Fitness and Probity
under the
Central Bank Reform Act, 2010,
for
Regulated Financial Service Providers

Patrick Leonard SC

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1. Unlike the healthcare, legal, and accountancy professions, there was traditionally no formal system to regulate those persons who occupy senior roles in the financial services industry. Whether as a part of the greater regulation now present in society, or as a response to the financial crisis, it became clear that such a system was necessary. The Central Bank Reform Act, 2010, provided a substantial response to this *lacuna* in the regulation of the financial services industry. Regulation of this key part of a modern economy is achieved through the requirement that regulated financial services providers ensure that persons performing certain roles meet the required standards of fitness and probity.

2. The central requirement in the Act of 2010 is identified in section 21(1) of the Act of 2010 which provides that:

> *"A regulated financial service provider shall not permit a person to perform a controlled function unless –*
>
> *(a) the regulated financial service provide is satisfied on reasonable grounds that the person complies with any standard of fitness and probity in a code issued under section 50, and*
>
> *(b) the person has agreed to abide by any such standards."*

3. The fitness and probity standards referred to in the Act of 2010 were first issued by the Central Bank of Ireland in 2011, and fully came into effect from the 1 December 2012.[1] This paper seeks to review some aspects of

[1] By clause 1.4, the standards applied to pre-approval controlled functions from the 1 December, 2011, and to persons to be appointed to controlled functions, other than pre-approval controlled functions, after 1 March 2012.

the legislative scheme underpinning the fitness and probity regime, and then discusses some issues that may arise in the implementation of the regime. It looks at the following topics:

(i) the designation of certain roles as controlled functions, and

(ii) the designation of certain roles as pre-approval controlled functions, and how approval is obtained,

(iii) the Fitness and Probity standards, and

(iv) the practical enforcement of the scheme by means of pre-approval and investigations into fitness and probity by the Head of Financial Regulation.

4. The paper concludes with some general comments as to the nature of the investigation scheme, and the interaction between this scheme and the administrative sanctions procedures. The paper does not look in detail at the requirement for certain roles to be approved by the European Central Bank, or the application of the code to credit unions, and certain insurers and re-insurers.

Controlled Functions

5. As identified above, a regulated financial service provider is not permitted to allow a person perform a controlled function unless satisfied that that person complies with the relevant standards of fitness and probity. Controlled functions are defined in section 20 of the Act of 2010 which provides that:

> *"20.— (1) The Bank may make regulations prescribing functions that are to be controlled functions.*

(2) The Bank may prescribe a function under subsection (1) if and only if the function is a function in relation to the provision of a financial service and—

(a) is likely to enable the person responsible for its performance to exercise a significant influence on the conduct of the affairs of a regulated financial service provider,

(b) is related to ensuring, controlling or monitoring compliance by a regulated financial service provider with its relevant obligations, or

(c) is likely to involve the person responsible for its performance in the provision of a financial service by a regulated financial service provider in one or more of the following ways:

(i) the giving of advice or assistance to a customer of the regulated financial service provider in the course of providing, or in relation to the provision of, the financial service;

(ii) dealing in or having control over property of a customer of the regulated financial service provider to whom a financial service is provided or to be provided, whether that property is held in the name of the customer or some other person;

(iii) dealing in or with property on behalf of the regulated financial service provider, or providing instructions or directions in relation to such dealing."

6. The Central Bank has implemented regulations prescribing functions to be controlled functions.[2] The positions that are controlled functions are described by the Central Bank as ones which involve, and/or require:

> *"CF1 Ability to exercise a significant influence on the conduct of the affairs of a regulated financial service provider,*
>
> *CF2 Ensuring, controlling or monitoring compliance by a regulated financial service provider with its relevant obligations,*
>
> *CF3 Giving of advice to a customer of the regulated financial service provider,*
>
> *CF4 Arranging a financial service for a customer of the regulated financial service provider,*
>
> *CF5 Assisting a customer in the making of a claim under a contract of insurance or reinsurance,*
>
> *CF6 Determining the outcome of a claim arising under a contract of insurance or reinsurance,*
>
> *CF7 Management or supervision of those persons undertaking CF3 to CF6 roles,*
>
> *CF8 Adjudicating on any complaint communicated to a regulated financial service provider by a customer,*
>
> *CF9 Insurance and reinsurance intermediaries who direct and manage the undertaking or are directly involved in insurance or reinsurance mediation,*
>
> *CF10 dealing in or having control over property of a customer of the regulated financial service provider,*

[2] By Statutory Instruments 437 and 615 of 2011, 171 of 2013, 394 of 2014 and 97 of 2015.

