



Banc Ceannais na hÉireann
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GUIDANCE ON INVESTIGATIONS UNDER PART 3 OF THE CENTRAL BANK REFORM ACT 2010



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INTRODUCTION

PURPOSE OF DOCUMENT

- 1.1 This document (**“the Guidance”**) is intended to provide individuals and Regulated Financial Service Providers (**“regulated entities”**) with a brief overview of the manner in which investigations, held pursuant to Part 3 of the Central Bank Reform Act 2010 (**“the Act”**), and decisions flowing from such investigations, will operate. The Guidance in no way replaces the provisions of the Act, and merely provides assistance as to the manner in which investigations may be conducted. The Guidance should not be taken to represent an exhaustive guide to the entire investigative process which is set out in the Act.
- 1.2 The Central Bank of Ireland (**“the Bank”**) has issued regulations - the Central Bank Reform Act 2010 (Procedures Governing the Conduct of Investigations) Regulations 2012 (**“the Regulations”**) - which set out certain procedures to be followed in the exercise of the powers of the Bank, the Governor or the Deputy Governor (Financial Regulation)(**“the Deputy Governor”**)¹ under Part 3 of the Act; to the extent that there is a conflict between the Regulations and this Guidance, the Regulations take precedence.

STRUCTURE OF THE GUIDANCE

- 1.3 This Guidance will address each of the key stages of the process envisaged by Part 3 of the Act, in particular:
- i. Preliminary Consideration;
 - ii. The Investigation;
 - iii. The Report;

¹ Pursuant to section 23(2) of the Central Bank Act 1942, the Commission of the Central Bank decided to change the titles “Head of Financial Regulation” and “Head of Central Banking” to “Deputy Governor”: *Iris Oifigiúil* 13th May 2011.

- iv. The Decision.

INTERPRETATION

- 1.4 Section 52 of the Act prescribes that the Governor and/or the Deputy Governor may delegate their respective functions under the Act to another suitably qualified person(s). Accordingly, this Guidance must be read in light of the power contained in section 52 of the Act, and references to the Deputy Governor should be interpreted as including references to his delegatee(s).
- 1.5 In this Guidance:
 - i. The term “person” shall be taken to mean a natural or a legal person;
 - ii. The term “investigation” or “investigate” or any word which is a variant, derivative or is analogous to any of those words shall be taken as referring to an investigation under Part 3 of the Act;
 - iii. A term utilised in this Guidance which is also used in the Act has the same meaning as in the Act unless a contrary intention appears; and,
 - iv. All references to the masculine shall be read as including reference to the feminine.

PRELIMINARY CONSIDERATION

2.1 The Act empowers the Deputy Governor to commence an investigation into the fitness and probity of a person (**“the Subject”**) to perform a particular controlled function (**“CF”**) where:

- there is reason to suspect the Subject’s fitness and probity to perform the relevant CF, and
- an Investigation is warranted in the particular circumstances of the case.

An Investigation may be conducted in respect of:

- a person performing a CF; or,
- a person who a regulated entity proposes, or is considering, to appoint to carry out such a CF (other than a “pre-approval controlled function”).

2.2 Examples of grounds upon which the Deputy Governor is entitled to commence an Investigation are set out in Section 25(3) of the Act.

2.3 Concerns may arise in respect of a Subject’s fitness and probity to perform a CF in a number of different contexts. For example, the Deputy Governor may form a suspicion as a result of information obtained by the Bank in the course of its day-to-day supervisory activities.

2.4 Subject to paragraph 2.6 below, where the Deputy Governor is considering whether or not to commence an Investigation, he will give written notice to the Subject, who will be afforded 15 working days within which to provide submissions to the Deputy Governor for consideration. In certain circumstances the regulated entity may also be notified of the above notice.

