



Financial services conduct supervision:

What to expect in four key EU jurisdictions

Winter 2020

As global financial services firms, AFME members already have relationships with regulators across many jurisdictions. From a compliance and conduct perspective, the management of these relationships generally falls to you, the firms' Compliance officers.

Navigating the front line of those relationships, you will know that Brexit means forging new regulator relationships or deepening existing ones. Either way, you can expect to encounter new ways of interacting, new expectations and an additional layer of scrutiny.

Notwithstanding some standardisation derived from EU law, national regulators retain their own priorities and expectations of the firms they supervise. Conduct supervision as a term does not benefit from a neat definition. Instead the concept has largely evolved out of the behaviours, expectations and culture of each regulator, as well as the market that it supervises. This makes it more difficult for those in Compliance to grapple with their supervisory priorities and meet the expectations of regulators.

Working closely with Arthur Cox in Ireland, this publication considers the approach to conduct supervision taken by financial regulators in France, Germany, Ireland and the Netherlands. In respect of each, it provides at-a-glance answers to the following questions:

- > Who is the financial services conduct supervisor?
- > How does that regulator supervise?
- > What specific approach is taken to the supervision of:
 - market misconduct;
 - treatment of customers;
 - AML;
 - operational resilience;
 - individuals; and
 - governance and culture?
- > What are their current supervisory priorities?

We have deliberately chosen to focus on conduct rather than prudential supervision (particularly where one regulator supervises both) and on supervision by national competent authorities, rather than the ECB. The review is intended to highlight key issues rather than to provide comprehensive advice. If you have any particular questions, please do not hesitate to contact any of the authors of this report.

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Overview

The consistent themes defining conduct supervision in all jurisdictions surveyed in this report are the fair treatment of customers and the proper functioning of financial markets. These underpin the purpose of the conduct supervisor and unify the outcomes that each seeks to deliver.

- > In Ireland, the organisational structure of the CBI comprises two key pillars, Prudential Regulation and Financial Conduct, with the latter comprising four distinct Directorates: Consumer Protection, Securities and Markets Supervision, Policy and Risk and Enforcement and AML.
- > Similarly, the French Monetary and Financial Code charges the AMF with responsibility for overseeing the protection of savings invested in financial instruments, the information to investors and the proper functioning of financial markets.
- > The Dutch regulator is “problem-oriented”. Dutch law expresses conduct supervision in terms of outcomes, describing it as something aimed at securing orderly and transparent financial market processes, integrity in relations between market parties and due care in the provision of services to clients.
- > In Germany, the concept is articulated as an obligation imposed upon investment firms to act honestly, fairly and professionally in accordance with the best interests of their clients and to provide a fair, orderly and transparent financial market when providing investment services to clients.

Proportionality and harm

- > Regulators in all jurisdictions apply a proportionality principle to decisions about where and how to focus their supervisory efforts. Whilst tending to base this on the ECB significance criteria, proportionality is not precisely defined and will differ between regulators.
- > In the Netherlands, the regulator applies its risk-based and problem-oriented approach by continuously analysing problems market-wide that may pose the greatest risks, and focusing on the most harmful behaviour rather than only non-compliant behaviour.
- > To determine proportionality, the German regulator focuses on a firm’s characteristics (including size, complexity and risk profile) and its interconnectedness with other firms. The German regulator also monitors and takes into account market-wide problems.
- > In general, there is if anything a gradual movement away from a firm-specific analysis towards a market-wide problem-oriented approach, following the UK FCA’s preference for thematic reviews and market studies. The Irish regulator is a good example: whilst it still conducts firm-specific assessments, it has started to develop a wholesale financial market risk-based supervisory framework.

Co-operation with the regulator

- > In all jurisdictions, firms must co-operate with regulators in satisfying requests for information made under their supervisory powers.
- > Beyond this, there is a general but undocumented expectation that firms should engage with their regulators in a transparent, open and co-operative way. The extent to which this is a formal regulatory requirement, however, varies depending on the approach to regulation adopted by the relevant regulator.
- > None of the jurisdictions surveyed have an equivalent to FCA Principle 11. Indeed, the broad regulatory expectations encapsulated in all of the FCA’s Principles for Business are, at present, a uniquely British concept.



The fair treatment of customers and the proper functioning of financial markets consistently define conduct supervision in all of the surveyed jurisdictions.”



Culture and governance

- > The regulators' approach in this space is substantially influenced by whether they take a rules- or principles-based approach.
- > A rules-based approach to supervision addresses culture and governance as a symptom or by-product of regulatory concerns and specific rule breaches (more typical of the French and German regulators), whilst a more principles- or risk-based regulatory approach identifies culture and governance as itself the root cause of failure to meet regulatory standards (as in the Netherlands, and increasingly in Ireland, although the CBI states that it applies a "risk-based" approach to supervision).
- > These differences play out in the regulators' approaches to personal non-regulatory-related misconduct. The German regulator does not supervise in this area unless the misconduct gives rise to regulatory concerns regarding the firm (e.g. the integrity of the firm's management). Ireland currently addresses the issue as part of its fitness and probity assessments, though this may change with the introduction of the SEAR (its individual accountability regime).

Hot topics

- > **AML.** In all four jurisdictions, AML is a key regulatory priority. In Germany, there is currently a focus on customer due diligence, the position and powers of MLROs and risks associated with correspondent banking relationships. The CBI takes a risk-based approach like that employed by the FCA, ensuring that firms with a higher level of risk of exposure to AML and CTF activity are supervised more closely.
- > **Market misconduct.** Unsurprisingly, the four conduct supervisors agree that this is another area of focus. Market misconduct is highlighted in the CBI's Strategic Plan 2019-2021 and the BaFin is also reported to be active here, consulting on an update of the issuer guidelines regarding market misconduct under MAR and proposing to raise the threshold for directors' dealings to €20,000.
- > **MiFID II.** The implementation of MiFID II is another common priority. Led largely by ESMA, national supervisors are assessing their markets for specific areas of MiFID II whose implementation requires improvement. The AMF recently reported on its first "mystery" campaigns, conducted within French major retail banks providing investment advice. BaFin has also tasked the auditing firms to put a special focus on MiFID II implementation in the upcoming audits.
- > **Sustainability.** Finally, sustainability is an increasingly important feature of conduct supervision, with the German, French and Dutch regulators highlighting this as an area of growing work and investigation.

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Sustainability is an increasingly important feature of conduct supervision.”



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The Netherlands

Who supervises the conduct of regulated financial services firms in your jurisdiction?

The financial services conduct supervisor in the Netherlands is the Authority for the Financial Markets (*Autoriteit Financiële Markten*, “AFM”).

Do any third parties assist with supervision?

There are several self-regulatory organisations that supervise financial services. The Foundation for Banking Ethics Enforcement (*Stichting Tuchtrect Banken*) enforces the ethical Code of Conduct for the Dutch banking industry. The DSI Foundation (*Stichting DSI*) enforces self-regulation in the financial sector by screening new employees, certifying personnel and regularly reviewing certified individuals. For insurers, the Foundation for the assessment of insurers (*Stichting toetsing verzekeraars*) periodically assesses the self-regulation that insurers have agreed on and certifies those insurers that pass this assessment. The Financial Services Disciplinary Board (Insurance) (*Tuchtraad Financiële Dienstverlening (Assurantiën)*) assesses the behaviour of insurers in light of, *inter alia*, self-regulation. Complaints about financial services providers can be filed with the Financial Services Complaints Tribunal (*Klachteninstituut Financiële Dienstverlening*, “Kifid”), which is an independent tribunal that handles complaints about financial products or services. Consumers can file any complaint; SME businesses can file complaints regarding corporate financing and interest rate derivatives. Kifid will resolve complaints by either mediation or a binding decision by Kifid’s arbitration board.

In the Netherlands, there is no single regulator that covers both conduct and prudential supervision areas. The Dutch Central Bank (*De Nederlandsche Bank*, “DNB”) is the prudential supervisor, whilst the AFM is the conduct supervisor.

Does the regulator in charge of conduct supervision operate a working definition of ‘conduct’ or ‘conduct risk’?

According to Article 1:25 of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, “FSA”), conduct supervision is aimed at orderly and transparent financial market processes, integrity in relations between market parties and due care in the provision of services to clients.

Does the conduct regulator in your jurisdiction produce a business plan or other outline of its key concerns and priorities?

The AFM published a document on its supervisory approach in 2017, for which it notes that this document should be considered a snapshot, as the way in which it supervises is constantly evolving. Every year, the AFM also publishes an agenda, in which it shows which supervisory activities it undertakes, how its supervisory capacity is used, and which areas it will focus on during the coming year. Additionally, the AFM also issues Q&As on certain topics (for example on the application of MiFID II and AIFMD, but also on public offerings), sometimes together with DNB. Further, in its annual report, the AFM provides for an update as to the target areas it has identified.



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The Netherlands

How does your regulator supervise?

Do firms have an individual supervisor or supervision team allocated to them?

The AFM uses a risk-based and problem-oriented approach, by continuously analysing the problems in the markets that may pose the greatest risks. The AFM focuses mostly on harmful behaviour instead of only non-compliant behaviour. In order to effectively address these risks, the AFM uses a project-based organisational structure. For each selected risk, a project team is established with the aim of mitigating that risk. Employees are assigned to various project teams according to how many employees and what expertise is needed.