CF11 dealing in or with property on behalf of the regulated financial service provider."

7. In order for any regulated entity to properly comply with its obligations as regards the persons who carry out controlled functions, it will be clear that detailed review of the roles performed by staff in the entity is required, together with an enhanced recruitment process for such persons.

Pre-Approval Controlled Functions

8. Certain controlled functions are regarded as being of sufficient importance that a person may not be appointed to perform such a function unless the Central Bank has approved this appointment in advance. This is the effect of section 23(1) of the Act of 2010, which provides, *inter alia,* that:

> *"A regulated financial service provider shall not appoint a person to perform a pre-approval controlled function unless the Bank has approved in writing the appointment of the person to perform the function."*

9. Pre-approval controlled functions are defined by section 22 of the Act of 2010 which provides, *inter alia*, that:

> *"(1) A function is a pre-approval controlled function if—*
>
> *(a) it is prescribed as such in regulations made pursuant to subsection (2), or*
>
> *(b) it has been declared by the Bank to be a pre-approval controlled function by written notice pursuant to subsection (8)."*

10. As set out above, regulations have been made dealing with these issues[3]. The Central Bank has designated 47 separate roles as being pre-approval

[3] See also Statutory Instruments 437 and 615 of 2011, 171 of 2013, 394 of 2014 and 97 of 2015.

controlled functions. The full list is appended to this paper, and includes positions such as PCF – 1 Executive Director, PCF – 2 Non – Executive Director, and PCF – 8 Chief Executive[4].

11. In the Central Bank's Guidance on Fitness and Probity Standards, useful guidance is given as to the approval process for PCF's, and, in particular, the due diligence that the Central Bank expects a regulated financial service provider to employ in assessing a person's fitness and their probity to perform a controlled function. In an appropriate case, the Central Bank will conduct an interview with the proposed holder of a PCF before deciding on whether or not to approve an application to it[5]. A refusal to grant approval is an appealable decision to the Irish Financial Services Appeals Tribunal.

Fitness and Probity Standards

12. As identified above, fitness and probity standards were issued under section 50[6] of the Central Bank Reform Act, 2010, in 2011. Section 50 provides, simply, that:

> *"The Bank may issue a code setting out standards of fitness and probity for the purposes of this Part."*

13. The central provisions of the standards are at sections 2 to 4.

14. Section 2 provides, *inter alia*, that:

> *"2.1 A person to whom this code applies shall comply with these standards at all times.*
>
> *2.2 In order to comply with section 2.1, a person is required to be:*
>
> *(a) competent and capable;*

[4] Certain certified persons within the meaning of s.55 of the Investment Intermediaries Act 1995 are exempt from the pre-approval provisions. This appears to relate to accountants and solicitors.
[5] See paragraph 8.6 and elsewhere in the Guidance document.
[6] The Central Bank have also issued Part 1 of the Minimum Competency Code under s.50 of the Act of 2010.

(b) honest, ethical and act with integrity; and

(c) financially sound.

2.3 Any information provided by an individual pursuant to this code to the Central Bank... shall be candid and truthful and shall be full, fair and accurate in all respects and not misleading to the best of his or her knowledge..."

15. By section 3, it is provided, *inter alia*, that:

"3.1 A person shall have the qualifications, experience, competence and capacity appropriate to the relevant function.

3.2 Without limiting the generality of paragraph 3.1, the person must be able to demonstrate that he or she:

(a) has professional or other qualifications and capability appropriate to the relevant function;

(b) has obtained the competence and skills appropriate to the relevant function, whether through training or experience gained in an employment context,

(c) has shown the competence and proficiency to undertake the relevant function through the performance of previous functions which if carried out would be subject to this code...

