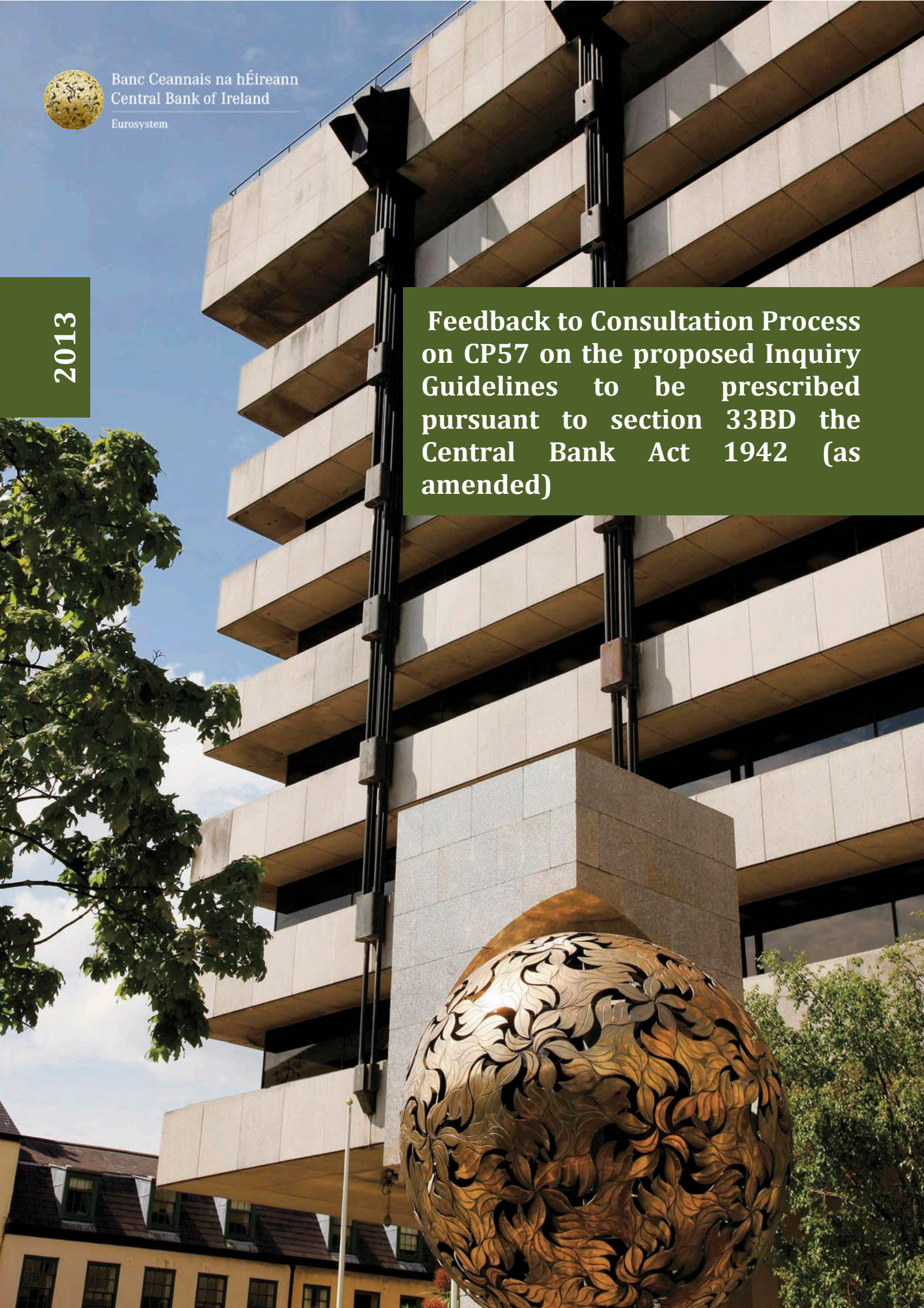
Banc Ceannais na hÉireann
Central Bank of Ireland
Eurosystem
2013
Feedback to Consultation Process on CP57 on the proposed Inquiry Guidelines to be prescribed pursuant to section 33BD the Central Bank Act 1942 (as amended)

Introduction

The Central Bank of Ireland **("the Central Bank")** received and published 6 submissions[1] to Consultation Paper 57 on the proposed Inquiry Guidelines to be prescribed pursuant to section 33BD of the Central Bank Act 1942 (as amended) **("the Guidelines")**.

