

**Our ref** MKS/9999999-12827581v1  
**Direct tel** +353 1 619 2052  
**Email** malachi.sweetman@maplesandcalder.com

**By Post and Email: ASPConsultationPaper@centralbank.ie**

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

24 June 2013

Dear Sirs

**Re: CP65 – Inquiry Guidelines to be prescribed pursuant to Section 33BD of the Central Bank Act (as amended)**

We refer to the above matter, and in particular to the invitation made in the Draft Guidelines for submissions from interested parties.

Please see enclosed the submissions made by the Maples and Calder Financial Services Regulatory Enforcement (FRSE) Group in this regard. As you will see, there is a broad range of issues which we have addressed. Some are relatively technical and require little more than clarification of the presumed intention of the Draft Guidelines. Some others are of profound importance to any regulated entity, given the potential scope and gravity of potential sanctions. This importance is heightened by the fact that Inquiries are not to be bound by the rules of evidence, which is a general cause for concern. Although we acknowledge that this power arises under Section 33AY(2) of the Act, and is not therefore a product of the Guidelines themselves, we wish, nonetheless, to record our concerns this regards.

In particular, we note that submissions have previously been made in respect of the CBI's entitlement to depart from the published Guidelines. We further note the stated position of the Bank (in Feedback to CP57) to the effect that treating the Guidelines as a rigid framework which could not be departed from could potentially undermine fairness. We respectfully disagree, and submit that procedural fairness is more likely to be undermined by an unregulated and ad hoc departure from the Guidelines. In that regard, we submit that express provision as to the circumstances in which the Guidelines could be departed from is a necessity.

The balance of our submissions are self-explanatory. We welcome the opportunity to have made submissions in this respect, and are more than happy to engage further with the Central Bank should this be required. We look forward to the publication of the finalised Guidelines.

Yours faithfully

Maples and Calder  
Encl.

**CP65: Draft Inquiry Guidelines**

| 1. Introduction  | Maples Comments on Guidelines   |
|--|---|
| <p>1.1 The Central Bank of Ireland ("the Central Bank") may conduct an Inquiry under Part IIIC of the Central Bank Act 1942, as amended ("the Act") where it suspects on reasonable grounds that a prescribed contravention is being or has been committed. Such Inquiries will be conducted with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before the Inquiry will allow.</p> <p>1.2 These Inquiry Guidelines, published pursuant to section 33BD of the Act, ("the Guidelines") set out the procedure which the Central Bank ordinarily proposes to follow when holding an Inquiry under Part IIIC of the Act. It may be necessary to depart from the Inquiry Guidelines in certain instances where compliance with the Inquiry Guidelines is not appropriate in the circumstances of the individual case.</p> | <p>There is no provision in the Act for departure from the guidelines as outlined in 1.2. In fact, given that Section 33BD(3) states that the revocation or amendment of the Guidelines <b>must</b> be in writing, the statutory basis for departure from the Guidelines without formal amendment or revocation is unclear, to say the least.</p> <p>There is an onus on the Central Bank to indicate, at the very outset, to any regulated entity in which it proposes to conduct an Inquiry (other than in compliance with the Guidelines) when, why and how it proposes to depart from the Guidelines.</p> |
| <p>1.3 The Guidelines should be read in conjunction with another information publication - Outline of the Administrative Sanctions Procedure ("the Outline"), which provides a general overview of the Administrative Sanctions Procedure operated by the Central Bank. The Guidelines and the Outline do not purport to represent a definitive legal interpretation of Part IIIC of the Act and in case of doubt it is recommended that reference be made to the text of the legislation itself and/or individual legal advice sought, as appropriate.</p>  |   |

|  |  |
|--|--|
| 1.4 For the purposes of these Guidelines reference to "regulated entities" or a "regulated entity" can be taken to include both present and former regulated financial service providers, as well as persons presently or formerly concerned in their management. Similarly, in this regard, reference to regulated entities or a regulated entity having committed a prescribed contravention, can be taken to include situations where persons presently or formerly concerned in the management of a regulated entity have participated in that prescribed contravention.   | What is the statutory basis for this interpretation of regulated entity, having regard to the definition of " <i>financial services provider</i> " in Section 2(g) of the Central Bank and Financial Services Authority of Ireland Act 2004? |
| <b>2. Referral</b>   |  |
| <b><i>Referral to Inquiry</i></b>  |  |
| 2.1 Where the Central Bank suspects on reasonable grounds that a prescribed contravention is being, or has been committed, it may decide to hold an Inquiry.   |  |
| 2.2 The Enforcement Directorate ("ENF") will inform the Regulatory Decisions Unit ("RDU") within the Central Bank of a decision to hold an Inquiry and will refer the case to the RDU. The work and role of the RDU is outlined in further detail at paragraph 2.9 below.  |  |
| 2.3 At the time of referral ENF will provide the RDU with the following: <ul style="list-style-type: none"> <li>• an outline of the prescribed contraventions that the regulated entity is suspected of committing or having committed and the grounds upon which the suspicions are based;</li> <li>• an Investigation Report, which will detail the Investigation carried out by Enforcement and contain a schedule of the categories of materials and information gathered during the Investigation;</li> <li>• copies (hard copy or electronic) of supporting documentation relied upon in preparing the Investigation Report; and</li> <li>• copies of any Investigation Letter(s) issued to the regulated entity and any responses.</li> </ul> |  |
| <b><i>Appointment of Inquiry Members</i></b>   |  |
| 2.4 One or more persons, internal officers or employees of the Central Bank and/or external individuals, will be appointed to an Inquiry, ("the Inquiry Members"). Following the   | The appointment of a Sole Member Inquiry would not appear to be appropriate for any but the most trivial of suspected contraventions, and the possible appointment of a Central Bank   |

