

SUBMISSION

Response to Consultation Paper CP51: The Fit and Proper Regime in Part 3 of the Central Bank Reform Act 2010

GENERAL COMMENTS

Our general comments (i.e. those which would apply across the board to all regulated entities the subject of CP51) are as follows:

1. Definitions

The definitions of "Pre-Approval Controlled Function" ("PCFs") and "Controlled Function" ("CFs") as currently drafted are too broad and guidance is required from the Central Bank to assist individuals and firms in their consideration of the Fit and Proper Regime and the extent to which it applies to them. In addition, there is considerable overlap in terms of which functions are considered to fall within which category (whether "CF" or "PCF") and this also needs to be clarified.

2. Processing Applications

No indication is given as to the timeframe in which applications will be considered or the timeframe within which queries may be raised and/ or approval received from the Central Bank. Such timeframes are necessary to ensure that no party is inadvertently in breach of the new Regulations.

It is also noted that the department within the Central Bank with responsibility for considering applications will be a separate department from others such as the funds department and delays in approval of funds may occur as a result of delays in authorising PCFs or CFs as the case may be. Similar considerations would apply to other types of investment firms also.

Directors and other senior management personnel are already required to complete and submit a Form IQ to the Central Bank. It is not clear from CP51 if it is intended to abolish the Form IQ for those persons who are required to complete it and who will also be performing PCFs and CFs as the requirement to complete both would unduly onerous on these individuals. It would also be useful for any new application form to be circulated to industry as soon as possible to give people an opportunity to review it.

CP51 does not make any provision for people already authorised under a similar process in another EU/EEA Member State or Third Country and this should be addressed as to require such individuals to go through the approval process again would be unduly onerous.

3. Central Bank Guidance

Central Bank guidance will be required to assist generally with the interpretation and implementation of all aspects of the proposed new Fit and Proper Regime.

In particular (and this is not an exhaustive list of examples), guidance will be required on matters such as the interpretation of terms as outlined above and also in the determination of issues such as the financial soundness of individuals (paragraphs 22 and 23) and what, in the opinion of the Central Bank, constitutes adequate due diligence (paragraphs 33 and 38) etc...

4. Persons exercising Controlled Functions on commencement of Regulations.

It is noted that a person who is exercising a CF on commencement of the Regulations is not required to seek re-approval for the role but that they must apply if taking up a new PCF position even if within the same firm. This is excessive and should be changed. If a person agrees to comply with the Fit and Proper requirements as required by the proposed new Regulations they should not be obliged to apply for approval for so long as they stay with the same employer as at the commencement of the Regulations.

5. Corporate Company Secretaries

Paragraph 9 (c) on page 12 of CP51 refers to the Act and states that "The Central Bank may also prescribe a CF as a PCF if the person who performs the function reports directly to the office of director, chief executive or secretary, if the Central Bank is satisfied that it is warranted on the grounds of the size or complexity of the regulated financial service provider and it is necessary and prudent in order to verify compliance by the regulated financial service provider."

Company secretaries are prescribed as PCFs in the draft Regulations. Therefore, as the Fit and Proper Regime applies to individuals only, clarification is required as to how the Central Bank will apply this requirement to corporate company secretarial entities which typically have no staff and which are owned and controlled by legal or auditing firms. In most cases, the directors of such companies are the partners of the legal or auditing firm as the case may be with some more junior company secretarial staff. This issue should be addressed and guidance provided by the Central Bank as to how the Fit and Proper Regime will be applied to such entities in practice.

RESPONSES TO SPECIFIC CENTRAL BANK QUESTIONS IN PARAGRAPH 16 OF CP51:

- 16 (i) (a) Specific functions do not need to be removed from the list provided comprehensive guidance from the Central Bank is forthcoming to assist in the interpretation of what roles are included in the terms "CF" and "PCF".
- (b) No further functions should be added to the list of either PCFs or CFs.

- (c) (1) Yes. Certain categories such as those persons providing “part of” a CF should be expressly excluded from the list.
- (2) Yes. Guidance should be provided to firms on what the Central Bank considers to be appropriate levels or types of due diligence for various roles at certain specified levels within firms. Guidance is also required to assist firms in other areas too. Some example of where guidance is required are outlined above and others include to assist firms in deciding what level of due diligence is required in proposing a person for a “CF” or “PCF” as the case may be including for example whether or not it is reasonable for a firm to rely on the fact that a person is previously approved as a “CF” or “PCF” in another EU/EEA Member State or other third country.

SPECIFIC COMMENTS

Please note the following specific comments in addition to the General Comments outlined above.

Paragraph 8 (Controlled Functions) and Schedule 1 to Appendix 1:

As previously outlined above a more precise definition of “CF” is required in addition to guidance from the Central Bank to assist in the proper application of the Fit and Proper Regime.

In this regard, reference should be had to the UK and the definition of “controlled functions” contained in the regulations issued under S.59 of the Financial Services and Markets Act, 2000 together with the revised “approved persons” regime established in 2010. There is a single standard in the UK which can be easily understood and applied. Similar clarity and guidance is required in Ireland to ensure the efficient operation of the proposed new Fit and Proper regime.

