



Banc Ceannais na hÉireann
Central Bank of Ireland

Eurosystem

Central Bank of Ireland Response to the Law Reform Commission Issues Paper “Regulatory Enforcement and Corporate Offences”

December 2017

1. The Central Bank of Ireland (“Central Bank”) welcomes the publication of the Law Reform Commission’s (“LRC”) Issues Paper *Regulatory Enforcement and Corporate Offences* (“Issues Paper”). Further, the Central Bank welcomed the opportunity to address the LRC at its conference in November 2016¹.
2. The Central Bank is taking the opportunity to give a written response to the Issues Paper in order to contribute to the LRC’s work. This work is part of ongoing efforts to ensure that regulators are not hampered in achieving their full potential and delivering a credible threat of enforcement.
3. In order to do this, regulators require a coherent, robust and well-drafted legislative framework that allows for adaptive responses to suspected breaches of regulatory requirements. To ensure the Central Bank’s submission is meaningful and constructive we have focused on the aspects of the Issues Paper most relevant to our enforcement remit and experience. After a brief introduction containing general remarks on the Central Bank’s enforcement powers and recent legislative reform, and some specific observations on criminal powers, individual responsibility for regulatory breaches and reckless trading, we set out experience-based responses to issues 1, 2, 5 and 6.

Introduction

4. Regulation of financial institutions and markets by the Central Bank is undertaken through risk-based supervision, which is underpinned by credible enforcement deterrents. The aim is to safeguard the stability and sustainability of the Irish economy and to protect consumers and investors. It is critical that regulators such as the Central Bank have a toolkit of varied and adaptive methods by which to promote a culture of ethical compliance by firms and individuals. Enforcement powers are a key element of this toolkit. The Central Bank therefore seeks to ensure that the use of its enforcement powers effectively contributes to the promotion of core behaviours and standards within industry.
5. Where firms and individuals fail to comply with their regulatory requirements, enforcement action serves to impose dissuasive and proportionate sanctions, in order to achieve widespread compliance. The Central Bank’s enforcement powers include:

¹ Law Reform Commission Conference 3 November 2016, Regulatory Powers and Corporate Offences, Remarks by Derville Rowland, Director of Enforcement, Central Bank.

- Investigating and taking cases under the Administrative Sanctions Procedure² (“ASP”) with the imposition of appropriate sanctions against regulated firms and individuals;
- Investigating and taking cases under the Securities Markets Regulations³;
- Prohibition of persons who do not meet the applicable fitness and probity standards from performing specified functions in the financial services industry;
- Revocation or refusal of firms’ authorisations to carry out regulated financial services, where those firms fail to meet their regulatory requirements or where a firm fails to meet the authorisation requirements;
- Summary criminal prosecutions; and
- The provision of information by the Central Bank to agencies including the Garda Síochána, the Revenue Commissioners, the Director of Corporate Enforcement and the Competition and Consumer Protection Commission, of information that leads the Bank to suspect that a criminal offence may have been committed by a supervised entity.

Recent enhancements to the Central Bank’s enforcement powers

Central Bank (Supervision and Enforcement) Act 2013 (“2013 Act”)

6. The Central Bank’s powers under the ASP to administer sanctions in response to regulatory breaches by regulated financial service providers (“regulated firms”) and persons concerned in the management of such regulated firms, were significantly enhanced by the 2013 Act.
7. The 2013 Act significantly increased the level of fines that can be levied on regulated firms and persons concerned in the management of regulated firms under the ASP. The 2013 Act also provided the Central Bank with the following powers:
 - i. A consolidated set of authorised officer powers;
 - ii. The power to obtain an Enforcement Order; and

² As provided for under Part IIIC of the Central Bank Act 1942, as amended (“1942 Act”)

³ The following are collectively known as the ‘Securities Markets Regulations’: European Union (Market Abuse) Regulations 2016 (“Market Abuse Regulations”); Prospectus (Directive 2003/71/EC) Regulations 2005 as amended (“Prospectus Regulations”); Transparency (Directive 2004/109/EC) Regulations 2007 as amended (“Transparency Regulations”); European Union (European Markets Infrastructure) Regulations 2014 (“EMIR Regulations”).

- iii. The power to require that appropriate redress be made to customers that have suffered or will suffer loss as a result of widespread or regular breaches by a regulated firm.

