

WILLIAM FRY

Recommendations to reform the fitness and probity approval process

22 July 2024

The Governor of the Central Bank has endorsed all twelve recommendations in the report of an independent review of the fitness and probity (F&P) assessment process.

Following a finding by the Irish Financial Services Appeals Tribunal (**IFSAT**) that the Central Bank of Ireland (**Central Bank**) breached constitutional and natural justice in a F&P assessment process, the Governor of the Central Bank commissioned an independent review of the F&P approval process. The findings of the independent review include twelve key recommendations which will be of interest to both firms and applicants for F&P approval.

IFSAT Decision

On 14 February 2024, IFSAT found on appeal that a Central Bank F&P approval assessment process breached constitutional and natural justice requirements under administrative law.

The appeal concerned a decision by the Central Bank to refuse an application for two senior roles (pre-approval controlled functions (**PCFs**)). The applicant had already been approved by the Central Bank to act as a Non-Executive Director or Chair of seventeen regulated financial service provider firms in Ireland.

The tribunal concluded that key elements of constitutional and natural justice were missing from the F&P assessment, including fair notice, the duty to give reasons and the duty to hear the other side.

Specifically, it was noted that:

- The applicant was questioned off camera on issues beyond the scope of the agenda.
- Questions were lengthy and complex.
- Briefing information was sent the day before the interview.
- The Minded to Refuse letter did not properly consider the applicant's experience and qualifications.
- The final decision maker didn't hear the other side or consider the rebuttal evidence.

IFSAT emphasised that it concerned the applicant's right to earn a livelihood and their reputation in the funds industry.

Please find further analysis of the IFSAT decision [here](#).

Independent Review

Following the IFSAT finding, the Governor of the Central Bank of Ireland (**the Governor**) commissioned an independent review of the Central Bank's F&P approval process. The review was conducted by Andrea Enria, the former Chair of ECB Supervisory Board.

On 11 July 2024, the Central Bank published Mr. Enria's F&P review report (the **Report**). While the Report concluded that the F&P process in Ireland is broadly aligned with other jurisdictions, it was found that the requisite standards of fairness and transparency are not always met.

The Report makes the following twelve recommendations.

Fostering industry role in gatekeeping

The Central Bank should provide guidance and clarity on the gatekeeping role of regulated entities including the Central Bank's proportionate expectations of regulated entities regarding the role they undertake prior to submitting an application for PCF approval in relation to due diligence/screening, background checks, record keeping and the ongoing monitoring of the F&P of individuals.

Clear fitness and probity standards

To provide greater clarity of the F&P standards, the Central Bank should:

- Consolidate F&P standards, guidance and requirements in a single location to promote greater accessibility.
- Incorporate objective measurements (e.g. specific qualifications, certifications or experience to reduce subjectivity of the F&P assessment; expectations regarding the number of mandates that an individual can hold).
- Develop specific guidance on the role of an executive, non-executive and independent non-executive director.
- Add provisions on identifying, managing and mitigating conflicts of interest.
- Clarify how collective suitability and diversity within boards will be assessed.
- Clarify expectations regarding consideration of past events.
- Establish a mechanism for regular review of the F&P standards.
- Review materials relating to F&P, corporate governance and the individual accountability framework to ensure they operate in an integrated manner.

Governance

A gatekeeping unit should be established within the Central Bank with responsibility for the entire gatekeeping process. The Central Bank should reconsider the overall number of PCF roles and increase the number of interviews held in the funds sector given its increased systemic footprint in Ireland.

Decision-making

Where legal advice is required on any PCF gatekeeper application, this advice should be obtained by the in-house legal division of the Central Bank.

In the event that significant F&P concerns persist in relation to a candidate, a Minded to Refuse Letter should be issued by the F&P team. It should include a draft decision, provide a clear outline of the circumstances, concerns and guidance and address all relevant issues raised to date including written responses to any arguments raised by the applicant.

A significant decisions committee should be established within the Central Bank to deal with applications that could potentially be refused. The significant decisions committee should be chaired by a senior official not routinely involved in the assessment to ensure independence.

Communication and IT platform

Annual information sessions and workshops should be held to assist firms and potential candidates in their understanding of the F&P process.

Ad hoc workshops should be organized to obtain feedback from firms on the functioning of the online portal for applications and other possible improvements of the practical aspects of the application process including the Individual Questionnaire.

Interview Stage

The Report recommends:

- A minimum of five working days' notice should be provided for an F&P interview.
- Notices should include the Central Bank staff members attending (which should be limited to three staff members) and their roles.
- Interviews should be kept to a time limit (e.g. ninety minutes as it is good practice in other jurisdictions).
- The format should be conversational and not adversarial.
- Minutes of the interview should be shared with the individual within one week, allowing one week for providing comments.
- The individual may decide to bring a note keeper or lawyer as observers.
- Feedback should be provided in all cases where an interview is conducted (whether an assessment interview or a specific interview) and such feedback should be provided to both the firm and the individual.

Efficiency of the interview process

The Central Bank should aim to conduct a single comprehensive interview to avoid unnecessary duplication, such as conducting an initial assessment interview followed by a specific interview, particularly when a specific issue is known in advance. "*Meet and greet*" interviews are to be avoided.

Withdrawals/feedback

Feedback should also be provided where an application is withdrawn.

Off-the-record discussions between the Central Bank and regulated entities relating to specific F&P applications received by the Central Bank should not occur to maintain integrity and impartiality of the process.

Management information

In relation to management information:

- Service standards should be clear and comprehensive and there should be no exclusions from the service standards.
- Although voluntary, the Central Bank should commit to a timeframe within which it will have processed to conclusion all F&P applications. Based on a comparison of other peer regulators, ninety days is recommended with limited opportunities to stop the clock.
- Standardised information should be published annually with data on all F&P applications received (without exclusions) including on the number of applications, interviews, approvals, refusals, withdrawals, incomplete applications received, timeframes (i.e. the date from which the application is received until it is closed by way of decision or withdrawal) and approvals with recommendations (i.e. to address knowledge gaps or other issues that emerged in the assessment). The report should be by reference to all regulated entity types, individual regulated entity types and sectors and should include average times for applications received during that year.

Quality Assurance

A robust quality assurance mechanism should be established. The Report suggests that it would be conducted by Central Bank staff but with oversight from an externally appointed risk advisor.

Complaints procedure

A complaints process should be established specifically for the F&P gatekeeping process. This procedure should be led by an externally appointed risk advisor.

Training

A comprehensive training programme for the F&P gatekeeping process (including but not limited to conduct of interviews and provision of feedback) should be developed.

Conclusion

With the endorsement of the twelve recommendations by the Governor of the Central Bank at the launch of the Report, the F&P approval process is likely to experience a material overhaul. Currently, a complex overlapping regulatory regime exists for applicants between F&P, conduct standards and the individual accountability framework/senior executive accountability regime. The review and the anticipated reforms will hopefully bring greater clarity for firms and individuals in the regulated financial services sector.

Firms and applicants will welcome a reformed F&P approval process which embeds fairer and more transparent procedures and processes. William Fry's Financial Regulation team supports firms and applicants for PCF roles as they navigate the F&P approval process.

Contributed by Sean Quinn and Luke McDonough