

**INQUIRY PURSUANT TO PART IIIC OF THE CENTRAL BANK ACT 1942 CONCERNING
THE IRISH NATIONWIDE BUILDING SOCIETY, MICHAEL P. FINGLETON, WILLIAM
GARFIELD MCCOLLUM, TOM MCMENAMIN, JOHN S. PURCELL AND MICHAEL P.
WALSH (“the Inquiry”)**

INQUIRY MANAGEMENT MEETING

Wednesday 30 November 2016

Decision on Modular Hearings

Introduction

1. At the Inquiry Management Meeting (“IMM”) held on 16 March 2016, the Legal Practitioner Team (“LPT”) suggested that the expeditious conduct of this Inquiry may be best served by splitting the Inquiry hearing into a number of modules. In making this suggestion, reference was made to Section 33AY(1) of the Central Bank Act 1942 (as amended) (“the Act”) which requires the Inquiry to act with “*as little formality and technicality, and with as much expedition, as a proper consideration of the matters before it will allow*”. This is subject to the requirement outlined at Section 33AY(2): “*At an Inquiry, the [Bank] shall observe the rules of procedural fairness, but is not bound by the rules of evidence*”.
2. By letter dated 16 September 2016 written by the Regulatory Decisions Unit of the Central Bank (“RDU”), on behalf of the Inquiry Members to Messrs. Michael Fingleton, William Garfield McCollum, Tom McMenemy, John S. Purcell and Michael P. Walsh (“the Persons Concerned”) and Enforcement Division of the Central Bank (“Enforcement”), the modular approach to Inquiry hearings was identified as an issue which would be considered at the IMM scheduled for 12 – 17 October 2016. The Persons Concerned and Enforcement were given until 30 September 2016 and 7 October 2016 respectively to submit written submissions on this matter.
3. The 16 September 2016 letter set out the Inquiry Members’ provisional view that there was likely to be some merit to a modular approach and that the structure of the Investigation Report would suggest that the Inquiry might be broken into four modules as follows:

Module 1 - consisting SPCs 1, 2, 3 and 4;

Module 2 - consisting SPC 5;

Module 3 - consisting SPC 6; and

Module 4 - consisting SPC 7.

4. The Inquiry Members further proposed that in the event that the Inquiry hearing was to be conducted on the basis of the modules identified above, their provisional view was that the modules would be heard in the following order: Module 2, Module 3, Module 4 and finally Module 1. The letter stated:

“As a provisional view, it would seem to the Inquiry Members that Module 1 requires the consideration of a large volume of loan documentation relating to individual loans the preparation of which ... may take some time. By contrast the SPCs relevant to each of Modules 2, 3 and 4 are more self-contained and relate to a significantly smaller pool of documents. In these circumstances the Inquiry Members consider that, in the event that a modular approach is adopted along the lines considered above, there may be merit in hearing Modules 2, 3 and 4 before hearing Module 1 which would facilitate the necessary work in respect of Module 1 continuing while Modules 2, 3 and 4 are being heard.”

5. This decision will look first at the proposition that the Inquiry hearings should be broken into modules and secondly, the order in which such modules should be heard. It will address the issue that arose in relation to whether a preliminary module was required in relation to general issues or whether the parties would be afforded the opportunity to make an opening statement in respect of same. It will also address the issue of whether the Inquiry Members may make decisions at the end of each module.

Modular Approach to the Inquiry Hearing

6. In his submission dated 3 October 2016, Mr Walsh stated that he could not meaningfully comment on the Inquiry Members’ proposal for modular hearings until such time as the case against him is adequately explained. He submitted that the letter of 16 September 2016 did not precisely explain what was envisaged by a modular approach and queried whether it was proposed that a decision would be made after each module. He also queried how the Inquiry Members had come to the provisional view expressed in their letter.