2.5 Where, following consideration of any submissions received under paragraph 2.4, the Deputy Governor decides to commence an investigation, the Subject and relevant regulated entity will be notified of the decision in writing (**“the**

Written Notice”). The Written Notice will outline the nature of the Deputy Governor’s concerns into the fitness and probity of the Subject.

- 2.6 In circumstances where the Deputy Governor is satisfied that it is necessary in the interests of the proper regulation of a regulated entity that the Subject not perform the relevant (or any) controlled function while the Deputy Governor is carrying out an investigation, the Deputy Governor may commence an investigation and issue a Suspension Notice without having afforded a person an opportunity to make submissions as outlined in paragraph 2.4.
- 2.7 The correspondence specified in paragraphs 2.4 and 2.5 will be served on the Subject and regulated entity, as appropriate, in accordance with paragraph 6.9 below.

THE INVESTIGATION

CONDUCT OF INVESTIGATION

3.1 Once a person has been served with a Written Notice, the Investigation will be deemed to have commenced.

(i) First Stage

3.2 In general, it is envisaged that there will be two information-gathering stages in an Investigation. The first phase (**“the First Stage”**) will be an initial, informal information-gathering exercise. This will involve the collection of documentary evidence and/or interviews with witnesses, which may include the Subject. These interviews will be conducted in private. The Deputy Governor may require individuals to appear before him or to provide documentary material to him, and may issue Evidentiary Notices for this purpose if necessary.²

3.3 During the First Stage, the Deputy Governor does not intend to circulate lists of questions in advance of the taking of any evidence from witnesses. Given the nature of an Investigation at this stage, it will not be possible to predict with certainty what questions will or will not arise at any particular interview.

(ii) Second Stage

3.4 Where the outcome of the First Stage indicates that it is possible that adverse conclusions may be drawn from the evidence obtained, the Deputy Governor will proceed to the second phase of the Investigation (**“the Second Stage”**). The Second Stage will operate in the following way:

3.4.1 At the conclusion of the First Stage, the Deputy Governor will write to the Subject setting out a summary of the present concerns of the Deputy

² As to Evidentiary Notices in general, see paragraphs 3.5 – 3.8 below.

Governor in light of the material gathered during the First Stage (**“the Statement of Grounds”**), together with copies of such materials as are relevant. Where interviews have been conducted during the First Stage, the Deputy Governor will provide an account of the evidence given at those interviews to the Subject.

- 3.4.2 The Subject or any regulated entity concerned may, after receiving the Statement of Grounds, provide the Deputy Governor with details of any individual whom the Subject and/or regulated entity concerned contends could give evidence relevant to the concerns in the Statement of Grounds. The Deputy Governor may, at his sole discretion, conduct an interview and/ or oral hearing with, or require evidence to be produced by, such a person,
- 3.4.3 For the avoidance of doubt, the Deputy Governor, during the course of an Investigation, may issue an amended Statement of Grounds, to reflect the up-to-date concerns of the Deputy Governor at a particular point in time during the Investigation, including following any interviews or oral hearings conducted with the persons referred to in paragraph 3.4.2.
- 3.4.4 In circumstances where an oral hearing is to occur, the Deputy Governor will then set a date or dates on which oral hearings will take place. The Subject may be required to give evidence on oath and may be cross-examined at such a hearing. In addition, the Deputy Governor may permit the Subject and/ or regulated entity to:
- Attend to hear the evidence obtained by the Deputy Governor;
 - Cross-examine such witnesses as are called;
 - Give evidence personally;
 - Tender documentary evidence to the Deputy Governor relevant to the matter under investigation;

- Request the Deputy Governor to require the attendance of any other person whom the Subject believes could give relevant evidence.

The Deputy Governor, when setting a date(s) for the oral hearing or at any time subsequently, may make such other directions as he deems fit in the circumstances of the case.