|   |  |
|---|--|
| notification to the RDU of the decision to hold an Inquiry, the RDU will arrange for the appointment of the Inquiry Members. Where appropriate, the RDU will arrange the nomination of a presiding person on the Inquiry, who shall be known as the Chairperson. In certain cases, the RDU may arrange for the appointment of a sole member and in such cases, references in these Guidelines to the "Inquiry Members" and the "the Chairperson" shall be understood as referring to "the Sole Member". | <p>officer as Sole Member Inquiry in a significant matter could and would give rise to reasonable concerns about impartiality and bias. The scope of the RDU to appoint a Sole Member Inquiry should be expressly limited in the Guidelines, or alternatively provision should be made for a challenge to same by the regulated entity.</p> <p>2.10 provides that</p> <p><i>"RDU staff will have no role in deciding matters before the Inquiry and will have had no prior involvement in the subject matter of the Inquiry or the supervision or authorisation of the regulated entity."</i></p> <p>It is anomalous that this should be the case for RDU staff providing admin support to the Inquiry, but that an equivalent express provision should not apply to the appointment of internal CBI officers to the Inquiry itself.</p> |
| 2.5 Each person shall confirm in writing that he or she is not prevented from participating in the Inquiry by virtue of any actual or apparent conflict of interest.  | <p>What is the procedure for challenging the appointment of members based on perceived bias, notwithstanding the written confirmation?</p> <p>This written confirmation, to be valid, should precede the acceptance by the Inquiry Member of their appointment, and moreover, should be based on all of the information referred to at 2.9 below, in order to be complete and accurate.</p>  |
| 2.6 All decisions of the Inquiry shall be determined by a simple majority of the Inquiry Members, with each member having one vote. Where the RDU appoints a Sole Member, he or she shall decide the matter.  | Presumably with a multi-member Inquiry, this provision requires that there be an odd number of Inquiry members, or alternatively that the Chairperson should have the casting vote if there is a tie?  |
| 2.7 Once appointed, the Inquiry Members will not meet with, correspond or discuss matters relating to the Inquiry with supervisory or ENF staff involved in the case without the regulated entity either being offered the opportunity to be present, or sent a copy of any correspondence.   | How does this provision interact with Section 2.11 below? There is a clear conflict between the two, unless the regulated entity is to be privy to all enquiries referred to at 2.11 below. If so, this could prove problematic, particularly in relation to 2.11(iii) and (iv)  |
| 2.8 The Inquiry will commence once the Inquiry Members are appointed. The Inquiry Members will decide how the Inquiry will proceed and the procedures to be followed.   | When will the regulated entity be informed of the identities of the Inquiry Members, for the purpose of challenging, if necessary, the appointment of same? This should be at the earliest possible stage, and prior to  |



|  |   |
|--|---|
|  | the Notice of Inquiry referred to at 3.1 below.   |
| 2.9 The RDU will furnish all materials provided to it at referral by ENF to the Inquiry Members.   |   |
| <p><b>Regulatory Decisions Unit</b></p> <p>2.10 The RDU will provide administrative support to the Inquiry. The RDU will act as registrar to the Inquiry and will be the point of contact within the Central Bank for the regulated entity in relation to all Inquiry matters. The RDU will not give the Inquiry or the regulated entity legal advice but can provide assistance on procedural matters. RDU staff will have no role in deciding matters before the Inquiry and will have had no prior involvement in the subject matter of the Inquiry or the supervision or authorisation of the regulated entity.</p>  | The effect of 2.10 means that RDU staff who have previously been involved in supervising or authorising the regulated entity cannot give admin support to the Inquiry – presumably this means that any such staff cannot also be made members of any such Inquiry - does this apply to affected ENF staff also? |
| <p><b>Enforcement</b></p> <p>2.11 ENF will be available during the Inquiry to provide any assistance requested by the Inquiry Members. Such assistance might include asking ENF to explain or provide any or all of the following:</p> <ul style="list-style-type: none"> <li>(i) additional information about the matter before the Inquiry;</li> <li>(ii) further explanation of any aspect of the papers furnished to the Inquiry by ENF;</li> <li>(iii) information about Central Bank policies (including as to ENF's view on the law or on the correct legal interpretation of legislative provisions relevant to the matter at Inquiry);</li> <li>(iv) information relevant to any sanctions hearing; and/or</li> <li>(v) any other relevant matter.</li> </ul> | How does this provision interact with 2.7 above?  |
| 2.12 At least one representative of ENF will attend any Inquiry management meetings, the Inquiry hearing and any sanctions hearing.  |   |
| <p><b>Legal Representation</b></p> <p>2.13 The regulated entity may choose to be represented at the Inquiry by a legal practitioner or, with the leave of the Inquiry Members, any other person.</p>   | Please clarify the reasons as to why leave to be represented by a non-legal practitioner might be refused?  |