7. In its submission dated 7 October 2016, Enforcement stated that “*a modular approach has the potential to assist with the expeditious conduct of the Inquiry*”.
8. Enforcement further submitted that the proposed Module 1 was very large in scale in that SPCs 1 – 4 would require consideration of a very large volume of loan sample documentation concerning 98 individual loan accounts across nine commercial lending customers reviewed as part of the Investigation. By way of example, Enforcement pointed out that the Investigation Report concerning INBS runs to 1,792 pages of which 1,297 concern SPCs 1 – 4. Accordingly, Enforcement suggested that Module 1 should be further broken into sub modules as follows:
 - Module 1.1 - consisting SPC 1;
 - Module 1.2 - consisting SPC 2;
 - Module 1.3 - consisting SPC 3; and
 - Module 1.4 - consisting SPC 4.
9. In relation to Mr Walsh’s request that the case against him should be adequately explained, Enforcement submitted that this had been done and this issue had already been addressed in submissions furnished by them to the Inquiry on 1 June 2016 and that they did not propose to repeat them.
10. By letter dated 24 November 2016, Mr Walsh repeated his request made in his letter of 3 October 2016 that the Inquiry Members and the LPT should explain in advance what precisely is envisaged when the Inquiry and the LPT refer to the hearing being broken down into modules.
11. By letter dated 25 November 2016 RDU, on behalf of the Inquiry Members, responded to the two specific queries raised by Mr Walsh in his letter of 3 October 2016 as follows:

“1. No provisional view has been expressed by the Inquiry Members in respect of whether or not a final decision should be made in respect of each specific SPC after each module. Parties are free to make submissions on that issue at the hearing on 30 November next.

2. The Inquiry Members have set out the basis for their provisional view on modular hearings in their letter of 16 September 2016. In any event, a decision by the Inquiry Members as to how to organise the inquiry is in essence a matter for them.”

12. At the IMM, the LPT submitted that there were two options open to the Inquiry about how the hearing of evidence before it should proceed:

(a) The first one was that there should be a unitary hearing, which would involve a single hearing spread over time at which all of the seven SPCs alleged against the Persons Concerned would be inquired into without any significant break or distinction between those hearings.

(b) The second option would be a set of distinct modular hearings which would deal with different topics at individual hearings. The LPT submitted that one obvious way in which that could be arranged would be by reference to the SPCs alleged against INBS and against the Persons Concerned. The LPT outlined three reasons why such an approach should be adopted by the Inquiry:

- i. the original estimate in the Notice of Inquiry that the Inquiry would last 45 days and which was provided on the basis that the questionnaire which was appended to the Notice of Inquiry would be addressed by the Persons Concerned in a manner that might narrow the issues and lead to some consensus about the basic facts before the Inquiry and the extent to which the SPCs were, in truth, being disputed. The LPT submitted that this had not in fact happened and that this will lengthen the likely time that the Inquiry will be at hearing;
- ii. the decisions taken by the Inquiry Members in relation to proof of documents which could have the potential of lengthening the time required to complete this Inquiry; and
- iii. the question of access to documents which could involve even more documentation than the 110,000 documents that have already been made available to the Persons Concerned. Again, this would have an impact on the length of the Inquiry.

13. In his submissions counsel on behalf of Mr Walsh, stated that, subject to clarification on the issue of making decisions at the conclusion of each module which is dealt with at paragraph 31 et seq below, he could see the value in having a modular approach in order to save costs and move matters forward.

14. Mr Fingleton, in his submission to the IMM, agreed with Mr Walsh and did not object to modular hearings.
15. Enforcement concurred with the view expressed by all other parties to the Inquiry that modular hearings were appropriate.
16. In light of the Inquiry Members' own preliminary view, the agreement in principle of those Persons Concerned who were in attendance and Enforcement, the volume of the documentation that will be required for consideration and given that there has been no suggestion of any prejudice to any of the Persons Concerned the Inquiry Members have decided that the Inquiry will be heard in modules.

