

Review of the Central Bank of Ireland’s Fitness and Probity Regime: What do the Findings mean for Regulated Firms?

8 August 2024

The Central Bank of Ireland (the “**CBI**”) recently published a report (the “**Report**”) ([here](#)) outlining the findings of an independent review of the Fitness and Probity (“**F&P**”) regime. Speaking at the publication of the Report, CBI Governor Gabriel Makhlouf confirmed that the CBI will accept all recommendations arising from the review, commenting that reform of the F&P regime will help ensure that it can continue to perform its key role into the future.

In this briefing, we outline the recommendations made in the Report and examine what incoming changes to the F&P regime might mean for regulated firms.

Key Takeaways

- The commitment to consolidating CBI standards in a single location is welcome.
- The report recommends the establishment of a senior panel, which will deal with more complex F&P assessments, or assessments that are moving towards possible refusal.
- The report recommends that the CBI commit to a voluntary 90-day timeframe for F&P applications, in line with international best practice.
- The report suggests that the CBI may increase the number of interviews held in relation to certain sectors. In this respect, the report highlights the funds sector, which is the largest contributor in terms of F&P applications. An increase in the number of interviews may “destigmatise” the fact of being called for interview.

Background

The CBI’s decision to commission an independent review of the F&P regime followed a decision¹ by the Irish Financial Services Appeals Tribunal (“**IFSAT**”), which identified “*fundamental procedural flaws*” regarding the CBI’s handling of specific applications to perform pre-approval controlled function (“**PCF**”) roles. According to IFSAT, the procedures adopted by the CBI at various stages of that approval process failed to comply with requirements of natural and constitutional justice. Those requirements included the necessity for fair notice, the duty to give reasons, and adherence to the principle of *audi alterem partem*.

In response to IFSAT’s decision, the CBI commissioned the independent review, seeking to ensure that the F&P regime remain effective into the future. It sought to utilise the review of the F&P regime as an opportunity to identify areas for improvement, and to address any shortcomings in the current regime.

Findings of the Review

According to the Report, the operation of the F&P regime is broadly comparable to equivalent regimes in peer jurisdictions, across a number of dimensions. The independent review found that:

- CBI standards are comparable with those of similar regimes in peer jurisdictions;
- statistics on outcomes (i.e. approvals/withdrawals of applications/refusals) are in line with other supervisory authorities, and do not signal a particular stringency or leniency of the process; and
- timelines are well-aligned with CBI regulatory service standards, and generally faster than in other jurisdictions.

The Report concludes that, since its introduction in the wake of the financial crisis, the F&P regime has been broadly successful in raising the bar for entry in respect of key positions in the financial services industry, to the benefit of consumers and the stability of the financial system. Industry has “*widely acknowledged*” this point; no respondent to the CBI's consultation that preceded the independent review argued for a need to revise the core regulatory framework.

As part of that consultation, however, respondents highlighted areas in which the F&P process does not always meet requisite standards of fairness and transparency. The Report offers a series of recommendations as to targeted improvements that would enhance the overall consistency of the approvals process. The recommendations focus on enhancing: (i) clarity of supervisory expectations; (ii) CBI internal governance procedures; and (iii) the fairness, efficiency and transparency of the process.

Notably, the Report stresses that the F&P process cannot be reduced to a tick-the-box exercise. An efficient process calls for supervisory judgement on the ability of individuals to exercise functions within firms in a professional and ethical manner. Moreover, whilst a probity assessment tends to be a black or white decision (i.e. either an individual gives sufficient guarantees of ethically driven behaviour, or they do not), a fitness assessment is not an absolute judgement. It is time contingent, specific to the position, and specific to the firm. Therefore, a refusal should not be perceived as a “ban” from the industry; rather, refusals are based on firm-specific and position-specific assessments.

Nevertheless, a negative decision carries significant consequences for individuals and firms. Accordingly, CBI powers have to be exercised with care. The IFSAT decision highlights a number of improvements that can be made to ensure appropriate standards of fairness, efficiency and transparency are consistently achieved. To this end, the Report makes a number of recommendations aimed at ensuring the continued efficacy of the F&P regime.

Recommendations

Key recommendations detailed in the Report are outlined below. As mentioned, CBI Governor Makhoul has accepted all recommendations arising from the review. The CBI will implement the recommendations over the coming months, with the aim of implementing all recommendations by the end of 2024.

Recommendation 1: Fostering Industry Role in Gatekeeping

Enhanced Guidance

The Report states that the CBI should provide greater clarity and guidance to industry on the key role of regulated entities in the gatekeeper phase. Guidance should clearly outline supervisory expectations in relation to the process of submitting applications for PCF approval. Such guidance should relate to: (i) screening and due diligence; (ii) background checks; (iii) record-keeping; and (iv) mechanisms for monitoring individuals' ongoing fitness and probity.

