Banking Regulation

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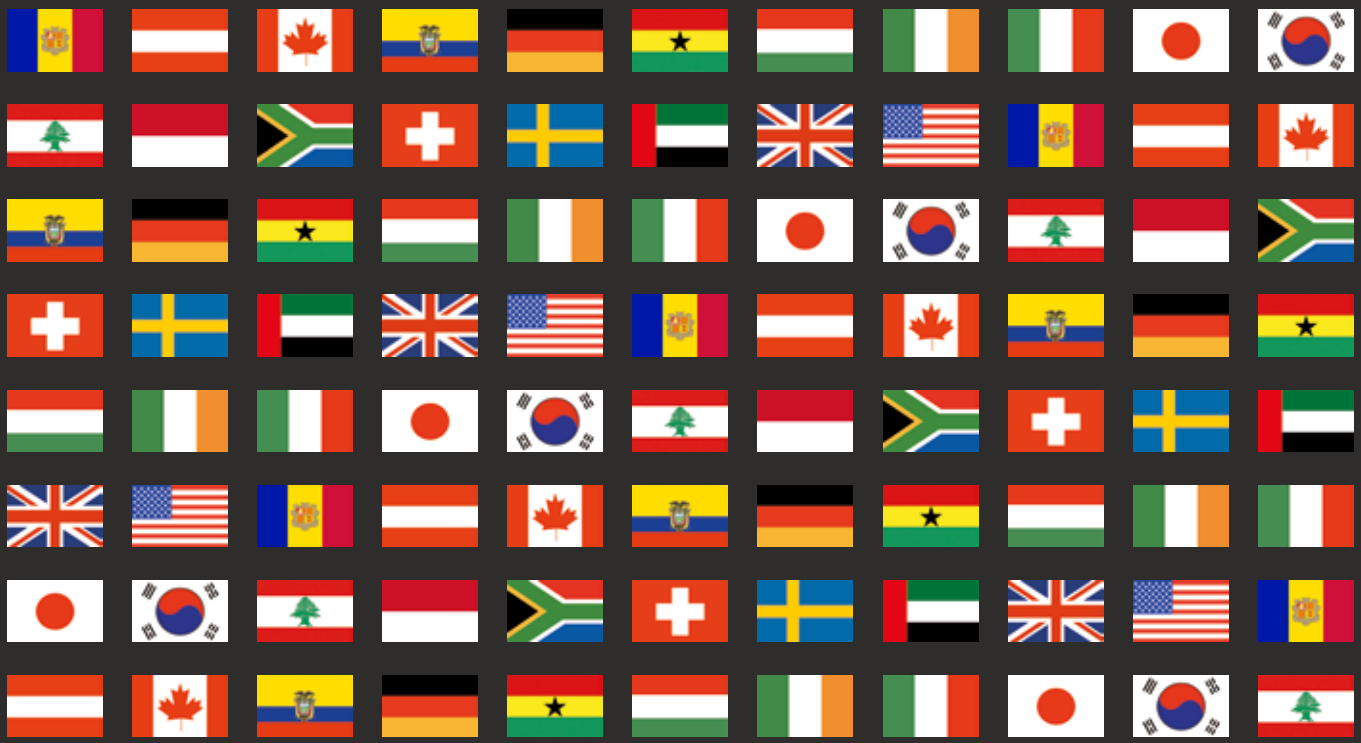

2019

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Banking Regulation 2019

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Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Banking Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Sweden.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Richard K Kim of Wachtell, Lipton, Rosen & Katz, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
February 2019

Ireland

Orla O'Connor, Robert Cain, Maedhbh Clancy and Aaron Tangney
Arthur Cox

Regulatory framework

1 What are the principal governmental and regulatory policies that govern the banking sector?

The overall mandate of the Central Bank of Ireland (Central Bank) covers prudential regulation and financial conduct with a view to safeguarding stability and protecting consumers. The Central Bank's key statutory objectives are:

- price stability;
- the stability of the financial system;
- the proper and effective regulation of financial institutions (while ensuring consumer protection); and
- the resolution of financial difficulties in banks.

Until November 2014, the Central Bank was solely responsible for the authorisation and supervision of banks operating in Ireland. When the Single Supervisory Mechanism (SSM) came into effect on 4 November 2014 across the eurozone, the European Central Bank (ECB) became the competent authority for supervising banks in Ireland. Any applications for authorisation as a bank in Ireland are now subject to the final approval of the ECB. From a supervisory perspective, where a bank is designated as 'significant' by the ECB, it is supervised directly by the ECB. Six Irish banks are, at the time of writing, designated as significant:

- AIB Group plc;
- Bank of America Merrill Lynch International Designated Activity Company;
- Bank of Ireland Group plc;
- Barclays Bank Ireland plc;
- Citibank Holdings Ireland Limited; and
- Ulster Bank Ireland Designated Activity Company.

Where a bank is designated as 'less significant' by the ECB, it is subject to direct supervision by the Central Bank, and to indirect supervision by the ECB. The ECB may give guidelines to the Central Bank regarding the supervision of less significant banks, and may also take over direct supervision of a less significant bank if it views it as necessary to do so.