The Central Bank welcomes the submissions. These have proved useful in refining the approach adopted in respect of the Guidelines. Following receipt of the submissions the Central Bank undertook a review of the Guidelines in their entirety and has made a number of changes to reflect a more inquisitorial approach to Inquiry as outlined in Part IIIC of the Central Bank Act 1942, as amended **("the Act")**.

In light of the changes proposed, the Central Bank is publishing revised draft Inquiry Guidelines concurrently with this paper and is inviting comments in relation to the draft Inquiry Guidelines[2].

The Submissions

The attached Schedule captures the proposals and key recurring themes in the submissions, and sets out whether there was a change in the position ultimately adopted in the Guidelines in light of the submissions. It also states where guidance has been requested and provided. The key points made in the submissions are referred to in summary form here. The full text of the submissions (received as at 13th January 2012) is available on the Central Bank website[3].

Having considered the submissions received, the Central Bank has:

[1] They can be broken down as follows:
- 1 Compliance firm;
- 3 Representative Bodies;
- 1 Solicitors firm;
- 1 Accountancy firm.

[2] Consultation Paper No. 65
[3] Available here

- noted the issues which were generally agreed;
- clarified the Guidelines where respondents sought more clarity and where we thought further clarity was needed;
- provided guidance where respondents sought guidance and where we thought guidance was needed;
- revised the Guidelines where we were persuaded by the rationale put forward by respondents; and
- retained core parts of the Guidelines which we are satisfied properly reflect the legislative and appropriate procedural scheme for Inquiries held under Part IIIC of the Act.

Where matters have been raised which are outside of the scope of the Consultation, this has been indicated.

Schedule of feedback summarising key changes to Inquiries under Part IIIC of the Act following the Consultation Process on CP 57

The following table sets out on a section by section basis a description of the proposed Guidelines contained in the Consultation Paper, details of the number of submissions received on each section and details of any changes to the Guidelines. We have omitted sections of the Consultation Paper where no comments were received.

Generally where more than one respondent commented on a particular section we have also included a brief synopsis of the recurring themes arising in the submissions.

Reference in this document to a *"paragraph"* is a reference to a paragraph in the Guidelines as published in Consultation Paper No. 57.

Reference in this document to a *"new paragraph"* is a reference to a paragraph in the revised draft Inquiry Guidelines published in Consultation Paper No. 65.

Feedback on Consultation Paper

Para. No.	Content	Comment No.	No. of Comments received	Summary of key comments	Nature of change (if any)
N/A	The Guidelines (generally)	**1.**	3	The Guidelines are not wholly consistent with the provisions of Part IIIC of the Act, particularly in terms of their scope, the status of the Inquiry, and the description of the role of the Inquiry, and/or they take into account matters yet to be enacted by the Oireachtas.	The Guidelines as sent to consultation were drafted in light of the Central Bank (Supervision and Enforcement) Bill 2011 **("the Bill")**. References to the Bill have been removed pending the Bill's enactment.
		2.	1	The Guidelines should not be published before the Central Bank (Supervision and Enforcement) Bill 2011 is enacted into law.	The Guidelines may be published prior to the enactment of the Bill. All references to the Bill have therefore been removed from the current draft. Updated Guidelines will be published once the Bill is enacted if necessary.
		3.	1	Operation of Inquiries may not be in accordance with principles of natural justice and fair procedures.	Paragraph 3.1 (new paragraph 4.1) has been amended to clarify this. The Inquiry shall observe the rules of

					procedural fairness (see section 33AY(2) of the Act).
		4.	1	Part IIIC of the Act is potentially unconstitutional and may be inconsistent with Article 34(1) of the Constitution, and may not fall within the exception set out in Article 37(1) of the Constitution.	This is not a matter within the scope of the Consultation.
		5.	1	No reference is made to settlement under section 33AV of the Act, or to the alternative procedure under section 33AR of the Act.	The purpose of the proposed Guidelines is to provide for process and procedure around the conduct of Inquiries. The examination phase (now called the **"Investigation"**) and settlement process will be considered separately in a new Outline of the Administrative Sanctions Procedure 2013 **("the Outline")** that will be published in conjunction with the final Inquiry Guidelines. In relation to the alternative procedure under section 33AR(1)(b) of the Act this is an Inquiry on sanctions only, and will proceed in the same manner as an