- 3.4.5 The Subject may be legally represented at any hearing held during the Second Stage.
- 3.4.6 The Deputy Governor has the discretion to grant or refuse any application made to him in the course of an oral hearing. That discretion will be exercised fairly, taking due account of fair procedures. The Deputy Governor may also make such directions as he deems appropriate to ensure the proper and efficient conduct of the oral hearing.
- 3.4.7 In general, oral hearings during an Investigation will be held in private, unless the Deputy Governor directs otherwise. Where the oral hearing is to be held in private, the Deputy Governor may decide which persons are permitted to attend the oral hearing. A hearing may (at the request of the Subject or otherwise) be held publicly where the Deputy Governor is satisfied that it is desirable in the public interest that the hearing (or part of the hearing) should be held in public.
- 3.4.8 Where an oral hearing takes place in private, the Deputy Governor may give directions specifying who may be present during proceedings and preventing or restricting the publication of the whole or any part of the evidence given during the course of the hearing.
- 3.4.9 The proceedings at an oral hearing will be recorded by a stenographer (or by other similar means) and any party to the oral hearing before the Deputy Governor shall be entitled to a transcript of the proceedings upon payment of a reasonable fee to be determined by the Deputy Governor, where appropriate.

- 3.4.10 At the conclusion of an oral hearing, the Subject (personally, or through his legal representative) may make submissions to the Deputy Governor. Other than where the Deputy Governor directs, such submissions shall be made in writing to the Deputy Governor within such period of time as he may direct.

EVIDENTIARY NOTICES

- 3.5 In order to enable the Deputy Governor to properly carry out an Investigation, the Act provides that he may serve an “Evidentiary Notice” on a person. The Deputy Governor may serve an Evidentiary Notice on the Subject and any other person who the Deputy Governor believes on reasonable grounds may be able to give evidence in relation to the matter being investigated. The Evidentiary Notice may require the person to do one or more of the following things:
- Appear before the Deputy Governor to give evidence about a matter;
 - Provide evidence to the Deputy Governor; or
 - Produce a document for examination.
- 3.6 The Deputy Governor may serve an Evidentiary Notice on a person during the First Stage or the Second Stage of an Investigation. During the Second Stage the Deputy Governor will always issue Evidentiary Notices at the point where it is proposed to call a person to give evidence or produce a document before an oral hearing.
- 3.7 Where a person is served with an Evidentiary Notice, that person is obliged to comply with the notice. Failure to comply with an Evidentiary Notice will amount, amongst other potential repercussions, to a criminal offence, unless the person has a reasonable excuse or has been excused by the Deputy Governor. What amounts to a reasonable excuse will depend on the circumstances of the case. It is not possible to exhaustively list the matters

which may constitute a reasonable excuse, however such matters may include where the person:

- does not have (and cannot reasonably obtain) the document or information;
- could not be compelled to produce the document in, or provide the information to, a court of law;
- is unable to attend on the date requested, but will be able to appear at a later date *e.g.* due to illness.

Where a person feels that he has a reasonable excuse for refusing or failing to give evidence or provide information to the Deputy Governor, he must provide a written statement setting out the details of the excuse to the Deputy Governor.

- 3.8 The Deputy Governor may certify a refusal or failure of a person to comply with an Evidentiary Notice to the High Court. The person is entitled to appear before the High Court and that Court may hear from any witnesses in relation to the failure or refusal. The High Court may make any order it thinks fit, including an order directing the person to comply with the Evidentiary Notice or answer particular questions.

ALLOWANCES OR EXPENSES ARISING AS A RESULT OF COMPLIANCE WITH AN EVIDENTIARY NOTICE

- 3.9 A person who appears before the Deputy Governor in compliance with an Evidentiary Notice is entitled to be paid, by the Bank, such allowances and travelling or other expenses as the Deputy Governor may reasonably allow. However, the costs and expenses of the following persons will not be paid:

- The Subject;
- A regulated, or formerly regulated, entity;
- Any person called to give evidence on behalf of the Subject or a regulated, or formerly regulated, entity.

