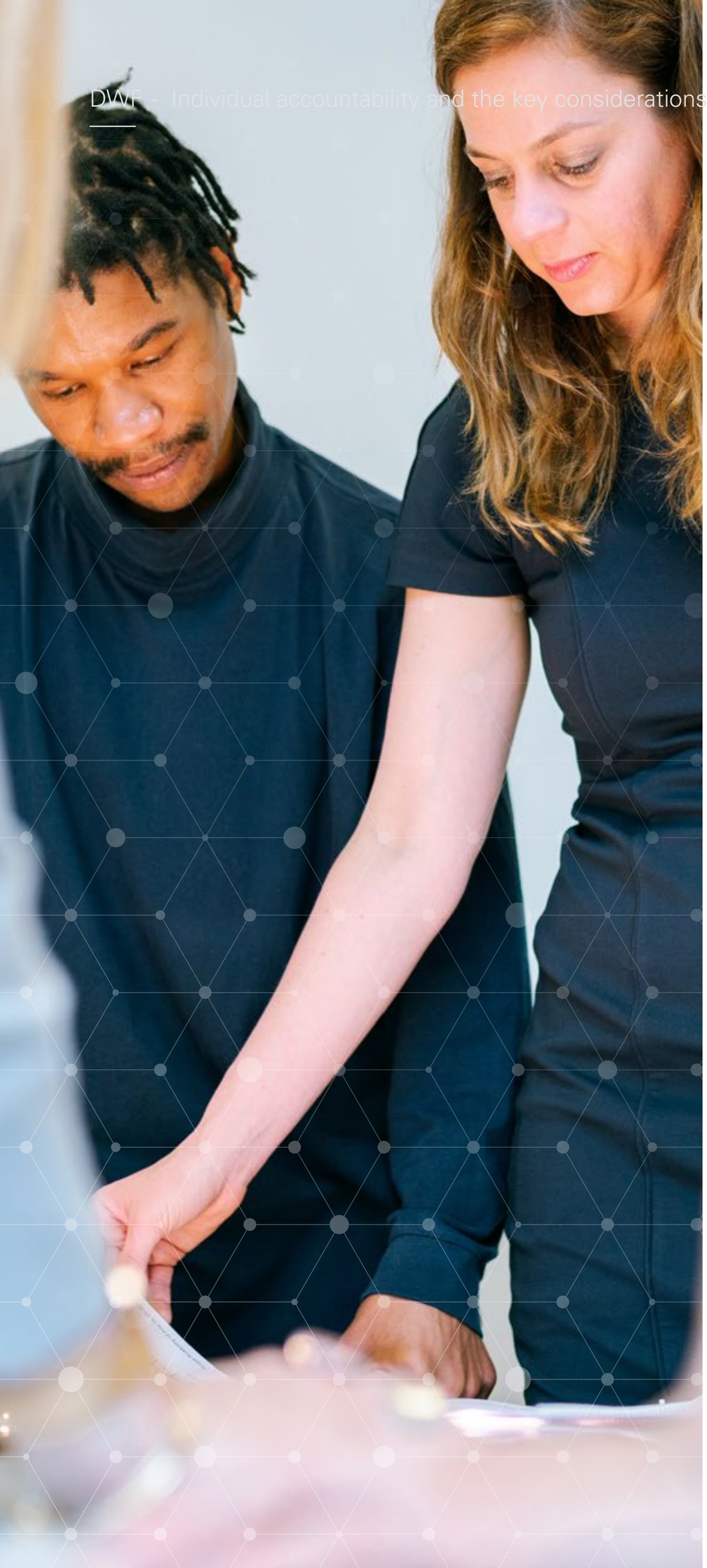
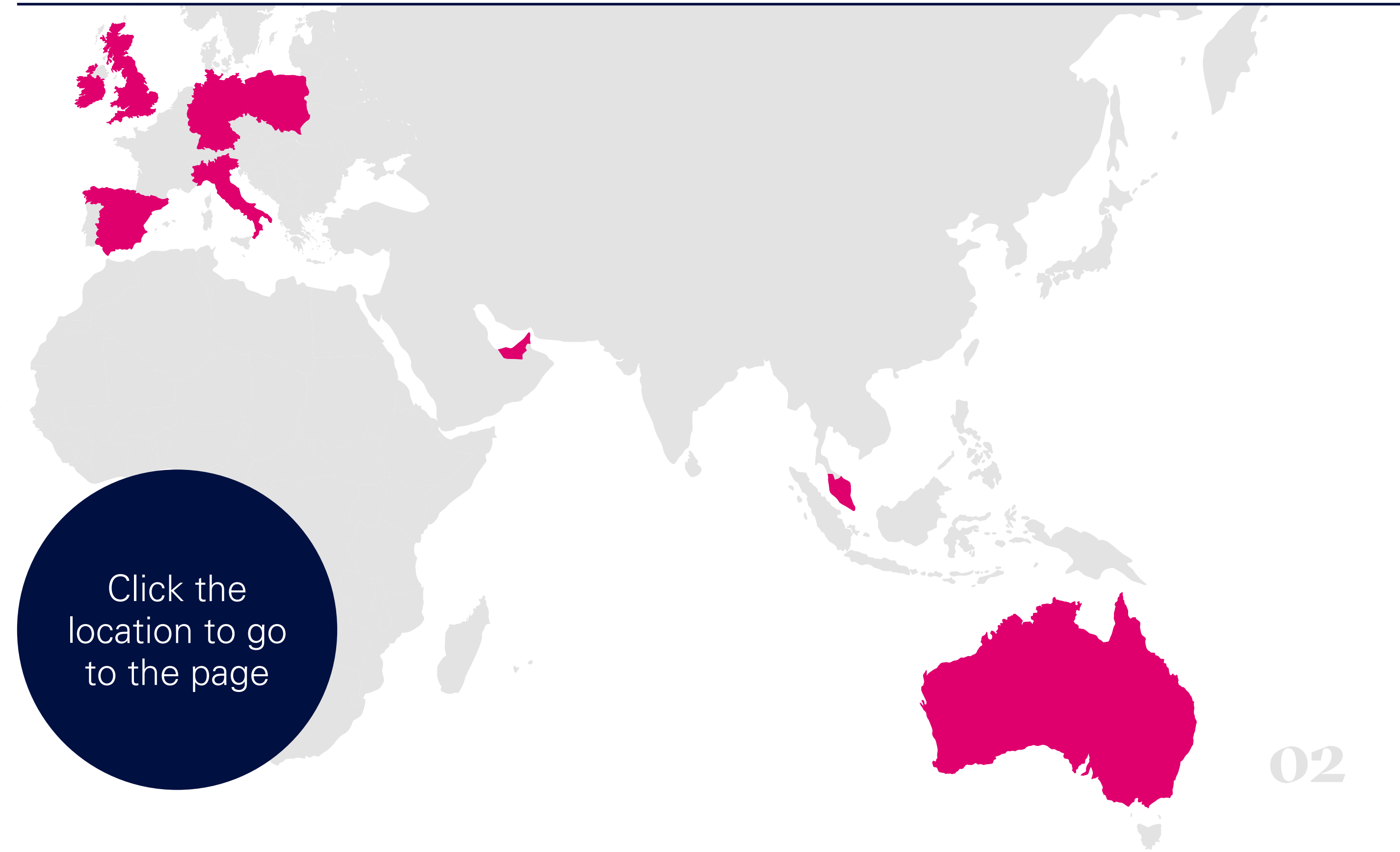
Individual accountability and the key considerations

A comparative overview of accountability regimes across three global regions

Open report



Contents



Click the location to go to the page

Introduction

In the years following the 2008 financial crisis, financial services regulators in many jurisdictions have increased their scrutiny of individuals carrying out regulated functions.

Regulators have either introduced new or enhanced measures with the aim of driving higher standards of conduct. It has therefore never been more important for firms to understand the extent of the regulatory regimes to which they and their employees are subject.

In that context, we set out a comparative overview of the accountability regimes in nine jurisdictions. For each jurisdiction, you will find an overview of the key aspects of the relevant regime, and practical commentary drawing on our widespread experience.

The UK's Senior Managers and Certification Regime (SMCR) is considered the most prescriptive and unified regime. Since its implementation in 2016, other common law jurisdictions have followed the UK's lead; Australia implemented the Banking Executive and Accountability Regime (BEAR) in 2018, Singapore is due to introduce the Guidelines on Individual Accountability and Conduct (IACG) imminently, and the Republic of Ireland is due to implement its Senior Executive Accountability Regime (SEAR) in the near future.

In contrast, many of the regimes in civil law jurisdictions are based on multiple laws that have been in place for years and have been incrementally updated to take into account the increasing focus on individual accountability over the last decade. A reason for this may be that civil law codes seem not to suffer from the same 'lack of law' that drove the development of the SMCR in the UK, and similar regimes in other common law jurisdictions. It is hard to assess whether the accountability regimes in civil law jurisdictions were already more effective in holding individuals to account, or whether the regulators were or are simply not scrutinising the behaviours of individuals to the same extent.

Individual accountability is very much at the forefront of regulators' agendas and will continue to be so for many years to come. We have seen from compiling this insight that the frameworks for holding individuals to account will continue to evolve as regulators review their scope. For example, later this year the SMCR is due to be extended to benchmark administrators and the Australian government has indicated plans to expand the BEAR to all entities supervised by the Australian Prudential Regulation Authority (APRA).

This report will be of particular interest to international financial services firms, as well as national firms operating in any one or more of the jurisdictions covered.

It is important for the industry to maintain a close watch on ever changing regulatory expectations.

Imogen Makin
Head of Financial Services Regulatory Investigations (UK)
M: +44 7842 608 194
E: Imogen.Makin@dwf.law

Martin Pugsley
Global Head of Financial Services Sector
M: +44 7718 130683
E: Martin.Pugsley@dwf.law

United Kingdom

In the wake of the 2008 financial crisis and the LIBOR scandal, the UK parliament established the Parliamentary Commission for Banking Standards (PCBS) in order to make recommendations on how to improve conduct in the banking sector.

