An Coimisiún Imscrúdúcháin
(Corparáid na hÉireann um Réiteach Bainc)

Commission of Investigation
(Irish Bank Resolution Corporation)

The Hon. Mr. Justice Brian Cregan
Sole Member

FIRST INTERIM REPORT
13th NOVEMBER 2015

Submitted to the Taoiseach with a request for the revision of the time frame for submitting a final report under section 6(6) of the Commissions of Investigation Act 2004

Contents

Appendices

1. Introduction

1.1. On 16th June 2015 the Government made an Order under the Commissions of Investigation Act 2004 (the "2004 Act" or the "Act") establishing the Commission of Investigation into Irish Bank Resolution Corporation ("IBRC"). This Order is set out in S.I. 253 of 2015 - Commission of Investigation (Irish Bank Resolution Corporation) Order 2015. (The 2004 Act and the Statutory Instrument are set out at Appendix One and Two of this Report).

1.2. Under the Order of the Government which established the Commission, the Taoiseach was appointed as the Specified Minister pursuant to section 3(3)(b) of the Act.

1.3. The Statutory Instrument establishing the Commission provides that the Commission shall (subject to section 6(6) of the Act) submit to the Taoiseach the final report in relation to its investigation no later than 31st December 2015.

1.4. Section 6(6) of the Act provides:

> "*Even though a commission's terms of reference are not amended, the specified Minister may, at the commission's request, revise the time frame for the submission of its final report to the extent consistent with the objective of having the investigation conducted and the report submitted as expeditiously as a proper consideration of the matter referred to the commission permits."*

1.5. This interim report is submitted to the Taoiseach pursuant to section 33(3) of the Act which states:

> *"If a commission requests that the time frame for submitting its final report be revised under section 6(6), the commission shall submit an interim report to the specified Minister with the request."*

1.6. The purpose of this interim report is to set out the work which has been undertaken by the Commission since its establishment, to outline issues which it has encountered, to outline work which requires to be done and to accompany a request for an extension of time for submitting the Commission's final report under section 6(6) of the Act.

2. Preliminary Matters

2.1. On 16th June 2015 the Government appointed Mr. Justice Daniel O'Keeffe, a former judge of the High Court, as Sole Member of the Commission.

2.2. On 9th July 2015 Mr. Justice O'Keeffe retired from his appointment and on 9th July 2015 the Government appointed Mr. Justice Brian Cregan, currently a judge of the High Court, as Sole Member of the Commission. Mr Justice Cregan was unable to take up his appointment on a full-time basis until 1st August 2015 due to pre-existing court commitments.

2.3. On 10th July 2015, the Sole Member of the Commission met with officials from the Department of the Taoiseach and from the Attorney General's office to discuss administrative matters and to obtain assistance from the Department of the Taoiseach in establishing the infrastructure of the Commission. On the same day, suitable premises were identified at 5 Upper Mount Street, Dublin 2. Certain works had to be carried out on the premises and the Commission took possession of the premises on 27th July 2015.

2.4. On 13th July 2015 the Sole Member met with Mr Justice O'Keeffe to discuss work done to date on the Commission.

2.5. Ms. Karen Quigley was appointed as Solicitor to the Commission on 20th July 2015 (on secondment from the Chief State Solicitor's office). The Commission has not appointed any external firm of solicitors to assist it in its work.

2.6. The Commission has also appointed two Senior Counsel, two Junior Counsel and a documentary Junior Counsel pursuant to the provisions of section 8 of the 2004 Act to provide advice and assistance to the Commission.

3. Terms of Reference

3.1. The Commission of Investigation is charged with investigating a number of matters of significant public concern as set out in its Terms of Reference:

1. The Commission shall investigate all transactions, activities and management decisions, other than those relating solely to the acquisition of assets by the National Asset Management Agency, which occurred between 21 January 2009 (being the date of the nationalisation of IBRC) and 7 February 2013 (being the date of the appointment of the Special Liquidators to IBRC) (the "Relevant Period"); and which either:

(a) resulted in a capital loss to IBRC of at least €10,000,000 during the Relevant Period, whether in consequence of a single transaction or of a series of transactions relating to the same borrower or entities controlled by the same borrower ("Relevant Write-Offs"); or

(b) are specifically identified by the Commission as giving rise or likely to give rise to potential public concern, in respect of the ultimate returns to the taxpayer.

2. The purposes for which each such decision, transaction and activity referred to in 1 above are to be investigated are the following (and accordingly the Commission's terms of reference extend to investigating):

(a) the processes, procedures and controls which were operated by IBRC in relation to the Relevant Write-Offs to ascertain whether the appropriate internal IBRC governance procedures and controls were adhered to in respect of the transactions under review and whether the said procedures and controls were fit for purpose,

(b) whether there is prima facie evidence of material deficiencies in the performance of their functions by those acting on behalf of IBRC, including the IBRC board, directors, management, the staff of the wealth

management unit and agents, in respect of any transactions, activities and management decisions identified in 1. above,

(c) whether it can be concluded from the information available within the IBRC and relevant evidence and witness testimony as appropriate that the transactions were not commercially sound in respect of the manner in which they were conducted, the decisions made and the outcomes achieved having regard to the purposes of the Irish Bank Resolution Corporation Act 2013 set out in section 3 thereof,

(d) whether the interest rates or any extension to interest rates or any periods for re-payments were given by IBRC on preferential terms that were unduly favourable to any borrower, where those interest rates resulted in a differential of more than €4 million in interest due over the standard applicable interest rates for loans of that nature or where the amendments give rise to or are likely to give rise to potential public concerns,

(e) whether, in respect of any transaction under investigation, any unusual share trading occurred which would give rise to an inference that inside information was improperly provided to or used by any persons, and in the event that such an inference does arise whether any such information was actually improperly provided or used,

(f) in relation to each transaction under investigation, whether the Minister for Finance or his Department was kept informed where appropriate in respect of the transactions concerned, and whether he, or officials on his behalf, took appropriate steps in respect of the information provided to them.

4. Initial Work of the Commission

4.1. As an initial step, the Commission considered its Terms of Reference and the issues which arose thereunder. It then proceeded to consider what persons and bodies might hold information and documentation relevant to the Commission's investigation.

4.2. Subsequently, the Commission has met and/or corresponded with the following persons and/or bodies:

(i) The Joint Special Liquidators appointed to IBRC;
(ii) The Department of Finance;
(iii) The Irish Stock Exchange;
(iv) The Central Bank of Ireland;
(v) The Directors of IBRC;
(vi) The Liquidator of Siteserv Plc;
(vii) The Banking Inquiry.

4.3. This Interim Report sets out the interaction between the Commission and each of these persons and bodies and the issues which have arisen.

4.4. The Commission has also received correspondence from a number of individuals which it is considering.

5. Interaction with Special Liquidators

5.1. On 22nd July 2015 and 31st July 2015 the Commission had meetings with Mr. Kieran Wallace and Mr. Eamonn Richardson, the Joint Special Liquidators of IBRC (the "Special Liquidators") together with their solicitors, Messrs. A&L Goodbody, in order to review the nature and scope of the documents relevant to the work of the Commission held by IBRC.

5.2. On 7th August 2015 the Commission wrote to the Special Liquidators seeking voluntary disclosure of various categories of documents pursuant to the provisions of section 10(2) of the Act. In particular, the Commission sought the following information in respect of the transactions, activities and management decisions captured by Paragraph 1(a) of the Terms of Reference:

> *(1) A comprehensive list (in descending order of losses) of all transactions, activities and management decisions captured by Paragraph 1(a) of the Terms of Reference;*
> *(2) A witness statement in relation to each of the transactions, activities and management decisions set out in this schedule of transactions; and*
> *(3) Copies of all relevant core documents pertaining to each transaction.*

5.3. By letter dated 12th August 2015 the Special Liquidators, through their legal advisors, stated they were not in a position to voluntarily hand over any documentation or information to the Commission in the absence of a Direction pursuant to section 16 of the Commissions of Investigation Act 2004.

5.4. Further correspondence was exchanged between the Commission and the Special Liquidators on 13th August 2015 and on 17th August 2015.

5.5. On 24th August 2015 the Commission issued draft Directions 1, 2 and 3 to the Special Liquidators in order to provide them with an opportunity to make observations on the time period within which they could comply. By letter dated 26th August 2015 the Special Liquidators, through their legal advisors, responded and the Commission

subsequently issued Directions 1 and 2 taking into account the time frames suggested. In advance of issuing all final Directions to the Special Liquidators, the Commission either issued draft Directions or requested observations from the Special liquidators through meetings and correspondence in order to ensure that compliance within the time frames suggested was realistic and/or manageable.

Direction 1 - Schedule of Transactions

5.6. On 27th August 2015 the Commission issued its first Direction to the Special Liquidators. This Direction required the Special Liquidators to provide to the Commission a Schedule (in descending order) of all transactions, activities and management decisions which resulted in a capital loss to IBRC of at least €10m during the relevant period within three days of the date of the Direction.

Direction 2 - Witness Statements and Books of Core Documents

5.7. On 27th August 2015 the Commission also issued a second Direction to the Special Liquidators requiring them to provide a written statement of facts in relation to each transaction and all core documents relating to each transaction. The statements of facts and booklets of core documents relating to the first 15 transactions were to be furnished to the Commission on or before 31st August 2015; the statements of facts and booklets of core documents relating to the remainder of the transactions were to be furnished to the Commission on or before 30th September 2015.

Response to Directions 1 and 2

5.8. On 28th August 2015, in compliance with Direction 1, the Special Liquidators furnished a Schedule of the relevant transactions to the Commission (the "Schedule"). This Schedule contained a list of 38 transactions.

5.9. However, in a covering letter with the Schedule, the Special Liquidators asserted a duty of confidentiality over the Schedule.