|  |  |
|--|--|
| <p><b>Legal Practitioner</b></p> <p>2.14 The Act provides that the Inquiry may be assisted by a legal practitioner. Any decision to appoint a legal practitioner will be a matter for the Inquiry Members.</p>   |  |
| <p><b>3. Preliminary Inquiry Procedures</b></p> <p><b>Notice of Inquiry</b></p> <p>3.1 The RDU will send a written Notice of Inquiry to the regulated entity by registered post at least 25 working days in advance of an Inquiry hearing being held. The Notice of Inquiry shall:</p> <ul style="list-style-type: none"> <li>(a) set out the suspected prescribed contravention(s) and the grounds upon which the suspicions are based, as outlined by ENF at referral;</li> <li>(b) specify the date, time and place of the Inquiry hearing;</li> <li>(c) invite the regulated entity to attend the Inquiry hearing and/or to make written submissions; and</li> <li>(d) set out the procedure that is envisaged.</li> </ul> <p>The Notice of Inquiry will be accompanied by a copy of all documentation provided to the RDU by ENF at the time of the referral.</p> | <p>The Notice of Inquiry should be preceded by notice of the composition of the Inquiry, in order to allow the regulated entity form a view as to the necessity for challenging the composition of same.</p> <p>Alternatively, the Notice of Inquiry should inform the regulated entity of the composition of the Inquiry and there should be provision for a preliminary stage at which any challenge to same can be heard.</p> <p>There is an implicit on-going obligation for the RDU and ENF to provide the regulated entity and the Inquiry with all further relevant information which becomes available to the RDU and to the ENF. This obligation should be made explicit.</p> |
| <p>3.2 The Inquiry (including any Inquiry management meetings) will usually be held in public. An Inquiry may only be held in private in the following circumstances:</p> <ul style="list-style-type: none"> <li>□ by agreement: the Inquiry and the regulated entity agree that the Inquiry should be held in private; or</li> <li>□ by decision of the Inquiry: the Inquiry decides that the Inquiry shall be held in private being satisfied that: <ul style="list-style-type: none"> <li>(a) evidence may be given, or a matter may arise during the Inquiry that is of a confidential nature or relates to the commission, or the alleged or suspected commission, of an offence against a law of the State, or</li> <li>(b) a person's reputation would be unfairly prejudiced.</li> </ul> </li> </ul>   |  |
| <p><b>Inquiry management</b></p>   |  |

|   |  |
|---|--|
| <p>3.3 Appended to the Notice of Inquiry will be an Inquiry Management Questionnaire ("the Questionnaire") which must be completed and returned to the RDU by the regulated entity within the time specified in the Questionnaire (allowing at least 10 working days for response). If the regulated entity fails to respond within the time specified, the RDU will notify the Inquiry Members and may proceed to confirm the date and arrangements for the hearing without further consultation with the regulated entity</p>   |  |
| <p>3.4 The purpose of the Questionnaire is to enable the Inquiry Members to establish whether an Inquiry management meeting is required for the purpose of issuing directions prior to the Inquiry hearing. The Questionnaire may seek responses on the following topics:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Inquiry arrangements (confirmation of suggested dates when the Inquiry will sit, estimated length of the Inquiry, legal representation);</li> <li><input type="checkbox"/> any submissions in relation to the public nature of the Inquiry;</li> <li><input type="checkbox"/> whether the regulated entity intends to deliver written submissions;</li> <li><input type="checkbox"/> matters of evidence;</li> <li><input type="checkbox"/> proposed witnesses; and</li> <li><input type="checkbox"/> any other relevant matters</li> </ul> |  |
| <p>3.5 Where the Inquiry Members decide that an Inquiry management meeting is required, the regulated entity will be invited to attend and may make submissions to the Inquiry. The Inquiry Members may agree to hold the Inquiry management meeting in private where the regulated entity wishes to make submissions in relation to the public nature of the Inquiry.</p>  | <p>There should be provision in the Guidelines for the inquiry Members to direct and hold an Inquiry management meeting if so requested by the regulated entity.</p> |
| <p>3.6 It should be emphasised that the purpose of an Inquiry management meeting is to assist in the timely and efficient running of the Inquiry. It ensures that the issues to be determined at Inquiry are narrowed to the greatest extent possible. Effective Inquiry management meetings enable, for example:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> the issues disputed by the regulated entity to be identified at an early stage;</li> <li><input type="checkbox"/> arrangements to be put in place to ensure that evidence, whether disputed or not, is presented clearly and</li> </ul>   |  |

