



IRISH FINANCIAL SERVICES
REGULATORY AUTHORITY



Financial Services Regulation: Administrative Sanctions Procedure

Consultation Paper

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1. MAKING YOUR SUBMISSIONS

The closing date for submissions is 28 February 2005. Comments are welcome from all interested parties. Please make your submissions in writing and, if practical, by email or on disk. When addressing any issue raised in this paper, please use the corresponding numbers in this paper to identify the section you are referring to. If you are raising an issue that we have not referred to in this paper, please indicate this in your submission.

We place a high value on the openness of the consultation process. Consequently, we intend to make a summary of the submissions received available on our website after the deadline for receiving submissions has passed.

Please clearly mark your submission 'Administrative Sanctions Procedure Policy Consultation' and send it to:

Legal and Finance Department
Irish Financial Services Regulatory Authority
P.O. Box 9138
College Green
Dublin 2

Email: derville.rowland@ifsra.ie
Ph: 410 4820
Fax: 410 4060

All submissions should be sent before 28 February 2005.

2. INTRODUCTION

- 2.1 The Irish Financial Services Regulatory Authority (the Financial Services Regulator (FSR)) was established in May 2003. Our overall objective is to help consumers make informed decisions about their financial affairs in a safe and fair market and to foster sound, dynamic financial institutions in Ireland, thereby contributing to financial stability.
- 2.2 As the regulator of most financial services in Ireland, the FSR is required to promote the best interests of users of financial services. In promoting the best interests of these users, the FSR must do so in a way that is consistent with both the orderly and proper functioning of financial markets, and the orderly and prudent supervision of providers of those services.¹
- 2.3 One way that we can protect consumers is by enforcing compliance with certain regulatory requirements by regulated financial service providers and persons concerned in their management. The Central Bank and Financial Services Authority of Ireland Act 2004 has given a range of powers to the FSR to enable it to promote compliance with regulatory requirements. The FSR now has the power to impose sanctions in respect of breaches of regulatory requirements and to publicise the findings and sanctions imposed. The proportionate and effective use of these powers will play an important part in securing public confidence in the regulatory regime and the regulated industry. These powers are similar to powers increasingly being given to financial regulators in Europe.
- 2.4 Section 33BD of the Central Bank Act, 1942 provides for the Authority to publish guidelines for the conduct of Inquiries. The Authority is now considering its options in that regard. A draft of possible guidelines dealing with Inquiries and other issues is included in this paper as appendix 1.
- 2.5 The purpose of this paper is to seek views on the approach outlined in this paper in order to facilitate the development of an appropriate administrative sanctions policy that implements the new powers in a fair and effective way. We are seeking views both on the general policy issues and on the draft guidelines.²
- 2.6 The goal of the approach outlined is to apply the enforcement powers available to the FSR in a way that is fair and effective, with a view to protecting the consumers of financial products and enhancing the reputation of the financial services industry by promoting compliance with regulatory requirements.

¹ Section 33C (3)(a) and (b) of the Central Bank Act 1942 as inserted by Section 26 of the Central Bank and Financial Services Authority of Ireland Act 2003.

² A further extension of our enforcement role is currently under consideration, arising from the Market Abuse Directive. That matter is not examined in this paper.

- 2.7 In order to achieve an efficient, effective and economic model³ of regulation, a flexible and responsive approach must be employed. The policy must also take into account the principles of fair procedure. In order to fulfil the requirements of fair procedure and the FSR's statutory duty, the policy and procedure must be flexible and responsive so that the continually evolving financial services sector can be effectively regulated.
- 2.8 Our general approach is that, having authorised firms, the FSR sets regulatory requirements, supervises compliance with those requirements and will enforce compliance when the regulatory requirements are breached.
- 2.9 This paper does not cover the FSR's powers in respect of granting or revoking authorisation to provide financial services, nor does it cover the FSR's powers to deal with entities that are operating unlawfully in the market without the appropriate authorisation.
- 2.10 The distinctive functions and aims of supervision and enforcement are summarised in chapter 3 of this consultation paper. This puts into context the role of enforcement in the regulatory regime. Chapter 4 gives a general overview of how the FSR proposes to approach enforcement. It identifies the interaction between the FSR's existing enforcement powers and the powers available pursuant to the new procedure. Where the FSR has one or more enforcement options available, for example the decision to take a criminal prosecution and/or to take action pursuant to the Administrative Sanctions Procedure, the proposed policy is identified. If the policy is under consideration, that fact is stated.
- 2.11 Chapter 5 details the legislative scheme of the new powers 'the Administrative Sanctions Procedure'.
- 2.12 The policies which the FSR is considering applying to the Administrative Sanctions Procedure are detailed in chapters 4 and 6 and certain areas where the FSR is still considering the policy which should be applied are highlighted. While the paper sets out a definite approach in many areas, all aspects of the FSR's approach are still under consideration.
- 2.13 Comment is invited in respect of all aspects of the policies and proposed procedure and will be carefully considered when formulating policy and, in particular, prior to the Authority finalising its guidelines. The FSR will exercise its powers in accordance with the guidelines.

³ Section 33H (3) of the Central Bank Act 1942 as inserted by Section 26 of the Central Bank and Financial Services Authority of Ireland Act 2003.

3. THE ROLE OF ENFORCEMENT IN THE REGULATORY REGIME

3.1 The Aims of Regulation

3.1.1 The primary aim of financial regulation is to foster a safe and fair market. Good market regulation is achieved by applying a range of regulatory requirements. A fine balance between regulatory requirements and commercial freedoms must be achieved so the financial services market is innovative, dynamic yet stable, fair and comprehensible to the consumer.

3.1.2 Regulation must be sufficiently prescriptive to foster safe and sound financial institutions. This is in the interests of financial stability and is ultimately to the benefit of consumers.

3.1.3 However, the weight of regulation on the financial market must not be so heavy as to stifle competition or extinguish choice for the consumer. Regulation must aim to nurture an innovative and competitive market so that the consumer is provided with choice and better value.

3.1.4 There are a number of strands to the regulatory regime which promote compliance with relevant requirements. These are authorisation, supervision, and enforcement.

3.2 How Compliance is Achieved

3.2.1 The goal of supervision and enforcement is to promote compliance by regulated financial service providers with the regulatory standards and requirements set by the FSR or directly in legislation. Effective compliance functions within regulated financial service providers, together with successful supervision, results in a compliant market. Successful enforcement action aims to promote compliance where regulated financial service providers have not achieved the required levels of internal control and compliance.

3.3 Authorisation and Supervision

3.3.1 Entry into the market is regulated, and authorisation must be obtained prior to the provision of financial services. Authorisation can be denied or revoked. This is the ultimate restriction and a very powerful protection for the consumer.

3.3.2 Supervision, involving the examination of the activities of regulated financial service providers, is a crucial element in securing adherence by the regulated financial service provider with the regulatory requirements. A principles-based approach to supervision is employed. This places the onus of responsibility for compliance on the regulated financial service provider and upon the boards and senior managers of such entities.

