

Central Bank of Ireland's fitness and probity assessment process to be reviewed

Individuals' rights in focus after decision by appeals tribunal



Introduction

The assessment of applications for the appointment of individuals to PCF roles is part of the Central Bank's fitness and probity regime. This was introduced under the Central Bank Reform Act 2010 (the "2010 Act") and is a critically important feature of financial services regulation in this jurisdiction. It allows the Central Bank to carry out its gatekeeper function, determines the make up of a regulated firm's senior management team, and can dictate whether an individual can continue to pursue a career in financial services. Yet despite its critical importance, firms and individuals are often unclear about elements of the assessment process, the extent of their rights and how these can be asserted.



On 31 January 2024, the Irish Financial Services Appeals Tribunal ("IFSAT") upheld an appeal by an individual against a decision by the Central Bank of Ireland (the "Central Bank") to refuse to approve his appointment to two pre-approval control function ("PCF") roles on the grounds it was not satisfied the individual had an appropriately clear and comprehensive understanding of the legal and regulatory environment. In upholding the appeal, IFSAT found the process by which the Central Bank assessed the applications breached constitutional and natural justice requirements.

In its decision¹, which focused on fair procedures, IFSAT found the Central Bank's decision-making process was flawed, that it had denied AB fair procedures at each stage of the process, and the decision was, in law, incorrect. IFSAT found fault with the Central Bank's approach to providing notice of the issues to be raised with AB, the timing of its provision of documents to AB, and the nature, content and complexity of its questioning of AB. IFSAT also found the Central Bank failed to adequately engage with material put forward on behalf of AB, or to provide reasons for its decision.

This decision will be of significant interest to all firms and individuals involved in the financial services industry and in this briefing we consider the key issues it raises as well as the significant potential implications for all stakeholders in the PCF process, and any other regulatory processes (including investigations and enforcement actions) which involve the exercise of a regulatory power that may significantly engage a constitutional right.

¹ IFSAT decision dated 31 January 2024. Appeal No. 029/2022, AB and Central Bank of Ireland



Overview of the Assessment Process

Under the 2010 Act, a firm shall not appoint an individual to perform a PCF role unless the Central Bank has approved in writing the appointment of the individual to perform that function.² Section 23(2) of the 2010 Act provides that for the purposes of considering whether to approve an individual to a PCF role, the Central Bank can require by written notice, documents and information, including answers to questions, as well as the attendance of the individual at an interview with the Central Bank.³

The Central Bank uses the information it obtains under section 23(2) of the 2010 Act to assess whether, in its opinion, the individual is appropriately capable, honest, ethical and of integrity and also financially sound⁴ to perform the function for which the individual is proposed to be appointed.⁵

The process by which the Central Bank carries out this assessment, which was criticised by IFSAT in its decision, is set out in the Central Bank's Guidance on Fitness and Probity Standards.⁶ This includes the submission of detailed information through a document known as an Individual Questionnaire ("IQ"). On occasion the Central Bank will request copies of documents which it believes are relevant to its assessment of the individual's fitness and probity. Some individuals are required to attend an initial interview with the Central Bank, known as an assessment interview and some are subsequently required to attend a second interview, known as a specific interview.

When the Central Bank has considered the information it gathers through the IQ, document requests and any interviews it conducts with the individual, it should typically then either approve the appointment, or issue a letter known as a 'minded to refuse' letter. This will inform the firm and the individual that the Central Bank has reached a preliminary opinion that the individual is not suitable for approval and invite submissions by and on behalf of the individual. The Central Bank's preliminary opinion and any submissions in response are then considered by an official from the Central Bank who has not had a previous involvement in the matter.

² section 23(1) of the Central Bank Reform Act 2010

³ section 23(2) of the Central Bank Reform Act 2010

⁴ section 2.2 of the Fitness and Probity Standards, Central Bank of Ireland, issued under section 50 of the Central Bank Reform Act 2010

⁵ section 23(5)(a) of the Central Bank Reform Act 2010

⁶ Part B of the Guidance on Fitness and Probity Standards, Central Bank of Ireland

AB and The Central Bank of Ireland⁷



Background to applications

In its decision IFSAT stated that in 2014, AB was appointed Chairman and Non-Executive Director of a financial services provider named Quayside Fund Management Limited (“Quayside”), which was appointed a delegate of the Board of Directors of an alternative investment fund known as Ruvercap ICAV (“Ruvercap”). Rivercap invested in bonds that suffered significant impairment in value with considerable losses to investors. In October 2019, the Central Bank decided to investigate what had happened in Rivercap.

AB gave evidence that in 2020 several applications for approval to PCF roles were made on his behalf, which the Central Bank would not engage with. AB contended this was without explanation, which left him in suspense and ultimately led to the withdrawal of those applications because of the uncertainty it caused for promoters trying to launch funds.

In June 2021, the applications for the appointment of AB to the two PCF roles that were the subject of the Central Bank decision AB appealed, were made by an investment fund named Redhedge UCITS ICAV (“Redhedge”), which is authorised by the Central Bank. At that time AB was authorised by the Central Bank to perform PCF roles in a substantial number of funds and was a Non-Executive Director of seventeen regulated entities in the State.



