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13 January 2011

Enforcement 1 Division
Central Bank of Ireland
Block D Iveagh Court
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**Response to Consultation Paper CP 57 - Inquiry Guidelines to be prescribed pursuant to section 33BD Central Bank Act 1942 (as amended).**

Dear Sir/ Madam,

We welcome the opportunity to make submissions in relation to the recent Consultation Paper 57 ("CP57"). This paper sets out draft guidelines for inquiries which the Central Bank may run in respect of the investigation and adjudication of breaches of regulatory requirements by regulated financial services providers ("FSPs") and persons concerned in the management of these firms (the "Guidelines"). As part of our review of CP57, we reviewed the existing Administrative Sanctions Procedure pursuant to Part IIIC Central Bank Act 1942. We have also considered the proposed Guidelines in the context of the Central Bank (Supervision and Enforcement) Bill 2011 and the Central Bank's Enforcement Strategy 2011-2012.

The matters set out in this response are a summary of our thoughts on the proposed Guidelines and include some suggestions where further direction may assist FSPs in better understanding the Guidelines in the event that these are subject to these procedures.

**Fair Procedures**

A key concern which cuts to the core of this proposed new inquiry process are the measures which will counterbalance the extensive powers which are afforded to the Central Bank. FSPs and those working for these institutions which are under investigation must be accorded the right to due process and fair procedures. Given the sanctioning powers and the wide spectrum of enforcement measures with which the Central Bank is empowered e.g. public reprimand; monetary penalty; or even the revocation of the FSP's authorisation (and/or on a personal level the potential disqualification of a person from future management of an FSP) the need for fair and transparent procedures is further accentuated.

The Guidelines note that while the Panel appointed by the Central Bank to investigate alleged breaches shall observe the rules of procedural fairness, it will not be bound by the strict rules of evidence. Further, the Panel may invoke the power to subpoena witnesses to give evidence. Therefore, it would appear that the Panel is armed with certain powers which are akin to those of a court of law in terms of sanctioning but the counterbalancing levels of protection as would be provided in such a forum do not appear to be provided to the FSP. We consider that the extent to which the rules of evidence will apply should be clarified in these Guidelines and a note on whether the rule against hearsay will be observed

should be set out. Further, as the burden of proof on the Central Bank is to prove their case beyond a reasonable doubt, this is quite a low standard given that a person working for an FSP may have his/her future career in financial services restricted in the event of an adverse finding. Also, in the interests of fair procedures, the Panel should not take legal advice in private without disclosing the nature of that advice to the parties concerned. This means that any advice given by independent legal adviser sitting at a Panel hearing should be given in public and both parties should be entitled to comment on the advice. This is not provided for under the Guidelines and should be clarified as to whether this will apply. In short, we consider that the checks and balances which might be ordinarily expected in such a process are absent, all to the very obvious detriment of the FSP.

**The need for proportionality and the proposed enhanced sanctions**

We agree that sanctions should act as a deterrent to FSPs from engaging in certain misconduct and in particular in relation to prescribed contraventions. Under section 49(b) Central Bank (Supervision and Enforcement Bill) 2011, it is proposed to increase the monetary penalties as follows:

- In the case of a body corporate, the greater of:
  (i) €10,000,000; and
  (ii) An amount equal to 10% of the turnover of the body for its last complete financial year before the finding is made.
- In the case of a natural person €1,000,000; and/or
- Such other amount as may be prescribed by Regulations.

In increasing both the number of enforcement actions to be taken and the sanctions that may be imposed on FSPs, the Central Bank should ensure that a balance is struck between the need to regulate and supervise FSPs against the impact and cost in terms of the firm's ability to carry on its business in a viable manner. We note that section 4.8 of the Guidelines reflects this point, stating that "the monetary penalty shall not be of an amount that would be likely to cause the regulated financial service provider to cease business, or would be likely to cause the person concerned to be adjudicated bankrupt". This would represent a shift from the sanctioning procedure heretofore where certain breaches would ordinarily attract a set penalty. Indeed, we are not aware of any sanctions in other similar legislation, criminal or otherwise, that base fines on turnover or other variable factors. There is no guidance as to how this penalty might be calculated and we consider that details should be given in this regard. In particular, the meaning of the term "turnover" in the financial services industry is not by any means clear, in particular, but not exclusively, in insurance business. This is an issue the Courts have grappled with, but not defined, in some appeals from the Ombudsman to the Courts. It follows that different firms (depending on their turnover and profits and type of FSP) may attract varying levels of monetary punishments for the same offence.

