THE ADMINISTRATIVE SANCTIONS PROCEDURE OF THE CENTRAL BANK OF IRELAND

1. The Central Bank ("the Bank") has a wide remit in regulation. This paper concerns the Bank's Administrative Sanctions Procedure ("ASP"), which is the disciplinary procedure applicable to the actions of regulated financial service providers[1] and persons concerned in their management.[2]

2. Part IIIC of the Central Bank Act 1942[3] ("the 1942 Act) governs the ASP procedure. Part IIIC was introduced in 2004[4] to give the Bank stronger powers. In particular, the Bank was given the power to impose sanctions in respect of breaches of regulatory requirements, and to publicise the findings and sanctions imposed. In 2013, the Bank's powers were strengthened by the introduction of additional sanctions and the provision for increased fines[5].

3. Speaking generally, the system is as follows:-

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[1] Section 2(1) of the 1942 Act defines a "regulated financial service provider" as follows:-

> "'Regulated financial service provider' means:-
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> (a) a financial service provider whose business is subject to regulation by the Bank under this Act or under a designated enactment or a designated statutory instrument.
>
> (b) a financial service provider whose business is subject to regulation by an authority that performs functions in a EEA country that are comparable to the functions performed by the Bank under this Act, or under a designated enactment or designated statutory instrument, or
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> (c) in relation to Part VIIB only, any other financial service provider of a class specified in the regulations for the purpose of this paragraph."

[2] Section 2(4) of the 1942 Act states as follows:-

> "For the purposes of this Act, a person is concerned in the management of a body corporate or a firm, that is a regulated financial service provider, if the person is in any way involved in directing, managing or administering the affairs of the body or firm."

[3] The consolidated version of the Central Bank Act 1942 is to be found on the Central Bank website.
[4] Central Bank and Financial Services Authority of Ireland Act 2004
[5] Central Bank (Supervision and Enforcement) Act 2013

(a) Where a concern arises that a prescribed contravention has been or is being committed, the Bank may investigate. This in itself is a relatively formal and structured process.

(b) If the investigation reveals that there are reasonable grounds to suspect that a prescribed contravention has been or is being committed, a full Inquiry may be held.

(c) The Inquiry decides if the prescribed contravention has occurred and determines the appropriate sanctions.

(d) The final decision of an Inquiry may be appealed to the Irish Financial Services Appeals Tribunal ("IFSAT"), and subsequently to the High Court.

(e) At any time before the conclusion of an Inquiry (but far more often before its commencement), the matter may be resolved by entering into a settlement agreement

4. Section 33 AO of the 1942 Act outlines the basis for the Bank to hold an ASP Inquiry.[6] In essence, the Bank may hold an ASP inquiry where it suspects on reasonable grounds

(a) that a regulated financial service provider is committing or had committed a prescribed contravention[7], or

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[6] Section 33AO of the 1942 Act provides as follows:-

"(1) Whenever the Bank suspects on reasonable grounds that a regulated financial service provider is committing or has committed a prescribed contravention, it may hold an inquiry to determine whether or not the financial service provider is committing or has committed the contravention.

(2) Whenever the Bank suspects on reasonable grounds that a person concerned in the management of a regulated financial service provider is participating or has participated in the commission of a prescribed contravention, by the financial service provider, it may hold an inquiry to determine whether or not the person is participating or has participated in the contravention."

[7] Section 33AN of the 1942 Act sets out the definition of the term "prescribed contravention" as follows:-

"`Prescribed contravention' means a contravention of

(a) a provision of a designated enactment or designated statutory instrument; or

(b) a code made, or a direction given, under such a provision, or

(b) that a person concerned in the management of a regulated financial service provider is participating or has participated in a prescribed contravention.

The ASP procedure is also applicable to certain other regulatory breaches.[8]

5. It is of practical importance to bear in mind that it is not only regulated financial service providers that are at risk of an ASP inquiry, but also persons concerned in the management of such a provider. A person is involved in the management of a regulated financial service provider if the person "*is in any way involved in directing, managing or administering the affairs of the body or firm.*" It is important also to note the expanded meaning of "*contravene*",[9] so that (for instance) an

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(c) any condition or requirement imposed under a provision of a designated enactment, designated statutory instrument , code or direction, or

(d) any obligation imposed on any person by this Part or imposed by the Bank pursuant to a power exercised under this Part."

