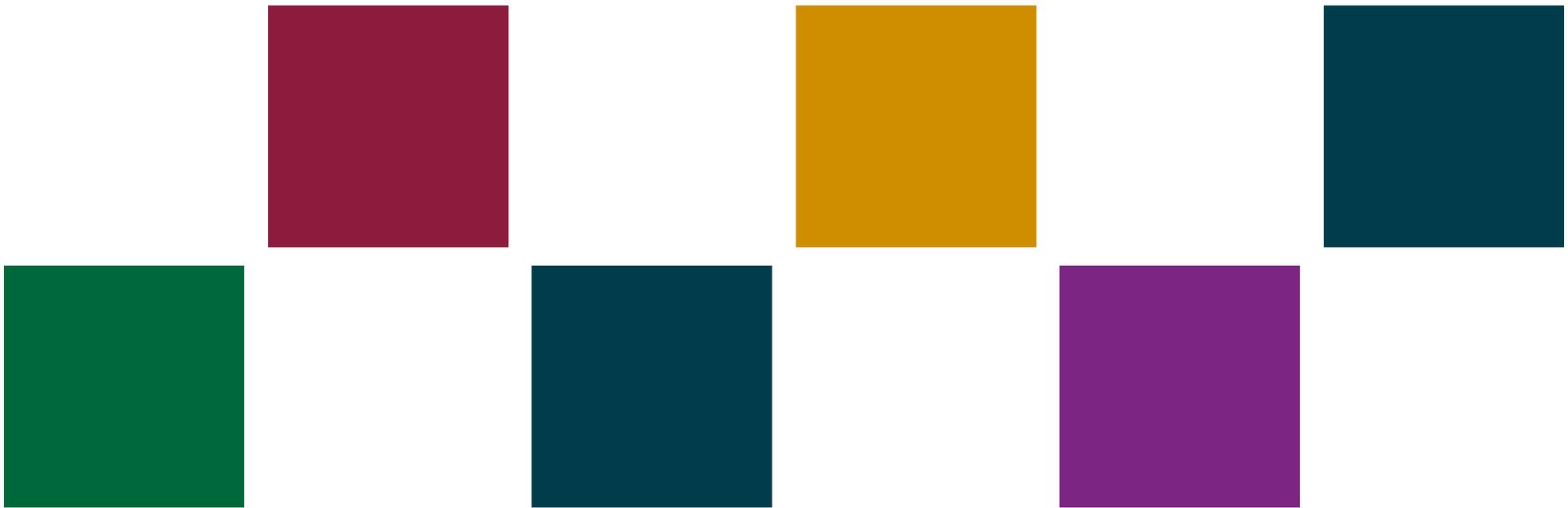


Regulatory Investigations & Inquiries

Thursday 22 November 2018



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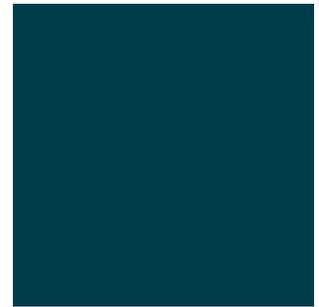
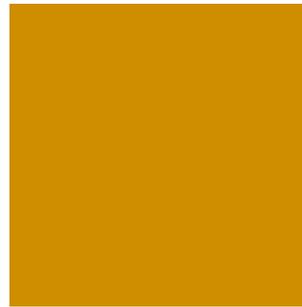
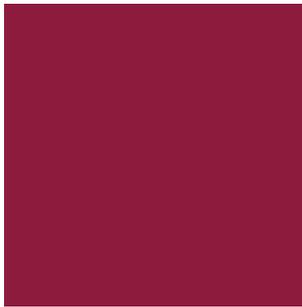
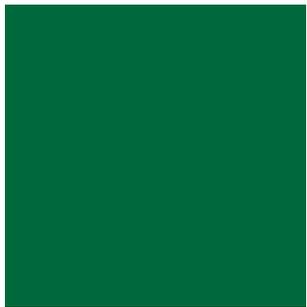
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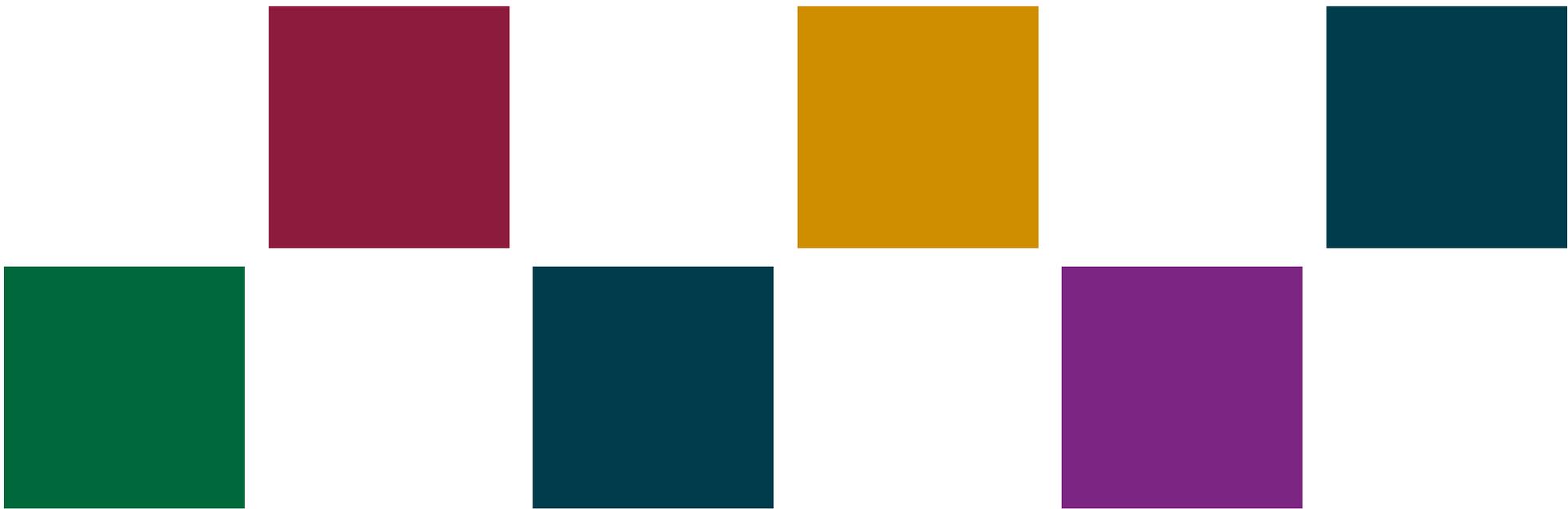
Welcome

Edward Gleeson, Partner & Head of Public,
Regulatory & Investigations



Overview of Typical Regulatory Schemes: What to Expect

Niall Michel, Partner, Mason Hayes & Curran



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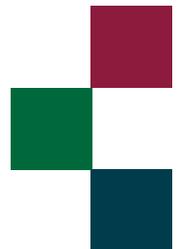
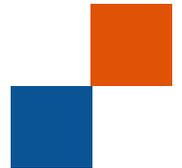
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Introduction

- Typical regulatory investigative schemes
- General issues to consider
- No typical regulatory schemes!
 - Happenstance
 - Due differences owing to necessary differences in regulatory area



What is a Regulatory Body?

- Better Regulation Group definition:
- A body that has *statutory recognition*; is *independent and continuing*; has some *capacity for autonomous decision-making*; has some *personnel and financial resources*; and has *functions* in at least two of the following areas of activity:
 - The formulation of goals, the making of rules [and/or] the setting of standards;
 - Monitoring, gathering information, scrutiny, inspection, audit and evaluation;
 - Enforcement, modifying behaviour, applying rewards and sanctions
- Over 200 bodies meet this definition in Ireland (both domestic and EU-derived).

What to Expect

- ‘Regulatory toolkit’ of a generic regulator
 - to licence/authorise, and include conditions to be complied with
 - to make regulations/issue codes/standards to be complied with
 - to monitor compliance with regulatory/legal requirements
 - to investigate suspected non-compliance, usually via authorised officers
 - to issue warnings/directions regarding non-compliance
 - to find non-compliance and make consequential decisions, or take enforcement action (including revocations; imposing sanctions; bringing prosecutions; sending file to DPP; applying to court for relevant orders (e.g., directing compliance))

Template Suite of Investigative Powers

- appoint authorised officers
- enter premises, with force if necessary
- apply for a warrant to enter premises
- search and inspect premises/records
- secure premises for later inspection
- require assistance and cooperation from persons on the premises
- require a person to provide information, answers, records, or access to records
- summon persons to given information, provide records or provide explanations of decisions, courses of action, or practices
- require production of information, documents/records, answers
- take copies or extracts of records
- remove and retain books, documents or records
- require a person to maintain books, documents or records
- require declaration of truth of answers/certificate of accuracy/completeness of information