The PCBS recommended the introduction of a new accountability framework focussed on senior management. As a result, the first version of the Senior Managers and Certification Regime (SMCR) came in to force in March 2016, and applied to UK banks, building societies, credit unions and PRA-designated investment firms and branches of foreign banks operating in the UK.

The scope of the SMCR has since been extended twice: to all UK insurers and reinsurers in December 2018, and to all other solo-regulated (Financial Conduct Authority (FCA) only authorised) firms, in December, 2019. It is also due to be extended to benchmark administrators in December, 2020.

The SMCR has three distinct but connected parts:

- **The Senior Managers Regime:** which focusses on the most senior individuals who perform Senior Management Functions (SMFs);
- **The Certification Regime:** which applies to employees who could pose a risk of significant harm to the firm or any of its customers; and
- **The Conduct Rules:** which are high-level requirements that apply to in-scope people (which is most within financial services firms).

In this report we have provided a snapshot of the SMCR for both dual and solo-regulated firms. The application of the regime varies according to the type of firm and whether it is dual or solo-regulated and it is not possible to capture all of the variations in a summary report. We have, therefore, focussed on the key points which apply to the widest number of firms.

Whilst the SMCR has now been in place for over four years, we have not yet seen the plethora of enforcement outcomes against senior managers that was anticipated by some prior to the regime's implementation. In fact, the FCA has opened relatively few enforcement investigations into senior managers and has only had one public enforcement outcome in relation to a senior manager's conduct under the regime.

However, given the SMCR's ever-increasing scope, this is highly likely to change, especially in the wake of the COVID-19 pandemic during which the FCA's rhetoric has been clear; senior managers' obligations remain unchanged and SMFs, as well as firms, must be able to demonstrate that they took 'reasonable steps' to deal with the pandemic.

> **The regulator has recently reiterated the view that 'senior managers have a crucial role to play to ensure their firms continue to act appropriately and with integrity' and it is highly probable that where failings are identified, the individuals responsible will find themselves facing enhanced regulatory scrutiny and potential enforcement action.**

Implementation

Implementation of the SMCR was resource intensive and presented difficulties for most firms. Those operating in jurisdictions in which similar regimes are due to be implemented (such as the Republic of Ireland or Singapore), firms applying to be regulated in the UK, new SMFs and EEA firms considering their post-Brexit position may find the following practical observations helpful:

- Initially some firms found it difficult to determine which senior managers were responsible for which business area. Often, open and frank conversations were needed amongst senior managers to determine this. We have found this clarity has, in some cases, resulted in a positive change to how those areas of the firm were managed.
- Some individuals were reluctant to take up SMFs or certification functions, so firms should address this ahead of time, including through re-negotiation of employment terms and confirmation of the extent and access to Directors and Officers (D&O) insurance.
- Senior managers not only need to take reasonable steps to ensure their areas of responsibility have complied with all applicable regulatory requirements, they also need to be able to evidence them. It is important that senior managers consider how to document their actions from the outset, without risking turning their operation into an unproductive exercise in compliance reporting, attestations and approvals.
- Firms needed to consider how they amend interview and other on-boarding processes to help comply with the need to carry out 'fit and proper' assessments. This process has helped some firms to identify improvements required as part of their governance structure. For example, where one committee was, in practice, responsible for multiple group entities, this may result in those committee members being SMFs for multiple group entities. This was unlikely to be the intention and so necessitated some changes to the group's structure.
- Some firms found obtaining buy-in across the business difficult. Whilst compliance and legal functions often understood the need, convincing more customer facing roles such as sales teams and advisers, proved difficult for some. Board committees or sponsors were often needed to force through the necessary changes and deal with what invariably proved complex and time-consuming projects on time and on budget.

Post-implementation

Post-implementation of the SMCR, we have seen the following issues:

- A number of firms have not really understood how, in practice, changes to those holding SMFs should be effected. This included knowing when the new SMF could carry out the role, what forms should be submitted to the FCA and when, and ensuring the firm has captured sufficient information as part of the SMF on-boarding process. Advice should be sought as and when necessary in order to avoid breaches and/or enhanced regulatory scrutiny.
- Where firms have suddenly lost a senior manager, consideration may need to be given to how that senior manager's responsibilities are handled in the short term and whether this necessitates FCA applications and/or changes to internal documentation – such as the 'responsibilities map' (where applicable). Firms should be alert to the temporary '12 week rule' (which, in specific COVID-19 related circumstances, can be extended to 36 weeks).
- It is advisable for firms to seek and obtain external validation of their implementation from a qualified practitioner. Depending upon the scope of any review, this may go some way to demonstrate that the senior managers have taken reasonable steps to ensure their practice areas comply with the regulatory requirements.
- We expect that once a number of senior managers have been penalised by the FCA/PRA for failing in their 'duty of responsibility', senior managers will more urgently and attentively consider the steps they are taking on a day-to-day basis.

It will be interesting to see how firms with a significant number of certification staff ensure substantive compliance with yearly certification requirements. We can expect many employment law disputes around internal misconduct investigations, dismissals, team moves and regulatory references.

United Kingdom

The SMCR is applicable to dual-regulated (FCA and PRA regulated) and solo-regulated firms operating in the UK. For dual-regulated firms, our summary focuses on the rules applicable to banks and PRA-designated investment firms rather than insurers.

Approvals required

Any individual performing a SMF needs FCA approval (and PRA approval depending on the SMF/combination of SMFs) before carrying out that function.

The FCA expects firms to satisfy themselves that the individual is fit and proper before seeking approval. Under the '12 week rule', individuals can cover for absent SMFs without approval from the relevant regulator in some circumstances. Firms must certify individuals as fit and proper to carry out certification functions both before undertaking a SMF role and annually thereafter.

This includes considering how each SMF complies with the senior manager conduct rules (see below). Depending on the type of SMCR firm, there is a requirement for firms to make ongoing notifications to the FCA concerning the accuracy of the information about their certification staff, and that it is correctly reflected in the new FCA directory.

Employee conduct rules

The Code of Conduct containing conduct rules is applicable to almost all employed by firms falling within the regime except for those who perform 'ancillary' functions not specific to financial services.

'Senior manager conduct rules' apply to those holding SMFs and include obligations for SMFs to disclose information of which the FCA or PRA would reasonably expect notice and to take reasonable steps to ensure:

1. that the business for which they are responsible complies with regulatory requirements; and
2. that any delegation of responsibilities is to an appropriate person.

Employment implications

Regulatory reference

Firms must obtain regulatory references for any individual it is considering:

1. appointing to carry out a SMF;
2. certifying as 'fit and proper'; or
3. appointing as a board director.

Firms must provide regulatory references to other firms where the rules apply.

Disciplinaries

Where disciplinary action is taken because of a conduct rule breach, the firm must notify the FCA. For senior managers, the notification is required within seven working days.

For other individuals, the reporting occurs via annual reporting. Other notification requirements may also apply under rules outside the SMCR.

Remuneration

Disciplinary action taken by firms for breaches of the code of conduct may include a reduction in remuneration or clawback (depending on the circumstance and the malus/clawback provisions in the relevant employment contract).

Criminal record checks

Required for SMFs prior to initial approval by the FCA. Not required as part of annual assessment of fitness and propriety. Criminal record checks are not mandatory for certification functions but firms can, where legally permissible, carry out these checks.

United Kingdom

The SMCR is applicable to dual-regulated (FCA and PRA regulated) and solo-regulated firms operating in the UK. For dual-regulated firms, our summary focuses on the rules applicable to banks and PRA-designated investment firms rather than insurers.

Criminal, civil and/or regulatory liabilities

Senior managers have a 'duty of responsibility' under the regime. The FCA and PRA are able to take enforcement action against senior managers if they are responsible for the management of any activities in relation to which their firm contravenes a 'relevant requirement', and the senior manager has not taken reasonable steps to avoid the contravention occurring (or continuing).

Senior managers of UK banks, building societies and PRA investment firms can be held criminally liable for the failure of their firm (the firm becoming insolvent) in certain circumstances.

The FCA can also take enforcement against senior managers, certified persons and those subject to the code of conduct for breach of the conduct rules or for being 'knowingly concerned' in the breach of a 'relevant requirement'. Sanctions available to the FCA include financial penalties, public censure, withdrawal of permission to hold a SMF and the power to impose prohibition orders.

All those within the scope of the SMCR (and more) can face criminal prosecution for financial crimes, such as market abuse.

Senior managers cannot be indemnified by insurers, or their employer, for any regulatory fines imposed upon them by the FCA for breach of FCA rules.

Other points of interest

Statement of responsibilities

Each senior manager must have a statement of responsibilities which sets out what they are responsible for – see 'duty of responsibility' in the preceding column for its significance.

Data protection

There is no SMF or 'prescribed responsibility' (PR) for the FCA or PRA which explicitly relates to data protection. However, data protection and operational resilience are a current focus of the FCA.

Whistleblowing

UK SMCR banking firms are required to appoint a non-executive director (NED) as a 'whistle-blowers champion' responsible for ensuring and overseeing the integrity, independence and effectiveness of the firm's policies and procedures on whistleblowing.

Management responsibilities map

Some firms, including enhanced scope firms and SMCR banking firms must have a management responsibilities map. This is a single document which describes a SMCR firm's management and governance arrangements and sets out how responsibilities have been allocated, including whether they have been allocated to more than one person.

Territorial limitations

The SMCR has no territorial limitation. If individuals are carrying out captured roles outside the UK for UK regulated activities then they may be caught.

The conduct rules apply to certain senior individuals worldwide, including SMF holders, and other individuals based overseas in specified circumstances. For UK firms, this includes activities conducted outside of the UK, which involve dealing with UK clients.

Australia

The Banking Executive Accountability Regime (BEAR) was initially implemented in 2018. Similar to the Senior Managers and Certification Regime (SMCR) in the UK, it was introduced in order to increase senior management accountability in authorised deposit-taking institutions (ADIs).