5.10. By 4th September 2015 the Special Liquidators had furnished to the Commission the witness statements and core documents in respect of some of the first 15 transactions on the Schedule. There were certain production difficulties with some of the documents but by 21st September 2015, the Commission had received the core documents for the first 15 transactions indexed and paginated.

5.11. However, every witness statement in relation to every transaction asserted a duty of confidentiality over all of the information and documentation contained within the witness statements and core documents (and also asserted legal advice privilege over certain documents).

5.12. In addition, Mr. Kieran Wallace, one of the Joint Special Liquidators appointed to IBRC, swore an affidavit on 11th September 2015 asserting confidentiality and legal advice privilege over all the information and documents furnished to the Commission.

5.13. Subsequently by 1st October 2015, the Commission received the witness statements and core documents in respect of transactions numbered 16 to 38. These witness statements also claimed confidentiality and/or privilege over the documents.

5.14. The Commission decided not to assess the issue of confidentiality in respect of all the transactions until it had received witness statements and core documents in respect of all transactions.

Direction 3 - General discovery in respect of Siteserv Plc.

5.15. After a number of meetings and discussions with the Special Liquidators about the production of documents relating to Siteserv Plc ("Siteserv") on 28th September 2015 the Commission issued its third Direction to the Special Liquidators. This was a Direction to the Special Liquidators to furnish to the Commission all documents in their possession or power relating to Siteserv. Due to the fact that Siteserv Plc (who was the borrower under the original facilities agreement) had been dissolved on the 6th August 2015, the Commission could not contact Siteserv prior to making this Direction.

Direction 4 - Minutes and Other Documents

5.16. The Commission issued its fourth Direction on 28th September 2015. This required the Special Liquidators to furnish the following categories of documents:

(i) The complete minutes of all IBRC Board meetings which took place between 21st January 2009 and 7th February 2013;

(ii) The complete minutes of all IBRC Credit Committee meetings which took place between 21st January 2009 and 7th February 2013;

(iii) The complete minutes of all IBRC General Executive Committee meetings which took place between 21st January 2009 and 7th February 2013;

(iv) All Framework Agreements, protocols, policies, procedures or other like documents which governed the relationship between the Minister/Department of Finance and IBRC between 21st January 2009 and 7th February 2013;

(v) A Statement of Fact and core documents in relation to the issues raised by Mr Aynsley at the Banking Inquiry in respect of a communication from the Department of Finance to the IBRC relating to the sale of an asset for €100 million less than a putative rival bid; and

(vi) A copy of the William Fry report into the conflicts of interest within IBRC and all related documents.

5.17. The Commission directed that these documents be furnished to the Commission by 30th September 2015.

Direction 5 - Interest Rates

5.18. The Commission also issued a fifth Direction on 28th September 2015. This Direction required the Special Liquidators to furnish to the Commission a statement of facts together with all relevant documentation relating to the interest rates applicable to the first six transactions in the Direction 1 Schedule by 30th September 2015.

Direction 6 - Unredacted copies/Statements of Account

5.19. The sixth Direction, dated 14th October 2015, to the Special Liquidators was a Direction to furnish to the Commission:

(i) An unredacted copy of all redacted documents that were furnished to the Commission pursuant to Direction 2;
(ii) A full running statement of account (for the Relevant Period) in respect of each of the transactions in the Direction 1 Schedule; and
(iii) All reports prepared by Grant Thornton in its capacity as the Monitoring Trustee during the Relevant Period in respect of matters relevant to the Commission's Terms of Reference.

Documents provided to the Commission pursuant to these Directions

5.20. In compliance with these Directions, the Special Liquidators have furnished to the Commission the following documents:

5.21. **Documents furnished pursuant to Direction 1**

As stated above, on 28th August 2015 the Special Liquidators furnished a Schedule of 38 transactions which resulted in a capital loss (as that term has been defined by the Special Liquidators) to IBRC of at least €10m during the Relevant Period. This schedule runs to 4 pages. The Special Liquidators have asserted a duty of confidentiality over this document.

5.22. **Documents furnished pursuant to Direction 2**

By 1st October 2015 the Special Liquidators had furnished to the Commission:

(i) 36 written statements in relation to the 38 transactions;
(ii) 36 booklets of core documents in relation to the transactions.

This amounted to a total number of 48 lever-arch files of documents in respect of all the transactions. The Special Liquidators have asserted a duty of confidentiality over all these documents.

Notwithstanding that the Commission was furnished with a Schedule of 38 transactions, transactions numbers 3 and 23 are related, as are transactions numbers 9 and 10. Accordingly, only one witness statement and one book of core documents was furnished in respect of each related transaction. As a result, the Commission was furnished with 36 witness statement and 36 booklets of core documents for the 38 transactions.

The Commission has reviewed the written statements and booklets of core documents in relation to each of the transactions. However, Mr Kieran Wallace, one of the Special Liquidators of IBRC, in an affidavit sworn on 3rd September 2015 specifically states that:

> *"For each of the thirty-eight transactions identified as a result of that approach, the Special Liquidators prepared a statement of facts and collated the core documents relevant to those transactions which were found to be on IBRC's files following a manual review of those files. The Special Liquidators have informed the Commission that they have not conducted a forensic search of all of IBRC's electronic files in the time available and having regard to the cost of conducting such a forensic search.*
>
> *The documentation attached to the witness statements provided to the Commission comprises the totality of documentation which the Special Liquidators are in a position to produce to the Commission having regard to the time and resources available to the Special Liquidators and to the fact that the transactions and the documents concerned pre-date their appointment to IBRC. The Special Liquidators are not in a position to aver that these documents comprise all of the documents possibly within the scope of the Directions but they comprise all of the documents which*

the Special Liquidators have been able to collate having made reasonable efforts to comply with the directions."

These core documents were only the start of the process of gathering documents relevant to the investigation into each of the transactions. The Special Liquidators themselves acknowledge that they did not do any forensic search of the computers within IBRC to retrieve all documents which might be material and relevant. The Commission is of the view that a full search of the relevant computer records within IBRC in respect of each transaction under investigation is a prerequisite to a proper investigation by the Commission of each transaction. It is clear, however, that a full search of IBRC's computers in respect of each transaction will take a considerable period of time and will require considerable resources.

However, it was always understood between the Special Liquidators and the Commission that the core documents were not the only documents which would be furnished to the Commission in respect of each transaction. The Commission had indicated at an early stage that general orders for discovery would be made in respect of most, if not all, transactions and therefore, the Special Liquidators would be furnishing all documents to the Commission pursuant to such directions.

5.23. **Documents furnished pursuant to Direction 3 - Siteserv**

The Special Liquidators initially furnished four lever-arch files of documents to the Commission containing the documents identified by the Special Liquidators as the core documents in respect of this transaction.

However, in relation to the Direction to provide <u>all</u> documentation in relation to the Siteserv transaction covering the Relevant Period, the Special Liquidators furnished to the Commission 276 lever-arch files of documents running to 186,498 pages. These documents were provided on a phased basis between 1st October 2015 and 16th October 2015.

The Special Liquidators have asserted a duty of confidentiality over all these documents.

5.24. **Documents furnished pursuant to Direction 4 - Minutes and other documents**

In respect of Direction 4, the Special Liquidators have furnished the following documents:

(i) Board minutes - consisting of three lever-arch files containing 1,876 pages;
(ii) Credit Committee minutes - consisting of seven lever-arch files containing 4,794 pages;
(iii) General Executive Committee minutes - consisting of one lever-arch file containing 145 pages;
(iv) Audit Committee minutes - consisting of one lever-arch file containing 318 pages;
(v) Asset & Liability Committee minutes - consisting of one lever-arch file containing 286 pages;
(vi) Framework Agreements which govern the relationship with the Department of Finance - consisting of one booklet containing 54 pages;
(vii) Statement of facts and core documents in relation to Mr. Aynsley's evidence to the Banking Inquiry – consisting of one booklet containing 5 pages; and
(viii) Copy of the William Fry report – consisting of one booklet containing 127 pages.

These documents were furnished on 1st October 2015.

The Special Liquidators have asserted a duty of confidentiality over all these documents.

5.25. **Documents furnished pursuant to Direction 5 - Statements relating to interest rates applicable to the first six transactions**

In respect of Direction 5, the Special Liquidators furnished a statement of facts together with documents relating to the interest rate applicable to the first six transactions in the Direction 1 Schedule. The Special Liquidators furnished one lever-arch file containing 315 pages. The Special Liquidators have asserted a duty of confidentiality over all of these documents.

5.26. **Documents furnished pursuant to Direction 6**

In respect of Direction 6, the Special Liquidators have furnished the following documents to the Commission:

(i) Statements of account for the Relevant Period in respect of each of the transactions, activities and management decisions - consisting of one booklet containing 567 pages;

(ii) All reports prepared by Grant Thornton in its capacity as the Monitoring Trustee (during the Relevant Period) in respect of matters relevant to the Commission's Terms of Reference - consisting of one booklet containing 303 pages.

The Special Liquidators have claimed a duty of confidentiality over all of the above documents.

5.27. **Exchange of legal Submissions**

5.28. Given these assertions of confidentiality and privilege, and given the central significance of these issues to the work of the Commission, the Commission requested the Special Liquidators to furnish legal submissions to the Commission in support of these claims. The Special Liquidators furnished these submissions on 21st September 2015 setting out the legal basis for their claim of banker-customer confidentiality and legal advice privilege.

5.29. The Commission, having considered these submissions, forwarded them to the directors of IBRC and to the Department of Finance and invited these parties to furnish legal submissions in turn.

5.30. The directors furnished their legal submissions on 30th September and 1st October 2015. The Department of Finance furnished its legal submissions on 5th October 2015.

5.31. These submissions in turn were forwarded to the Special Liquidators for their observations. The Special Liquidators furnished supplemental submissions on 9th

October 2015. These submissions in turn were sent on to the directors and the Department of Finance for final comments.