In the wider context and given the current economic environment, a large fine on an FSP may bring it to the brink of bankruptcy. We would consider that in the event that a fine from the Central Bank leads or contributes to a large extent to bankruptcy that a "look back" period of up to two years be introduced so that some of this fine might be rescinded in order that shareholders or creditors of the FSP in question be paid.

We also feel it is important that these Guidelines be considered in conjunction with equivalent regimes in force in other jurisdictions. Given the income stream generated by foreign banks which may have

headquarted (or set up branches) in Ireland, it is imperative for the Central Bank to ensure that Ireland is not placed at a competitive disadvantage within the global financial services industry, due to excessive enforcement powers or excessive sanctions in comparison to its other European or international counterparts.

**How will the Final Guidelines, once issued, interact with other legislation currently in place?**
Section 4.9 of CP 57 states that "if a monetary penalty is imposed in respect of a contravention which is also an offence under the law of the State, the respondent is not liable to be otherwise prosecuted or punished for the offence". While this is already set out in the current version of the Administrative Sanctions Procedure, given the introduction of further codes of conduct and in particular the fit and proper regime, some clarity as to the interaction between sanctions under the Inquiry Guidelines and the other non-legislative requirements would be welcomed.

**The need for clarity and the circumstances in which the Guidelines can be departed from or amended**
Section 3.5 of the Guidelines states that "it may be necessary to depart from the finalised Inquiry Guidelines in certain instances where the circumstances of the individual case demand. The finalised Inquiry Guidelines may be amended or revoked by the Central Bank at any time". Given the gravity of both the nature of the Inquiry and the possible sanctions which may follow, we consider it imperative that the procedural guidelines be put in place to definitively set the parameters for these inquiries. Should it be envisaged that the Central Bank may need to depart from the finalised Guidelines, proper notice and the reasons for such departure should be given to the FSP. Furthermore, if this is to be undertaken on a case-by-case basis only, will the FSP be engaged prior to such a decision being reached and if so, will the FSP be given the opportunity to make submissions to the proposed changes to the Inquiry process? In the event that the Central Bank may, in the future, propose to amend or revoke any part of the finalised Guidelines (once issued), will this be subject to a further industry consultation or will it be by way of unilateral amendment by way of the Central Bank issuing amending regulations? We would submit that this should be subject to industry engagement by way of the consultation process, particularly in relation to any material amendments.

**Timelines**
According to the Guidelines the Central Bank will consider all representations received and issue finalised Inquiry Guidelines. However, the paper does not indicate the proposed timeline for issuing these final Guidelines. We would suggest that adequate notice be provided to FSPs as to when these will become effective, in order that they may familiarise themselves with these.

**PART B: DETAILED COMMENTS AND OBSERVATIONS**

This part of our response takes individual provisions of CP57 and documents comments on those provisions

| Question/ Rationale | Comments |
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| **Section 2.1 Notice of Inquiry- in what circumstances may the date of an inquiry be re-scheduled?**<br>(Rationale : Clarity of obligations for FSPs, level of engagement with FSPs) | We note that the FSP will be given at least 28 days' notice prior to an Inquiry being held. In what circumstances will a request to change this date be considered by the Panel? Would such a request only be granted in exceptional circumstances or |