The list of designated enactments and designated statutory instruments is located in Schedule 2 of the 1942 Act. Because there are many instances where the Bank issues statutory instruments, or imposes conditions, directions or requirement pursuant to a designated enactment or statutory instrument, Schedule 2 does not give a definitive list of the legal provisions which may give rise to a prescribed contravention. Some obligations, in the form of conditions, directions or requirements are imposed on a bilateral basis, and therefore would be known only to the Central Bank and the regulated entity involved.

[8] In particular:-

- Council Regulation (EU No. 1204/2013) of the 15th October 2013 established the Single Supervisory Mechanism ("the SSM"). The SSM involves the direct supervision of certain entities by the European Central Bank. In certain instances the ECB is competent for the investigation and sanctioning of regulatory breaches. In other instances, the ECB may require the Central Bank to open proceedings with a view to taking action to ensure that appropriate penalties are imposed. An investigation may also be commenced when the Bank is required to open proceedings by the ECB pursuant to article 18(5) of the SSM Regulation.

- The European Union (Capital Requirements) Regulations 2014 give effect to Directive 2013/36/EU. The European Union (Capital Requirements) (No. 2) Regulations 2014 give effect to a number of technical requirements so that the Capital Requirements Regulation (Regulations 575/2013) ("the CRR") can operate effectively in Irish law. Certain specific sanctions, as provided for in Regulations 54 and 55 of the European Union (Capital Requirements) Regulations 2014, may be imposed by the Central Bank following an inquiry under section 33AO of the 1942 Act.

[9] Section 33AN of the 1942 Act sets out the definition of "contravene" as follows:-

"'Contravene' includes failing to comply, and also includes:

(a) Attempting to contravene, and

individual who merely counsels the commission of a prescribed contravention may also be at risk of an ASP inquiry.

6. In *Fingleton v. the Central Bank of Ireland* [2016] IEHC 1, Noonan J. considered the question of whether the expression "*person concerned in the management*" in section 33AO(2) is an exclusively present tense definition, so that there could be no inquiry into a person who had been concerned in the management of a regulated financial service provider only at some stage in the past. Noonan J. rejected this proposition, holding that section 33AO(2) applied to a person who had been, at the time of the alleged prescribed contravention, concerned in the management of the regulated financial service provider. He said at paragraph 108:-

> *"There is in my view no warrant for importing into S.33AO a different temporal context than the one that supplies itself by reference to the unrelated tense used in a definition section. To do so would again give rise to absurd results. As previously mentioned, it would mean that misconduct of such seriousness as to cause the business of the RFSP to fail and possibly being concealed until after that failure, could never be the subject of the ASP. If such were the intention of the legislator, very clear language would be required to express it and common sense readily supplies the reason for such language not being apparent."*

If that is correct, then not just present management, but past management, are at risk of ASOP inquiries.

7. The Bank has published two very useful documents, as follows:-

- Outline of the Administrative Sanctions Procedure

- Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942.

(b) Aiding, abetting, counselling or procuring a person to commit a contravention, and

(c) Inducing, or attempting to induce, a person (whether by threats or promises or otherwise) to commit a contravention, and

(d) Being (directly or indirectly) knowingly concerned in, or a party to, a contravention, and

(e) Conspiring with others to commit a contravention."

The first document gives a description of the ASP in general. It includes a description of the investigation system, the settlement policy and procedure of the Bank, the structure of an inquiry, and a description of the sanctions available. The second document deals more specifically with inquiries. Both are available on the Central Bank website.

THE INVESTIGATION

8. The Bank has various Supervisory Divisions**.** Concerns that prescribed contraventions may have taken place will arise in the normal course of work undertaken by Supervisory Divisions. Such concerns may be referred by the Supervisory Division to the Enforcement Directorate of the Bank, which is the division responsible for conducting investigations. Such concerns could also arise from other sources. While the Enforcement Directorate conducts an investigation, the relevant Supervisory Division may maintain dialogue with the regulated entity in respect of matters outside the remit of the investigation.

