



COMMENTARY  
DECEMBER 2018

## Bank of England Establishes Enforcement Decision Making Committee

### IN SHORT

**In Short:** The Bank of England ("BoE") has published its final [policy statement](#) and [procedures](#) for its new Enforcement Decision Making Committee ("EDMC").

**The Result:** The EDMC will be the BoE's independent decision-making committee for contested enforcement and is modelled on the UK Financial Conduct Authority's ("FCA") Regulatory Decisions Committee ("RDC").

**Looking Ahead:** The EDMC strengthens the independence of the BoE's enforcement regime and potentially foreshadows more enforcement action by the BoE.

### Background

The BoE prudentially regulates and supervises approximately 1,500 banks, insurers, and major investment firms through the Prudential Regulation Authority ("PRA"). Historically, the PRA has been committed to using its statutory powers to secure ex-ante remedial action (i.e., intervening early to address emerging risks) rather than ex-post enforcement action. As part of this approach, case decisions were taken by PRA decision-making committees, usually comprised of PRA executives.

In December 2014, the UK Treasury [concluded](#) that the PRA's executive-led model may not be perceived as sufficiently independent and objective for contested decision-making. Accordingly, the review recommended that the PRA establish an independent case committee, similar to the RDC operated by the FCA.

### EDMC Remit and Composition

The EDMC is the BoE's response to the Treasury's recommendation. The EDMC will be the BoE's decision-making body for contested enforcement cases with respect to prudential regulation, financial market infrastructures, and resolution.

In line with the Treasury's recommendation, the EDMC will be functionally independent from the BoE's investigation teams and BoE decision-makers in contested enforcement cases. The EDMC will be made up of individuals who are not employees of the BoE and who will be independent from the BoE's existing executive management structure. The first chair of the EDMC will be Sir William Blair, a former High Court judge in charge of the English Commercial Court.



The EDMC offers the BoE a more efficient and objectively fairer decision-making body for contested enforcement cases.



### EDMC Procedures

Under the EDMC's procedures, panels of at least three EDMC members will be convened by the EDMC chair to hear contested enforcement cases. The composition and size of the EDMC panels may vary depending on the nature of the case under consideration.

The key steps that an EDMC panel will take in a contested enforcement case are summarised below:

1. **Warning Notices:** The EDMC panel decides whether the BoE's recommendation to issue a warning notice is appropriate. If the EDMC panel decides to issue a warning notice, the EDMC will determine the wording of the warning notice and its timing.

2. **Representations:** The recipient of a warning notice may make representations to the EDMC panel in relation to the warning notice. Alternatively, the recipient may notify the EDMC panel that they do not wish to make representations and that they intend to have the matter referred to the Upper Tribunal (Tax and Chancery Chamber).

Representations to the EDMC panel will usually be in writing, although the recipient of a warning notice may ask the EDMC for permission to make oral representations. The EDMC panel will enable relevant BoE staff to respond to any representations where appropriate, and the EDMC panel itself may raise further questions or points.

3. **Decision Notices:** The EDMC panel will determine whether to issue a decision notice once it has considered all of the material that has been placed before it, including any written and oral representations. If the EDMC decides to issue a decision notice, the recipient of the decision notice may refer the EDMC's decision to the Upper Tribunal (Tax and Chancery Chamber). The subsequent proceedings of the Upper Tribunal will not be a matter of the EDMC panel.

If the EDMC panel decides against issuing a decision notice, the relevant parties will be notified. Where appropriate, the BoE will issue a notice of discontinuance of action to the person to whom the warning notice was given.

### A New Enforcement Regulator?

The EDMC offers the BoE a more efficient and objectively fairer decision-making body for contested enforcement cases. Its remit goes beyond prudential regulation and extends to all of the areas in which the BoE has enforcement powers. Moreover, the caliber of the EDMC's [initial members](#) suggests that the BoE is serious about the EDMC's reputation and long-term success.

All of the above factors suggest that the PRA is moving away from its traditional "early intervention" approach to supervision and toward the ex-post enforcement action model traditionally preferred by the FCA. Indeed, the EDMC is modelled on the FCA's RDC.

Arguably, the EDMC simply provides a more efficient forum to deal with the greater volume of contested enforcement cases anticipated under the Senior Managers Regime ("SMR"), which focuses on individual accountability. Individuals, unlike firms, are more likely to contest enforcement action in an attempt to clear their names.

However, the PRA's steadily increasing and diverse body of enforcement actions over the last five years would suggest that the EDMC is more than an administratively convenient forum for determining contested SMR cases. Additionally, the EDMC reflects a growing interest from prudential regulators in the enforcement space in recent years. Accordingly, the establishment of the EDMC should be viewed as part of the PRA's increasingly sophisticated and tougher approach to enforcement. It follows that the PRA's activities in this area should be kept under review.

In addition, it will be important to monitor how the PRA and EDMC interact with the FCA and RDC in cases where both regulators have a stake. The regulators have proposed to provide more guidance on joint investigations and the referral of matters for investigation in due course. Historically, joint enforcement matters have relied more heavily on FCA's enforcement infrastructure. If the EDMC marks a shift away from this approach, then a new enforcement regulator may well have arrived.

### THREE KEY TAKEAWAYS

1. The PRA has strengthened its enforcement regime by creating an independent decision-making committee for contested enforcement cases similar to the FCA's RDC.



Harriet Territt  
London



Adam R. Brown  
London

2. The creation of the EDMC potentially reflects a growing interest from European prudential regulators in the enforcement space in recent years.
3. Firms should monitor the EDMC's activities and regulatory statements on how the EDMC will operate alongside the FCA's enforcement structure.



Aidan Lawes  
London



Nikesh Pandit  
London

[All Contacts >>>](#)

---

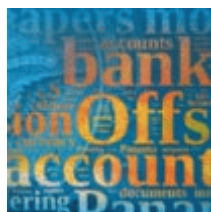
YOU MIGHT BE INTERESTED IN: [Go To All Recommendations >>](#)



[CFTC Announces  
Insider Trading  
Task Force and  
New Insider  
Trading Case](#)



[Case Alleging  
Cryptocurrencies  
Are Securities Can  
Proceed to Trial](#)



[First Conviction in  
the United States  
for FATCA  
Violations](#)

---

SUBSCRIBE

SUBSCRIBE TO RSS



---

Jones Day is a global law firm with more than 2,500 lawyers on five continents. We are One Firm Worldwide<sup>SM</sup>.

**Disclaimer:** Jones Day's publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at [www.jonesday.com](http://www.jonesday.com). The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2018 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113