5.32. Final observations were furnished by the directors and the Department of Finance by Friday 16th October 2015.

5.33. The Special Liquidators submitted that all the documents which they had submitted to the Commission were protected from disclosure by virtue of the rule of law on banker-customer confidentiality. They also asserted legal advice privilege over certain documents. They also submitted that the Commission had no jurisdiction under section 21 of the 2004 Act to compel IBRC to disclose the documents or to hold that the public interest in disclosure outweighed the private interest in confidentiality. They also submitted that this duty of confidentiality covered all documents furnished to the Commission by third parties (e.g., the Department of Finance) which related to customer information.

5.34. The Department of Finance also submitted that many of the documents which it furnished were covered by its duty of confidentiality to IBRC.

5.35. The directors submitted that the Commission did have the relevant statutory powers to admit these documents into evidence and to overrule the claim of confidentiality by the Special Liquidators of IBRC.

5.36. The Commission considered these submissions carefully and the complex issues of law which they raised.

5.37. The Commission then made its Determination on the claims of Confidentiality and Privilege on 5th November 2015. A summary of this Determination is set out in the next section of this Report.

6. The Decision on Confidentiality

6.1. Section 21(1) of the Commissions of Investigation Act 2004 provides that nothing in the Act compels the disclosure by any person of any document or information that a person would be entitled under any rule of law to refuse to disclose on the grounds of any duty of confidentiality or privilege.

6.2. Section 21(2) of the 2004 Act provides that where a person claims to be entitled under any rule of law to refuse to disclose any document or information on the grounds of any duty of confidentiality (or on the grounds of any privilege), then the Commission may determine whether the duty of confidentiality (or privilege) applies to that document or information.

6.3. Crucially, section 21(8) of the 2004 Act provides that where the Commission determines that the duty of confidentiality or privilege relied upon as a ground for refusing to produce a document applies to any of the information, then the document may not be received as evidence by the Commission.

6.4. Therefore, if the Special Liquidators' claims of a duty of confidentiality and/or legal advice privilege were upheld by the Commission, then it followed that:

a) The Commission could not receive any of those documents as evidence in its investigation; and
b) It could not compel the production of those documents from the Special Liquidators.

6.5. As the Special Liquidators have asserted a duty of confidentiality over hundreds of thousands of pages of documents, it would effectively mean that the Commission could not continue its work.

6.6. The rule of law under which the Special Liquidators have claimed a duty of confidentiality was first enunciated in ***Tournier v National Provincial and Union Bank of England*** [1924] 1 KB 461 and approved subsequently in the Irish High and Supreme Courts.

6.7. This rule states that a banker owes a duty of confidentiality to its customers. However, that duty is not absolute. There are four specific qualifications and/or exceptions. These are:

a) Where disclosure is under compulsion by law;
b) Where there is a duty to the public to disclose;
c) Where the interests of the bank require disclosure; and
d) Where the disclosure is made by the express or implied consent of the customer.

6.8. The Commission considered the documents supplied by the Special Liquidators and it was of the view that the documents were indeed covered by the general rule of banker-customer confidentiality.

6.9. The Commission has considered whether any of these four exceptions apply in the present case. However, the Commission concluded that the first exception – where disclosure is under compulsion of law – could not apply because section 21(1) of the 2004 Act provides that *"...nothing in this Act compels..."* the disclosure of confidential information or documents.

6.10. The Commission also concluded that the third exception – where the interests of the bank require disclosure – does not apply in the present case because it is the Special Liquidators who decide whether the interests of the bank require disclosure and they must be taken to be of the view that the interests of the bank do not require disclosure.

6.11. The Commission has also concluded that the fourth exception does not apply because there is no express or implied consent to the disclosure by the customer. The Commission considered writing to the various customers of the bank to ask them to waive this confidentiality but it concluded that there was no reality to this course of action. It is difficult to envisage any reasons why a customer would voluntarily waive a right to confidentiality or consent to a bank waiving its duty of confidentiality to permit a Commission of Investigation to investigate the write-off of certain of its

loans. Moreover, to carry out this exercise would be a time consuming, costly, wasteful and ultimately futile exercise.

6.12. The Commission has also considered in great detail the second exception – whether there is a duty to the public to disclose the confidential documents. This second exception has been the subject of considerable judicial comment and analysis over the years. It is clear from the case-law that in considering this exception the Courts must engage in a balancing of private rights and public interests. There are numerous cases where the Courts have engaged in such a balancing exercise and have weighed the private interests in confidentiality, the public interest in confidentiality and the public interest in disclosure. In many cases the Courts have held that the public interest in disclosure outweighs the private interest in confidentiality and, indeed, the public interest in confidentiality.

6.13. The various interests to be considered include:

(i) The customers' right to confidentiality;
(ii) The banker's duty of confidentiality;
(iii) The public interest in maintaining banking confidentiality;
(iv) The public interest in disclosure for the purposes of investigating write-offs (and other matters) in a State-owned bank as is evidenced by the establishment of this Commission.

6.14. However, the Special Liquidators submitted that although the Courts have the power to engage in such a balancing of rights (and infringement of private contractual rights), the Commission has no express statutory power under the 2004 Act to engage in such a balancing exercise and to consider whether the duty of confidentiality should be outweighed by a public interest in disclosure. The Commission has concluded that this submission is correct as a matter of law. The Commission has no express statutory power to infringe a private contractual right to confidentiality.

6.15. Moreover, the Commission, as a creature of statute can only perform such acts as the statute which created it has empowered it to do. The Commission has no inherent

power to engage in such a balancing exercise of whether the private duty of confidentiality and public interest in confidentiality should be outweighed by a public interest in disclosure.

6.16. Whilst there is an undoubted public interest in the work of this Commission, if the Commission were to engage in this balancing exercise or to infringe private contractual rights to confidentiality without the necessary statutory powers to do so, it is probable that it would be the subject of challenge in the Courts. The Commission is of the view that such a challenge would be likely to be successful.

6.17. Moreover it should be noted, that even if the Commission were to be granted an express statutory power to balance the private duty of confidentiality with a public interest in disclosure, a customer may still assert a constitutional right to confidentiality over their bank accounts or a constitutional right to privacy. In such circumstances, the Courts may have to determine this matter before the Commission could proceed with its investigation.

6.18. Having considered all of the above, the Commission has concluded that the duty of confidentiality applies to the documents and that none of the exceptions to the rule may be relied on by the Commission to admit the documents into evidence.

6.19. Under section 21 of the Act, the only option open to a Commission – where it determines that a duty of confidentiality applies to the documents – is to consider, under section 21(9) of the Act, whether the Commission could prepare a summary version of the document which excludes the confidential information. Given that the essence of the documents is the confidential information contained therein, the Commission is of the view that the documents do not allow a summary to be made of them.

6.20. Therefore, the Commission, reluctantly, is driven to the conclusion that the duty of confidentiality applies to the documents and information in them and they may not be received into evidence by the Commission.

6.21. As a result of this conclusion, the Commission is unable to proceed with its investigation without legislative change.

7. The Decision on Legal Advice Privilege

7.1. The Special Liquidators have also claimed legal advice privilege over many of the documents which they have furnished to the Commission. Each of the thirty six witness statements furnished to the Commission contain a general claim of legal advice privilege; however, sixteen of them also make an explicit claim of legal advice privilege in respect of specific legal advice received by IBRC.

7.2. The Commission has considered this claim and it is satisfied that legal advice privilege does apply to the documents and information in question.

7.3. The Commission is satisfied that it cannot prepare a summary version of these documents which excludes the relevant information.

7.4. Therefore, under section 21(8) of the 2004 Act, none of these documents can be considered to be evidence received by the Commission.

7.5. As a consequence, none of these documents can be forwarded by the Commission to the directors. As the directors may have relied on this legal advice before they agreed to the write-off of certain loans, the directors need access to these documents in order to prepare themselves properly for the Commission's investigation. If the directors are denied access to these documents, they would be deprived of their constitutional right to fair procedures and their right to be able to respond to the Commission's investigation in a meaningful way.

7.6. As a result of these concerns, the Commission wrote to the Special Liquidators asking them to waive their claim to legal advice privilege.

7.7. The Commission emphasised that it was not seeking a waiver of privilege over any legal advice which the Special Liquidators are currently receiving from their lawyers about how to interact with the Commission. The only documents over which the Commission is seeking a waiver of privilege are those documents which the directors of IBRC have received in the past which relate to legal advice which they might have

received in respect of the write-offs of certain loans by IBRC which are the subject matter of the current investigation.

7.8. However, the Special Liquidators in their reply stated that, although they were willing to disclose the documents covered by legal advice privilege to the Sole Member solely for the purpose of allowing him to investigate the transactions, they did not consent to the documents being provided to any third parties, such as witnesses or former directors of IBRC without further consent to such disclosure being sought from the Special Liquidators. Therefore, these documents could not be received into evidence by the Commission.

7.9. The Commission wrote again to the Special Liquidators on 21st October 2015 indicating that these conditions were unsatisfactory and again requesting the Special Liquidators to waive their claim to privilege.

7.10. In their letter of 27th October 2015 the Special Liquidators replied stating that they were not in a position to generally waive the claim to privilege. They also indicated that they could not waive privilege because they were in litigation with certain borrowers and the waiver of this privilege might have an adverse effect upon this litigation. They reiterated however that they were willing to consider requests by the Commission to waive privilege on a case-by-case basis.

7.11. This limited and conditional offer of disclosure of such documents to the Commission, but not to the directors, except on a case-by-case basis, and subject to the consent of the Special Liquidators, means that the future work of the Commission in investigating each transaction would be subject to a veto by the Special Liquidators or would be conditional upon the Special Liquidators approving the release of such legal advice documents to the Commission. In the view of the Commission, this is an unsatisfactory situation.