The Single Supervisory Mechanism (“SSM”)

8. The period 2013-2014 also brought about significant change for enforcement in the European sphere with the commencement of the SSM. Since 4 November 2014 the Central Bank has pursued cases relating to breaches of prudential regulation by credit institutions⁴ on the instruction of and/or in conjunction with the Enforcement and Sanctioning Division of the European Central Bank. This close cooperation with our European counterparts ensures the achievement of effective enforcement outcomes, and that appropriate penalties are imposed in such cases.

The Central Bank Reform Act 2010 (“2010 Act”)

9. The 2010 Act also gave the Central Bank consolidated and enhanced powers under the fitness and probity regime to remove individuals performing controlled functions and pre-approval controlled functions from industry, or to prevent individuals from performing pre-approval controlled functions, where they do not meet the Fitness and Probity Standards issued by the Central Bank. To give context to the Central Bank’s responses to the Issues Paper, we have set out further detail in relation to these powers in paragraphs 16 to 17 below.

The Administrative Sanctions Procedure (“ASP”)

10. The Central Bank’s experience is that the ASP has proven to be a robust regulatory tool. The ASP can be used as part of an overall regulatory response to bad or sub-standard behaviour. Under the ASP, if the Central Bank suspects that a regulated firm has committed a breach of the financial services legislation, or if it suspects that a person concerned in the management of a regulated firm has participated in the commission of the breach, it has power to investigate the matter. If the Central Bank has reasonable grounds to suspect that a breach has occurred, it may refer the matter to a specialised body, the Inquiry, or it can settle the case and sanctions may be imposed through either process. Where a case is referred to the Inquiry, the Inquiry can consider the

⁴ Classified as “Significant Institutions”.

suspected regulatory breaches and fulfil a critical regulatory function. The procedure is an adaptive mechanism which facilitates the imposition of a diverse range of sanctions and is an effective escalation tool.

11. Following the referral of a number of cases by the Central Bank to Inquiry in 2015, a number of challenges to these referrals were brought to the High Court. One of these cases challenged the constitutionality of the 1942 Act by way of Judicial Review and plenary proceedings. Mr Justice Hedigan found for the Central Bank and confirmed the constitutionality of the legislation.⁵
12. The Central Bank's power to conclude an ASP by way of a settlement agreement with a regulated firm or individual has proved to be invaluable. The Central Bank promotes the option of early settlement once an ASP has commenced. This means firms and individuals are incentivised to engage with the Central Bank at an early stage and allows for the efficient use of public resources.
13. Since 2006, 116 cases have been concluded through the ASP/settlement procedure. This has resulted in the sum of over €61,000,000 being imposed by way of monetary sanctions. Public statements on the Central Bank's settled ASP cases are available publicly on the Central Bank's website. Details of significant enforcement outcomes, including case studies, are set out in the Central Bank's Annual Performance Statement. Public statements facilitate transparency and offer guidance to regulated entities and individuals, and improve compliance across all sectors. Monetary sanctions are an important element in the Central Bank's regulatory toolkit and are just one of a number of tools available to the Central Bank.

Public statements

14. Public statements play a central role in effective enforcement regimes. The public dissemination of ASP case outcomes provides transparency and

⁵ In the course of his judgment, Mr Justice Hedigan found: "...the constitutional action fails because the inquiry is not an administration of justice nor does it seek to impose criminal liability upon the applicant" Mr Justice Hedigan also noted that the evidence of expert witnesses in the proceedings "demonstrated very clearly the overwhelming public interest in maintaining the integrity of the financial sector of society ... It is something that requires... effective forms of regulation and enforcement. The Oireachtas has provided that those functions should be carried out by the Central Bank ... and have established complex and sophisticated administrative machinery for doing so. The courts have manifestly never been involved in this area of financial regulation" *Purcell v Central Bank and Others* [2016] IEHC 514.

engenders trust and confidence in the effectiveness of regulatory regimes. Public statements provide clear messages as to what behaviour is deemed unacceptable by industry participants from a regulatory perspective. These statements facilitate transparency, serve as a source of guidance to regulated entities and individuals, and demonstrate to stakeholders the challenges which they face and how these may be mitigated. The Central Bank's public statements aim to include significant detail in order to maximise the deterrent effect on poor conduct across the wider industry.

Compulsory powers to obtain information as part of an investigation

15. The 2013 Act introduced a uniform set of compulsory powers to require information from regulated firms. This legislation has made it easier to obtain documentation and information. It also affords protection to employees of financial services firms, when providing information.