Recommendation 2: Clear F&P Standards

Accessibility

The independent review found that CBI standards are not misaligned with those of peer regulators; however, they are fragmented and not always user-friendly. Accordingly, the Report

recommends that the CBI consolidate its standards in a single location (complemented by an array of communication tools such as speeches, Q&As and workshops). This step would promote ease of access and comprehension, encouraging a more efficient F&P process.

Enhanced Standards

The Report states that in some areas the standards could be enhanced by adopting best practices from other jurisdictions.

Recommendations include:

- **Incorporation of objective measures** (i.e. specific qualifications, certifications or experience requirements) to reduce subjectivity in the process.
- **Expectations in relation to multiple mandates:** According to the Report, the CBI should also outline clear expectations in terms of the number of mandates that an individual can hold. Those would not operate to preclude the possibility of holding a mandate above expressed expectations. In such instances, a more detailed level of information, assessment and consideration would be expected of the proposing regulated entity, and the application would receive a heightened level of scrutiny.
- **Enhanced guidance** on the role of an **executive, non-executive** and on the specific expectations for **independent directors**.
- Specific provisions on identifying, managing and mitigating **conflicts of interest**.
- Clarification on the assessment of **collective suitability and diversity** within boards and management teams.
- Clarification on the approach to considering **past events**.

Ongoing Review

The Report recommends that the CBI establish a process for regularly reviewing and updating F&P standards to ensure that they remain relevant and reflective of industry developments and emerging risks, and that the CBI engage with stakeholders in respect of all such reviews.

Holistic Consideration of Complementary Powers

The Report states that the CBI should consider its regulatory powers in a holistic manner, including corporate governance powers, the F&P regime, and the Individual Accountability Framework.

Recommendation 3: Governance

The Report notes that the F&P process is fragmented across different units at the CBI. There is a degree of organisational overlap between the F&P and the enforcements functions, which has generated some confusion amongst firms and candidates.

According to the Report, it is essential that a clear dividing line be maintained between enforcement actions and the F&P process. Enforcement actions aim to ascertain breaches of rules, or improper conduct in past cases. They are by nature investigative and adversarial, and may conclude with penalties or sanctions. F&P gatekeeping is, on the other hand, a forward-looking assessment that considers past events with a view to evaluating a candidate's fitness and probity in respect of a particular role.

To uphold the principle of independence of decision-making, the Report recommends:

Establishment of F&P Gatekeeping Unit

A single gatekeeping unit would have responsibility for the entire gatekeeping process, and would be organisationally segregated from the enforcement function at the CBI, ensuring a clear dividing line between the two functions.

According to the Report, having a single unit following approvals from start to finish would help ensure consistency across decisions, and discipline in keeping timeframes within clear boundaries.

Escalations to Senior Panel

The Report recommends that, as the assessment moves towards a possible refusal, the management of the process be escalated to higher levels of seniority. To ensure sufficient seniority, as well as efficiency and independence in decision-making, the Report recommends that a senior panel be established. The members of the panel would not have been directly involved in the management of the process to that point, ensuring an independence of perspective.

Enhanced Implementation of Risk-Based Approach

The Report recommends enhanced implementation of the risk-based approach regarding F&P gatekeeping, with a reconsideration of the overall number of PCF roles, and a possible adjustment of approach in relation to different sectors.

For example, in relation to the funds sector (which is the largest contributor in terms of F&P applications), the Report notes it could be appropriate to increase the number of interviews held in the sector. This assessment is based on the increased size and systemic footprint of the funds sector, and the practice of holding multiple directorships, which the Report states is common in the sector.

The Report also notes that, by considering the number of PCF roles, the F&P regime could better differentiate the expectations and responsibilities in relation to various roles.

Recommendation 4: Decision-making

“Minded to Refuse” Letter

Where the F&P process progresses and concerns persist, the Report recommends that the CBI issue a “Minded to Refuse” letter to the proposing entity. The letter would include a draft decision, and outline supervisory concerns. The entity would then be afforded a reasonable time (e.g. 10 working days) to provide submissions.

Establishment of a Significant Decisions Committee

The Report recommends establishment of a Significant Decisions Committee within the CBI. The Committee would be responsible for significant decision-making (i.e. when an assessment is potentially leading to a refusal decision). The Committee would also be able to appoint a single decision maker, not below the grade of Director, to decide a given case.

Recommendation 5: Communication and IT Platform

Information Sessions

The Report recommends that the CBI organise an annual information session for firms and prospective candidates to improve their understanding of the F&P process.

Online Portal

The Report recommends that ad hoc workshops be organised to obtain feedback from firms on the functioning of the CBI’s online portal for applications.