7.12. The Commission has concluded that the legal advice privilege claimed by the Special Liquidators does apply to the relevant documents. As a result, the Commission is unable to proceed with its investigation until this problem is resolved as such documents cannot be received as evidence by the Commission and it would amount to

a breach of fair procedures owed to the directors. This matter can only be resolved either by legislative change or by a waiver of the privilege by the Special Liquidators.

8. Interaction with the Department of Finance

8.1. The Commission met with the Secretary General of the Department of Finance on 27th July 2015. The purpose of the meeting was to review the Commission's Terms of Reference and to review the scope of documents and information which the Commission would require from the Department.

8.2. On 29th July 2015 the Commission met with officials from the Department of Finance. The Commission outlined the nature and volume of documentation which the Commission would be seeking in relation to the Commission's investigation. The Commission also indicated to the Department that it would be seeking witness statements from the relevant staff members who interacted with IBRC throughout the relevant period.

8.3. Arising out of these meetings the Commission wrote to the Department of Finance on 10th August 2015 and requested the Department to furnish certain information and documentation to the Commission on a voluntary basis. The Department responded on 14th August 2015.

8.4. By letter of 24th August 2015, the Department of Finance wrote again to the Commission to state that some of the documents might contain information which was confidential, commercially sensitive, privileged and/or might be subject to the Official Secrets Act 1963. As a result the Department was concerned that if it furnished the documentation to the Commission voluntarily it might be exposed to the risk of litigation. In the circumstances, the Department was of the view that it would be necessary for the Commission to issue formal Directions to the Department pursuant to section 16 of the Commissions of Investigation Act 2004.

8.5. A further meeting took place between the Commission and officials from the Department of Finance on 31st August 2015 to review these matters.

8.6. On 9th September 2015 the Commission wrote to the Department of Finance and enclosed three draft Directions which the Commission proposed to issue to the

Department. The Commission requested that the Department revert with any observations which it might have by 11th September 2015.

8.7. The Department reverted to the Commission by letter dated 11th September 2015 with comments on the draft Directions.

Directions 1 and 2

8.8. The Commission then issued two Directions (pursuant to the provisions of section 16 of the Commissions of Investigation Act 2004) to the Department of Finance on 22nd September 2015.

8.9. The first Direction sought:

1. A written statement of facts in relation to each of the transactions identified in the Schedule of Transactions and,
2. All core documents pertaining to each transaction (with the categories of core documents specified in a schedule to the Direction).

8.10. The second Direction issued by the Commission sought:

(i) An affidavit setting out the chronological progression of the relationship between the Minister/Department of Finance and IBRC during the relevant period (to be provided by 30th October 2015);

(ii) All framework agreements, protocols, policies, procedures or other like documents which governed the relationship between the Minister/Department of Finance and IBRC during the relevant period (to be provided by 30th September 2015);

(iii) All documentation regarding any concerns of the Minister/Department of Finance in relation to the compliance with and/or operation of the documents referred at (ii) (to be provided by 30th September 2015);

(iv) A detailed organisational structure operational within the Department of Finance in respect of the relevant period to include the names and positions held of each person with responsibilities in relation to the relationship between the Department and IBRC (to be furnished by 30th September 2015);

(v) A list detailing the names, current positions and contact details of persons holding the grade of Principal Officer or higher, or equivalent grade, who had responsibilities in relation to IBRC and who has left the Department of Finance (and to provide this information by 30th September 2015);

(vi) A schedule of all hard copy files and/or folders retrieved from archives by the Department of Finance in order to prepare for the Commission of Investigation (to be furnished by 30th September 2015); and

(vii) The agenda, minutes and copies of all documentation relating to all Board Minutes which took place in IBRC during the relevant period and furnished to the Department (to be provided by 30th September 2015).

Response to Directions

8.11. By letter dated 1st October 2015 the Department wrote to the Commission and furnished certain documentation in accordance with the Directions issued by the Commission.

8.12. The Department, however, also asserted a duty of confidentiality and/or legal advice privilege over certain documents. This related to all information concerning borrowers of IBRC and all other confidential information received from IBRC. The Department stated that it had provided the documentation to the Commission to enable the Commission to make a determination pursuant to section 21 of the Commissions of Investigation Act 2004 as to whether the documents were confidential, but that this should not be taken as a waiver of any entitlement to refuse to produce the documents concerned or an acceptance that the documents could be received in evidence by the Commission.

8.13. The duty of confidentiality asserted by the Department of Finance was a duty of confidentiality owed to IBRC and IBRC customers in respect of documents provided by IBRC to the Department of Finance. The Department of Finance did not assert confidentiality over any documents which were confidential to the Department.

8.14. The Department of Finance has furnished to the Commission statements of facts and booklets of core documents relating to some of the transactions. This process is continuing and the Department has informed the Commission that this process is expected to be fully concluded shortly.

8.15. As set out above, the Department of Finance also made legal submissions on the issue of confidentiality and legal advice privilege.

8.16. As a result the Commission made a Determination in relation to these documents as it was required to do so under section 21 of the 2004 Act. The Commission concluded that these documents received from the Department which related to IBRC customers were also covered by the duty of confidentiality and those that contain legal advice are privileged. As a result, the Commission is unable to receive these documents into evidence.

9. Interaction with the Directors of IBRC

9.1. The Commission has also had some interaction with persons who were members of the Board of IBRC during the relevant period. The Relevant Period for the purpose of the Commission of Investigation is between 21st January 2009 (being the date of the nationalisation of IBRC) and 7th February 2013 (being the date of the appointment of the Special Liquidators to IBRC).

9.2. Messrs. Eames Solicitors, who are acting on behalf of a number of the directors, wrote to the Commission on 1st July 2015 submitting that their clients were ready and available to assist the Commission to the fullest extent possible. They noted that their clients no longer had access to the documentation and information which pertained to the period of time during which they were on the Board of IBRC and they raised a concern about the availability of the documentation that their clients would require access to in order to properly prepare for any evidence which they might have to give to the Commission.

9.3. The Commission subsequently received correspondence from Messrs. Groarke & Partners Solicitors who act for another of the directors.

9.4. The Commission had an introductory meeting with two of the directors together with their legal advisors (who represent nine of the directors) on 31st August 2015.

9.5. Subsequently the Commission received correspondence on behalf of the directors raising issues about the Commission's Terms of Reference. The directors had a specific concern in relation to paragraph 2(c) (which requires the Commission to assess the commercial soundness of the transactions under investigation having regard to section 3 of the Irish Bank Resolution Corporation Act 2013). Given that section 3 of the 2013 Act was enacted on 7th February 2013, the directors were concerned that the decisions they took as directors would be judged by a standard not in place when they were directors. As such it would amount to retrospective legislation which, in their view, would be unconstitutional and a breach of fair procedures. (This matter is addressed further in this interim Report in the section on "Amendments to Terms of Reference").

9.6. Further correspondence also took place between the Commission and the directors in respect of the issue of confidentiality and privilege claimed by the Special Liquidators and the Department of Finance, and the directors furnished legal submissions in respect of these matters.

10. Interaction with the Central Bank of Ireland

10.1. The Commission's legal advisors met with the Governor of the Central Bank on 5th August 2015. The purpose of the meeting was to explore how the Central Bank could assist the Commission with its investigation.

Disclosure of Confidential Information by the Central Bank of Ireland

10.2. The Governor outlined to the Commission the information sharing restrictions which the Central Bank is subject to as a result of Irish and European legislation. In particular the Governor highlighted section 33AK of the Central Bank Act 1942 (as amended). Subsection (1A) of section 33AK provides, *inter alia*, that a person to whom this section applies (current and former Central Bank of Ireland officials and other employees) is not permitted to disclose confidential information concerning (a) the business of any person or body whether corporate or incorporate that has come to the person's knowledge through the person's office or employment with the Bank, or (b) any matter arising in connection with the performance of the functions of the Bank or the exercise of its powers, if such disclosure is prohibited by the Rome Treaty, the European System of Central Banks Statute or the supervisory EU legal acts. It is a criminal offence to contravene subsection (1A).

10.3. Subsection (1A) is qualified by subsection (5) which permits the Central Bank to disclose certain confidential information in a number of different situations, including to a Commission of Investigation, provided that the disclosure of such confidential information is not prohibited by the Treaty of Rome, the European System of Central Banks Statute or the supervisory EU legal acts. This subsection provides, *inter alia*, "*Subject to subsection (1A), the Bank may disclose confidential information — ... (aha) to any Commission of Investigation established under the Commissions of Investigation Act 2004...*".

10.4. Any such disclosure by the Central Bank of confidential information to the Commission pursuant to the provisions of section 33AK(5) of the Central Bank Act 1942 (as amended) must also be in accordance with the specific conditions set out in Article 59(2) of the Capital Requirements Directive (CRD IV) on access to the activity

of credit institutions and the prudential supervision of credit institutions and investment firms (Directive 2013/36/EU). This provides, *inter alia*, that Member States may, by virtue of provisions laid down in national law, authorise the disclosure of certain information relating to the prudential supervision of institutions to entities in charge of enquiries in their Member State under the following conditions:

(a) that the entities have a precise mandate under national law to investigate or scrutinise the actions of authorities responsible for the supervision of institutions or for laws on such supervision;
(b) that the information is strictly necessary for fulfilling the mandate referred to in point (a);
(c) the persons with access to the information are subject to professional secrecy requirements under national law at least equivalent to those referred to in Article 53(1);
(d) where the information originates in another Member State that it is not disclosed without the express agreement of the competent authorities which have disclosed it and, solely for the purposes for which those authorities gave their agreement; and
(e) to the extent that the disclosure of information relating to prudential supervision involves processing of personal data, any data processing by the Commission shall comply with the applicable national laws transposing Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

10.5. The Central Bank of Ireland must respect and implement these conditions when disclosing confidential information to a Commission of Investigation.