Fitness and Probity

16. Part 3 of the 2010 Act enables the Central Bank to operate a fitness and probity regime as follows:

- “gatekeeper role” – this operates to prevent individuals from entering into senior positions in regulated firms;
- “standard setting role” – this imposes statutory Standards of fitness and probity which individuals in the financial services industry are required to follow; and
- “supervisory role” – this operates to allow the Central Bank to investigate, suspend, remove or prohibit individuals from senior positions in regulated firms.

17. The gatekeeper function of fitness and probity is robust and effective. In 2015 for example, following fitness and/or probity concerns raised by supervisors in relation to proposed appointments to Pre-Approval Controlled Functions in regulated firms, the Bank prepared for 26 specific interviews (22 of which were conducted) with proposed appointees. Following contact from the Central Bank, ten proposed appointments were subsequently withdrawn and one proposed appointment was refused. The first Prohibition Notice and the first Suspension Notice in relation to individuals in controlled functions were issued

by the Central Bank in 2015 under the powers set out in the 2010 Act⁶.

18. As set out above, the fact of enforcement being carried out in public serves as an effective deterrent and a means of communication and guidance for key regulatory messages and themes to industry stakeholders. In order to further enhance and strengthen the Central Bank's gatekeeper role, a power to publish the details of refusals to approve those who have applied to perform pre-approval controlled functions under section 23 of the 2010 Act, would be of further assistance in protecting users of financial services. Transparency in regulatory outcomes plays a critical part in engendering confidence in the effectiveness of the regulatory system and demonstrating that the public are protected.

19. With regard to fitness and probity investigations, two further potential reforms are considered below:

- (i) The Central Bank recommends the broadening of the remit of the fitness and probity regime to include investigations into those individuals who performed controlled functions in the past. This would ensure that the public were protected and that accountability lines are clear; and
- (ii) The 2010 Act limits the duration of suspension to six months. The intricacies of investigating in the financial services sector and the need for effective protection of the public justify an extension to this six month timeframe.

Specific observations on criminal powers, individual responsibility and reckless trading

Criminal powers

20. The Central Bank notes the questions posed under Issue 10 of the Issues paper (*"Are Irish Fraud Offences Adequate?"*) and supports a review of the scope, investigation and prosecution of fraud offences. Fraud is a serious matter and instances of fraud require thorough investigation and attract appropriate punishment. The investigation and prosecution of fraud should be properly resourced and carried out by appropriate specialist agencies.

⁶ These figures are taken from the Central Bank Annual report 2015, p34

21. The Central Bank has statutory reporting obligations to An Garda Síochána, and other specialist agencies, where it suspects a criminal offence may have been committed. The Central Bank takes these obligations very seriously as it considers it appropriate to defer to the judgment of specialist criminal investigative agencies to investigate the matter at issue.
22. The Central Bank has certain powers of summary prosecution. Its focus is on the effective discharge of its objective of safeguarding financial stability and the protection of consumers. While retaining its discretion to take summary criminal prosecutions where appropriate⁷, the primary enforcement process for achieving those objectives has been the ASP, which the Central Bank has found to be an effective means of implementing its agenda of credible deterrence⁸ as detailed above.
23. An effective framework for the investigation and prosecution of white collar crime is of critical importance to Ireland as an open economy within the EU, seeking to attract increased investment from international financial services firms. There is understandable public concern around the investigation and prosecution of white collar crime. The Central Bank would support the creation of a dedicated division within an existing criminal agency to investigate white collar crime. In addition, there may be scope for the creation of a specialised prosecution unit. These reforms would allow for more effective investigations into white collar offences and, where appropriate, prosecutions taken. Individuals with relevant skills could be seconded to such a division from other agencies in order to provide support in complex areas of investigation and prosecution.

Individual responsibility

24. The Central Bank notes that the personal criminal liability of senior corporate decision-makers is covered in Issue 8 of the Issues Paper (*“Liability of Corporate Officers”*). The Central Bank strongly recommends that reforms assigning responsibility to senior personnel be adopted in this jurisdiction. Such reforms should be modelled on the Senior Managers and Certification Regime in the UK

⁷ See further in Part 3.6 of the Outline of the Administrative Sanctions Procedure, v2.2.