|  |  |
|--|--|
| <p>effectively;</p> <ul style="list-style-type: none"> <li>□ the needs of any witnesses to be taken into account; and</li> <li>□ an effective programme and timetable to be established for the conduct of the Inquiry</li> </ul>  |  |
| <p>3.7 Prior to the commencement of the Inquiry hearing the Inquiry Members will issue directions to the regulated entity together with a timeframe for compliance.</p>  |  |
| <p>3.8 The regulated entity will have the opportunity to provide written legal submissions in accordance with the timetable laid down in any directions given by the Inquiry Members. All submissions must be accompanied by a copy of the case law to be relied upon in the course of legal submissions.</p>  |  |
| <p>3.9 If the regulated entity fails to comply with a direction made by the Inquiry Members and the Inquiry Members are satisfied of adequate notification to the regulated entity, the Inquiry hearing may proceed on the date set out in the Notice of Inquiry or on any other date which has been notified to the regulated entity by the RDU.</p>  |  |
| <p>3.10 The Inquiry Members may direct the RDU to furnish a copy of correspondence issued to and received from the regulated entity to ENF. The Inquiry Members may also direct the RDU to furnish a copy of any written submissions received from the regulated entity to ENF and may seek ENF's response to any submissions. A copy of any response from ENF will be sent to the regulated entity.</p> |  |
| <p>3.11 A sample running order for Preliminary Inquiry Procedures is set out at Appendix 1.</p>  |  |
| <p><b>4. The Inquiry Hearing</b></p>   |  |



|   |  |
|---|--|
| <p><b><i>Form and order of proceedings</i></b></p> <p>4.1 The Inquiry is not a court of law, and the procedure at the Inquiry hearing will be kept as informal as possible. The Central Bank has a statutory duty to undertake the Inquiry with as little formality and technicality, and with as much expedition, as proper consideration of the matter will allow. However, an Inquiry into suspected prescribed contravention(s) is a serious matter and the procedure at Inquiry must reflect this fact. The Inquiry will at all times observe the rules of procedural fairness, but is not bound by the rules of evidence.</p> | <p>It is problematic that an Inquiry could make findings against a regulated entity which could include significant financial penalties as well as reprimand and/or disqualification, without the rules of evidence being applied.</p> |
| <p>4.2 The Inquiry shall be held in public, subject to certain exceptions (see paragraph 3.2). If the Inquiry is held in public, a notice will appear on the Central Bank website advising of the time and location of the Inquiry hearing. The public and media will be able to watch and listen to the proceedings in a public gallery located within the Inquiry Room or adjacent to it. No notice will appear if the Inquiry is to be held in private.</p>  |  |
| <p>4.3 The Central Bank is not proposing that the Inquiry necessarily adopts the approach of a hearing adducing oral evidence. In exercising its discretion whether to hold such a hearing, the Inquiry Members will consider whether oral evidence is necessary for a fair determination of the suspected prescribed contravention(s), taking into account any submissions by the regulated entity on the matter.</p>  |  |
| <p><b><i>Standard of proof</i></b></p> <p>4.4 The Inquiry Members shall make findings as to whether the regulated entity is committing or has committed the prescribed contravention(s) to which the Inquiry relates on the balance of probabilities.</p>   |  |
| <p><b><i>Legal submissions</i></b></p> <p>4.5 As outlined in paragraph 3.8, the regulated entity will have the opportunity to provide written legal submissions prior to the Inquiry hearing date and in accordance with the directions of the Inquiry. In the context of a hearing, with or without oral evidence, the regulated entity will also be afforded the opportunity of making oral legal submissions.</p>  |  |
| <p><b><i>Applications during an Inquiry</i></b></p>   |  |

|   |  |
|---|--|
| <p>4.6 The Inquiry Members must act fairly and must consider and deliberate upon such applications as may be made to them in the course of the Inquiry.</p>   |  |
| <p>4.7 The Inquiry Members may be required to deal with a number of preliminary applications and issues, including inter alia:</p> <p><u>1. A decision to proceed in the absence of the regulated entity</u></p> <p>The Inquiry may proceed in the absence of the regulated entity provided that the regulated entity has been given an opportunity to participate in an Inquiry or to make written submissions to it.</p> <p><u>2. A request for an adjournment</u></p> <p>The Inquiry Members may adjourn any Inquiry hearing but in so doing shall ensure that the regulated entity is notified of the date, time and place at which any Inquiry hearing is to be resumed.</p> <p>The Inquiry Members have the discretion to grant or refuse an application for an adjournment. That discretion shall be exercised fairly, in accordance with fair procedures.</p> |  |
| <p><b><i>Commencement of the Inquiry Hearing</i></b></p> <p>4.8 At the beginning of a hearing, the Chairperson shall state the purpose of the Inquiry and introduce the Inquiry Members and explain the manner and order of the Inquiry. Appendices 2 and 3 outline sample running orders but these formats are flexible and, as the Inquiry Members may adopt their own procedures, may vary.</p>  |  |
| <p>4.9 Following this introduction, the suspicions against the regulated entity, as per the Notice of Inquiry, will be set out by the Chairperson with the main facts, dates and persons involved outlined. If minor or clerical amendments are to be made to the Notice of Inquiry by the Inquiry Members, they will be raised at this stage. If more substantive amendments are required and the regulated entity has not agreed to such amendments in advance, the hearing shall be adjourned in order to give the regulated entity adequate time to consider the amendments. The regulated entity will then be invited to make any preliminary submissions.</p>   |  |