In addition to this organisational structure, the AFM also uses two separate departments to carry out its ongoing activities. One department, *inter alia*, processes signals from third parties (which may come from within the market, but also from consumers), which may serve as a basis for supervisory activity. The other department is an account department for the larger firms, and its objectives include: (i) getting to know the larger firms well, so that the project teams know how they can influence these organisations best; and (ii) observing and assessing the most important risk signals from these organisations. Larger firms typically have a primary contact within the AFM who handles the contact with the regulated entity.

Do firms have regular meetings with their supervisor?

This largely depends on the nature, size and scope of activities of the firm. Meetings between the regulator and the firm will take place when the supervisor carries out an investigation or when they want to instil certain behaviour by means of informal supervision.



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The Netherlands

What level of communication do you typically see/expect from a firm towards its supervisor?

The relationship between the AFM and the firm starts with the application for a licence. Firms must provide information at the point of application, but also during the ongoing supervision that follows after firms have received a licence. Firms will provide information because this is required by law or because the supervisor requests it. In addition, the AFM generally appreciates and expects an open and transparent relationship with firms under its supervision, and that firms pro-actively inform the AFM even if there is no strict requirement to do so.

What reports and notifications are firms expected to make to their supervisor?

Most of the reports and notifications that a firm is expected to make to the AFM are based on EU law. Other notable notification requirements are:

- > Reports of misconduct and incidents. Misconduct and incidents are defined as acts or events that pose a significant threat to the ethical business conduct of a financial undertaking. Notifications that deal with, *inter alia*, incidents that affect the reliability of management board or supervisory board members, or incidents that affect the firm's sound and controlled business operations, are mandatory, but it is also possible to make voluntary reports (which can be made anonymously).
- > Notification of substantial shareholding or (gross) short position in listed companies. A substantial shareholding amounts to 3% or more (instead of 5% under EU law). Lowering the threshold to 2% is currently under discussion.

Are there any requirements as to the timing of the report/notification?

The timing of a notification of a substantial shareholding or (gross) short position is 'without delay', or 'immediately'. Misconduct or incident reporting should be done immediately after the misconduct or incident has been detected.

In the UK, firms are subject to a very broad requirement to deal with their regulator in an open and co-operative way. Is there a similar requirement in your jurisdiction?

There is no such broad requirement in the Netherlands. As mentioned above, firms have to comply with certain notification requirements and they are generally expected to be transparent and co-operative in the context of the supervisory relationship. In addition, there is a requirement to co-operate with the AFM in every way that the AFM can reasonably demand within the exercise of its supervisory powers, i.e. if the AFM were to request specific information or access to the firm's premises, the firm would have to comply with such request within the reasonable term prescribed by the AFM.

Is the supervisory process tailored depending on the size/impact of the firm?

Larger firms are more closely supervised than smaller firms. Generally, however, all firms are supervised in the same way, which is based on addressing the greatest risks that follow from market analysis and third-party signals.

Have there been any recent changes to your supervisor's powers in respect of financial services firms?

- > On 1 July 2018, the Act on Transparent Supervision on the Financial Markets (*Wet transparant toezicht financiële markten*) entered into force. This Act has extended the possibility for the AFM to publish sanctions and measures.
- > On 11 August 2016, the Act implementing the Market Abuse Regulation and Directive (*Wet implementatie verordening en richtlijn marktmisbruik*) entered into force. This Act, *inter alia*, increased the maximum amount of administrative penalties from €4m to €5m.



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The Netherlands

Supervisory approach

Market misconduct

In the Netherlands, the Market Abuse Regulation (“MAR”) is the legislative basis for the market misconduct supervision of the AFM. AFM supervision is based on the MAR, and also takes into account delegated regulations and ESMA Guidelines.

Treatment of customers

Pursuant to the FSA, due care must be observed when dealing with clients, which includes, *inter alia*, information provision requirements, know-your-customer requirements, and general duty of care provisions with regard to customers. The AFM has published several guidelines with regard to compliance with those requirements. In its supervision, the AFM also takes into account that consumers’ decisions are not always fully rational. This means that when a consumer is placed in an environment in which he or she chooses a certain product, the AFM supervises firms in such a way that that environment is not steering the consumer towards a choice that runs counter to the interests of the consumer. The AFM also supervises firms so that they always put the interest of the consumer in first place and are not only focused on their own profits.

AML

The Dutch anti-money laundering legislation is set out in the Money Laundering and Terrorist Financing Prevention Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*, “Wwft”). In the Wwft, the fourth EU anti-money laundering Directive is implemented. The AFM has published guidelines regarding the requirements that follow from the Wwft.



The Netherlands

Operational resilience

When applying for a licence, a firm must provide the AFM with a sustainable business model. In addition, firms must have in place sound and controlled business operations.

Under the FSA, outsourcing may take place as long as the party to whom the activity is outsourced also complies with the legislation that is applicable to the party that does the outsourcing.

The AFM is focusing more on care in the use of customer data, the robustness of value chains that are becoming more complex, and the management of risks in IT-intensive business operations.

Individuals

Is there a specific approvals process for individuals?

There is a prior approval process for individuals who are to become management board members or supervisory board members of a firm. These individuals should comply with suitability and integrity requirements, which are ongoing requirements. In addition, the management board members of qualifying shareholders (i.e. shareholders that hold in excess of 10% of the shares or voting rights) in certain types of firms (including investment firms) must be screened for integrity and reputation.

Are individuals registered with the regulator or approved by other means (either by the regulator or by the firm)?

Management board members and supervisory board members within a firm are approved by the AFM, but they are not recorded in a register held by the AFM. When a management board member or supervisory board member is approved, he or she may be appointed and will need to be recorded in the trade register held by the Chamber of Commerce.

To what extent does the relevant regulator supervise the fitness and propriety and/or conduct of individuals working in financial services firms?

The AFM generally assesses the suitability and integrity of management board members and supervisory board members only, prior to appointment. However, as suitability and integrity are ongoing requirements, reassessments may take place once there are changes in facts or circumstances that may affect an individual's suitability and integrity. Changes in antecedents (i.e. events that may be considered an offence and will affect the suitability and integrity of an individual) must be notified to the AFM. The AFM's supervision is based on the FSA and the Decree on Conduct of Business Supervision of Financial Undertakings under the FSA (*Besluit Gedragstoezicht financiële ondernemingen Wft*), in which EU legislation has been implemented, but also on its own policy rules (e.g. Policy Rule on Suitability 2012 (*Beleidsregel geschiktheid 2012*)).

Is your conduct regulator considering introducing a personal accountability regime?

Currently, no such regime is being considered. Individuals who ordered an offence or were de facto in charge of the prohibited conduct can be held liable and are as such subject to administrative and criminal sanctions. A sanction may be imposed on a person who is de facto in charge, if such person had the power and was reasonably required to take measures to prevent the breach of law, but failed to take such measures, thus knowingly accepting the substantial chance that the prohibited conduct would occur.



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The Netherlands

Governance and culture

Do your supervisors assess the behaviours and culture within individual firms?

The AFM conducts supervisory investigations at firms in the financial sector on behaviour and culture, particularly as culture and behaviour can be a root cause why the customers' interests are not given a central priority. These investigations are conducted by means of interviews with the firm's employees, reviewing documentation (e.g. board minutes), and holding (online) surveys. Investigation can be carried out at individual firms or thematically focused on a group of firms. Based on these observations, the AFM will report back to the firm on areas for improvement. In case of a thematic investigation, the AFM is likely to issue a public report including best practices.

To what extent do regulators in your jurisdiction consider the personal misconduct of individuals as part of their supervisory remit?

If the personal misconduct is part of a firm's culture, it would be included in the behaviour and culture assessment of a firm. However, if it is not related to this, the AFM has not explicitly stated that it is part of their supervisory remit. The AFM does, however, supervise a firm's sound and controlled business operations, including the prevention of actions that run counter to the principles of unwritten law, that may seriously harm the confidence in the firm or the financial markets. Socially improper behaviour, including personal misconduct, can be addressed in this way. If the person concerned is a management board or supervisory board member, the AFM may also possibly reassess their suitability and integrity.

To what extent do your regulators assess remuneration and recognition practices to ensure they drive positive behaviours within firms?

Firms are required to have a sound remuneration policy. The AFM supervision is geared towards making sure that the remuneration policy of financial firms does not give the wrong incentives, but instead ensures that clients are treated with care. The AFM also has a legislative basis upon which they can conduct supervision, which is the Remuneration Policy Financial Enterprises Act (*Wet beloningsbeleid financiële ondernemingen*, "Wbfo"). The Netherlands has strict remuneration rules, including a 20% bonus cap.

Supervisory priorities

What aspects of MiFID II are the focus of post-implementation review work in your jurisdiction?

The AFM has recently evaluated the implementation of MiFID II in the Netherlands, together with ESMA. They have concluded that cost information is not fully transparently presented by investment firms, so that it is hard to compare this information properly. With regard to product development, investment firms have not always sufficiently identified the target group and distribution strategy, so unsuitable products may be offered to clients. In capital markets, transparency could also be further improved. The AFM has urged the relevant parties to implement the necessary improvements.