SUSPENSION NOTICES

- 3.10 Where a person is, or has been, the subject of an Investigation, the Deputy Governor may issue a Suspension Notice in relation to the person prohibiting that person from performing a CF if the Deputy Governor is satisfied that a Suspension Notice is necessary in the interests of the proper regulation of a regulated entity. The Suspension Notice will be in writing. The Deputy Governor will serve the Suspension Notice on the suspended person and any regulated entity for whom the person is, or is going to be, performing a CF. The Suspension Notice may be served in any of the manners set out in paragraph 6.9 below.
- 3.11 The Suspension Notice will require the suspended person and the regulated entity concerned to show cause, in writing within 5 days of the service of the notice, why the Suspension Notice should not be confirmed.
- 3.12 A regulated entity is obliged to comply with the terms of the Suspension Notice and may not permit a suspended person to perform the specified CF. Similarly, the suspended person may not perform the specified CF as long as the Suspension Notice remains in force.
- 3.13 A Suspension Notice lasts for an initial period of 10 days (unless earlier revoked by the Deputy Governor). If, having considered any submissions made by the suspended person and/or the regulated entity, the Deputy Governor is still of the view that the Suspension Notice should remain in force, he may confirm the Suspension Notice. Where so confirmed, the Suspension Notice will remain in force for a period of 3 months, unless sooner revoked.
- 3.14 The Suspension Notice may be extended for a further period of 3 months by the High Court. Where the Deputy Governor intends to apply to the Court for such an extension, the suspended person and any regulated entity concerned will be notified of the application.

3.15 Where, at any time in which a Suspension Notice is in effect, the Deputy Governor considers that the suspended person is performing the relevant CF, or a regulated entity is permitting the suspended person to perform the relevant CF, the Deputy Governor may apply to the High Court without notice to the suspended person or the regulated entity for an order directing the person or regulated entity to comply with the Suspension Notice.

THE REPORT

PREPARATION OF REPORT

- 4.1 After carrying out the information gathering stage of an investigation the Deputy Governor shall provide written notice to the Subject and any regulated entity concerned informing them of the conclusion of that stage of the Investigation. Within six months of issuing the above written notice, the Deputy Governor shall serve a copy of a report prepared in accordance with section 41(1) of the Act. The aforementioned six month timeframe may be affected where the Deputy Governor, before serving a copy of a report, requires any person to provide additional material.

SERVICE OF REPORT

- 4.2 As soon as practicable after completion, the Report will be sent to the Bank and the Governor, and to the Subject and any regulated entity concerned. The Report shall be served in any of the ways set out in paragraph 6.9 below. The Subject and regulated entity will be informed of their right to make submissions in response to the Report.

SUBMISSIONS IN RESPONSE TO REPORT

- 4.3 A Subject and regulated entity on whom the Report is served may, within 7 days of service of the Report or such longer period as the Deputy Governor considers reasonable, make submissions in writing to the Deputy Governor on any matter contained in the Report. Any submissions made by the Subject and/or the regulated entity to the Deputy Governor, will be passed to the Bank and the Governor for their consideration.
- 4.4 In the ordinary course, it is envisaged that the submissions made in relation to the Report will be of a legal nature only, as the Subject and regulated entity will, in most cases, have had an opportunity to address issues of factual

contention at the Second Stage of the Investigation. Notwithstanding this, the Subject and regulated entity will be at liberty to make such submissions as they consider relevant to the consideration of the Report.