Given that the regime is relatively new, its full effects are not yet clear in Australia. There have not yet been any significant enforcement outcomes under the BEAR and until recently, no BEAR-related investigations had been carried out by the Australian Prudential Regulation Authority (APRA).

In early 2020, the APRA confirmed that it would conduct its first formal BEAR-related investigation into one of the largest banks in Australia and its senior officials. The investigation coincides with legal action being taken against the same institution by AUSTRAC, the Australian government agency responsible for detecting, deterring and disrupting financial crime. The investigation relates to contraventions of anti-money laundering and counter-terrorism financing laws.

It is unclear at this stage whether this announcement is an isolated incident, or heralds a new era of BEAR-related investigations in Australia. The investigation is also unlikely to be concluded any time soon, with its expected completion date not until 2022. Nonetheless, the investigation will be watched closely by financial institutions in Australia, not least because of the proposed extension of the BEAR later this year, which will mean that far more institutions are at risk of facing similar investigations in the future.

Despite the relatively recent implementation of the BEAR and minimal investigations, the regime is expected to undergo significant expansion and redevelopment in the upcoming years.

Recent developments

In February 2019, the Hayne Royal Commission released their final report to the Australian government on misconduct in the banking, superannuation and financial services industries. One of the most critical recommendations in that report was that the provisions of the BEAR should cover all entities licenced by the APRA by extending to cover all general and life insurance licensees, all private health insurance licensees, and all superannuation fund licensees and licensed non-operating holding companies.

This proposal was adopted by the Australian treasury in early 2020, which has outlined a proposed Financial Accountability Regime (FAR) which will extend the accountability and responsibility frameworks to all APRA-regulated entities once implemented. It is clear, therefore, that individual accountability and the frameworks surrounding it should be a focus of financial services firms in Australia in the months, and years, to come.

Australia

The BEAR and Responsible Lending Regime are applicable to almost all ADIs. The government has indicated plans to expand the BEAR to all entities supervised by the APRA, most banking, insurance and superannuation institutes in late 2020.

Approvals required

Relevant ADIs and 'accountable persons' (all directors of ADIs and most individuals with 'actual or effective' senior executive responsibility) are required to satisfy themselves that they have complied with their obligations. In particular, ADIs must ensure that all parts of their operations are covered by accountable persons.

While there is no requirement for those persons to be approved in advance by any regulatory body, an individual must be registered with the APRA prior to commencing employment as an accountable person. They must do this with a grace period for temporary or unforeseen vacancies. The APRA may query or challenge the nomination at that time.

Employee conduct rules

Relevant ADIs and accountable persons are both required to comply with certain accountability obligations under division 2 of the BEAR.

In addition, relevant ADIs are required to comply with key personnel, deferred remuneration, and notification obligations.

Employment implications

An ADI's remuneration policy must require a reduction of the variable remuneration (for example, bonuses) of any accountable person that fails to comply with their accountability obligations. The amount of the reduction is essentially equivalent to the amount required to be deferred (which ranges from 10-60%, depending on the size of the ADI and that person's role within it).

An ADI must notify the APRA within 14 days after:

- becoming aware of a breach of accountability obligations by the ADI or an accountable person;
- dismissing or suspending an accountable person as a result of a breach of accountability obligations; or
- reducing the variable remuneration of an accountable person due to a breach of their BEAR obligations.

There is no explicit requirement under the BEAR for an ADI to perform a criminal check prior to employing an accountable person. However, this may be considered by the ADI in its determination of whether or not an accountable person is suitable for that role.

Criminal, civil and/or regulatory liabilities

Criminal liability is not imposed by the BEAR, however any breach by a relevant ADI may result in a civil penalty on the ADI of between 50,000 to 1 million penalty units (currently between AUD 10.5 million and AUD 210 million).

Any breach of accountability obligations by an 'accountable person' may result in that person being disqualified from being an 'accountable person' for a fixed, or indefinite period of time.

Neither ADIs nor accountable persons can be indemnified by a related body corporate for a breach of the BEAR.

Australia

The BEAR and Responsible Lending Regime are applicable to almost all ADIs. The government has indicated plans to expand the BEAR to all entities supervised by the APRA, most banking, insurance and superannuation institutes in late 2020.

Other points of interest

Data protection

There is no provision in the BEAR which explicitly imposes data protection obligations on relevant ADIs or accountable persons.

However, it is generally expected that an ADI must specify which accountable persons are accountable for data protection within that organisation when they submit their accountability statements under section 35FA of the BEAR. Any change to that accountable person must be notified to the relevant regulatory authority (APRA).

Whistleblowing

Similarly, although there are no specific provisions relating to whistleblowing under the BEAR or Responsible Lending Regimes, an ADI may be expected to consider the responsibility of accountable persons for whistleblowing policies as part of their section 35FA accountability statements. Protection for whistle-blowers is separate to the BEAR and is contained in part 9.4AAA of the Corporations Act 2001.

Territorial limitations

The BEAR does not apply to foreign ADIs, except to the extent they operate branches within Australia.

Otherwise, the BEAR has no territorial limitation. It applies to all accountable persons within Australian ADIs and Australian branches of foreign ADIs, regardless of that person's place of residency.

The lack of clarity in the relevant legislation means there is a high risk that the conduct of accountable persons in a foreign branch of an Australian ADI would be covered by the regime.

Singapore

The Monetary Authority of Singapore (MAS) is due to introduce the Guidelines on Individual Accountability and Conduct (IACG) imminently in order to enhance individual accountability and restore public confidence in Singaporean financial services.

The MAS has been considering conduct and culture in the financial services sector for some time and is introducing the IACG in the wake of the 2016 1MDB scandal, in which several Singapore-based financial institutions were implicated, and there were various other instances of egregious risk taking and unethical behaviour. Whilst Singapore is a major international financial centre, until now it has not had any individual accountability regime equivalent to the Senior Managers and Certification Regime (SMCR) in the UK.

The MAS has indicated that the public consultation process for the IACG has concluded. A recent announcement by the MAS indicated that the implementation of the IACG has been deferred because of COVID-19. However, there has been little indication of the duration of the deferral.

Once issued, financial institutions will have one year to implement the IACG. Unlike the SMCR, the IACG will apply to all financial institutions simultaneously, rather than there being a phased introduction.

Singapore's reaction to the 1MDB scandal showed the MAS's intentions to combat financial crime. We saw the first banking licence revocations for 32 years; senior bankers, including expatriates, jailed (for 4.5 years, in one case); and multimillion dollar fines levied against well-known global banking groups.

While subsequent cases may have been less high profile, the MAS has continued to impose fines and instigate jail sentences for those involved in financial crime in Singapore. As a result, we do not expect the MAS to hesitate in taking action against individuals and financial institutions for breaches of the IACG once they have been implemented.

The introduction of the IACG has precipitated a realisation that there has to be a change in the current approach of some in the sector in terms of accepting the risk of relatively minor corporate-level fines for certain conduct offences. The implementation of the IACG may well prompt a departure from the acceptance of these fines simply as 'a cost of doing business'.

If any senior manager is not concerned about the IACG, they should be; a senior manager's remuneration and career prospects will be directly affected by their ability to maintain good conduct in their team. Among other consequences, a sanction under the IACG could raise questions about a senior manager's 'fitness and propriety' for many different roles within financial institutions.

Conduct expected to be the subject of regulatory action under the IACG includes the mis-selling of financial products, understating risks and AML breaches among others. However, senior manager personal accountability under the IACG could conceivably extend to broader matters such as internal team conduct, in light of various allegations that have been made through, for example, the #MeToo movement.

Preparing for implementation

The IACG will significantly affect, and have far-reaching implications, on financial services firms. Not only that, but the IACG are not prescriptive; they set five objectives that must be achieved, but the institutions are left to determine how to attain them.

The task of implementing the IACG is substantial and financial institutions should prepare for implementation now. Initial preparatory steps should include identifying senior managers, their areas of responsibility and so-called 'material risk personnel'. This is unlikely to be an easy task. In reality, many senior managers have overlapping areas of responsibility and these need to be clearly delineated and allocated in accordance with the IACG. This may result in amended job descriptions, which the senior manager must sign off. Any new responsibilities allocated to senior managers under the IACG may also raise questions about remuneration. There are many similarities between the IACG and the SMCR. The difficulties experienced by firms prior to, and post SMCR implementation in the UK, may prove useful to Singaporean firms looking to understand potential pitfalls, and the resources required for implementation.

The key subtleties to observe with this regime are that despite it being outcomes based and known as the IACG, the stated outcomes also clearly set expectations of financial institutions at a corporate level. These include that the 'governance within financial institutions is supportive and conducive' to those subject to the regime being able to 'perform their role effectively'. This leads us to expect that the final rules and resulting downsides of implementing the regime incorrectly could be punitive to institutions, as well as individuals.

In order to avoid regulatory action for misconduct/breaches of the IACG, financial services firms and individuals should consider the following:

1. **Do not assume that because an employee is based outside of Singapore that they cannot be classified as a senior manager under the IACG.** Personnel location is irrelevant, and already being subject to another similar individual accountability regime does not grant an exemption.
2. **Do not assume that implementing the IACG in Singapore will be exactly the same as implementing the SMCR.** Certainly, lessons can be learned and experience drawn from implementing the SMCR, but the regimes are different as is the working culture of the countries involved.
3. **Do not delay your preparations.** Those financial institutions in the UK that struggled with the SMCR were those who underestimated the level of change required and the far-reaching consequences of the regime.

Where in-house legal and compliance teams in Singapore are limited in numbers or experience, the task of implementing the IACG can appear overwhelming. Many stakeholders have to be involved and consulted, including HR and IT. A substantial period of consideration, discussion and negotiation of roles and (revised) responsibilities with senior managers and others will be required.

Singapore

The IACG will apply to almost all entities regulated by the MAS. There is an exclusion for those firms with a headcount of below 20.

Approvals required

No approvals required from the MAS. The regime creates five outcomes that financial institutions must achieve. The MAS will assess efforts to achieve those outcomes and success in doing so through supervision, inspections, meetings and audits.

