

## CHAPTER 5

### OPERATIONAL ABILITY

#### Application of Chapter

35. The fit and proper requirements relating to operational ability contained in this Chapter apply to the extent set out in this Chapter to FSPs, representatives and key individuals.

#### General requirements

36. (1) An FSP must-

- (a) have the operational ability, including adequate and appropriate human, technical and technological resources, to effectively function as a particular category of FSP and to render the financial services in relation to the financial product for which it is authorised;
- (b) adopt, document and implement an effective governance framework that provides for the fair treatment of clients and prudent management and oversight of the business of the FSP; and
- (c) at all times have-
  - (i) a fixed physical business address from where the business is operated or controlled;
  - (ii) adequate access to communication facilities, including a full-time telephone or cell phone service;
  - (iii) adequate storage and filing systems for the safe-keeping of records, business communications and correspondence;
  - (iv) a bank account with a registered bank, including, where required in the Act, a separate bank account for client funds; and
  - (v) adequate and appropriate key individuals to effectively manage or oversee the activities of the FSP relating to the rendering of financial services, including having at least one key individual per class of business in respect of which the FSP is authorised.

- (2) The key individual referred to in subsection (1)(c)(v) insofar it relates to the requirement that the FSP must have at least one key individual per class of business in respect of which the FSP is authorised, could be a single person responsible for managing or overseeing the rendering of financial services in respect of all or multiple classes of business of the FSP provided that it -
  - (a) is approved for all such classes of business; and
  - (b) has the operational ability to oversee or manage the rendering of financial services in respect of all such classes of business.

#### Governance requirements

37. The governance framework of an FSP must -

- (1) be proportionate to the nature, scale, risks and complexity of the business of the FSP;
- (2) include, but not limited to, effective and adequate systems of corporate governance, risk management (including conduct risk management) and internal controls that subject to subsection (1) includes -
  - (a) a business plan setting out the aims and scope of the business, the business strategies and related matters;
  - (b) risk management policies, procedures and systems, including-
    - (i) effective procedures for risk assessment, which identify the risks relating to the FSP's activities, processes and systems, and where appropriate, set the level of risk tolerated by the FSP;
    - (ii) effective procedures and systems -
      - (aa) to ensure compliance by the FSP, its officers, employees, key individuals and representatives with the Act and other applicable laws, including the Financial

- Intelligence Centre Act, 2001 and other applicable anti-money laundering or terrorist financing legislation;
- (bb) to ensure compliance with decisions and decision-making procedures at all levels of the FSP;
  - (cc) to detect any risk of failure by the FSP to comply with applicable legislation, and put in place measures and procedures to minimise such risk; and
  - (dd) that provide for corrective actions to be taken in respect of non-compliance, weak oversight, failure of controls or lack of sufficient management;
- (ii) systems and procedures that are adequate to safeguard the security, integrity and confidentiality of information, including -
    - (aa) electronic data security and internal and external cybersecurity;
    - (bb) physical security of assets and records;
    - (cc) system application testing;
    - (dd) back-up and disaster recovery plans and procedures for systems and electronic data; and
  - (iii) systems and processes to ensure accurate, complete and timeous processing of data, reporting of information and the assurance of data integrity;
- (c) accounting policies and procedures to enable the FSP to record, report and deliver in a timely manner to the Registrar financial reports which reflect a true and fair view of its financial position and which comply with the applicable reporting and accounting standards and requirements;
  - (d) sound and sustainable remuneration policies and practices which promote the alignment of interests of the FSP with those of its clients and which avoid excessive risk taking and unfair treatment of customers;
  - (e) a business continuity policy aimed at ensuring, in the case of an interruption to the FSP's systems and procedures, that any losses are limited, the preservation of essential data and functions, and the maintenance of its regulated activities, or where that is not possible, the timely recovery of such data and functions and the timely resumption of those activities;
  - (f) a recovery plan for the restoration of the FSP's financial situation following a significant deterioration and viable resolution plan setting out options for the orderly resolution of the FSP in the case of failure; and
  - (g) provide for regular monitoring and evaluation of the adequacy and effectiveness of its systems, processes and internal control mechanisms and measures to address any deficiencies and to determine whether it serves reasonably to ensure -
    - (i) risk detection and compliance with applicable legislation;
    - (ii) the integrity of the FSP's practices, including the treatment of clients with due care, skill and diligence and in a fair, honest and professional manner; and
    - (iii) appropriate segregation of key duties and functions, particularly those duties and functions which, when performed by the same individual, may result in undetected errors or may be susceptible to abuses which expose the FSP or its clients to inappropriate risks.