					Inquiry set out in the Guidelines (save that it will relate only to sanctions) (see new paragraph 5.5).
		6.	2	Lack of detail surrounding the pre-Inquiry / examination / settlement process.	The purpose of the Guidelines is to provide for process and procedure around the conduct of Inquiries. The investigation phase and settlement process will be considered separately in the Outline.
		7.	1	The use of without prejudice settlement letters should be abolished as it creates a perception of pre-judgment on the part of the Central Bank.	No perception of pre-judgment arises from the use of without prejudice settlement letters. All settlement will be conducted by the Enforcement Directorate on behalf of the Central Bank. The Inquiry Members will have no involvement in settlement and will only be informed of the fact of the settlement discussions and their outcome, so as to facilitate any adjournment required (see new paragraph 4.22). Without prejudice correspondence is appropriate so that the respondent is not prejudiced during settlement negotiations.

		8.	1	The proposed Guidelines are an expansion on previous publications of October 2005. The present Guidelines will supersede these previous publications.	The box on page 1 has been amended to clarify this. The Guidelines will repeal and replace those published in October 2005.
		9.	2	Clarification should be provided on the interaction between sanctions under the Inquiry guidelines and, in particular, the fitness and probity regime, and *"the other non-legislative requirements"*.	This is not a matter within the scope of the Consultation. The purpose of the proposed Guidelines is to provide for process and procedure around the conduct of Inquiries. Only sanctions which may be imposed at Inquiry are considered in the Guidelines.
		10.	1	Given that the Guidelines state that the Central Bank may depart from the Guidelines in individual cases, will the regulated entity be given notice and reasons for such departure? The Guidelines should definitively put in place the procedures to be followed.	Having regard to section 33AY(1) and (2) of the Act, the Inquiry is to be conducted with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before it will allow. The Inquiry must also observe the rules of procedural fairness. It therefore would not be appropriate that the Guidelines should constitute a rigid framework which could not be departed

					from where circumstances require; this could potentially undermine fairness.
		11.	1	If the Guidelines are amended or revoked in future, will the Central Bank engage in further consultation with industry, or will it undertake such changes unilaterally? Any material amendments should be subject to industry consultation.	The Central Bank welcomes comments from persons at this consultation stage. In light of changes made to the Guidelines originally published in Consultation Paper No. 57, it has been decided to provide an additional period of public consultation on the new proposed Guidelines. The Central Bank has taken no decision as to whether it will further consult on the Guidelines, or any amendments or repeals thereof, in the future. Once published, any material changes to the Guidelines will be properly notified to the relevant persons and will be published on the Central Bank's website.
		12.	1	Notice should be provided to regulated entities as to when the finalised Guidelines will become effective, to permit familiarisation.	The new Guidelines will be effective from the date of publication and will be available on the Central Bank's website. Any person subject to the administrative

					sanctions procedure will be provided with a copy of the Guidelines prior to any Inquiry.
		13.	1	Further guidance should be provided in relation to the issue of costs where a case is found to be not proved against a respondent.	No provision is made in the Act in relation to costs where a case is not found to be proven against a respondent.
		14.	1	Although section 33AN of the Act requires that notifications be in writing, it should be clarified that this does not prohibit other forms of communication, in addition to the formal notification in writing. It should be clarified that material may additionally also be sent by e-mail, as a matter of convenience.	Clarification – As standard practice, notices would be sent out by registered post. However, where agreed, these may additionally be sent by e-mail.
1.1	Referral to Inquiry	**15.**	1	A provisional letter should be sent to a respondent prior to the examination letter.	This is a matter outside of the scope of the Guidelines (see Comment 6).
1.2	Referral to Inquiry	**16.**	1	A timeline should be set for response to the Examination Letter.	This is a matter outside of the scope of the Guidelines (see Comment 6).

