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PRDBA
Professional, Regulatory and Disciplinary Bar Association of Ireland

Submission to the Central Bank of Ireland on the

FITNESS AND PROBITY REGIME

25 March 2026

About The Bar of Ireland

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About the Professional, Regulatory and Disciplinary Bar Association of Ireland

The Professional, Regulatory and Disciplinary Bar Association of Ireland ("*PRDBA*") is a specialist bar association for Irish barristers who practice before professional regulatory tribunals (such as the Legal Practitioners Disciplinary Tribunal and the Fitness to Practise Committee of the Medical Council) and who are interested in professional regulatory and disciplinary law.

The PRDBA provides specialist education to its members through legal updates and morning seminars and acts as a forum for practising barristers involved in professional regulatory law. It also promotes the Bar as a specialist provider of advocacy and legal advice in this area.

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Introduction

1. The PRDBA would like to make submissions in relation to the Central Bank's consultation paper *"Guidance on Prohibition Notices under the Fitness and Probity Regime"* (CP-166). The consultation paper relates to the Central Bank's proposal to supplement its main guidance in this area (*"**Fitness and Probity Investigations, Suspensions and Prohibitions (April 2023)**"*), with additional guidance on prohibition notice procedures. Prohibition notices under the Central Bank's fitness and probity regime are provided for by Part 3 Chapter 4 of the Central Bank Reform Act 2010, as amended (*"**the 2010 Act**"*).

2. As a stakeholder representing Irish barristers who practice before professional regulatory tribunals including within the Central Bank's fitness and probity regime, the PRDBA's submissions in this respect highlight the need for clear guidance that guarantees fair procedures to those that are subject to the fitness and probity regime (*"**Subject(s)**"*) during the Decision stage of the process.

3. While the decision to publish supplemental guidance which expands upon and further clarifies the Central Bank's prohibition procedures is welcome, there are a number of areas where some additional guidance might be useful. To that end, these submissions provide some observations on a number of aspects of the supplemental guidance where consideration may be given to further clarification or amendment.

4. Clear guidance that is accessible to practitioners and the wider public is of particular importance in order to ensure fair procedures to those subject to prohibition notices.

5. The Central Bank may consider amending the list of relevant considerations contained at Table 1 of the supplemental submissions to promote clarity and reduce duplication by listing each relevant consideration divided into mitigating and aggravating factors. Such an approach would serve to clarify the effect that certain factors may have in a decision as to whether prohibition is appropriate, and encourage focused submissions that identify how certain factors mitigate or aggravate the circumstances pertaining.

6. It may also be prudent to include additional guidance as to the importance of complying with prohibition notices (and any conditions attached), and highlight the seriousness of a failure to do so. Additional guidance may be helpful in ensuring that Subjects understand the gravity of a potential breach, and ensure that if a Subject agrees to a prohibition agreement with the Central Bank that there is no doubt as to the necessity to thoroughly comply with a notice and any agreed conditions.

7. Some consideration may also be given to providing additional guidance in respect of the circumstances in which an oral hearing on the question of sanction would be appropriate. Similarly, it would appear that the procedures whereby additional evidence relevant to sanction may be advanced require elaboration. Furthermore, consideration may be given to the adoption of a legal assessor role to assist the Prohibition Decision Maker by advising in respect of any procedural or evidential issue that may arise at the Decision stage, and help ensure that fair procedures are afforded to the Subject.

8. Further amendment to the supplemental guidance in respect of termination of prohibition notices may also be considered. Given the obvious benefit in encouraging Subjects to agree a prohibition with the Central Bank insofar as increased time and resources are avoided in the making of an application to the High Court for confirmation, some consideration may be given to amending the guidance on the circumstances to be

considered by the Central Bank in deciding whether to terminate an agreed prohibition. On the one hand, employing the same test as the High Court may improve consistency and negate any apprehension by a Subject in reaching agreement with the Central Bank arising from a potentially more onerous test being applied by the Central Bank in a later decision to terminate the agreement. On the other hand, however, this is a difficult issue where guidance as to the relevant factors to be considered by the Central Bank may be of particular benefit.

9. Finally, amendments to the supplemental guidance relating to the publication of a prohibition notice to include the privacy of the Subject as a relevant consideration relevant to a decision to publish would be welcome. Such an amendment would contribute to ensuring that any decisions as to publication are carried out in a proportionate and fair manner. Furthermore, the suggestion in the supplemental guidance to the effect that the Central Bank may publish a prohibition notice after it has been served but prior to it taking effect may prove problematic if a prohibition notice is not confirmed by the High Court. In those circumstances, publication of a prohibition notice before it has taken effect may harm the reputation of the Subject if that prohibition notice is found to be inappropriate. Therefore, some consideration might be given to further clarifying the procedures relating to the publication of prohibition notices, and the requirement to ensure the Subject's rights to fair procedures and a good name are protected.