9. Once an investigation has commenced, the enforcement directorate will issue an Investigation Letter to the regulated entity. The Investigation Letter will put the regulated entity on notice that the matter may be referred to inquiry. It may contain an outline of the suspected prescribed contravention, and may call upon the regulated entity to provide information, responses to specific questions, or responses to the suspected prescribed contraventions. Investigation Letters can be, and often are, subsequently amended in the light of responses received from the regulated entity and other information gathered during the course of the investigation.

10. The responses received may lead the Bank to require further information, to hold interviews, and/or take statements. Although investigations are confidential, third parties with information about the suspected contravention may also be contacted by the Bank as part of this process.

11. At the conclusion of its investigation, the Enforcement Directorate determines whether a prescribed contravention is suspected to have been committed. If it does so, then the options open to the Bank are as follows:-

- Decide to take no further action.

- Issue a Supervisory Warning.

- Resolve the matter by taking supervisory action.
- Agree a settlement, or
- Refer the case to an Inquiry.

12. According to its ASP Outline document[10], the Bank may decide to take no further action, notwithstanding that it concludes that a prescribed contravention may have been committed, where:

    - The matter giving rise to concern
        - Is very minor in nature,
        - Immediate remedial action has been taken, and
        - Full co-operation has been provided.
    - The Bank considers that resources could be more effectively directed to other uses, and/or
    - Other policy considerations of the Bank are of relevance.

13. According to its ASP Outline document,[11] the Bank may issue a Supervisory Warning where it considers that the matter does not warrant an administrative sanction, but there are nonetheless reasonable grounds to suspect that a prescribed contravention has occurred. A Supervisory Warning is a written warning notifying the regulated entity that the Bank considers that it has not complied with certain regulatory requirements, and calling upon the regulated entity to rectify the matters identified. According the ASP Outline document,[12] Supervisory Warnings may be issued in a number of circumstances, including where :-

    - The matter giving rise to concern is minor in nature;
    - Immediate remedial action has been taken;
    - Full co-operation has been received, and;

[10] Paragraph 3.7.3
[11] Paragraph 3.7.5
[12] Paragraph 3.7.7

- Considerations supporting another enforcement approach do not apply.

SETTLEMENT PROCEDURE

14. It is always open to the Bank and the regulated entity to seek to settle a matter under investigation, although the Bank makes it clear that it does not see itself as being under any obligation to settle. Specific provision is made for this procedure under section 33AR and 33AV of the 1942 Act. Many investigations are concluded by the use of this process: indeed while some full Inquiries are pending, none of the ASP actions to date has been finally determined by an Inquiry.

15. The possibility of settlement is therefore a useful one to explore.[13] It is not however necessarily an easy way out for a regulated entity. The Bank expects that a Settlement Agreement will contain an admission of the breach. The Settlement Agreement may contain any of the normal range of sanctions of the kind referred to in section 33AQ of the 1942 Act, although (as seen below) the Bank operates a discount scheme to encourage settlement. Furthermore, it is invariably **a** stipulation of a settlement agreement that a public statement will be published: details of settlement agreements appear on the Bank's website. A settlement agreement may therefore not avoid the imposition of significant sanction and publicity, but it will avoid the additional costs and other burdens associated with an Inquiry. It may therefore be a desirable end for a regulated entity

16. The settlement process itself is normally conducted on a without prejudice basis. It is usually commenced by the Central Bank issuing a without prejudice letter offering the possibility of settlement to the regulated entity. Where a regulated entity settles a matter at an early stage with the Bank, a discount may be applied to the sanction.[14] The discount system provides for a percentage discount (on both monetary sanction and disqualification) of up to 30% if the regulated entity confirms its willingness to enter into the settlement procedure and to settle within the time indicated by the Central Bank in its initial settlement letter ("Stage 1"). It provides for a discount of up to 10% for settlement between the time at which Stage one expires and the time at which a Notice of Inquiry is issued ("Stage 2").

[13] It is important to note that, while settlement is in principle available at all stages, the Bank has made it clear that it will not generally consider it after the matter has been referred to Inquiry.
[14] Paragraph 4.4 Early Settlement Discount Scheme.