Other matters arising

10.6. In addition to discussing the Central Bank's obligations on professional secrecy, the Commission and the Governor discussed the Commission's Terms of Reference. The Governor confirmed that the Central Bank supervised IBRC throughout the relevant period which included examining any particular risks which arose in respect of liquidity

and the corporate governance of the bank including assessing its compliance with set procedures. Reports into such matters were prepared by the Central Bank. The Central Bank does not generally examine specific transactions but rather carries out reviews of processes and structures. The Governor referred to specific "whistle-blowing" allegations that were made to the Central Bank in respect of one specific transaction at IBRC which the Central Bank investigated.

10.7. The Commission queried with the Governor whether there is any benchmark for a "*standard applicable interest rate*". The Governor confirmed that the Central Bank of Ireland does not have any involvement in setting or controlling interest rates and what a "*standard applicable interest rate*" would be is a commercial judgment based on a wide number of factors relating to individual borrowers and individual banks.

10.8. The Governor confirmed that he would have to take legal advice in order to consider the extent of the information and reports which the Central Bank could provide to the Commission under the relevant Irish and EU statutory provisions.

Second meeting

10.9. The Commission held a further meeting with two officials from the legal department and the banking supervision division of the Central Bank on 31st August 2015. The officials explained that the Central Bank may have a limited gateway to disclose certain confidential information to the Commission in accordance with the Irish and EU statutory provisions.

10.10. The officials confirmed that the Central Bank supervised IBRC throughout the relevant period in relation to, *inter alia*, risk management control, governance, liquidity management and capital adequacy. The Central Bank had regular meetings with IBRC and it carried out credit risk inspections and assessed the management of the loan book. In relation to assessments of IBRC which the Central Bank carried out, the conclusions arising from such assessments were provided to IBRC and the Central Bank advised that IBRC could furnish such conclusions to the Commission.

10.11. In addition, the Central Bank confirmed to the Commission that IBRC might provide consent to the Central Bank for the Central Bank to release certain information and documentation to the Commission which consent would provide a limited release to the Central Bank from its professional secrecy obligations under Irish and EU law. The Central Bank informed the Commission that the Commission of Investigation into the Banking Sector (established by S.I. 454 of 2010) in which Mr. Peter Nyberg was the Sole Member, was facilitated by the Central Bank through consents and waivers obtained from the relevant financial institutions.

Third Meeting

10.12. The Commission held a third meeting with two officials from the legal department and the Banking Supervision Division of the Central Bank on 2nd November 2015. This meeting was useful in further examining the relevance of the Central Bank's supervisory functions over IBRC to this Commission's terms of reference, and for the purposes of examining and considering in detail legal aspects of what had been described as the "*limited gateway*" under which the Central Bank may possibly be able to disclose certain confidential information in accordance with Irish and EU statutory provisions.

10.13. The possible "*limited gateway*" for disclosure centres around the provisions of paragraph (a) and (b) of Article 59 (2) of the Capital Requirements Directive referred to in paragraph 10.4 above. Under paragraph (a) it would be possible for the Central Bank to disclose information to a Commission of Investigation with "*a precise mandate under national law to investigate or scrutinise the actions of authorities responsible for the supervision of institutions...."* (such as the Nyberg Commission).

10.14. However, this Commission of Inquiry does not have a mandate to investigate or scrutinise the actions of the Central Bank. The relevant part of its mandate is "*to ascertain whether the appropriate internal IBRC governance procedures and controls were adhered to in respect of the transactions under review and whether the said procedures and controls were fit for purpose*". The Commission has no mandate to investigate or scrutinise the actions of the Central Bank.

10.15. The second possibility permitted by paragraph (a) is in relation to entities that "*have a precise mandate under national law to investigate or scrutinise the actions of authorities responsible for .... laws on such supervision*". The Department of Finance may well be considered to be the relevant authority responsible for laws on banking supervision. However, the only mandate this Commission has to inquire into the Department of Finance is under Term of Reference 2(f) (whether, in relation to each transaction, the Minister and his Department were kept informed of and took appropriate steps in respect of the transactions concerned).

10.16. It is very doubtful whether the Central Bank would have any documentation or information relevant to this term of reference that could not be obtained elsewhere. More importantly, it is difficult to see how any such document or information, if it existed, could be regarded as being "*strictly necessary for fulfilling*" any mandate to scrutinise the Department as the authority "*responsible for the ... laws on such supervision".*

10.17. In the circumstances, it seems to the Commission that the conditions set out in Article 59(2) (a) and (b) create an insuperable obstacle to the Central Bank disclosing any relevant information it may have to the Commission.

10.18. It does not appear to the Commission that a simple amendment to domestic law would be likely to overcome the problem of obtaining information from the Central Bank. This is because secrecy requirements appear to be demanded by a wide variety of European legal provisions referred to in Section 33AK (1A) of the Central Bank Act 1942 which refers not only to the Treaty of Rome, the European System of Central Banks Statute, but also "*Supervisory EU legal Acts*" which include:

(a) Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000,
(b) Council Directive 93/22/EEC of 10 May 1993,
(c) Council Directive 85/611/EEC of 20 December 1985,
(d) Council Directive 92/49/EEC of 18 June 1992,
(e) Council Directive 92/96/EEC of 10 November 1992,

(f) the 2003 Market Abuse Directive (within the meaning of Part 4 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005),

(g) the supplemental Directives (within the meaning of that Part 4),

(h) the 2003 Prospectus Directive (within the meaning of Part 5 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005),

(i) Directive 2005/68/EC of 16 November 2005,

(j) the Transparency (Regulated Markets) Directive (within the meaning of Part 3 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006),

(k) Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions,

(l) Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions,

(m) Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation,

(n) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments,

(o) the Supplemental Directive and the MiFID Regulation as defined in section 3(1) of the Markets in Financial Instruments and Miscellaneous Provisions Act 2007 (No. 37 of 2007),

(p) Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC,

(q) Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC,

(r) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, and

(s) Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories,

(t) The Single Supervisory Mechanism Regulation, and

(u) The Single Supervisory Mechanism Framework Regulation.

10.19. In the circumstances, the Commission has decided to request the Special Liquidators to provide all information, documentation and correspondence from the Central Bank that may have relevance to the Commission's Terms of Reference. The Central Bank has provided all documentation sought from it of a non-confidential nature, such as Corporate Governance and Fitness and Probity Codes. It is not anticipated that there will be any further contact with the Central Bank.

11. Interaction with the Irish Stock Exchange

11.1. The Commission has made contact with the Irish Stock Exchange with regard to the proposed investigation into share trading referred to in paragraph 2(e) of the Terms of Reference of the Commission. The Commission had a meeting on 14th August 2015 with the Head of Regulation at the Irish Stock Exchange. In addition there has been some preliminary correspondence exchanged. A further meeting was held on 2nd November 2015 with the Head of Regulation and a manager from the Regulation Department of the Irish Stock Exchange. It was explained that the regulatory functions of the Stock Exchange are kept quite separate from its commercial functions.

11.2. It was confirmed at these meetings that the Irish Stock Exchange would like to assist the Commission if possible, but the Stock Exchange had statutory obligations of secrecy contained in Part V of the Companies Act 1990.

11.3. Section 118 of the Companies Act 1990 makes it a criminal offence for any relevant authority, authorised person or employee or ex-employee of the Exchange to disclose information obtained under Part V of the 1990 Act relating to insider dealing "*except in accordance with law".*

11.4. The Commission has considered the question as to whether the making of a Direction pursuant to section 16(1) of the Commissions of Investigation Act 2004 would be sufficient to permit the disclosure of any such information.

11.5. However, it appears to the Commission that the express wording of section 21(1) "*...nothing in this Act compels – (a) the disclosure by any person of any information that the person would be entitled under any rule of law or enactment to refuse to disclose on the grounds of any...duty of confidentiality, or (b) the production of any document in the persons possession or power containing such information*" clearly overrides section 16.

11.6. Accordingly, in the event that the Irish Stock Exchange claims an entitlement to refuse to disclose information obtained in relation to its functions with regard to insider dealing and if the Commission were satisfied that such information was obtained by virtue of the exercise of its functions under Part V of the Companies Act 1990, the Commission would be obliged not to receive any such documentation in evidence, as it would be clear that the statutory duty of confidentiality set out in section 118 applies to such information or documentation.

11.7. For entirely understandable reasons, the Irish Stock Exchange has not been able to confirm or deny whether it has information in its possession that it may have acquired pursuant to the obligations of the Stock Exchange under Part V of the Companies Act 1990. In the circumstances, the Commission has on the 4th November 2015 issued a Direction to the Irish Stock Exchange directing it to swear an affidavit of discovery in relation to any such documentation and to provide that documentation to the Commission. The Commission will thereupon decide whether the documentation provided is covered by the secrecy obligations contained in section 118.

11.8. Section 118 of the Companies Act 1990 does not prevent the Irish Stock Exchange from providing standard information in relation to transactions in shares and certain information has already been provided by the Irish Stock Exchange to the Commission showing dealings in the shares of Siteserv between January 2011 and June 2012. The Irish Stock Exchange has agreed to provide further documentation of a public nature including announcements made by Siteserv to the Irish Stock Exchange and daily price and market capitalisation information.

11.9. However, insofar as the Irish Stock Exchange may have information acquired under Part V, the Commission will be constrained by the provisions of section 118 of the Companies Act 1990 from receiving such information into evidence.

11.10. This constraint would be removed if there were a statutory provision, either specifically excluding the application of section 118 of the Companies Act 1990, or specifically providing that any prohibition or restriction imposed by law in relation to

the disclosure of information shall not apply in relation to the disclosure of information to or access to information by a Commission of Investigation.

12. Dissolution of Siteserv PLC

12.1. One of the entities that has featured in public discourse preceding the establishment of the Commission is Siteserv Plc ("Siteserv").