“The AFM conducts supervisory investigations on behaviour and culture.”

The Netherlands

Does your regulator have any additional current supervisory priorities?

- 1) Sustainability in the financial sector. As this is becoming more important and can create confusion or even misinformation for consumers, the AFM is planning to investigate the provision of information on sustainable investment products and will enforce legislation in case the information is misleading or incomplete.
- 2) The digitisation of the financial sector. Technological advances in the financial sector influence the market greatly and also influence the products in those markets. The AFM wants to prevent irresponsible use of technology and data. However, the AFM also intends to use technological progress to improve its supervisory activities.
- 3) Political uncertainty, for example due to Brexit. The AFM helps parties that are new to the Dutch market, analyses the effects and impact of Brexit on its supervisory tasks, and informs supervised firms and consumers about the effects of Brexit.

Have you seen any recent trends/changes in terms of the way in which financial services firms are supervised?

One of the focuses of the AFM is the prevention of money laundering, the financing of terrorism, and other financial economic crimes. It is conducting more enhanced supervision and scrutiny in this respect and has also intensified suitability and integrity screening of individuals within firms.



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The AFM is conducting more enhanced supervision and scrutiny of firms regarding anti-money laundering and the financing of terrorism.”





France



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Who supervises the conduct of regulated financial services firms in your jurisdiction?

The financial services conduct supervisor in France is the *Autorité des marchés financiers* (“**AMF**”). It supervises French investment firms from a conduct (as opposed to prudential) perspective. The *Autorité de contrôle prudentiel et de résolution* (“**ACPR**”) is the conduct supervisor of credit institutions (and not the AMF), and its remit includes supervising how a credit institution carries out its duties to its clients.

The ACPR is also the prudential regulator for investment firms and credit institutions¹ (including those firms whose permissions cover both the provision of banking services and investment services, i.e. *établissements de crédit – prestataires de services d'investissement*)².

The supervision of anti-money laundering and countering financing of terrorism (“**AML-CFT**”) obligations falls to the ACPR in respect of both investment firms and credit institutions.

Do any third parties assist with supervision?

Certain French industry associations are entitled by French laws and regulations to adopt binding codes of conduct, for example the *Règlement de déontologie des OPCVM et de la gestion individualisée sous mandat* (ethical code for UCITS and portfolio management).

Decisions of the *Commission des sanctions de l'AMF* (AMF sanction commission) and decisions of the *Commission des sanctions de l'ACPR* (ACPR sanction committee) may be appealed before the French *Conseil d'Etat* (i.e. highest degree of appeal of French administrative courts).

Where one regulator covers both conduct and prudential supervision, how do they define the boundary between these?

For investment firms, there is no single regulator: the AMF handles conduct supervision and the ACPR handles prudential supervision and AML-CFT supervision.

For credit institutions, the ACPR is the single supervisor for both conduct and prudential supervision (subject to the European Central Bank's role – see footnote 1).

Article L. 621-1 of the French Monetary and Financial Code (“**FMFC**”) provides that the AMF oversees the protection of savings invested in financial instruments and assets which give rise to an offer to the public or to admission to trading on a regulated market, and monitors information to investors and the proper functioning of markets in the financial instruments and assets mentioned above.

The role of the ACPR is to maintain the stability of the financial system and protect clients, policy holders, adherents and beneficiaries of the persons under its supervision. Article L. 612-1 FMFC further specifies that the ACPR is responsible for (i) exercising permanent monitoring of the financial situation and operating conditions of the firms it supervises and controlling their compliance with solvency requirements and (ii) monitoring compliance by firms it supervises with rules relating to EU-derived client protection laws and regulations, codes of conduct, good practices, etc.

The body in charge of overall supervision at the ACPR is the *Collège de supervision* (supervisory board) and the *Secrétariat général* (general secretariat) is the body in charge of conducting controls (please also refer to our answer to ‘Do firms have an individual supervisor?’ below).



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¹ French credit institutions are also supervised by the European Central Bank pursuant to 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.

² Please note that any reference herein to “investment firms” refers to both French investment firms and French credit institutions authorised to provide investment services.

France

Does the regulator in charge of conduct supervision operate a working definition of 'conduct' or 'conduct risk'?

As conduct supervisor of investment firms, the AMF oversees the protection of savings invested in financial instruments, the information to investors and the proper functioning of financial markets. It does not use a working definition of conduct risk.

As conduct supervisor of credit institutions (as well as being the prudential regulator for both categories of firm), the ACPR does not have a definition of conduct risk that describes the conduct supervision aspect of its role.

Does the conduct regulator in your jurisdiction produce a business plan or other outline of its key concerns and priorities?

Every year, the AMF publishes its annual report. This reflects macro developments in the EU financial regulatory landscape and provides an overview of the AMF's co-operation with the EU and its NCAs, rather than detailing its plan of work and priorities for the year to come.

The AMF published a document on its medium-term strategy for 2018–2022 called “#Supervision2022”, introducing its main areas of focus for this period. These are (i) its commitment to a strong, more integrated and more competitive EU27, (ii) rethinking its supervision and intervention tools, (iii) assisting market participants, promoting innovation and committing to the attractiveness of the markets and the financial centre and (iv) implementing a modern and more agile AMF. This strategy plan is complemented each year by the AMF's annual report.

Every year, the ACPR publishes a report of its activities which sets out its priorities. For 2019, ACPR's focus is on (i) firms' implementation of their obligations related to asset freeze measures, (ii) ensuring an EU harmonised supervision of firms providing their services on a cross-border basis (as part of the capital market union) and (iii) climate change risks.



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The AMF published a document on its medium-term strategy for 2018–2022 called “#Supervision2022”, introducing its main areas of focus for this period. ”





Finally, both the AMF and the ACPR regularly issue positions or recommendations on specific topics such as MiFID II, AML-CFT, etc.

How does the regulator supervise?

Do firms have an individual supervisor or supervision team allocated to them?

The ACPR *Collège de supervision* oversees supervision of firms under control of the ACPR. The *Secrétariat général de l'ACPR* (ACPR general secretariat) is in charge of conducting permanent controls (*contrôles sur pièces*) or on-site controls (*contrôles sur place*).

To conduct *contrôles sur pièces*, the *Secrétariat général* analyses documentary information that firms are required to provide to the ACPR on a regular basis, such as internal control reports or AML-CFT questionnaires. Also, the *Secrétariat général* analyses information collected during regular discussions and meetings with the management of firms.

Contrôles sur place consist of conducting investigations by visiting the premises of the relevant firm and carrying out thematic reviews (such as in relation to AML-CFT), through checks of the overall financial situation of the firm or of the implementation of internal control arrangements.

The AMF uses several tools to conduct its supervision, from permanent follow-up to specific controls. Permanent follow-up involves the continuous review of documents submitted to the AMF. Follow-up actions are conducted by the AMF department in charge of supervising firms, which acts either on an individual firm basis (following specific alerts received) or on a thematic multi-firm basis (for example, to ensure the correct implementation of new regulations).

The AMF keeps an active watch on financial offers and savings products offered to individuals as well as on firms' marketing practices. The AMF also conducts continuous monitoring of the firms under its supervision through information provided to the AMF on a regular basis (annual control and compliance reports, reporting data, declarations, etc.) or upon request (requests for additional information, interviews, etc.). The AMF may also receive information on the activities of the firms it supervises through other means such as whistle-blowers, exchange of information with other regulators in France or abroad, queries addressed by investors or professionals to the AMF through its website, etc.

The AMF's specific controls consist of on-site controls/investigations. These reviews are conducted by the AMF *Direction des contrôles* which acts either on a regular basis following a risk-based approach or on a thematic basis through the control of a sample of market participants (usually five for each theme). The thematic controls aim to provide the AMF with a better understanding of a given practice or activity, to assess the implementation of rules and regulations, or to examine potential risks for investors or markets.

Do firms have regular meetings with their supervisor?

Meetings with the ACPR and the AMF usually occur (i) before a firm seeks to implement change that would require prior authorisation from the ACPR or the AMF or (ii) as part of the ACPR's and the AMF's supervisory or communication duties.

The ACPR also organises annual meetings with management of firms to express its main areas of focus in terms of AML-CFT. More generally, the ACPR has issued a document in which it expresses its missions and values. One of the ACPR's values is to maintain regular discussions with firms it regulates (both in its prudential and conduct supervisory capacity). Such discussions and exchanges may take



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The AMF has announced that it intends to improve communication through feedback of the lessons learned from its supervisory actions or through discussion with executives and business line managers.

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France

the form of: (i) active communications with market participants to explain the ACPR's positions or recommendations (e.g. with respect to client protection); or (ii) technical and operational relationships with the management of firms. Such exchanges aim to complement the prescriptive approach of the regulation with a forward-looking approach incorporating the ACPR's judgement and policy.

Recently, the AMF has announced that it intends to improve communication through feedback of the lessons learned from its supervisory actions or through discussion with executives and business line managers. This should strengthen the AMF's understanding of both regulatory and business-related issues. Also, the AMF announced that it will focus on new formats of communication (such as webinars, newsletters on operational issues published on an ongoing basis, use of social media, etc.) to reach a wider audience.

What level of communication do you typically see/expect from a firm towards its supervisor?