17. If a regulated entity indicates its willingness to enter into the settlement procedure, the Central Bank writes to the regulated entity notifying it of the sanction (monetary or otherwise) which the Bank considers is appropriate. This is envisaged to be followed by a settlement meeting, again held on a without prejudice basis. If agreement is reached, the terms are set out in a settlement agreement. According to the ASP Outline document,[15] a settlement agreement will include the following:-

- Admissions by reference to the prescribed contraventions;
- A statement that the prescribed contraventions have ceased or are being addressed;
- A statement from the regulated entity that it has disclosed all relevant information in its possession;
- Appropriate sanctions;
- Any discount for any settlement;
- A detailed public statement;
- Other relevant terms.

18. Execution of a Settlement Agreement is followed by the Central Bank issuing a public statement, providing a detailed account of the admitted prescribed interventions and other matters. These public statements are generally available on the Central Bank's website. The Settlement Agreement then forms part of the regulated entity's compliance record, and may be taken into account in future investigations.

THE INQUIRY

19. Conduct of an Inquiry is regulated at a broad level by the 1942 Act: see sections 33AP to 33AQ and section 33AY to 33 BB. As mentioned above, the detailed procedures relating to the conduct of an Inquiry are set out in the Inquiry Guidelines published by the Bank. These Guidelines are made by the Bank under section 33BD of the 1942 Act, and have statutory force.

[15] Paragraph 4.6.3

20. Section 33AO, as set out above, provides for the circumstances in which an inquiry may be held. An inquiry is held if there are reasonable grounds to suspect that a prescribed contravention is being or has been committed is reached by the enforcement division. In practical terms, that issue is addressed by the Enforcement Directorate's investigation. If the Enforcement Directorate determines that there are reasonable grounds to suspect that a regulated entity has committed or is committing a prescribed contravention, and the matter has not otherwise been concluded (for example by way of settlement), an Inquiry will be established. The Regulatory Decisions Unit ("RDU") of the Bank acts as the secretariat to the Inquiry. The Enforcement Directorate provides the following to the Inquiry:-

    - 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;

    - An Investigation Report, which details the investigation carried out by the enforcement directorate, and contains a schedule of the categories of materials and information gathered during the investigation;

    - Copies of documentation relied upon in preparing the investigation report, and

    - Copies of any Investigation Letters issued to the regulated entity and nay responses.

21. The Central Bank has appointed an Inquiry Panel from which persons are appointed to carry out a particular inquiry. Following the notification to the RDU of the decision to hold an Inquiry, it arranges for the appointment of the Inquiry members to conduct a particular inquiry. It is up to the Inquiry Members to decide how the inquiry will proceed and the procedures to be followed, subject to the Act and the Inquiry Guidelines. The purpose of the Inquiry is to determine if a prescribed contravention is being or has been committed, and to determine the appropriate sanctions.

22. Section 33AY(3) of the Act provides that the inquiry may be assisted by a legal practitioner or practitioners. On the assumption that the inquiry members appoint legal

practitioners for this purpose, the persons involved in an Inquiry thereafter would normally be the following:-

- The Inquiry Members.
- The legal practitioners appointed to assist the inquiry.
- RDU personnel, who act as a secretariat only.
- Representatives of the Enforcement Directorate. The Guidelines provide that the Enforcement Directorate will be available during the inquiry to provide any assistance, information or evidence requested by the inquiry members. They do not however contemplate that the Enforcement Directorate will act as prosecutor.
- The regulated entity, with or without its legal advisors.

23. The RDU issues a notice of inquiry to the relevant regulated entity.[16] The Notice of Inquiry must, pursuant to section 33AP of the 1942 Act, set out certain information, including the grounds upon which the suspicions are based. The notice of inquiry also appends an Inquiry Management Questionnaire, whose answers are intended to assist the inquiry in assessing practical questions, such as the issues that are likely to ne in dispute, the witnesses that are likely to be required, and the length of time that the inquiry is likely to take.