|  |   |
|--|---|
| <p><b>Hearing without oral evidence</b></p> <p>4.10 In circumstances where the matter is suited to resolution without adducing oral evidence, the Inquiry Members will conduct their review based on relevant documents, any witness statements and any oral or written submissions. No witnesses shall be called at this form of Inquiry, but a hearing may be convened and oral submissions at any such hearing may be held in public.</p>   |   |
| <p>4.11 A sample running order for this type of Inquiry is set out at Appendix 2.</p>  |   |
| <p><b>Hearing with oral evidence</b></p> <p>4.12 A stenographer will be in attendance at all Inquiry hearings where oral evidence is adduced. A copy of the transcript will be made available to the Inquiry Members and the regulated entity as soon as practicable.</p>  | <p>It would be preferable and in the interests of fair procedures for the Guidelines to provide for the attendance of a stenographer for all Inquiry hearings, not just those where oral evidence is adduced.</p> |
| <p><b>Procedures for the taking of evidence</b></p> <p>4.13 Once the suspicions against the regulated entity have been set out and the regulated entity has been invited to make preliminary submissions, witnesses may be called. The Inquiry Members will call such witnesses as they wish to hear from to give evidence at the Inquiry; such witnesses may also be examined by or on behalf of the regulated entity.</p>  | <p>The Guidelines do not specify whether or not the regulated entity has the right to call witnesses – this right should be made express.</p>   |
| <p>4.14 During the course of an Inquiry, at any time from the appointment of the Inquiry Members to the conclusion of the Inquiry, the Inquiry Members may, in writing:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> summons a person to appear before the Inquiry Members to give evidence and/or produce specified documents; and</li> <li><input type="checkbox"/> require the person to attend each day of the hearing unless excused or released from attendance.</li> </ul> |   |
| <p>4.15 The Chairperson may require the oral testimony of a witness to be given on oath. He or she may also:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> require a witness at the Inquiry to answer a question put to the witness; and</li> <li><input type="checkbox"/> require a person appearing at the Inquiry pursuant to a summons to produce any document specified in the summons.</li> </ul>  |   |

|   |   |
|---|---|
| 4.16 The Chairperson may also allow a witness at the Inquiry to give evidence by tendering a written statement, verified by oath. The witness may be required to attend the Inquiry hearing for the purposes of examination.  |   |
| 4.17 A sample running order for this type of Inquiry is set out at Appendix 3.  |   |
| <p><b>No oral hearing or evidence</b></p> <p>4.18 The Inquiry Members may decide to proceed on an entirely written basis, i.e. without oral submissions or evidence. This may occur where the Inquiry Members do not intend to take oral evidence and:</p> <p>i) the regulated entity has indicated in the Questionnaire that it does not intend to make oral submissions; or</p> <p>ii) the regulated entity has been afforded an opportunity to be present at the Inquiry hearing, but has failed to appear</p> | The Guidelines should formally provide that the Inquiry Members will proceed to hear oral submissions and/or evidence where asked to do so by the regulated entity. |
| <p><b>Referral to the High Court on a point of law</b></p> <p>4.19 The Inquiry Members may, on their own initiative or at the request of the regulated entity, refer a question of law arising during the Inquiry to the High Court for decision. This procedure constitutes a consultative case stated procedure, the main purpose of which is to seek clarification on a point of law. The Inquiry Members are not obliged to state a case upon being requested to do so.</p>                                   |   |
| 4.20 Where a question of law is referred to the High Court, the Inquiry will be temporarily stayed in full or in part (depending on whether the question is relevant to all of the prescribed contraventions), pending a decision by the High Court.  |   |
| 4.21 The question of law shall be drafted by the Inquiry Members taking into account any submissions of the regulated entity and shall be sent by the RDU to the High Court, accompanied by all documents before the Inquiry that are relevant to the matter in question.   |   |
| <p><b>Applications for an adjournment to pursue settlement</b></p> <p>4.22 The Central Bank has authority and discretion to enter into a settlement agreement with the regulated entity at any</p>  | Completion of the Inquiry is not defined, but is taken to mean the issue by the Inquiry of its written decision in accordance with 5.12.                            |