(d) has a sound knowledge of the business of the regulated financial service provider as a whole, and the specific responsibilities that are to be undertaken in the relevant function;

(e) has a clear and comprehensive understanding of the regulatory and legal environment appropriate to the relevant function;

(f) shall not allow the conduct of concurrent responsibilities to impair his or her ability to discharge the duties of the relevant function or otherwise allow personal conflicts of interest to arise...; and

(g) is compliant with the applicable minimum competency code issued by the Central Bank."

16. By clause 4, it is provided, *inter alia*, that:

"4.1 Without limiting the generality of subsection 2.2(b), a person must be able to demonstrate that his or her ability to perform the relevant function is not adversely affected to a material degree where one or more of the following may be applicable:

(a) the person is or was a sole trader or a director or partner in a legal entity, which has in any jurisdiction, been refused, prohibited, restricted or suspended from the right to carry out any trade, business or profession for which a licence, registration or other authorisation is required by law, in that jurisdiction or has had any such registration, authorisation, membership or licence revoked, otherwise than on a voluntary basis;

(b) the person has been the subject of any complaint made to the Central Bank, the Financial Services Ombudsman or any equivalent body, reasonably and in good faith, relating to activities regulated by the Central Bank or regulated by an equivalent authority in any jurisdiction...

(c) the person is or has been, in any jurisdiction, subject to any disciplinary proceedings or has been issued a warning, reprimand or other administrative sanction or its equivalent by the Central Bank, or an equivalent measure issued by any other regulatory authority...,

(d) the person has been, in any jurisdiction, dismissed, or asked to resign and did resign from any profession, vocation, office or employment or from any position of trust or fiduciary appointment...

(e) the person has, in any jurisdiction, been a director, of a company that was struck off the register of companies (or its equivalent) by the Registrar of Companies (or its equivalent) on an involuntary basis;

(f) the person has been disqualified or restricted from acting as a director in any jurisdiction or has been disqualified from acting in any managerial capacity;

(g) the person has, in any jurisdiction:

....

(2) convicted of an offence which could be relevant to that person's ability to perform the relevant function;

(3) has had a finding, judgment or order made against him/her involving fraud, misrepresentation, dishonesty or breach of trust or where the person is subject to any proceedings for fraud, misrepresentation, dishonesty or breach of trust.

(h) the person has been the subject of a civil penalty enforcement action taken by a regulatory authority under any law in any jurisdiction;

(i) the person has been untruthful or provided false or misleading information to the Central Bank or been uncooperative in any dealings with the Central Bank;

(j) the person or any business with which the person held a position of responsibility or influence has been or is being in any jurisdiction investigated, disciplined, censured, suspended or criticised by any regulatory or professional body, a court or any tribunal or any similar body...

(k) the person has, in any jurisdiction, been found by the Central Bank or any other regulatory authority to have perpetrated or participated in any negligent, deceitful or otherwise discreditable business or professional practice."

17. Financial soundness is dealt with in section 5 which provides that:

"5.1 A person shall manage his or her affairs in a sound and prudent manner.

5.2 Without prejudice to the generality of paragraph 5.1, a person must be able to demonstrate that his or her role in a relevant function is not adversely affected to a material degree by the fact that one or more of the following may be applicable:

(a) the person has defaulted upon any payment due arising from a compromise or scheme of arrangement with his or her creditors or made an assignment for the benefit of his or her creditors;

(b) the person is subject to a judgment debt which is unsatisfied, either in whole or in part, whether in the State or elsewhere;

(c) the person is or has been the subject of a bankruptcy petition, whether in the State or elsewhere;

(d) the person has been adjudicated a bankrupt and the bankruptcy is undischarged, whether in the State or elsewhere; or

(e) a person was a director of an entity which has been the subject of insolvency.

18. Useful guidance is provided by the Central Bank in relation to the practical application of the fitness and probity standards[7].

