imposed on those performing ‘Controlled Functions’ and additional conduct standards on those performing senior roles (such as PCFs¹ and CF1s²).

In some organisations, the roles of General Counsel/Head of Legal are designated as CF1s. Under the IAR as currently proposed, such a designation would give rise to conduct standards (and, in certain instances, additional conduct standards) being imposed on the General Counsel/Head of Legal.

The proposed conduct standards include disclosure and reporting obligations which are the focus of our concern. In particular, while we assume the intention behind the General Scheme is not to extend disclosure and reporting requirements to privileged information, this is not clear from the wording of the General Scheme.

Disclosure Requirement

The statement of the conduct standards (set out in an explanatory note to Head 7) includes the following:

“Cooperating as appropriate with the Central Bank and other regulators or authorities and dealing with them in good faith and without delay, including, without limitation, and by reference to any guidelines published:

¹ PCF is a pre-approval controlled function within the Central Bank’s fitness & probity regime.

² CF is a controlled function within the above regime and CF1s are individuals with the ability to exercise a significant influence on the conduct of the affairs of a regulated financial service provider.

...

(iii) by disclosing all relevant information or records when requested or required to do so by the Central Bank and other regulators or authorities and doing so in an open and timely manner”.

While individuals and organisations which are subject to the IAR should, of course, deal with regulators and other authorities in good faith, there is concern around how such a broad disclosure requirement would interact with LPP in various circumstances, which include where a General Counsel/Head of Legal is providing legal advice or where litigation privilege exists.

Reporting Requirement

The following references are relevant:

1. **Head 4** – describes “*a regulation-making power allowing the Central Bank to impose obligations on regulated financial service providers (RFSPs), or designated classes of RFSPs, with respect to the establishment, management, monitoring and reporting of governance and management arrangements of RFSPs including provisions allowing the Central Bank to provide for inherent, prescribed and other responsibilities for persons in senior executive functions (SEFs), statements of responsibilities for SEFs, and management responsibility maps for in-scope RFSPs*”;
2. **Explanatory Note to Head 10** – refers to the power of the Central Bank to make Regulations “*specifying requirements for firms in relation to the reporting of related information to the Central Bank*”.

It will be important to ensure that the scope of the Central Bank’s regulation-making power is crafted in such a manner to ensure no interference with LPP.

Interaction with other provisions

We note that Head 33 contemplates the introduction of a ‘safe harbour’ for the voluntary disclosure of privileged material to the Central Bank in certain circumstances, without such limited disclosure constituting a waiver of privilege vis-à-vis third parties generally (“the **Safe Harbour Protection**”). However, it remains open to such persons to make their own determination as to whether they wish to disclose privileged material and does not compel such disclosure. In this way, the existence of the Safe Harbour Protection does not assist in the non-disclosure of privileged information in the first instance.

We further note that section 33AK of the Central Bank Act 1942 restricts the disclosure of ‘confidential information’ by prescribed individuals. It could be argued (particularly having regard to the explanatory note to Head 33) that Section 33AK may prevent disclosure, by the Central Bank, of privileged material to third parties in certain circumstances, such privileged information having previously been disclosed to the Central Bank. As such, the existence of Section 33AK does not assist in the non-disclosure of privileged information in the first instance.

The Law Society does not believe that the above provisions are sufficient for the purposes of protecting LPP.

The UK Position

We have discussed the General Scheme with representatives of the Law Society of England & Wales who made representations to the Financial Conduct Authority when equivalent provisions (the Senior Managers & Certification Regime) were introduced there.

The Financial Services Markets Act, 2000 (“**FSMA**”) which underpins the UK regime provides specific statutory protection in this area as follows:

413 Protected items.

- (1) *A person may not be required under this Act to produce, disclose or permit the inspection of protected items.*
- (2) *“Protected items” means—*
 - (a) *communications between a professional legal adviser and his client or any person representing his client which fall within subsection (3);*
 - (b) *communications between a professional legal adviser, his client or any person representing his client and any other person which fall within subsection (3) (as a result of paragraph (b) of that subsection);*
 - (c) *items which—*
 - (i) *are enclosed with, or referred to in, such communications;*
 - (ii) *fall within subsection (3); and*
 - (iii) *are in the possession of a person entitled to possession of them.*
- (3) *A communication or item falls within this subsection if it is made—*
 - (a) *in connection with the giving of legal advice to the client; or*
 - (b) *in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings.*
- (4) *A communication or item is not a protected item if it is held with the intention of furthering a criminal purpose.*

In an Irish context, the precise wording of any such legislative provision would need to align with Irish law on LPP.

Conclusion

Given the above concerns, we would ask that the Bill would provide clarity around the precise scope of both the disclosure and reporting requirements such that neither can impede the protection of LPP in any way.

We will be glad to discuss these matters further if that would be helpful.

Yours sincerely,



Mary Keane
Director General

Cc: Paul Gallagher SC, Attorney General, by email to info@aq.irlgov.ie