



CLERKIN LYNCH LLP

# ManCo Event

Mark Browne



# Fund Management Companies in Ireland

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- Introduction and Welcome
- Trends and Key Regulatory Issues
- Litigation and Regulatory Enforcement
- Panel Discussion
  
- Networking Reception

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# Trends and Key Regulatory Issues

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# Structural Change

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- Growth of ManCos
- Relationship with Fund boards
- Substance



# Operational Change

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## Central Bank Initiatives

- CP 140: Cross Industry Guidance on Operational Resilience
- CP 138: Cross-Industry Guidance on Outsourcing
- CP135: Consultation on Competent Authority Discretions in the Investment Firms Directive and the Investment Firms Regulation



# Operational Change

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## ESMA / EU Initiatives

- Marketing
- ESG
- Costs and Charges
- Enforcement and liability



# Environmental Change

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- *“Enforcement plays a fundamentally important role within the Central Bank’s new risk-based regulatory framework [PRISM], helping to achieve a regulatory regime that is credible and effective.”*
  - Central Bank Statement 2012
- *“Enforcement action combined with the resultant publicity has a powerful impact, promoting compliance and deterring other industry participants from similar non-compliance whilst educating stakeholders on the standards and behaviours expected of them”.*
  - Director of Enforcement, Peter Oakes
- During 2011 the Central Bank entered into enforcement settlements with 10 regulated financial service providers resulting in a range of sanctions including the disqualification of two directors and fines totalling €5,050,000, including the then largest fine of €3,350,000.

# Enforcement Tools

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## Fines

- Fines imposed under Section 33AQ of Central Bank Act, 1942. The maximum penalty is the greater of €10,000,000, or an amount equal to 10% of annual turnover of a regulated financial service provider.
- 2019: detailed guidance on sanctions published to help understand the Administrative Sanctions Procedure.

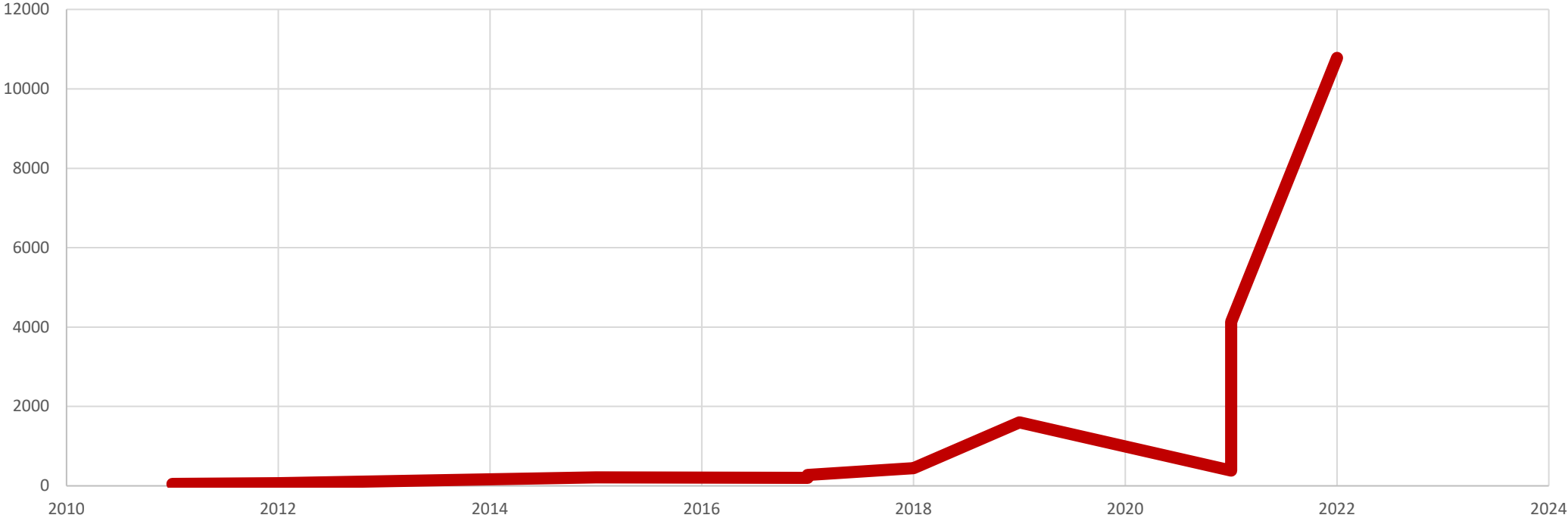
<https://www.centralbank.ie/docs/default-source/regulation/how-we-regulate/enforcement/administrative-sanctions-procedure/asp-sanctions-guidance.pdf>