A proactive and transparent relationship on the part of the firm is always welcomed by French regulators. The relationship between French regulators and firms usually starts with the application for a licence. Firms are required to provide information upon application for a licence, and also after having received such licence if there is any change to the information initially provided (e.g. a change to the firm's programme of operations) or as part of the ongoing supervision by French regulators. Communication is continuously maintained between the firms and the regulators since firms are required to report any upcoming event to the regulators. For example, a change in the firm's shareholding which does not result in (i) the acquisition of the effective management control or (ii) the acquisition of shareholdings above the thresholds of one tenth, one fifth or one third of the voting rights, would require the firm to report to the ACPR. Firms may also be required to provide information pursuant to French laws and regulations or upon request from French regulators.





What reports and notifications are firms expected to make to their supervisor?

Most of the reports and notifications that a firm is expected to make to the ACPR and the AMF stem from EU law. In addition, we note firms are required to:

- > submit annually their internal control and risk reports to the ACPR;
- > respond to AML-CFT questionnaires;
- > in a takeover bid, notify the AMF (a) of their positions in targeted securities on a daily basis and as long as the relevant thresholds are exceeded, and/or (b) their intentions with regard to these securities (subject to specific conditions and thresholds) on a daily basis/ immediately (as the case may be); and
- > report various information to the AMF about senior managers that the firm has approved.

Have there been any recent changes to your supervisor's powers in respect of financial services firms?

The French law entitled “**PACTE**”, which was adopted on 22 May 2019, extended the supervisory role of the AMF with respect to sustainable finance. The AMF is now empowered to oversee the quality of information provided by asset managers with respect to the management of risks relating to climate change. Also, the PACTE law has extended the limitation period after which the AMF can no longer bring enforcement action from three to six years.

There have been no significant changes in respect of the ACPR.

Supervisory approach

Market misconduct

In France, the AMF is the competent authority for the supervision of market misconduct. The AMF's supervision is based on MAR levels 1, 2 and 3 provisions. The AMF is the sole supervisor for such matters, irrespective of whether a firm is a credit institution or an investment firm.

Treatment of customers

The ACPR and the AMF supervise the protection of clients/investors and savings. For example, the AMF regularly updates customers (through its website, social media, newsletter, hotline, etc.) in order to help them invest knowingly.

The ACPR has issued three principles of good commercial practice and client protection: (i) ensuring that fair and loyal information is provided to clients; (ii) considering client's interests; and (iii) ensuring that firm's and staff conduct is driven by principles of fairness and loyalty to clients.

In addition, please note that French investment firms under the supervision of the ACPR and/or the AMF are subject to client protection rules and notably MiFID II client protection rules.

AML

The French AML-CFT regime is set out in Articles L. 561-1 et seq. FMFC. These provisions include French specific requirements (e.g. entities in scope, definition of beneficial owners, definition of politically exposed persons, internal procedures/policies requirements, regulatory reporting requirements, sanctions, etc). The ACPR and TRACFIN (i.e. the French financial intelligence unit) are the competent authorities supervising AML-CFT compliance obligations and they produce guidelines.



“The ACPR and TRACFIN are the competent authorities supervising AML-CFT compliance obligations.”

France

Operational resilience (including outsourcing)

Investment firms, as part of their licensing application, must establish a programme of operations which is assessed by the AMF (although the ACPR remains the regulator in charge of issuing a licence).

Under French law, outsourcing is defined as the externalisation to a third-party service provider, on a lasting and regular basis, of the provision of services or other critical or important operational tasks. Outsourcing of the provision of regulated services is only possible to a third-party services provider which is duly licensed to conduct such activity.

French investment firms under the supervision of the ACPR and/or the AMF must notably comply with MiFID II outsourcing provisions. Also, please note that the ACPR has declared that it fully complies with EBA outsourcing guidelines (EBA/GL/2019/02).

Individuals

Is there a specific approvals process for individuals?

Any change to the composition of the board or a change of senior managers (i.e. *dirigeants effectifs*) of an investment firm must be notified to the ACPR (i.e. no prior approval is required but the ACPR may oppose the appointment of a new board member/senior manager). The newly appointed board members and senior managers must comply with suitability and integrity requirements set out in the relevant EBA/ESMA guidelines. In addition, in case of change in control of investment firms, managers of qualifying shareholders (i.e. shareholders that hold in excess of 10% of the shares or voting rights) are assessed by the ACPR for fitness and propriety purposes. The AMF does not review this area.



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Under French law, outsourcing is defined as the externalisation to a third-party service provider.

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To what extent does the relevant regulator supervise the fitness and propriety and/or conduct of individuals working in financial services firms?

As well as having to comply with the suitability and integrity requirements for board members and senior managers, additional fitness and propriety requirements may apply, such as:

- > There is a general requirement for individuals acting for an investment firm to have sufficient knowledge and the minimum level of competence.
- > Individuals who provide investment advice or information on financial instruments, investment and ancillary services (i.e. “sales functions”) to clients on behalf of investment firms must demonstrate sufficient knowledge and competence in order to comply with French rules of conduct. Investment firms may be required to assess their minimum level of knowledge, triggering the requirement for these sales functions to take an examination organised either by the investment firm or the AMF.
- > With respect to their AML-CFT obligations, investment firms must ensure that their staff are regularly informed and benefit from the appropriate training. Also, staff exposed to an investment firm’s AML-CFT risks or involved in an investment firm’s AML-CFT system are subject to certain fitness and/or training requirements.

Is your conduct regulator considering introducing a personal accountability regime?

As mentioned above, the ACPR is responsible for supervising the compliance of investment firms with the French AML-CFT rules. In case of a breach of the French AML-CFT rules by an investment firm, those holding management functions at the investment firm (i.e. the French Branch senior managers) may be held liable and face the ACPR’s range of sanctions to the extent they are directly and personally involved in the breach, in accordance with Article L. 561-36-1, IV FMFC.

Pursuant to Article L. 621-9 FMFC, the AMF is responsible for ensuring that an investment firm, and any individual acting under its authority or on its behalf, complies with the professional duties to which they are subject. Such professional duties may include the implementation of policies and procedures. In case of breach or failure to comply with their professional duties, the AMF may impose disciplinary sanctions notably on any individual having management functions within an investment firm pursuant to Article L. 621-15, II, b) FMFC.

Governance and culture

Do your supervisors assess the behaviours and culture within individual firms?

We note that Article L. 511-41 FMFC prohibits investment firms from adopting any discriminatory measures in the recruitment, training, revocation or remuneration of staff.

In addition, we believe French regulators prohibit any behaviours that may impact the ability of an investment firm (or of individuals acting under its responsibility) to comply with its duties and notably its duties towards clients.

To what extent do regulators in your jurisdiction consider the personal misconduct of individuals as part of their supervisory remit?

They do not consider these areas of misconduct as part of their supervisory remit (other than to the extent they impact the ability of individuals acting under the responsibility of an investment firm to comply with their professional duties and notably their duties towards clients).





To what extent do your regulators assess remuneration and recognition practices to ensure they drive positive behaviours within firms?

The AMF requires investment firms to have a sound remuneration policy.

The ACPR requires that the remuneration policy of investment firms does not wrongly incentivise its staff, but instead ensures that clients are treated with care. Pursuant to Article L. 612-2 FMFC, the ACPR supervises the application of the remuneration rules of the French investment firms provided in Article L. 511-71 et seq. FMFC as well as in the Order of 3 November 2014 on internal control (*Arrêté du 3 novembre 2014 relatif au contrôle interne*).

Notably, Article L. 511-78 FMFC provides that the variable share of the remuneration of certain material risk-takers cannot exceed twice the total amount of their fixed remuneration.

Supervisory priorities

What aspects of MiFID II are the focus for post-implementation review work in your jurisdiction?

The AMF has recently issued a report of its first “mystery” campaigns conducted within French major retail banks providing investment advice (supervision has been conducted through interviews with investment advisors). The report, which focuses on information to clients, outlines the following topics (which we assume are under scrutiny by the AMF): (i) assessment of client’s financial situation and objectives, (ii) information as to whether advice given is independent or not and (iii) information on fees. The AMF has concluded that fee information is an area of concern. In addition, as one of its supervision priorities for 2019, the AMF mentioned study of the following areas: (i) compliance of portfolio management with MiFID II provisions, (ii) transparency, (iii) best execution and (iv) product governance (noting that the last three areas were already under scrutiny by the AMF in 2018).



France

Does your regulator have any additional current supervisory priorities?

In respect of ACPR supervisory priorities (other than AML-CFT): no.

On 2 July 2019, the AMF announced the creation of the “Climate and Sustainable Finance Commission” to monitor and evaluate the information provided by the financial institutions on climate commitments. This new commission, which works closely with the ACPR, will also publish an annual report on the climate commitments of financial institutions of the French marketplace.

Have you seen any recent trends/changes in terms of the way in which financial services firms are supervised?

As part of its new supervision strategy, the AMF is now conducting *Supervision des Pratiques Opérationnelle et Thématique* (supervision of operational and thematic practices, or “SPOT” controls) which are shorter (in terms of delay) controls focused on a specific theme whose purpose is to compare market practices.



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Germany



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Germany

Who supervises the conduct of regulated financial services firms in your jurisdiction?