24. Depending upon the answers to the Questionnaire, the inquiry members may decide that an inquiry management meeting is needed. Such a meeting has occurred in the Inquiries that have taken place to date. According to the Guidelines,[17] effective inquiry management meetings enable for example

- Any material factual disputes to be identified at an early stage,
- Arrangements to be put in place to ensure that evidence, whether disputed or not, is presented clearly and effectively,
- The needs of any witnesses to be taken into account, and

[16] See section 33AP of the 1942 Act
[17] Paragraph 3.9

- An effective programme and timetable to be established for the conduct of the inquiry.

25. Section 33AZ deals with the issue of whether Inquiries are held in public or private. Section 33AZ(1) provides that, save as provided by section 33AZ (2), inquiries shall be held in public. In accordance with the practice now prevalent in most statutory disciplinary procedures, the provisions mean that inquiry hearings will usually be held in public. They may only be held in private (or part in private) in the following circumstances:-

    - By agreement: the Inquiry and the regulated entity can agree that the Inquiry should be held in private, or,

    - By decision of the Inquiry. The inquiry can decide that the Inquiry should be held in private, being satisfied that:

        - 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 the law of the State, or

        - A person's reputation would be unfairly prejudiced.

26. Both the Act and the Guidelines provide for informality. Thus, section 33AYprovides:-

> *"(1) The Bank shall conduct an inquiry with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before it will allow."*
>
> *"(2) At an inquiry, the Bank shall observe the rules of procedural fairness, but is not bound by the rules of evidence."*

Paragraph 4.1 of the Guidelines provides:-

> *"The Inquiry is not a court of law, and the procedure at the Inquiry hearing will be kept as informal as possible…"*

27. The Guidelines allow for considerable flexibility. In particular, they provide [18] that the Inquiry need not necessarily adopt the approach of a hearing adducing oral evidence. The Guidelines clearly envisage that the inquiry members will have a discretion as to whether to hold a hearing with oral evidence, and in exercising that discretion *"….will consider whether oral evidence is necessary for a fair determination of the suspected prescribed contravention(s), having considered any submissions by the regulated entity on the matter."*

28. If a hearing is to be conducted without oral evidence[19], the inquiry members will then conduct the review based on relevant documents, any witness statements, written submissions and oral submissions.

29. If the inquiry is to be conducted with oral evidence,[20] the Guidelines provide that the inquiry members will call such witnesses as they wish to hear from to give evidence at the inquiry. The legal practitioner may be required to lead evidence or to cross examine the witnesses as appropriate. The legal or other representatives of the regulated entity may also lead evidence or cross examine witnesses as appropriate.

30. It should not be assumed that an oral hearing will be conducted wherever there is a conflict of fact. As Noonan J. pointed out recently in *Coleman v. the FSO* [2016] IEHC 169 at paragraph 24:-

> *"It cannot be the case that the FSO has an obligation to hold an oral hearing merely because there is a conflict of fact. The requirements to hold an oral hearing can only arise where the fact in issue cannot be resolved without such hearing. It seems to me that the FSO has a significant discretion in considering this issue to decide whether in fact the holding of an oral hearing would be likely to be of any assistance."*

See also *Star Homes (Middleton) Limited v. The Pensions Ombudsman* [2010] IEHC 463.

31. Pursuant to statute,[21] the inquiry members may summons witnesses to give evidence, or to produce specified documents. The chairperson [22] may require the oral testimony of a witness to be given on oath. He/she may also require a witness to answer a question put to the witness, and require a person appearing at the inquiry pursuant to a

[18] Paragraph 4.2
[19] Paragraph 4.9 of the Guidelines
[20] Paragraph 4.11 of the Guidelines
[21] See section 33BA (1) of the 1942 Act. See also section 4.12 of the Guidelines
[22] Section 33BA(2) : see also paragraph 4.13 of the Guidelines

summons to produce any documents specified in the summons. The chairperson may also allow a witness at the inquiry to give evidence by tendering a written statement, verified by oath.

32. Again, pursuant to statute[23], the Inquiry has the same powers with respect to the examination of witnesses that a judge of the High Court has from hearing civil proceedings that are before the High Court. A person who is summoned to appear before the inquiry will be entitled to the same rights and privileges as a witness appearing in civil proceedings.