⁸ Where both the ASP and summary criminal prosecution are available to the Central Bank in respect of a breach of financial services legislation, the Central Bank considers the circumstances of each case on its merits and may decide to pursue matters which constitute both a prescribed contravention and a criminal offence via the criminal courts. In deciding whether to pursue criminal proceedings, the CBI will exercise its discretion, having regard to the Director of Public Prosecution’s “Guidelines for Prosecutors”. In cases where only criminal prosecution is available, in deciding whether to pursue criminal proceedings, the Central Bank will again exercise its discretion, having regard to the “Guidelines for Prosecutors”.

and we note that great benefit has been found in other jurisdictions in relation to the adoption of this policy. The Financial Conduct Authority has found the new approach effective, and is currently consulting on an extension of the regime to all firms, where it had previously applied only to certain firms. Such a reform would permit the Central Bank to require every senior manager to present a statement of responsibilities that clearly states the matters for which they are responsible and accountable. Firms could be obliged to provide maps setting out the responsibilities of their senior managers, and their management and governance arrangements. These requirements would assist in assigning responsibility to individuals in a regulatory context and decrease the ability of individuals to claim that the responsibility for wrongdoing lay outside their sphere of responsibility.

Recklessly causing a firm to fail

25. We note that reference is made at paragraph 11.19 of the Issues Paper to comments by former Central Bank Governor Honohan in November 2010, who suggested that the criminal offence in section 36 of the UK's Financial Services (Banking Reform) Act 2013 "could be usefully mirrored in Ireland" as a means of tackling "egregious recklessness in risk-taking" in financial undertakings.
26. The criminal offence in section 36 of the UK's 2013 Act "relating to a decision causing a financial institution to fail" was drafted with the intention of deterring reckless management decision making within firms. There are undoubtedly cases where misconduct by individuals is so egregious as to merit criminal sanction. The Irish legislative framework deserves to be strengthened to take account of such egregious recklessness in risk-taking by those who were in charge of failed financial firms. While the investigation and prosecution of this type of offence are not without their challenges (and we note that a number of those challenges have been referred to in the Issues Paper at paragraph 11.17) the Central Bank supports efforts to combat reckless decision-making by senior managers, particularly where such decisions have wide-ranging negative effects.

Issue 1: Standardising regulatory powers

The benefits of standardisation

27. The Central Bank agrees with the observation made in the Issues Paper that:

‘there is no uniform template for regulatory legislation in Ireland. In part, this reflects the individual characteristics of the sectors that regulators oversee’⁹.

28. The diversity of various regulatory regimes has resulted in the current legislative architecture being developed on a piecemeal basis. The disparate nature of the current legislative framework can result in inconsistencies, conflicts and gaps in application. The Central Bank encourages measures which will assist the delivery of a robust, well-drafted, effective and enforceable legislative framework for regulatory agencies, and supports the enactment of a single Act setting out the full suite of relevant inspection and investigation powers. For example, the introduction of the 2013 Act, which consolidated authorised officer powers, conferred real advantages for the Central Bank. In particular, the 2013 Act went a long way to repealing the disparate and inconsistent powers previously embedded in sector-specific legislation. Standardising legislation should be framed to enhance mutual learning and training, facilitate cooperation between regulators and allow for the development of reliable precedents.

Important considerations

29. When endeavouring to introduce more uniformity and consistency in the context of regulatory investigation and inspection powers, areas such as whistleblowing protection¹⁰, data protection¹¹ and freedom of information¹² are of crucial importance.

30. The Central Bank supports the concept of standardised inspection and investigation powers for regulators. Given the diverse nature of regulation, however, it may not be appropriate to give all regulators identical powers. Further, any standardisation exercise should not result in a reduction of a given regulator’s existing range of powers. Different powers are required by different regulators depending on the sector and the regulator’s specific mandate and function. Any such exercise would also be subject to variation of powers imposed on regulators by virtue of EU law whether transposed or directly applicable. As noted above, a standardising Act could set out a full suite of inspection/investigation powers and specify in a schedule the powers that can

⁹ Issues Paper, paragraph 1.05

¹⁰ Protected Disclosures Act 2014

¹¹ Data Protection Acts 1988-2003. In addition, the General Data Protection Regulation (Regulation (EU) 2016/679), adopted the 27th April 2016 is due to be applicable by 25th May 2018

¹² Freedom of Information Act 1997, as amended by the Freedom of Information (Amendment) Act 2003

be used by particular regulators.