The financial services conduct supervisors are the German Federal Financial Supervisory Authority (“**BaFin**”), the German Central Bank (“**Bundesbank**”) (both hereafter referred to as the “**German Regulator**”) and, with respect to significant credit institutions, the European Central Bank (“**ECB**”). BaFin co-operates with Bundesbank in both areas, prudential and conduct supervision, whereas Bundesbank has a focus on ongoing monitoring, the clarification of facts and the retrieval of information.

Prudential and conduct supervision are not conducted by different divisions within BaFin. With regard to actual supervisory tasks, BaFin is divided into the following four divisions: banking supervision, securities supervision/asset management, insurance and pension funds supervision and resolution. These divisions are further divided into sub-divisions, so-called directorates. For example, the division for banking supervision is divided into the following directorates: co-ordination and supervision of foreign banks, supervision of significant banks, supervision of Bausparkassen, private banks and leasing, supervision of cooperative, savings and specialist banks, banking risk – policy issues, restructuring/macprudential supervision and payment transactions/cyber security. Furthermore, some divisions within these directorates are tasked with the supervision of a single group of banks.

The other functions of BaFin such as the prevention of money laundering and consumer protection are covered by these divisions as well. For example, BaFin has a sub-division within the resolution division which covers the prevention of money laundering and terrorist financing.

For further details, please refer to the [organisation chart of BaFin](#).

Do any third parties assist with supervision?

Generally speaking, there are no self-regulatory organisations or bodies with respect to conduct or prudential supervision of the financial sector in Germany. Moreover, when carrying out its tasks, the German Regulator may use third parties such as auditors. On a case-by-case basis and depending on the topic, BaFin may also request consultancy services from third parties.

Where one regulator covers both conduct and prudential supervision, how do they define the boundary between these?

The German regulator exercises overall financial supervision and does not formally distinguish between conduct and prudential supervision. However, there are some specialised divisions in BaFin, for example a division that supervises AML compliance.

Does the regulator in charge of conduct supervision operate a working definition of ‘conduct’ or ‘conduct risk’?

Under German law, there is no clear-cut definition of conduct or conduct risk. Generally speaking, the rules of conduct (*Wohlverhaltensregeln*), as contained in the German Securities Trading Act (*Wertpapierhandelsgesetz*, “**WpHG**”), require investment firms to act honestly, fairly and professionally in accordance with the best interests of their clients and aim to provide a fair, orderly and transparent financial market when providing such (ancillary) investment services to German clients. The rules of conduct cover various areas such as product governance rules, client classification, information and transparency requirements, best execution, and rules on the distribution or suitability of products.

Does the conduct regulator in your jurisdiction produce a business plan or other outline of its key concerns and priorities?

Each year, BaFin publishes a [list of areas of supervision](#) they will focus on in the year ahead. Moreover, BaFin publishes an annual report and a monthly journal which give further information regarding BaFin’s supervisory practice and current priorities.



“Under German law, there is no clear-cut definition of conduct or conduct risk.”

Germany

How does your regulator supervise?

Do firms have an individual supervisor or supervision team allocated to them?

Yes, each firm has a competent division and/or a competent assigned supervision team.

Do firms have regular meetings with their supervisor?

Supervisory meetings are held routinely or on a case-by-case basis. The general principle of proportionality applies with respect to frequency, duration and intensity of supervisory discussions. Typically, they are held at least once a year.

The discussions held annually with the managing directors of the institutions focus primarily on the results of the audit of the annual financial statements, economic developments, the overall risk situation, strategic planning and management of the institution. Discussions may also be requested ad hoc, depending on specific occasions, to address matters or topics which, due to significant developments concerning the institution, require further clarification and analysis by the supervisory authorities.

What level of communication do you typically see/expect from a firm towards its supervisor?

Depending on the nature, size or scope of activities and the relationship of the institution to the German Regulator, a proactive approach can be applied to address regulatory concerns at an early stage. Typically, the German Regulator expects good communication and is equally willing to enter into discussions.



“Typically, the German Regulator expects good communication and is equally willing to enter into discussions.”



Germany

What reports and notifications are firms expected to make to their supervisor?

Though mostly derived from EU law, generally various types of notification are required. These are, amongst others, notifications in relation to certain functions, such as managing directors, members of the supervisory/administrative board, the AML Officer and the Compliance Officer, notifications regarding large exposures or intragroup loans, notifications of substantial shareholdings and notifications regarding suspicions of money laundering.

Are there any requirements as to the timing of the report/notification?

Most of the notifications have to be filed “without undue delay”; however, some of the notifications must be made on a yearly basis.

In the UK, firms are subject to a very broad requirement to deal with their regulator in an open and co-operative way. Is there a similar requirement in your jurisdiction?

There is no such requirement with regard to the overall communication with the German Regulator. Generally speaking, firms have to comply with certain notification requirements and they are expected to be transparent and co-operative in the context of the supervisory relationship. In addition, firms are expected to co-operate with the German Regulator in every way that it can reasonably demand within the exercise of its supervisory powers. For example, if the German Regulator requests specific information or access to the firm's premises, the firm would have to comply with such request. Please see also the answer [concerning the working definition of conduct/conduct risk](#) above.

Is the supervisory process tailored depending on the size/impact of the firm?

BaFin follows the proportionality principle and considers in particular the firm's size, complexity, risk profile and its interconnectedness with other firms. Significant institutions which satisfy (amongst others) the following categories are directly supervised by the ECB:

- > Size: the total value of its assets exceeds €30 billion;
- > Economic importance for the specific country or the EU economy as a whole;
- > Cross-border activities: the total value of its assets exceeds €5 billion and the ratio of its cross-border assets/liabilities in more than one other participating Member State to its total assets/liabilities is above 20%;
- > Direct public financial assistance: the institution has requested or received funding from the European Stability Mechanism or the European Financial Stability Facility.

Have there been any recent changes to your supervisor's powers in respect of financial services firms?

In January 2018, the supervisory powers of BaFin were extended such that BaFin is now the competent resolution authority in Germany. Further, in early 2018, BaFin's Executive Board categorised sustainability as a strategically important issue (even though the supervisory powers of BaFin have not been extended in this respect, as BaFin deems its existing powers sufficient to cover this subject). As a result, the undertakings that are supervised by BaFin are now required to take into account material environmental and climate risks in their risk management systems. Finally, BaFin's supervisory powers will soon be extended to also include the supervision of financial investment brokers (in German “Finanzanlagenvermittler”). Such brokers currently provide their services with respect to a limited range of financial products, operate under an exemption and are not regulated under the German Banking Act.



“Undertakings supervised by BaFin are now required to take into account material environmental and climate risks in their risk management systems.”

Germany

Supervisory approach

There is no specific distinction in the German Regulator's approach with regard to the topics below. The approach taken by BaFin changes regularly on the basis of the current focus and priority of its supervisory approach. This focus is published each year on BaFin's website.

Market misconduct

Market misconduct is not a focus area explicitly identified by BaFin in 2019. Nevertheless, the German Regulator is active in this area. For example, BaFin currently consults on a part of its so-called issuer guidelines regarding market misconduct under the MAR and furthermore intends to raise the threshold for directors' dealings to 20.000 Euro. We note that BaFin held an industry conference (the "16th Practical Forum on White-Collar Crime and the Capital Market") in September, where it addressed current issues in this area.

Since most rules regarding market misconduct are already governed by the MAR, there are only a few rules left to be governed by national law. In Germany, these are governed by WpHG.

Treatment of customers

In the area of treatment of customers, BaFin focuses on strengthening its profile in collective consumer protection and on dealing with new forms of instruments in the capital market, such as ICO, STO, etc.

Furthermore, the German government is currently liaising with the European Commission with regard to possible changes to the MiFID II regime as part of the upcoming review of the directive. Issues being addressed are costs and charges, the taping obligation and the need for the introduction of a new client category.

Rules regarding the treatment of customers are mostly governed by the WpHG and the German Investment Services Rules of Conduct and Organisation Regulation (*Wertpapierdienstleistungs Verhaltens und Organisationsverordnung*, "WpDVerOV").

AML

According to its list of areas of supervision, BaFin focuses on the review of customer due diligence ("CDD"), of the position and powers of the money laundering officer and of correspondent bank relationships in 2019.

We note that BaFin convened an industry conference with regard to combating money laundering and the financing of terrorism in December 2019.

The prevention of money laundering is governed by the German Money Laundering Act (*Geldwäschegesetz*, "GwG"). BaFin substantiates these rules with its Interpretation and Application Guidance in relation to the German Money Laundering Act.

Operational resilience (including outsourcing)

With Brexit looming, operational resilience is a focus area of the German Regulator. According to the list of areas of supervision published on BaFin's website, it puts a special focus on the testing of IT systems and the associated IT processes.

Operational resilience and outsourcing rules are covered by the German Banking Act (*Kreditwesengesetz*, "KWG"). BaFin's Minimum Requirements for Risk Management (*Mindestanforderungen an das Risikomanagement*, "MaRisk") give further details and insights into the regulatory practice with regard to this topic.



“The German government is currently liaising with the European Commission with regard to possible changes to the MiFID II regime as part of the upcoming review of the directive.”

Germany

Individuals

Is there a specific approvals process for individuals?