# Fines for the Asset Management Sector

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Individual Fines





# Overview:

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- Central Bank has now reached 147 settlement under its Administrative Sanctions Procedure.
- Total fines imposed by the Central Bank exceed €200 million.
- Offenders have *ALSO* paid over €730 million in redress and compensation to affected customers (mortgages).
- Funds collected from penalties are included in the Central Bank's Surplus Income, which is payable directly to the Exchequer.

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“All changed, changed utterly:  
A terrible beauty is born.”

— William Butler Yeats, "Easter 1916"



# Clerkin Lynch LLP

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Mark is a Partner and Head of Asset Management and Funds in Clerkin Lynch LLP. He has in excess of 15 years experience as a solicitor advising on the establishment, launch and ongoing operations of investment funds.

His experience covers both funds authorised as UCITS and under the AIFMD. In addition to Dublin, he has worked in some of the other key international fund domiciles including the Cayman Islands and Luxembourg. He also advises on a broad range of regulatory issues impacting the financial services sector.

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# Litigation and Regulatory Enforcement

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# The Central Bank Acts: Administrative Sanction Procedure

Niall Clerkin



# Historical Development

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Central Bank Act 1942

Central Bank Act 1989

Central Bank Act 1997

Central Bank Act 1998

Central Bank and Financial Services Authority of Ireland Act 2003

Central Bank and Financial Services Authority of Ireland Act 2004

Central Bank and Reform Act 2010

Credit Union and Co-Operation with Overseas Regulators Act 2012

Central Bank (Supervision and Enforcement) Act 2013

Central Bank Act 2014



# Historical Development

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Currency Act 1927 (Repealed)

Currency (Amendment) 1930 (Repealed)

Central Bank Act 1961 (Repealed)

Central Bank Act 1964 (Repealed)

Central Bank Act 1971





Section 33AO was first inserted by Section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004 and amended again by Central Bank (Supervision and Enforcement) Act 2013 (26/2013)

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Regulatory Authority may hold inquiry into conduct of regulated financial service provider or person concerned in its management

**33AO.**—(1) Whenever the Regulatory Authority suspects on reasonable grounds that a regulated financial service provider is committing or has committed a prescribed contravention, it may hold an inquiry to determine whether or not the financial service provider is committing or has committed the contravention.

(2) Whenever the Regulatory Authority suspects on reasonable grounds that a person concerned in the management of a regulated financial service provider is participating or has participated in the commission of a prescribed contravention by the financial service provider, it may hold an inquiry to determine whether or not the person is participating or has participated in the contravention. Such an inquiry may form part of an inquiry held under this section in relation to the suspected commission of a prescribed contravention by the financial service provider.



Section 2 of the Central Bank Act 1942 (as substituted by section 3 of the Central Bank and Financial Services Authority of Ireland Act 2003 ) is amended

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2.— (j) by inserting the following subsections after subsection (3):

“(4) For the purposes of this Act, a person is concerned in the management of a body corporate, or a firm, that is a regulated financial service provider if the person is in any way involved in directing, managing or administering the affairs of the body or firm.

(5) In this Act, a reference to the directors of a company, in relation to a company that does not have a board of directors, is a reference to the persons responsible for directing the operations of the company.”



Section 33 AQ was Inserted by Central Bank and Financial Services Authority of Ireland Act 2004 and Substituted by Central Bank Reform Act 2010

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**33AQ.**—(1) At the conclusion of an inquiry held under section 33AO, the Regulatory Authority shall make a finding as to whether the financial service provider concerned is committing or has committed the prescribed contravention to which the inquiry relates.

(2) At the conclusion of an inquiry relating to the conduct of a person concerned in the management of a regulated financial service provider, the Regulatory Authority shall make a finding as to whether the person is participating or has participated in the prescribed contravention to which the inquiry relates.