Assessment interview

On 30 August 2021, AB received written notice he was required to attend an assessment interview on 8 September 2021. The notice listed the matters the Central Bank would examine at the interview. It did not refer to Quayside or Ruvercap. However, IFSAT found that AB was asked a series of extremely detailed questions relating to the relationship between Quayside and Ruvercap at the assessment interview which had not been notified to AB and which did not flow naturally from the notified issues. IFSAT determined it was abundantly clear the notification AB received did not cover the type and depth of issue put to AB at the assessment interview. It noted AB’s contention that if he had been provided with prior notice, he would have had the opportunity of presenting other material in response to the detailed questions put to him at that stage. In its decision IFSAT found that some of the questions put to AB at the assessment interview were “unnecessarily granular and sometimes unclear”, and “extraordinary complex, with many sub-clauses.” It noted that a Central Bank official who had been involved in the Central Bank’s investigation into what had happened at Ruvercap, carried out the main questioning at the assessment interview. IFSAT found that AB had not been provided with fair notice or subject to fair questioning at the assessment interview in breach of his right to fair procedures under the Constitution as enunciated by the courts through various decisions.



Specific interview

On 13 September 2021, the Central Bank issued a written notice requiring AB to attend a specific interview on 28 September 2021. The notice set out a description of the issues the Central Bank intended to cover. This included AB’s roles at Quayside. On the afternoon of 27 September 2021, the Central Bank sent AB an email providing access to an electronic folder of documents the Central Bank intended to put to AB the following day. IFSAT noted the email had not been sent to AB’s solicitor.

The specific interview lasted the entire day and was recorded by a stenographer in a 224-page transcript. In its decision, IFSAT found that the invitation to the specific interview was “broad and unspecific in its terms” and that AB “was not given full notice of the issues which were going to be explored”. It found the Central Bank had not provided the folder of documents to AB with insufficient time before the interview to consider the contents and noted AB’s unchallenged contention that he was not given any opportunity to refer to these documents during the interview.

It noted that the same Central Bank official who carried out the main questioning at the assessment interview (and who, as noted above, had been involved in the Central Bank’s investigation into what had happened at Ruvercap) played a major role at the specific interview. IFSAT found that many of the criticisms made of the assessment interview could also be made of the specific interview. It decided that “[T]he flaws from the Assessment interview fed into and were reflected in this interview.”

⁷ The information in this document concerning AB and The Central Bank of Ireland is taken from the ISFAT decision dated 31 January 2024 in Appeal No. 029/2022



Minded to refuse letter

On 3 December 2021, the Central Bank issued a 'minded to refuse' letter informing Redhedge and AB that in its preliminary opinion, AB was not of appropriate fitness to perform either of the two PCF roles. In its decision IFSAT states that "[W]hile the Central Bank had received some documentation in relation to the Appellant's background and experience, it received little attention in the minded to refuse letter." Further submissions were invited on behalf of AB, which would be considered by a separate decision-maker from the Central Bank. IFSAT notes that a substantial quantity of materials was provided by AB's solicitor in response. These included written statements by five individuals endorsing AB's fitness and probity for these PCF roles, as well as a detailed statement from AB.



Decision by the Central Bank

The Central Bank appointed a senior official ("Official Z") to consider the preliminary opinion and the submissions provided in response and determine the matter. Official Z decided that the Central Bank would refuse to approve the appointments sought because AB had not demonstrated a clear and comprehensive understanding of the regulatory and legal environment. In its decision IFSAT states that Official Z "acted on foot of the 'minded to refuse' opinion. She was reliant on the information which emerged from a previously flawed interview process. The procedural flaws identified in the first two stages of the process fed into the impugned decision." IFSAT found Official Z failed to adequately consider the "highly significant material" submitted by and on behalf of AB, including statements from five individuals and a substantial body of material from AB, "which addressed in considerable detail the conclusions reached in the assessment, and particularly in the specific interview." IFSAT determined this to be a failure to observe the principle of hearing the other side, known as audi alteram partem. IFSAT also found Official Z failed to give reasons for the decision. IFSAT referred to a recent decision of the Supreme Court, where it held that what is required "is for decision-makers to engage with an objector's submissions and give reasons on which those submissions were rejected."



IFSAT's decision and Order

IFSAT decided that the decision by the Central Bank to refuse to approve AB to the PCF roles was "flawed as it was based on a flawed preliminary process, because it did not observe the principle of audi alteram partem, and because it did not give reasons, so as to comply with what was required in law."⁵ It considered the extent of its powers and made an Order pursuant to the 2010 Act remitting the matter to the Central Bank for reconsideration with directions as to what aspects of the matter should be reconsidered, including that the reassessment process should be completed within 90 days of the date of its decision. IFSAT also gave a preliminary view on costs, which was that AB should be allowed to recover costs from the Central Bank.