Commentary on General Issues regarding Powers

- EU-derivation
 - *Purcell v Central Bank of Ireland*
- Jurisdiction to carry out investigation
 - *Dellway (McKillen) v NAMA*
- Underlay of Constitution, European Convention on Human Rights; EU Charter of Fundamental Freedoms
 - *CRH v Competition and Consumer Protection Commission; Tesco v Office of Fair Trading; Purcell v Central Bank of Ireland; R (McKenzie) v Director of Serious Fraud Office*

Commentary on General Issues regarding Powers

- Respecting Legal Professional Privilege
- Fundamental legal entitlement
- Privileged materials:
 - Confidential communications between lawyer and client, the dominant purpose of which is to seek, or give, legal advice
 - Confidential communications between lawyer and client; lawyer and third party; or client and third party, the dominant purpose of which is to prepare for litigation or some other adversarial process affecting rights and obligations, including regulatory proceedings

Commentary on General Issues regarding Powers

- Regulatory investigations can be 'litigation':
 - If investigation is or becomes adversarial, rather than inquisitorial
 - If process can impose liability/sanction or affect rights and obligations, or if it can result in proceedings (e.g. criminal prosecution) and such proceedings are reasonably contemplated
 - *Ahern v Mahon; Quinn v IBRC; ODCE v Buckley; SFO v ENRC; Tesco v OFT*

Commentary on General Issues regarding Powers

- Not all regulatory investigation powers are the same
- Law Reform Commission *Report on Regulatory Powers and Corporate Offences*
- Regulatory Powers (Standard Provisions) Act 2014 (Aus)
- Advantages of uniformity in core regulatory powers
 - certainty and consistency in the approach of regulators
 - aid in the interpretation of those powers by those exercising them/subject to them, and the courts
 - Court decisions would also be of precedential value to all regulators with the same powers
 - Deliberately and consciously chosen differences between regulatory schemes would themselves then also be useful in interpreting the different schemes, by contrasting their deliberate differences
- LRC recommendation

Improving Schemes and Filling the Gaps

- Older vs newer regulatory schemes
- Pensions Act 1990 vs Central Bank (S&E) Act 2013
- Section 30 of Central Bank (S&E) Act 2013: 'sanitises' information-provision by persons to CBI
- Privilege-determination mechanisms:
 - Central Bank (S&E) Act 2013; Data Protection Act 2018
 - Section 33 of the Competition and Consumer Protection Commission Act 2014
- No equivalent of section 33 of the CCPC Act 2014 - in any scheme - for non-LPP materials

Key 'Take-Away' Points

- Many similar investigative provisions and powers in regulatory legislation, but look out for key differences
- Some differences are inherent, given the different, individual, contexts
- Other differences are an accident of when and how the regulatory schemes were drafted
- Some schemes are therefore not as effective, and there is a disparity in powers between regulators, for no good reason
- All schemes (but particularly older ones) need updating to bring them in line with current legal developments, best current legislative drafting, and relevant case law
- This is particularly so regarding privilege determinations; 'sanitising' document-provision to authorised officers against breaches of other enactments or rules of law; and 'sealing and sieving' of privileged and/or private materials captured in bulk
- This could be achieved by preparing a common legislative template of powers, as suggested by the LRC