Investigations into Fitness and Probity

19. According to section 25 of the Act of 2010:

"(1) If in relation to a person to whom subsection (2) applies, the Head of Financial Regulation[8] is of the opinion that –

(a) there is reason to suspect the person's fitness and probity to perform the relevant controlled function, and

(b) in the circumstances an investigation is warranted into the person's fitness and probity,

[7] See Guidance Document on Fitness and Probity Standard issued 2015. In addition, see the guidance issued in 2014 on the fitness and probity amendments 2014, and the detailed document entitled "Frequently Asked Questions", issued November 2014 by the Governing, Accounting and Auditing Policy Division of the Central Bank in relation to the application of the fitness and probity standards.

[8] Now the Deputy Governor (Financial Regulation). In this paper, I retain the old wording, as this is what appears in the legislation.

the Head of Financial Regulation may conduct an investigation, in accordance with this Chapter, in relation to the fitness and probity of the person to perform a controlled function."

20. Subsection (2) extends the right to conduct such an investigation to a wide group of people, including all persons performing a controlled function and persons whom a regulated financial service provider proposes to appoint to carry out controlled functions.

21. Leaving aside the very general terms set out in section 25(1), section 25(3) gives a detailed list of matters which may inform the opinion of the Head of Financial Regulation that there is reason to suspect a person's fitness and probity and that an investigation is warranted. That section provides that:

> *"(3) Without prejudice to the generality of subsection (1), the Head of Financial Regulation may form the opinion referred to in that subsection if there is reason to suspect that—*
>
> *(a) the person does not have the experience, qualifications or skills necessary to perform properly and effectively the controlled function, the part of a controlled function or any controlled function, as the case may be,*
>
> *(b) the person does not satisfy an applicable standard of fitness and probity in a code issued pursuant to section 50,*
>
> *(c) the person has participated in serious misconduct in relation to the business of a regulated financial service provider,*
>
> *[(ca) the person, being a person who has been appointed to perform a preapproval controlled function, has failed to make a disclosure to the Bank under section 38(2) of the Central Bank (Supervision and Enforcement) Act 2013 or*

has made such a disclosure knowing it to be false or misleading in a material respect,]

(d) the person has directly or indirectly provided information to the Bank, the Governor or the Head of Financial Regulation (whether pursuant to this Part or otherwise) that the person knew or ought to have known was false or misleading,

(e) the person has directly or indirectly provided information that the person knew or ought to have known was false or misleading to another person in order for it to be provided to the Bank, the Governor or the Head of Financial Regulation,

(f) the person has caused or sought to cause information requested by the Head of Financial Regulation by evidentiary notice from a regulated financial service provider or a person who is carrying out a controlled function not to be provided by the due date,

(g) the person has failed to comply with an evidentiary notice, or

(h) the person has been convicted of an offence (whether in the State or outside the State) of money laundering or terrorist financing or an offence involving fraud, dishonesty or breach of trust."

22. During the course of an investigation into a person's fitness and probity, the Head of Financial Regulation is entitled to issue a suspension notice if satisfied that:

"it is necessary in the interests of the proper regulation of a regulated financial service provider concerned that the person not perform the

relevant controlled function, or any controlled function, while the Head of Financial Regulation, the Bank or the Governor, as the case may be, is carrying out the investigation."

The factors which must be taken into account in deciding whether to issue such a suspension notice are identified in section 26(2) in the following terms:

> *"(2) When considering whether to issue a suspension notice, the Head of Financial Regulation shall have particular regard, where appropriate, to—*
>
> *(a) the need to prevent potential serious damage to the financial system in the State and ensure the continued stability of that system, and*
>
> *(b) the need to protect users of financial services."*

23. In sections 26 to 31, the Act sets out detailed provisions for the operation and enforcement of a suspension notice. Section 32 allows the Head of Financial Regulation serve a notice (known as an evidentiary notice) requiring that person to either appear before the Head of Financial Regulation to give evidence about a matter, to provide information to the Head of Financial Regulation or produce a document for examination. By section 34 of the Act of 2010, it is clear that oral evidence may be given where necessary for the proper conduct of an investigation, such oral evidence to include the right for cross-examination. Proceedings are normally held in private and evidence given to the Head of Financial Regulation is privileged.[9] By the Central Bank Reform Act 2010 (Procedures Governing the Conduct of Investigations) 2012[10], the Central Bank have set out the detailed procedures that will apply in the conduct of such an investigation.