The appointment and the resignation of senior management and of supervisory board members needs to be notified to and in some cases approved by the German Regulator. The assessment of senior managers, in particular, relates to compliance with standards on expertise and professional integrity. Further, management board members must have the necessary professional qualifications, be trustworthy and dedicate sufficient time to performing their functions. This includes adequate theoretical and practical knowledge of the business concerned, as well as managerial experience. Similar requirements apply for members of the supervisory board.

In addition, staff who conduct investment advice have to be notified to BaFin and Bundesbank and registered in a dedicated register. This also applies – in line with MiFID – to sales representatives.

Further notification requirements apply in relation to certain functions, such as the AML Officer and the Compliance Officer of a credit institution.

Are individuals registered with the regulator or approved by other means (either by the regulator or by the firm)?

There is no official register for the senior management maintained by the German Regulator.

Is your conduct regulator considering introducing a personal accountability regime?

Currently, no such regime is being considered.



Assessment of senior managers, in particular, relates to compliance with standards on expertise and professional integrity.



Germany

Governance and culture

Do your supervisors assess the behaviours and culture within individual firms?

If culture/behaviour within the firm gives rise to regulatory concerns, this may be assessed by the German Regulator in the course of the day-to-day supervision of the respective institution.

To what extent do regulators in your jurisdiction consider the personal misconduct of individuals as part of their supervisory remit?

Generally speaking, the German Regulator is not competent to supervise personal misconduct of individuals (such as sexual harassment or bullying). However, if such misconduct gives rise to regulatory concerns (e.g. has implications for the integrity of the management of an institution), this might also be of interest to the German Regulator and may lead to regulatory measures being undertaken by the German Regulator.

To what extent do your regulators assess remuneration and recognition practices to ensure they drive positive behaviours within firms?

The remuneration regime is governed by law in Germany and supervised by the German Regulator. Under the German Remuneration Ordinance for Institutions, institutions are required to have a sound remuneration policy. For example, this requirement is not met if there are incentives to take disproportionately high risks due to the absence of reductions in certain benefits in the event of misconduct.

Supervisory priorities

What aspects of MiFID II are the focus of post-implementation review work in your jurisdiction?

In January, the Federal Ministry of Finance consulted on experiences and the possible need for change with regard to MiFID II and MiFIR. In the responses, the criticism has been raised that some of the requirements, e.g. regarding product governance, cost transparency, inducements and recording obligations, go beyond the legislative rationale and objective of investor protection.

Furthermore, auditing firms were tasked by the German Regulator to put a special focus on MiFID II implementation in their upcoming audits.

Does your regulator have any additional current supervisory priorities?

BaFin also focuses on topics such as Brexit, digitalisation (amongst other things, dealing with new forms of instrument in the capital market, such as cryptocurrencies, initial coin offerings, security token offerings, etc.) and sustainability (especially in the area of asset management).



“ Generally speaking, the German Regulator is not competent to supervise personal misconduct of individuals. ”



Ireland



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Ireland

Who supervises the conduct of regulated financial services firms in your jurisdiction?

The Central Bank of Ireland (“CBI”) is both the prudential supervisor and financial conduct supervisor in respect of regulated financial services providers (“RFSPs”) operating in Ireland.

In respect of banks operating in Ireland, the CBI was solely responsible for their authorisation and supervision until the introduction of the single supervisory mechanism (“SSM”) in November 2014. When the SSM came into effect across the Eurozone, the European Central Bank (“ECB”) became the competent authority for the supervision of banks operating in Ireland. Any applications for authorisation as a bank in Ireland are now subject to the ECB’s final approval and, from a supervisory perspective, where a bank is designated as “significant” by the ECB, it is supervised directly by the ECB. As of 1 June 2019, six Irish banking groups were designated as “significant” by the ECB: AIB Group plc, Bank of America Merrill Lynch International DAC, Bank of Ireland Group plc, Barclays Bank Ireland plc, Citibank Holdings Ireland Limited, and Ulster Bank Ireland DAC. Where a bank is classified as “less significant” by the ECB, it is subject to direct supervision by the CBI, and to indirect supervision by the ECB. The ECB may give guidance to the CBI regarding the supervision of “less significant” banks, and may take over supervision of a “less significant” bank if it forms the view that it is necessary to do so.

Where one regulator covers both conduct and prudential supervision, how do they define the boundary between these?

Since the start of 2018, the organisational structure of the CBI has comprised two key pillars: Prudential Regulation, and Financial Conduct, which collaborate closely with the CBI’s other two pillars: Central Banking, and Operations.

The Prudential Regulation pillar is managed by the CBI’s Deputy Governor (Prudential Regulation) who oversees four key units:

- > The Credit Institutions Supervision Directorate, comprising two divisions: (1) Banking Supervision and (2) the Registry of Credit Unions.
- > The Asset Management and Investment Banking Directorate, comprising three divisions: (1) Asset Management Authorisations, Advisory and Client Assets, (2) Asset Management Supervision and (3) Investment Banking and Broker Dealers.
- > The Insurance Supervision Directorate, comprising two divisions: (1) Insurance Supervision and (2) Insurance Actuarial, Advisory and Major International Firms.
- > The Prudential Analysis and Inspections Directorate, comprising three divisions: (1) Governance and Operational Resilience, (2) Financial Risk and (3) Risk Analysis, Data Analytics and Reporting.

The Financial Conduct pillar is managed by the CBI’s Director General (Financial Conduct) who also oversees four key units:

- > The Consumer Protection Directorate, comprising two divisions: (1) Consumer Protection Policy and (2) Consumer Protection Supervision.
- > The Securities and Markets Supervision Directorate, comprising two divisions: (1) Securities and Markets Authorisation and (2) Securities and Markets Supervision.
- > The Financial Regulation – Policy and Risk Directorate, comprising three divisions ((1) Financial Risk and Governance Policy, (2) Markets Policy and (3) Supervisory Risk) and a team (the Policy and Risk Horizontal Team).
- > The Enforcement and Anti-Money Laundering Directorate, comprising three divisions: (1) Enforcement Investigations, (2) Enforcement Advisory and (3) Anti-Money Laundering.



The ECB may give guidance on ‘less significant’ banks and take over their supervision where necessary. ”

Ireland

Does the regulator in charge of conduct supervision operate a working definition of 'conduct' or 'conduct risk'?

While the CBI does not use a standard working definition of “conduct risk”, the CBI’s focus on market conduct risk in the wholesale financial markets has greatly increased in 2018 and 2019.

In 2018, in light of the increased scale and sophistication of wholesale financial market activity carried out in and from Ireland and by branches of Irish firms in other jurisdictions, the CBI started to develop a proportionate risk-based supervisory framework, focusing on supervising conduct risk in wholesale market firms. The new supervisory model has involved a structural assessment of the conduct risk management framework in RFSPs that carry out a wide range of MiFID activities. At the same time, the CBI established a specialised Wholesale Market Conduct Team which carries out market conduct risk assessments of RFSPs that engage or plan to engage in wholesale market activity. To date, that new team has primarily been focused on assessing authorisation applications by large, complex credit institutions and MiFID investment firms, with the aim of identifying and mitigating potential market conduct risks as early as possible.

As part of its focus on market conduct risk, the CBI wrote to RFSPs in March 2019, summarising how it expects them to identify, mitigate and manage market conduct risks, with a particular focus on market conduct strategy, governance and organisation, risk management, culture and people, and metrics and monitoring. In that letter, the CBI also emphasised that boards of RFSPs must have appropriate governance frameworks in place to ensure compliance with regulatory requirements, and “embed a positive conduct culture within their firm”.



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The CBI’s focus on market
conduct risk in the wholesale
financial markets has greatly
increased in 2018 and 2019.”





Ireland

Does the conduct regulator in your jurisdiction produce a business plan or other outline of its key concerns and priorities?

The CBI has committed to publishing a strategic plan every three years. In its Strategic Plan 2019-2021, published in November 2018, it set out five key themes for the next three years. It noted that the previous three-year period had seen the CBI prioritise its repositioning as “the effective steward of the Irish financial system”. For 2019-2021, while the CBI will focus on consolidating the policy framework that it implemented in recent years in response to the financial crisis, it sees two of its biggest challenges as Brexit and the implementation of a new approach to the regulation of financial conduct. The five strategic themes identified by the CBI for 2019-2021 are:

- > **Brexit** – the CBI is focused on ensuring that the authorisation process for all firms is “robust and effective”, while ensuring that the RFSPs that it regulates are prepared for Brexit and are protecting the best interests of their customers. One of its key priorities continues to be the mitigation of the immediate and longer-term risks posed by Brexit.
- > **Strengthening consumer protection** – the CBI signposted that “robust” enforcement action, coupled with “intrusive and targeted” assessments of both RFSPs and their product offerings, would continue to be a key focus area.
- > **Strengthening resilience** – addressing mortgage arrears/non-performing loans was specifically highlighted as a key continuing theme, together with the effective supervision and management of failing firms.
- > **Engaging and influencing** – the CBI plans to focus on its engagement with the public and key domestic stakeholders, while actively contributing to EU policy, promoting the development of Capital Markets Union, and focusing on sustainable finance.