The MAS may need to approve certain officers under other laws and regulations. Material risk personnel (MRPs) and senior managers must be assessed by their employer as 'fit and proper'.

Employee conduct rules

All employees within the affected institutions will be subject to conduct rules.

Senior managers will become individually accountable for conduct within their areas of responsibility.

MRPs will be subject to enhanced conduct requirements and oversight.

Employment implications

Behaviour and conduct should have a strong and impactful influence on compensation and promotion decisions, generally.

Senior manager remuneration should be designed with the desired conduct outcomes in mind, both at a personal level and for the business areas under their responsibility. Exactly how this is achieved is at the discretion of the institution, but non-financial KPIs should be included and, where appropriate, risk management/control lapses, customer complaints and adverse internal audit findings.

Criminal, civil and/or regulatory liability

The IACG do not establish any specific new penalties. Where misconduct, regulatory breaches, or offences have occurred, the applicable existing remedies or penalties can be applied.

Institutions have been instructed not to do anything to undermine the accountability of senior management, through insurance or other agreements that indemnify them against financial penalties for misconduct.

Territorial limitations

There are no territorial limitations to the regime. The IACG applies cross-border, if a senior manager for a Singaporean financial services firm is based overseas, they are still subject to the regime. Likewise, senior management of downstream subsidiaries of a Singaporean financial services firm are accountable.

Other points of interest

Senior managers' responsibilities

'Mapping' of senior managers' responsibilities is required, which may result in amended/clarified job descriptions. These have to be acknowledged in writing by senior managers. MRPs must also be identified. Succession plans for senior managers must be developed.

Data protection

Chief data officers are specifically named in the IACG as a senior manager, attaching particular importance to the responsible and ethical use and analysis of data (including personal data).

Whistleblowing

A whistleblowing programme in relation to the IACG must be developed by each institution, defining the whistleblowing channels available to employees, procedures to ensure anonymity and protection of whistle-blowers, plus procedures for handling whistle-blower complaints. The whistleblowing function can sit externally or in-house.

Republic of Ireland

The Central Bank of Ireland (CBI) has outlined proposals for an enhanced individual accountability regime, including the Senior Executive Accountability Regime (SEAR).

The new legislation enacting the SEAR is not expected to come into effect until late 2020 or early 2021. The SEAR is expected to apply to board members, executives reporting directly to the board and heads of critical business areas in:

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

The SEAR is expected to have many similarities with the Senior Managers and Certification Regime (SMCR). Financial services firms operating in the RoI may, therefore, find it useful to refer to our overview of the SMCR and commentary on the difficulties experienced by firms both pre-and post-SMCR implementation.

Republic of Ireland

The SEAR is expected to be applicable to credit institutions, insurance undertakings and investment firms.

Approvals required

It is expected that firms will be able to choose their senior management team provided that all prescribed responsibilities stipulated by the CBI are assigned.

It is also expected that firms will be required to annually self-certify the fitness and propriety of all members of their senior management team but not any other employees.

Employee conduct rules

Conduct rules prescribed by the CBI will be applicable to almost all employed by firms falling within the regime.

Enhanced conduct rules will apply to members of the senior management team.

Employment implications

It is yet to be confirmed, but it is expected that the SEAR will follow similar regimes to the UK and Australia.

Criminal, civil and/or regulatory liabilities

It is still to be confirmed under the SEAR, but the intention is to facilitate a more straightforward enforcement and sanctions process against individuals as opposed to the firm.

Employees of financial services firms can already face criminal prosecution for financial crimes, such as market abuse.

Other points of interest

Provisions under the SEAR relating to whistleblowing are still to be confirmed, but it is expected that they will follow similar regimes in the UK and Australia.

Senior managers' responsibilities

It remains to be seen whether statements of responsibilities and responsibilities maps, such as those required under the SMCR in the UK, will form part of the regime. However, similar provisions are expected to form part of the SEAR. The CBI will stipulate prescribed responsibilities which will need to be allocated accordingly.

Data protection

It is still to be confirmed if there will be a specific prescribed responsibility which explicitly relates to data protection or if the regime will extend to the data protection office in each firm.

Territorial limitations

It is yet to be confirmed, but it is expected that the SEAR will follow similar regimes to the UK and Australia.

Germany

Germany does not have a single individual accountability regime comparable to the Senior Managers and Certification Regime (SMCR) or similar regimes in other jurisdictions.

> **It is rare for regulatory authorities to take actions against individuals in Germany in contrast to other jurisdictions, such as the UK.**

Furthermore, there is no mechanism for holding individuals accountable for regulatory breaches by an institution. For example, a Head of Compliance cannot be held to account for the inadequate design or implementation of particular systems and controls, nor can they be held accountable for failing to take reasonable steps to remedy on-going regulatory breaches in the event that gaps in an institution's systems and controls are identified.

In Germany, the civil liability regime is widely seen as adequate to prevent personal misconduct. However, it is noteworthy that a third party which has suffered damage as a result of a managing director's (MD) misconduct can issue a claim for compensation against the MD's employer, but not against them directly. If the employer pays damages to a third party, it can, in cases of personal misconduct, claim damages from the MD personally. Germany has seen a number of prominent claims brought against MDs in recent years.

Germany

No specific individual accountability regime but applicable legislation includes the German Banking Act, German Stock Corporation Act (applies mostly to listed companies) and the German Act on limited liability companies.

Approvals required

No upfront approvals are required from the German Federal Financial Supervisory Authority (BaFin) in order for individuals to hold positions in financial institutions, nor are the institutions required to attest to, or certify, an individual's 'fitness and propriety' (or similar) to hold positions.

Employee conduct rules

There are no specific conduct rules stipulated by legislation or BaFin for directors or employees of financial institutions. However, financial institutions must implement appropriate conduct and governance rules which are assessed by their auditors. BaFin can also initiate special audits and investigations if they suspect an institution has not implemented appropriate conduct and governance rules.

Employment implications

Employment implications of misconduct are determined by the contract between the MD and institution. Directors and Officers (D&O) insurance policies can significantly mitigate the personal consequences of misconduct in the case of MDs. These policies usually cover liability for civil damages and regulatory sanctions are frequently excluded from cover, as are criminal sanctions.

Disciplinaries

Neither BaFin nor any other regulatory body needs to be informed if disciplinary action is taken against a director by the company.

Remuneration

In many service/employment contracts there are usually bonus and clawback provisions in individual employment contracts relating to misconduct. If the company takes out an insurance policy to cover a board member against risks arising from their professional activity for the company, a deductible of at least 10% of the loss up to at least one and a half times the fixed annual remuneration of the board member must be provided for as an indemnity under the insurance policy (according to section 93, paragraph 3 of the German Stock Corporation Act).

Criminal, civil and/or regulatory liabilities

BaFin can impose sanctions (for example, fines) on, and take actions against, MDs directly, such as removing them from office and appointing a replacement. However, this happens very rarely and BaFin tends to take action against institutions rather than individuals.

MDs can be held liable for damages to their employer, but not to third parties for any deliberate or negligent misconduct. Liability for damages under German civil law can be very burdensome for MDs.

Section 93 of the German Stock Corporation Act and section 43 of the German Act on limited liability companies also foresees personal liability for MDs in case of personal misconduct. In extreme cases, such as market abuse, the criminal law applies.

Other points of interest

Whistleblowing

Companies have to implement a whistleblowing policy and procedure, responsibility for which lies with the board of directors collectively (rather than any single individual).

Territorial limitations

Directors can be held liable in Germany for actions taken outside Germany if they affect customers of German financial services firms.

Italy

The individual accountability regime in Italy was introduced by Italian Legislative Decree in 2015 through amendments to the Italian Financial Intermediaries Act (TUF) and the Italian Banking Act (TUB).

Following these amendments, both financial institutions and, in some circumstances, their management, can be held liable for violation of the provisions of the TUF or TUB. Prior to the introduction of the regime, sanctions for failures were directed at the entity rather than the responsible individual.

The individual accountability regime in Italy now provides for severe administrative sanctions to be imposed on company representatives and personnel as a consequence of a breach of their duties (or of duties of bodies they belong to), when one or more of the following conditions are met:

- The conduct had a significant impact on the firm's overall organisation or on corporate risk profiles. In relation to financial institutions, TUF provides that sanctions can be imposed for conduct that caused serious prejudice to investor protection or to the transparency, integrity and proper functioning of the market.
- The conduct has contributed to the firm's failure to comply with specific measures issued by either the Bank of Italy or Consob (for example, orders to limit activities).
- The breaches relate to the obligations imposed on the remuneration and incentives of personnel (under regulations issued by the Bank of Italy, amongst others), where company personnel is involved in the breach.

