

IFSAT finds Central Bank decision making process “flawed” in appeal of F&P refusal

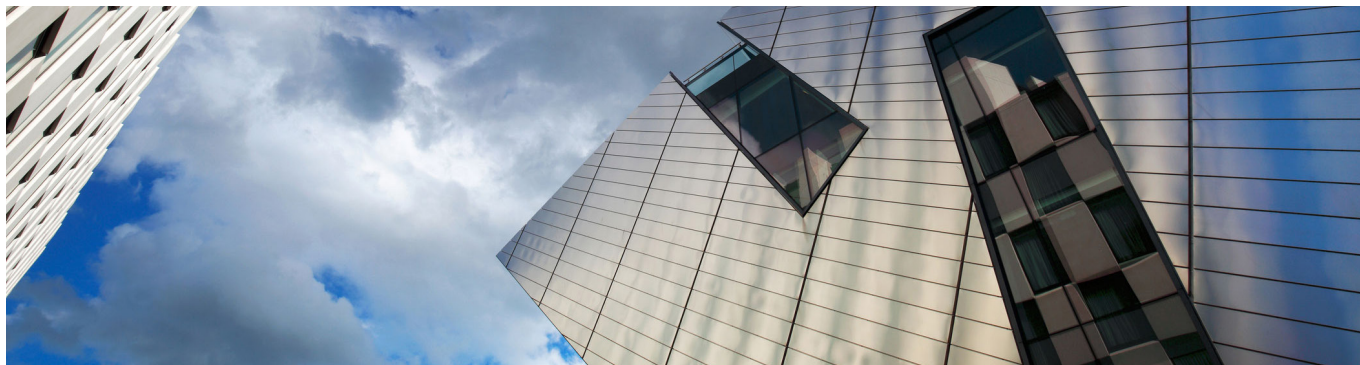
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The Central Bank of Ireland (**‘Central Bank’**) has commissioned an independent review into its Fitness and Probity (**‘F&P’**) approval process. The review was announced by the Central Bank in a public statement following a judgment by the Irish Financial Services Appeals Tribunal (**‘IFSAT’**) in which it held that a decision by the Central Bank was flawed on account of an absence of fair procedures. The decision in question has been remitted back to the Central Bank for re-consideration.

Central Bank Decision

In 2020 and 2021, applications by a financial service provider on behalf of the appellant (**‘Appellant’**) sought approval for appointment to a number of positions designated as pre-approved control functions (**‘PCFs’**) under the F&P regime, including positions of non-executive director and chairman. The Central Bank adopted a three-step procedure whereby it called the Appellant for an *‘assessment interview’*, followed by a *‘specific interview’*. Following both interviews, a *‘minded to refuse’* letter issued, setting out a preliminary view that the Appellant should not be approved for the PCF positions. The decision maker subsequently held that the Central Bank was





entitled to refuse the applications.

As a result, in December 2022, the Central Bank issued a decision refusing the applications, with a finding that the Appellant was unfit to hold the positions pursuant to the Central Bank's F&P regime.

F&P Regime

The F&P regime was introduced by The Central Bank Reform Act 2010 ('2010 Act'). Under section 23(1) of the 2010 Act, a regulated financial service provider shall not appoint a person to perform a PCF unless the Central Bank has approved the appointment. Section 23(5) of the 2010 Act allows the Central Bank to refuse such applications where *inter alia* it is of the opinion that the applicant does not have the appropriate fitness and probity to perform the relevant function.

Background

By way of context, IFSAT detailed in its published decision that

- at the time of the application in question, the Appellant was approved by the Central Bank to act as a non-executive director of 17 regulated entities in Ireland.
- the Central Bank was of the view that due diligence, oversight and monitoring had not been sufficiently robust in another financial service provider with which the Appellant had been a non-executive director and chairman. IFSAT acknowledged that the Central Bank was properly concerned.
- an earlier separate PCF application by the Appellant, which included an interview, did not result in any response from the Central Bank, despite requests. The Appellant had to withdraw other applications because funds were launched without him having received a response from the Central Bank.

Central Bank Procedure

IFSAT's decision largely concerned the procedures adopted by the Central Bank in this application process. The Central Bank had justifiable concerns about the fitness and probity of the Appellant but the question for IFSAT was not whether the concerns were legitimate but whether the Central Bank had adopted appropriate procedures.