3.3.3 The FSR's Strategic Plan 2004 - 2006 states the following: "voluntary compliance with legislation, codes and supervisory requirements will always be our preferred approach".⁴

3.3.4 Voluntary compliance should always be the norm. However, where voluntary compliance has not been achieved, the use of powers of enforcement is appropriate.

3.4 Enforcement

3.4.1 The aim of enforcement is to promote compliance by all regulated financial service providers by penalising an individual regulated financial service provider or persons concerned in its management that have not met the required standards.

3.4.2 While the FSR will always seek the cooperation of the firm involved, enforcement actions by their very nature tend to become adversarial, litigious, and fraught with legal considerations. Regard must be had to procedural fairness, natural justice, constitutional issues, administrative law requirements, and human rights legislation. This is a fine balance, particularly where compliance with principles is required and the cost of the enforcement action must be balanced with the benefit which will result from the enforcement action.

3.4.3 The use of enforcement tools must have a strategic purpose. The enforcement policy should seek to do the following:

- Reward voluntary reporting of issues
- Reward cooperation with enforcement and corrective measures
- Stop identified breaches of regulatory requirements
- Punish premeditated or careless breaches of regulatory requirements

provided that to do so is in the public interest.

⁴ IFSRA's Strategic Plan 2004 – 2006, Section 4.5, page 19.

4. THE FSR'S ENFORCEMENT POLICY

4.1 The Aim

4.1.1 This paper is only concerned with the FSR's powers of enforcement in respect of regulated financial service providers and persons concerned in their management. This chapter outlines the principles underlying the proposed enforcement policy. It details the general factors that will be taken into account by the FSR when deciding on the merits of taking enforcement action and which enforcement action(s) are most appropriate. Some general policy considerations applicable to the new Administrative Sanctions Procedure are also detailed.

4.2 Enforcement Policy – The Overriding Objectives

4.2.1 It is the policy of the FSR to consider the full circumstances of each case individually, on its own merits. Therefore, the decision to take enforcement action will be determined on a case by case basis. This approach is necessary to satisfy legal requirements and the strategic aims of the FSR.

4.2.2 However, when deciding whether to take an enforcement action, the following overriding objectives will be considered:

- The enforcement action should promote compliance by the regulated financial service provider or persons concerned in its management
- The enforcement action should promote compliance within the industry or sector
- The enforcement action should operate in the public interest
- The enforcement action should be proportionate, and be likely to support the economic, efficient and effective pursuit of the strategic objectives of the FSR.

4.3 Appropriate use of available Enforcement Actions

4.3.1 Before making a final decision, the FSR will consider:

- Which enforcement procedure or powers to use, and
- Whether to use one or more powers.

4.4 Enforcement Options in Respect of Regulated Financial Service Providers

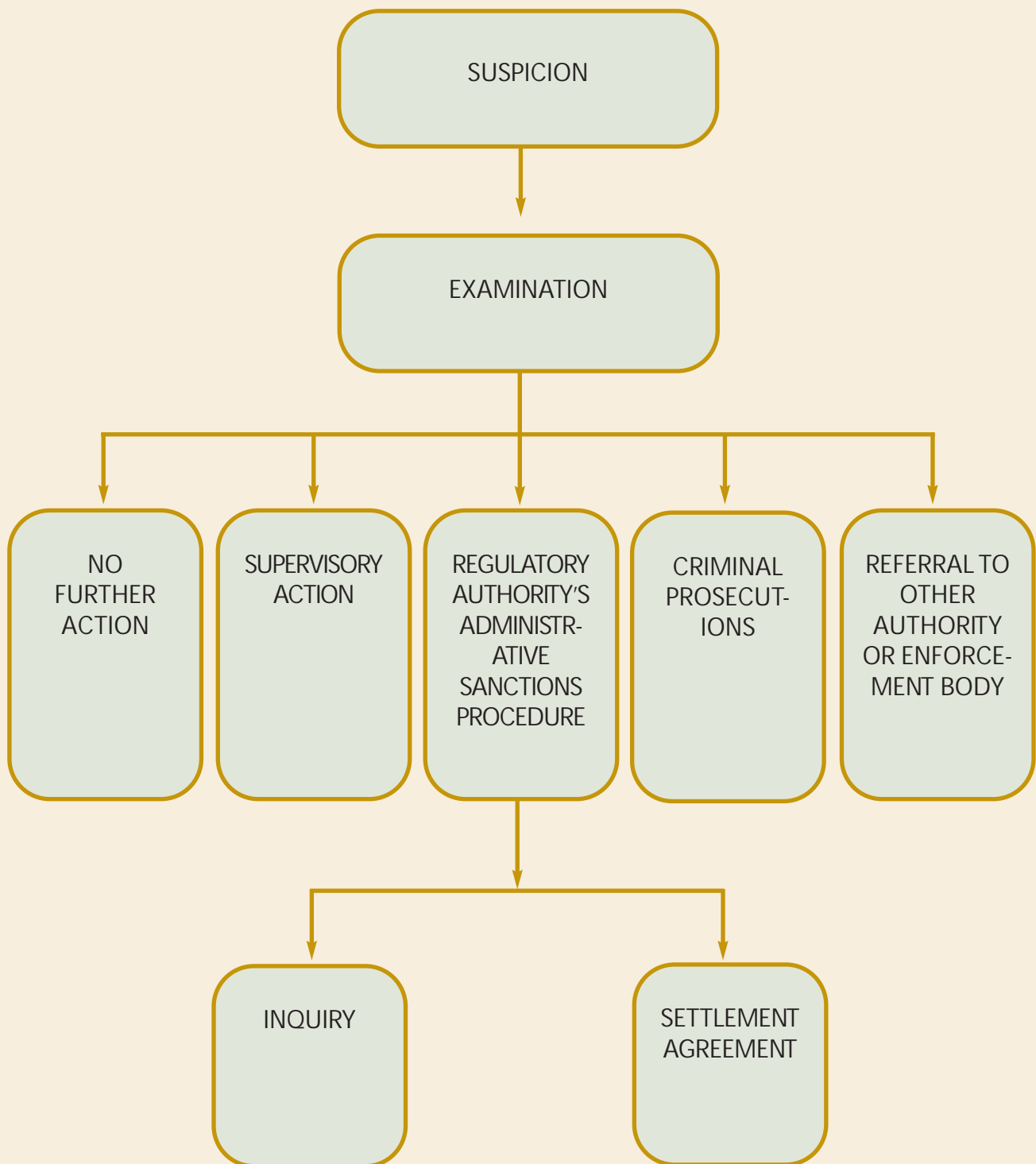
4.4.1 The FSR has a range of enforcement actions at its disposal in respect of regulated financial service providers and persons concerned in their management. Cases range from instances where regulated financial service providers and/or persons concerned in their management have breached various statutory provisions, codes, and requirements to suspected breaches of criminal law.

