

# Accountancy Ireland

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## Meeting the challenge of change

Shauna Greely,  
the Institute's  
new president,  
on her plans for  
the year ahead



# Under the spotlight of the Central Bank

Muireann Reedy examines the potential implications of the Central Bank's powers for those involved in the management of regulated entities.

**R**egulated entities and those involved in their management need to be aware of the potential consequences of not running a tight ship. Professional advisors to regulated firms, or even to entities related to such undertakings, should also be aware that the Central Bank can also come knocking at their door, using its compulsory information-gathering powers.

## The Administrative Sanctions Procedure

The Central Bank's enforcement regime, the Administrative Sanctions Procedure (ASP), was introduced in 2004 by amendment to the Central Bank Act 1942. It has evolved since then, most significantly since the introduction of the Central Bank (Supervision and Enforcement) Act 2013, which gave the Central Bank wide-ranging compulsory powers. These powers are frequently used in ASP investigations.

Under the ASP, the Central Bank can sanction regulated entities and individuals who are or were involved in the management of these entities where a regulatory breach, described as a "prescribed contravention", has been or is being committed. The definition of a "prescribed contravention" includes contraventions of over 100 pieces of legislation and any code or direction or condition imposed under them. A person who is or was involved in the management of the regulated firm can only be sanctioned where it is shown that they are "participating" or have "participated" in the breach.

The Central Bank can impose

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sanctions either following a settlement agreement with the relevant entity or individual or at the conclusion of an investigation under the ASP, or after a negative finding is made at inquiry (a formal mechanism used where an inquiry member or members decide if a "prescribed contravention" has occurred). While a settlement can be agreed on any terms, the Central Bank tends to use the sanctions available at inquiry as a benchmark. These include fines of up to €10 million or 10% of turnover (whichever is greater) on a regulated entity and fines of up to €1 million on an individual. An individual can also be disqualified from being involved in the management of a regulated entity for a certain period.

Firms need to understand that to date, apart from any financial penalty or fine, the Central Bank has only been willing to conclude a settlement agreement where the firm admits the contravention and agrees to the content of the Central Bank's publicity statement on the case.

Both admission and publicity can have far-reaching implications for a firm, both domestically and further afield.

Since 2006, the Central Bank has entered into over 100 settlements with firms and individuals, and imposed fines of over €56.5 million. Fines have generally been increasing – 2016 saw the biggest annual figure to date of €12.05 million. The largest fine on an individual to date is the €200,000 fine imposed on Seán Quinn Senior in 2008 in relation to an ASP concerning Quinn Insurance Limited (now under administration). A total of 11 individuals have also been disqualified from being involved in the management of regulated entities for periods of between one and 10 years.

Dealing with the enforcement process can be a significant emotional and financial burden for executives. In terms of the financial burden, checks should be made of directors' and officers' insurance cover to see what it provides for in terms of defence costs and fines under a regulatory enforcement regime. Executives also face other knock-on effects, particularly if they are seeking a position in another regulated firm in the future given disclosure obligations in the individual questionnaire.

## Fitness and Probity Regime

The Central Bank Reform Act 2010 introduced the Fitness and Probity Regime. It is applicable to those performing certain senior roles in regulated entities described as controlled functions (CFs) and pre-approval controlled functions (PCFs). Under this regime, regulated entities must seek the

prior written approval of the Central Bank before appointing individuals to perform a PCF (these are a subset of the individuals who perform CFs) and in all cases, must carry out their own due diligence.

The Central Bank has prescribed 11 functions as CFs and 46 functions as PCFs. Some of the listed PCFs include head of finance, head of internal audit, head of treasury and head of accounting valuations.

As part of its gatekeeper role in approving the appointment of individuals to perform PCFs, executives should be aware that the Central Bank may decide to call them in for interview to assist in its decision as to whether they have the requisite fitness and probity. The Central Bank has stated that it will routinely interview applicants for the roles of chairman, CEO, finance director or chief risk officer at any high impact firm as well as applicants for the role of chairman and CEO at any medium-high impact firm. The Central Bank can decide to interview any individual for a PCF role at its discretion, however.