From 2016 to 2018, one of the Central Bank's key priorities was to re-assert itself as 'the effective steward of the Irish financial system'. In its 'Strategic Plan 2019–2021', published in November 2018, it confirmed that it will remain focused on consolidating the policy framework that it implemented in recent years in response to the financial crisis. In the Strategic Plan, it signalled two of its biggest challenges as being the impact of Brexit, and the implementation of a new approach to the regulation of financial conduct. It identified its strategic themes for 2019 to 2021, and notably these included Brexit (in particular, ensuring that the authorisation process for firms (including banks) is 'robust and effective', and mitigating the immediate and longer-term risks posed by Brexit), strengthening consumer protection (including by way of 'robust' enforcement action and 'intrusive and targeted assessments'), and strengthening resilience (in particular, by addressing issues in the area of mortgage arrears and non-performing loans, and effectively supervising and managing failing firms).

2 Summarise the primary statutes and regulations that govern the banking industry.

Legislation

The primary Irish statutes governing the banking industry are the Central Bank Acts 1942 to 2015, the European Union (Capital Requirements) Regulations 2014 (which transposed Directive 2013/36/EU (CRD IV) into Irish law), and the European Union (Capital Requirements) (No. 2) Regulations 2014 (which gave effect to certain matters relating to Regulation (EU) No. 575/2013 (Capital Requirements Regulation). The Central Bank also complies with the Guidelines on Sound Remuneration Policies under articles 74(3) and 75(2) of CRD IV and Disclosures under article 450 of the Capital Requirements Regulation published by the European Banking Authority (EBA).

Corporate governance

Banks are also subject to the Central Bank's Corporate Governance Requirements for Credit Institutions 2015, which impose minimum core standards on all banks licensed or authorised by the Central Bank. The Corporate Governance Requirements impose extra requirements on banks designated as 'high impact' by the Central Bank. Banks are also subject to the EBA's Guidelines on Internal Governance, which took effect on 30 June 2018.

Staff

Minimum competency

The Central Bank's Minimum Competency Code 2017, and its Minimum Competency Regulations (the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) Minimum Competency Regulations 2017) set out minimum professional standards for staff of regulated financial services providers (RFSPs) (including banks) when dealing with consumers in relation to retail financial products, and with the Markets in Financial Instruments Directive (MiFID) (Directive 2004/39/EC) retail clients and MiFID elective professional clients in respect of MiFID investment products and certain MiFID services.

Fitness and probity

The Central Bank's Fitness and Probity Regime was introduced in 2010, and applies to persons in senior positions (ie, holding what is known as a 'controlled function', or a 'pre-approval controlled function') in an RFSP (including a bank). The Fitness and Probity Regime also requires RFSPs, such as banks, to ensure that those persons comply with the Regime. Where an Irish bank has been designated as 'significant' by the ECB for SSM purposes, its management board and key function holders are assessed for fitness and probity purposes by the ECB under the SSM framework. The ECB is also responsible for fitness and probity assessments for the management board of banks designated as 'less significant' for SSM purposes. As part of fitness and probity assessments, regard must be had to the 'Guidelines on the Assessment of the Suitability of Members of the Management Body and Key Function Holders', which came into force on 30 June 2018, replacing the previous November 2012 Guidelines. A person wishing to hold a position on the management board of an RFSP such as a bank, or wishing to become a key function holder in that RFSP, must complete an individual questionnaire and submit it to the Central Bank, together with an addendum containing additional information required by the ECB.

Company law
Banks established as companies under Irish company law will be required to comply with the Irish Companies Acts. The directors of such banks will also have statutory duties (set out in the Companies Acts) and common law duties.

Consumer protection
Banks operating in Ireland are also subject to the Central Bank's consumer protection codes and regulations (see question 7).

Money laundering
Irish banks are also subject to the Irish legislation that transposes the Fourth Money Laundering Directive (Directive 2015/849/EU) into Irish law (the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 to 2018), and the drafting of domestic legislation to transpose the Fifth Money Laundering Directive (Directive 2018/843/EU) is underway at the time of writing.

3 Which regulatory authorities are primarily responsible for overseeing banks?

Until 4 November 2014, the Central Bank was solely responsible for the authorisation and supervision of banks operating in Ireland. When the SSM came into effect on 4 November 2014, the ECB became the competent authority for supervising banks in Ireland.

Supervision of 'significant' banks
Where a bank is designated as 'significant' by the ECB, it is supervised directly by the ECB. Six Irish banks are, at the time of writing, designated as 'significant' (see question 1).

Supervision of 'less significant' banks
Where a bank is designated as 'less significant' by the ECB, it is subject to direct supervision by the Central Bank, and to indirect supervision by the ECB. The ECB may give guidelines to the Central Bank regarding the supervision of 'less significant' banks, and may also take over direct supervision of a 'less significant' bank if it views it as necessary to do so.

Authorisation
The introduction of the SSM also led to changes in how banks are authorised in Ireland. An application for authorisation as a bank in Ireland is still submitted to the Central Bank. If the Central Bank forms the view that the required conditions to authorisation have been met, it then proposes to the ECB that the ECB grant the authorisation.