1.6	Appointment of Inquiry	**17.**	1	The Inquiry should always contain at least one external member, preferably from the same peer group as the respondent subject to examination.	The exact composition of the Inquiry will depend on the particular case. It should be noted, however, that a requirement for the membership of the Inquiry to contain at least one member from the same peer group could result in unavoidable conflicts of interest; particularly in small sectors.
		18.	1	The Guidelines should make it clear that the role of appointing the Inquiry will be delegated to the RDU.	Clarification – The RDU will arrange for the appointment of the Inquiry Members (see new paragraph 2.4).
		19.	1	Account should be taken of the ECHR case of *Dubus v. France* (11th June 2009), and procedures amended in light of it if necessary. In particular, there is no mechanism to challenge an assertion that a member of the Inquiry has no conflict of interest.	The case of *Dubus v. France* was considered during the drafting of the Guidelines.
1.9	Appointment of Inquiry Members	**20.**	1	The word *"correspond"* should be added to paragraph 1.9 to read: *"Once appointed, the Inquiry will not meet with, correspond or discuss matters relating to*	Paragraph 1.9 (new paragraph 2.7) has been amended to clarify this. Any correspondence sent by the Inquiry

				the Inquiry with Central Bank staff responsible for the case without the respondent(s) being present."	Members to the Central Bank, or its staff, or to the respondent(s) will be sent through the RDU.
2.1	Notice of Inquiry	**21.**	2	In what circumstances may the date of an Inquiry be re-scheduled? The period of 28 days is too restrictive.	Paragraph 2.1 (new paragraph 3.1) has been amended, and now states that the Notice of Inquiry will be provided *"at least 25 working days in advance of an Inquiry being held"*. It will otherwise be a matter for the RDU if additional notice is given, and will depend upon the circumstances of the case.
2.2	Notice of Inquiry	**22.**	2	Inquiries should always be held in private where the regulated entity is small, for example it is an intermediary, since a public inquiry will always lead to the reputation of the concerned individual being unfairly prejudiced compared to larger institutions with branch networks. Further, in what circumstances will the Inquiry agree to hold an Inquiry in private?	Section 33AZ of the Act provides that the Inquiry will normally be held in public, unless the Inquiry Members are satisfied of certain matters. The question of whether an Inquiry will be held in public or private will ultimately be a matter for the Inquiry Members taking into account all of the circumstances of the case.
2.3	Case	**23.**	2	A timeline should be set for responses to	Paragraph 2.3 (new paragraph 3.3) has

	Management			the Case Management Questionnaire.	been amended. A timeline of at least 10 working days will be set for responses to the Case Management Questionnaire (now referred to as the Inquiry Management Questionnaire).
2.6	Case Management	**24.**	2	A timeline should be set for case management meetings. Further guidance should also be provided as to the circumstances in which it will be decided that a case management meeting will be required.	The timeline for case management meetings (now referred to as Inquiry management meetings) is a matter entirely within the discretion of the Inquiry Members, and may vary depending on the nature and complexity of the case. It is therefore not appropriate to set a timeline in this regard.
		25.	1	Is the case management meeting a further screening or examination process? Can further charges be added at this point?	The case management meeting (now referred to as the Inquiry management meeting) is not a further screening or examination process. Its purpose is merely to ensure that the Inquiry proceeds in an organised, efficient and expeditious manner.

2.8	Case Management	**26.**	3	The periods of 15 working days to prepare an agreed Book of Documents and 5 days for consideration is extremely tight.	The Book of Documents has been removed from the Guidelines. New paragraph 2.3 sets out the materials ENF will provide to the RDU at the time of referral and new paragraph 3.1 outlines the materials that will accompany the Notice of Inquiry sent to the regulated entity. Any issues relating to further documentation will be a matter for the Inquiry and may be raised in responding to the Inquiry Management Questionnaire.
2.9-2.10	Case Management	**27.**	1	Will the provision of the "Agreed Book of Documents" be the first opportunity for a respondent to see the relevant materials relied upon by the Central Bank?	See Comment 26. It is proposed that the Outline will set out that the Investigation Letters may enclose key supporting documents and materials, where appropriate.
2.11	Case Management	**28.**	1	Will a copy of written submissions and relevant case law be made available to the other party prior to the Inquiry hearing and if so, how many days prior to the hearing will these be made available?	The provision of submissions will be in accordance with the directions of the Inquiry Members (see new paragraph 3.10).