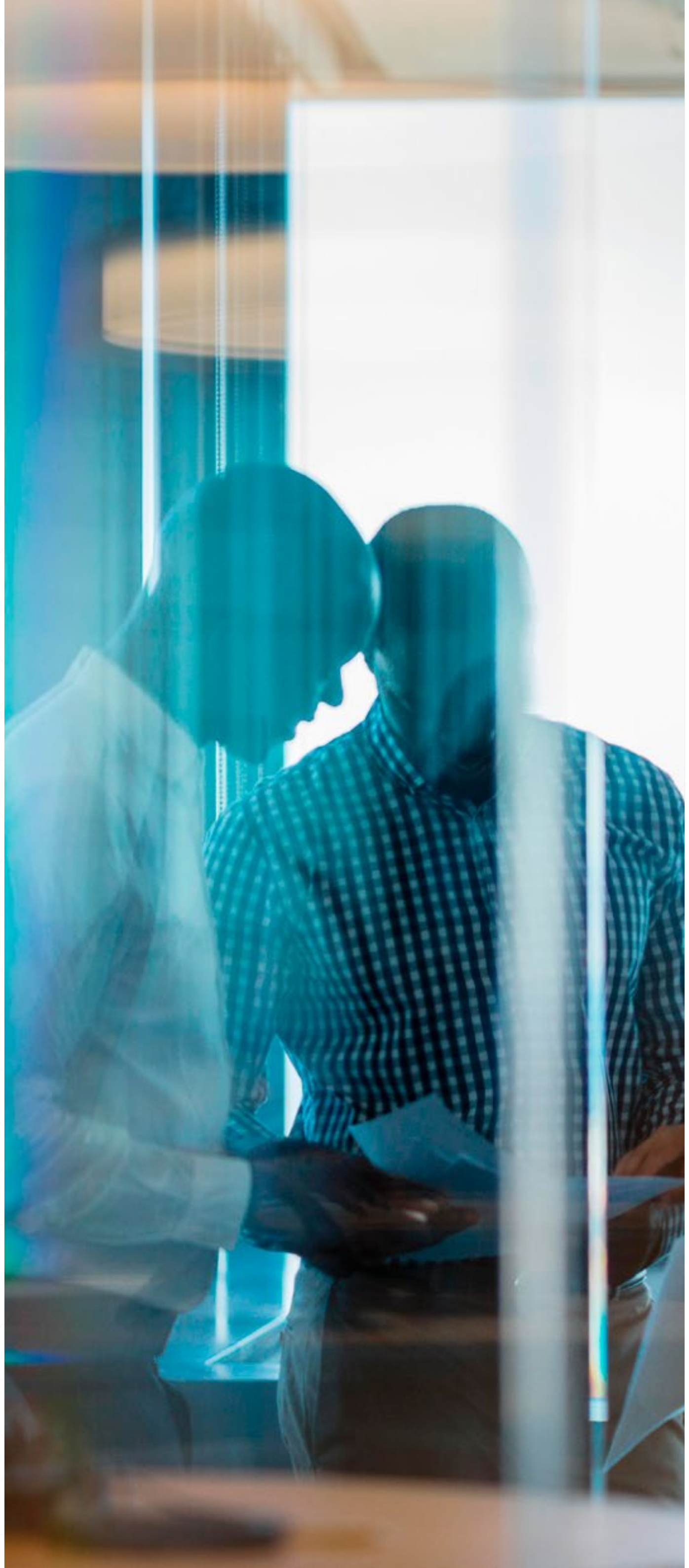
Potential sanctions include financial penalties, disqualification orders and reputational sanctions. The regime, therefore, has a strong dissuasive effect and appears to be effective in holding individuals to account when they have been involved in serious wrong-doing. Both the Bank of Italy and Consob have used their powers under the individual accountability regime many times. To date most investigations using the powers given to the authorities under the 2015 amendments have related to criminal conduct or severe violations of statute, rather than more minor violations.

As is the same in several other jurisdictions, wide discretions are used by the Bank of Italy and Consob in assessing conduct and using their powers to impose sanctions. More prescriptive rules would clearly benefit those subject to the regime, so as to provide them with more clarity on their obligations and the ramifications of failing to comply. This would, hopefully, limit the authorities' ability to use discretion when applying sanctions. In addition, the procedure by which the appropriate sanction is determined by the relevant authority can be unclear and does not present the procedural guarantees of claims brought in court. For this reason, the sanctioned party always has the option to appeal the sanction to the competent court. The regime could be amended to allow for individuals to exchange information, and negotiate, with the authorities regarding the appropriate sanctions prior to their imposition (such as occurs in the UK); this is not currently provided for in Italy.

The regime could also be improved through the introduction of a specific whistle-blower channel in order to report minor violations and prevent more serious violations. This could enable either the Bank of Italy or Consob (as appropriate) to investigate less serious violations which, nonetheless, have the potential to amount to misconduct, albeit not criminal behaviour. For instance, reports could be made of behaviours which suggest that a more serious violation is about to take place, or that the foundations for such a violation have been laid (for example, when preparing company plans or projects that are not in line with specific measures adopted by the competent authority).

> **Given the potentially severe consequences of breaches of the regime, financial services firms should ensure that they have implemented a detailed training programme on the relevant rules and obligations on individuals and that the programme is updated regularly to reflect relevant legal or regulatory changes.**

Furthermore, all processes and procedures implemented in order to ensure compliance with the regime should be formalised through appropriate governance mechanisms and documented accordingly. This will assist in providing the relevant authority with evidence of institutions', and individuals', attempts to comply with the regime in the event of an investigation. Lastly, establishing an internal whistleblowing procedure specifically related to the individual accountability regime could help to identify misconduct and mitigate the risk of serious misconduct occurring unidentified.



Italy

The regime is applicable to most financial services firms in Italy. In particular, it applies, inter alia, to banks, financial intermediaries, depositaries and 'qualified entities' (for example, EU investment firms with branches in Italy).

Approvals required

No approvals are required from either the Bank of Italy or Consob for individuals performing senior management roles. There are specific requirements for institutions to cover the positions of company representatives with those that meet certain standards set out in the TUB and TUF. The administrative and controlling bodies of the institutions are responsible for assessing the suitability of their members and the overall adequacy of the body.

Employee conduct rules

Compliance with provisions of the TUF and TUB is required for 'persons performing administrative, management or control functions' as well as 'personnel'. 'Personnel' means 'employees and those who, in any case, operate within the company by means of a relationship that determines their inclusion in the company organisation, even in a form other than an employment relationship'.

Employment implications

There are no specific provisions in the individual accountability regime regarding employment implications.

The fact of internal disciplinary proceedings (or lack thereof) is irrelevant to the regulators' assessment of the appropriate sanctions. On the contrary, reports resulting from the application of the whistleblowing procedure could be relevant.

There are no specific provisions relating to remuneration for breaches of the regime. Reductions in remuneration are determined by the relevant employment contract and employment law.

Criminal, civil and/or regulatory liability

The Bank of Italy and Consob can impose administrative or financial sanctions on financial institutions and individuals. This includes the power to prohibit individuals (either permanently or for a specific period of time) from holding certain functions in financial institutions and the power to publish an order censuring an individual for particular misconduct.

Pursuant to article 7, paragraph 2-bis and 2-ter, TUB, the Bank of Italy and Consob may remove one or more employees of financial institutions under their supervision in order to ensure the safe and prudent management of institutions or the transparency and fairness of their conduct.

Individuals cannot be indemnified by insurers for regulatory fines imposed upon them by Bank of Italy or Consob.

Italy

The regime is applicable to most financial services firms in Italy. In particular, it applies, inter alia, to banks, financial intermediaries, depositaries and 'qualified entities' (for example, EU investment firms with branches in Italy).

Other points of interest

Whistleblowing

In accordance with annex 4 of the Bank of Italy's Regulation implementing articles 4-undecies and 6 of the TUF, dated 5 December 2019, and Circular no. 285 of 17 December 2013 (as subsequently updated), a 'person responsible for internal reporting systems' shall be appointed. This person 'shall ensure the proper conduct of the process and shall report directly without delay to the corporate bodies the information reported, where relevant'.

Both TUF (articles 4-undecies and 4-duodecies) and TUB (articles 52-bis and 52-ter) require the recipients to adopt specific procedures for the reporting by their personnel of acts or facts that may constitute violations of the provisions governing the activity carried out. The procedures shall be suitable to:

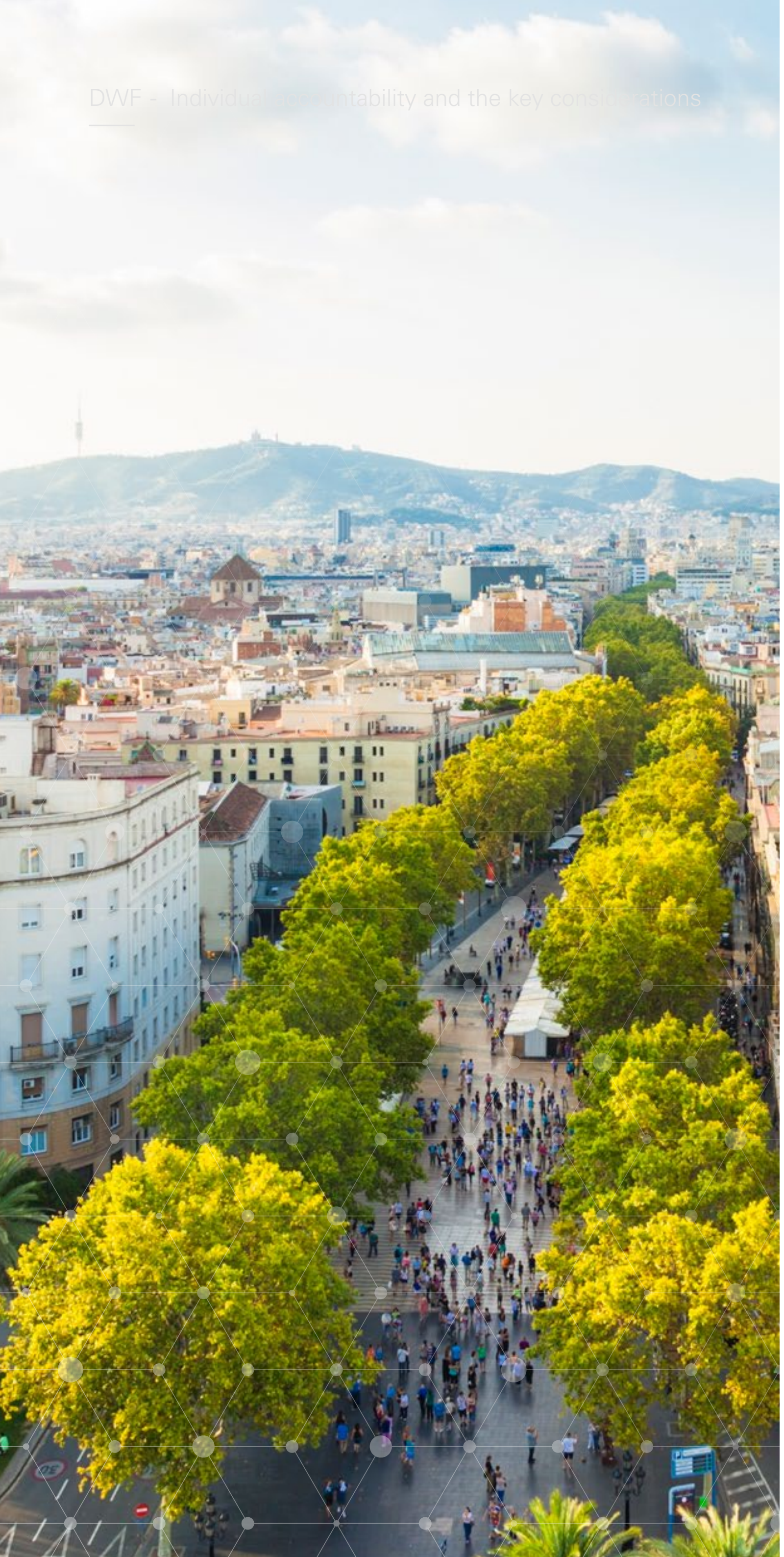
1. ensure the confidentiality of the personal data of the whistle-blower and of the alleged perpetrator;
2. protect the whistle-blower from retaliatory, discriminatory or unfair conducts related to the report; and
3. provide a specific, independent and autonomous channel for reporting.