4.4.2 All breaches of criminal law committed by a regulated financial services provider or a person concerned in its management for which the FSR may initiate a summary prosecution, now also fall within the Administrative Sanctions Procedure.

4.4.3 In respect of a regulated financial service provider and persons concerned in its management who have failed to comply with regulatory requirements, the FSR may (depending on the facts and seriousness of the matter) decide to take no further action, resolve the matter routinely by taking supervisory action, agree a settlement, impose a sanction via the Administrative Sanctions Procedure, initiate a summary criminal prosecution and/or refer the case to another authority or enforcement body.

4.4.4 The diagram which follows outlines the manner in which suspected breaches of regulatory requirements may be dealt with and the available enforcement actions.

Diagram 1 – Regulated Financial Service Providers Compliance Process



4.5 Referral to Other Authority or Enforcement Body

4.5.1 Where appropriate,⁵ the FSR works with other regulatory authorities, bodies and law enforcement agencies.

4.5.2 Where appropriate, the case may be referred to the Garda Síochána and / or the Director of Public Prosecutions (DPP) for consideration of prosecution. Cases may also be referred to other enforcement agencies or bodies. This approach ensures that suspected breaches are taken forward by the correct authority, and that the most appropriate remedy is applied to the case.

4.6 Outside the FSR's Jurisdiction

4.6.1 Certain matters fall outside the FSR's jurisdiction, for example fraud and will always be referred to the appropriate authority or body.

4.7 Mandatory Reporting

4.7.1 In respect of regulated financial service providers, the FSR is under a duty to disclose information which gives rise to a suspicion that a criminal offence may have been committed, save where the FSR is prohibited from making that disclosure pursuant to European law.

4.7.2 The FSR is not under a duty to disclose, if it is satisfied that the regulated financial service provider has, itself, provided the information to the relevant authority or agency.⁶

4.8 Discretionary Reporting

4.8.1 The FSR has a discretion to disclose information to other regulators or bodies unless prohibited from doing so by European law. This discretion is exercised having regard to the public interest.

4.9 Direction to Make Disclosure

4.9.1 In cases where the FSR is prevented by operation of law from disclosing information and where the FSR is not satisfied that the information has been disclosed, it shall issue a disclosure issue notice to the regulated financial service provider.⁷ The disclosure issue notice requires the regulated financial service provider to make disclosure to the relevant regulator or body. The FSR will do this if it believes that the information is or is likely to be material to an authority concerned with the enforcement of any law.

⁵ Section 33AK (3) and (5) of the Central Bank Act 1942 as inserted by section 26 of the Central Bank and Financial Services Authority of Ireland Act 2003.

⁶ Under section 57 and section 57A of the Criminal Justice Act, 1994 (as amended), the FSR is under an obligation to report to the Gardaí and the Revenue Commissioners a suspected breach of sections 31, 32 or 57A of the Criminal Justice Act, 1994 (as amended). This obligation applies even if the regulated financial service provider has, itself, reported a suspected breach.

⁷ Section 33AK (4) of the Central Bank Act 1942 as inserted by section 26 of the Central Bank and Financial Services Authority of Ireland Act 2003.

4.9.2 The FSR shall then advise the relevant authority or body that a disclosure issue notice has been served on the regulated financial service provider.

4.10 FSR's Action Following Referral to Other Authority or Enforcement Body

4.10.1 To the extent consistent with the effective exercise of its own statutory functions, the FSR will seek to avoid any action that might unfairly prejudice the actions of the other enforcement body or which may unfairly prejudice the defendants in the conduct of their defence. The FSR will provide those agencies or persons with an opportunity to make representations in relation to these matters.

4.10.2 Where the other authority or enforcement body proposes to take action, the FSR will consider whether it would be appropriate for the FSR to take its own action. It will apply a test of where the balance of the public interest lies in deciding whether to forbear in relation to any matter being pursued by another authority or body.

4.11 No Further Action

4.11.1 Suspicions of a regulatory breach will arise which prove to be unfounded. In many cases this should be evident from a routine examination of the matter. The FSR will be best placed to identify such cases speedily if the full cooperation of regulated financial services providers with the FSR's initial examination is forthcoming.

4.11.2 No further action will also be appropriate if the matter giving rise to concern is minor in nature and where immediate remedial action has been taken and full cooperation with the FSR's examination of this minor matter has been provided.

4.12 Supervisory Action

4.12.1 In some cases, where it appears that a failure to comply with relevant statutory or regulatory obligations has occurred, the FSR will decide that the case may most appropriately be dealt with by taking supervisory action. This will be particularly appropriate if the matter is of limited regulatory significance or can be dealt with fully without applying sanctions.

- 4.12.2 There are a number of available options. It may be appropriate to impose an enhanced supervisory regime to ensure adherence to the required standards and reduce the risk of future non-compliance.
- 4.12.3 The FSR may issue a warning where there are reasonable grounds to suspect a breach of statutory or regulatory requirements has occurred. If it proves necessary to issue a warning, that shall form part of the compliance record of the regulated financial service provider or person concerned in its management.
- 4.12.4 Where a matter might otherwise be suitable for enforcement action, this warning may be issued where open co-operation is received and the problem was rectified immediately and other considerations supporting enforcement do not apply. It is not possible to list exhaustively the criteria to be applied to this decision.
- 4.12.5 Such a warning may influence the FSR's decision whether to commence enforcement action in relation to future breaches or contraventions. However, where such future breaches or contraventions occur, there must be sufficient evidence to support a 'reasonable suspicion' in respect of the contravention which is the subject of the case. No reliance will be placed on past conduct to prove the contravention which is the subject of the case.
- 4.12.6 Where a warning is taken into account by the FSR in determining if enforcement action should take place, the age of the warning may be taken into account.
- 4.12.7 Warnings may be considered cumulatively, although they relate to separate areas of a regulated financial service provider or person concerned in its management's business, where the concerns, which gave rise to those warnings, are considered to be indicative of the compliance culture. Similarly, warnings issued to different subsidiaries of the same parent company may be considered cumulative where the concerns, which gave rise to those warnings, relate to a common management team.

4.13 Settlement Agreement

4.13.1 The Act provides⁸ that if the FSR suspects on reasonable grounds that:

- A regulated financial service provider is committing or has committed a prescribed contravention⁹, or
- A person concerned in the management of the financial service provider is participating or has participated in such contravention

the FSR may enter into a settlement agreement to resolve the suspected contravention.

4.13.2 The settlement agreement must be in writing and is binding on the FSR and the regulated financial service provider or person concerned in its management. The terms of the settlement agreement may contain sanctions and require the agreement to be published. In accordance with the legislation, the FSR proposes to report publicly on its settlement agreements.

4.13.3 The FSR will expect the firm to act promptly to take the necessary remedial action to deal with its concerns before any settlement agreement can be contemplated.