Assessment Interview and Specific Interview

The relevant application was submitted in June 2021. An assessment interview was arranged for September 2021. The interview was conducted on a teleconferencing platform. Two weeks later, an invitation was sent for the Appellant to attend the specific interview. The Appellant was entitled to have representation present. The meeting lasted an entire day, with breaks.

Minded to Refuse Letter

On 03 December 2021, a 'minded to refuse' letter issued on the basis *inter alia* that the Appellant had not demonstrated a clear and comprehensive understanding of the legal and regulatory framework nor had he demonstrated the competency and skills appropriate to the roles in question. The Appellant provided written submissions on the "minded to refuse" letter' which was a preliminary opinion.

Decision

The Central Bank's decision issued on 05 December 2022 noting *inter alia* that the Appellant did not demonstrate understanding of specified regulatory provisions and did not meet the requirement of having a clear and comprehensive understanding of the legal and regulatory environment appropriate for the role as required by the F&P Standards (a code issued under the 2010 Act). By way of example, the Central Bank referenced the Appellant's apparent unfamiliarity with 'basic legal pillars' of UCITS Investment Funds, namely 'trash ratio' and the '5/10/40

rule

IFSAT Findings

The oral hearing of the appeal took 4 days, with IFSAT having to consider 1,500 documents. Both sides were legally represented with IFSAT commenting on the adversarial basis of the hearing with no allegation going without rebuttal.

While the Central Bank argued that the processes followed were clearly and transparently described to the Appellant at various stages throughout the application and that it had discharged its statutory functions, IFSAT found that the decision making process was flawed. IFSAT noted that what was in issue was more than the right to a good name but also a binding decision on the right to earn a living. Reputation and standing with the Central Bank truly matter in the market, as does the ability to obtain timely decisions to enable prospective PCF holders take up roles with a fund.

The issues identified by IFSAT with the Central Bank approach included:

- The notification of the assessment interview did not cover the type and depth of issues covered. While the Appellant was informed that he would be examined regarding his knowledge of the regulatory environment, some of the questions were unnecessarily granular, sometimes unclear and extraordinarily complex. The absence of fair notice fell below the standard of constitutional fairness.
- A focus on issues that had arisen in other entities with which the Appellant had a PCF role should have been made clear in advance.
- That one interviewer used a blank screen for the interview conducted by teleconference was described as "*striking*".
- Minutes of the assessment interview were not provided to the Appellant in a timely manner so as to allow for errors to be corrected.
- The Appellant's solicitor was not provided with materials to which reference was intended to be made in the specific interview.
- The decision maker had no prior involvement in the process, but she was reliant on information which emerged from a previously flawed interview process.
- The decision maker followed the 'minded to refuse' letter without properly taking into account submissions by and on behalf of the Appellant. There was a requirement to

properly weigh submissions on behalf of the Appellant in the balance of whether the Appellant did have experience, skill and competence but it was not adequately engaged in by the decision maker.

- There was a failure by the decision maker to give reasons.
- Evidence was given that in 2022 there were as many as 3500 PCF applications, with up to 98% of applications dealt with in 12-15 days. IFSAT noted that unexplained questions remain over the Central Bank's failure to respond to earlier applications by the Appellant, delays in other applications and the fact the Appellant continues to hold other PCF roles.
- The standard which the Appellant was expected to be able to meet was never made clear.

IFSAT noted that a statutory opinion, as allowed for in the 2010 Act, must be based on discernible, objective and fair criteria.

What is next?

IFSAT has made a direction to the Central Bank to reconsider its decision. However, the manner in which it will do so is for the Central Bank to determine. IFSAT directions include that the Central Bank, within 21 days, notify the Appellant of the procedures it will apply in reconsidering the applications and the process should be carried out by a person not directly involved previously. Reassessment should be completed within 90 days.

Conclusion

While acknowledging that the Central Bank has to fulfil different statutory functions of investigator, regulator and decision maker which can be hard to reconcile, IFSAT emphasised that it is essential that quasi-judicial bodies exercising powers be independent, impartial, dispassionate, apply the law and observe fair procedures. The subjects of these decisions, which can affect livelihoods, are entitled to fair procedures, including fair notice, decision making by independent decision makers and a fair hearing.

IFSAT has imposed directions to be complied with by the Central Bank in terms of its reconsideration of this matter and as noted, an independent review has been commissioned into the F&P approval process. As such, the full implications of the IFSAT decision are awaited.

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