# Other Relevant Sections of Part IIIC of the Central Bank Act 1942



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- **S.33 AP:** Bank to give notice to regulated financial service providers with respect of inquiry
  - **S.33 AR:** Alternative procedure when commission of, or participation in, prescribed contravention is acknowledged
  - **S.33 AS:** Limitations on imposing monetary penalties
  - **S.33 AT:** Financial service provider, etc. not liable to be penalised twice for the same contravention
  - **S.33 AU:** Person not to be concerned in management of regulated financial service provider while disqualified
  - **S.33 AV:** Power of the Bank under this Part to take effect.
  - **S.33 AY:** Proceedings at inquiries
  - **S.33 BA:** Power to summon witnesses and take evidence
  - **S.33 BB:** Bank may refer to the Court question of law arising at inquiry
  - **S.33 BD:** Bank may make guidelines with respect to the conduct of proceedings under this Part



# Administrative Sanction Procedures

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- Outline of the Administrative Sanctions Procedure 2005
- Outline of the Administrative Sanctions Procedure 2014 (Live document replaces the Outline of the Administrative Sanctions Procedure 2005)
- Inquiry Guidelines prescribed pursuant to Section 33BD of the Central Bank Act 1942
- Outline of the Administrative Sanctions Procedure 2018 (Live document replaces the Outline of the Administrative Sanctions Procedure 2014)
- ASP Sanctions Guidance November 2019



# Prescribed Contravention

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- A prescribed contravention is a breach of:
  - a provision of a designated enactment, including any instrument made thereunder, or a designated statutory instrument; or
  - a code made, or a direction given, under such a provision; or
  - any condition or requirement imposed under a provision of a designated enactment, designated statutory instrument, code or direction; or
  - any obligation imposed on any person by Part IIIC of the Act or imposed by the Central Bank pursuant to a power exercised under Part IIIC of the Act
- Relevant factors when considering a prescribed contravention:
  - (a) whether the contravention was deliberate, dishonest or reckless;
  - (b) duration and frequency of the contravention;
  - (c) the amount of any benefit gained or loss avoided due to the contravention;
  - (d) whether the contravention reveals serious or systemic weaknesses of the management systems or internal controls relating to all or part of the business;



# Sanctions

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- Caution or reprimand.
- Direction to refund or withhold all or part of money charged or paid, or to be charged or paid, for the provision of a financial service by a regulated financial service provider.
- Direction to pay to the Central Bank a monetary penalty (not exceeding the greater of €10,000,000 or 10% of turnover where the regulated financial service provider is a body corporate or an unincorporated body and not exceeding €1,000,000 where the regulated financial service provider is a natural person and for persons concerned in the management of a regulated financial service provider).
- In the case of a regulated financial service provider which is not authorised by the European Central Bank under the Single Supervisory Mechanism Regulations, suspension or revocation of the authorisation of that regulated financial service provider.
- In the case of a regulated financial service provider which is authorised by the European Central Bank under the Single Supervisory Mechanism Regulations, the submission of a proposal to the European Central Bank to suspend or revoke the authorisation of that regulated financial service provider.
- In the case of a natural person, a disqualification from management for a prescribed time
- Direction to cease a contravention
- Directed to pay the Central Bank for the cost of holding and investigating an inquiry

# Power v Greymountain Management Company 2022 IEHC 599: Comments on personal liability of Directors

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199. pp. 71

“They failed to inform themselves about the nature of their duties as director (or if they did they ignored those duties”

“They Failed to acquaint themselves with the affairs generally of Grey mountain and”

“They failed to exercise appropriate supervision or oversight at a board level in respect of the execution or discharge of whatever tasks or function have been properly and appropriately delegated to others.”



# Clerkin Lynch LLP



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Since starting Clerkin Lynch, Niall has expanded his practice and has successfully acted in a broad range of litigation cases in the Commercial Court and Chancery Division of the High Court. He has particular expertise in all types of financial services litigation, professional negligence actions, insolvency, shareholders disputes and property disputes.

In addition to the above Niall has also acted for purchasers and vendors in large property and corporate transactions. Niall has also worked with the European Commission in Brussels and the Legal Resources Centre in Pretoria, South Africa.

# Panel Discussion

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DAVID ALLEN: [STEPSTONE](#)

PEADAR DEBARRA: [KBA / WAYSTONE](#)

CONOR HOEY: [GEMCAP](#)

KIERAN MULCAHY: [LEMANIK](#)

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