[9] See section 38.
[10] Statutory Instrument 56 of 2012

24. After the carrying out of an investigation under Part 3 into a person's fitness and probity, section 41 provides that the Head of Financial Regulation: *"shall prepare a report for consideration by the Bank and the Governor."* The subject of the report and the regulated financial service provider are entitled to make submissions to the Head of Financial Regulation in relation to any matter in the report.

25. On the basis of the material before it, the Bank and Governor are entitled to issue a prohibition notice. The detailed provisions in relation to prohibition notices are identified at section 43 of the Act of 2010 which provides that:

> *"(1) Subject to subsection (4), if the Bank or the Governor has reasonably formed the opinion that a person is not of such fitness and probity as is appropriate to perform a particular controlled function, a specified part of a controlled function or any controlled function, the Bank or the Governor, as the case may be, may issue a notice in writing (in this Part called a "prohibition notice") forbidding the person—*
>
> *(a) to carry out the controlled function, the specified part of a controlled function or any controlled function, as the case requires, or*
>
> *(b) to carry out the controlled function, the specified part of such a function or any controlled function, as the case requires, otherwise than in accordance with a specified condition or conditions,*
>
> *either for a specified period or indefinitely.*
>
> *(2) Without prejudice to the generality of subsection (1), the Bank or the Governor may form the opinion referred to in that subsection if satisfied that—*

(a) the person does not have the experience, qualifications or skills necessary to perform properly and effectively the controlled function, the specified part of a controlled function or any controlled function, as the case may be,

(b) the person does not satisfy an applicable standard of fitness and probity in a code issued pursuant to section 50,

(c) the person has participated in serious misconduct in relation to the business of a regulated financial service provider,

[(ca) the person, being a person who has been appointed to perform a pre-approval controlled function, has failed to make a disclosure to the Bank under section 38(2) of the Central Bank (Supervision and Enforcement) Act 2013 or has made such a disclosure knowing it to be false or misleading in a material respect,]

(d) the person has directly or indirectly provided information to the Bank, the Governor or the Head of Financial Regulation (whether pursuant to this Part or otherwise) that the person knew or ought to have known was false or misleading,

(e) the person has directly or indirectly provided information that the person knew or ought to have known was false or misleading to another person in order for it to be provided to the Bank, the Governor or the Head of Financial Regulation,

(f) the person has caused or sought to cause information requested by the Head of Financial Regulation by evidentiary notice from a regulated financial service

provider or a person who is carrying out a controlled function not to be provided by the due date,

(g) the person has failed to comply with an evidentiary notice or a suspension notice, or

(h) the person has been convicted of an offence (whether in the State or outside the State) of money laundering or terrorist financing or an offence involving fraud, dishonesty or breach of trust.

(3) The Bank or the Governor shall not issue a prohibition notice in relation to a person unless—

(a) either—

(i) all of the following requirements have been satisfied:

(I) the Head of Financial Regulation has conducted an investigation into the person's fitness and probity in accordance with this Chapter;

(II) section 41 has been complied with in relation to that investigation and the report of it;

(III) the Bank or the Governor, as the case may be, has considered the report and any submissions made (within the period specified pursuant to section 41 (4)) to the Head of Financial Regulation in relation to any matter in the report,

or

(ii) there are undisputed facts that in the reasonable opinion of the Bank or the Governor render an investigation unnecessary, and the person and any

regulated financial service provider concerned have been afforded a reasonable opportunity to make a submission in relation to the matter,

(b) the person and the regulated financial service provider have been afforded such a hearing in relation to the proposed issue of the prohibition notice as is necessary to do justice in the circumstances, and

(c) the Bank or the Governor, as the case may be, is satisfied that the issue of a prohibition notice is necessary in the circumstances.