4.13.4 This settlement agreement shall form part of the firm's compliance record. As such it may influence the FSR's decision whether to commence enforcement action in relation to future breaches or contraventions. However, where such future breaches or contraventions occur, there must be sufficient evidence to support a 'reasonable suspicion' in respect of the contravention which is the subject of the case.

4.13.5 Where a settlement agreement is taken into account by the FSR in determining if enforcement action should take place, the age of the agreement shall be taken into account.

4.13.6 Settlement agreements may be considered cumulatively, although they relate to separate areas of a regulated financial service provider or person concerned in its management's business, where the concerns, which gave rise to those settlement agreements, are considered to be indicative of a firm's compliance culture. Similarly, settlement agreements with different subsidiaries of the same parent company may be considered cumulative where the concerns, which gave rise to those settlement agreements, relate to a common or overlapping management team.

4.13.7 Settlement agreements may be taken into account in determining appropriate sanctions pursuant to the Administrative Sanctions Procedure if subsequent contraventions occur.

⁸ Section 33AV of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

⁹ Prescribed contravention is explained in chapter 5 at section 5.3.

4.14 Inquiry Pursuant to the Administrative Sanctions Procedure

4.14.1 If it is determined that there are reasonable grounds to suspect that a prescribed contravention has been committed, the case may be referred to an Inquiry held pursuant to the Administrative Sanctions Procedure and if appropriate, sanctions imposed. The procedure for this option is discussed in detail in chapter 5. The sanctions are discussed in chapter 6.

4.15 Criminal Breaches and the Administrative Sanctions Procedure

4.15.1 The FSR is empowered to initiate summary prosecutions only. The FSR may also refer the case to the Garda Síochána and/or the DPP for consideration of prosecution. It is essential to note that the FSR may impose a sanction via the Administrative Sanctions Procedure in addition to bringing criminal proceedings, except where the Administrative Sanctions Procedure leads to the imposition of a monetary penalty. No administrative monetary penalty may be imposed if the financial service provider or person concerned in its management has been found guilty or not guilty of committing a criminal offence and that offence involves the prescribed contravention.¹⁰ If a monetary penalty is imposed by or agreed with the Inquiry and the relevant contravention is also an offence, then no prosecution may be brought in respect of the offence.¹¹

4.15.2 In light of the limited penalties available pursuant to summary criminal trial, as a matter of general policy, the FSR proposes to pursue contraventions via the Administrative Sanctions Procedure instead of bringing a summary prosecution. Thus, the FSR's preferred enforcement option will generally be via the Administrative Sanctions Procedure. Only in exceptional cases will the FSR pursue a case via summary prosecution.

4.16 Policy Considerations Pertaining to the Administrative Sanctions Procedure

4.16.1 The FSR shall operate the Administrative Sanctions Procedure in respect of prescribed contraventions which occur after the coming into force of the Administrative Sanctions Procedure on 1 August 2004. Nothing in this consultation should be taken to imply any assurance that the FSR is deferring the use of its sanction powers until this consultation is complete. The FSR reserves the right to use these powers in relation to any contravention committed on or after 1 August 2004.

¹⁰ Section 33AT(2)(a) and (b) of the of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

¹¹ Section 33AT(1) of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

- 4.16.2 In tandem with this consultation exercise, the FSR is considering the most effective application of the Administrative Sanctions Procedures to specific regulatory requirements to promote compliance.
- 4.16.3 An evolving approach may be appropriate. This could involve an initial focus on applying the administrative sanctions powers to the enforcement of the new codes of conduct,¹² followed by a broader roll-out to other areas of the FSR's work where the administrative imposition of penalties is likely to promote significantly improved compliance.
- 4.16.4 The issue of the roll-out of the application of these powers is closely related to the option of the increased formalisation of our regulatory requirements. The FSR currently engages in extensive dialogue with regulated financial services providers, legal firms and others advisers to the financial services industry. A significant amount of this work involves discussing compliance matters. The FSR is considering whether the Administrative Sanctions Procedure will impact on dialogue, when this is about prescribed contraventions or matters which might usefully be treated as prescribed contraventions. In addition, the FSR is reviewing generally whether this kind of dialogue is always an efficient, effective and economic use of its resources.
- 4.16.5 The FSR is considering adopting a policy which:
- Constrains or limits responses to general enquiries from advisors to the financial service industry
 - Requires certain queries in relation to regulatory requirements to be dealt with in writing
 - Progressively replaces bilateral advice with published guidance notes, where appropriate.
- 4.16.6 Upon the conclusion of this consultation the Authority will consider adding to the guideline, a draft of which appears at appendix 1, a paragraph addressing this issue.

¹² See www.ifsra.ie in the Consultation Paper (Archive) section.

5. THE ADMINISTRATIVE SANCTIONS PROCEDURE

5.1 The Statutory Framework

5.1.1 The Central Bank and Financial Services Authority of Ireland Act 2004 provides the FSR with the power to administer sanctions in respect of prescribed contraventions by regulated financial service providers and persons concerned in the management of regulated financial service providers, 'The Administrative Sanctions Procedure'.