Within the scope of their specific functions, the Bank of Italy and Consob can receive reports by personnel of violations of the provisions of the TUB and TUF or of directly applicable EU legislation. They shall use the content of these reports in the exercise of their respective supervisory functions.

Territorial limitations

These apply to corporate representatives and personnel of 'qualified entities' for which the Bank of Italy has the sanctioning power. These include, inter alia, EU investment companies with a branch in Italy, Italian banks or EU banks with a branch in Italy authorised to provide investment services or activities.

Sanctions can be applied irrespective of whether the subject involved has a registered office/residence in Italy or whether they are based abroad, provided that they fall within the scope of the TUB and TUF.



Spain

Whilst there is no unified individual accountability regime in Spain, the legal provisions holding individuals within credit institutions and investment firms to account was first introduced 32 years ago, with Law 26/1988 of 29 July and Law 24/1988.

Both laws have been amended on several occasions to adapt Spanish legislation to the regulatory changes imposed at international and EU level.

There has been no shortage of regulatory actions taken by Bank of Spain (BE) and the National Securities Commission (CNMV) against individuals in recent years. The majority of the sanctions or penalties imposed by the BE and CNMV on individuals recently are attributable to the following infringements:

- the provision of financial services without the prior required authorisation;
- breaches of the obligations regarding client relationships, specifically not providing sufficient pre-contractual information to the client (for example, tariffs and commissions), and not acting in the best interest of the client;
- non-compliance with internal conduct rules, for example, relating to a lack of oversight, inadequate risk management, the improper use of privileged information, or a lack of transparency and integrity;
- non-compliance with the obligation to record transactions; and
- failure to have proper administration and management in the Spanish territory.

There have not been any recent changes to the legislation governing individual accountability in Spain. However, given the amount of regulatory activity and recent public judicial proceedings against both financial institutions and their senior managers for criminal infringements of the law, there has been an increase in the procurement of Directors and Officers (D&O) insurance (which includes cover for certain fines and regulatory sanctions). There has also been an increase in the inclusion of 'golden parachute' clauses in senior managers' employment contracts. The issue of senior management accountability is, therefore, very much a live issue in the jurisdiction.

Spain

Whilst there is no unified regime in Spain, there are legislative provisions holding senior individuals to account. These provisions apply to the senior management of all financial institutions authorised by the BE or the CNMV. Insurance entities are not included within the scope of this note.

Approvals required

Members of the board, managing directors (MD), general managers and, in some specific cases, those individuals holding other key positions require approval from the relevant regulator. Individuals must be assessed by the relevant regulator as suitable for the role.

In some cases a register of approved individuals is maintained by the relevant regulator (for example, 'registry of senior executives' in the BE for credit institutions; the register of MLROs in SEPBLAC, the Spanish anti-money laundering supervisor).

Employee conduct rules

Financial institutions must have codes of conduct in force, applicable to all staff, as well as additional rules and requirements for those holding key positions (management body, general manager, etc.). These codes of conduct must include the standards set out in the EBA Guidelines (that is, guidelines on internal governance) and the requirements set out in Spanish and European legislation. However, there are no standardised models officially published by the regulators.

Employment implications

Remuneration

Spanish regulation does not specifically provide for a reduction in remuneration or clawback in the case of misconduct. Internal disciplinary policies and an individual's employment contract or commercial agreement with the relevant institution will govern this.

If the misconduct is defined by law, any individual within the company or external, such as a client, with knowledge of the breach of the rules is entitled to notify the regulator. Communications must be submitted by any means that provides proof of identity of the person communicating the breach.

If internal disciplinary action is taken against a senior manager, the financial institution is not obliged to notify the regulator. However, changes in senior management must be notified for approval purposes, without having to report the reason.

Dismissal of an administrator/board member for misconduct does not need to be justified, as the labour legislation regarding dismissal does not apply.

The dismissal of a general manager for misconduct can be considered 'appropriate' (and not subject to compensation) if justified and proven. Additionally, the general manager could be dismissed without a justified cause, but any such dismissal would be subject to indemnification.

Spain

Whilst there is no unified regime in Spain, there are legislative provisions holding senior individuals to account. These provisions apply to the senior management of all financial institutions authorised by the BE or the CNMV. Insurance entities are not included within the scope of this note.

Criminal, civil and/or regulatory liability

An infringement or a breach of conduct rules will be considered misconduct. Misconduct in financial services is dealt with by different sets of legislation and therefore can be assessed by different public authorities, specifically:

- for general corporate misconduct, such as failure to fulfil fiduciary duties, civil claims can be brought against an individual (the administrator/director responds for his/her misconduct). Claims can also be brought against the corporate (the company must respond for the misconduct) by creditors, stakeholders, third-parties affected, or by other directors or the company itself;
- in terms of a breach of rules in financial or securities market regulation, such as infringement of the suitability regime, the competent authority would be the CNMV, BE, the Ministry of Economy and/or the administrative jurisdiction; and
- infringements of the Criminal Code (Código Penal), such as money laundering or falsification of company's accounts, are prosecuted under the criminal jurisdiction. In order to avoid criminal prosecution, most financial institutions publish a Criminal Compliance Handbook; the existence of an effective crime prevention programme can operate as a defence.

Administrative supervisors are able to take administrative actions and sanctions against senior managers, when:

1. they are responsible for the firm contravening the relevant legal requirements; and
2. if they do not implement the necessary steps/actions that a person in their position is expected to take in order to avoid these infringements from occurring (or continuing).

Sanctions

These can include financial penalties, suspension or removal of directors, or even prohibition orders preventing individuals from holding a board position in the future. A sanctions regime also exists in relation to third parties to whom credit institutions have subcontracted operational functions or activities.

Indemnification

Some liability policies could cover certain fines and sanctions. However, senior management cannot be indemnified by insurers if they commit a wilful 'wrongful act'. As a result, D&O policies usually exclude cover for fraudulent, criminal or an intentional 'wrongful act'.

Other points of interest

Data protection

There are no specific rules regarding accountability for administrators or senior managers under Spanish data protection law.

Whistleblowing

There are no requirements for a particular senior individual to be responsible for whistleblowing.

Financial institutions must implement and supervise whistleblowing procedures and channels.

Territorial limitations

The senior management of a Spanish financial institution can be held responsible for misconduct without any territorial limitation, provided such misconduct is carried out within the scope of application of the codes of conduct and accountability of the financial institution. This applies to the entire group of the financial institution, thus including branches and their employees in other countries.

Poland

The individual accountability regimes applicable to the board members of banks and other financial services firms are enforced by the Polish Financial Supervision Authority (PFSA) and the President of the Office of Competition and Consumer Protection (OCCP).

The regimes cover two different areas of responsibility. The first is focussed particularly on violations of consumer protection rules, which applies to all entrepreneurs and is not limited to financial institutions, the other, is focussed on financial institutions. The exact nature of individual responsibility and the powers of the PFSA depends on the sector of financial market of the relevant institution. The individual accountability regime applicable to banks, for example, is influenced by several EU directives (especially CRD IV).

Potential sanctions under the regime in Poland (such as dismissal from the board of a bank by the PFSA), could affect an individual's whole career path. They have therefore, proven very effective in ensuring that the managers of financial institutions maintain good standards of conduct and carry out their responsibilities in an appropriate manner.

Notwithstanding the existence of the regime and its apparent effectiveness in ensuring good levels of conduct, sanctions are not commonly imposed on the board members of financial institutions in Poland. That said, it is clear that regulators are not afraid to use their powers when required.

Board members of financial institutions would benefit from further clarity regarding the circumstances in which fines and/or other penalties are likely to be imposed. The rules allow regulators a wide discretion when interpreting them and exercising the relevant powers. They would also benefit from the introduction of firmer procedural guarantees of respecting their rights by the regulators. For example, the right of the party to participate actively in the conducted administrative proceedings and the right to be informed of the evidence collected by the regulator. The process of reconsidering contested decisions by the PFSA and the appeals process in the administrative courts can be very slow. This often leaves individuals with the burden of regulatory actions imposed on them for several years.

> **Whilst individuals do not commonly find themselves personally subject to regulatory investigations in Poland, the existence of the regime and the severity of the potential sanctions mean that those in management positions in financial institutions should ensure they fulfil their roles with due care and diligence, always critically assessing the risks and consequences of their actions.**

It is advisable for individuals to obtain legal and compliance opinions from advisors with experience in regulatory matters when making strategic decisions. Additionally, they should follow the statements of the Polish regulators carefully, and ensure that their knowledge of the interpretations of laws and regulations provided by the regulator remains current. Financial institutions should implement codes of conduct and corporate governance rules in accordance with guidance from the PFSA. It is also advisable to maintain an open and cooperative dialogue with the regulator at all times.