4 Describe the extent to which deposits are insured by the government. Describe the extent to which the government has taken an ownership interest in the banking sector and intends to maintain, increase or decrease that interest.

Deposit Guarantee Scheme
The Central Bank's Deposit Guarantee Scheme is administered by the Central Bank and is funded by the banks covered by the scheme. It provides protection for eligible depositors if a bank (or certain other types of regulated entity) is unable to repay deposits. That protection is for up to €100,000 per person per institution, and covers balances in current accounts, deposit accounts, and share accounts. The deposits of individuals, sole traders, partnerships, clubs, associations, schools, charities, companies, small self-administered pensions, and funds held in trust or in client accounts by solicitors and other professionals (if the underlying beneficiaries are eligible in their own right), are protected. Not protected are deposits by banks, credit unions, building societies, persons charged (pending a court decision) or convicted of money laundering offences, financial institutions, investment firms, depositors who have never been identified in accordance with money laundering legislation, insurance and reinsurance undertakings, collective investment undertakings, public authorities, or pension schemes or retirement funds (other than small self-administered pension schemes). Debt securities issued by a bank are also not protected.

State ownership in the banking sector
During the 2008 global financial crisis, the state took ownership interests in AIB, Bank of Ireland, and permanent TSB. Anglo Irish Bank was taken into full state ownership, and is now being wound up. The state currently has just over a 70 per cent interest in AIB, a 14 per cent interest in Bank of Ireland and a 75 per cent interest in permanent TSB. The expectation is that those shareholdings will be reduced over time, rather than maintained or increased.

5 Which legal and regulatory limitations apply to transactions between a bank and its affiliates? What constitutes an 'affiliate' for this purpose? Briefly describe the range of permissible and prohibited activities for financial institutions and whether there have been any changes to how those activities are classified.

The Central Bank's Code of Practice on Lending to Related Parties applies to Irish banks, but not to banks incorporated in other European Economic Area member states who conduct their business in Ireland on a branch or services basis. Subject to certain exceptions, a bank cannot grant a loan to a related party on terms more favourable than those it would apply to a loan to a non-related party. Loans to related parties must be specifically approved by the board of the bank (or a sub-committee of that board) and loans in excess of €1 million are subject to Central Bank approval. The bank must have specific policies and procedures in place to cover lending to related parties, and there are also exposure limits and regulatory reporting requirements.

For the purposes of the Code, a 'related party' is a director, senior manager or significant shareholder of the bank or an entity in which the bank has a significant shareholding, as well as a connected person of any of the foregoing. A 'connected person' is defined as a spouse, domestic partner, civil partner or child of the person, or two or more natural or legal persons who, unless it is shown otherwise, constitute a single risk because one of them, directly or indirectly, has control over the other or others, or two or more natural or legal persons between whom there is no relationship of control as set out above, but who are to be regarded as constituting a single risk because they are so interconnected that, if one of them were to experience financial problems, the other(s) would be likely to encounter repayment difficulties.

6 What are the principal regulatory challenges facing the banking industry?

In its 'Strategic Plan 2019–2021', the Central Bank signposted two of the biggest challenges as the impact of Brexit, and the implementation of a new approach to the regulation of financial conduct. Its strategic themes for 2019 to 2021 focus on certain key areas, most notably:

- Brexit, in particular, ensuring that the authorisation process for firms (including banks) is 'robust and effective', and mitigating the immediate and longer-term risks posed by Brexit;
- strengthening consumer protection, including by way of 'robust' enforcement action and 'intrusive and targeted assessments'; and
- strengthening resilience, in particular, by addressing issues in the area of mortgage arrears and non-performing loans, and effectively supervising and managing failing firms.

The management of mortgage arrears and bank stocks of non-performing loans has been a key focus area for the Central Bank for a number of years, and this is likely to continue. There is renewed emphasis in this space following the introduction of legislation requiring that those who purchase the legal title to loans (principally residential mortgages), and those who set the strategy for those portfolios of loans, and control key decisions in respect of those portfolios, be regulated by the Central Bank. To date, many of those loan buyers (usually special purposes entities established by international banks or private equity firms) did not require regulation provided that the loans were serviced by a regulated credit servicing firm.

In light of the recent transposition of the Fourth Money Laundering Directive (Directive 2015/849/EU) into Irish law, and the impending transposition of the Fifth Money Laundering Directive (Directive 2018/843/EU), we expect anti-money laundering (AML) and counter-terrorist financing (CTF) to remain key priorities for the Central Bank (see question 11).

7 Are banks subject to consumer protection rules?

Yes. Banks in Ireland are subject to the Central Bank's consumer protection codes and regulations as follows:

- Consumer Protection Code: this Code contains a set of general 'treating customers fairly' principles combined with more detailed requirements in certain areas.