|   |  |
|---|--|
| stage before completion of the Inquiry.   |  |
| <p>4.23 Where the regulated entity wishes to settle the matter immediately prior to or during the course of the Inquiry, the regulated entity and/or its legal adviser should contact ENF. The Inquiry Members may adjourn any hearing in order to facilitate settlement but shall have no other role in relation to settlement. The settlement discussions shall be carried out in private. The details of any settlement discussions should not be disclosed to the Inquiry Members. Where the matter is successfully settled, the Inquiry Members shall be informed of the fact of settlement. Where settlement negotiations are unsuccessful, the Inquiry shall, where it has been adjourned, be resumed.</p> |  |
| <p>4.24 Settlement agreements will be concluded only where the basis for settlement is consistent with the general approach to regulation adopted by the Central Bank, is fair having regard to all the facts known, and will contribute to the efficient, effective and economic use of resources.</p>   |  |
| <b>5. The Findings of the Inquiry Members</b>   |  |
| <p><b><i>Written Findings</i></b></p> <p>5.1 Following any closing submissions and a review of all the evidence, the Inquiry Members shall set out in writing their finding(s) as to whether the regulated entity is committing or has committed the prescribed contravention(s) to which the Inquiry relates.</p>  |  |
| <p>5.2 In all circumstances, the Inquiry Members shall produce written findings, which shall set out:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> their findings as to whether or not the regulated entity: <ul style="list-style-type: none"> <li>(a) is committing or has committed a prescribed contravention, or</li> <li>(b) is participating or has participated in the commission of the prescribed contravention to which the Inquiry relates; and</li> </ul> </li> <li><input type="checkbox"/> the grounds on which its findings are based.</li> </ul>  |  |
| <p>5.3 The written findings will be delivered to the regulated entity by registered post (and email, if agreed in advance with the regulated entity) as soon as the written findings are</p>  |  |

|   |   |
|---|---|
| available. The regulated entity will be kept informed of any delays in the preparation of the written findings.   |   |
| 5.4 If necessary, the Inquiry Members will invite the regulated entity to attend before them on a specified date for a sanctions hearing.   |   |
| <b>Sanctions</b><br>5.5 A sanctions hearing will either: (a) follow the Inquiry Members' written findings; or (b) constitute a standalone hearing (in circumstances where the regulated entity acknowledges the contravention and consents to dispensing with an Inquiry).  |   |
| 5.6 The Inquiry Members will invite submissions regarding sanctions.  |   |
| 5.7 The regulated entity will be entitled to submit any documentation relevant to the Inquiry Members' decision on sanctions once the Inquiry Members have delivered their findings on the prescribed contravention(s). Oral submissions may also be made directly to the Inquiry Members at the sanctions hearing.   |   |
| 5.8 If the Inquiry Members find that a regulated entity is committing or has committed a prescribed contravention, or is participating or has participated in the commission of such a contravention, the Inquiry Members may impose one or more of the following sanctions:<br>(a) a caution or reprimand;<br>(b) a 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 by the regulated financial service provider;<br>(c) a direction to pay to the Central Bank a monetary penalty (not exceeding the prescribed maximum amount, see paragraph 5.10 below);<br>(d) a direction disqualifying a person from being concerned in the management of a regulated financial service provider for such period as is specified in the order;<br>(e) if the contravention is found to be ongoing, a direction ordering the contravention to cease;<br>(f) a direction to pay the Central Bank all or | When considering the quantum of any monetary penalty under 5.8(c), due consideration should be given to any costs specified in 5.8(f) as otherwise, the protection contained in paragraph 5.10 runs the risk of being completely ineffective. |

|  |  |
|--|--|
| <p>a specified part of the costs incurred by it in holding the Inquiry and investigating the matter.</p>   |  |
| <p>5.9 All the circumstances of the case will be taken into account by the Inquiry Members in determining the appropriate sanction(s) and, in doing so, regard may be had to the following factors –</p> <p><u>1. The Nature, Seriousness and Impact of the Contravention</u></p> <ul style="list-style-type: none"> <li>(a) whether the contravention was deliberate, dishonest or reckless;</li> <li>(b) duration and frequency of the contravention;</li> <li>(c) the amount of any benefit gained or loss avoided due to the contravention;</li> <li>(d) whether the contravention reveals serious or systemic weaknesses of the management systems or internal controls relating to all or part of the business;</li> <li>(e) the extent to which the contravention departs from the required standard;</li> <li>(f) the impact or potential impact of the contravention on the orderliness of the financial markets, including whether public confidence in those markets has been damaged or put at risk;</li> <li>(g) the loss or risk of loss caused to consumers or other market users;</li> <li>(h) the effect, if any, of the contravention on vulnerable consumers;</li> <li>(i) the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the contravention;</li> <li>(j) whether there are a number of smaller issues which individually may not justify administrative sanction, but which do so when taken collectively;</li> <li>(k) 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.</li> </ul> <p><u>2. The Conduct of the Regulated entity after the Contravention</u></p> <ul style="list-style-type: none"> <li>(a) how quickly, effectively and completely</li> </ul> | <p>With regard to 5.9(2)(e) and without prejudice to 4.23 above, in circumstances where as part of unsuccessful settlement negotiations, the regulated entity had offered to admit contraventions which were ultimately upheld by the Inquiry, the Inquiry members should have due regard to this factor when considering the appropriate sanctions to impose.</p> |

|   |  |
|---|--|
| <p>the regulated entity brought the contravention to the attention of the Central Bank or any other relevant regulatory authority;</p> <p>(b) the degree of co-operation with the Central Bank or other agency provided during the investigation of the contravention;</p> <p>(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;</p> <p>(d) the likelihood that the same type of contravention will recur if no administrative sanction is imposed;</p> <p>(e) whether the contravention was admitted or denied.</p> <p><u>3. The Previous Record of the Regulated entity</u></p> <p>(a) whether the Central Bank has taken any previous enforcement action including instances resulting in a settlement or sanctions or whether there are relevant previous criminal convictions;</p> <p>(b) whether the regulated entity has previously undertaken not to do a particular act or engage in particular behaviour;</p> <p>(c) whether the regulated entity has previously been requested to take remedial action, and the extent to which such action has been taken.</p> <p><u>4. Other General Considerations</u></p> <p>(a) prevalence of the contravention;</p> <p>(b) the appropriate deterrent impact of any sanction on the regulated entity and on other regulated entities;</p> <p>(c) action taken by the Central Bank in previous similar cases;</p> <p>(d) the level of turnover of the regulated entity in its last complete financial year prior to the commission of the contravention; and</p> |  |
|---|--|