12.2. On 16th March 2012 Siteserv announced to the stock market that it had conditionally agreed to the disposal of its operating subsidiaries.

12.3. Subsequent to the completion of the sale transaction, Siteserv, having disposed of substantially all of its assets, was placed in members' voluntary liquidation. Mr. Kieran Wallace of KPMG was appointed Liquidator of Siteserv and he proceeded to distribute the remaining assets to the shareholders with a view to winding up the company in the ordinary way.

12.4. In accordance with company law, the final meeting of Siteserv was held on 10th July 2014 and the statutory account of the winding up was registered with the Registrar of Companies on 6th May 2015.

12.5. Company law provides that, in a members' voluntary winding up, a company is dissolved three months after its final account is registered with the Registrar of Companies, unless an Order is made by the Court deferring the dissolution of the company. No such Order was sought or made in relation to Siteserv, and accordingly, the company was dissolved by operation of law with effect from 6th August 2015.

12.6. The Commission was established on 16th June 2015, by which time the three month period prior to deemed dissolution had commenced. At no time between then and 6th August 2015 did the Liquidator of Siteserv inform the Commission of its impending dissolution or take any step to defer the dissolution.

12.7. The Commission first became aware of the dissolution of Siteserv on 22nd September 2015.

12.8. The consequence of these events is that, if and to the extent that the Commission is to investigate any transaction involving Siteserv, unless the company is restored to the Register of Companies, it will not exist in corporate form and will not be in a position to engage with the Commission. As stated above in paragraph 5.15, the Commission has not written to Siteserv Plc (as the borrower under the original facilities agreement with IBRC) because it is dissolved.

12.9. The Commission wrote to the Liquidator of Siteserv seeking further explanations of the events surrounding its dissolution. In his response, the Liquidator stated that he did not consider applying for an order deferring the dissolution of Siteserv as he did not believe that there was any reason to do so. He stated further that he did not believe that the deferral of the dissolution would affect in any way the workings of the Commission on the basis that he was, and remains, the custodian of all documentation which belonged to Siteserv of which he was in possession prior to the dissolution of the company and is in a position to allow the Commission access to it.

12.10. The Commission is considering whether an application should be made to the High Court to restore the company to the Register of Companies and is in correspondence with the liquidator of Siteserv about this matter. He has indicated his willingness to make this application.

13. The Banking Inquiry

13.1. The Commission also received documents from the Banking Inquiry in relation to a claim made by Mr Aynsley, former Chief Executive Officer of IBRC. A transcript of Mr Aynsley's evidence to the Banking Inquiry was furnished to the Commission.

13.2. As a result of this, as part of its fourth Direction, the Commission required the Special Liquidators to furnish a statement of fact and core documents in relation to the issues raised by Mr Aynsley at the Banking Inquiry in respect of an alleged communication from the Department of Finance to the IBRC relating to the sale of an asset for €100 million less than a putative rival bid.

13.3. In compliance with this direction, the Special Liquidators furnished one booklet to the Commission containing a five page email together with a two page statement of fact.

13.4. The Special Liquidators have asserted a duty of confidentiality over these documents.

14. Amendments to Terms of Reference

14.1. In the course of its initial work, the Commission has identified a number of issues which arise with its Terms of Reference.

14.2. It is the view of the Commission that a number of amendments to the Terms of Reference are required.

(1) Paragraph 2(c) of the Terms of Reference

14.3. The first proposed amendment deals with Paragraph 2(c) of the Terms of Reference. That paragraph reads as follows:

"2. The purposes for which each such decision, transaction and activity referred to in 1 above are to be investigated are the following (and accordingly the Commission's terms of reference extend to investigating):

> *(c) whether it can be concluded from the information available within the IBRC and relevant evidence and witness testimony as appropriate that the transactions were not commercially sound in respect of the manner in which they were conducted, the decisions made and the outcomes achieved having regard to the purposes of the Irish Bank Resolution Corporation Act 2013 set out in section 3 thereof... ".* [Emphasis added]

14.4. The Commission's Terms of Reference are directed at transactions, activities and management decisions which occurred between 21st January 2009 (being the date of the nationalisation of IBRC) and 7th February 2013 (being the date of the appointment of the Special Liquidators to IBRC). This period is defined as the "*Relevant Period*" in the Terms of Reference.

14.5. The Irish Bank Resolution Corporation Act 2013 was enacted on 7th February 2013, one of its functions being to provide for the appointment of the Special Liquidators to IBRC. Section 3 of that Act sets out its purposes.

14.6. In the view of the Commission, it would be inappropriate for the Commission to have regard to any part of the Act of 2013 when performing its work, and in particular when assessing the commercial soundness of transactions entered into in the Relevant Period. This is because the Act was not in force at any time during the Relevant Period, and accordingly, any assessment of actions or decisions taken in that period that took account of any part of the Act would amount to an unfairness, and a breach of the obligations of fair procedures and natural justice owed to, *inter alia*, the IBRC Board, directors, management and others affected by the Commission's work. The Commission is of the view also that to have regard to any part of the Act of 2013 while assessing transactions, activities and management decisions that occurred in the Relevant Period would in effect be applying the Act retrospectively.

14.7. It is also to be noted that in correspondence to the Commission, solicitors representing those who were directors of IBRC in the Relevant Period have expressed a similar view.

14.8. For these reasons, the Commission is seeking the removal from paragraph 2(c) of its Terms of Reference of the words "*having regard to the purposes of the Irish Bank Resolution Corporation Act 2013 set out in section 3 thereof*".

(2) Paragraph 6(c) of the Terms of Reference

14.9. The second amendment being sought by the Commission is an amendment to paragraph 6(c) of the Terms of Reference. Paragraph 6 (c) reads as follows:

"6. In these terms of reference:

(c) references to IBRC shall be construed as including references to Anglo Irish Bank or Irish Nationwide Building Society and any subsidiaries of IBRC, Anglo Irish Bank or Irish Nationwide Building Society".

14.10. Because Irish Nationwide Building Society merged with Anglo Irish Bank during the Relevant Period, the Commission is of the view that, for the sake of clarity, this paragraph should be amended to make it clear that the Commission is not investigating any aspect of the business of Irish Nationwide Building Society or any of its subsidiaries prior to its merger with Anglo Irish Bank. The proposed amendment seeks to achieve this clarification. (The Special Liquidators when preparing the Schedule of transactions included one transaction on the Schedule where there was a write-off by Irish Nationwide Building Society before it merged with Anglo Irish Bank.)

(3) Paragraph 2(d) of the Terms of Reference: Difficulties in Implementation

14.11. In addition to the amendments suggested, the Commission has identified a number of difficulties arising in relation to paragraph 2(d) of the Terms of Reference. The Commission is of the view that in its present form, paragraph 2(d) does not appear to address the issues for which it was designed. Furthermore, the Commission is unlikely to be able to respond meaningfully, or at all, to paragraph 2(d) in its present form.

14.12. Paragraph 2(d) of the Terms of Reference provides as follows:

"2. The purposes for which each such decision, transaction and activity referred to in 1 above are to be investigated are the following (and accordingly the Commission's terms of reference extend to investigating):

(d) whether the interest rates or any extension to interest rates or any periods for re-payments were given by IBRC on preferential terms that were unduly favourable to any borrower, where those interest rates resulted in a differential of more than €4 million in interest due over the standard applicable interest rates for loans of that nature or where the amendments give rise to or are likely to give rise to potential public concerns..."

14.13. It appears to the Commission that the intention behind paragraph 2(d) is that it would cause the Commission to investigate arrangements that involved favourable interest

rates (or certain amendments to terms and conditions of loans) where those rates (or amendments) gave rise to significant savings for borrowers at the expense of the taxpayer. If this is the intent behind paragraph 2(d) then, in the view of the Commission, this objective is not achieved by the paragraph as currently expressed. In particular:

(a) It is apparent from the Commission's work to date that there were no standard applicable interest rates in IBRC during the Relevant Period for loans of the kind that fall for consideration by the Commission. For this reason, there is no basic rate of interest against which a differential could be measured that would permit a determination as to whether the threshold of €4 million mentioned in paragraph 2(d) had been exceeded.

(b) Paragraph 2(d) is silent as to the period over which any measurement of a differential, if it were possible, should take place. For example, if it were possible to measure differentials in this way, then such differentials could be measured over the life of a loan, or over the Relevant Period, or over some other period. In the absence of guidance as to what period is envisaged, no calculation is possible.

(c) Similarly, paragraph 2(d) does not limit its scope to interest rates that were set, or amendments that were made, in the Relevant Period. It therefore seems likely that, if it were possible to identify interest arrangements that gave rise to differentials in excess of the specified threshold, many of those arrangements might well derive from agreements entered into prior to the Relevant Period. Similarly, any amendments to interest rates or repayment periods falling within paragraph 2(d) might also derive from decisions made outside the Relevant Period. In this regard, it is worth noting that amendments to the terms and conditions of loans falling within paragraph 1 of the Terms of Reference will be investigated under that paragraph by virtue of paragraph 6(d) of the Terms of Reference.

(d) Under paragraph 2(d) as currently drafted, the interest rates (and/or amendments) to be considered by the Commission are limited to the rates

and repayment arrangements applying to loans that fall within paragraph 1 of the Terms of Reference (i.e., where such transactions involved a write-off of an amount greater than €10 million). However, as those loans by definition involve significant losses of capital, it seems unlikely that any change in interest or repayment arrangements would affect materially the total loss incurred on the loan.