- Code of Conduct on Mortgage Arrears: this Code applies to the mortgage lending activities of all regulated entities operating in Ireland, and sets out a number of requirements with which residential mortgage lenders must comply. It includes a requirement to put a mortgage arrears resolution process in place, and restricts the taking of possession proceedings until certain steps are followed (provided that the borrower in arrears is cooperating). In November 2018, the Central Bank published its 'Report on the Effectiveness of the Code of Conduct on Mortgage Arrears' in the context of the sale of loans by regulated lenders, which noted that this Code 'is working effectively and as intended' where borrowers are cooperative and engage with their lender of record.
- SME Regulations: the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending to Small and Medium-Sized Enterprises) Regulations 2015 apply to credit provided to micro, small and medium-sized (SME) enterprises, and set out conduct of business requirements, including in relation to communicating with borrowers, providing information to borrowers, and dealing with borrowers in financial difficulties.
- Code of Conduct on the Switching of Current Accounts with Payment Service Providers: this Code sets out processes that must be followed where a consumer is moving its payment account from one provider to another.

Each of the above Codes and the SME Regulations are legally binding. There is also a voluntary code (the Code of Practice on the Transfer of Mortgages), which has been in place since 1991 and relates to loans secured on residential property.

There are also 'form and content' requirements applicable to consumer lending set out in the Consumer Credit Act 1995, the European Union (Consumer Mortgage Credit Agreements) Regulations 2016 (which transposed the Mortgage Credit Directive (Directive 2014/17/EU) into Irish law), and the European Union (Consumer Credit) Regulations 2010 (which transposed the Consumer Credit Directive (Directive 2008/48/EC) into Irish law. Compliance with the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000 (which transposed the Unfair Terms Directive (Directive 93/13/EEC) into Irish law) is particularly important when contracting with consumers, because the question of whether particular contract terms are unfair has been raised before the Irish courts with increasing frequency by borrowers in recent years.

8 In what ways do you anticipate the legal and regulatory policy changing over the next few years?

Brexit

Brexit will continue to be a key focus area for the Central Bank, in particular in light of the high volume of firms that have sought to set up in Ireland in advance of the UK's withdrawal from the European Union. A key area of focus will be ensuring that the business plans and models of those relocating entities, and of those banks that are already authorised in Ireland, remain sufficiently robust.

Senior managers

The Central Bank recommended (in January 2018 to the Law Reform Commission, and in July 2018 to the Minister for Finance) that reforms be introduced whereby responsibility would be assigned to senior managers within banks (and certain other regulated entities). A key aspect of its proposal is the introduction of a senior executive accountability regime, which would allow the Central Bank to require in-scope senior managers to present a statement of responsibilities that clearly states the matters for which they are responsible and accountable. The proposed senior executive accountability regime would also require banks and their senior managers to clearly delineate where responsibility and decision-making lies for their business, and comprehensive statements of primary responsibilities would be required for all senior roles. Conduct standards would be imposed on all staff in banks, and not just those within the scope of the Central Bank's Fitness and Probity Regime. Those conduct standards would oblige banks and their staff to act with integrity, honesty, skill, care and diligence, and an additional layer of standards would be imposed on senior staff. The Central Bank is expected to consult on its proposed senior executive accountability regime during the course of 2019 and has expressed the view that the regime should be implemented via primary legislation.

Credit reporting

The new Irish credit reporting regime is now in operation. In-scope banks (which would include Irish banks and banks passporting into Ireland on a branch or services basis), need to report details of in-scope credit agreements (ie, credit agreements with Irish borrowers, or credit agreements governed by Irish law). Related credit applications also need to be reported. From 30 September 2018, in-scope lenders must request a credit report in respect of an applicant for a consumer loan of €2,000 or more. In respect of business lending, in-scope lenders will be obliged to request a credit report in respect of an applicant for a loan of €2,000 or more from March 2019 onwards. The current scope of the credit reporting regime may be extended to include information on guarantees.

Revisions to CRD IV and the Capital Requirements Regulation

These proposals, currently being negotiated at EU level, will include measures relating to the leverage ratio, the net stable funding ratio, total loss absorbing capacity, market risk, counterparty credit risk, equity investments in funds, and large exposures.

Other changes

The Central Bank has also signalled an increasing focus on diversity in financial institutions in Ireland, and on financial innovation (fintech and regulatory technology).

Supervision

9 How are banks supervised by their regulatory authorities? How often do these examinations occur and how extensive are they?

Banks designated as 'significant' for the purposes of the SSM by the ECB are directly supervised by joint supervisory teams (JSTs) made up of staff from both the ECB and the Central Bank. Those JSTs have overall responsibility for the day-to-day supervision of 'significant' banks. The SSM takes a risk-based approach to supervision, and day-to-day supervision by the JSTs involves interaction with banks and constant oversight of their activities. The SSMs Supervisory Review and Evaluation Process is the process used to assess risks, governance, capital positions and liquidity positions on an ongoing basis. Other SSM supervisory activities include granting authorisations, dealing with the acquisition of qualifying holdings, crisis management, withdrawing authorisations and imposing sanctions.