- > **Enhancing organisational capability** – the CBI will, in particular, focus on the use of targeted inspections, understanding and mitigating market and conduct risk, improving its functioning (particularly in the area of accountability of senior management of RFSPs), and ensuring that it is equipped to deal with (and benefit from) technological changes.

The importance of culture was also emphasised, as was the CBI’s continued work to combat market abuse, money laundering, terrorist financing, and the provision of unauthorised financial services. Other key takeaways from the Strategic Plan were the importance attached by the CBI to RFSPs having effective crisis management arrangements in place to address any potential future financial crises, and identifying the opportunities and risks posed by FinTech.

Officials within the CBI give regular speeches outlining the CBI’s key concerns and priorities, and (aside from ongoing supervisory engagement) those speeches play a key role in promoting awareness within RFSPs and the wider financial services industry of the CBI’s areas of focus. The Annual Reports and Annual Performance Statements published by the CBI also look back on key initiatives by the CBI in the preceding year, and set out priorities for the forthcoming year.



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The CBI will focus on using targeted inspections, and on understanding and mitigating market and conduct risk.

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Ireland

Manner of conduct supervision

Do firms have an individual supervisor or supervision team allocated to them?

Banks classified as “significant” by the ECB for the purposes of the SSM are directly supervised by joint supervisory teams (“JSTs”) comprising staff from both the ECB and CBI. The JST of a “significant” bank will have overall responsibility for its day-to-day supervision. The SSM takes a risk-based approach to supervision, and the day-to-day supervision of a “significant” bank by its JST involves the JST interacting with the bank and constant oversight of the bank’s activities. The SSM’s Supervisory Review and Evaluation Process is the process used to assess risks, governance, capital positions and liquidity on an ongoing basis.

Banks classified as “less significant” by the ECB for the purposes of the SSM are directly supervised on a day-to-day basis by the CBI, with oversight from the ECB. The CBI carries out in-depth on-site inspections of individual risk areas, risk controls and governance, and its day-to-day supervisory activities in respect of “less significant” banks include, among other matters, the ongoing assessment of the bank’s risk profile, its solvency, liquidity and recovery planning.

Regarding other RFSPs, the CBI takes a risk-based approach to supervision, introduced in November 2011 and known as the “Probability Risk and Impact System” (“PRISM”). Under PRISM, the CBI will classify an RFSP as either “high-impact”, “medium-high impact”, “medium-low impact” or “low impact”. That PRISM categorisation will determine the number of supervisors that the CBI allocates to an RFSP (for example, “low-impact” firms generally have no allocated supervisor), and the level of supervisory scrutiny to which that RFSP is subject.

Do firms have regular meetings with their supervisor?

Yes.

What level of communication do you typically see/expect from a firm towards its supervisor?

While the relationship between the CBI and RFSPs is generally reactive from the perspective of the RFSP, the CBI aims to have an “assertive, risk-based, intrusive approach to supervision, underpinned by robust enforcement powers, consistent with European and international good practice. This includes day-to-day supervision and high-quality analysis with particular focus on key risks to help ensure regulated firms and markets are financially sound and safely managed.”

What reports and notifications are firms expected to make to their supervisor?

While the reporting and notification obligations on banks are largely derived from EU legislation, MiFID investment firms are subject to a number of detailed reporting requirements, summarised by the CBI in its Reporting Requirements for MiFID Investment Firms, some of which derive from EU legislation and others which derive from Irish requirements (e.g. the CBI’s Fitness and Probity Regime (see further below), and the CBI’s Client Asset Regulations).

Are there any requirements as to the timing of the report/notification?

Yes. For example, for MiFID investment firms, the timings are set out in the CBI’s comprehensive Reporting Requirements for MiFID Investment Firms.

In the UK, firms are subject to a very broad requirement to deal with their regulator in an open and co-operative way. Is there a similar requirement in your jurisdiction?

Yes. RFSPs that are subject to prudential and financial conduct supervision by the CBI are expected to engage with the CBI, and their supervisory team, in an open and co-operative manner. For investment firms, there is a specific obligation to provide certain types of information to the CBI (including in relation to material matters affecting the firm) and a failure to comply could lead to application of administrative sanctions, although we have no history of enforcement in this area in practice.



“The CBI carries out in-depth on-site inspections of individual risk areas, risk controls and governance.”



Is the supervisory process tailored depending on the size/impact of the firm?

Yes, the supervisory process is tailored. As mentioned above, “significant” banks are subject to supervision by JSTs comprising staff from both the ECB and CBI, while “less significant” banks are supervised on a day-to-day basis by the CBI. Under the CBI’s PRISM model, RFSPs directly supervised by it are classified as either “high-impact”, “medium-high impact”, “medium-low impact” or “low impact”. That PRISM categorisation will determine the number of supervisors that the CBI allocates to an RFSP (if any), and the level of supervisory scrutiny to which that RFSP is subject.

Have there been any recent changes to your supervisor’s powers in respect of financial services firms?

There have been no significant changes or extensions since 2013, when the Central Bank (Supervision and Enforcement) Act 2013 doubled the monetary fines that could be imposed by the CBI on RFSPs who are found to have breached Irish financial services legislation, and on the individuals involved in the management of those RFSPs, and introduced a range of supervisory powers for the CBI.

Supervisory approach

Market misconduct

The supervision by the CBI of market misconduct and, in particular, market abuse, insider trading and market manipulation, derives from the EU Market Abuse Regulation, which has direct effect in Ireland and in respect of which the CBI has been appointed as the national competent authority. The CBI’s Investment Market Conduct Rules, its Guidance on the Market Abuse Regulatory Framework, and certain provisions of the Companies Act 2014, together with the Irish legislation that transposed the EU Directive on Criminal Sanctions for Market Abuse, all form part of that legislative framework. The CBI has not taken enforcement action in respect of market misconduct since the new regime came into force; however, continuing to combat market abuse was signposted as a key focus area in the CBI’s Strategic Plan 2019–2021.





Treatment of customers

The CBI is particularly focused on ensuring that a strong consumer-focused culture is embedded within the RFSPs that it supervises. A set of principles relating to the fair treatment of all customers is set out in the CBI's Consumer Protection Code, and among recent CBI initiatives to ensure that consumers are treated fairly by RFSPs were its 2018 review of the operation of its Code of Conduct on Mortgage Arrears, to ensure that lenders were being fair and transparent in their dealings with borrowers in arrears, and its review of behaviour and culture in the five main Irish retail banks (see further below). Thematic inspections continue to be an important tool for the CBI in supervising dealings by RFSPs with consumers. Enforcement actions taken by the CBI often have a consumer-protection focus.

AML

The legislative basis for the supervision by the CBI of AML compliance within the RFSPs that it supervises is the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, which was most recently amended in November 2018 to transpose the Fourth Money Laundering Directive into Irish law. The CBI's AML division has overall responsibility for risk-based supervision of AML compliance. In December 2018, the CBI began an industry consultation on Anti-Money Laundering and Countering the Financing of Terrorism Guidelines for the Financial Sector – the consultation closed in April 2019, and the final form guidelines are awaited. In its Annual Report 2018, the CBI confirmed that it had continued to apply a “graduated” risk-based approach to AML supervision in 2018, with a view to ensuring that RFSPs with a higher level of risk of being exposed to money laundering or terrorist financing activity are supervised more closely, and more often. In total, the CBI carried out 72 on-site inspections, held 59 review meetings, and issued 259 risk evaluation questionnaires to RFSPs in relation to AML and CFT in 2018.

Operational resilience

Operational resilience and, in particular, outsourcing, is coming to the forefront of the CBI's supervisory work, particularly as a result of Brexit and the migration of a large number of firms to Ireland. The CBI has undertaken a number of initiatives with a view to better understanding the extent to which RFSPs engage in outsourcing, the risks inherent in outsourcing arrangements, and the role of boards and senior management in managing and mitigating those risks and has issued its regulatory expectations in relation to outsourcing governance.

Individuals

Is there a specific approvals process for individuals?

Introduced by the Central Bank Reform Act in 2010, the CBI's Fitness and Probity Regime applies to individuals who carry out “controlled functions” (“**CFs**”) (of which there are 11 broad types) within RFSPs. Those who carry on certain categories of CFs, known as “pre-approval controlled functions” (“**PCFs**”) (of which there are 46 types) cannot carry out those functions without the prior written approval of the CBI. Where the individual in question is to carry on a CF role other than a PCF role, CBI approval is not required, but the RFSP must be “satisfied on reasonable grounds” that the person complies with the CBI's Fitness and Probity Standards.

The ECB, rather than the CBI, is the supervising body for fitness and probity assessments in the case of banks designated as “significant” under the SSM, and “less significant” banks in certain cases.



“The CBI's AML division has overall responsibility for risk-based supervision of AML compliance.”



Ireland

Are individuals registered with the regulator or approved by other means (either by the regulator or by the firm)?