Paragraph 9 (Pre-Approval Controlled Functions) and Schedule 2 to Appendix 1:

As previously outlined above a more precise definition of “PCF” is required in addition to guidance from the Central Bank to assist in the proper application of the Fit and Proper Regime.

APPENDIX 1

Draft Regulations:

Paragraph 4: This paragraph provides that the Regulations shall include “part of” a CF. This should be deleted as it is not possible to say with clarity what “part of” a CF would bring it within the parameters of the Regulations.

Paragraph 5: The references to “the functions commonly performed by a person of such title”

should be deleted for uncertainty. It is too broad.

Paragraph 7: If the requirement that a person is responsible for the performance of a function "notwithstanding that the person does not have the title commonly used by a person who performs such function" is to remain in the Regulations a clearer definition and Central Bank guidance on the meaning of the terms "CF" and "PCF" is required. Otherwise the provision is too broad to be applied in practice.

Paragraph 8. This paragraph needs to be clarified so that a person performing a CF on a temporary basis would also be able to avail of the temporary approval process for PCFs referred to in paragraph 11. The new provisions should also have regard to accountability issues for any non compliance with the new Regulations by the holder of the office prior to the appointment, whether on a temporary basis or not, of the new person.

Paragraph 9: The reference to a person to whom others are "accustomed to act in accordance with the directions or instruction of the person in question" should be deleted as it is too broad. There are many reporting lines and many reasons why this might occur in practice which does not automatically make the person in question fall within the definition of a "CF" or "PCF" as the case may be.

Paragraph 11: Clarification is required as to the precise form and nature of the written agreement with the Central Bank for approval of an alternate person on a temporary basis.

Paragraph 12: This paragraph should be amended to reflect that once a person is approved to perform a "CF" or "PCF" as the case may be they should be approved to perform that function for all time and not just in respect of a particular regulated financial service provider.

Paragraph 13: The Operative Date of the Regulations is noted, however, the transition period until 31.12.2011 for the application of the Regulations is too short and should be extended at least until 31.3.12.

APPENDIX 2 FITNESS AND PROBITY STANDARDS

Paragraphs 2 and 3. Fitness and Probity Standards and Competent and Capable Conduct:

The extent of the application of the Regulations should also vary with nature, scale and complexity of firm having regard to its business activities and range of financial services provided by it in addition to the people employed by it. A small firm, for example, may not have the same resources as a large firm in terms of hiring and training staff etc.

Paragraph 3.2(c) The following part of paragraph 3.2(c) as currently drafted should be deleted;

"If the person performed a function in a regulated financial service provider, which if performed at present would be subject to this Code, and that regulated financial service provider received State

financial support, consideration shall be given to the competence and skills demonstrated by that person in that function and to the extent, if any, to which the performance of his or her function may have contributed to the necessity for such State financial support.”

This places an impossible burden on a regulated financial service provider as they are unlikely to have access to sufficient information regarding the issues arising within the entity which received State financial support, (for a variety of reasons including the fact that legal proceedings may be pending), to be able to assess the situation fully. Given that the relevant regulated financial service provider will be subject to Administrative Sanctions for a breach of the Regulations this provision is not reasonable and not workable in practice and should be deleted from the draft Regulations.

Paragraph 3.2 (f) This section should be deleted in its entirety as there are no parameters around the references to physical and mental health and no guidance is provided as to how wide it is necessary for a firm to go in terms of making enquiries about a proposed employee which may breach data protection laws and employment law.

In addition to the foregoing, Central Bank guidance is also required generally in assessing the extent of the due diligence enquiries required to be conducted by a relevant financial service provider in applying the provisions contained in the other sub-paragraphs of paragraph 3. In this regard it is necessary to be mindful of employment law considerations and people’s right to work.

Paragraph 5: Financial Soundness

The provisions of paragraph 5 are too broad. There is no time limit provided in terms of how far back in a person’s history it is necessary to go. In Ireland a bankruptcy lasts for 12 years which should be the absolute maximum limit. In any event even such a limit is unreasonable where a person may have had minor financial difficulties such as failure to pay a credit card bill or find themselves in a negative equity situation with their home due to market movements and no fault of their own, which would not affect a persons decision making capabilities.

In order to make these provisions more user friendly it will be necessary to insert reasonable time limits commensurate with the particular financial difficulties and to apply appropriate nature, scale and complexity considerations. It will also be necessary for the Central Bank to provide guidance as to what it considers reasonable in the particular circumstances.

Paragraph 5 (g) The reference to “management” in this paragraph should be clarified as it is too broad. A person should not be held responsible for the insolvency or other failure of an entity he/she previously worked in unless they held a very senior role which roles should be expressly specified in this paragraph as the consequences for individuals for non-compliance with these provisions are potentially detrimental to a person’s reputation and ability to find employment.

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