



*By email: fitandproper@centralbank.ie*

Governance, Accounting and Auditing Policy Division  
Central Bank of Ireland  
PO Box 559  
College Green  
Dublin 2

20 May 2011

**Re: Consultation Paper CP51 – The Fit & Proper Regime  
in Pt. 3 of Central Bank Reform Act 2010**

Dear Sirs,

**Introduction**

We welcome the publication of the *Consultation Paper on The Fit and Proper Regime* and we are grateful to have the opportunity to comment on its content. This submission is made on behalf of Zurich Insurance plc, Zurich Life Assurance plc and Zurich Bank.

**Zurich and Fitness and Probity**

The Zurich business units in Ireland form part of the Zurich Financial Services group. As a major international group, we are anxious to ensure that our officers and executives comply with the highest standards of fitness and probity. Therefore, we welcome the CBI's initiative to publish a consultation paper on this matter.

### **Meaning of Terms**

We welcome the recent initiatives taken by the Central Bank (CBI) in the area of corporate governance, consumer protection etc. However, we are of the view that it is important that there is a high degree of commonality across the various requirements being imposed.

We are of the view that CBI should strive for consistency in the meaning of technical/legal terms. To this end, we propose that as a general rule, terms should attract the meaning provided for in the relevant Act or statutory instrument. Where a term is not defined in those primary sources, the definition of a term in a consultation paper or ensuing policy document should be consistent across all CBI policies/requirements.

We are unclear as to what the precise meaning of the term "advice" is for the purpose of CP51 and the accompanying proposed Regulations.

### **Natural Justice**

We are concerned that some of the requirements which are proposed to be introduced as a result of CP 51 are likely to give rise to employee challenge.

For example, a refusal by CBI to allow a person to serve in a Controlled Function (CF) or Pre-approval Controlled Function (PCF) position is a decision which is likely to impact on the livelihood of an individual and is also likely to have an impact on the employer firm. In recognition of the requirements of natural justice, we are of the view that CP51 should provide for a right of

appeal as well as other features which serve to ensure that the process as a whole accords with the requirements of procedural fairness and transparency.

We are of the view that the potential for employee challenge arising from this, as well as other requirements contained in CP51, require further in-depth consideration.

### **Mobility of Approval**

We would welcome some clarity on the question as to whether a person who has been approved for a certain position in one firm, can retain that approval in circumstances where they move to a similar position in another firm. Clarity would also be welcomed in relation to a situation where a person has been approved for a certain position and is then promoted to another position in the same firm.

### **Outsourcing**

We would welcome clarity on the requirements which will apply in circumstances where certain CF-related functions are outsourced.

### **Pre-Approval of Controlled Functions, P.12**

Para.10, P.12 of CP 51 states that in the case of institutions such as credit institutions, insurance/reinsurance undertakings, relevant managers below executive level as well as particular post holders should also be fit and proper.

In circumstances where a firm nominates its most senior managers as PCFs, it would appear that all of their direct reports will also have to be nominated under the fit and proper regime. It is unclear as to how far down the managerial chain CBI requires that this rule should drop. Guidance in relation to this matter would be of assistance.

**Response to Questions: P.15, Para.16, i, (a & b)**

We are somewhat concerned at how widely the net is cast in relation identifying those who are to be regarded as performing a "controlled function" and our concerns are outlined below under the heading "Controlled Functions".

**Response to Questions: P.16-17 Para.16, i, (1 & 2)**

On pages 16 and 17 of CP51, two questions are posed: (1) Should the CBI formally exempt specific categories of staff from the definition of a CF; or (2) Should the CBI provide non statutory guidance to firms on what it considers to be appropriate levels or types of due diligence which firms should carry out prior to appointing staff thereby allowing for firms to adopt varying levels of due diligence (e.g. providing reduced vetting for assistance roles with a lower risk profile, such as call centre staff)?

Regarding question 1, our view is that CBI should exercise its powers under section 20 of the Central Bank Reform Act 2010 and prescribe the particular posts which it regards as constituting a controlled function. In our view, the current approach of repeating broad categories of controlled functions (on page 39) is not tenable for reasons particularised below (under the heading "Controlled Functions").

Regarding question 2 above, our view is that CBI should provide the non-statutory guidance referred to. The provision of such guidance should ensure that firms do not have to carry out overly extensive due diligence unnecessarily; the level and extent of due diligence should be reflective of the risk associated with the role.

**H.R. - Due Diligence Requirements, p.16 & 29**

We note the requirement that firms must have in-place effective systems and controls in place to ensure that the individuals proposed are, and remain, fit and proper.

This requirement raises the question as to what extent H.R. departments can extend their limited powers of investigation in relation to an applicant or employee. Data protection laws in Ireland mean that principally CVs and letters of reference are sought in relation to potential candidates. It is important that any requirements proposed as part of CP51 are consistent with the existing Data Protection legislation and other related requirements.

In circumstances where Garda checks are commissioned by CBI, CP51 does not state whether the results of such checks will be shared with candidates. Clarity is also required as to whether a right of appeal will be provided in respect of persons who are deemed unsuitable on the basis of Garda checks. Clarity is also required as to whether an applicant who has a minor offence on his/her record (perhaps dating back several years) will be disqualified on the grounds of having a tarnished record. Therefore, consideration could be given to indicating a time-limit or cut-off point so that incidents which date back beyond a certain period are not taken into consideration.

