



August 2017

ECB issues first fine under SSM

The European Central Bank (the “**ECB**”) has fined Permanent tsb Group Holdings plc (“**PTGH**”) €2.5 million for breaching two ECB decisions which imposed specific liquidity requirements on it. This is the first fine to be levied by the ECB under the Single Supervisory Mechanism (the “**SSM**”).

What is the SSM?

The SSM is one of the two pillars of EU Banking Union, which was created as a response to the financial crisis. The second pillar of the EU Banking Union is the Single Resolution Mechanism.

Under the SSM the ECB is the central prudential supervisor of financial institutions in the euro area and in non-euro EU countries that chose to join the SSM. The ECB directly supervises those banks which are classified as being “*significant*”, while the national supervisors - in Ireland’s case, the Central Bank of Ireland (the “**Central Bank**”) - continue to supervise the remaining banks.

Fines under the SSM

Council Regulation (EU) No 1024/2013 (the “**SSM Regulations**”) confers specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions. As the SSM Regulations only relate to prudential supervision, certain matters are outside of the ECB’s supervisory remit such as consumer protection and anti-money laundering/countering terrorist financing.

Article 18 of the SSM Regulations provides that the ECB may

www.dilloneustace.com

/7608757v1

For further information on any of the issues discussed in this article please contact:



Muireann Reedy
DD: +353 (0)1 674 1002
Muireann.reedy@dilloneustace.ie

impose fines (referred to as “*administrative pecuniary penalties*”) or “*sanctions*” on credit institutions, financial holding companies, or mixed financial holding companies when carrying out tasks which fall within its supervisory remit. Fines can be imposed where these entities breach directly applicable EU law which provides for administrative pecuniary penalties (Article 18(1)) and “*sanctions*” may be imposed where ECB regulations or decisions have been breached (Article 18(7)). The reference to “*sanctions*” encompasses both fines and “*periodic penalty payments*” – the latter specifically relating to a monetary penalty which can be applied at a daily rate (for a maximum period of six months) where an infringement is on-going.

The fines available to the ECB when sanctioning under the SSM are up to 10% of the total annual turnover “*as defined in relevant Union law*” in the preceding business year (see below) or twice the amount of the profits gained or loss avoided because of the breach, where these can be determined, or, any other pecuniary penalties as may be provided for in relevant Union law. The maximum periodic penalties which can be imposed by the ECB under the SSM are 5% of the average daily turnover per day of infringement.

Notably, where the entity is a subsidiary of a parent undertaking, the figure used for total annual turnover shall be the total annual turnover resulting from the consolidated accounts of the ultimate parent undertaking in the preceding business year. Similarly when calculating the daily turnover in these circumstances, the annual turnover of the ultimate parent company shall be used and divided by 365. This could potentially lead to huge fines being imposed on a subsidiary.

Article 128 of Regulation (EU) No 468/2014 which establishes the framework of the SSM (the “**SSM Framework Regulations**”) states that the definition of “*annual turnover*” as set out in Article 67 of Directive 2013/36/EU (i.e. the Capital Requirements Directive) shall be used when calculating the total annual turnover referred to in Article 18 of the SSM Regulations.

Under the SSM, the ECB does not have the power to impose sanctions on individuals.

Other SSM related fines

The ECB’s power to sanction PTGH arose from Article 18(7) of the SSM Regulations. However Article 18(5) of the SSM Regulations provides that the ECB may require national competent authorities to open proceedings for breaches of national law transposing Directives, among other matters (as the ECB does not have the power to levy fines in such cases).

In March 2016, the ECB instructed the Central Bank to open proceedings under Article 18(5) of the SSM Regulations in relation to suspected breaches by KBC Bank Ireland plc of the Code of Practice on Lending to Related Parties 2010 (the “**Code**”), as the Code constituted a transposition of Directive 2013/36/EU i.e. CRD IV. This ultimately led to KBC Bank Ireland plc being fined €1.4 million by the Central Bank for breaches of the Code in October 2016.

Limitation period

The ECB's power to impose fines on supervised entities is subject to a limitation period of five years, which starts running on the day the breach was committed. In the case of on-going or repeated breaches, the limitation period will start running on the day which the breach ceases. This can be contrasted with the Central Bank's Administrative Sanctions Procedure for which there is no statutory limitation period.

The SSM Framework Regulations also set out certain scenarios which will "stop the clock" in terms of calculating the limitation period.

Contact information

If you have any queries about the information contained in this article, please contact Muireann Reedy of our Regulatory Investigations Unit at Muireann.Reedy@dilloneustace.ie or at 01-674 1002.

Dillon Eustace
August 2017

DILLON EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:

© 2017 Dillon Eustace. All rights reserved.