|   |  |
|---|--|
| (e) any other relevant consideration.   |  |
| <p>5.10 Where a monetary penalty is imposed, the amount shall not exceed:</p> <p>(a) in the case of a body corporate or an unincorporated body, €5,000,000;</p> <p>(b) in the case of a natural person, €500,000; or</p> <p>(c) such other amount as may be prescribed by regulations.</p> <p>The monetary penalty shall not be of an amount that would be likely to cause the regulated entity to cease business, or in the case of a natural person would be likely to cause the person concerned to be adjudicated bankrupt. If more than one contravention is found in respect of the same conduct, only one monetary penalty may be imposed.</p> |  |
| <p>5.11 If a monetary penalty is imposed in respect of a contravention which is also an offence under the law of the State, the regulated entity is not liable to be otherwise prosecuted or punished for the offence. Where a regulated entity has already been tried for an offence and found either guilty or not guilty, and the offence involved a prescribed contravention, a monetary penalty may not be imposed.</p>  | <p>If a settlement agreement is reached or entered into under which the regulated entity agrees to pay a penalty, does this double indemnity provision also apply? Or does this provision only apply for penalties imposed by way of formal sanction at the conclusion of the Inquiry process?</p> |
| <p>5.12 At the conclusion of a sanction hearing the Inquiry Members shall issue their written decision, which will set out their findings, the sanctions, if any, imposed and the reasons for same.</p>   |  |
| <p><b><i>Appeal to the Irish Financial Services Appeals Tribunal</i></b></p> <p>5.13 A decision of the Inquiry may be appealed by the regulated entity to the Irish Financial Services Appeals Tribunal ("IFSAT") within 28 days of being notified of that decision, or within such time as agreed with the Registrar and Chairperson of IFSAT. IFSAT may confirm, alter, amend or set aside the decision of the Inquiry, or remit the matter back to the Inquiry for reconsideration, together with any recommendation or direction as to the matters to be reconsidered.</p>  |  |
| <p><b><i>Appeal to the High Court</i></b></p> <p>5.14 The regulated entity or the Central Bank may appeal the decision of IFSAT to the High</p>   |  |

|  |  |
|--|--|
| <p>Court within 28 days of being notified of the decision, or within such time as the High Court may allow. An appeal to the High Court does not affect the operation of the IFSAT decision appealed against, or prevent the taking of action to implement the decision, unless the High Court otherwise orders.</p> <p>5.15 The High Court may make such order as it sees fit in light of its decision, including, but not limited to, affirming or setting aside the decision of IFSAT, or remitting the matter to IFSAT with such directions as it sees fit. The decision of the High Court is final, save that an appeal may be brought to the Supreme Court on a point of law only, with leave of either Court.</p>   |  |
| <p>When a decision of the Inquiry takes effect</p> <p>5.16 A decision by the Inquiry Members to impose a caution or reprimand will take effect:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> if no appeal is lodged with IFSAT within the period allowed, at the end of that period (28 days after the affected person is notified of the decision or such extended period as the Registrar of IFSAT allows after consulting with the Chairperson of IFSAT); or</li> <li><input type="checkbox"/> if an appeal is lodged with IFSAT and the decision is confirmed by IFSAT (with or without variation), at the time when the period allowed for lodging an appeal with the High Court has ended, no appeal against IFSAT's determination having been lodged within that period (28 days after the affected person is notified of IFSAT's decision or such extended period as the High Court allows); or</li> <li><input type="checkbox"/> where an appeal is lodged with IFSAT and withdrawn, at the time of withdrawal; or</li> <li><input type="checkbox"/> where an appeal is subsequently made to the High Court against IFSAT's determination and the determination is confirmed (with or without variation), at the time of confirmation; or</li> <li><input type="checkbox"/> where an appeal is subsequently made to the High Court against IFSAT's determination, and withdrawn, at the time of withdrawal.</li> </ul> | <p>In the event of an appeal to the Supreme Court, presumably the decision will not take effect until after the appeal has either been heard or withdrawn?</p> |