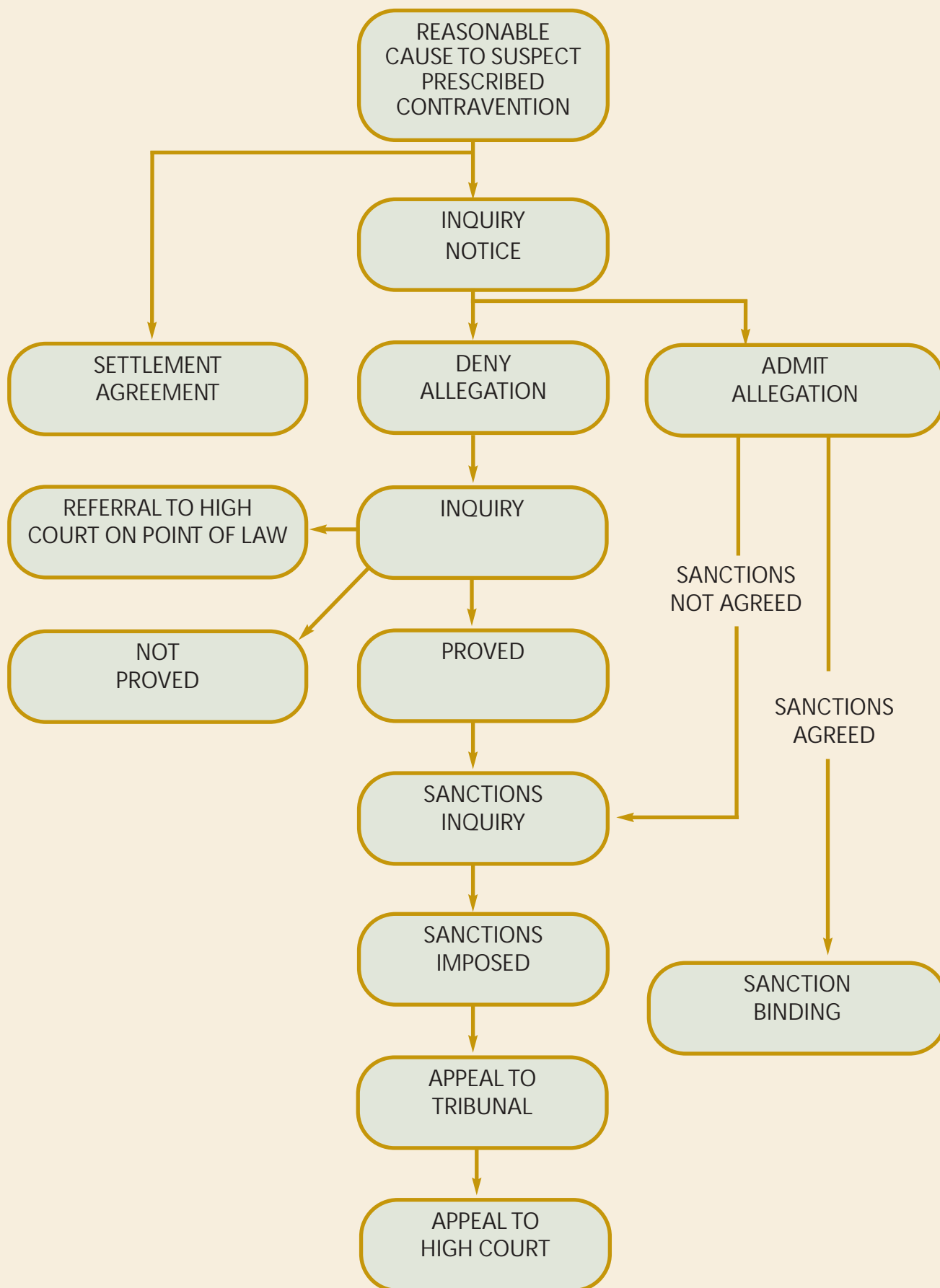
5.1.2 The Administrative Sanctions Procedure consists of an Inquiry which considers whether a prescribed contravention has occurred and determines sanctions. The procedure provides that the FSR may, at any time before the conclusion of the Inquiry, resolve the suspected contravention by agreement, which is called 'a settlement agreement'. Please refer to section 4.13 for more information on settlement agreements.

5.2 Summary of the Administrative Sanctions Procedure

5.2.1 If a decision is taken to establish an Inquiry, written notice of Inquiry will be sent in advance of the Inquiry being held. If the breach is admitted, sanctions may be agreed or alternatively imposed after a sanctions Inquiry. If the contravention is denied, an Inquiry is held. If the contravention is found proved then sanctions may be imposed.

5.2.2 The diagram which follows outlines the Administrative Sanctions Procedure and the stages in the scheme.

Diagram 2 – The Administrative Sanctions Procedure



5.3 Prescribed Contravention

5.3.1 The Administrative Sanctions Procedure will only apply to 'prescribed contraventions'.

5.3.2 A 'prescribed contravention' is defined as 'a contravention of

- a provision of a designated enactment or designated statutory instrument, or
- a code made, or a direction given, under such a provision, or
- any condition or requirement imposed under a provision of a designated enactment, designated statutory instrument, code or direction, or
- any obligation imposed on any person by this Part or imposed by the Regulatory Authority pursuant to a power exercised under this Part¹³ (part refers to Part IIIC of the Central Bank Act 1942).

5.3.3 'Contravene' is defined as including 'fail to comply, and also includes –

- attempting to contravene, and
- aiding and abetting and counselling and procuring a person to commit a contravention, and
- inducing, or attempting to induce, a person (whether by threats or promises or otherwise) to commit a contravention, and
- being (directly or indirectly) knowingly concerned in, or a party to, a contravention, and
- conspiring with others to commit a contravention'.¹⁴

5.4 Reasonable Grounds to Suspect

5.4.1 In determining whether an Inquiry should be held pursuant to the Administrative Sanctions Procedure, there must exist reasonable grounds to suspect that a prescribed contravention is, or has been, committed.¹⁵ The test is likely to be satisfied if a fair and impartial bystander would conclude that the information constitutes grounds to suspect that a prescribed contravention is being or has been committed.

¹³ Section 33AN of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

¹⁴ Section 33AN of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

¹⁵ Section 33AO (1) and (2) of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

5.5 The Examination

5.5.1 Examination of initial suspicions of regulatory breaches will be carried out as part of normal supervisory work and will not lead to the FSR deciding that a contravention has occurred, only that an Inquiry should take place.

5.5.2 In terms of the examination, the FSR proposes to adopt the following approach:

- The FSR will identify specific statutory or regulatory breaches and identify documentary evidence
- A decision to refer the case for an Inquiry will not be taken until the person affected by it has had a reasonable opportunity to respond and has been informed of the possible consequences. This response, if provided, will then be given due consideration in the context of the case.

5.6 Inquiry Notice

5.6.1 A written Inquiry notice will be sent in advance of an Inquiry being held.¹⁶ The FSR proposes to send the notice no later than 28 days in advance of the Inquiry. The notice will:

- Set out the suspected contraventions
- Specify the grounds upon which the suspicions are based
- Specify the date, time and place of the Inquiry
- Invite the financial service provider or person concerned in its management to attend the Inquiry and/or to make written submissions.
- Set out the procedure that is envisaged.

5.6.2 In addition to the Inquiry notice, the following information will be furnished:

- Details of the information relevant to the issue (statements, documents and any other relevant material)
- A report prepared by or for the FSR setting out the relevant prescribed contravention(s) and the facts and matters relied on in support of the case.

5.6.3 The regulated financial service provider or person concerned in its management shall be asked to:

- Confirm if the suspected contravention(s) is/are admitted or denied
- Identify agreed facts
- Submit representations on the suspected contraventions
- Submit any representations on the procedure.

¹⁶ Section 33AP of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

5.7 Case Admitted

5.7.1 If the case is admitted, the Inquiry shall write and request:

- Consent to dispense with an Inquiry
- Offer sanctions so that the need to hold a sanctions Inquiry is avoided.

5.7.2 If no response is received or consent is not given, then an Inquiry shall be held to determine sanctions.¹⁷

5.8 Case Denied

5.8.1 If the case is denied or no reply is received then an Inquiry will be held to determine whether the case is proved and appropriate sanctions.

5.9 Representations to the Inquiry

5.9.1 In every case, the regulated financial service provider or person concerned in its management is entitled to make written representations to the Inquiry. These representations must be submitted in advance of the Inquiry.¹⁸

5.9.2 The FSR is considering imposing a requirement that written submissions and documents must be received by the FSR no later than 7 days in advance of the Inquiry or longer where the material is substantial. Submissions and documents submitted after that time would only be considered in exceptional circumstances.