Banks designated as 'less significant' for the purposes of the SSM by the ECB are supervised directly, on a day-to-day basis, by the Central Bank (with ECB oversight). The Central Bank carries out in-depth on-site inspections of individual risk areas, risk controls and governance, and its day-to-day supervisory activities in respect of banks include, among other matters, the ongoing assessment of the bank's risk profile, its solvency, liquidity, and recovery planning. The Central Bank takes a risk-based approach to supervision, introduced in November 2011 and known as the 'Probability Risk and Impact SysteM' (PRISM). Under PRISM, RFSPs are categorised as 'high impact', 'medium-high impact', 'medium-low impact' or 'low impact'. That categorisation determines the number of supervisors allocated to an RFSP, and the level of supervisory scrutiny to which it is subject. The Central Bank has recently reiterated that its approach to supervision is 'effective, intrusive, analytical, outcomes-focused . . . and underpinned by the credible threat of enforcement'. In 2017, key areas of supervisory focus in respect of banks included prudent loan underwriting measures, approaches to resolving stocks of non-performing loans, and thematic reviews and inspections covering regulatory reporting, readiness for International Financial Reporting Standard (IFRS) 9, risk governance and compliance. The improvement of capital ratios, the targeted review of internal models, liquidity risk management, and recovery and resolution planning, were also key focus areas.

10 How do the regulatory authorities enforce banking laws and regulations?

There is a wide range of enforcement tools available to the Central Bank where RFSPs breach Irish financial services legislation and codes.

The Central Bank's Administrative Sanctions Procedure (under the Central Bank Act 1942) gives the Central Bank the power to administer sanctions in respect of what are known as 'prescribed contraventions'.

A 'prescribed contravention' includes a breach of a provision of financial services legislation (or of a condition or requirement imposed pursuant to that legislation), a breach of a code made under that financial services legislation (examples of such codes would be the Consumer Protection Code, the Code of Conduct on Mortgage Arrears and the Code of Practice on Lending to Related Parties). Sanctions can be imposed by the Central Bank, under its Administrative Sanctions Procedure, on both RFSPs, and on persons currently or previously involved in the management of an RFSP who participated in the 'prescribed contravention'. If a 'prescribed contravention' occurs, it is open to the Central Bank to enter into a settlement agreement with the RFSP or individual. It may also refer the matter to an inquiry for further investigation. The range of sanctions which can be imposed is broad, and includes:

- a caution or reprimand;
- a direction to refund money;
- monetary penalties (not exceeding the greater of €10 million or 10 per cent of turnover where the RFSP is a body corporate or an unincorporated body and not exceeding €1 million where the RFSP is an individual or a person concerned in the management of an RFSP);
- where the RFSP is within the scope of the SSM (this would include a bank), a proposal to the ECB that the RFSPs authorisation be suspended or revoked;
- in the case of an individual, a direction disqualifying the person from being concerned in the management of an RFSP for a prescribed period of time;
- a direction to cease the 'prescribed contravention' if it is continuing; and
- a direction to pay the Central Bank's costs in relation to the matter.

The Central Bank (Supervision and Enforcement) Act 2013 strengthened the Central Bank's enforcement powers by giving it the power to direct RFSPs to make redress to affected customers where it has committed widespread and regular breaches that have caused loss or damage to its customers. That 2013 Act also gave customers of RFSPs the right to take an action against that RFSP for any loss or damage suffered by that customer as a result of the RFSPs breach of applicable Irish financial services legislation.

In addition to the above, the Central Bank can also carry out fitness and probity investigations, issue directions, impose conditions, and make reports to other agencies (including An Garda Síochána, the Revenue Commissioners and the Competition and Consumer Protection Commission).

The ECB may take direct enforcement and sanctions proceedings against banks designated as 'significant', and can instruct the Central Bank to use its supervisory powers or to open proceedings against 'significant' banks operating in Ireland.

11 What are the most common enforcement issues and how have they been addressed by the regulators and the banks?

The Central Bank levied a significant fine in 2018 for breaches by a bank of the Code of Practice on Lending to Related Parties. Another bank was also fined by the Central Bank for breaches of that code in 2016. In 2017, two Irish banks were fined for compliance failures in respect of AML and CTF legislation (another Irish bank was also fined for compliance failures under the same legislation in 2016). In 2014, two banks were sanctioned for breaches of the European Communities (Capital Adequacy of Credit Institutions) Regulations 2006 (which transposed the original Capital Requirements Directive into Irish law). The Central Bank has also previously sanctioned banks for breaches of its 2009 Requirements for the Management of Liquidity Risk.

The Central Bank's ongoing Tracker Mortgage Examination is the largest and most significant supervisory review ever undertaken by the Central Bank in the area of consumer protection. The examination covers all lenders that offered tracker mortgages to customers, including mortgages used for a family home or an investment property. The initial review involved more than two million mortgage accounts. By the end of 2017, lenders had been required to pay €316 million in redress and compensation, with further redress and compensation payments expected. The examination arose out of a number of customers being denied tracker products or charged interest at the wrong rates.

Resolution

12 In what circumstances may banks be taken over by the government or regulatory authorities? How frequent is this in practice? How are the interests of the various stakeholders treated?