Poland

Individual accountability regimes under the jurisdiction of the president of the OCCP and the PFSA applicable to board members of banks and management personnel of certain other financial institutions, for example, investment firms.

Approvals required

Approvals from the PFSA are required for certain members of managed boards of certain financial institutions. Applicable requirements depend on the sector of the financial market.

In relation to banks, certain members of the board, namely the chair and those in charge of supervising material risk in the bank's activities, must be approved by the PFSA.

Members of a bank's management and supervisory boards should have knowledge, skills and experience relevant to their functions and duties, and give an adequate guarantee of due performance of their duties. Banks must certify that those criteria are met.

If a person performs a function without approval or against the decision of the PFSA, there are no criminal ramifications, but it would likely lead to regulatory sanctions being imposed on a bank.

Employee conduct rules

Board members of banks must have the knowledge, skills and experience relevant to their functions and duties, and give an adequate guarantee of due performance of their duties.

Employment implications

Remuneration

The individual accountability regimes do not explicitly deal with remuneration. Remuneration may be reduced for misconduct depending on the policies of the financial institution and the employment contract of the relevant individual (if the individual's employment is not terminated).

The supervisory board of a bank must notify the PFSA of the composition of the management board and of any changes to it.

Banks must conduct criminal record checks of candidates for positions on a management board.

Criminal, civil and/or regulatory liabilities

The PFSA has the power to dismiss the board member of a bank if he/she is convicted for an intentional (as defined in Polish criminal law) or fiscal offence (except for offences tried in a private prosecution), or for a failure to inform the PFSA of charges relating to such offences within 30 days of the charges being brought.

The PFSA also has the power to impose fines on the board members of banks if a bank:

1. fails to comply with recommendations issued by the PFSA in response to its conduct of business activity in contravention of law or the bank's articles of association;
2. refuses to provide the PFSA with explanations and information when required; or
3. if irregularities are discovered in a bank's activity relating to structured deposits.

There are no specific rules prohibiting the indemnification of senior managers by insurers for regulatory fines.

Poland

Individual accountability regimes under the jurisdiction of the president of the OCCP and the PFSA applicable to board members of banks and management personnel of certain other financial institutions, for example, investment firms.

Other points of interest

Data protection

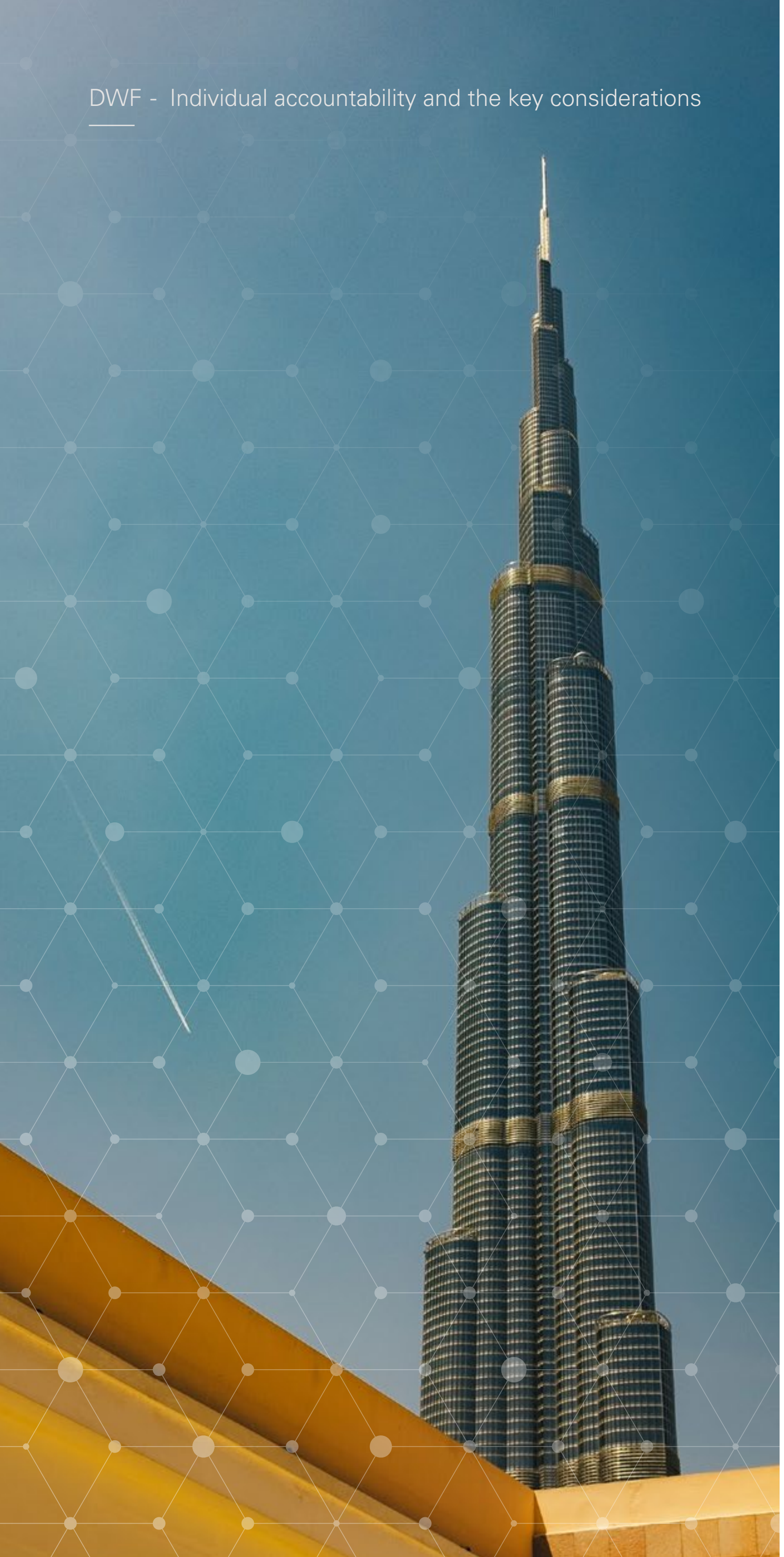
The Polish individual accountability regimes do not explicitly cover data protection. Responsibility for data protection breaches is regulated by GDPR and other domestic legislation.

Whistleblowing

There are requirements for a senior manager to be responsible for whistleblowing. In relation to banks, one board member must be responsible for whistleblowing. Entities from certain sectors of the financial market (in particular banks and investment firms) must implement whistleblowing policies. In the case of banks, the articles of association must include a procedure of anonymous reporting of violations of the laws, internal regulations and ethical standards applicable to the bank. The procedure must provide protection for whistle-blowers against retaliation, discrimination and other potential instances of unfair treatment.

Territorial limitations

The regimes are only applicable to conduct within Poland.



United Arab Emirates

There are three key legal regimes in the UAE:

- the laws and regulations of the Central Bank of the UAE;
- the laws and regulations of the Dubai Financial Services Authority (DFSA), the financial regulator for the Dubai International Financial Centre (DIFC); and
- the laws and regulations of the Financial Services Regulatory Authority (FSRA), the financial regulator for the Abu Dhabi Global Markets (ADGM).

All three of these jurisdictions have their own laws and regulations. The DFSA and ADGM have to comply with the Central Bank regulations and usually incorporate these into their rule books.

There is no one set of law or regulations in any of the UAE jurisdictions that are similar to the Senior Managers and Certification Regime (SMCR) in the UK. However, each jurisdiction has a few regulations that overlap with the SMCR. The rules were introduced to enhance the governance of financial institutions and ensure compliance with national and international banking regulations.

The regimes are considered to be fairly effective and have led to an improvement in the conduct of those caught by the regimes.

> **The Central Bank and other regulatory authorities are involved in firms' governance processes and routinely conduct audits and investigations.**

There have been instances where the senior officials of firms have been terminated and/or fined as a result of investigations by the UAE regulatory authorities. The DFSA has also blacklisted individuals who have been found non-compliant with their regulations.

UAE

Regime applicable to banks and other financial institutions in the UAE, with the exception of institutions incorporated and licensed by the DIFC and the ADGM.

Approvals required

The Central Bank is required to assess and approve those in senior management positions at banks and financial institutions operating in the UAE (UAE Federal Law no.14 of 2018 concerning the Central Bank, the Monetary System and the Organisation of Banking (Banking Law)).

The activities of senior management are 'designated functions' under the Banking Law, and are defined as functions of an influential nature on the relevant institution's activities. A financial institution must submit an application to the Central Bank if it wants a particular individual to undertake a designated function. The Central Bank may reject an application if it determines that the individual is not 'fit and proper' for the relevant role.

Employee conduct rules

There is no separate set of conduct rules within the Central Bank's laws and regulations. However, any individual licensed to undertake designated functions may have their license revoked or suspended if they no longer meet the criteria of the Central Bank.

Employment implications

Remuneration

There is currently no legislation that allows the Central Bank to target the remuneration of a senior manager. However, a financial institution can have its own internal disciplinary hearings relating to the conduct of senior management, which may result in the institution itself taking actions affecting their remuneration.

Disciplinaries

If an employer takes disciplinary action against an employee then it must inform the relevant regulator; the DFSA, ADGM and/or the Central Bank as appropriate.

Criminal, civil and/or regulatory liabilities

The Central Bank may suspend, withdraw, or revoke the authorisation issued to an individual undertaking designated functions via an official notice. This may occur in several circumstances including:

1. if the relevant individual ceased to meet, or breached one or more of the fit and proper criteria;
2. if the relevant individual violated any of the State's established laws and regulations or the regulations, rules, standards, or guidelines issued by the Central Bank;
3. if the relevant individual was declared bankrupt; and/or
4. if the relevant individual refused to cooperate with representatives of the Central Bank, or failed to submit required information or records.

The Banking Law sets out various fines and prison terms for individuals who contravene its conditions and restrictions.

The rules and regulations do not stipulate whether senior management may be indemnified by insurers, or their employers, for any fines imposed by the Central Bank.

Other points of interest

There are no specific provisions assigning responsibility for whistleblowing or data protection to particular senior individuals.