31. Other considerations apply to the potential standardisation of enforcement powers such as fitness and probity regimes, binding codes of conduct, civil financial sanctions and settlement agreements. These powers are more intrinsically linked to the mandate and functions of the particular regulator and may be too dependent on sector-specific factors to be comprehensively standardised. That said, as noted below, it would be worth considering the introduction of non-sector specific common core standards.
32. With respect to civil financial sanctions, in particular, different regulators may be required to have different powers by virtue of certain EU law requirements¹³, which would affect the capacity of the regulator to operate within the confines of a standardised set of powers.

Introduction of core common standards for regulated entities

33. All sectors are governed by prescriptive rules. However, the conduct of firms might be improved further by requiring them to behave in accordance with high standards set out in overarching principles. The Central Bank therefore recommends one aspect of legislative reform and standardisation, namely the embedding of certain non-sector specific core common standards within a legislative framework. These standards would be used to guide regulated entities, and the individuals who exercise influence and authority over them, as to the standards expected of them. Core standards embedded in the legislative framework can sit alongside prescriptive rules, and can be enforced where entities or individuals fall below the required standards. Examples of such core standards could include the requirement on entities and individuals that they conduct themselves with honesty and integrity, possess the competence and capability to conduct their business and co-operate with relevant regulatory authorities¹⁴. As with other areas, reform proposals would have to take into account the fact that regulators' ability to use principles may be circumscribed by the need to implement European Union legislation.

¹³ As noted above, since 4 November 2014, the European Central Bank (the "ECB") has directly supervised significant credit institutions within Ireland. As a result, the ECB can take direct enforcement and sanctions proceedings against significant institutions. The ECB can also instruct the Central Bank to use its supervisory powers or to open proceedings against significant institutions operating in Ireland. Further, minimum levels of civil financial sanctions may be prescribed by EU law, as in the Securities Market Regulations.

¹⁴ The Principles for Businesses that form part of the FCA's Handbook, or the General Principles in the Central Bank's Consumer Protection Code 2012 may provide a helpful example of this aspect of regulation.

34. While the Companies Act 2014 codified directors' fiduciary duties¹⁵, its application depends on the legal status of the entity and the consequences for breaching these duties are focused on civil remedies rather than regulatory enforcement. As regulated entities across many regulated sectors are not restricted to particular legal forms (e.g., a regulated entity may be a partnership or a sole trader) there is scope for greater standardisation.

Issue 2: Civil Financial Sanctions¹⁶

Enforcement in context

35. Enforcement complements regulation and supervision, and should not be considered in isolation. All three components are intrinsically interconnected, and work as part of a complementary strategy aimed at improving behaviour, embedding ethical standards and deterring misconduct. Regulators require a coherent, robust and well-drafted legislative framework which allows for adaptive responses to suspected breaches of regulatory requirements.
36. It is important to note that there are other administrative measures that the Central Bank can use before or as an alternative to enforcement actions. There is a very wide range of administrative measures available to the Central Bank outside of the ASP, and separately under the Securities and Markets Regulations, including the use of guidance and education opportunities through industry letters; increased supervisory engagement; imposition of a condition on an authorisation; refusals and revocation of authorisations; summary criminal prosecution; and reports to other agencies (including Gardaí, the Revenue Commissioners, and the Competition and Consumer Protection Commission).
37. When set in context, the Central Bank's approach to enforcement forms part of a set of adaptive responses to suspected breaches of regulatory requirements and therefore reflects the 'enforcement pyramid' set out in the Issues Paper¹⁷.

¹⁵ Section 228 of the Companies Act 2014

¹⁶ Part IIIC of the 1942 Act refers to monetary penalties as one of the sanctions that may be imposed under the ASP. To be consistent with the LRC's terminology in the Issues Paper, we refer to 'civil financial sanctions' in this submission.