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| | will the Regulatory Decisions Unit ("RDU") engage with the FSP in identifying a date that is convenient for both parties? We note at page 9 of the Guidelines the discretion to adjourn the Inquiry will be exercised fairly, taking due account of fair procedures and affording both parties the opportunity to be heard. We would request some guidance on the circumstances in which such a request for adjournment would be considered by the Panel. |
| **Section 2.2: In what circumstance will the RDU agree to hold an Inquiry in private?**<br>(Rationale : Clarity of obligations for FSPs, level of engagement with FSPs, proportionality) | Taking into consideration the fact that publication has been highlighted as a key tool for enforcement by the Central Bank and also considering the need for protection of an FSP's reputation and the reputation of those involved in its management during the inquiry stage pending a final decision, under what circumstances will a request to have an Inquiry heard in private be granted? What will the procedure be for making such a request and what will be the factors considered by the RDU in deciding whether or not to grant such an application? |
| **2.3: How long will a FSP be allowed to complete the Case Management Questionnaire?**<br><br>(Rationale: Clarity of obligations for FSPs) | The Guidelines state that the Case Management Questionnaire must be returned to the RDU within the time specified in the Questionnaire. Given that the Panel may proceed to hearing without further consultation in the event that the FSP fails to complete the Questionnaire within the timeframe, we believe some guidance should be provided as to how long the FSP will be given to complete the Questionnaire. |
| **2.5: What factors will be considered in deciding whether a case management meeting is required?**<br><br>(Rationale: Procedural clarity) | It is stated in the Guidelines that this meeting will only be required in the minority of cases but that the rationale for holding such a meeting is to leave the Panel to adjudicate upon only those matters which are properly in dispute between the parties. While we acknowledge that much will depend on the nature of the alleged contravention and the facts of each individual case, we believe that some guidance should be issued on the circumstances in which it will be decided that a case management meeting will be required and the factors that the RDU will consider in making this decision. |

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| **2.7: Is this "case management" meeting a further screening or examination process?** | It would appear that this preliminary step (which is undertaken at the Central Bank's discretion) in order to decide which issues are in dispute, it implies that it will make an important decision in drawing up the parameters of the inquiry. As this is a fundamental stage of the entire process, the FSP should be given the right of reply and the same procedures which apply at the inquiry stage proper should be applied. It would appear that there might be a possibility of adding certain charges at this point and if this is the intention, the FSP should be afforded due process in this regard. |
| **2.8: An 'Agreed Book of Documents' will be delivered to each of the parties at least 5 working days prior to the Inquiry'. Will this be the first opportunity for the FSP to seek confirmation of the documentation to be relied upon during the Inquiry or will there be any other informal/formal request for discovery or similar process?**<br><br>(Rationale: Procedural clarity and fairness) | Given that a number of sources may be used in collating evidence, the FSP should be provided ample opportunity to prepare a defence to the allegations raised in the course of the Inquiry. In circumstances where documentation is only made available to the respondent 5 days prior to the Inquiry, this may impact the FSPs ability to prepare a robust defence to the allegations made and the basis for same. This is particularly the case in relation to evidence such as expert reports prepared by the Central Bank, the contents of which the respondent may not be aware. Given that the strict rules of evidence are not being applied in the course of these Inquiries, it is important that this point be clarified. |
| **2.10: Will a copy of the written submissions and relevant case law of each party be made available to the other party prior to the Inquiry hearing and if so, how many days prior to the hearing will these be made available?**<br><br>(Rationale: Procedural clarity and fairness) | The Guidelines state only that the parties will have the opportunity to provide written legal submissions but does not specify whether these will be made available to the other party for review prior to the Inquiry hearing or whether they will be made available to the Panel only. In line with the rationale above, these submissions and supporting precedents should be notified to the other party in advance of the Inquiry in order that they may be adequately prepared to respond to issues raised in the other party's legal submissions. |
| **Prior to going to Section 3 (Inquiry), the reasons for proceeding to this juncture should be shared with the FSP and the FSP should be allowed to a right of reply on this important preliminary issue.** | The rationale for this suggestion is to afford the FSP in question all appropriate documentation and evidence which the Central Bank will consider prior to submitting the case to inquiry stage and the reasons for proceeding to this stage should be given. The Guidelines do not provide for the FSP to receive these in written format. |