(4) When considering whether to issue a prohibition notice, the Bank or the Governor, as the case may be, shall have particular regard to—

(a) the need to prevent potential serious damage to the financial system in the State and ensure the continued stability of that system, and

(b) the need to protect users of financial services.

(5) A prohibition notice may be expressed to apply—

(a) to one or more specified controlled functions or parts of controlled functions or all controlled functions, and

(b) in relation to the performance of any such controlled function or part of a controlled function for one or more regulated financial service providers, a class of regulated financial service providers or every regulated financial service provider.

(6) …..

(7) A prohibition notice—

(a) takes effect on first service on either the prohibited person or the regulated financial service provider concerned, and

(b) if an application is made to the Court under section 45 before the notice ceases to have effect, continues to have effect until that application is determined by the Court or withdrawn.

Subject to section 46, a prohibition notice ceases to have effect at the end of 2 months (or a shorter period specified in the notice) beginning on the day after it is first served as mentioned in paragraph (a) if no application is made to the Court within that period.

(8) …..

(9) …..

(10) The Bank may publish a prohibition notice if, in the opinion of the Governor, it is necessary to do so in order to achieve the purposes of this Part.

(11) A prohibition notice does not alter the contractual rights of any person to remuneration or benefits. Those rights shall continue to be determined in accordance with the relevant contract.

(12) The Bank or the Governor, as the case may be—

(a) shall not continue a prohibition notice for longer than is necessary to achieve those purposes, and

(b) shall not make an application to the Court under section 45 in relation to a prohibition notice unless the Bank or the Governor is satisfied that it is necessary that the notice

continue for longer than 2 months to achieve the purposes referred to in subsection (4).”

26. Taking these somewhat heavily worded sections together, the following appears to be the position:

(i) Following consideration of representations by the person to be affected, the Central Bank or Governor may issue a prohibition notice either upon receipt of a report into an investigation by the Head of Financial Regulation, in accordance with section 41, or where there are undisputed facts which render an investigation unnecessary,

(ii) A prohibition notice may issue in relation to a controlled function, or part of a controlled function, or may impose conditions on the performance of a controlled function,

(iii) Unless an application is made to Court for the confirmation of a prohibition notice, it has effect for 2 months from service,

(iv) If on consent, applications on consent may be made *ex parte*,

(v) Applications for confirmation may be made otherwise than in public, and the High Court has a wide jurisdiction as to the orders to be made. The consideration by the High Court of a prohibition notice is, however, limited by the provisions of s.45(6) of the Act of 2010 which state explicitly the limits of the High Court jurisdiction,

(vi) Upon confirmation by the High Court, a prohibition notice may be indefinite, or for such time as the Court directs.

Issues Arising and Discussion of the Regime

27. In common with many modern regulatory schemes, the legislative provisions of the Fitness and Probity scheme are complicated, and not easily accessible to non-lawyers.

28. By way of general comment, there are some curiosities to the structure of the fitness and probity regime. It operates in parallel to the Administrative Sanctions Procedures (ASP) established by Part IIIC of the Central Bank Act, 1942, but is separate to and different to that procedure. At set out below, the ASP appears designed to investigate past actions, with a view to sanctioning wrongdoing, whereas the Fitness and Probity looks to ensure that persons taking up certain positions in regulated entities meet the appropriate standard. It looks forward. However, to the extent that the Fitness and Probity regime looks to past conduct as a measure of present fitness and probity, it is clear that there is an overlap between the two procedures.

29. Taken on its own, the fitness and probity regime has features of the conventional fitness to practise procedures for professionals, but also has the characteristics of disciplinary proceedings in an employment context. The commencement of an investigation, hearing and report, consideration by a higher body, with a requirement for final decisions to be considered by the High Court, all resemble the fitness to practise procedures existing in many of the statutory professions.

30. On the other hand, the provision whereby the Head of Financial Regulation commences an investigation and then himself prepares a report has more in common with what one would expect to find in the private law context of an inquiry by an employer into disciplinary allegations made against an employee. In particular, it is unusual in traditional fitness to practise procedures that the person who makes a preliminary decision that an

investigation ought be commenced, is also be the person who conducts that investigation.