5.10 Form of the Inquiry

5.10.1 The FSR is not proposing to adopt the approach of a full oral hearing in respect of the Inquiry. The Act provides for the Inquiry to be conducted with as little formality and technicality, and with as much expedition, as a proper consideration of the matters will allow.¹⁹ The Inquiry may be held in the absence of the regulated financial service provider or person concerned in its management so long as an opportunity to attend the Inquiry or make written submissions has been provided.²⁰

¹⁷ Section 33AR(1) and (2) of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

¹⁸ Section 33AP(3) of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

¹⁹ Section 33AY(1) of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

²⁰ Section 33AP(5) of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

- 5.10.2 The FSR will, on a case by case basis, determine the most effective and efficient procedure to adopt. The options will be:
- A consideration of the case on the basis of the written representations and documents alone
 - A consideration of the case on the basis of both written and oral information and, if relevant, depositions.
- 5.10.3 The factors that will be taken into account in determining the procedure to be adopted are:
- The complexity of the case
 - The benefit that oral examination would add to the written representations
 - The unique facts of the case.
- 5.10.4 The FSR will consider representations on the appropriate procedure to adopt prior to finalising its approach. The FSR considers that the majority of cases will be considered on a paper basis without the attendance of any parties or oral submissions.

5.11 Inquiries held in Public or Private

- 5.11.1 The Act provides for the Inquiries to be held in public save where:
- The parties agree to hold the Inquiry in private or
 - where information may arise
 - Of a confidential nature
 - Relating to an offence against a law of the State
 - Unfairly prejudicing a person's reputation.

A decision not to hold the Inquiry in public may be varied or revoked at any time.

- 5.11.2 The FSR is conscious that the conditions for holding an Inquiry in private will be met on many occasions. It is also the case that because a significant portion of the work of Inquiries will be done by written procedure, public conduct of the Inquiry, while possible, will be somewhat ineffective as a method for improving public understanding of the regulatory process. However, rather than adopt a general policy of holding Inquiries in private, the FSR is proposing to consider each Inquiry individually in this regard.

5.11.3 The FSR proposes routinely to seek the views of the parties on holding the Inquiry in private or public and would come to its conclusions having had regard to the nature of the matters it wished to bring to the Inquiry, the representations made and the public interest. Where the FSR is satisfied that it is appropriate to do so, Inquiries will be held in public. Where Inquiries are held in public, arrangements will be made for appropriate access for the public.

5.12 The Rules of the Inquiry

5.12.1 It is important to note that the Act provides that the rules of evidence are not binding at the Inquiry.²¹ The rules of evidence will not be applied. The Administrative Sanctions Procedures will adhere to the requirements of natural and constitutional justice.

5.12.2 The Authority proposes to delegate the operation of Inquiries to its staff. The detailed arrangements will be determined by the Chief Executive. The FSR is considering adopting the following general rules for an Inquiry:

- The decision maker(s) shall not be directly involved in the day-to-day supervision of the regulated financial service provider or person concerned in its management (which includes not being directly involved in any pre-Inquiry examinations of matters to be covered by the Inquiry)
- The information upon which the Inquiry relies shall be relevant to the issues
- The legal burden of proof will not rest with the regulated financial service provider or persons concerned in their management
- The standard of proof that will be applied is the civil standard – on the balance of probabilities
- The regulated financial service provider or person concerned in its management will have an opportunity to make representations on all information that the Inquiry is asked to rely on.

5.13 Publicity

5.13.1 The Act provides that in the event of an adverse decision following an Inquiry or where sanctions are agreed, details shall be published save where the information is confidential, pertains to a criminal offence or would unfairly prejudice a person's reputation.²² The FSR does not intend to publish information which it reasonably believes falls into the above categories. However, the FSR considers that publicity is critical to an effective enforcement regime and it will seek to publish the results of its Inquiries in as many cases as possible.

²¹ Section 33AZ of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

²² Section 33BC of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

5.13.2 The information to be published is:

- The finding
- The details of any sanction imposed.

5.13.3 The FSR proposes publicising the details of adverse decisions in a prompt manner. The information shall be placed on the FSR's website and, where relevant, copies of press releases shall be provided to the local and national press. The FSR does not propose to purchase space in the press for the purpose of advertising the Inquiry outcome. The publicity material shall refer to the regulated financial service provider or person concerned in its management by name unless exceptional circumstances apply. Exceptional circumstances shall be determined on a case by case basis.

5.13.4 The FSR is also proposing to publish details of selected cases on an anonymous basis in order to promote compliance with regulatory requirements. This will include cases where a finding of a contravention is made and where the finding is that the contravention has not been shown.

5.14 Written Reasons for the Decision

5.14.1 If it is determined that there has been a prescribed contravention, a sanction may be imposed. Written notification of the findings of fact and the grounds upon which the findings are based together with the sanctions imposed, if any, must be provided.

5.14.2 The FSR proposes sending such notification to a regulated financial service provider or the person concerned in its management no later than 28 days after the conclusion of the Inquiry.

6. ADMINISTRATIVE SANCTIONS

6.1 Sanctions

6.1.1 The previous chapter set out the administrative sanctions procedure. This chapter deals with the key policy issue of sanctions.

6.1.2 The Act provides for the following sanctions to be imposed:

- Caution or reprimand
- Direction to refund or withhold all or part of an amount of money charged or paid, or to be charged or paid, for the provision of a financial service
- Monetary penalty (not exceeding €5,000,000 in the case of a corporate and unincorporated body, not exceeding €500,000 in the case of a person)
- Direction disqualifying a person from being concerned in the management of a regulated financial service provider
- Direction to cease the contravention if it is found the contravention is continuing
- Direction to pay all or part of the costs of the investigation and Inquiry.

6.1.3 Sanctions ensure that:

- The contravention has ceased, thus protecting the market (Direction to cease contravention and/or Disqualification of individual)
- The gravity of the contravention is marked (Caution or Reprimand)
- Compliance within the market is promoted by having a deterrent effect on others (Monetary penalties and Costs)
- Compliance is promoted by reversing significant unfairness to consumers (Order to Refund or Withhold charges or money paid).

6.2 Restrictions on Sanctions

6.2.1 No monetary penalty may be imposed if the regulated financial service provider or person concerned in its management has been found guilty or not guilty of committing a criminal offence and that offence involves the prescribed contravention.²³

6.2.2 If a monetary penalty is imposed by or agreed with the Inquiry and the relevant contravention is also an offence, then no prosecution may be brought in respect of that offence.²⁴

²³ Section 33AT(2)(a) and (b) of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

²⁴ Section 33AT(1) of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

6.2.3 If the conduct engaged in by the regulated financial service provider or person concerned in its management constitutes two or more prescribed contraventions, only one monetary penalty may be imposed in respect of the same conduct.²⁵

6.2.4 The amount of any monetary penalty should not be in such an amount as would be likely to cause the regulated financial service provider to cease business or in the case of a person to be adjudged bankrupt.²⁶

6.3 Sanctions Policy

6.3.1 The FSR will, in all cases where an Inquiry has determined that a breach has occurred or a breach has been admitted, consider what sanctions should apply.