⁵ NECI v. The Labour Court, Minister for Business Enterprise & Innovation, Ireland & Attorney General [2021] IESC 36; [2022] 3 IR 515.

Potential implications of IFSAT decision

While this IFSAT decision is specific to the appeal brought by AB, it is likely to have significant and far-reaching implications for all stakeholders in the PCF process, as well as other regulatory processes (including investigations and enforcement actions) which involve the exercise of a regulatory power that may significantly engage a constitutional right. The most significant of these implications may be that firms and individuals will have a greater focus on understanding the full extent of their rights and will feel emboldened in asserting them. Other potential implications are described below.



Prior notice of issues to be raised

IFSAT was critical of the notice the Central Bank provided to AB setting out the issues it raised at the interviews. It described the provision of this type of notice as “the first step in a highly important regulatory process touching on the Appellant’s right to earn a living” but found it was abundantly clear that the issues actually covered were at variance from those described in the notices sent to AB. IFSAT found the description of the issues contained in these notices were “generic” and “broad and unspecific”. Individuals attending for interview with the Central Bank will want to prepare thoroughly and will no doubt look to this decision as support for a position that issues to be raised at interview must be clearly set out in advance,

with sufficient time for the individual to carry out a detailed review and take advice.

Documents to be put to individuals at interview

Where documents are to be put to an individual at interview, the individual may point to this decision in support of a contention that they have a right to receive copies well in advance of the interview, with sufficient time to carefully consider those documents, as well as other related documents they may feel are relevant and to take advice on the issues arising.

Substance and form of questioning at interviews

IFSAT found the Central Bank’s questioning of AB to be unfair, that some questions were “extraordinarily complex, with many sub-clauses”

and that there was an “intense preoccupation with the Ruvercap/Quayside events”, which it said “should have been made evident and clear in advance”. In its decision IFSAT referred to the clear distinction between a PCF application and an investigation and the Central Bank’s powers and the individual’s rights. Individuals and their advisors will no doubt carefully monitor questioning at interviews in light of this decision and will be in a much stronger position to challenge questioning on issues which they were not notified in advance of, does not flow naturally from the issues that were notified, or is unnecessarily complex. The recent introduction of the Individual Accountability framework and the imminent commencement of the Senior Executive Accountability Regime may further enhance the focus on this issue.

Adequate consideration of information submitted in support of application

IFSAT found the Central Bank failed to give appropriate consideration to statements submitted in support of AB's application. Individuals may now place greater focus on including these types of statements in materials submitted as part of the assessment process. This would reflect a view that the assessment process should not assign a disproportionate weighting to an individual's performance at an interview, and that testimonial-type statements can have a valid and valuable role in demonstrating an individual's fitness and probity.

Reasons for a decision

IFSAT found the Central Bank failed to provide adequate reasoning for its decision. Individuals will of course be hopeful they do not become the subject of a decision by the Central Bank to refuse an application to approve their appointment to a

PCF role, but where this happens, individuals and their advisors may now expect to be provided with substantial reasoning for the decision, and this will no doubt form a critical part of the individual's decision as to whether they exercise their right to challenge the decision before IFSAT.

Individuals performing multiple PCF roles

In submissions made on behalf of AB, his lawyers questioned how it could be that the Central Bank could decide AB was "unfit" to perform these PCF roles with Redhedge, while apparently having no difficulty with AB continuing to perform similar PCF roles with other regulated entities. IFSAT found this to be an unexplained question and it is a difficult issue the Central Bank will need to carefully consider as part of the review of the Fitness and Probity approval process it has decided to commission. The potential implications of this for firms and individuals (where the

same individual performs more than one PCF role or provides PCF roles for more than one firm) could be profound and could significantly increase the consequences at stake when applications are made for PCF approval.

Time taken to carry out assessment

IFSAT referred to "the inordinate time-elapse in this case" and directed the Central Bank to take several actions to ensure its reassessment process is completed within 90 days of IFSAT's decision. It will be interesting to see how this impacts on the future timing of the assessment process.

Recording of assessment interviews

The detail of the issues addressed at AB's assessment interview was a focus of important consideration by IFSAT. It was notable there was no recording of that interview, whether by way of audio or transcript and this could lead to a change in approach.

How KPMG Law LLP can help

Engagements with the Central Bank as part of a PCF assessment process can have profound professional, financial, employment-related and reputational consequences for firms and individuals. Any party preparing to engage with the Central Bank on a PCF application or on any other matter such as an investigation or enforcement action where they could be the subject of the exercise of a regulatory power, should approach those engagements with the necessary understanding of the relevant legal issues, including the operation of the principles of natural justice, and the requisite level of preparation and expert professional support.



Experienced lawyers from KPMG Law LLP's Financial Services Regulation team and its Employment Law team can provide firms and individuals with confidential legal advice on these issues, including assistance with preparations for interviews and representation at those interviews. Clients can also benefit from access to market-leading fitness and probity experts from KPMG Ireland with unique practical experience gained from the implementation and on-going assurance of clients' fitness and probity compliance controls.

Queries? Get in Touch



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