Recommendation 6: Interview Stage

In relation to procedural aspects of the interview stage, the Report makes the following recommendations:

- **Notification:** A minimum of five working days' notice should be given to interviewees. Notifications should identify CBI staff attending the interview (this number should be limited to three). A draft agenda should be provided to candidates in advance of the interview, outlining topics on which the interview will focus.
- **Duration:** The CBI should commit to keeping interviews within a certain time limit (e.g. 90 minutes, as is good practice at other authorities).
- **Setting:** The setting for interviews should remain conversational, rather than adversarial.
- **Attendees:** Interviewees may be accompanied by a note keeper or a lawyer. Candidates should be informed of this option in advance of the interview.
- **Minutes:** The minutes of the interview should be shared with the individual within one week of the interview, allowing a further week to provide comments.
- **Feedback:** The CBI should provide feedback in all cases where an interview has been conducted, both to the individual and to the regulated entity.

Recommendation 7: Efficiency of Interview Process

The CBI should aim to conduct a single comprehensive interview. This approach reduces the potential for unnecessary duplication.

The primary purpose of an F&P gatekeeping interview is to assess an individual's fitness and probity. The Report recommends that "meet and greet" type interviews should not form part of the F&P gatekeeping process.

Recommendation 8: Withdrawals / Feedback

Feedback should be provided by the CBI even in instances of withdrawal.

The CBI should not engage in off-the-record discussions with regulated entities regarding specific F&P applications. This aims to maintain the integrity and impartiality of the process, and ensure that all relevant information is documented and available for review.

Recommendation 9: Management of Information

Clear and Comprehensive Service Standards

According to the Report, the CBI's Regulatory Service Standards should be clear, comprehensive, and cover all relevant aspects of the F&P process. All F&P gatekeeping applications should be captured and subject to the same overarching timeframe for completion; there should be no exclusions from the Service Standards.

Time limits

The Report recommends that the CBI commit to a set (albeit voluntary) timeframe within which it will have processed to conclusion all F&P applications. Based on comparison with peer regulators, the Report recommends a 90-day timeframe (with limited opportunities to stop the clock).

Reporting

The Report recommends publication, on at least an annual basis, of the outcomes of the F&P process, with granular information on outcomes. The report would cover all applications for F&P assessment. It would provide information by reference to all regulated entity types, by individual regulated type, by sector, and provide average times for applications received during that year. In addition, the report would provide quantitative information on outcomes, including: (i) applications received; (ii) interviews conducted; (iii) approvals and refusals information; (iv) withdrawals from the F&P process prior to a decision by the CBI; (v) incomplete applications received; (vi) timeframes; and (vii) approvals with recommendations.

Recommendation 10: Quality Assurance

The Report recommends that robust quality assurance mechanisms be put in place. The output from this process would be conveyed on at least an annual basis to a senior committee. This

work should be conducted by CBI staff, with the oversight of an externally appointed risk advisor.

Recommendation 11: Complaints Procedure

The Report recommends establishing a complaints process specifically for F&P gatekeeping. This procedure would be led by an externally appointed risk advisor.

According to the Report, there should be channels for candidates to challenge assessments of the CBI. A full appeals process would not be available in the absence of a decision; however, the Report states that the CBI should make available a formal complaints channel, with sufficient safeguards of independent assessment. The outcome of this process would not change the fact of a withdrawal by the firm, though it would provide an explanation to the complainant, as appropriate, or potentially recommend process changes to be applied in future cases.

Recommendation 12: Training

According to the Report, interviewers should go undergo comprehensive training, to ensure a non-adversarial process. The Report recommends that the CBI develop a training programme for the F&P gatekeeping process that includes training on the nature of the gatekeeping role and its significance, the process to be adopted including any risk framework overlay, conduct during interviews, and the provision of feedback.

Comment and Next Steps

Governor Makhlouf says that the CBI accepts all recommendations arising from the independent review of the F&P regime, and that it is *“immediately looking to [its] implementation approach”*. The CBI will implement the recommendations over the coming months, aiming for full implementation by the end of the year.

It remains to be seen how exactly some of the recommendations will be implemented, in what will be a significant overhaul of the F&P regime. Many of the proposals, in particular enhancements to the F&P standards, safeguards in relation to interviews, and the establishment of a dedicated gatekeeping unit and a senior panel, appear to be positive steps towards addressing some of the concerns raised by IFSAT earlier in the year. Stakeholders will follow the implementation process with interest, in the hope that, once in place, the reforms will help deliver a fairer, more transparent, and streamlined approvals process.

Also contributed to by David O’Keeffe [loiart](#)

-
1. AB v Central Bank of Ireland (Decision available [here](#)).

This document has been prepared by McCann FitzGerald LLP for general guidance only and should not be regarded as a substitute for professional advice. Such advice should always be taken before acting on any of the matters discussed.