Structure of Modules

17. As set out above, the letter of 16 September 2016 suggested that the Inquiry hearing might be broken into four modules as outlined at paragraph 3 above.
 - a. Module 1 relates to:
 - i. the processing of commercial loan applications (SPC1);
 - ii. the approval of commercial loan applications by the Society (SPC2);
 - iii. the security obtained by the Society in respect of commercial loans (SPC3);
 - and
 - iv. the monitoring of commercial lending (SPC4).SPCs 1 - 4 necessarily involve the consideration of some 98 loans and the significant quantity of documentation relevant to those loans.
 - b. Module 2 (SPC 5) relates to the functions of the Credit Committee;
 - c. Module 3 (SPC 6) concerns reports to the Board of Directors; and
 - d. Module 4 (SPC 7) relates to what, if any, policy applied to profit share agreements entered into by the Society.
18. Enforcement reiterated at the IMM its suggestion that Module 1 may need to be further sub-divided into four distinct modules dealing with SPCs 1 – 4 respectively.

19. Mr Fingleton suggested that SPC 4 could be taken with SPCs 5, 6 and 7 on the basis that it could be dispensed with on external evidence.
20. The Inquiry Members have decided that the structure of the modular approach as outlined in their letter of 16 September 2016 and set out at paragraphs 3 and 17 above is the structure that will be adopted for the hearing of evidence in this Inquiry. No decision is being made at this time as to how or whether Module 1 may usefully be subdivided. On balance, the inclusion of SPC 4 in Module 1 would appear to be more logical than separating it out into a separate module as suggested by Mr Fingleton.

Order of Modular Hearing

21. As outlined at paragraph 4 above, the Inquiry Members suggested that the order for hearings would be Module 2, 3, 4 and 1. This was suggested on the basis that Modules 2, 3 and 4 were more self-contained and related to relatively fewer documents than Module 1. Preparation for Module 1 could proceed whilst the other Modules were dealt with.
22. In its written submission Enforcement submitted that hearing the proposed modules in sequential order, following the structure of the Investigation Reports "*is likely to assist in the logical and efficient consideration by the Inquiry Members of each SPC as well as the case against INBS and each of the Persons Concerned as a whole*". In addition, Enforcement submits that it must be taken into consideration that not all of the Persons Concerned are alleged to have participated in all of the SPCs.
23. In his oral submission counsel, on behalf of Mr Walsh, agreed with the suggestion by the LPT that it would be more cost effective to adopt the order as proposed by them. Counsel for Mr Walsh said that he did not believe that there was any essential logic or necessity to adopting the approach suggested by Enforcement of following the order in which the SPCs appear in the Investigation Reports.
24. In his oral submissions to the IMM, counsel for Enforcement, said that ultimately it was a question of balancing the assistance that might be provided to the Inquiry Members by following the chronological sequence of the Investigation Reports against the perceived benefit of "*parking SPCs 1 to 4*". He acknowledged that SPCs 1 – 4 involved a considerable amount of documentation.

25. The Inquiry Members are of the view that, on balance, it would be more expeditious and cost effective to proceed with Modules 2, 3 and 4 before hearing Module 1. Such ordering of the modules would not prejudice any of the Persons Concerned and it would allow for the preparation needed for a full consideration of SPCs 1 – 4 to continue during the progress of the other modules.

Preliminary Module

26. In his letter of 24 November 2016 Mr Walsh asked for further explanation of what was meant by a modular approach. He stated:

“We can appreciate that the Inquiry Members would require to understand the operations of the Society in the relevant period such as its governance, regulation, strategic plans, its market and its management structures, as full knowledge of these would be essential in assessing compliance or otherwise with the designated enactments.”

27. In response to that suggestion, the LPT submitted that, inasmuch as the Inquiry Members do need to understand some or any of the issues identified by Mr Walsh, this should only be done in the context of the SPCs.

28. Counsel for Mr Walsh submitted that it was very important from his perspective that there would be an opening module or that there would be opening statements by both INBS and Mr Walsh. He said that this was important as a matter of basic fairness.