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| **3.9: It is unclear as to whether the Central Bank may make amendments to the Notice of Inquiry at this point and clarity should be given.** | In the event that the Central Bank might wish to amend or add to the scope of alleged breaches at this point, we consider that this would not afford the FSP fair process in preparing to defend these. Further, in the event that amendments to the initial Notice of Inquiry are extensive, we would propose that the process be adjourned for sufficient time in order that the FSP has an opportunity to prepare an amended file. |
| **3.10: We would submit that a copy of the transcript of the Inquiry should be made available to the respondent within a set timeframe, at least a week in advance of the deadline for making an appeal to the Irish Financial Services Appeal Tribunal ('IFSAT').**<br><br>(Rationale: Procedural clarity and fairness) | In order for the respondent to be in a position to make a fully informed decision as to whether or not to appeal the decision of the Panel, a copy of the transcript of the Inquiry should be made available, where reasonably practicable, to the respondent in advance of the deadline for appealing the decision to the IFSAT. This is to ensure that the respondent has the opportunity to review the arguments of both parties in detail and the reasoned decision of the Panel. |
| **3.20: A summary of the proposed sanctions for each of these prescribed offences listed at section 3.20 should be included in the final Guidelines, where available.**<br>(Rationale: Procedural clarity) | These penalties should be summarised in the Guidelines in order that those individuals who may be called as witnesses to an Inquiry will be able to easily identify the sanctions to which they may be subject if found to have committed one of the specified criminal offences, e.g. refusing to attend the Inquiry as required by a summons. |
| **3.23: In a situation where a point of law is referred to the High Court for decision; can this High Court decision then be used as a precedent for later Inquiries conducted by the Panel? If the Panel refuses to refer a point of law to the High Court does the respondent have any redress?**<br>(Rationale: Procedural clarity) | We note that the Panel is not obliged to state a case to the High Court. Does either party have any redress in a situation where it has requested the Panel to refer a question to the High Court and it refuses to do so? Where the matter is referred and the High Court reaches a decision on the matter, can this decision then be used as a precedent by the Panel and by other respondents in later cases, where relevant? Given that the rules of evidence do not apply to these Inquiries in full, these matters require clarification to ensure fair procedures are maintained through these Inquiries. |
| **3.26: In relation to settlement agreements, would the Central Bank consider integrating a rule equivalent to that of a tender in commercial litigation whereby if a settlement is proposed by the respondent and that figure is not ultimately exceeded in the final decision then the judge may make a decision that the respondent will not be** | In these types of Inquiries costs can be high, particularly through the engagement of legal and other experts. If a respondent proposed a settlement to the Central Bank during the course of an Inquiry which the Central Bank rejects, and the final monetary penalty imposed by the Panel is lower than the settlement figure proposed by the |

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| **responsible for costs from the date that settlement figure was proposed to the date of the final decision.**<br>(Rationale: Procedural fairness) | respondent, the Central Bank may consider a clause in the Guidelines that the respondent should not be responsible for its costs from the date of the proposed settlement. |
| **4.4: A set time limit should be prescribed in the Guidelines in which the Panel must produce its final written decision to all parties.**<br>(Rationale: Procedural fairness) | This final written decision will form an important part of a party's decision whether or not to appeal the matter to the IFSAT. Therefore, in order to preserve procedural fairness, improve efficiency and reduce costs, a time limit should be laid down in the final Guidelines in which this decision must be made available to the parties concerned. |
| **4.6: In relation to a direction disqualifying an individual from being concerned in the management of a regulated financial service provider, can this be a perpetual disqualification? Is it possible that a person could be merely restricted in the way in which they can be concerned in such management (like with company directors, for example) or will it always be the case that the person will be disqualified simpliciter? Further, are the criteria listed at 4.6 non-exhaustive and will the Central Bank have due regard to each constituent element of this with an equal weighting for each point?**<br>(Rationale: To clarify the extent of a sanction) | Again, proportionality should be borne in mind throughout the Inquiry process and particularly when deciding on the sanction to be imposed against a respondent. There may be room for argument that disqualification may not be necessary and the interests of consumers etc. could be protected by imposing restrictions on the manner in which the individual in question can be involved in the management in the FSP, e.g. decision-making powers could be retracted or subject to supervision or dual verification. It should also be clarified whether an individual can be permanently disqualified from being concerned in the management of a FSP or whether this will always be on a permanent basis. It would also be very beneficial if the Guidance could explain the interaction between the sanctions under the fitness and probity regime and the administrative sanctions regime on this point. Guidance on these issues would greatly benefit the industry in understanding the extent of the sanctions that could potentially be imposed by the Panel. Further, it is unclear as to whether the criteria to be considered by the Central Bank is a non-exhaustive list and what weightings might be placed on each issue noted. |
| **4.8: How does the Central Bank propose to calculate a fine such that will not be likely to cause the FSP to cease business or cause the person to be adjudicated bankrupt? Will the intention be to fine on a set percentage of the previous year's turnover and is the intention to fine as much as possible in each circumstance?** | Given the wording, it would appear that one firm may be fined much more than another for the same breach (if the fine is calculated on the basis of turnover). This would represent a shift in strategy for the Central Bank. Further, will the intention of the Central Bank to fine as much as possible, to the obvious detriment of the firm? |