During the 2008 global financial crisis, the state took ownership interests in AIB, Bank of Ireland, and permanent TSB. Anglo Irish Bank was taken into full state ownership, and is now being wound up. Currently, the state has more than a 70 per cent interest in AIB, a 14 per cent interest in Bank of Ireland and a 75 per cent interest in permanent TSB.

The Irish government introduced stabilisation and resolution legislation in 2010 and 2011 for the banking industry in response to the financial crisis. That legislation (the Credit Institutions (Stabilisation) Act 2010, and the Central Bank and Credit Institutions (Resolution) Act 2011), which enabled various orders to be made (including most notably orders transferring various assets and liabilities of the former Anglo Irish Bank) has now, in the case of the 2010 Act, ceased to be in force and, in respect of the 2011 Act, been superseded as regards banks by the European Union (Bank Recovery and Resolution) Regulations 2015 (BRRD Regulations). The BRRD Regulations transposed the Bank Recovery and Resolution Directive (Directive 2014/59/EU) into Irish law. The only remaining key provision of the 2011 Act that still applies to banks is the provision that allows for the Central Bank to petition for an Irish bank to be wound up in certain circumstances.

The Central Bank was designated as the competent authority in Ireland under the BRRD Regulations, save as regards the specific tasks conferred on the ECB as part of the SSM, in which case the ECB is the competent authority. The Central Bank was also appointed as the resolution authority in Ireland for BRRD purposes under the BRRD Regulations. As regards banks designated as 'significant' under the SSM, the Single Resolution Mechanism, which took effect across the European Union on 1 January 2016, is relevant. It divides the recovery and resolution tasks for those banks between the Single Resolution Board (SRB) and the relevant national resolution authority (in the case of Ireland, the Central Bank). The SRB will exercise some of the powers that would otherwise be exercisable by the Central Bank under the BRRD Regulations if a 'significant' Irish bank fails, or begins to fail.

Under the BRRD Regulations, the relevant resolution authority can propose a 'resolution order' (which will then be made by the Irish High Court) in respect of an Irish bank if it forms the opinion that the bank is failing or likely to fail, there is no reasonable prospect of any alternative private sector measures, resolution is necessary in the public interest, and the Minister for Finance has consented. When resolution tools are put in place, or resolution powers exercised, the bank's shareholders will bear first losses. Creditors generally bear losses after the shareholders in accordance with the priority of their respective claims under normal insolvency proceedings. Creditors of the same class are to be treated equally, and the 'no creditor worse-off' principle means that no creditor should incur losses greater than it would have incurred had the bank been wound up under normal insolvency proceedings. Covered deposits are also protected.

Once a resolution order is made, four resolution tools are available:

- the 'sale of business tool';
- the 'bridge institution tool';
- the 'asset separation tool'; and
- the 'bail-in tool'.

The related 'resolution order' may provide for (among other matters) the transfer of shares, the transfer of assets and liabilities, the reduction of principal under a capital instrument or in respect of eligible liabilities (or their conversion into shares), the cancellation of debt instruments (other than secured liabilities), the close-out or termination of financial contracts, and the removal and replacement of management by a special manager. The BRRD Regulations also contemplate another resolution measure whereby the Central Bank can apply to the High Court for a 'capital instruments order' to write down or convert relevant capital instruments into shares, or other instruments into shares or other instruments of ownership in respect of an institution that requires resolution.

13 What is the role of the bank's management and directors in the case of a bank failure? Must banks have a resolution plan or similar document?

Under the BRRD Regulations, if the financial position of an Irish bank deteriorates significantly, or there are serious breaches by the bank or its management body of Irish law, or there are serious administrative irregularities, the bank's senior management may be removed. Temporary suspension notices may also be served pending the relevant issues being explored in more detail. It is also possible for senior management to be replaced temporarily, through what is known as a 'temporary administration order'. A resolution order (see question 12) may also appoint a special manager to replace the bank's management body.

Under the BRRD Regulations, banks must have both a recovery plan, which sets out measures to be taken by the bank to restore its financial position following a significant deterioration in that financial position, and a resolution plan (developed in consultation with its competent authority), which sets out the resolution actions that its resolution authority plans to take if the bank meets the conditions for resolution (ie, it is failing or likely to fail, there is no reasonable prospect of any alternative private sector measures, and resolution is necessary in the public interest).

14 Are managers or directors personally liable in the case of a bank failure?

Managers and directors will not have personal liability for the bank failure per se, but to the extent that they have breached financial services legislation see question 10 regarding the type of sanctions that could be imposed upon them. If they contravene the specific requirements of the BRRD Regulations, including the requirement to draw up recovery plans, provide information for resolution plans, and notify the competent authority if the bank is failing or likely to fail, they will also be exposed to sanctions. Further, if the bank commits an offence under the BRRD Regulations and it is proven that senior management were involved in the commission of that offence, or it was attributable to wilful neglect on their part, they will also be guilty of an offence.

15 Describe any resolution planning or similar exercises that banks are required to conduct.

See question 13 regarding the requirement for a bank to have both a recovery plan and a resolution plan. A bank's recovery plan must be updated at least annually, and on request by its competent authority. It must also be updated if there is a change to its legal or organisational structure, its financial position or its business which could impact what is set out in in that recovery plan.