				The Guidelines should specify whether they will be made available in this regard, and if so whether this will be in advance.	
3	The Inquiry	**29.**	1	Prior to going to Section 3 (Inquiry) the reasons for proceeding at this juncture should be shared with the regulated entity and a right of reply allowed.	This is outside the scope of the consultation (see Comment 6).
		30.	1	In the interests of justice, the Inquiry should not take legal advice without disclosing it to the respondents.	Section 33AY(3) of the Act permits the Inquiry to be assisted by a legal practitioner (see new paragraph 2.13). The question of whether legal advice received by the Inquiry Members during the oral hearing will be disclosed to the respondent is a matter for the Inquiry Members.
		31.	1	Provision should be made in the Guidelines for the lodging of submissions by third parties under section 33AP(3) of the Act.	Section 33AP(3) of the Act does not provide a right of submission for unrelated third parties. Instead it provides that an *"other person concerned"* may lodge submissions with the Central Bank. Further, section 33AP(1) of the Act

					provides that, before holding an Inquiry under section 33AO of the Act, the Central Bank shall give notice in writing of the proposed Inquiry to the financial service provider or other persons concerned. The Central Bank considers that the phrase *"other person concerned"* should be read in light of section 33AO(2) which clarifies that these other persons are *"persons concerned in the management of a regulated financial service provider"*.
3.1	Form and Order of Proceedings	**32.**	1	The provision of the same powers with respect to the examination of witnesses as a judge of the High Court to the Inquiry undermines the objective of holding the Inquiry with as little formality and technicality as possible and is detrimental to the process.	This reference has been removed pending enactment of the Bill. However, section 51 of the Bill proposes the introduction of the powers referred to. Nonetheless, whilst section 33AY(1) of the Act provides that the Inquiry should be undertaken with *"as little formality and technicality, and with as much expedition, as a proper consideration of the matters will allow"*, in conducting an Inquiry under Part IIIC of the Act it is important that the overriding

					requirement of fair procedures be complied with. Furthermore, these powers are consistent with similar powers provided to the Financial Services Ombudsman (section 57CE of the Act) and the Pensions Ombudsman (section 137 of the Pensions Act 1990 (as amended).
		33.	1	Given the extensive powers afforded to an Inquiry, the rules of evidence to be adopted should be clarified, including whether the rule against hearsay will be observed.	Section 33AY(2) of the Act provides that Inquiries shall observe the rules of procedural fairness, but are not bound by the rules of evidence.
3.2	Form and Order of Proceedings	**34.**	1	Notifications on the time and place of public Inquiries should be in a prominent place on the Central Bank's website.	It is agreed that it is important that proper notice be given to the public of upcoming Inquiries. Dates for public hearings will therefore be displayed prominently on the Central Bank's website.
3.5	Form and Order of Proceedings	**35.**	1	Respondents should have an automatic right to bring in a third party such as a delegate from their representative body.	Whether a respondent will be permitted to be represented by a member of their representative body will be a matter for

					the Inquiry Members (see section 33AY(4) of the Act). Where an Inquiry is being held in public, however, there is nothing preventing such a person from attending.
		36.	1	The Guidelines state that the *"respondent(s) may choose to be represented at the Inquiry by counsel and/or solicitor or, with leave of the Panel, any other person. The Central Bank may be similarly represented."* This should be amended in light of section 33AY(3) of the Act which permits the Central Bank to be assisted only by legal practitioners.	The Guidelines have been amended in line with section 33AY of the Act (see new paragraphs 2.12-2.13).
3.9	Oral hearing with live evidence	**37.**	1	It should be clarified whether the Central Bank may make amendments to the Notice of Inquiry at the beginning of the oral hearing.	Paragraph 3.9 (new paragraph 4.9) has been amended to clarify this. The ultimate decision to permit such amendment remains a matter for the Inquiry Members. However should such amendments be permitted, the respondent will be afforded an opportunity to consider such