14.14. In summary, in the view of the Commission, it would not be possible to respond meaningfully or at all to paragraph 2(d) in its current form. In addition, it is the view of the Commission that paragraph 2(d), as it is currently expressed, fails to achieve what the Commission understands to be its objective. If, in fact, the objective of paragraph 2(d) was intended to be the investigation of interest rates arrangements (and changes to interest rates and repayment periods) made during the Relevant Period that gave rise to significant reductions in amounts realised from borrowers on behalf of the taxpayer, this objective might best be addressed in a separate paragraph in the Terms of Reference using words that more accurately reflect that objective. Such an exercise would not, by definition, be limited to transactions that gave rise to significant capital losses, but would be limited to arrangements that arose from decisions made during the Relevant Period.

(4) Statutory restriction on amendments

14.15. Section 6(2) of the Act provides:

> *"A commission may not consent to or request an amendment of its terms of reference if satisfied that the proposed amendment would prejudice the legal rights of any person who has co-operated with or provided information to the commission in the investigation."*

14.16. Given that the Commission's investigation remains at preliminary stage, the Commission is of the view that none of the proposed amendments to its Terms of Reference would prejudice the legal rights of any person who has co-operated with or provided information to the Commission.

15. Meaning of Capital Loss

15.1. The Commission notes that a central feature of its Terms of Reference is that they address transactions, activities and management decisions in the Relevant Period that resulted in a "*capital loss*" to IBRC of at least €10million during the Relevant Period. The term "*capital loss*" is not defined in the Terms of Reference. It is important, therefore, that a clear definition of this term would be arrived at in order that the Commission could define the parameters of its work.

15.2. The Special Liquidators of IBRC have provided to the Commission an explanation of their interpretation of the term "*capital loss*", and the Commission has responded to that explanation. The Special Liquidators have interpreted the term "*capital loss*" as meaning "*amounts ... comprising either capital or capital plus interest [that] were written off IBRC's books (excluding loan provisions where no amounts in excess of €10,000,000 have actually been written off IBRC's books.)*". The Commission's response has been to accept the Special Liquidators' interpretation for the moment, whilst reserving the Commission's right to revisit the definition of the term as matters progress.

15.3. In subsequently identifying transactions that fall within paragraph 1(a) of the Terms of Reference, the Special Liquidators have made reference to a number of detailed assumptions that they have made. Certain of the features of the transactions included in, and excluded from, the Schedule provided by the Special Liquidators give rise to questions as to the meaning of the term "*capital loss*", and its application. By way of example, the Special Liquidators have excluded from the Schedule loans where, although the loan was fully provisioned and the underlying security sold, the loan had not been formally written off during the Relevant Period.

15.4. Arising from this, the Commission wrote to the Special Liquidators on 28th September 2015 seeking further clarification of their interpretation of the term "*capital loss*" and the manner in which they have applied that interpretation in identifying transactions that fall within paragraph 1(a).

15.5. The Special Liquidators responded to the Commission by letter dated 23rd October 2015. In that letter the Special Liquidators confirmed that, *inter alia*, the schedule of 38 transactions prepared by them does not include loans in respect of which the underlying security has been sold and the remaining balance has been deemed irrecoverable, unless that remaining balance was written off in the books of the Bank during the Relevant Period. In response to a specific query raised by the Commission, the Special Liquidators' letter of 23rd October 2015 also stated that they have identified 156 transactions where loan loss provisions in excess of €10 million were recorded by the Bank during the Relevant Period. It is clear that most, if not all, of these transactions have been excluded from the schedule of 38 transactions provided to the Commission.

15.6. The Commission is concerned that the definition of "*capital loss*" adopted by the Special Liquidators may not respond fully to the objectives of the investigation. For example, if a decision was made during the Relevant Period to dispose of the security underlying a loan at a price below the balance outstanding on the loan, it would seem clear that that decision resulted in a capital loss, being the difference between the loan balance and the amount realised from the security. However, the Special Liquidators have stated that such a loss would only be regarded by them as a capital loss for the purposes of the investigation if, following the disposal of the security, the remaining balance on the loan was written off in the books of the Bank before the end of the Relevant Period. Thus, any such loss, however large, would not appear on the Schedule of Transactions if the remaining balance had not been written off by 7th February 2013.

15.7. The Commission intends to arrive at a concluded view as to the meaning of "*capital loss*" in the near future and before doing so would welcome clarification of the intended meaning of that term.

16. Approach Required to Investigate each Transaction

16.1. At present and given the above comments in respect of the meaning of capital loss, there are 38 transactions which require to be investigated. Moreover, each transaction has to be investigated under each of the headings set out in the Terms of Reference. These are in broad terms:

1. Whether the processes, procedures and controls operated by IBRC were fit for purpose and were adhered to.
2. Whether there is *prima facie* evidence of material deficiencies in the performance of their functions by those acting on behalf of IBRC including the IBRC board, directors, management, staff of the Wealth Management Unit and agents.
3. Whether the transactions were or were not commercially sound in respect of the manner in which they were conducted, the decisions made and the outcomes achieved.
4. Whether the Minister for Finance or his Department was kept informed where appropriate and whether he, or officials on his behalf, took appropriate steps in respect of the information provided to them.
5. Whether any unusual share trading occurred giving rise to an inference that inside information was improperly provided to or used by any person.

16.2. The investigation will, therefore, be analogous to managing 38 pieces of commercial litigation separately and simultaneously. Such an investigation will take several years and will result in substantial costs. That is absolutely inevitable given the current Terms of Reference and number of transactions.

16.3. The investigation of each transaction may require the following steps to be taken:

Phase one – Discovery Directions

The first step will be to issue Directions to the Special Liquidator and/or to other parties to make discovery of all documents relevant to each transaction under investigation.

As a result of the *dicta* of the Supreme Court in ***Haughey v Moriarty*** [1999] 3 IR 1 the Commission, in accordance with fair procedures, must write and notify persons affected by any Direction it makes to IBRC and afford such persons the opportunity to make representations as to the relevance and scope of that Direction for general disclosure of relevant banking documentation.

The Commission notes from the Schedule of transactions furnished to it that twelve of the borrowers are US limited liability corporations, ten are UK registered private companies (some of which are dissolved) and some borrowers are European and Irish companies (some of which are dissolved, in receivership or liquidation). As a result, the Commission may face challenges and delays in seeking to communicate with the borrowers.

The Special Liquidators have indicated that it would take approximately one month to conduct an electronic search of all files within IBRC in respect of each transaction depending on the volume of documentation involved. (The Special Liquidators may, however, only be able to process a limited number of transactions every month due to the capacity constraints in their electronic systems).

Phase Two – Review for Relevance

The members of the Commission's legal team will then need to review all the documents for relevance.

Phase Three – Circulation of Documents/Requests for Statements

The third phase will be to send the documents to the directors to review and consider. (It may also be necessary to send them to other members of the management of IBRC or staff at the Wealth Management Unit and/or agents as appropriate).

It may also be necessary for certain directors or members of the management team to prepare their own witness statements/affidavits in respect of each transaction. This process could also take a period of approximately four weeks per transaction.

It may also be necessary to send the documents to the relevant borrower in question which has had the benefit of the write-off to ascertain if it wishes to submit a written statement/affidavit in respect of certain matters.

In addition to sending the documents to the directors, the documents will also have to be sent simultaneously to the Department of Finance so that they may review these documents and also, if necessary, prepare a witness statement/affidavit in respect of each transaction.

Again, it is anticipated that this process could take approximately one month per transaction, although it should be possible to review a number of transactions simultaneously.

Phase Four – Taking of Evidence

The next stage will be the taking of oral evidence (where necessary). It is envisaged that evidence (whether oral or written) will have to be taken in respect of each transaction from the Special Liquidators, the directors and employees of IBRC, officials from the Department of Finance and also, perhaps in certain circumstances, the borrower who benefited from the write-offs. Again this process of calling witnesses in respect of each transaction could take approximately one month but it will be possible to review a number of transactions simultaneously.

Phase Five – Writing Draft Report

The next step is the writing of a draft report on each transaction. It is anticipated that for the more complex transactions the drafting of this report could take at least eight weeks.

Phase Six – Circulation of Draft Report

The next step would be to circulate this draft report to all interested parties or parties named in the draft report for their comments. This process will take approximately one month.

Phase Seven – Finalise report

The final step would be to finalise each report on each transaction. This process will also take approximately one month.

16.4. It can be seen from the above that the process of a Commission of Investigation into banking matters where there have been significant write-offs, and where the directors and/or members of the management team and/or officials from the Department of Finance are being investigated (and where they, naturally, wish to defend their conduct) and where the requirement of constitutional fair procedures must be observed at all times is a complex process which could take seven to eight months in respect of each transaction. The process of investigation is not simply a documentary review.

16.5. It will of course be possible to run a number of these transactions simultaneously. Not every transaction will be enormously complicated. Some of the transactions may involve write-offs which are straightforward. However, all, or nearly all, may require to be investigated in the manner set out above.

16.6. It is clear from the above that the investigation of 38 transactions will take several years to complete.

16.7. The Commission envisages producing a number of interim reports (each containing reports on a number of transactions) when its investigation into those transactions is complete.

16.8. This process assumes that the Commission will not face any legal actions challenging its work. If such legal challenges are made, then the work of the Commission will be delayed.

17. Other matters of Potential Public Concern

17.1. Clause 1(b) of the Commission's Terms of Reference provides:

> *"1. The Commission shall investigate all transactions, activities and management decisions, other than those relating solely to the acquisition of assets by the National Asset Management Agency, which occurred between 21 January 2009 (being the date of the nationalisation of IBRC) and 7 February 2013 (being the date of the appointment of the Special Liquidators to IBRC) (the "Relevant Period"); and which either: ...*
>
> *(b) are specifically identified by the Commission as giving rise or likely to give rise to potential public concern, in respect of the ultimate returns to the taxpayer."*

17.2. The Commission specifically asked the Special Liquidators if they had discovered any matters in the course of the liquidation that might potentially be considered by the Commission to come within paragraph 1(b) of the Terms of Reference. By letter dated 27th October 2015 the Special Liquidators wrote to the Commission outlining certain matters that might be considered by the Commission to fall within this paragraph of its Terms of Reference.