33. Under section 33BB (1) of the Act, the Inquiry members may refer a question of law arising in the inquiry to the High Court for a decision.

34. The Guidelines provide that the findings as to whether the prescribed contraventions have been committed will be made on the balance of probabilities.[24]

35. It is clear from the Act and the Guidelines that an Inquiry is intended to be inquisitorial rather than strictly adversarial. In particular, there is no specific provision for a prosecutor. The Guidelines themselves contemplate that the inquiry members will call such witnesses as they wish to hear from to give evidence at the inquiry.

36. In *Fingleton v. the Central Bank*, Noonan J. dealt with a suggestion that the applicant in those proceedings could not obtain a fair hearing before the inquiry, because the inquiry would or might take into account the fact that the financial service provider in whose management he had been concerned had itself admitted the prescribed contravention. Noonan J. rejected that argument. He said at paragraph 116:-

> *"116. The applicant here appears to be proceeding on the assumption that the inquiry will have regard to the admissions of INBS and the agreement in a way that will be prejudicial to him. All of that remains to be seen and is, at this juncture, purely hypothetical. The court is, in effect, being asked to direct the inquiry prospectively as to how it should conduct its business. That is not the function of judicial review."*

He went on to refer to the decision of the Supreme Court in *Z v. DPP* [1994] 2 I.R. 476, where Finlay CJ said at p. 507:-

> *"With regard to the general principles of law I would only add to the principles which I have already outlined the obvious fact to be implied from the decision of this Court in D. v. The Director of Public*

[23] Section 33BA (6) and (7) see also paragraph 4.17 of the Guidelines.
[24] Paragraph 4.3 of the Guidelines

Prosecutions, that where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."

While this case was determined on its own facts, it may suggest a certain judicial intolerance for advance complaints of an inability to obtain a fair trial in inquiries of this nature.

37. At the end of the inquiry, the inquiry members must produce written findings, setting out their finding as to whether the regulated entity is committing or has committed the prescribed contravention, and the grounds on which their findings are based.[25] Those written findings are then delivered to the regulated entity. If necessary, the inquiry members invite the regulated entity to attend before them on a specified date for a separate sanctions hearing[26].

38. Following the sanctions hearing, the inquiry members may, pursuant to section 33AQ of the Act, impose one or more of the following sanctions:-

    (a) A caution or reprimand;

    (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;

    (c) A direction to pay to the Bank a monetary penalty;[27]

    (d) Except where the provisions of Council Regulation (EU) No. 1024/2013 apply, suspension of the regulated financial service provider's authorisation in respect of any one or more of its activities, for a period not exceeding 12 months;

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[25] Section 33AQ (1) and (2) of the Act, paragraphs 5.1 and 5.2 of the Guidelines

[26] Paragraph 5.4 of the Guidelines

[27] Under section 33AQ, where a monetary penalty is imposed, the amount shall not exceed

(a) In the case of a body corporate or an unincorporated body, the greater of
- €10 million, or
- An amount equal to 10% of the turner of the body for its last complete financial year before the finding is made;

(b) In the case of a natural person, €1 million, or

(c) Such other amount as may be prescribed by regulations.

Under section 33AS, the monetary penalty shall not be of an amount that would be likely to cause a regulated entity to cease business, or in the case of a natural person would be likely to cause the person concern to be adjudicated bankrupt.

(e) Except where the provisions of Council Regulation (EU) No. 1024/2013 apply, revocation of the regulated financial service provider's authorisation;

(f) 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;

(g) If the contravention is found to be ongoing, a direction ordering the contravention to cease;

(h) A direction to pay the Central Bank all or a specified part of the costs incurred by it in holding the inquiry and investigating the matter.

39. All of the circumstances of the case are to be taken into account by the inquiry members in determining the appropriate sanction. Regard may be had in particular to the following factors [28]

(a) The nature, seriousness and impact of the contravention.

(b) The conduct of the regulated entity after the contravention.

(c) The previous record of the regulated entity,

(d) Other general considerations, including the prevalence of the contravention, the appropriate deterrent impact of the sanction, action taken by the Bank in similar previous cases, the level of turnover of the regulated entity, and any other relevant considerations.