#### **Additional requirements applicable to FSPs that provide automated advice**

- 38.** In addition to the requirements set out in section 37, an FSP that provides automated advice must-
- (a) have adequate and appropriate human resources that have the required competence to-
    - (i) understand the technology and algorithms used to provide the automated advice;
    - (ii) understand the methodological approaches, including assumptions, embedded in the algorithms;
    - (iii) understand the preferences or biases that exist in the approaches referred to in (ii);
    - (iv) understand the risks and rules underpinning the algorithms;
    - (v) identify the risks to clients arising from the automated advice; and
    - (vi) monitor and review the automated advice generated by algorithms to ensure quality and suitability of the advice and compliance with the Act;

- (b) establish, implement and maintain adequate policies and procedures –
  - (i) to monitor, review and test the algorithms and the advice generated by it;
  - (ii) to monitor, review and test the filters implemented to ensure clients for whom the automated advice is not suitable are filtered out; and
  - (iii) that set out the level of human review that will be undertaken on the advice generated;
- (c) in relation to the monitoring and testing of the algorithms and filters referred to in (b), -
  - (i) have appropriate system design documentation that sets out the purpose, scope and design of the algorithms and filters;
  - (ii) have a documented test strategy that explains the scope of testing, including test plans, test cases, test results, defect resolution, and final test results;
  - (iii) have appropriate processes for managing any changes to an algorithm and filters that include having security arrangements in place to monitor and prevent unauthorised access to the algorithms;
  - (iv) be able to control, monitor and reconstruct any changes to algorithms or filters;
  - (v) review and update algorithms whenever there are factors that may affect their relevance (such as market changes and changes in the law);
  - (vi) have in place controls and processes to suspend the provision of advice if an error within an algorithm or filters is detected; and
  - (vii) be able to frequently monitor and supervise the performance of algorithms and filters through an adequate and timely review of the advice provided;
- (d) have adequate and sufficient technological resources to-
  - (i) maintain client records and data integrity;
  - (ii) protect confidential and other information; and
  - (iii) meet current and anticipated operational needs, including in relation to system capacity.

#### **Outsourcing of functions to a person other than a representative of the FSP**

39. (1) An FSP must exercise due skill, care and diligence when entering into (including the selection process), managing or terminating any arrangement for the outsourcing to any person other than a representative of the FSP of -
- (a) a function that the Act or another law requires to be performed or requires to be performed in a particular way or by a particular person;
  - (b) a function that is integral to the nature of the financial services for which the FSP is authorised; or
  - (c) any material important operational function of the FSP.
- (2) An FSP, where it outsources a function or activity referred to in (1), must -
- (a) ensure that the person to whom the function or activity has been outsourced –
    - (i) has the ability, capacity, and any authorisation required by law to perform the outsourced functions, services or activities reliably and professionally;
    - (ii) is able to carry out the outsourced services effectively, to which end the FSP must establish methods for assessing the standard of performance of that person;
  - (b) have a written contract that governs the outsource arrangement and which clearly provides for all material aspects of the outsourcing arrangement, including –
    - (i) addressing the rights, responsibilities, and service-level requirements of all parties;
    - (ii) providing for access by the FSP and the Registrar to the person's business and information in respect of the outsourced function or activity;
    - (iii) addressing sub-outsourcing; and
    - (iv) addressing confidentiality, privacy and the security of information of the FSP and clients of the FSP;
  - (c) properly supervise the carrying out of the outsourced functions, and adequately manage the risks associated with the outsourcing, including any risks to the FSP's clients;