Determining a Prohibition

Relevant Circumstances

10. The supplemental guidance lists a number of matters the Prohibition Decision Maker will consider when deciding whether to impose a prohibition and determining its nature, scope and duration:

- The objectives of Part 3 of the Act;
- The relevant circumstances of the case including the reasons why the Subject is not of appropriate fitness and probity and the level of risk that they pose to the achievement of the objectives of Part 3 of the Act.

11. The supplemental guidance goes on to set out a non-exhaustive table of *"relevant circumstances"* to be taken into account in the Prohibition Decision Maker's determination in Table 1. Table 1 contains a number of factors (A-G) as relevant considerations.

12. While the recognition that a wide variety of factors may be relevant to the decision taken by the Prohibition Decision Maker is welcome (in particular, for example potentially mitigatory factors such as *(F) Whether the Subject has shown an understanding of any matters indicating a lack of appropriate fitness or probity;* and *(G) The personal circumstances of the Subject*), there would appear to be some overlap in certain of the categories which are not readily delineated.

13. For example, under heading *(A) The extent to which the Subject is not of such fitness and probity as is appropriate to perform the relevant controlled function, a specified part of a controlled function, or any controlled function,* the considerations listed include the relevant standards of fitness and probity in a code issued by the Central Bank pursuant to Section 50 of the 2010 Act. In the Bank's published Fitness and Probity Standards, and under the heading *'Conduct to be honest, ethical and to act with integrity'* some of the

considerations mentioned include whether the person has been the subject of disciplinary proceedings, or disqualified or restricted from acting as a director.

14. It is not immediately clear how those standards interact with and whether they are different to relevant consideration *(C) The previous supervisory, disciplinary, criminal and compliance record of the Subject*.

15. As such, Table 1 may be clearer and more accessible to practitioners and the wider public if every factor (whether pursuant to s. 43(2) of the Act, the fitness and probity code of the Bank, or otherwise) is listed as a consideration that may be taken into account, with any duplication therein removed to avoid confusion.

16. Furthermore, it may be helpful to divide the considerations into mitigating and aggravating factors, as is done in the Sanctions Guidance in a range of other professional disciplinary regimes.[1] Such an approach would serve to clarify the effect that certain factors may have in the consideration of whether prohibition is appropriate, and encourage submissions made to the Prohibition Decision Maker to identify how certain factors mitigate or aggravate the circumstances pertaining.

Conditions

17. The supplemental guidance also considers prohibition notices which are imposed with conditions, and provides a list of examples of conditions which may be imposed.

18. It may be helpful to include some additional guidance as to the importance of complying with any conditions imposed and the serious consequences a failure to comply might entail. Indeed, it would be important to highlight that a failure to adhere to certain conditions in the case of a prohibition notice confirmed by the High Court would amount to a breach of a Court Order by the relevant Subject, and contempt of Court. Similarly, in circumstances where a prohibition notice is agreed, as set out in s. 46(3)(c) of the 2010

[1] See for example, the Medical Council's Sanctions Guidance (28 May 2024), the NMBI's Guidance on Sanctions (March 2018), the Pharmaceutical Society of Ireland's Sanctions Guidance (March 2021), and the Veterinary Council of Ireland's Sanctions Guidance (May 2024).

Act, an application may be made to the High Court for an Order directing the person concerned to comply with the agreed notice. Any breach of an Order directing compliance would similarly amount to contempt of Court.

19. Given the significant consequences associated with breaching prohibition notices with or without conditions, for the avoidance of any doubt, the supplement guidance could expand on the necessity to comply with a prohibition notice and the consequences associated with such a breach. Additional guidance may be helpful in ensuring that Subjects understand the seriousness of any potential breach, and ensure that if a Subject agrees a prohibition agreement with the Central Bank, that there is no doubt as to the necessity to thoroughly comply with any conditions attached.