					amendments.
3.10	Oral hearing with live evidence	**38.**	1	A timeframe should be set for the provision of a transcript of proceedings following the Inquiry, at least a week in advance of the deadline for making an appeal to IFSAT.	The Guidelines currently provide that a copy of the transcript will be provided to the respondent *"as soon as practicable"*. This should not impact on a person's ability to make an appeal to IFSAT.
3.12	Burden and standard of proof	**39.**	1	*"[A]s the burden of proof on the Central Bank is to prove their case beyond a reasonable doubt, this is quite a low standard given that a person working for an FSP may have his/her future career in financial services restricted in the event of an adverse finding."*	As an Inquiry under Part IIIC of the Act is inquisitorial in nature, there is no moving party upon whom a burden of proof will rest. The Inquiry is the Central Bank inquiring into a matter and making findings based upon those inquiries. The standard of proof to be applied at Inquiry is on the balance of probabilities (new paragraph 4.4). This is consistent with the civil nature of the proceedings, and is in line with similar civil proceedings, *e.g.* restriction proceedings under the Companies Acts (section 150 of the Companies Act 1990) or disciplinary proceedings before IAASA (regulation 9 of the Companies (Auditing and

					Accounting) Act 2003 (Procedures Governing the Conduct of section 24 Investigations) Regulations 2012).
3.14	Applications prior to and in the course of an oral hearing	**40.**	1	Guidance is requested on the circumstances in which a request for an adjournment will be considered.	Section 33AP(4) of the Act provides that an Inquiry may be adjourned from time to time, and from place to place, but the Inquiry Members must ensure that the respondent is notified of the date, time and place at which the Inquiry is to be resumed. The power to grant such adjournments is entirely within the discretion of the Inquiry Members. However, it is clear from the Guidelines that a respondent will be free to apply for an adjournment, and that the Inquiry Members, in making a decision in relation to such an application, will exercise their discretion fairly, observing fair procedures and affording the respondent an opportunity to be heard.
3.20	Procedures for the taking of	**41.**	1	A summary of the proposed sanctions for each of the offences listed at section 3.20 should be included in the Guidelines.	At present, no criminal sanctions attach to a failure to comply, *inter alia*, with directions of the Inquiry. The Bill will

	evidence				introduce the relevant criminal sanctions, namely: on summary conviction, a class A fine and/or up to 12 months imprisonment; or on indictment, a fine of up to €250,000 and/or up to 5 years imprisonment (see section 51 of the Bill, as amended by amendment no. 19 of the Committee Stage Amendments). Once the Bill is enacted, the Guidelines will be updated accordingly.
3.23	Referral to the High Court on a point of law	**42.**	1	It should be clarified as to whether, where a point of law is referred to the High Court, it can be used as a precedent for later Inquiries, given that the rules of evidence do not apply in full at Inquiries.	Clarification – Inquiries will be bound by any interpretation of law which has been ruled upon by the High Court and which arises at Inquiry; this is a matter of law, not evidence.
3.24	Referral to the High Court on a point of law	**43.**	1	It should be clarified as to whether there is any redress if the Inquiry Members refuses to refer a point of law to the High Court.	The power to refer a point of law to the High Court will be exercised by the Inquiry Members in accordance with fair procedures. However, it is a matter for the respondent to decide what legal action to take if the Inquiry Members refuse to refer a matter to the High Court.

3.28	Applications for an adjournment to pursue settlement	**44.**	1	A rule should be introduced that where a respondent has offered to settle on terms greater than the penalty actually imposed at Inquiry, but this was rejected by the Central Bank, the regulated entity should get its costs from the date that settlement figure was proposed to the date of the final decision.	Sections 33AQ(3)(f) and 33AQ(5)(e) of the Act provide that where the Inquiry has found that a contravention has been committed it may direct the payment of all or part of the costs of investigating holding the Inquiry by the regulated entity. The Act does not provide for a costs order in favour of a regulated entity where there is no such finding.
4.5	Written decision of the Inquiry	**45.**	1	A set time limit should be prescribed within which the Panel must produce its final written decision.	Given that Inquiries may involve varying levels of evidence and/or complexity and/or allegations it would be inappropriate to impose a strict time limit in this regard. The procedure adopted is nonetheless designed to ensure that the respondent is kept appraised of the situation. The decision will be delivered to the respondent as soon as available and the regulated entity will be kept informed of any delays in the preparation of the written findings (see new paragraph 5.3).