Territorial limitations

No territorial limitations are specified. The regulator may bring proceedings against individuals who are based in another jurisdiction for conduct in the UAE.

Dubai

The DFSA regulates banks and financial institutions (and their staff) registered in the DIFC. The regime is applicable to all those regulated by the DFSA.

Approvals required

Any director, officer, employee or agent of an entity, body, government or state that has been licensed by the DFSA to carry out financial services in the DIFC (authorised firm), and who performs functions that require a licence pursuant to the DIFC Laws amendment no.1 (authorised individual) should be registered with the DFSA.

An authorised firm must investigate the individual's fitness and propriety to carry out a 'licensed function', as set out in the DFSA rules and guidelines. The individual must satisfy the requirement that they are the 'fit and proper' person to carry out the role. The DFSA must be satisfied that the functions of each authorised individual's role will be conducted in a sound and prudent manner. Once the authorised firm and DFSA are satisfied, an application form for authorised individual status must be completed and submitted through the DFSA.

Employee conduct rules

The licensed functions of an authorised individual are linked to an authorised firm's management and/or its provision of services. Therefore, the DFSA require authorised individuals to meet certain standards in relation to their experience, knowledge and qualifications. The licenced functions include senior executive officers, licensed directors, licensed partners, finance officers, compliance officers, senior managers, money laundering reporting officers or responsible officers/non-executive directors.

An authorised individual must abide by principles set out in the DFSA's General Module (section 4.4). These include integrity, due skill, care and diligence, market conduct, relations with the DFSA, systems and controls, management and compliance.

Employment implications

Remuneration

There are no explicit provisions regarding how the remuneration of a senior manager is to be affected if they breach the rules. However, a financial institution can have its own internal disciplinary hearings relating to the conduct of senior management, which may result in the institution taking actions affecting remuneration.

Criminal, civil and/or regulatory liabilities

If the DFSA considers that a person has breached a provision of any DFSA legislation or rules, it may impose a restriction preventing that person from performing any function in connection with the provision of financial services in, or from, the DIFC (articles 58 and 59 of the Regulatory Law). The time period of the restriction is within DFSA's discretion. A person may be suspended as the authority sees fit or in serious circumstances, can be barred from practising within the jurisdiction.

Criminal liability is not explicitly imposed by the DFSA. In circumstances where contravention of DFSA legislation or rules are of a more serious nature, the DFSA may seek to impose a financial penalty by commencing proceedings before the Financial Markets Tribunal or the DIFC Court (civil proceedings).

There are no explicit provisions that define whether senior management may be indemnified by insurers, or their employers, for any fines imposed by the DFSA.

Dubai

The DFSA regulates banks and financial institutions (and their staff) registered in the DIFC. The regime is applicable to all those regulated by the DFSA.

Other points of interest

The DFSA does not have specific rules or regulations relating to whistleblowing or data protection.

Territorial limitations

There are no explicit territorial limitations under the DFSA regime. However, an authorised individual must reside in the UAE (rule 7.5.2 of the General Module).

The regulator may bring proceedings against individuals who are based in another jurisdiction for conduct in the UAE.

Abu Dhabi

The FSRA regulates the activities of banks and financial institutions (and their staff) registered in the ADGM. The regime applies to all those regulated by the FSRA.

Approvals required

The FSRA requires that any director or executive officer of an authorised firm is assessed and approved by the regulator. Once approved, such individuals are known as 'approved persons'. The authorised firms are accountable for recognising and approving customer facing staff and those who perform 'recognised functions'. This includes senior managers, compliance officers and money laundering reporting officers.

Employee conduct rules

The FSRA General Rule Book expands on the conduct rules of approved persons. These include the requirement to act with due care and responsibility. Financial institutions must ensure the appropriate allocation of management responsibilities and are required to ensure that effective systems and controls are implemented. Furthermore, guidance on complaints handling, including acknowledgement and resolution of complaints, must be established.

Employment implications

Remuneration

There are no explicit provisions regarding how the remuneration of senior management will be affected if they breach the rules. However, a financial institution can have its own internal disciplinary hearings relating to the conduct of senior management, which may result in the institution taking actions affecting their remuneration.

Criminal, civil and/or regulatory liabilities

If the FSRA considers that an approved person has breached any FSRA law or rules, it may suspend the approved person for a period it considers appropriate (Financial Services and Markets Regulations, 2015).

Criminal liability is not explicitly imposed by the FSRA. In circumstances where contravention of FSRA legislation or rules are of a more serious nature, the FSRA may seek to impose a fine by commencing proceedings before the ADGM court (civil proceedings).

There are no explicit provisions that define whether senior management may be indemnified by insurers, or their employers, for any fines imposed by the regulator.

Other points of interest

Data protection

There is no explicit data protection responsibility for senior management. The ADGM has a data protection law that prescribes general implications on licensed firms.

Whistleblowing

The FSRA does not have specific rules and/or regulations related to whistleblowing protection.

Territorial limitations

There is no explicit territorial limitation imposed for contravention. The regulator may bring proceedings against the individuals who are based in another jurisdiction for conduct in the UAE.

How can we help

DWF's outstanding team of financial services regulatory lawyers and consultants has extensive experience of:

- regulatory change implementation projects;
- on-going compliance advisory work;
- breach response and regulatory reporting;
- internal investigations; and
- defending regulated firms, directors, officers and senior managers in enforcement actions.

We can help financial services firms and their senior managers by:

Acting as trusted advisers to both firms and individuals subject to senior management accountability regimes.

Providing training to firms, their senior managers and other relevant individuals regarding the main risks of falling foul of the regime.

Running accountability regime implementation on behalf of clients.

Providing a verification service to confirm firms' plans and approaches comply with the relevant regime(s).

Drafting and implementing internal policies and procedures aimed at preventing violations and, consequently, the application of sanctions.

Representing both firms and individuals who are the subject of internal and/or regulatory investigations.

Key contacts

United Kingdom

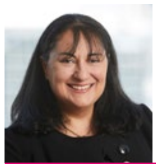
Imogen Makin
Head of Financial Services Regulatory Investigations (UK)
M: +44 7842 608 194
E: Imogen.Makin@dwf.law

Robbie Constance
Head of Financial Services Regulatory (UK)
M: +44 7545 100514
E: Robbie.Constance@dwf.law

Andrew Jacobs
Head of Regulatory Consulting (UK & Singapore)
M: +44 7902 701867
E: Andrew.Jacobs@dwf.law

Aaron Osborn
Associate
M: +44 7892 701766
E: Aaron.Osborn@dwf.law

Australia



Mary Nemeth
Principal Lawyer
M: +61 400 627 048
E: Mary.Nemeth@dwf.law

Singapore

Ben Constance
Partner
M: +65 9172 1039
E: Ben.Constance@dwf.law

Republic of Ireland

Louis Burke
Partner
M: +353 86 609 7500
E: Louis.Burke@dwf.law

Germany

Dr. Steffen Ernemann
Partner
M: +49 171 9120154
E: Steffen.Ernemann@dwf.law

Italy

Luca Lo Pò
Head of Financial Services and Capital Markets (Italy)
M: +39 33 9753 9913
E: Luca.LoPo@dwf.law

Francesco Falco
Counsel
M: +39 34 7836 3081
E: Francesco.Falco@dwf.law

Spain

Carlos Nogareda
Partner
M: +34 69 588 04 14
E: Carlos.Nogareda@dwf-rcd.law

Iratxe Lezamiz
Senior Associate
M: +34 69 599 02 20
E: Iratxe.Lezamiz@dwf-rcd.law

Poland

Adam Stopyra
Partner
M: +48 571 244 772
E: Adam.Stopyra@dwf.law

Michal Toronczak
Senior Associate
M: +48 692 003 532
E: Michal.Toronczak@dwf.law

United Arab Emirates

Umera Ali
Head of Banking and Finance (Middle East)/ Global Head of Islamic Finance
M: +971 52 3859126
E: Umera.Ali@dwf.law

About DWF

DWF is a global legal business with a different mindset: we disrupt to progress.

Like our Financial Services sector clients, we recognise that the world is changing fast and the old rules no longer apply. That's why we're always finding agile ways to tackle new challenges together. We don't simply claim to be different, we prove it through every detail of our work, across every level. We go beyond conventions and expectations.

We're taking the business to the next level, building on our three principal strategic objectives: understanding our clients; engaging our people; and doing things differently. Our purpose is to transform legal services through our people for our clients.

We have received recognition by The Financial Times which named DWF the 8th most innovative law firm in Europe and we were recognised for our ground breaking IPO, where we became the first legal business to list on the main market of the London Stock Exchange.

FT INNOVATIVE LAWYERS 2019 AWARD WINNER

Our Financial Services sector approach

We bring disruptive business solutions to financial institutions, creating a shift in how traditional law firms deliver results. Our comprehensive offering of legal, advisory and regulatory solutions is designed to meet your requirements, in an efficient and commercial manner.

Our clients trust us to combine the very best knowledge with a practical understanding of the relevant commercial challenges they face. With financial services capabilities across our global network, we can advise and instruct clients on local and multi-jurisdictional complex matters, including across the following areas:

- Asset finance and leasing companies
- Banking and restructuring
- Consumer credit
- Data protection and cyber security
- Debt capital markets (DCM)
- Disputes and litigation
- Equity capital markets (ECM)
- FinTech
- Fraud
- Funds
- Islamic finance
- Private equity
- Project finance
- Regulatory and compliance
- Risk management
- Venture capital
- Volume litigation
- Wealth management

31 locations
10 across the UK and 21 across the rest of the world

+4,000
People

3 key sectors
- Financial Services
- Insurance
- Real Estate

Largest listed legal business globally
Listed on LSE 15 March 2019

3 delivery platforms
- Complex
- Managed
- Connected

+10
Years relationships with 62% of clients

£272.4m
Revenue for FY19

DWF Foundation
£310,000
Donated through 130+ grants

4 global regions
Europe, Middle-East, Asia-Pacific and North America

dwfgroup.com