Conduct of Regulatory Investigations: Practical Issues

Paul Fitzpatrick, Senior Associate, Mason Hayes & Curran



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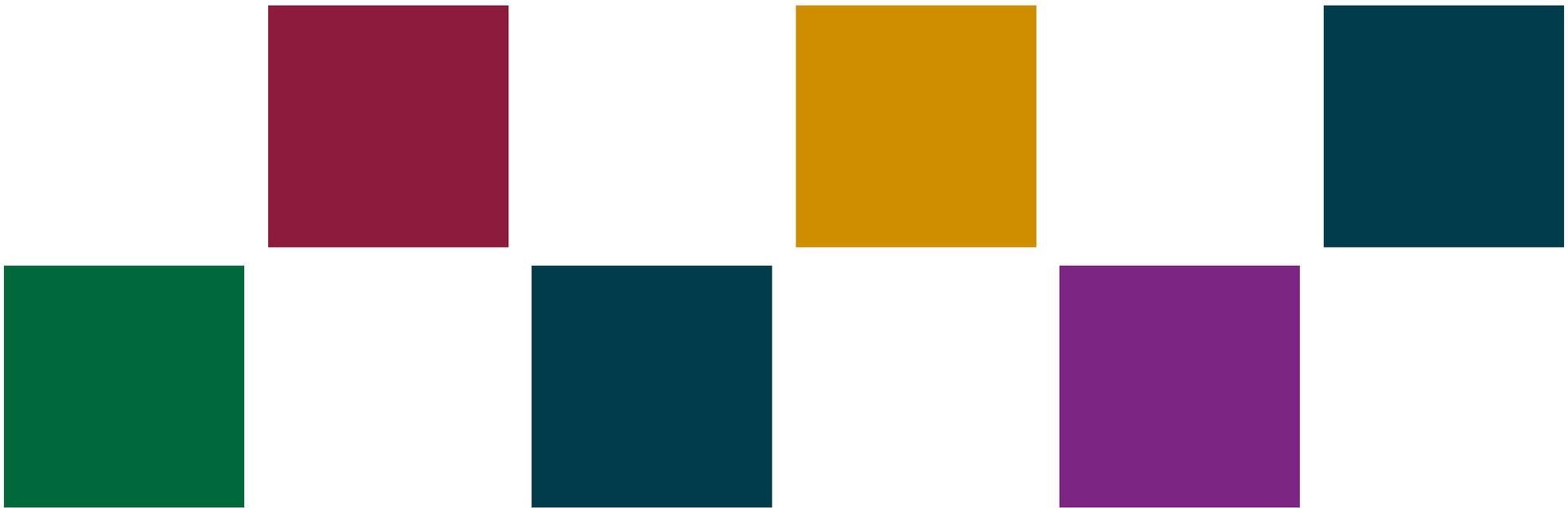
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Statutory Investigations: An Update from the Courts

Lisa Joyce, Partner, Mason Hayes & Curran



Fingleton v Central Bank [2018] IECA 105

Section 33AO of the Central Bank Act 1942, as amended (my emphasis):

- (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 provide.

Fingleton v Central Bank [2018] IECA 105

Section 33AR(1) of the Central Bank Act 1942, as amended:

- (1) If, in a case where the Bank suspects on reasonable grounds that a regulated financial service provider is committing or has committed a prescribed contravention, the financial service provider acknowledges that the financial service provider is committing or has committed the contravention, the Bank may:
- (a) with the consent of the financial service provider, dispense with an inquiry and impose on the financial service provider any sanction that it is empowered to impose on regulated financial service providers under section 33AQ, or
 - (b) hold an inquiry to determine what sanction (if any) should be imposed on the financial service provider in accordance with that section.

Fingleton v Central Bank [2018] IECA 105

Section 33AV(1) of the Central Bank Act 1942, as amended:

- (1) If the Bank suspects on reasonable grounds that:
 - (a) a regulated financial service provider is committing or has committed a prescribed contravention, or
 - (b) a person concerned in the management of the financial service provider is participating or has participated in such a contravention,it may enter into an agreement in writing with the financial service provider or person to resolve the matter.
- (2) Such an agreement is to be on such terms as are specified in the agreement ... Those terms may include terms under which that financial service provider or person accepts the imposition of sanctions of the kind referred to in section 33AQ.
- (3) The Bank may enter into an agreement under this section:
 - (a) without having held an inquiry into the matter under section 33AO or 33AR, or
 - (b) after beginning (but not after completing) such an inquiry.

Fingleton v Central Bank [2018] IECA 105

Section 33BC(2) of the Central Bank Act 1942, as amended:

(2) If the Bank has, in accordance with section 33AR, imposed—

- (a) a sanction on a regulated financial service provider in respect of the commission of a prescribed contravention, or
- (b) a sanction on a person concerned in the management of a financial service provider in respect of the person's participation in the commission by the financial service provider of such a contravention,

it shall publish, subject to subsection (4), in such form and manner as it thinks appropriate, the finding and such (if any) of the particulars specified in subsection (3) as it thinks appropriate.

Fingleton v Central Bank [2018] IECA 105

Section 33BC(4) of the Central Bank Act 1942, as amended:

(4) Subsections (1) and (2) do not apply to the finding or particulars specified in subsection (3):

(a) if publication of the finding or particulars involves the disclosure of confidential information the disclosure of which is prohibited by the Rome Treaty, the ESCB Statute or the supervisory EU legal acts (within the meaning of section 33AK(10)), or

(b) if the Bank determines:

- (i) that the finding or particulars are of a confidential nature or relate to the commission of an offence against a law of the State, or
- (ii) that publication of the finding or particulars would unfairly prejudice a person's reputation.

Q&A



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Thank you

