

Fitness and Probity - Investigations and Prohibition Notices

There has been much discussion of the fitness and probity regime in the context of the Tracker Mortgage Examination. Muireann Reedy looks at the Central Bank's powers to investigate people performing certain key roles at regulated entities.

The fitness and probity regime was introduced by the Central Bank Reform Act 2010 (the "2010 Act") against the backdrop of the financial crisis. Section 25 of the 2010 Act gives the Central Bank the power to investigate the fitness and probity of a person to perform a controlled function ("CF") (which includes a pre-approval controlled function or "PCF"). The Central Bank can do so where the Head of Financial Regulation is of the opinion that there is reason to suspect the person's fitness and probity¹. Various matters may be taken into account by the Central Bank in deciding that there is reason to suspect an individual's fitness and probity including the suspicion that the person does not have the experience, qualifications or skills necessary to properly and effectively perform the CF (or part of it), that the person does not satisfy the Fitness and Probity Standards issued by the Central Bank or that the person has participated in serious misconduct in relation to the business of a regulated financial service provider. Other grounds of suspicion are also listed at Section 25(3) which is not exhaustive.

While a fitness and probity investigation is ongoing, the Central Bank can suspend the individual from performing the CF if it believes it is necessary and in the interests of the proper regulation of the relevant regulated financial service provider (the "RFSP") to do so.

The process

The Central Bank has issued the Central Bank Reform Act 2010 (Procedures Governing the Conduct of Investigations) Regulations 2012 and published guidance (Guidance on Investigations Under Part 3 of the Central Bank Reform Act 2010) setting out how investigations under Part 3 of the 2010 Act will run. The Guidance states that the Central Bank will normally provide advance notice to a person (a "Subject") who it is considering investigating and give him/her 15 working days to provide it with any submissions. The RFSP may also be notified of this. If the Central Bank ultimately decides to proceed with an

investigation, it will notify the Subject and the RFSP in writing, setting out its concerns about the Subject's fitness and probity. Investigations will generally consist of two information gathering stages.

The first phase involves the collection of documentary evidence and/or interviews with witnesses. The Subject may also be interviewed. The investigation will then proceed to the second stage, where the Central Bank thinks that adverse conclusions may be drawn from evidence obtained in the first stage. At that point the Subject will be served with a "Statement of Grounds" summarising the Central Bank's concerns and giving the Subject copies of any relevant material. During the second stage of the investigation, the Central Bank may decide to interview any individuals nominated by the Subject and/or the RFSP as being in a position to provide it with relevant evidence, or to hold an oral hearing. At an oral hearing the Subject can be required to give evidence on oath and be cross-examined, but he/she (as well as the RFSP) may also be given the opportunity to cross-examine other people. The default position is that oral hearings will be held in private unless the Central Bank believes it is in the public interest that the hearing, or part of it, should be held in public. Although the Subject can be legally represented at an oral hearing, he/she will not be entitled to claim any legal costs back from the Central Bank, regardless of the outcome of the investigation.

During the course of an investigation the Central Bank may serve Evidentiary Notices on certain individuals or companies, which it reasonably believes may have relevant evidence. The Evidentiary Notice can require the individual or company to produce a document, to provide information, or to appear before the



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Central Bank to give evidence. Failure to comply with an Evidentiary Notice is a criminal offence unless the person or company has "reasonable excuse" not to do so.

Conclusion of investigation

Various timeframes and steps are involved in the conclusion of the process but ultimately the Subject and the RFSP will be served with a Report setting out the Central Bank's findings and advised as to whether the Central Bank is minded to issue a Prohibition Notice. The Subject and the RFSP will be given an opportunity to provide submissions at both of these stages.

If a Prohibition Notice is subsequently issued it can prohibit the Subject from carrying out the CF, part of the CF or any CF for the period specified in the Notice, or indefinitely, or unless certain specified conditions are complied with. However the 2010 Act provides that the Central Bank shall not continue a Prohibition Notice for longer than is necessary to achieve its purposes. If the Prohibition Notice is for a period longer than 2 months, the Central Bank must have it confirmed by the High Court, unless the Subject and RFSP agree in writing to comply with its terms.

Prohibition Notices to date

The Central Bank may publish details of Prohibition Notices and so far three such Notices have been published. Two related to the prohibition of individuals (a former manager of a credit union and a former director of a retail intermediary firm) from performing any CF, in any regulated financial service provider, for an indefinite period. The other Prohibition Notice prohibited the person (a sole trader insurance intermediary) from performing certain PCF functions for a two year period.

Recent Central Bank public commentary suggests that we may see more of these types of investigations in future.

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¹Although the 2010 Act refers to the Central Bank, the Head of Financial Regulation and the Governor performing various functions under Part 3 (which can be delegated to another "suitably qualified person" under Section 52), for ease of reference the rest of this article refers to the "Central Bank" throughout. This article does not consider the fitness and probity regime introduced by the Single Supervisory Mechanism for regulated entities which are categorised as "Significant Institutions" and "Less Significant Institutions" by the European Central Bank.