4.6–4.9	Sanctions	**46.**	1	The sanctioning regime represents a shift from the sanction procedure heretofore where certain breaches would ordinarily attract a set penalty.	No general policy relating to set fines has ever been in place in relation to sanctions for prescribed contraventions. Section 5.2.1 of the ASP Outline published in October 2005 stated that *"in determining sanctions all the circumstances of the case will be taken into account".* Each case is, and will continue to be, considered on a case-by-case basis. The factors to be considered in sanctioning are set out in paragraph 4.7 (new paragraph 5.9).
		47.	1	Can the Panel perpetually disqualify a person from being concerning the management, and can the disqualification be confined to certain aspects of management or is it disqualification *simpliciter*?	Section 33AQ(3)(d) of the Act provides for *"a direction disqualifying the person from being concerned in the management of a regulated financial service provider for such period as is specified in the order"*. This provides the Inquiry Members with discretion in terms of the duration of a disqualification which will be exercised with regard to the sanctioning factors specified in paragraph 4.7 (new paragraph 5.9).
		48.	1	The meaning of "turnover" is unclear and	The concept of turnover will be

				may result in varying levels of monetary punishment for the same offence. Further, similar sanctions are not contained in other legislation.	introduced by the Bill. However, the level of fines in a particular case will necessarily vary depending on the circumstances (and this is reflected in the sanctioning factors specified in paragraph 4.7 (new paragraph 5.9)). The phrase "turnover" is a generally understood accounting term and should be readily identifiable from company accounts. "Turnover" is also a concept utilised by the Irish Takeover Panel (see for example rule 24.2 of the Takeover Rules). Similar sanctions are provided for in other legislation, for example section 8 of the Competition Act 2002.
		49.	1	Are the criteria listed non-exhaustive and will the Central Bank have due regard to each constituent element of this with an equal weighting for each point?	The criteria listed at paragraph 4.7 (new paragraph 5.9) are non-exhaustive. This has been clarified by the phrase: *"All the circumstances of the case will be taken into account by the Inquiry Members in determining the appropriate sanction(s)…"*. Further, these are criteria which the Inquiry *"may"* have regard to.

					The weight to be given to a particular factor will be a matter entirely within the discretion of the Inquiry Members when imposing sanctions.
		50.	1	Paragraph 4.7(1)(e) should be amended to remove reference to the *"required standard"* and should be amended by reference instead to the *"letter of the relevant regulatory requirement"*, since a clear standard will not always exist.	The question of whether a respondent has met the relevant standard will be a matter of evidence before the Inquiry. Where a general standard of conduct is required this will be referable to such standards as set by the Central Bank, or in absence of such standards by the generally accepted industry standard.
		51.	1	A cross-definition from the Consumer Protection Code should be provided for *"vulnerable consumers"*.	Paragraph 4.7(1)(h) (new paragraph 5.9(1)(h) has been amended to clarify this.
		52.	1	Reference to the extent and nature of any financial crime facilitated in paragraph 4.7(1)(i) is not permissible since the Inquiry cannot make a finding that any crime was committed.	Whilst the Inquiry may not make any finding as regard criminal liability, or the imposition of a criminal sanction or conviction, it is entitled to draw a conclusion that acts which could constitute criminal conduct have been facilitated, occasioned or otherwise