29. Under Appendix 3 of the Guidelines issued by the Central Bank¹ there is a provision for preliminary submissions. This is also provided for at Paragraph 5.3 of the Outline Procedure of the Inquiry pursuant to Part IIIC of the Central Bank Act 1942 (the “Outline Procedure”) issued by the Inquiry:

“The Persons Concerned shall each be invited to make preliminary submissions. If the Inquiry Members consider it to be of assistance, they may also invite the Legal Practitioner and/or Enforcement to make preliminary submissions.”

¹ Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942, 3 November 2014

30. The Inquiry Members do not propose having a preliminary module in advance of commencing the four modules indicated above but there will be an opportunity for the Persons Concerned and, if the Inquiry Members consider it to be of assistance, for Enforcement and the LPT to make preliminary submissions at the commencement of each module.

Decisions at end of each module

31. In their letter to RDU dated 3 October 2016, William Fry Solicitors, on behalf of Mr Walsh, raised some questions regarding the proposed modular approach. They asked whether it was envisaged that there would be “*some kind of decision to be made following each module?*”

32. In response RDU stated in their letter dated 25 November 2016:

“No provisional view has been expressed by the Inquiry Members in respect of whether or not a final decision should be made in respect of each specific SPC after each module. Parties are free to make submissions about the issue at the hearing on the 30 November next.”

33. Addressing this point the LPT said that it could be the case that during the course of any module it might be desirable for the Inquiry Members to make a determination in relation to specific issues such as, for example, witness credibility. Accordingly, they advanced the view that the Inquiry Members should give themselves the opportunity for making decisions at the end of a module where it was appropriate given the evidence and documentation presented.

34. Counsel, on behalf of Mr Walsh, expressed some concern that the Inquiry would be proposing to make decisions at the end of each module. He opened the case of *Weaving Macro Fixed Income Fund Limited (in Liquidation), Plaintiff v. PNC Global Investment Servicing (Europe) Limited (now known as BNY Mellon Investment Servicing (International) Limited) Defendant* [2012] IESC 60 (“the Weaving case”) in which the direction of the High Court to hold a modular trial was successfully appealed to the Supreme Court.

35. The Inquiry Members are of the view that the Weaving case dealt with a fundamentally different situation. In that case it was proposed to make final decisions at the conclusion of each module and then decide as a matter of sequencing whether to proceed to follow-on issues.

36. The Inquiry Members are of the view that they should not close off the possibility that it may be appropriate to make decisions following a particular module.

Conclusions

- In light of the Inquiry Members' own preliminary view, the agreement in principle of those Persons Concerned who were in attendance and Enforcement, the volume of the documentation that will be required for consideration and given that there has been no suggestion of any prejudice to any of the Persons Concerned the Inquiry Members have decided that the Inquiry will be dealt with by way of modular hearing.
- The Inquiry Members have decided that the structure of the modular approach as outlined in their letter of 16 September 2016 and set out at paragraphs 3 and 17 above is the structure that will be adopted for the hearing of evidence in this Inquiry. No decision is being made at this time as to how or whether Module 1 may usefully be subdivided. On balance, the inclusion of SPC 4 in Module 1 would appear to be more logical than separating it out into a separate module.
- The Inquiry Members are of the view that on balance it would be more expeditious and cost effective to proceed with Modules 2, 3 and 4 before hearing Module 1. Such ordering of the modules would not prejudice any of the Persons Concerned and it would allow for the significant preparation needed for a full consideration of SPCs 1 – 4 to continue during the progress of the other modules.
- The Inquiry Members do not propose having a preliminary module in advance of commencing the four modules indicated above but there will be an opportunity for the Persons Concerned and, if the Inquiry Members consider it to be of assistance, for Enforcement and the LPT to make preliminary submissions at the commencement of each module.
- The Inquiry Members are of the view that they should not close off the possibility that it may be appropriate to make decisions following a particular module.

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20 January 2017