

CP86 2.0: Welcome Clarity on Corporate Governance Issues

Introduction

On 20 October 2020, the Central Bank of Ireland ("CBI") published the findings of its themed inspection of Irish fund management company ("FMC") governance, management and effectiveness.

We welcome the publication and associated guidance which provide further clarity to Irish FMCs on best-in-class governance, management and organisation principles. Indeed, the inspection found that, when applied correctly, the current CP86 regime provides a framework of robust governance, management and oversight arrangements. However, the findings also revealed areas for improvement which will pose challenges for entities needing to implement changes prior to next year's deadlines.

This update provides a high-level summary of those findings and considers the implications and necessary next steps for impacted FMCs.

Background

The CBI introduced its [Fund Management Companies – Guidance](#) (commonly known as the "CP86 Guidance") in December 2016 and the [framework](#) of rules and guidance became fully effective for firms in scope (namely Irish UCITS management companies, authorised AIFMs, self-managed UCITS and internally-managed AIFs) from 1 July 2018.

The CBI has now completed a detailed 18-month review of how 358 Irish FMCs have been applying the CP86 Guidance.

As noted, a high degree of compliance and adherence was discovered. Indeed, for FMCs authorised post-Brexit the application of the CP86 also took into account the Brexit sectorial opinions issued by ESMA and work of the Supervisory Convergence Network. As a result, the authorisation of those FMCs generally resulted in appropriate and effective overall levels of resourcing.

As a result, the findings largely focus on pre-2017 authorisation and do not reflect a fundamental reset of the existing CP86 guidance itself.

FMCs will need to (i) critically assess and evaluate their operations in light of this review; (ii) consider appropriate enhancements and (iii) adopt a formal plan (by the end of Q1 2021) to implement those enhancements within a specified time period.

Key Focus Areas

The outcome of the review takes the form of a "[Dear Chair Letter](#)" (the "Letter"), accompanied by a summary of high-level findings. The Letter has been issued to all firms in scope and sets out the CBI's findings in the following key areas:

- **Governance risk:**

- Designated Persons (e.g. challenge of delegates, quality of reporting);
 - Organisational effectiveness role (e.g. adequacy of reporting, evidence for findings on adequacy of resources);
 - Functioning of the board (e.g. gender diversity, quality of minutes, role of CEO); and
 - Resources and organisational structure (e.g. adequate time commitments of Designated Persons, succession planning).
- **Operational risk:** risk management and delegate oversight (e.g. evidencing initial and ongoing due diligence of delegates, documented risk management framework).

Qualitative and Quantitative Findings

The Letter contains a range of qualitative-based findings that will challenge firms to enhance their operational framework, reporting and oversight functions.

It also contains some quantitative-based findings, particularly on resourcing, including:

- **FTE Levels** - The CBI expects that all firms should have a minimum of three full-time employees or equivalents ("FTE"). It further states that this minimum level of internal resources applies to only "*the smallest and simplest of entities*" with other firms expected to have a greater level of internal resources dependent on the nature, scale and complexity of the firm's operations. It is not specifically mentioned whether self-managed UCITS / internally-managed AIFs may fall within the category of "*simplest of entities*".

- **Designated Persons and other staff located in Ireland** - The Letter refers to the appointment of "*locally based*" Designated Persons and other staff, but does not give any further details on this or specifically reference any intention to review the location rules contained, for example, in the Central Bank UCITS Regulations¹.
- **CEO** - The Letter sets out an expectation that "*all but the smallest [firms] should have a CEO*", i.e. a senior executive responsible for the day-to-day running of the business. It is acknowledged that this is unconnected to existing guidance.
- **Board rotation / independent director tenure / gender diversity** - The Letter notes that 28% of firms have at least one independent director in the role for more than 10 years, only 16% of director roles are held by women and indicates that boards should consider both board rotation (so as to ensure independent board challenge) and gender diversity. Again, it is noted that these elements are not connected to existing guidance.

Assessment and Implementation Plan

Some firms will be subject to further direct CBI supervisory engagement as a further part of the process.

The CBI expects all other firms to critically assess their day to day operational, resourcing and governance arrangements, taking into account the CP86 Guidance and the findings in the Letter.

The outcome of this review should take the form of an assessment and implementation plan which each firm should formulate to make any necessary enhancements to its business (including entity-specific policies and procedures)

¹ Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Undertakings for Collective Investment in Transferable Securities) (Amendment) Regulations 2019.

to ensure that it is aligned with the CP86 Guidance and the findings in the Letter.

The plan should, at a minimum, consider:

- The firm's resources;
- The division of retained tasks and delegated tasks and how independent challenge of delegates can be achieved;
- How the firm meets the specific positive obligations (on a fund by fund basis) in the CP86 Guidance;
- How resources and operational capacity should be adjusted to reflect an increase in a firm's nature, scale and complexity; and
- How resources and operational capacity should be adjusted to deal with market and/or operational crisis.

The plan should be approved by the board before the end of Q1 2021, with a timeline agreed for its execution.

The CBI plans to conduct a further industry-wide review of these matters in 2022 *"to assess firms' actions on foot of these findings"*.

How can the Maples Group help?

The Maples Group is a global leader in the provision of legal advice and professional services in the area of corporate governance. We work in the world's leading jurisdictions by combining legal, regulatory, fiduciary and fund services teams to provide a comprehensive service to our clients.

We will be working with our clients to assess the Letter; consider its practical implications for the relevant firm's particular circumstances; and tailor and initiate the business reviews that will ultimately result in the formulation of the assessment and implementation plans.

Further Information

If you would like to discuss the plan for your firm or have any questions in relation to the matters

addressed in this update, please liaise with the below or your usual Maples Group contact.

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The Maples Group's Irish legal services team is independently ranked first among legal service providers in Ireland in terms of total number of funds advised (based on the most recent Monterey Insight Ireland Fund Report, as at 30 June 2019).

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