					attributable to the contravention. This is line with the relevant case law which permits civil bodies to draw conclusions that criminal actions have been committed, although of course criminal sanctions cannot be imposed.
		53.	1	Since it is not for the Inquiry to consider wider policy issues, reference to consideration of *"potential or pending criminal proceedings"* should be removed.	This factor takes into account, *inter alia*, the impact of section 33AT of the Act, since the Inquiry Members will be prohibited from imposing a monetary penalty where a respondent has been prosecuted for an offence relating to a contravention, and a criminal sanction will be prohibited where a monetary penalty has been imposed for a related contravention.
		54.	1	Paragraph 4.7(2)(p) should be amended to read: *"Whether <u>the facts constituting</u> the contravention were admitted or denied."* It does not appear fair to punish a regulated entity for a reasonably held view, albeit subsequently not upheld, that it did not commit a contravention.	Whether a regulated entity has admitted or denied a contravention will always be a relevant factor when determining sanctions. The weight to be given to this factor will be a matter for the Inquiry Members and will necessarily vary depending on the circumstances of the

					case.
		55.	1	It is not permissible for the Inquiry to have regard to whether the respondent has previously been requested to take remedial action; although this may be a separate allegation of a prescribed contravention.	Whether a regulated entity has been previously requested to take remedial action and whether that remedial work has been carried out will be a relevant factor in imposing sanctions.
		56.	1	Reference to consideration of the *"prevalence of the contravention"* should be deleted since, unless individual cases are found by the Inquiry Members, how can the Inquiry Members determine that there is a prevalence of a particular contravention.	The question of the prevalence of a contravention, in the industry in general, may be a legitimate factor in considering deterrence, as well as being a potential aggravating factor where a practise has previously been found to amount to a contravention. The prevalence of a given contravention will, nonetheless, require to be established before the Inquiry before it can be taken into account; as rightly pointed out this may include evidence of previously decided cases, but may also include, *inter alia*, settlements with the Central Bank.
		57.	1	Is *"likelihood of detection"* of a	This factor has been deleted from

				contravention a mitigating factor? That is, if a contravention was very difficult to detect, the sanction would be lesser than if it was obvious and easy to see. This should be clarified.	paragraph 4.7 (new paragraph 5.9).
		58.	1	The way in which the Central Bank proposes to calculate a fine should be set out. Will it be the intention of the Central Bank to fine on a set percentage of the previous year's turnover, and is it the intention to fine as much as possible in each circumstance?	The maximum monetary penalties which may be applied at Inquiry are set out in section 33AQ of the Act. The way in which a fine will be calculated in a given case cannot be set out with any specificity, and is in any event a matter of discretion for the Inquiry Members. Nonetheless, once the Bill is enacted, it will only be the maximum fine which will be referable to a percentage of turnover, and, whilst turnover will generally be a relevant consideration, it will not necessarily be a determinative factor in calculating a fine. The factors which will be taken into account will vary from case-to-case and will include, *inter alia*, all those factors listed in paragraph 4.7 (new paragraph 5.9). The fine in any given case will be appropriate and proportionate to

					the prescribed contravention committed. It should be noted in this regard that the Central Bank is under an obligation not to fine a person such an amount that it will cause them to cease business and/or become a bankrupt (section 33AS of the Act).
		59.	1	In the event that a fine from the Central Bank leads or contributes to a large extent to the bankruptcy of a regulated entity, a "look back" period of up to two years should be introduced so that some of the fine might be rescinded in order that shareholders and creditors of the regulated entity in question be paid.	Section 33AS of the Act provides that the Inquiry may not impose a monetary penalty on a regulated entity that would be likely to cause it to cease business, or on individuals that was likely to cause them to be adjudicated bankrupt.
		60.	1	The Central Bank should ensure that its enforcement powers and sanctions are consistent with international and European norms, so as not to competitively disadvantage Ireland.	The Guidelines represent guidance for the conduct of Inquiries, and do not constitute new enforcement powers or sanctions, which are set out in statute.
4.10	Appeal to the Irish	**61.**	1	It should be clarified whether a regulated entity must appeal to IFSAT before going	A final decision of the Inquiry may be appealed to IFSAT and thereafter IFSAT's

	Financial Services Appeals Tribunal			to the High Court, and further information as to deadlines before IFSAT should be set out.	decision may be appealed to the High Court. The operation of the appeals process is set out in statute (see Part VIIA of the Act, and specifically sections 57L and 57AK of the Act). IFSAT is an independent body, and in this regard the Central Bank is not at liberty to prescribe or comment on its procedures; this is a matter for IFSAT (see http://www.ifsat.ie/).

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