40. An important feature of the statutory framework is the absence of any express provision for an award of costs to the party who has been investigated, even if it is demonstrated that no prescribed contravention took place. It seems unlikely that there is a power to award such costs. That is particularly noteworthy under circumstances where, as is clear from what is set out above, there is a power in section 33AQ to award costs against a respondent.

[28] See paragraph 5.9 of the Guidelines for more detail on this issue.

41. At the conclusion of this process, the Inquiry Members issue their written decision setting out their findings, the grounds on which the findings are based, and the sanctions imposed (if any).[29]

42. There is an appeal to the IFSAT within 28 days of being notified of the decision, or within such time as agreed with the registrar and chairperson of IFSAT.[30] IFSAT may affirm, vary, substitute or set aside the decision, or remit the matter back to the Inquiry for reconsideration, together with any recommendation or direction as to the matters to be reconsidered.

43. The regulated entity or the Bank may appeal the decision of IFSAT to the High Court within 28 days of being notified of the decision, or within such time as the High Court may allow[31]. An appeal to the High Court does not affect the operation of the IFSAT decision against which the appeal is lodged, or prevent the taking of action to implement the decision, unless the High Court otherwise orders. 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.

44. Although the Act in terms provides merely for an appeal to the High Court, without limiting the nature of the appeal, this may not be interpreted as providing for a full appeal. Furthermore, the precise nature and extent of the appeal may depend in part on whether any "*curial deference*" should be accorded to the decisions of the inquiry and of IFSAT. In *Ulster Bank Investments Funds Limited v. Financial Services Ombudsman* [2006] IEHC 323 Finnegan P. reviewed the case law and held:-

> *"It is desirable that there should be consistency in the Courts in the standard of review on statutory appeals. Accordingly, unless the words of the statute mind it otherwise it is appropriate that the standard of review in this case be that enunciated by Keane C.J., Kearns J. and Laffoy J. I see nothing in the wording of the statute with which I am concerned to mandate a different approach to the statutory appeal under the Central Bank Act 1942 section 57CL. To succeed on this appeal, the Plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test*

[29] Section 33AQ(7) and (8) of the Act
[30] Section 57L of the Act.
[31] Section 57AK of the Act.

> *the Court will have regard to the degree of expertise and specialist knowledge of the Defendant. The deferential standard is that applied by Keane C.J. in Orange v. the Director of Telecommunications Regulations and anor and not that in the State (Keegan) v. Stardust Compensation Tribunal.*"

See more recently the decision of the Supreme Court in *Fitzgibbon v. The Law Society* [2014] IESC 48. The *Ulster Bank* case dealt with an appeal from the FSO under the provisions of the 1942 Act. Although the provisions of the 1942 Act dealing with appeals from the FSO to the High Court are not dissimilar to those in the same Act dealing with appeals from IFSAT to the High Court, the same conclusions do not necessarily follow. It may not be the case that the Inquiry Members conducting a particular inquiry have financial expertise. The same may apply to the members of IFSAT hearing an appeal. Indeed the nature of the appeal to IFSAT may itself be relevant to the nature of the further appeal. Thus, while the appeal to the High Court may not be a full appeal, and while it may still be necessary for an appellant to demonstrate an error or series of errors, it may not be necessary for the High Court to exercise any particular curial deference towards the decisions of the inquiry members or the IFSAT. All of this remains to be explored in the future.

45. *Fingleton* is the only decision as yet on a challenge to the procedures of a Bank ASP Inquiry. There are other cases before the courts at present in which issues relating to two ongoing Inquiries have been raised, namely the Inquiry concerning Irish Nationwide Building Society and Certain Persons concerned in its Management, and the Inquiry concerning Certain Persons concerned in the Management of Quinn Insurance Limited (under administration). A High Court hearing in the former has been concluded, and judgment is awaited from Hedigan J. Among the issues raised in these proceedings was the constitutionality of Part IIIC of the 1942 Act. Given that these inquiries are only now just beginning to occur, more developments in this area can be expected.

Eoin McCullough S.C.

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