- (d) take appropriate action if it appears that the person may not be carrying out the functions effectively and in compliance with applicable laws and regulatory requirements;
- (e) retain the necessary expertise to supervise the outsourced functions effectively and manage the risks associated with the outsourcing;
- (f) be able to terminate the arrangement for outsourcing where necessary without detriment to the continuity and quality of its provision of financial services to clients;
- (g) establish, implement and maintain a contingency plan for disaster recovery and periodic testing of backup facilities;
- (h) have effective access to data related to the outsourced activities, including any data relating to the FSP's clients, as well as to the business premises of the person; and
- (i) ensure that the outsourcing arrangement does not –
  - (i) compromise the fair treatment of or continuous and satisfactory service to the FSP's clients; or
  - (ii) result in key decision making responsibilities being removed from the FSP.

#### **Appointment of representatives**

40. (1) An FSP must ensure that where it appoints a person as a representative -

- (a) the person-
    - (i) is not declared insolvent or provisionally insolvent;
    - (ii) is not under liquidation, provisional liquidation or business rescue; and
    - (iii) is not subject to any pending proceedings which may lead to an outcome referred to in subparagraph (i) to (ii);
  - (b) the person, in the case of a juristic representative, has sufficient operational ability and financial resources to perform the activities for which it is appointed as a representative; and
  - (c) such appointment does not-
    - (i) materially increase any risk to the FSP or to the fair treatment of its clients;
    - (ii) materially impair the quality of the governance framework of the FSP, including the FSP's ability to manage its risks and meet its legal and regulatory obligations;
    - (iii) compromise the fair treatment of or continuous and satisfactory service to clients;
    - (iv) prevent the FSP from acting in the best interests of its clients; or
    - (v) result in key decision making responsibilities being removed from the FSP.
- (2) An FSP must ensure that any remuneration or fee paid in respect of an activity or function for which a person is appointed as a representative-
- (a) is reasonable and commensurate with the actual function or activity; and
  - (b) is not structured in a manner that may increase the risk of unfair treatment of clients.
- (3) An FSP must develop appropriate contingency plans to ensure the continued function of the FSP's business and continued service to its clients in the event that the appointment of the representative is terminated or becomes ineffective.
- (4) An FSP may not permit a representative to outsource or sub-delegate any activity or part thereof relating to the rendering of financial services that that representative performs on behalf of the FSP.

#### **Representatives**

41. (1) A representative of an FSP must have the operational ability to effectively function as a representative of the FSP or perform the activities for which that person was appointed.
- (2) A juristic representative must at all times have at least one key individual responsible for managing or overseeing the financial services rendered by the representative.

**Key individuals**

42. (1) A key individual must have the operational ability to effectively manage and oversee the financial services related activities of the FSP or juristic representative and the financial services in relation to the financial product for which the key individual was approved or appointed.
- (2) A key individual, where he or she is-
- (a) approved or appointed as a key individual of more than one FSP or juristic representative; or
  - (b) approved or appointed as a key individual of an FSP or juristic representative and appointed as a representative of an FSP other than the first mentioned FSP, must be able to demonstrate to the Registrar, in a form and manner which may be determined by the Registrar, that he or she has the required operational ability to effectively and adequately manage or oversee the financial services related activities of all the FSPs or juristic representatives for which the key individual was approved or appointed.
- (3) An FSP must, on a regular basis, assess the operational ability of its key individuals to adequately and effectively perform their functions taking into account individual circumstances, the nature, scale, range and complexity of the FSP's financial services related activities and whether the key individuals are approved as key individuals or appointed as representatives of other FSPs.