¹⁷ Issues paper, paragraphs 1.02 to 1.04

The regulatory toolkit

38. Civil financial sanctions form an important part of the regulatory sanctions model, by providing another tool to be used where appropriate. They do not displace existing regulatory powers, including the use of criminal law. The imposition of civil financial sanctions outside of the traditional court process is a feature of most sophisticated financial regulatory systems. This type of action is not purely punitive in nature. The core aims of such measures are to ensure compliance, protect consumers, and to deter bad behaviour in the future. The imposition of a civil financial sanction must be considered within the overall regulatory context and in the development of an appropriate regulatory response to issues arising within a regulated industry or within specific firms or individuals. As noted at paragraph 40 below, the disqualification of individuals from key positions and suspension or revocation of authorisations may prove a more effective regulatory response to egregious misconduct by those firms or individuals.
39. The Issues Paper asked if there are circumstances in the regulation of financial services in which civil financial sanctions would not be appropriate. There will be circumstances in which a civil financial sanction is not an appropriate regulatory response. In some instances, supervisory engagement will be more appropriate and, by contrast, in egregious circumstances a very robust response such as revocation of authorisation may be warranted. The appropriate regulatory tool and response must be considered in the particular circumstances and within the overall regulatory context.
40. In the Central Bank's experience of ASP, settlement agreements that incorporate other sanctions or requirements alongside civil financial sanctions can be a more targeted means of securing appropriate outcomes and remedies, thereby allowing regulators to apply scarce resources to other priority areas. For example, a settlement agreement might incorporate the imposition of remedial actions to strengthen systems and controls and risk mitigation strategies. Other remedies may include disqualification of persons from key positions and suspension or revocation of authorisations¹⁸.

¹⁸ A non-exhaustive list of the sanctions available under a settlement agreement is set out in section 33AQ of the 1942 Act: a caution or reprimand; a direction to refund or withhold all or part of an amount of money charged or paid, or to be charged or paid, for the provision of a financial service; the imposition of a monetary penalty (in the case of a corporate and unincorporated body an amount not exceeding €10,000,000 or 10% of the annual turnover of the regulated financial service provider in the last financial year, whichever is the greater, or in the case of a natural person an amount not exceeding €1,000,000); a direction disqualifying a person from being concerned in the management of a regulated financial service provider; except where the provisions of Council Regulation (EU) No 1024/2013 apply, suspension of the authorisation of a regulated entity, in respect of one or more of its activities, for a period not exceeding 12 months; except where the provisions of Council Regulation (EU) No 1024/2013 apply, revocation of a

41. As noted above, it is Central Bank policy to issue a public statement in respect of all settlements concluded. Public statements are vital to the delivery of the Central Bank's strategy of credible deterrence and to ensure that enforcement operates in a transparent manner, informing the financial sector and consumers about the issues identified, how a firm or individual fell below the expected standard, why a particular regulatory response was adopted and what lessons are available generally from the particular case. Public statements are, therefore, a valuable method of deterring misconduct within the financial sector, of signalling to the market what practices and/or behaviours are not acceptable and the consequences of breach. We consider that any standardised enforcement regime should ensure maximum transparency with minimal restrictions where possible.
42. Civil financial sanctions are important. Such sanctions require wrongdoers to pay substantial sums and, when accompanied by public statements, can cause significant reputational damage. In the Central Bank's experience, they are an important tool in the suite of enforcement powers that act as a powerful deterrent to unlawful behaviour.

European obligations

43. As in other areas, the European context affects the Central Bank's approach to civil financial sanctions. EU law is having an increasing impact on the Irish regulatory legislative framework and much of our domestic legislation results from the State's obligation to implement EU directives and parts of certain EU regulations (notwithstanding their general directly applicable nature). The legislation governing the Central Bank's use of sanctions is regularly updated and varied as a result of specific EU law requirements in different sectors, particularly the minimum range of sanctions which must be available to a national competent authority to address regulatory breaches and the maximum financial sanctions which may be imposed. In addition to applicable EU law the Central Bank's power to impose administrative sanctions must also be considered in the context of the SSM.

regulated entity's authorisation; a direction to cease a contravention, if it is found the contravention is continuing; and a direction to pay to the Central Bank all or a specified part of the costs incurred by the Central Bank in holding the Inquiry and in investigating the matter to which the Inquiry relates. See further in Part 6 of the Outline of the Administrative Sanctions Procedure, v2.2.