Hearing

20. The supplemental guidance makes reference to the hearing that must be afforded to the Subject/relevant entity in relation to the proposed issue of the prohibition notice as is "*necessary to do justice in the circumstances*". After it is stated that an oral hearing will have been held where necessary during the investigation carried out by the Deputy Governor, the supplemental guidance states (in respect of prohibition notices):

> "*save where it is necessary to do justice in the circumstances, the Prohibition Decision Maker will not hold a further oral hearing for the same purpose. In general, any hearing held by the Prohibition Decision Maker will relate to the proposed issue of a Prohibition Notice and will be limited to the imposition and nature of the prohibition.*"

21. However, on the basis of the relevant circumstances that are listed in Table 1 of the supplemental guidance, it seems likely that the Prohibition Decision Maker will be required to make findings outside of the findings made in the investigation report by the Deputy Governor. For example, at *(D) The length of time that has elapsed since the occurrence of any matter indicating a lack of appropriate fitness and probity*, it is stated "*if the matters in question are <u>ongoing</u>, or if a short time has passed since their occurrence*

or existence, this may indicate greater risk to the objectives of Part 3 of the Act" (emphasis added). Similarly, *(E) The Subject's behaviour since the occurrence of any matters indicating a lack of appropriate fitness and probity* seems to envisage account being taken of events that have occurred since the conclusion of the investigation report. This may also apply to *(G) The personal circumstances of the Subject* insofar as it could plausibly be said that the *current* personal circumstances of the Subject may be relevant to the proportionality of a decision on prohibition.

22. As a result, and particularly in circumstances where a Prohibition Decision Maker may decide to make certain adverse findings against the Subject (for example, a lack of insight), it seems that an oral hearing may in many cases be required to afford fair procedures to the Subject, particularly if there is a material conflict of fact in relation to matters arising outside of the investigation report. As such, some consideration may be given to providing additional guidance in respect of the circumstances in which an oral hearing on the question of sanction would be appropriate. By way of analogy, in a range of other professional disciplinary contexts, decisions on sanction are ordinarily reached following a distinct *"sanctions hearing"* conducted by way of oral hearing.

23. Similarly, it would appear that insofar as the Prohibition Decision Maker makes any such findings, there is a lack of guidance as to the procedures whereby certain extraneous evidence can be considered. For example, there seems to be no provision made for procedures relating to the submission of references supportive of the Subject to the Prohibition Decision Maker or evidence of rehabilitation or remediation undertaken, which would be highly relevant to *(E) The Subject's behaviour since the occurrence of any matters indicating a lack of appropriate fitness and probity*.

24. On the basis of the current supplemental guidance, there may be a danger that a Subject may not proffer evidence to support any submission in mitigation to the Prohibition Decision Maker in circumstances where there does not appear to be any guidance on relevant procedures inviting same. Equally, insofar as such evidence is tendered by a Subject, there is no guidance as to how same might be challenged, queried or tested in appropriate cases. Again, we would emphasise that there can be inherent limitations in

dealing with these types of issues by way of written representations/submissions, and oral hearings may be a more efficient and robust method through which fair procedures can be ensured.

25. Furthermore, it may be necessary that a legal assessor is empanelled to provide legal advice to the Prohibition Decision Maker. As stated in the supplemental guidance, the Prohibition Decision Maker is appointed from a panel of decision makers established pursuant to s. 33BI of the 1942 Act, and the panel comprises both externally recruited experts and Bank staff. Insofar as additional extraneous evidence is advanced and submissions in mitigation are made to the Prohibition Decision Maker, a legal assessor would provide assistance to the Prohibition Decision Maker by advising in respect of any procedural or evidential issue that may arise.

26. In a variety of other professional disciplinary regimes it is customary that a legal assessor would be present at the sanctions stage of the process. The input of a legal assessor helps ensure that fair procedures are afforded to a Subject, and their participation is likely to render decisions made less vulnerable to challenge. As such, consideration may be given to empanelling a legal assessor when determining whether a prohibition notice is appropriate so as to encourage compliance with fair procedures at this stage of the fitness and probity regime.

Termination, Revocation or Variation of a Prohibition Notice

27. The supplemental guidance lays out the process by which the Central Bank may terminate a prohibition notice that has been agreed between the Subject and the Central Bank. It also addresses the process by which an application can be made to the High Court to revoke or vary a prohibition notice that has been previously confirmed by the High Court.

28. There is an obvious benefit in encouraging Subjects to agree a prohibition with the Central Bank insofar as increased time and resources would be avoided in the making of an application to the High Court to confirm a prohibition notice.