|   |  |
|---|--|
| <p>5.17 A decision by the Inquiry Members directing payment of a monetary penalty, a refund of money or costs will take effect:</p> <ul style="list-style-type: none"> <li>□ if the amount is not paid to the Central Bank within the period allowed for appeals against such a decision (28 days after the affected person is notified of the decision or such extended period as the Registrar of IFSAT allows after consulting with the Chairperson of IFSAT), and no appeal to IFSAT is lodged (or having been lodged, is withdrawn), at the time when the decision is confirmed by an order of a court of competent jurisdiction; or</li> <li>□ where an appeal is lodged with IFSAT and the decision is confirmed by that Tribunal (with or without variation), at the time when the period allowed for lodging an appeal against IFSAT's determination with the High Court has ended (28 days after the affected person is notified of IFSAT's decision or such extended period as the High Court allows), no appeal having been lodged within that period; or</li> <li>□ where an appeal is lodged with IFSAT and withdrawn, at the time of withdrawal; or</li> <li>□ where an appeal is lodged with the High Court against IFSAT's determination and the determination is confirmed (with or without variation), at the time of confirmation; or</li> <li>□ where an appeal is lodged with the High Court against IFSAT's determination and withdrawn, at the time of withdrawal.</li> </ul> | <p>In the event of an appeal to the Supreme Court, presumably the decision will not take effect until after the appeal has either been heard or withdrawn?</p>                   |
| <p>5.18 A disqualification direction will take effect:</p> <ul style="list-style-type: none"> <li>□ if no appeal is lodged with IFSAT within the period allowed for bringing such an appeal (28 days after the affected person is notified of the decision or such extended period as the Registrar of IFSAT allows after consulting with the Chairperson of IFSAT), or is lodged within that period but is later withdrawn, at the time when it is confirmed by an order of a District Court; or</li> <li>□ if an appeal is lodged with IFSAT and the direction is confirmed by IFSAT, at</li> </ul>   | <p>In the event of an appeal to the Supreme Court, presumably the disqualification direction will not take effect until after the appeal has either been heard or withdrawn?</p> |

|   |  |
|---|--|
| <p>the time when the period allowed for lodging an appeal with the High Court has ended, no appeal against IFSAT's determination having been lodged within that period (28 days after the affected person is notified of IFSAT's decision or such extended period as the High Court allows); or</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> where an appeal is lodged with IFSAT and withdrawn, at the time of withdrawal; or</li> <li><input type="checkbox"/> where an appeal is subsequently made to the High Court against IFSAT's determination and the determination is confirmed (with or without variation), at the time of confirmation; or</li> <li><input type="checkbox"/> where an appeal is subsequently made to the High Court against IFSAT's determination, and withdrawn, at the time of withdrawal.</li> </ul>   |  |
| <p>5.19 Any other decision by the Inquiry Members will take effect:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> if no appeal against the decision is lodged with IFSAT within the period allowed, at the end of that period (28 days after the affected person is notified of the decision or such extended period as the Registrar of IFSAT allows after consulting with the Chairperson of IFSAT); or</li> <li><input type="checkbox"/> if an appeal is lodged with IFSAT and the decision is confirmed by IFSAT (with or without variation), at the time when the period allowed for lodging an appeal with the High Court has ended, no appeal against IFSAT's determination having been lodged within that period (28 days after the affected person is notified of IFSAT's decision or such extended period as the High Court allows); or</li> <li><input type="checkbox"/> where an appeal is lodged with IFSAT and withdrawn, at the time of withdrawal; or</li> <li><input type="checkbox"/> where an appeal is subsequently made to the High Court against IFSAT's determination and the determination is confirmed (with or without variation), at the time of confirmation; or</li> <li><input type="checkbox"/> where an appeal is subsequently made to the High Court against IFSAT's determination, and withdrawn, at the</li> </ul> | <p>In the event of an appeal to the Supreme Court, presumably the decision will not take effect until after the appeal has either been heard or withdrawn?</p> |



|   |   |
|---|---|
| time of withdrawal.   |   |
| <p><b>Publication</b></p> <p>5.20 Where the Inquiry Members have found that a regulated entity is committing or has committed a prescribed contravention and/or the Inquiry Members have imposed a sanction, the Central Bank must, subject to paragraph 5.21, publish in such form and manner as it considers appropriate the Inquiry Members' findings and the particulars of the contravention(s), which will ordinarily include:</p> <ul style="list-style-type: none"> <li>(a) the name of the regulated entity on whom a sanction has been imposed;</li> <li>(b) details of the prescribed contravention(s) in respect of which the sanction has been imposed;</li> <li>(c) details of the sanction imposed; and</li> <li>(d) the grounds on which the finding is based.</li> </ul> | <p>Publication of the Inquiry's decision before all avenues of appeal have been exhausted would be prejudicial to the regulated entity, in the event that the appeal was ultimately successful.</p> |
| <p>5.21 Where the Inquiry Members determine that any findings or details are of a confidential nature or relate to the commission of an offence against a law of the State or would unfairly prejudice a person's reputation, they may decide not to publish all or part of the decision. The regulated entity shall be entitled to make submissions in this regard. Such submissions on publication shall not affect the timeframe within which the regulated entity must appeal the decision.</p>   |   |
| <p>5.22 Separate to the publication of the Inquiry Members' findings, the Central Bank may issue a market commentary on the outcome of the Inquiry, which will outline the Central Bank's view of how the findings in the case apply more broadly to the market at issue.</p>   |   |
| <p>5.23 The Central Bank will publish annually, in summary form, information on its actions under Part IIIC of the Act, including on the decisions of any Inquiry conducted.</p>  |   |