### **Qualifications, P. 52**

We are concerned at the prospect that CBI would become prescriptive as to the precise qualifications which an individual will be required to have, as we are of the view that this should remain within the discretion of the employer.

### **Processing of Applications – Timeframe, PP.29-30**

We note CBI's plans in relation to the processing of applications as outlined on pages 29-30. However, we note that no timeframe has been provided in respect of which a CBI response to a fit and proper application must be forthcoming. It would be helpful if CBI were to indicate a timeframe within which completed applications will be processed.

### **Response to Questions: P.31 Para.41, (i to iii)**

In response to the questions which you pose on page 31 regarding the appropriateness of the standards contained in Appendix 2, a question arises as to the manner in which employer firms are obliged to satisfy themselves of compliance the requirements set out in para. 3.2 (page 52). For example, in what way does CBI envisage that an employer should be able to verify a person's mental health. This, and other requirements could potentially require an employer to take actions which could be regarded as being intrusive and which could invite employee challenge.

We also note that Para. 4.1(g), P.55 would seem to be broad enough to capture even motor-related offences. Therefore, the wording of this requirement perhaps requires fresh consideration.

#### **Response to Questions: P.31 Para.42**

In para.42, p.31, two related questions are posed, namely whether non-statutory guidance on the standards [of fitness and probity] be useful? If so, what issues should the guidance cover to assist firms in carrying out their own fit and proper test for persons proposed or holding both PCFs and CFs?

We are of the view that the provision of non-statutory guidance on the standards of fitness and probity would be quite useful. In our view, guidance could provide clarity on matters including the steps which firms are required to take so as to ensure that all CFs and PCFs are fit and proper on an on-going basis.

#### **Controlled Functions, pp.35 and 39**

Page 2 of CP 51 makes reference to two critical factors which emerge from an analysis of the financial crisis, one of which is the lack of "knowledge and expertise to challenge at board or senior manager level". CP51 also refers to CBI's desire to raise the bar on fitness and probity so that CBI is empowered "to prevent individuals from entering into senior positions in regulated firms,

where we had concerns as to their fitness and probity” and there is also a reference to the need for CBI to be in a position to “investigate, suspend, remove or prohibit individuals from senior positions”. In these extracts from CP51, the emphasis and focus is very much on persons in senior positions.

It is in that context then that we are somewhat concerned at how widely the net is cast in relation identifying those who are to be regarded as performing a “controlled function”.

We note that the Central Bank Reform Act 2010 permits the CBI to prescribe CF positions. The purpose of s.20(1) & (2) of the 2010 Act is to empower the CBI to prescribe a function as being a controlled function, utilising paragraphs (a) to (c) of subsection (2) as the principles and policies which guide the Bank in so prescribing. It was not the intention of the legislature that the entirety of section 20(2) would simply be restated by CBI in a statutory instrument. If the legislature had so intended, the 2010 Act would have stated that the functions referred to in section 20(2) are so prescribed and in those circumstances there would be no necessity to empower CBI to make any regulations.

Rather than prescribing particular positions as envisaged by the legislation, CP 51 appears to indicate that it is CBI’s intention to capture *all* staff, rather than those staff members who might have a significant role or be in a position of influence.

Therefore, we are concerned about the approach which CBI proposes to adopt in relation to this. We would ask that you re-consider the approach which is being adopted in relation to the prescription of “controlled functions” so that only those positions of relevance are prescribed and they are actually prescribed with some degree of specificity rather than a mere repetition of the broad, sweeping categories set out in section 20(2) of the Act.

As currently drafted, para.3(a) on p.39 has the potential to apply to a significant number of staff who work at a more junior level. We are also somewhat concerned that the provision seeks to include those who provide "assistance" as this could, for example, capture persons at a call centre who are involved in administrative tasks, such as making minor client-requested changes to policy details.

By way of further example, the wording on p.39 appears to indicate that anyone who works in a compliance related role would be in a controlled function rather than just the compliance officer.

Therefore, we are concerned about the viability of the approach which is currently proposed to the prescription of "controlled functions". In our view, the designation of posts as "controlled functions" should only capture staff in senior/managerial/leadership roles.

With regard to staff working at a more junior level within an organisation, we are of the view that the Minimum Competency Requirements (MCR) would be a more appropriate way of ensuring that such consumer facing staff are adequately qualified.

### **Financial Soundness, pp.22 & 58**

When combined with the broad scope of CFs or PCFs, and in the context of the current recession, the requirements concerning financial soundness could prove problematic for a substantial number of people.

As CBI will be acutely aware, there is a very real possibility that a member of staff may have personal financial difficulties (credit cards, mortgages or any other impaired loan).

Therefore, we are of the view that the requirements relating to the financial soundness of individuals is overly stringent and potentially disproportionate.



Clarity is required on the consequences which such financial difficulties may have. For example, is a H.R. department expected to discipline the member of staff? Will such details be noted on a CF's CBI record? If the member of staff is not a CF but the CBI nominates him/her as such, and it is discovered that he/she has financial difficulties, what will this mean in terms of H.R. practicalities? In our view, this area presents a number of significant legal difficulties which require deeper consideration by CBI.

Requirements of fairness might suggest that a time-limit or cut-off point should be indicated so that transgressions which date back beyond a certain period are not taken into consideration.

### **Concluding Remarks**

In the event that you have any questions or require further information arising from our submission, please do not hesitate to contact us.

Yours sincerely,

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Head of Government & Industry Affairs, Zurich