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| **4.11: This states that an appeal to the High Court does not affect the operation of the IFSAT decision appealed against, or prevent the taking of action to implement the decision, unless the High Court orders otherwise. How will this operate in practice? Are FSP's obliged at all times to appeal to IFSAT before applying to the High Court? Further, there is no deadline on the adjudication by IFSAT which might be clarified by the Central Bank.**<br>(Rationale: Procedural fairness) | The principles of due process must be considered in prescribing Guidelines for how these Inquiries are to run. In relation to appeals to the High Court, the draft Guidelines state that the Central Bank may proceed to implement the decision of the IFSAT even whilst an appeal is pending to the High Court, unless the High Court issues an order to the contrary. We submit that such this should be reconsidered given the gravity of the potential sanctions that can be imposed under this regime and the potential impact any enforcement action may have on the business of the FSP and those concerned in its management. In the event that such an appeal is successful, the respondent would have suffered unnecessary loss at the hands of a decision that was ultimately overturned. We submit that this exceeds the bounds of procedural fairness and this aspect of the Guidelines should be reviewed before the final Guidelines are published. Further, it should be clarified whether an FSP must appeal to the IFSAT before taking its case to the High Court. We consider that the IFSAT should operate to a strict deadline in the interests of transparency and certainty for the FSP. |
| **Appendix 2, Page 22: Further guidance is requested in relation to the procedure for costs determination in the event that a case is not proved.**<br>(Rationale: Procedural fairness and clarity) | As part of the 'Order of Proceedings' methodology appended to the Guidelines, it is stated that a costs determination will be undertaken by the Panel if the case against the respondent is not proved. Further guidance is requested in relation to this. In particular, we submit that in instances where a case is not proven, it would be unjust to expect the respondent FSP to suffer more than its own costs i.e. not to bear the costs of the Inquiry itself. An assessment should be made as to the reasonableness of the initial grounds on which it was suspected that a prescribed contravention had been committed and the evidence available at the time that suspicion was formed and all other evidence that came to light during the course of the investigations and the Inquiry. There is an argument that where a case has not been proven against a respondent, the respondent should bear no responsibility for the costs of the proceedings. Further guidance in relation to this would be welcomed by the industry. |

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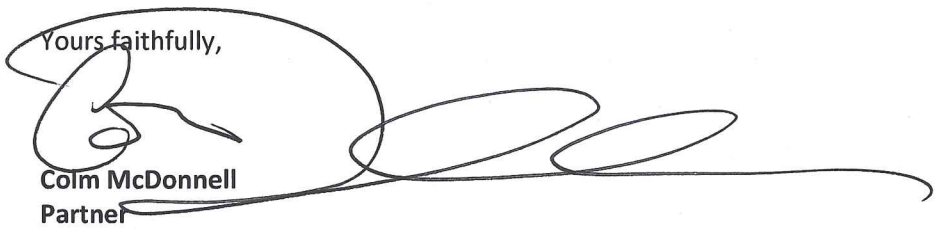
In the aftermath of the recent financial crisis and the weaknesses identified in governance, supervision and enforcement, we are in agreement that the Central Bank should equip itself with the tools to both encourage compliance by FSPs and to discourage behaviour which may negatively impact consumers, markets and investors. Ensuring that the Central Bank is armed with adequate powers which are exercised in a legitimate and proportionate manner, will ensure that the Bank will be in a position to effectively manage risk in the financial services sector for the benefit of all parties.

We look forward to receiving a response from the Enforcement Team in due course and we would welcome the opportunity to engage further with you in relation to this consultation.

Yours faithfully,



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