A resolution plan developed by the resolution authority for a bank must identify any 'material impediments to resolvability' and outline how those impediments could be managed. The resolution authority must review and update resolution plans at least annually, and can direct the bank to assist it with that process. Included in that resolution plan must be:

- a summary of its key elements;
- details of how its critical functions and core business lines could be separated on a failure of the bank;
- details of how long each element of the plan would take to implement;
- information on the assessment of resolvability carried out by the resolution authority;
- a description of any measures required to deal with impediments to resolvability;
- information on the different resolution strategies that could be applied and how those could be financed;
- details of critical interdependencies;
- communications plans;
- information on how various bank infrastructures would be maintained;
- operational continuity plans; and
- other essential matters.

Capital requirements

16 Describe the legal and regulatory capital adequacy requirements for banks. Must banks make contingent capital arrangements?

Under CRD IV, as transposed into Irish law by the European Union (Capital Requirements) Regulations 2014, a bank must have initial capital of at least €5 million and must meet ongoing risk-based capital requirements. Further, the countercyclical capital buffer applies. In December 2018, the Central Bank announced that the countercyclical capital buffer rate on Irish exposures is to be maintained at 1 per cent (that 1 per cent rate was originally announced by the Central Bank in July 2018 and comes into effect in July 2019). Banks are also required to carry out an internal capital adequacy assessment process.

17 How are the capital adequacy guidelines enforced?

Irish-authorised banks must comply with the prudential reporting requirements set out in the Capital Requirements Regulation and the Implementing Technical Standard No. 680/2014 on Supervisory Reporting 9 (see question 10 regarding how compliance is enforced).

18 What happens in the event that a bank becomes undercapitalised?

The Central Bank will require that bank to immediately inject sufficient capital so that it can meet the minimum capital requirements again. There is a range of sanctions that the Central Bank can impose if this happens (see question 10 regarding how compliance is enforced).

19 What are the legal and regulatory processes in the event that a bank becomes insolvent?

The Companies Act allows the Central Bank to petition to appoint an examiner to an Irish bank (examinership is a process whereby proposals are formulated for the survival of a company that has a reasonable prospect of survival, and involves a moratorium on certain enforcement actions for between 70 and 100 days while the examiner establishes whether a scheme can be formulated for the company's survival). The Central Bank and Credit Institutions (Resolution) Act 2011 also provides that a petition to wind up a bank can only be presented by or with the consent of the Central Bank.

However, notwithstanding the foregoing, were an Irish bank to get into financial difficulties, the most likely process to be followed would be a resolution order involving one or more resolution tools under the BRRD Regulations (see question 12).

20 Have capital adequacy guidelines changed, or are they expected to change in the near future?

No specific changes are imminent but changes to CRD IV and the Capital Requirements Regulation are being negotiated at EU level at the time of writing (see question 8).

Ownership restrictions and implications

21 Describe the legal and regulatory limitations regarding the types of entities and individuals that may own a controlling interest in a bank. What constitutes 'control' for this purpose?

The Central Bank's preference is that an individual does not hold a dominant interest in a bank – it prefers to see a relatively wide ownership spread between other banks or financial institutions. The Central Bank's preference has also been that a controlling interest in a bank not be held by an insurance company. Rather than focusing on control, the Central Bank focuses on those holding a qualifying holding in a bank, that is, a direct or indirect holding in the bank that represents 10 per cent or more of the capital or of the voting rights or that would make it possible to exercise a significant influence over the management of the bank. At application stage, the Central Bank seeks detailed information on all direct shareholders (irrespective of their percentage shareholding) and all indirect shareholders with a qualifying holding.

22 Are there any restrictions on foreign ownership of banks?

There are no specific restrictions on the foreign ownership of banks, but if an application for authorisation as a bank is received by the Central Bank, and the intention is that the applicant will be owned by

one or more foreign entities, the Central Bank will consult with the relevant supervisors of those foreign entities before deciding whether to propose to the ECB that the ECB grant an authorisation.

23 What are the legal and regulatory implications for entities that control banks?

All direct shareholders and indirect shareholders with qualifying holdings will be assessed in connection with an application for authorisation. Those entities may also be subject to consolidated supervision by the Central Bank.

24 What are the legal and regulatory duties and responsibilities of an entity or individual that controls a bank?

Any shareholder who has the ability to exercise a significant influence on the conduct of the affairs of a bank will be subject to the Central Bank's Fitness and Probity Regime. Direct or indirect shareholders must also notify the Central Bank if they acquire a qualifying holding (see question 21 as to what constitutes a qualifying holding) and they must also notify the Central Bank if their holding increases above a certain threshold (20 per cent, 33 per cent or 50 per cent).

25 What are the implications for a controlling entity or individual in the event that a bank becomes insolvent?

Where a resolution order is obtained in respect of a bank, the shareholders in that bank bear the first losses (see question 12).

