DILLON EUSTACE

Consequences of admissions in ASP Settlements

As part of any settlement under its Administrative Sanctions Procedure (the "ASP"), the Central Bank of Ireland (the "Central Bank") expects a breach to be admitted. Muireann Reedy examines the impact that this policy can have on a regulated entity or individual and contrasts the Central Bank's position with the practice of other financial regulators.

Central Bank approach

The Central Bank Act 1942 (as amended) empowers the Central Bank to enter into settlements to resolve an ASP, on whatever terms it and the other party agree to.

The reality, however, is that the Central Bank will only enter into a settlement if the regulated entity/ individual admits that it committed, or was involved in the commission of, a regulatory breach. This approach is reflected in the Central Bank's "Outline of the Administrative Sanctions Procedure" (2014) (the "Outline") which states that it: "*expects…all Settlement Agreements will contain admissions by the regulated entity in respect of the prescribed contraventions contained therein.*" Interestingly the first "Outline of Administrative Sanctions Procedure" which was published by the Central Bank in 2005, made no reference to admissions in the context of settlements. This possibly explains why publicity statements which were released in the early years of the ASP, frequently referred to "*suspected breaches*" of regulations.

Since September 2010 however, all publicity statements have referred to "*breaches*". Since November 2014, nearly all publicity statements have also contained a statement noting that the findings contained in it have been accepted, or that the relevant breach has been admitted by the relevant regulated entity or individual, as part of the underlying settlement agreement.

Approach in other jurisdictions

In other jurisdictions, such as America, Canada and Australia, it is possible to enter into settlements with financial regulators without admissions being made about the underlying breach.

In the US, the Securities and Exchange Commission (the "SEC") settles the vast majority of its cases on a no-admit-no-deny basis. This position is reflected in the relevant Orders which are published after settlement, which typically note that the respondent consents to the Order being made "…*without admitting or denying the findings herein*…". In May 2013, Andrew Ceresney, a Co-Director of SEC's Enforcement Division at the time, noted that the no-admit-no-deny policy was "…*important to allow us to get settlements in certain cases, such as when there are immense collateral consequences for civil cases and the defence is reluctant to admit and where the evidence may not be as strong as in other cases*." He also noted that the no-admit-no-deny settlements, enabled quicker settlements.

Muireann Reedy

In 2011, the Ontario Securities Commission ("OSC") in Canada, announced new enforcement initiatives "*aimed at resolving enforcement matters more quickly and effectively*." The "no-contest settlement programme" was introduced as one of these initiatives. No-contest settlements entered into with the OSC typically contain a clause stating that the respondent "*neither admits nor denies*" the accuracy of the facts or the conclusions of the OSC staff that are set out in the Settlement Agreement. The Settlement Agreements normally provide that the respondent will not make any public statement that is inconsistent with the Settlement Agreement or stating that there is no factual basis for it (the "Limitations"). However crucially from the respondents perspective, the Settlement Agreements normally provide that the stated Limitations will not affect the respondent's right to take such legal or factual positions as it sees fit in other investigations or legal proceedings, or to make public statements in respect of those proceedings, provided the OSC and/or the OSC's staff is not a party to them.

In Australia, the Australian Securities and Investments Commission ("ASIC") can issue Infringement Notices, under its administrative powers. These set out in very high level detail the offence which ASIC has "*reasonable grounds to believe*" may have been committed by the entity or individual and the sanction for the "*alleged offence*."

ASIC has stated that: "*The issue of an infringement notice, and any compliance with it, is not a determination or an admission of liability, nor does it represent a finding that the market integrity rules have been contravened. It simply signals the MDP's view* [the Markets Disciplinary Panel established by ASIC] *of the alleged conduct and provides a manner in which the matter may be dealt with, without engaging in lengthy and expensive court proceedings.*"

Interestingly, in the UK, the Financial Conduct Authority (the "FCA") has no specific rules in place which state that a firm must admit a breach as part of any settlement. While the Central Bank has no specific rules requiring this either, as noted above, its stated expectation (and practice) is that settlements will involve admissions.

Central Bank approach - potential consequences

Several potential consequences flow from the Central Bank's practice of requiring admissions.

Firstly, the admission of a breach could negatively impact an affected firm when applying subsequently for a license in another jurisdiction, although admittedly the fact of the settlement would be a matter of public record.

However, the biggest potential risk to a regulated entity, is that aggrieved customers may attempt to use any admissions made in the ASP settlement to their advantage in civil proceedings which they may take against the entity, concerning a related matter. This could act as a bar to settlement in future cases, in particular where an element of consumer detriment is involved and where the entity fears that the potential risk to it of making an admission, outweigh the benefits involved in settling.

It remains to be seen whether the Central Bank may modify its practice in future, if its insistence on an admission acts as a stumbling block to settlement, and it is faced with the choice of quick no-contest settlement as against a hard fought case at Inquiry.

Muireann Reedy is a senior associate at Dillon Eustace.