29. The supplementary guidance sets out a number of considerations to be taken into account when the Central Bank assesses a request to terminate a prohibition agreement (at para. 28):

> *"In assessing such a request, the Bank will have regard to the amount of time that has passed since the prohibition was imposed and any new relevant and material information provided by the Subject, such as any steps taken subsequently by the Subject to remedy the misconduct or other lack of fitness and probity. The Bank may also have regard to the matters set out in Table 1 above (Relevant Circumstances) to the extent that they appear relevant. The Bank will not terminate a prohibition agreement unless the Bank is satisfied that the Subject is of appropriate fitness and probity to perform a relevant CF, and that termination will not result in a reoccurrence of the risk to the objectives of Part 3 of the Act that resulted in the prohibition being imposed."*

30. However, a potentially different test is to be applied by the High Court in an application to vary or revoke a confirmed prohibition notice. As set stated at s. 45A(3) of the 2010 Act,

> *"(3) If on an application under this section the Court is satisfied that—*

(a) since the confirmation of the prohibition notice under section 45, there has been a change in circumstances, and

(b) the change is such that, if an application for confirmation were made at the time of the application under subsection (1), a different decision would be taken in relation to the application for confirmation, the Court may make an order setting aside or, subject to subsection (4), varying the prohibition notice as it thinks fit."

31. While the elaboration of relevant considerations to which regard will be had by the Central Bank in terminating an agreement is certainly welcome, it is possible that some divergence may occur if prohibition is terminated by the High Court rather than the Central Bank insofar as differing considerations could be said to apply to the relevant test to be applied by each.

32. On the one hand, employing the same test as the High Court may improve consistency and negate any apprehension by a Subject in reaching agreement with the Central Bank that might arise from a potentially more onerous test being applied by the Central Bank in a later decision to terminate the agreement. On the other hand however, this is a difficult issue where guidance as to the relevant factors may be of particular benefit.

33. Furthermore, while currently not provided for by the 2010 Act, a power to *vary* the written agreement between the Subject and the Central Bank to take account of relevant changes may be important in encouraging Subjects to opt in to written agreements rather than requiring a prohibition notice to be confirmed by the High Court. The variation of a prohibition notice is an important difference between the two regimes which may prove advantageous to a Subject if circumstances change to a limited effect such that the termination of a prohibition notice is not warranted, but a variation is.

34. While the power to vary a written agreement would likely require amendment of the 2010 Act, some consideration could still be given as to whether alignment with the test to be employed by the High Court regarding termination is to be preferred over the provision of detailed guidance as to the considerations relevant to a decision to terminate.

Publication of a Prohibition Notice

35. The supplemental guidance deals with the publication of prohibition notices, and lays out the importance of publication and its necessity in many cases.

36. However, the privacy of the Subject is also a valid consideration when deciding whether or not to publish prohibition notices, and its inclusion in this section, as well as provision for anonymisation in certain cases would be welcome.[2] Privacy concerns of a Subject may be particularly pertinent in situations where the Subject is found to have a medical disability (including for example if the Subject suffers from addiction to alcohol, drugs or gambling).

37. A recognition that the personal circumstances of the Subject may be a factor to be weighed in the decision of the Central Bank to publish a prohibition notice would contribute to ensuring that any decisions as to publication are carried out in a proportionate and fair manner. Further consideration in this respect may be given to the provision of supplemental guidance confirming the criteria to be considered in deciding how long prohibition notices will be published for – i.e., the length of time prohibition notices will remain on the Central Bank's website after their expiration.[3]

38. It is of note that the supplemental guidance states that the Central Bank may publish a prohibition notice after it has been served and prior to it taking effect.

39. However, difficulty may arise if a prohibition notice is published before it is confirmed by the High Court if the confirmation application is ultimately not successful. In such a scenario, a prohibition notice would remain devoid of effect.

[2] While there is scope under s. 45(3) of the 2010 Act for a confirmation hearing to the High Court (in respect of a prohibition notice) to be heard in otherwise than in public for reasons of confidentiality or commercial sensitivity or in order to avoid the disclosure of certain information, the Court also has the power to direct an in camera hearing under the *Gilchrist v. Sunday Newspapers* [2017] IESC 18, [2017] 2 IR 284 jurisdiction.

[3] See in this regard "*Appendix 1 Time Periods for retention for information*" as set out in the Medical Council's Publications Policy (The Medical Council's approach to publication and disclosure of specific information in Fitness to Practise matters) (July 2024).

40. In those circumstances, publication of a prohibition notice before it has taken effect may harm the reputation of the Subject if that prohibition notice is found to be inappropriate.

41. Therefore, some consideration might be given to further clarifying the procedures and principles relating to the publication of prohibition notices, and the necessity of ensuring the Subject's rights to fair procedures and a good name are protected.

Conclusion

42. The PRDBA thanks the Central Bank for inviting it to make submissions on these issues. The PRDBA remain available to assist further in the consideration of any of the issues raised in these submissions, and would be happy to answer any questions that may arise.

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