As mentioned above, under the CBI's Fitness and Probity Regime, where it is proposed that a person carry on a PCF role, the prior written approval of the CBI is required. PCF roles are broadly as follows:

- > General RFSP roles (Executive directors and non-executive directors; Chairs of the board, audit committee, risk committee, remuneration committee and nomination committee; Chief executive; Member of partnership; Sole trader; Heads of Finance, Compliance, and Internal Audit; Chief Risk Officer; Head of Compliance with responsibility for Anti-Money Laundering and Counter Terrorist Financing legislation; Branch managers of branches in other EEA countries; Head of Retail Sales; and Chief Operating Officer).
- > Banking roles (Heads of Treasury, Credit, and Asset and Liability Management).
- > Insurance roles (Heads of Underwriting, Investment, Claims and Actuarial Function).
- > Investment Firm roles (Branch managers in Ireland; Chief Investment Officers; and Heads of Trading, Investment and Client Asset Oversight).

Where the person in question is to carry on a CF role other than a PCF role, CBI approval is not required but the RFSP must be "satisfied on reasonable grounds" that the person complies with the CBI's Fitness and Probity Standards.

To what extent does the relevant regulator supervise the fitness and propriety and/or conduct of individuals working in financial services firms?

The CBI assesses the fitness and probity of individuals working in senior positions in RFSPs through the above-mentioned Fitness and Probity Regime. For RFSPs where the CBI is the supervising body for fitness and probity assessments (i.e. where the RFSP is not designated as a "significant" bank for the purposes of the SSM), the CBI has published Fitness and Probity Standards together with Guidance on Fitness and Probity Standards and Frequently Asked Questions. Fitness and probity is a key ongoing supervisory focus area for the CBI and, in April 2019, it wrote to RFSPs, noting that while there was good industry awareness of the obligations imposed on individuals under the Fitness and Probity Regime, there was less awareness of the obligations to which RFSPs themselves were subject.

Among the key concerns raised by the CBI in the letter were: failures by certain RFSPs to assess, on an ongoing basis, whether those carrying out CF roles remain "fit and proper" to do so; failures by certain RFSPs with concerns regarding the fitness and probity of those carrying out CF roles to notify the CBI about their concerns; failures by certain RFSPs to obtain prior CBI approval before appointing persons to PCF roles; failures by a number of applicants for PCF roles to disclose material facts on the individual questionnaires that they submitted to the CBI; and possible inadequate due diligence by RFSPs on those that they are proposing for PCF roles.

Recommendations made by the CBI in the letter included that RFSPs should require those who perform CF roles to inform them of circumstances that might impact their fitness or probity and should assess those individuals at least annually, and that the CBI be told "without delay" of any fitness and probity concerns and related actions taken regarding a person carrying on a CF role.



“
The CBI assesses the fitness and probity of individuals working in senior positions in RFSPs through the Fitness and Probity Regime.”

Ireland

The CBI advised RFSPs that, in light of the letter, it expected them to: review their Fitness and Probity policies, procedures and practices; address any shortcomings; be in a position to explain how they have considered the issues raised in the letter; and be in a position to explain and demonstrate any actions taken by them to remedy those shortcomings. It has also asked that the contents of the letter be discussed with the boards and, if relevant, nomination committees of relevant RFSPs.

Is your conduct regulator considering introducing a personal accountability regime?

To further drive changes in behaviour and culture within RFSPs, the CBI has recommended the introduction of an individual accountability framework comprising a senior executives accountability regime (“SEAR”), conduct standards, enhancements to the CBI’s existing Fitness and Probity Regime, and enhancements to the CBI’s existing administrative sanctions procedure. The framework is expected to be modelled on the Senior Managers and Certification Regime in the UK. In June 2019, the Department of Finance confirmed that work had begun on the necessary draft legislation (known as the Central Bank (Amendment) Bill 2019). The draft legislation is expected to be published towards the end of 2019, and the CBI is expected to publicly consult on the aspects of the new framework for which it will be responsible towards the end of 2019 or early in 2020.

Based on public statements from the CBI to date, it is expected that the conduct standards which will form part of the new individual accountability framework will comprise:

- > common conduct standards for all staff within in-scope RFSPs, requiring those staff to act honestly and with skill, care and diligence, to treat customers fairly, and to co-operate with the CBI;
- > additional conduct standards for PCFs/senior executives, reflecting their level of influence over the RFSP’s business; and
- > business standards for the RFSPs themselves, which will reflect and build on the obligations set out in the CBI’s existing Consumer Protection Code.



“
To further drive changes
in behaviour and culture
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accountability framework.”





It is anticipated that, initially, the SEAR will be introduced for:

- > credit institutions (excluding credit unions);
- > insurance undertakings (excluding reinsurance undertakings, captive (re)insurance undertakings, and insurance special purpose vehicles);
- > investment firms that underwrite on a firm commitment basis and/or deal on own account and/or are authorised to hold client monies/assets; and
- > third country branches of the above.

As has been the case in the UK, it is anticipated that the scope of the SEAR will be widened to include other types of RFSPs in due course.

Governance and culture

Do your supervisors assess the behaviours and culture within individual firms?

Behaviour and culture is gradually coming to the forefront of the CBI's work in the area of strengthening consumer protection. A significant step was taken in early 2018, when behaviour and culture assessments were carried out across the five main Irish retail banks, culminating in the publication by the CBI of its Behaviour and Culture Review in July 2018. The focus of that exercise was the leadership behaviour of the banks' executive committees, and key findings were that while all five banks were working towards embedding a consumer-focused culture, much work remained to be done. The board of each bank was then tasked with creating an action plan to identify and mitigate the risks highlighted by the review, and those action plans now form part of the CBI's supervisory activities in respect of those banks. Those banks were also required to respond to specific findings in the review regarding diversity and inclusion, and to provide separate action plans to the CBI in respect of those findings.

To further drive changes in behaviour and culture within RFSPs, as mentioned above, the CBI recommended the introduction of an individual accountability framework comprising a SEAR, conduct standards, enhancements to the CBI's existing Fitness and Probity Regime, and enhancements to the CBI's existing administrative sanctions procedure.

To what extent do regulators in your jurisdiction consider the personal misconduct of individuals as part of their supervisory remit?

We would expect that the CBI would address this primarily as part of an assessment under its Fitness and Probity Regime.

To what extent do your regulators assess remuneration and recognition practices to ensure they drive positive behaviours within firms?

While this has not (publicly) been a detailed focus area, the CBI has signalled that it expects the promotion and remuneration policies and practices of RFSPs to be designed to encourage employees to behave in a consumer-focused way.

Supervisory priorities

What aspects of MiFID II are the focus of post-implementation review work in your jurisdiction?

In the context of MiFID II firms operating in Ireland, the CBI's focus has been in the following areas:

- > **Product intervention** – in June 2019, the CBI confirmed that once ESMA's MiFIR product intervention measures expire, the CBI will use its product intervention powers under MiFIR to restrict the sale of contracts for difference, and ban the sale of binary options, to retail clients.



Ireland

- > **Data** – the CBI’s Market Surveillance Team has been actively engaging with MiFID firms on the accuracy and completeness of data.
- > **Engagement meetings** – MiFID II implementation remains a key part of the CBI’s PRISM supervisory model and the CBI has highlighted that it will continue to be a focal point of its engagement meetings with RFSPs.
- > **Thematic reviews** – in Q4 2018, the CBI began thematic reviews on product governance and investment research and is scoping further work in the areas of transparency and client protection for later in 2019.
- > **Brexit** – the CBI continues to engage with all RFSPs, including MiFID firms, to ensure that they have appropriate contingency plans in place for all plausible Brexit scenarios, with as little disruption to clients as possible.
- > **Market conduct risk** – our comments above in relation to wholesale market conduct risk have been flagged by the CBI as being of particular relevance to MiFID firms.
- > **Corporate governance** – in November 2018, the CBI published its final Corporate Governance Requirements for Investment Firms and Market Operators, to supplement the MiFID II framework and promote effective corporate governance across the industry.

Does your regulator have any additional current supervisory priorities?

The stated supervisory objectives of the CBI are to protect both financial stability and consumers by looking to ensure that RFSPs act in the best interests of consumers, are financially sound and safely managed, are appropriately governed and controlled, and have orderly resolution plans in place.

Key supervisory outcomes from 2018 included continuing to put pressure on banks to deal with their stocks of non-performing loans, managing its Tracker Mortgage Examination (launched in 2015 after it became apparent that there were industry-wide issues with the management of tracker mortgages), strengthening supervisory responses to cross-border risks in the insurance sector, MiFID II implementation, developing a wholesale market conduct supervision model, and both reactively supervising “low-impact” RFSPs and targeting compliance by those RFSPs across various areas.

As mentioned above, actions arising out of the CBI’s Behaviour and Culture Review are likely to remain a key CBI focus in relation to the main Irish retail banks.

In connection with Brexit, the CBI worked closely with other Irish authorities to identify a suitable (non-UK-based) central securities depository following Brexit. Euroclear Bank has been selected as the Irish market’s preferred long-term settlement solution, and the migration of securities from CREST to the new system is scheduled to be completed and be fully operational by March 2021.



Ireland

Have you seen any recent trends/changes in terms of the way in which financial services firms are supervised?

The most notable impending change is the expected introduction of the SEAR and related conduct standards, reforms to the CBI's Fitness and Probity Regime, and enhancements to its administrative sanctions procedure (its key enforcement tool). As part of these developments, it is proposed that the so-called "participation link" whereby an RFSP must first be found to have breached financial services legislation before a member of its senior management can be pursued by the CBI under its administrative sanctions procedure will be broken, enabling the CBI to pursue those individuals directly.



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