Changes in control

26 Describe the regulatory approvals needed to acquire control of a bank. How is 'control' defined for this purpose?

Under the European Union (Capital Requirements) Regulations 2014, a proposed acquirer cannot (directly or indirectly) acquire a qualifying holding in a bank without prior notification to, and approval from, the Central Bank. Since November 2014, the final approval is given by the ECB for all banks within the scope of the SSM, irrespective of whether they have been designated as 'significant' or 'less significant'. The notification, however, continues to be to the Central Bank, and is done by way of the submission of an Acquiring Transaction Notification Form.

A qualifying holding is a direct or indirect holding in the bank that represents 10 per cent or more of the capital or of the voting rights or would make it possible to exercise a significant influence over the management of the bank.

Further, where it is proposed to increase a qualifying holding above a specific threshold (being 20 per cent, 33 per cent or 50 per cent), the notification and approval process must also be followed.

The key issue is not control but, rather, whether a proposed acquirer will obtain a qualifying holding or whether there is a proposal that an existing qualifying holding will be increased above one of other thresholds of 20 per cent, 33 per cent or 50 per cent.

27 Are the regulatory authorities receptive to foreign acquirers? How is the regulatory process different for a foreign acquirer?

There are no specific restrictions on foreign acquirers, but if an Acquiring Transaction Notification Form is received from a proposed non-Irish acquirer, the Central Bank will consult with the relevant supervisor of that proposed acquirer as part of the application process.

28 What factors are considered by the relevant regulatory authorities in an acquisition of control of a bank?

Regard will be had to the 'Joint Guidelines on the Prudential Assessment of Acquisitions and Increases of Qualifying Holdings in the Financial Sector', published by the European Supervisory Authorities on 20 December 2016, which list certain assessment criteria for a proposed acquisition as follows:

- the reputation of the proposed acquirer, in particular its integrity and professional competence;
- the reputation and experience of those who will direct the business of the target bank;
- the financial soundness of the proposed acquirer;
- whether the proposed acquisition could adversely affect the target bank's compliance with prudential requirements; and
- whether the proposed acquisition could give rise to an increased risk of money laundering or terrorist financing.

Consideration will also be given to the ownership of the proposed acquirer, the rationale for the proposed acquisition, how the acquisition will be financed, and the impact of the proposed acquisition on the day-to-day operations of the target bank.

29 Describe the required filings for an acquisition of control of a bank.

The proposed acquirer must complete the Central Bank's Acquiring Transaction Notification Form for Credit Institutions. Before doing so, the Central Bank will expect the proposed acquirer to make contact with it (and pre-notification meetings will usually take place) with a view to ensuring that the application, when it is made, is in as complete a form as possible.

Supporting information and documentation must be included with the Acquiring Transaction Notification Form, including:

- organisation charts showing the current ownership, and the proposed structure following the proposed acquisition, setting out in percentage terms the capital and voting rights, and highlighting where significant influence exists;
- completed individual questionnaires and CVs for each proposed acquirer that is an individual, and for each proposed new appointee to the board of the target bank or the board of its holding company;
- detailed corporate information about each acquirer and its directors or controllers;
- where the proposed acquisition will involve a change in control, a business plan including:

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- a strategic development plan setting out, in general terms, the reasons for the proposed acquisition, the medium-term financial goals, any synergies that will result from the proposed acquisition, any changes that the proposed acquirer plans to introduce within the target bank, and details of how the target bank will be integrated within the group structure of the proposed acquirer;
- estimated financial statements for the target bank, on both a solo basis and a consolidated basis, for a three-year period; and
- details of the impact of the proposed acquisition on the corporate governance and general organisational structure of the target bank, with a particular focus on the target bank's board and committees, its administrative and accounting procedure and internal controls, its information technology systems, and its policies on subcontracting and outsourcing; and

- where the proposed acquisition will not involve a change in control, the proposed acquirer must submit a strategy document and the information to be contained in that strategy document will depend on whether the holding to be acquired is less than 20 per cent, or between 20 per cent and 50 per cent.

30 What is the typical time frame for regulatory approval for both a domestic and a foreign acquirer?

Once the completed Acquiring Transaction Notification Form is submitted to the Central Bank, the Central Bank must acknowledge receipt within two working days, and notify the ECB within a further five working days (the ECB will be involved in any case where the bank in question is subject to the SSM, irrespective of whether that bank is categorised as 'significant' or 'less significant').

When acknowledging receipt, the Central Bank must tell the proposed acquirer when the assessment period will end (the assessment must be completed within 60 working days). The assessment period may be extended by up to 20 working days (for EEA-based aquirers) and 30 working days (for non-EEA-based acquirers) if additional information is requested by the Central Bank.

The application is then considered by the ECB, the Central Bank and any other relevant regulatory authority. The Central Bank will propose a draft decision to the ECB as to whether or not to approve the proposed acquisition, and the final decision will rest with the ECB. The proposed acquirer will be notified by the ECB, rather than the Central Bank, of the outcome.

There is no time-frame difference as between an application submitted by a proposed domestic acquirer, and one submitted by a proposed foreign acquirer.

Getting the Deal Through

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Anti-Money Laundering
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Data Protection & Privacy
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Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
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Electricity Regulation
Energy Disputes
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Shareholder Activism & Engagement
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Shipbuilding
Shipping
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