THE DECISION

ISSUANCE OF A PROHIBITION NOTICE

- 5.1 Once the Bank and the Governor receive the Report and any submissions made in relation to same, they will both consider the matter. Where either the Bank or the Governor reasonably forms the opinion that the Subject is not of such fitness and probity as is appropriate to perform a particular or any CF, or any part thereof, a Prohibition Notice may be issued against the Subject.
- 5.2 Examples of grounds upon which the Governor or the Bank may form the opinion that the Subject is not of such fitness and probity as is appropriate to perform a particular CF are set out in Section 43(2) of the Act.
- 5.3 A Prohibition Notice can apply to one or more specified CFs, or parts thereof, or to all CFs. The Prohibition Notice may also be in respect of a particular regulated entity, a class of regulated entity or all regulated entities.
- 5.4 Before the Bank or the Governor may issue a Prohibition Notice a number of steps must occur. These include, as appropriate:
 - 5.4.1 The Bank or the Governor (as appropriate) must be satisfied that the Subject and regulated entity concerned has been informed of its entitlement to make submissions on the matters set out in the Report, and the Bank or the Governor (as appropriate) must have considered any submissions made in exercise of that entitlement.
 - 5.4.2 In addition, the Subject and regulated entity concerned must have been afforded such hearing in relation to the proposed issue of the Prohibition Notice as is necessary to do justice in the circumstances. In the ordinary course, this will include inviting and considering submissions in respect of the proposed issuance of the Prohibition Notice, and will not address

material subject to a hearing during the Second Stage of the Investigation. The Bank or the Governor (as appropriate) will send to the Subject and any regulated entity concerned a letter informing them that the Bank or Governor is minded to issue a Prohibition Notice within 3 months of the Bank or Governor receiving the Report and submissions (as discussed in paragraph 4.3). This letter will invite submissions in relation to the issue of the proposed Prohibition Notice.

Any such submissions shall be made within 7 days (or such longer period as the Bank or Governor considers reasonable in the circumstances) of receipt by the Subject and any regulated entity of the above letter.

5.4.3 Finally, the Bank or the Governor must be satisfied that the issue of the Prohibition Notice is necessary in the circumstances.

5.5 Where neither the Governor nor the Bank forms the opinion that a Prohibition Notice should issue, the Subject and the regulated entity shall be informed of this fact as soon as is reasonably practicable.

5.6 A Prohibition Notice can be served in any of the ways set out in paragraph 6.9 below and takes effect on service upon either the Subject or the regulated entity concerned.

EFFECT OF A PROHIBITION NOTICE

5.7 A person shall not carry out a CF where to do so would contravene a Prohibition Notice served on him and a regulated entity shall not permit a prohibited person to perform a CF where to do so would contravene a notice served on it.

5.8 Where a person performs a CF in contravention of a Prohibition Notice or where a regulated entity permits a prohibited person to perform a CF in contravention of a Prohibition Notice, the Deputy Governor may apply to the

High Court, without notice to the Subject or regulated entity, for an Order directing the person or the entity to comply with the Notice.

- 5.9 A Prohibition Notice ceases to have effect 2 months after first service, or such shorter period if specified in the Notice, unless an application has been made to the High Court for confirmation of the Notice. Where such an application is made, the Notice continues to have effect pending the determination of the matter by the High Court or until the Notice is withdrawn.
- 5.10 The Bank or the Governor will not continue the Prohibition Notice for longer than is necessary and shall not make an application to Court unless such an extension is necessary to achieve the purposes of Part 3 of the Act.
- 5.11 The Bank may publish a Prohibition Notice where the Governor is of the opinion that it is necessary to achieve the purposes of Part 3 of the Act.

CONFIRMATION OF PROHIBITION NOTICE

- 5.12 The Bank may apply to the High Court, on notice, for an Order confirming the Prohibition Notice. Where the Subject consents to the confirmation of the Prohibition Notice, there is no requirement for the Subject to attend before the High Court. A confirmation hearing may be held in private where the High Court is satisfied that the hearing should be held otherwise than in public; this may arise in cases of confidentiality or commercial sensitivity. If the High Court deems it just and equitable to do so, it may hear evidence which was not adduced before the Governor or the Bank.
- 5.13 Where the High Court confirms the Prohibition Notice, the prohibition may be expressed to have effect indefinitely, for such period as the High Court thinks appropriate, or until further order of the High Court.
- 5.14 Once confirmed, a Prohibition Notice takes effect as an order of the High Court and may be enforced accordingly.