Where the Central Bank is minded to refuse the appointment of an individual to perform a PCF, it will usually conduct a “specific interview” with the person. According to the Central Bank, these are very detailed and enforcement-led interviews. In November 2016, the Director of Enforcement at the Central Bank advised that approximately 31 specific interviews to challenge candidates had been conducted with 18 candidates withdrawing before the fitness and probity process reached conclusion. This likely reflects the reluctance of individuals to have a formal negative decision recorded against their name by a national regulator.

The Central Bank may also – at any time – investigate the fitness and probity of individuals who are performing CFs, or who it believes are about to be appointed to perform a CF, to determine if they are of appropriate fitness and probity. This can, in a worst case scenario, end with the Central Bank deciding that the individual is not of appropriate fitness and probity, in which case it may issue a prohibition notice prohibiting the individual from performing the relevant CF, part of a CF or any CF for

either a defined period or indefinitely, or alternatively from carrying out all or part of the CF without adhering to certain conditions.

To date the Central Bank has published details of two prohibition notices, one concerning an individual who was prohibited from performing certain PCFs for a two-year period and another where an individual was prohibited from performing any CF indefinitely. The Central Bank has also advised that a suspension notice has been issued, which prohibits an individual from performing a CF pending the outcome of an investigation, in respect of a former manager at a credit union concerning the alleged misappropriation of funds. This investigation is ongoing.

### Compulsory information-gathering powers

Part 3 of the Central Bank (Supervision and Enforcement) Act 2013 (the 2013 Act) gives the Central Bank extensive information-gathering powers, which can be used on an extremely broad range of entities and individuals including regulated entities, related undertakings of regulated entities and a person who is or was an officer, employee or agent of such entities.

Accountants, auditors and financial or other advisors to regulated firms or related undertakings of regulated firms (whether they are presently in that position or whether they previously advised them) are explicitly brought into the net of individuals in respect of whom the Central Bank can use its compulsory powers. The only pre-requisite for the use of these powers by the Central Bank is that it is “necessary to do so for the purpose of the performance of the Bank’s functions under financial services legislation relating to the proper and effective regulation of financial service providers”.

Although the Central Bank’s compulsory information-gathering powers can be used in a variety of circumstances, they are frequently exercised in the conduct of investigations under the ASP. Individuals may be surprised to receive a notice from the Central Bank requiring them to provide it with certain information or

to attend the Central Bank for interview in their position as a former advisor to a regulated undertaking, or indeed where they are asked in their position as an employee of a regulated entity or a related undertaking of a regulated entity to provide information to the Central Bank. The Central Bank can use its compulsory powers to:

- Inspect premises and take copies of records found at the premises;
- Require individuals to answer questions and provide a declaration of truth in relation to the answers to those questions;
- Compel individuals/entities to provide it with certain information; and
- Operate computers found at a premises, among other matters.

It is a criminal offence not to comply with a requirement imposed under Part 3 “without reasonable excuse”. The 2013 Act does not specify what might constitute a “reasonable excuse” for non-compliance with Part 3 but – given that the 2013 Act makes provision for the Central Bank to apply to the High Court for a determination as to whether documents contain privileged legal material – where access to information is refused, it would appear that non-disclosure on those grounds would amount to a reasonable excuse for non-compliance.

### What to do?

Individuals should ensure that they are aware of the scope of the Central Bank’s powers, and any limitations to them, when providing information or evidence to the Central Bank. For example, can they refuse to give access to particular documents on the basis that they contain privileged legal material? Or can they refuse to answer a question on the basis that it might incriminate them?

There are nuances in the breadth of these powers, depending on the legislation in question. Given the implications, legal advice should really be considered.



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