6.3.2 The FSR's first consideration is to ensure the contravention has ceased. Thus a direction to cease the contravention will be issued in every case where a contravention is or may be continuing. The FSR will, at an earlier stage, have considered the use of its supervisory powers to prevent the continuation of any practice which it finds unacceptable, even before considering whether a contravention of an existing regulatory requirement has occurred.

6.3.3 Having ensured that the contravention does not continue, the further aim of the sanctions policy is to promote compliance by that regulated financial service provider and persons concerned in its management and by all regulated financial service providers in the future. This goal is promoted by penalising regulated financial service providers and persons concerned in their management that have not met the required standards. The sanctions imposed should be appropriate and commensurate with the seriousness of the case.

6.3.4 The FSR will consider the imposition of a caution or if more serious, a reprimand. Additionally, the FSR will consider the imposition of an appropriate fine, taking into account relevant financial information.

6.3.5 The FSR does not propose to develop a scheme of sanctions or scale of fines in advance. The FSR proposes to develop its approach over time, taking into account the unique facts of each case. In particular, the distinction between a caution and a reprimand and the scale of fine attaching to various breaches will be developed.

²⁵ Section 33AS(3)(a) and (b) of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

²⁶ Section 33AS(1) and (2) of the Central Bank Act 1942 as inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004.

- 6.3.6 The power given to the FSR arising from an Inquiry to order a refund or withholding of all or part of an amount of money charged or paid, or to be charged or paid, for the provision of a financial service should not be taken to suggest that the FSR's sanctions process is envisaged by the legislature as an alternative to the Ombudsman scheme for achieving restitution for individual consumers. Clearly in all cases where customers are owed money by a regulated financial service provider because of a regulatory breach, the FSR shall pursue the matter vigorously throughout its supervisory work. However, the imposition of a sanction of ordering a refund will be applied only when this is proportionate to the contravention.
- 6.3.7 It appears to the FSR that this sanction is going to be most appropriate in situations where the power to fine is unlikely to eliminate the benefit to a regulated financial service provider or person concerned in its management from having committed the breach. It is also most likely to be appropriate when a very direct causal link between a breach of a regulatory requirement and readily identifiable, evidently unfair transactions can be shown.
- 6.3.8 The sanction of disqualification for a period of time raises its own issues. It applies only to natural persons. The FSR has not been given the power, as a sanction, to exclude a company from the industry. In applying this sanction, the FSR should satisfy itself that the disqualification of that person from management functions in the industry is a proportionate way to disincentivise others from committing that breach and/or it is necessary and desirable to ensure that that person does not commit the breach again. It is likely that the application of this sanction will be reserved for the most serious breaches or pattern of breaches.
- 6.3.9 The legislation allows for the costs of the examination and the Inquiry to be imposed as a sanction. The FSR will order reasonable costs when it appears proportionate to the contravention to do so to promote compliance. The amount of costs will reflect the complexity of the case and the length of the Inquiry.

6.4 Sanctions Factors

6.4.1 More generally, in determining the appropriate sanctions to impose, the FSR is considering applying a number of factors. In addition to taking account of all the circumstances of the case, the FSR considers the following factors to be relevant to sanctions:

- (1) The nature and seriousness of the prescribed contravention
 - (a) Whether the contravention was deliberate, dishonest or reckless
 - (b) Duration and frequency of the contravention
 - (c) The amount of any benefit gained or loss avoided due to the contravention
 - (d) Whether the contravention reveals serious or systemic weaknesses of the management systems or internal controls relating to all or part of the business
 - (e) The extent to which the contravention departs from the required standard
 - (f) The impact of the contravention on the orderliness of financial markets, including whether public confidence in those markets has been damaged
 - (g) The loss or risk of loss caused to consumers or other market users
 - (h) The nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the contravention
 - (i) Whether there are a number of smaller issues, which individually may not justify administrative sanction, but which do so when taken collectively
 - (j) Any potential or pending criminal proceedings in respect of the contravention which will be prejudiced or barred if a monetary penalty is imposed pursuant to the Administrative Sanctions Procedure

- (2) The conduct of the regulated financial service provider or person concerned in its management after the contravention
 - (a) How quickly, effectively and completely the financial service provider or person concerned in its management brought the contravention to the attention of the FSR or any other relevant regulatory authority
 - (b) The degree of co-operation with the FSR or other agency provided during the examination of the contravention
 - (c) Any remedial steps taken since the contravention was identified, including: identifying whether consumers have suffered loss and compensating them; taking disciplinary action against staff involved (where appropriate); addressing any systemic failures; and taking action designed to ensure that similar problems do not arise in the future
 - (d) The likelihood that the same type of contravention will reoccur if no administrative sanction is imposed
 - (e) Whether the contravention was admitted or denied

- (3) The previous record of the regulated financial service provider or person concerned in its management
 - (a) Whether the FSR has taken any previous action resulting in a settlement, sanctions or there are relevant previous criminal convictions
 - (b) Whether the regulated financial service provider or person concerned in its management have previously been requested to take remedial action
 - (c) General compliance history

- (4) General considerations
 - (a) Prevalence of the contravention
 - (b) Action taken by the FSR in previous similar cases
 - (c) Any other relevant consideration

APPENDIX 1 – ADMINISTRATIVE SANCTIONS PROCEDURE PROPOSED GUIDELINES

Set out below are draft guidelines for the operation of the Administrative Sanctions Procedure. The Authority is considering issuing such guidelines for the guidance of its staff and for the information of persons concerned with the manner in which it shall exercise its powers under Part IIIC of the Central Bank Act, 1942. The reasoning behind key points of policy and procedure in these draft guidelines is reviewed in the body of this consultation document.

IRISH FINANCIAL SERVICES REGULATORY AUTHORITY ADMINISTRATIVE SANCTIONS PROCEDURE GUIDELINES

The following guidelines were issued by the Irish Financial Services Regulatory Authority on [date to be inserted], in exercise of its powers including its powers under Section 33BD of the Central Bank Act, 1942 as inserted by the Central Bank and Financial Services Authority of Ireland Act, 2004.

For the purposes of these guidelines:

an 'examination' is any action undertaken by the officers of the Authority, staff of the Bank or other persons appointed for that purpose to establish whether there are reasonable grounds for a suspicion that a regulated financial service provider or a person concerned in the management of a regulated financial service provider is participating in, has participated in or has committed a breach of a regulatory requirement.

an 'Inquiry' is an Inquiry held by the Irish Financial Services Regulatory Authority under Section 33AO of the Central Bank Act, 1942.

'breach of a regulatory requirement' means a prescribed contravention for the purposes of Part IIIC of the Central Bank Act, 1942.

