IRISH FINANCIAL SERVICES APPEALS TRIBUNAL

REGISTER NUMBER: 021/2016

IN THE MATTER OF THE CENTRAL BANK ACT 1942

BETWEEN:-

OCTAGON ONLINE SERVICES LIMITED

APPELLANT

AND

CENTRAL BANK OF IRELAND

RESPONDENT

APPEALS TRIBUNAL:

The Hon. John D. Cooke, Chairperson

Geraldine Clarke

Helen Collins

DECISION

Further to the letters of 23 August 2016 and 14 September 2016 on behalf of the Tribunal requesting the observations of the parties on the question as to whether the subject matter of the above appeal was an "appealable decision" for the purpose of section 57A of the Central Bank Act 1942, the observations of the Respondent of 2 September 2016 have been considered by the Tribunal (no observations in reply having been received from the Appellant) the Tribunal has concluded that it has no jurisdiction in the matter for the following reasons:

1. The subject of this appeal is described in the Notice of Appeal as the *"firm's re-categorisation under PRISM from a low impact firm to a medium low impact firm under the MIFID regulations"*.

2. Section 57L of the above Act provides that "*An affected person may appeal to the Appeals Tribunal in accordance with this section against an appealable decision of the Regulatory Authority"*. The term "*appealable decision"* is defined in section 57A

of that Act as meaning "*a decision of the Regulatory Authority that is declared by a provision of this Act, or of a designated enactment or designated statutory instrument, to be an appealable decision for the purposes of this Part;".*

3. According to the information given in the Notice of Appeal and Response, the Appellant firm was originally registered in 2001 as a Business Investment Firm under the 1995 legislation but transferred to a registered Investment Firm under the MIFID Regulations in 2007.

4. Levies to fund the Central Bank's supervisory functions are imposed on registered firms according to a series of 14 categories (with sub-categories) listed in the Schedule to the Central Bank Act 1942 (Section 32D) Regulations 2015. (The "2015 Regulations".)

5. Investment firms come within Category D and the Appellant came under sub-category D2 as authorised for "Receipt and Transmission Orders and/or Provision of Investment Advice".

6. The amounts of levy for each of the sub-category firms are fixed by reference to a scale called the "Probability Risk and Impact System" ("PRISM") which seeks, according to the Respondent, to reflect the degree of regulatory supervision the Bank is called upon to exercise depending on the size of the firm and the risk its failure might pose.

7. The Appellant was originally classed "Low" and its levy was €6078 per annum. Its monthly return in September 2014 disclosed an increase in its retail customer numbers from 800 to 1331 and the Respondent reclassified it to "Medium Low" and fixed a levy of €49,709.

8. The Appellant's case as given in the Notice of Appeal is that the large increase in the levy was unjustified and will make the firm insolvent. It says it has always been a low risk firm and has no client assets under management. It maintains that in 2013/14 its turnover increased by only €35,000 (28%) and while the number of clients increased it was not by a significant number. Since 2007 its levy has always been under €10,000

or 5% of its turnover. The re-categorisation would increase the levy by 700% The Appellant complains that the non-disclosure to them of the weighting factors in the PRISM categorisation is unfair as it precludes it deciding whether or not to limit the number of clients.

9. The above categories are created by the Schedules to the 2015 Regulations and Regulation 6 provides that the Central Bank determines the particular category that is to apply to each registered entity. Regulation 7 provides that the Central Bank may "waive, reduce or remit a levy contribution" if it has a "reasonable opinion" that the amount would be likely to make the firm insolvent.

10. Regulation 13 entitles a firm to appeal to the Central Bank against the amount of a levy within 21 days of the amount being notified to it. The Regulations do not provide that the Bank's decision on such an appeal is itself an "appealable decision" to IFSAT for the purposes of s. 57A of the 1942 Act. Thus, the determinations made by the Bank under the 2015 Regulations both in allocating a Schedule category to a registered entity and fixing the amount of the levy applicable to it, have not been designated "appealable decisions" to come within the jurisdiction of the Tribunal.

11. The Appellant received an invoice for the new amount of €49,709 on 17th October 2015 which it then queried as incorrect. By a letter of 23 February 2016 it asked the Bank to review the re-categorisation on the basis that the firm had always been low risk and that anything more than €10,000 would jeopardise the firm's solvency. This letter was expressly directed at the categorisation question and did not expressly ask for a waiver or reduction.

12. The Bank's response of 25 February 2016, however, treats that letter as "*requesting a waiver of your 2015 Industry Funding levy*." By a letter of 15 March 2016 the Bank refused any waiver or reduction. On 12 April 2016 the Appellant, with a supporting affirmation from its auditors to the effect that enforcing the levy would make the company insolvent, explicitly requested a waiver under Regulation 7. On the basis that this contained "*supplementary details*" the Bank granted the reduction on 6 May 2016. In this letter the Central Bank refers to the letter of 12 April as "*resubmitting*

your request for a waiver" rather than as an appeal under Regulation 13 against either the original levy or the earlier refusal of any waiver.

13. It follows that the subject matter as defined in the Notice of Appeal does not disclose an "appealable decision". Insofar as the amount of the levy has been fixed at the reduced amount under Regulation 7 of the 2015 Regulations, the only available appeal is that under Regulation 13 which lies to the Respondent. Insofar as the Appellant seeks to challenge the Bank's refusal to reconsider the "medium low risk" classification, that refusal decision is not designated as an appealable one either in the 2015 Regulations or in the list of decisions that can be made in respect of registered investment firms in Regulation 191 of the MIFID Regulations.

14. In these circumstances, it is unnecessary to consider the alternative observation made by the Respondent to the effect that the Notice of Appeal was in any event out of time.

Date: 16 December 2016

Signed: The Hon. John D. Cooke, Chairperson

Signed: Treasa Kelly, Registrar