



By post and by email
ASPConsultationPaper@centralbank.ie

Enforcement 1 Division
Central Bank of Ireland
Block D Iveagh Court
Harcourt Road
Dublin 2

Re: Inquiry Guidelines CP 65

Dear Sir/Madam,

We welcome the opportunity to respond to the Draft Inquiry Guidelines CP 65 (the **Guidelines**) issued by the Central Bank. Our firm would have an interest in the area because we would frequently advise financial institutions on their obligations under the relevant legislation and on the steps which they should take in order to comply with the letter and spirit of their regulatory obligations.

From the viewpoint of a professional advisor, we believe it is very helpful that the Central Bank is offering additional guidance and clarity on the procedures which operate in respect of contraventions which are referred to an inquiry. As the financial services regulator, the Central Bank and its stakeholders will doubtless appreciate the importance of due process in relation to any such inquiry, including the need to meet the requirements of natural justice, constitutional fairness and the requirements of fair procedure.

We have a number of suggestions which we have highlighted below as to further possible clarification of the Guidelines.

Using the numbering contained in the Guidelines:-

Section 2.4 - Inquiry members:

Clearly any inquiry must be both constituted and conducted in accordance with the principles of constitutional fairness. In order to ensure that the basis for the enquiry is both fair and also seen to be fair, we believe it would be helpful if the basis for the appointment of inquiry members was specifically addressed in the Guidelines. At present the Guidelines confirm that either internal or external individuals can be appointed to the inquiry. However, we would respectfully submit that the composition of the Inquiry is a critical issue. In order to ensure a legally robust and transparent process it is important that all issues in terms of the independence, expertise and experience of the Inquiry members should be appropriately addressed, along with any other applicable requirements.

We would regard the requirement that the inquiry members should be independent as a basic tenet of fair procedure under Irish law. Such a requirement is also a feature of similar models in many Irish professional bodies and in corresponding procedures in other jurisdictions. Supervisory authorities in

Dublin Belfast London New York Palo Alto

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Consultants: J.R. Osborne S.W. Haughey T.V. O'Connor Professor J.C.W. Wylie A.F. Browne M.A. Greene A.V. Fanagan J.A. O'Farrell I.B. Moore

comparable jurisdictions have specific requirements in relation to independence, expertise and experience when appointing individuals to an inquiry and many of these bodies limit or prohibit internal officers or employees from being appointed to the inquiry. For example, there is a complete prohibition on employees of Chartered Accountants Ireland sitting on any of the inquiry bodies of their Chartered Accountants Regulatory Board (**CARB**) along with a limit on the number of inquiry members who may be members of Chartered Accountants Ireland.



In order to avoid any suggestion of bias it would be important to ensure that none of the Inquiry members had had any prior involvement in respect of any of the matters which form the subject matter of the inquiry.

Section 2.11 - Access to file:

It is imperative that the respondents should have full and complete access to the ENF's evidence file at the inquiry stage. This duty is in accordance with both best practice and the overriding principles of fair procedure (specifically to ensure fairness and equality during the inquiry). It is similar to the disclosure requirements which would apply in civil or criminal litigation and is essential in order to ensure that the respondent has an equal opportunity to defend him or herself and to probe any case being advanced at the inquiry. Otherwise the respondent would be at an unfair disadvantage at any hearing.

Section 4.13 – 4.16 - Witnesses:

When viewed in isolation, Sections 4.13 – 4.16 seem to suggest that it is only the inquiry members who may call such witnesses as they wish to give evidence at the inquiry. However, we believe that the better view, and one more consistent with the requirements of constitutional fairness, is that any party can call evidence. This would be supported by Section 3.4 of the Guidelines where the "Inquiry Management Questionnaire" seeks responses from the respondent on (inter alia) including the proposed witnesses. It would be helpful if the Guidelines were to expressly acknowledge the right for either party to call evidence.

Section 4.22 – 4.24 - Settlement discussions:

The Guidelines acknowledge at Section 2.7 that inquiry members will not discuss matters with supervision or enforcement without the respondent's knowledge. The Guidelines should explicitly confirm that any previous settlement discussions are without prejudice and may not be referred to as without this explicit confirmation, the respondent may be inhibited from engaging in any such discussions.

Confidentiality:

In order to protect the parties, we would suggest that the Guidelines should provide a mechanism for the protection of confidential information should the inquiry be held in public.

We look forward to reviewing the finalised Guidelines in due course.

Yours faithfully,

A & L Goodbody

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