1. The Chief Executive Officer and any officers of the Authority or staff of the Bank or other persons appointed by or engaged by him to assist him in the exercise of the Authority's functions under Part IIIC of the Central Bank Act, 1942 shall have regard to the following guidelines in the conduct of examinations of possible breaches of regulatory requirements and the conduct of Inquiries.
2. Having had regard to these guidelines, the Chief Executive shall make such administrative arrangements as he considers appropriate for the conduct generally of examinations and Inquiries.
3. The Chief Executive may delegate the exercise of the powers of the Authority in relation to Inquiries to which these guidelines relate as he considers appropriate to any one or more of a schedule of other officers of the Authority and staff of the Bank, which schedule shall be approved by the Authority from time to time and generally as he considers appropriate in relation to examination. Such delegation may include provision for further delegation. Any such delegation may be subject to terms and conditions.
4. In particular, the Chief Executive may delegate the making of a decision, within the meaning of Part IIIC of the Central Bank Act, 1942, to any one or more of such Officers of the Authority or members of staff of the Bank listed on that schedule as he considers appropriate having regard to procedural fairness and the efficient and effective use of the Authority's resources.
5. These guidelines shall not operate so as to prevent the Authority or a committee of the Authority directly exercising its powers under Part IIIC of the Central Bank Act, 1942.
6. Having had regard to these guidelines and while acting in conformity with any conditions applying to any delegation of powers by the Chief Executive and administrative arrangements put in place by the Chief Executive, any officer of the Authority, member of staff of the Bank or other person appointed to exercise the powers of the Authority under Part IIIC of the Central Bank Act, 1942 shall, when exercising those powers, endeavour to pursue a fair outcome to an Inquiry.

7. Where practical, regulatory requirements formulated by the FSR will be formulated as principles rather than as detailed rules. A regulatory requirement to comply with a certain principle shall be deemed to have been contravened where the outcome of a transaction or process appears contrary to the principle and the regulated financial service provider or person concerned in its management is unable to show that it has diligently put in place administrative arrangements which a reasonable person would consider likely to be sufficient to ensure that financial services are provided, the regulatory requirements are met and compliance is managed in a manner which complies with the principle.
8. Guidelines may be issued to explain matters incidental to regulatory requirements. However, each such guideline shall include a statement of its purpose and no reading of a guideline which is inconsistent with the purpose of the guideline shall be accepted as a defence against a finding that a contravention of a regulatory requirement has occurred. Such a reading, where reasonable if no regard is had to the purpose of the guideline, may be taken into account in assessing the sanctions to apply where the Inquiry considers that to do so would contribute to a fair outcome to the proceedings.

Examination of Suspected Breaches

9. The purpose of the examination shall be to gather information relevant to whether a suspicion that a breach has occurred is reasonable and to determine whether an Inquiry should be held.
10. An Inquiry will be held where suspicions of a contravention are reasonable and the holding of an Inquiry is desirable having regard to efficient and effective regulation generally.
11. Prior to determining that an Inquiry will be held, the regulated financial service provider or person concerned in its management shall be given an opportunity to make informed representations as to why an Inquiry should not be held. These representations shall be considered as part of the decision on whether to hold an Inquiry.

12. As a general matter of policy, the FSR will seek to pursue administrative sanctions rather than seeking convictions in court, except where an offence may have been committed which would be likely to attract a sentence of imprisonment and that form of penalty is considered to be in the public interest or for some other reason seeking a conviction in Court will benefit the regulatory work of the FSR.
13. As a general matter of policy, the FSR shall forbear from holding an Inquiry where another body with investigative, regulatory or prosecutorial functions can show to the satisfaction of the FSR that the holding of an Inquiry would be likely to prevent that body's intended course of action and that such an outcome would be less beneficial to the public interest, notwithstanding the beneficial effects of holding an Inquiry.

Inquiries

14. The purpose of the Inquiry shall be to draw a reasonable conclusion on the balance of probabilities as to whether the regulatory requirement has been breached. It will also identify which sanction to apply.
15. An Inquiry will be conducted by one or more persons, being officers of the Authority or members of staff of the CBFSAI working for the Authority who shall not also be directly responsible for authorisation or on-going supervision of the regulated financial service provider or person concerned in its management. This team may be assisted by other officers of the Authority or members of staff of the Bank or agents of the Authority who shall not, however, decide the matters before the Inquiry.
16. The Chief Executive of the Irish Financial Services Regulatory Authority shall approve the proposed team for each Inquiry and shall nominate the presiding person. Where the Chief Executive is proposed to be a member of the Inquiry team, the proposal shall be subject to approval by the Authority itself.
17. The Authority delegates its decision making power to the Inquiry, whose decision shall be final, subject to appeal to the Appeals Tribunal, and shall not be subject to any further process of review within the Authority unless referred back by the Appeals Tribunal.
18. The Authority further delegates to the Inquiry team its powers in relation to the conduct of the Inquiry.

Settlement Agreements

19. Persons to whom functions are delegated by the Authority under these guidelines shall conclude settlement agreements in respect of matters subject to Inquiry only where those persons are satisfied that the basis for settlement is consistent with the general approach to regulation the Authority adopts, is fair having regard to all the facts known to that person and that to conclude a settlement agreement will contribute to the efficient use of the resources of the Authority.

Sanctions

20. Sanctions shall be fixed at a level likely, in the view of the persons responsible for conducting the Inquiry, to be commensurate with the seriousness of the contravention and sufficient to deter the recurrence of similar contraventions, either by that regulated financial service provider or person concerned in its management or by others. The Inquiry shall seek to avoid the imposition of sanctions that are excessive having regard to that purpose.

Holding Inquiries in Public

21. Where an Inquiry is to be held in public appropriate arrangements shall be made to ensure access to the Inquiry.

Publication

22. Subject to the safeguards set out in legislation, the publication of the fact of a finding against a (named) regulated financial service provider or person concerned in its management of an occurrence of a regulatory breach and the sanctions to apply is essential if sanctions are to promote compliance. The matter will be published in all cases.
23. Significant cases will be selected (including cases where the Inquiry found that there was no breach) and appropriate details published on an anonymous basis.
24. The fact of an initial examination to establish whether there are reasonable grounds for holding an Inquiry is a normal part of the supervisory process. It is not part of the Administrative Sanctions Inquiry process. Consequently, publication of the fact of such examinations is not necessary to the effective functioning of an Administrative Sanctions Procedure. Publication of the fact of such examinations need only occur where it is judged to facilitate the effective conduct and reputation of the procedure and the FSR.



IRISH FINANCIAL SERVICES
REGULATORY AUTHORITY

Please clearly mark your submission 'Administrative Sanctions Procedure Policy Consultation' and send it to:

Legal and Finance Department
Irish Financial Services Regulatory Authority
PO Box 9138
College Green
Dublin 2

Email: derville.rowland@ifsra.ie
Fax: (01) 410 4060