Issue 5: Coordination of regulators

General

44. The Central Bank is fully supportive of measures designed to facilitate coordination and cooperation between regulators, and considers it to be in the best interests of the public. In the Central Bank's experience, frequent engagement with domestic and international regulatory colleagues is of significant assistance in the development of regulatory and enforcement strategy. Such interactions facilitate sharing of knowhow and insights on developments in law and practice, as well as the consideration of national cross-sectoral regulatory matters and international financial regulatory issues.
45. The Central Bank is subject to regular scrutiny from peer regulators, the European Supervisory Authorities (the European Insurance and Occupational Pensions Authority, the European Banking Authority and the European Securities and Markets Authority), the International Monetary Fund and international standards-setters. Such reviews also consider the Central Bank's enforcement function and enable the identification, sharing and further development of best practices. In the context of enforcement more generally, the Central Bank strives to ensure appropriate cooperation and collaboration with its national and international stakeholders as well as with the broader regulatory community. The Central Bank has previously hosted a Regulators' Forum comprising representatives of national regulatory bodies to further enhance domestic cross-sectoral cooperation and foster learning opportunities. We also regularly engage with international regulatory bodies such as the European Central Bank, the European Supervisory Authorities and the International Organisation of Securities Commission to input to legislation or standards, develop common enforcement policies and share best practices.
46. Domestically, increased cooperation between regulators is to be encouraged, particularly in areas such as the investigation and prosecution of white collar crime. As noted at paragraph 23 (above) cooperation in this sphere could take the form of the secondment of individuals with relevant skills from other agencies to a new body in order to provide support in complex areas of investigation and prosecution.

The lead agency approach and cooperation agreements

47. Where there is an overlap of jurisdiction between two or more regulators who have an interest in a matter, the Central Bank sees the merit in one regulatory

agency taking a lead role in investigating that matter in agreement and cooperation with other relevant bodies. This avoids unnecessary duplication of work and expenditure, and can assist in avoiding pitfalls such as the rule against double jeopardy. If a lead agency approach were adopted, the appointment of the lead agency would need to be decided on a case by case basis. It would not be possible to provide (on a statutory basis or otherwise) for a default position. Consequently, it would be preferable to have overarching agreements, protocols or memoranda of understanding which give structure to such arrangements. Statute could provide for the capacity of regulators to enter into such agreements, and for the possible inclusion of a lead agency provision. As such, the legislation would be discretionary rather than mandatory. We do not deem it necessary, in the abstract, to prioritise any particular policy area in this context. In the context of individual investigations, collaborating agencies may wish to particularise the practical procedures for collaboration in a case-specific agreement which might cover issues such as enforcement objectives, information sharing, actions, timescales and potential regulatory action.

48. The Central Bank therefore fully supports the development of cooperation agreements between regulators to address issues such as the exchange of information, cooperation in investigations and resolving conflicts arising from overlapping or concurrent jurisdiction. Any legislation underpinning the drafting of cooperation agreements could include a list of possible regulators with whom agreements could be concluded, rather than obliging specific regulators to enter into particular agreements. The regulators with whom the Central Bank can share information under Section 33AK of the 1942 Act may provide a useful starting point for identifying a list of regulators with whom agreements could be made¹⁹.
49. The development and implementation of well-crafted and sufficiently flexible agreements would allow for efficient, effective and structured cooperation and coordination between regulators and a clear division of roles and responsibilities.
50. The Central Bank does not believe the lead agency approach and the use of cooperation agreements to be mutually exclusive. Cooperation agreements can provide for the appointment of a lead agency where appropriate. Further, we do not consider it necessary, in the abstract, to prioritise any particular policy area in this context.

¹⁹ Section 33AK(3)(a) of the 1942 Act provides for the provision of information by the Central Bank to, inter alia, the Garda Síochána, the Revenue Commissioners, the Director of Corporate Enforcement, the Competition Authority, or “any other body, whether within the State or otherwise, charged with the detection or investigation of a criminal offence”.

Information sharing

51. Permitting regulators to share information that they have received in confidence, even where the information relates to matters other than criminal offences, would be helpful in furthering cooperation between regulators and promoting regulatory compliance. The sharing of confidential information with other regulators is, however, subject to statutory confidentiality and professional secrecy obligations, both at national and EU level. Any legislative reform on coordination and cooperation would need to take this into account. Furthermore, issues such as data protection constraints, common law duties of confidentiality, and the constitutional rights to privacy and to a good name would need to be considered.
52. From a Central Bank perspective, our confidentiality obligations and powers to exchange information exchange are set out in Section 33AK of the 1942 Act and various supervisory EU legal acts. Section 33AK of the 1942 Act provides certain “gateways” to facilitate the sharing of confidential information in specified circumstances and/or with specified bodies. These “gateways” are not all limited to information relating to criminal offences. They are, however, subject to over-arching restrictions on the disclosure of confidential information as set out in the supervisory EU legal acts, the wording of which can vary between directives.