31. As set out above, a further differentiation must be made between the statutory scheme enacted by the Act of 2010 and traditional fitness to practise procedures in that misconduct proceedings normally look to specified acts of a professional rather than their fitness and probity *per se*.

32. Typically, the "*fitness to practise*" of a professional is considered in the context of a physical or mental ailment as opposed to the issue as to whether past conduct in fact renders a person unfit to practice in the future.[11] As set out above, the ASP allows the Central Bank review past conduct, but the risk of conflicting decisions between the ASP and Fitness and Probity regimes must always exist. As a matter of law, there is probably no difficulty with the existence of parallel procedures under both fitness and probity and administrative sanctions as they appear to be parallel statutory procedures. Indeed, it is not uncommon under the procedures provided for under the Law Society legislation for more than one procedure to be pending against a particular practitioner at the same time.

33. As there does not appear to have been any High Court decisions on the operation of the Fitness and Probity Schemes, it is not absolutely clear how a Court might approach the implementation of the scheme. Some guidance can be obtained from similar legislative schemes.

34. From the perspective of persons who might the subject of an investigation, a key question may be the threshold that must be reached in order for the Head of Financial Regulation to form an opinion under the provisions of s.25(1) of the Act of 2010. Having regard to the approach taken in other regulatory schemes, it seems likely that a low threshold is required for the purpose of s.25 of the Act of 2010. There would, of course, have to be

[11] See for example the Dentists Act, 1985, the Nurses Act, 1985, and the Medical Practitioners Act, 2007. A different approach is taken in the United Kingdom as will be apparent for example from the texts in that a person's fitness to practise a profession is considered in the context of their proven misconduct.

some information before the Head of Financial Regulation which would allow him or her form the suspicion identified in s.25(1)(a) and some information or reason why he believes that "*in the circumstances an investigation is warranted into the person's fitness and probity*".

35. This is the initiating stage of the process, similar to the forming, by the Director of Public Prosecutions, of a view that a prosecution ought be brought, and to the decision of the various preliminary proceedings committees or fitness to practise committees for the regulated professions that there are *prima facie* or sufficient grounds for the holding of an inquiry. In general, challenges to the making of *prima facie* decisions are more often brought on procedural grounds than on the basis that there are no grounds for the holding of an inquiry.

36. Although it is clearly open to a person who is going to be the subject of an inquiry to challenge such a decision on the merits, it would normally be necessary to show that the Head of Financial Regulation either formed his opinion on the basis of improper or inadmissible evidence, or that it was irrational.[12] Indeed, in Harris, *Disciplinary and Regulatory Proceedings*, the author states that:

> *"In the usual course, the roles and duties of a screening committee are not appropriately made the subject of applications for judicial review. In R (on the application of Heath) v. The Home Office Policy and Advisory Board for Forensic Pathology[13] the Learned Judge, Newman J., added that:*
>
> > *"In exceptional cases, a need may arise for action to be taken to avoid an obvious miscarriage of justice. In the normal course, its supervisory jurisdiction is concerned with*

[12] For reference see Glynn and Gomez, Fitness to practise – Health Care Regulatory Law, Principle and Process, ch 12-006 and notes thereon, *Richards v. GMC* [2001] Lloyds Rep. Med. 47, the well-known case of *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54, and the authorities referred to in Mills, Ryan and others, Disciplinary Procedures in the Statutory Professions, p.91.
[13] [2005] E.W.H.C. 1793 (Admin.)

the legality of a decision made by a disciplinary tribunal not to monitor the procedural processes governed by a wide discretion which is exercised by disciplinary tribunals to rule their own affairs."[14]

37. In addition, in *R v. Securities and Futures Authority, Ex Parte Panton*, the then Master of the Rolls, Sir Thomas Bingham, stated that:

"The clear intention of the FSMA 2000 is that bodies established under the Act should be the regulatory bodies and that it is not the function of the Court to second guess their decisions, or as it were, to look over their shoulder"[15]*.*

38. Turning to the standard of proof in the context of forming an initial opinion to investigate, the standard of proof required for the forming of initial opinions is likely to be low. It is not a standard on the balance of probabilities and is probably more akin to the *prima facie* concept known to criminal law. This is to say that there must be some material upon which a decision can be made.