AGREEMENT TO BE BOUND BY PROHIBITION NOTICE

5.15 Where a Prohibition Notice has issued, the Subject and any regulated entity may agree in writing with the Bank or the Governor (as appropriate) to continue to comply with the Prohibition Notice for such period as may be agreed.

ISSUING A PROHIBITION NOTICE WITHOUT AN INVESTIGATION

5.16 In exceptional circumstances, where there are undisputed facts that in the reasonable opinion of the Bank or Governor render an investigation unnecessary, and the Subject and relevant regulated entity have been afforded a reasonable opportunity to make submissions in relation to the matter, the Bank or Governor may proceed to issue a Prohibition Notice, notwithstanding that no Investigation or hearing has been undertaken by the Deputy Governor.³

³ Where such circumstances apply, the requirement in paragraph 5.4.1 will not be relevant.

MISCELLANEOUS PROVISIONS

USE OF INFORMATION

- 6.1 The Bank may use any information and evidence gathered by the Deputy Governor in the course of an Investigation under Part 3, Chapter 3 of the Act, anything in submissions made to the Deputy Governor pursuant to paragraph 4.3, and anything in any document/evidence placed before the Court in the course of proceedings under Part 3 of the Act, for the purposes of any statutory function of the Bank, including its functions pursuant to Part IIIC of the Central Bank Act 1942.
- 6.2 The Bank may have regard to a document or information gathered or received otherwise than under Part 3 of the Act for any purpose under Part 3.

OFFENCES OF PROVIDING FALSE/MISLEADING INFORMATION

- 6.3 A person should not provide information to the Deputy Governor or the Bank for the purposes of this Part that the person knows or ought to know is false or misleading.
- 6.4 A person who is carrying out, or proposes to carry out, a CF should not provide information or documents that he knows or ought to know is false or misleading to a regulated entity with a view to that material being provided to the Deputy Governor or the Bank for the purposes of Part 3 of the Act.
- 6.5 A person shall not give the Deputy Governor or Bank for the purposes of Part 3 of the Act, a document whether in response to an Evidentiary Notice or otherwise, that the person knows or ought to know is false or misleading or is not what it purports to be.

- 6.6 A person appearing before the Deputy Governor shall not, in an answer to a question put to him by the Deputy Governor or by a person with the Deputy Governor's consent, make a statement which he knows or ought to know is false or misleading in a material particular.
- 6.7 A breach of any of the matters set out in paragraphs 6.3 to 6.6 above, constitutes an offence and may expose persons on summary conviction to a fine not exceeding €5,000.00 and/or imprisonment for a term not exceeding 12 months, or on indictment to an unlimited fine and/or imprisonment not exceeding 5 years.

FAILURE TO COMPLY OR CO-OPERATE SUBJECT TO ADMINISTRATIVE SANCTIONS

- 6.8 Where a regulated entity or person concerned in its management fails to comply with a requirement under Part 3 of the Act, the Bank may, if it considers it appropriate, commence administrative sanctions proceedings under Part IIIC of the Central Bank Act 1942 against the regulated entity or persons concerned in its management.

SERVICE OF DOCUMENTS

- 6.9 Where any document or notice is required to be served on a person under Part 3 of the Act, service may be effected by any of the following means:
- By delivering it to the person;
 - By leaving it at the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, at that address;
 - By sending it by post in a prepaid letter to the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, to that address; or
 - Electronically (by electronic mail to an email address, or by facsimile to a fax number, furnished by the person to, or otherwise known to, the Deputy Governor).

STANDARD OF PROOF

6.10 Where the Deputy Governor makes any finding(s) as part of a Report under section 41 of the Act, any such findings(s) may be made on the balance of probabilities.

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