Joint inspections

53. In principle, the Central Bank is in favour of regulatory agencies, where appropriate, conducting joint inspections to avoid duplication of work and expenditure, and to ensure common access to relevant information repositories such as hard copy files and electronic record²⁰. The development of a standardised set of inspection and investigation powers should facilitate the conduct of joint inspections. The Central Bank recognises the difficulty identified by the Issues Paper concerning the exercise of statutory powers by a regulatory agency for some purpose other than its statutory mandate, and agrees that this could present both legal and practical difficulties in the conduct of joint inspections. Any legislative reforms designed to facilitate joint

²⁰ The Central Bank has experience of this: its Anti-Money Laundering Division has conducted joint inspections with the Department of Justice on matters of anti-money laundering & countering terrorist financing

inspections would need to ensure the capacity of the appointed investigators to exercise all relevant statutory powers to fulfil the objectives of the investigation as a whole, rather than only those of the regulator appointing that member of the inspection team. It should also be established in statute that information or evidence gathered as part of a joint inspection would be admissible in subsequent enforcement actions taken by any of the participating regulators. Again, any legislative reform ought to take account of relevant restrictions as noted at paragraph 51 above.

The European angle

54. Finally, additional considerations will arise with respect to credit institutions, whose prudential supervision is now governed by the SSM. This particularly affects the capacity of the Central Bank to enter into arrangements with other regulators (where cooperation would concern the regulation of credit institutions) and the sharing of information concerning these credit institutions.

Issue 6: Jurisdiction for regulatory appeals

The Central Bank's experience - IFSAT

55. Appealable decisions of the Central Bank are heard by the Irish Financial Services Appeals Tribunal ("IFSAT")²¹, which is a specialist tribunal, independent of the Central Bank, easily accessible by appellants and with limited costs implications. The Chairperson or Deputy Chairperson of IFSAT is a former judge of the Supreme Court, Court of Appeal or High Court, or a barrister or solicitor of at least seven years' standing. The other tribunal members are "lay members" who possess special knowledge or skill in relation to the provision of financial services.

56. IFSAT has broad powers to affirm any appealed decision. It can also remit any appealable matter back to the Central Bank for reconsideration, together with a recommendation or direction. Further, it can vary, substitute or set aside any appealable decision made by the Central Bank under the ASP. IFSAT may also refer a question of law to the High Court.

²¹ IFSAT was established by the Central Bank and Financial Services Authority of Ireland Act 2003.

The High Court

57. There is a further appeal from IFSAT to the High Court and, if leave is granted, an appeal on a point of law to the Court of Appeal. While the maintenance of this type of appeals process has distinct advantages (most particularly, time and cost efficiencies by appealing to a specialist tribunal, rather than the Courts in the first instance) and has worked effectively to date, it does provide for multiple venues for onward appeal which has the potential to be unduly burdensome for both an appellant and the relevant regulatory agency. A more streamlined appeals process is, therefore, worth consideration.

The CAT approach

58. A single-step appeal to a specialised body akin to the Competition Appeals Tribunal (“CAT”) in the UK which would, in effect, be a division of the High Court, is an interesting proposal, and one that the Central Bank would support. Such an appeal mechanism has the considerable advantage of reducing the possible layers of appeal, thereby reducing the potential for long delays. Cases before the specialised body are subject to rigorous case management, robust procedures and defined timelines. An appeal to such a specialised body (given its equivalent status to the High Court) ensures the consistent application of fair procedures requirements and the development of a body of precedent which would be of benefit to all regulators.

59. An integral aspect of the establishment of such a body would be the provision of appropriate training and support to decision makers. As outlined in the Issues Paper, an essential aspect of the regulatory appeals process is access to sufficient expertise to enable understanding of, and competency to hear, the complex issues which may arise during the course of an appeal. We note in this context that the CAT in the UK has built up the requisite expertise, and provides for a hearing before both judges or senior lawyers and experts in relevant fields. If a similar body were established in this jurisdiction, it would therefore need to be properly resourced. The Irish experience in competition law, where the adjudication of merger appeals is conducted by a specialist High Court judge, may prove instructive.

60. The issue of costs in this area requires some consideration, most notably from the perspective of appellants and in particular those who do not intend to engage in series of onward appeals.



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