39. Insofar as the standard of proof for later decisions is concerned, if this were an inquiry by an employer into allegations of wrongdoing in an employment context, it is clear that the decision maker could apply the civil standard of proof.[16] In the United Kingdom, the position is identified by Harris as follows:

"Where the criminal standard of proof is stipulated in the regulator's rules the case has to be proved, as in a criminal trial, beyond reasonable doubt. Provisions of this sort were not uncommon in the past, but they are becoming increasingly difficult to justify in today's consumerist society. The civil standard of proof on balance of

[14] 6th Edition para. 8.08
[15] *Panton v. The Financial Institutions Services Ltd.* [2010] EWHC 308 (Ch)
[16] *Georgopoulos v. Beaumont Hospital Board* [1998] 3 IR 132. See also Redmond, Dismissal Law in Ireland, 2nd Edition, para. 7.34 and following.

probabilities applies where it is specified in the rules and may be assumed to apply where no standard of proof is specified..."[17]

40. On the other hand, the traditional view in Ireland as identified in a series of Supreme Court and High Court cases in disciplinary inquiries is that allegations must be proven beyond reasonable doubt.[18] In the absence of any statutory guideline to the contrary, this is probably the standard of proof that the Courts would require of the fitness and probity procedure.

41. As regards the dual role that may be held by the Head of Financial Regulation in both commencing and conducting an investigation, s.52(2) of the Act of 2010 clearly states that:

> *"The Head of Financial Regulation may at his or her discretion appoint a suitably qualified person (including a person who is not an officer or employee of the Bank) to perform a function (or any part of a function) of the Head of Financial Regulation under this Part if the Head of Financial Regulation considers it necessary or appropriate to do so to ensure that the functions of the Head of Financial Regulation under this Part are performed efficiently and effectively."*

42. Therefore, it is quite clear that the Head of Financial Regulation is entitled to delegate the s.25 function and indeed given the work load involved in conducting an investigation, it likely that such a delegation would take place in most cases. Such a delegation is likely to assist in maintaining fair procedures.

43. As regards the conduct of an investigation, it must, of course, be carried out in such a way as to preserve fair procedures and the right of any person who is the subject of an investigation to due process. This is not to say that the right to cross-examine is untrammelled and unfettered. As set out

[17] *op. cit*. para. 12.08.
[18] See for example, *O'Laoire v. The Medical Council*, unreported, Supreme Court, 25 July, 1997, *Millett-Johnson v. Medical Council*, unreported, High Court, Morris J. 12 January, 2011, and *Law Society v. Walker* [2006] I.E.H.C. 387.

above, the Central Bank Reform Act 2010 (Procedures Governing the Conduct of Investigations) 2012[19], identifies the detailed procedures that will apply in the conduct of such an investigation. Those regulations provide for the delivery of a "*statement of grounds*" to a person under investigation, interviews, the circumstances in which an oral hearing may be convened, the manner in which an oral hearing is conducted, and how the investigation is to be concluded, and report delivered.

44. According to media reports, the Central Bank issued both a prohibition notice and a suspension notice in 2015. Recent media reports disclose the issue of a prohibition notice to a well-known former sportsman. Given the number of PCF roles designated by the Central Bank, it is clear that a great deal of work is involved in the approval of persons for such roles[20].

45. Although it is likely that there have been a number of investigations into various persons' fitness and probity, it is not clear how many investigations have been commenced, and what the results of those investigations have been. There do not appear to have been any challenges to the regime brought before the High Court, although given the serious consequences that flow from a prohibition notice, it is likely that there will be future challenges to the initiation, conduct, and result of fitness and probity investigations. Future papers are likely to have more material to consider than is presently available.

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PATRICK LEONARD

[19] Statutory Instrument 56 of 2012

[20] According to a Central Bank presentation to the Association of Compliance Officers Ireland, in 2014, 29 Applicants were interviewed as part of the process for assessing their fitness and probity and 25 during the period from Jan to June 2013.