17.3. The Commission is not yet in possession of sufficient information for the purpose of determining whether such matters give "*rise or likely to give rise to potential public concern, in respect of the ultimate returns to the taxpayer."*

17.4. As a result, the Commission has not yet commenced investigating any potential issues under paragraph 1(b) of the Terms of Reference.

18. Schedule of Write-offs

18.1. It is clear from the Schedule of transactions of all relevant write-offs above €10 million that there are 38 transactions in which more than €10 million has been written off by IBRC during the Relevant Period.

18.2. The total amount of these write-offs of loans during the Relevant Period is approximately €1.9 billion.

18.3. There are six transactions with write-offs greater than €100 million. The combined total of these six transactions is approximately €859 million.

18.4. There are a further six transactions where the write-offs are between €50 million and €100 million. The total amount written off in respect of these transactions is €448 million.

18.5. Thus the total of write-offs of the first twelve transactions is €1.3 billion.

18.6. There are a further six transactions where the write-offs are between €30 million and €50 million. The total of these six transactions is €232 million.

18.7. Thus the total amount of write-offs of the first eighteen transactions is approximately €1.5 billion. Thus 81% of the write-offs in terms of value arise from the first eighteen transactions (or, in other words, 81% of the amount of the write-offs arise from 50% of the transactions under review).

19. Management of Workload of the Commission and Resources

19.1. If the Sole Member is to conduct at least 38 investigations into 38 transactions, such a process will take many years. That is inevitable given the number of transactions, the detailed Terms of Reference and the requirement for fair procedures. There is no quick and easy way to carry out an investigation concerning dozens of complex financial transactions involving multiple parties and with hundreds of thousands of pages of documents.

19.2. In the Commission's view, given that the matters to be investigated are matters which are considered by the Government to be of significant public concern, it would not be in the public interest for this Commission to take many years to achieve its work.

19.3. The duration of the investigation could be shortened significantly by the appointment of one or more additional members of the Commission (with the required additional legal resources).

19.4. In the circumstances, the Commission is of the view that one or more additional members of the Commission should be appointed as soon as possible. As each transaction is a separate investigation, it would be possible for each member of the Commission to investigate transactions separately and simultaneously. This would substantially reduce the duration of the investigation.

19.5. Under the statutory instrument which established the Commission, regulation 5 provides that the "*Commission shall exercise discretion in relation to the scope and intensity of the investigation as it considers necessary and appropriate, having regard to the general objectives of the investigation*".

19.6. The Commission intends to exercise its discretion to investigate the largest twelve transactions on the Schedule first. The largest six transactions involve write-offs greater than €100 million. The next six largest transactions involve write-offs greater than €50 million. The combined total write offs of these transactions is €1.3 billion (which represents 68% of all write-offs associated with the 38 transactions).

19.7. The Commission would expect that if one or more additional members of the Commission were appointed (with additional legal resources) then these twelve investigations could be concluded within 18 months to two years (after the legal obstacles have been resolved).

19.8. At that point, the Commission would report back to the Government about the progress of the investigation and its recommendations about how the balance of the transactions should be investigated.

19.9. In addition, the Commission will also consider what other matters of potential public concern have been identified.

20. Conflicts of Interest and Requirement for Second Member of the Commission

20.1. The Commission received the Schedule of Transactions which resulted in a write-off of greater than €10 million on 27th August 2015. The Sole Member was not aware of any actual or potential conflicts of interest (apart from those which he disclosed prior to his appointment) before he received the Schedule of transactions. Having reviewed the Schedule, it appears to the Sole Member that there are a small number of transactions in which he has an actual or perceived conflict of interest.

20.2. Given the conflicts of interest which will arise and the amount of transactions under investigation, the Commission recommends that at least one other person should be appointed as a member of the Commission, as set out above. This would mean that any conflicts of interest could be properly managed.

21. Request for an Extension of Time

21.1. As set out above, the Statutory Instrument establishing the Commission provides that the Commission shall submit its final report in relation to its investigation no later than 31st December 2015.

21.2. However, given the issues encountered by the Commission – particularly in respect of the issue of confidentiality, the issue on privilege and the issues raised by the Irish Stock Exchange – the Commission is unable to embark on its investigation in respect of any of the transactions until these matters have been resolved.

21.3. If these matters are not resolved, the Commission will not be able to continue with its investigation into these transactions.

21.4. If these matters are resolved by legislative change, then the Commission's investigation into all of the transactions, given the current Terms of Reference, will take several years to complete. The Commission is not in a position at this time to give any estimate of a likely period for completion nor an estimate of the likely costs.

21.5. As a result of various legal issues that have arisen as set out in this report, the Commission has been unable to embark on its investigation of the matters set out in its Terms of Reference. As a result, the Commission will not be in a position to conclude its investigation or to submit its final report to the Taoiseach by 31st December 2015 as required by the Order establishing the Commission.

22. Conclusions and Recommendations

22.1. The issue of confidentiality

22.1..1. The Special Liquidators have asserted a duty of confidentiality over all the documents which they have submitted to the Commission. The Commission has determined that the duty of confidentiality does apply to all these documents.

22.1..2. The Department of Finance has also asserted a duty of confidentiality over many of the documents which it has submitted to the Commission. The Commission has determined that the duty of confidentiality does apply to these documents also.

22.1..3. As a result of section 21 of the Commissions of Investigation Act 2004, the Commission is unable to receive these documents into evidence. Moreover, it cannot compel the production of these documents.

22.1..4. As a consequence of the Determination made by the Commission in relation to the claim for confidentiality, the Commission is not in a position to proceed with its investigation into any of the relevant transactions at this time without legislative change. The Commission would therefore recommend appropriate legislative change.

22.2. The Issue of Privilege

22.2..1. The Special Liquidators and the Department of Finance have also claimed legal advice privilege over certain documents. The Commission has considered these documents and it is of the view that the documents are indeed covered by legal professional privilege. As a result, the Commission, under section 21 of the 2004 Act, cannot admit these documents into evidence.

22.2..2. Because the Commission cannot receive these documents into evidence, it cannot forward them to the directors for their consideration in respect of each transaction. As the directors may wish to rely on legal advice which they received at the time

in respect of certain write-offs, this deprives the directors of the right to fair procedures in responding to the Commission's investigation into their actions in respect of each transaction.

22.2..3. Because of the fundamental importance of this issue, the Commission requested the Special Liquidators to waive their claim to privilege, but the Special Liquidators were unable to do so.

22.2..4. Therefore, as a result of the Special Liquidators' claim to privilege over these documents, the Commission is not in a position to proceed with its investigation in respect of any of these transactions until this matter has been resolved. This will require legislative change or a waiver of privilege by the Special Liquidators. The Commission recommends that both options should be considered.

22.3. **The Central Bank of Ireland**

22.3..1. Insofar as the Commission may need to obtain documents from the Central Bank, there are professional secrecy obligations imposed on the Central Bank which prevent them disclosing certain documents to the Commission. The legislative scheme in relation to this issue of secrecy as between the Central Bank and the Commission is complex and largely grounded in European law. The Commission's view is that domestic legislative change would be insufficient to overcome this problem. However, it should be possible to secure production of communications between the Central Bank and IBRC from the Special Liquidators.

22.4. **The Irish Stock Exchange**

22.4..1. Under paragraph 2(f) of its Terms of Reference, the Commission is charged with investigating whether, in respect of any transaction under investigation, any unusual share trading occurred which would give rise to an inference that inside information was improperly provided to or used by any persons and in the event

that such an inference does arise whether any such information was actually improperly provided or used.

22.4..2. The Stock Exchange is under a duty of professional secrecy under section 118 of the Companies Act 1990. It appears, therefore, that the Commission will be unable to obtain relevant documentation or information from the Stock Exchange without legislative change. The Commission recommends appropriate legislative change to this area.

22.5. **Terms of Reference – Request for Amendment**

22.5..1. There are a number of specific issues with the Terms of Reference which require to be addressed. These are as follows:

1. Paragraph 2(c)

Paragraph 2(c) of the Terms of Reference provides that the purposes for which each transaction are to be investigated include whether it can be concluded that the write-offs were not commercially sound in respect of the manner in which they were conducted, the decisions made and the outcomes received <u>having regard to the purposes of the Irish Bank Resolution Corporation Act 2013 set out in section 3 thereof</u>.

The phrase "*having regard to the purposes of the Irish Bank Resolution Corporation Act 2013 set out in section 3 thereof*" is problematic. This is because it directs the Commission to consider whether the write-offs were commercially sound in respect of the manner in which they were conducted but also having regard to the 2013 Act, which was not in place at the time the write-offs occurred (i.e. between 21st January 2009 (being the date of the nationalisation of IBRC) and 7th February 2013 (being the date of the appointment of the Special Liquidators to IBRC)). The effect of this is to give this part of the Irish Bank Resolution Corporation Act 2013 retrospective effect to the detriment to the directors. In effect, it means that the Commission is to consider the actions of the directors in respect of whether the write-offs were commercially sound having regard to a

standard which was not in place at the time the write-offs were made. To hold the directors to a standard which was not in place at the time they made their decisions would be a breach of their constitutional right to fair procedures. The Commission recommends that this phrase "*having regard to the purposes of the Irish Bank Resolution Corporation 2013 set out in section 3 thereof*" be deleted from the Terms of Reference.

2. Paragraph 2(d)

Paragraph 2(d) of the Terms of Reference is also difficult to investigate in its current form for the reasons set out earlier in this Interim Report. There do not appear to have been standard applicable interest rates for the loans the subject of this investigation. Moreover, the Commission is of the view that paragraph 2(d) in the Terms of Reference does not achieve what may have been intended to be achieved by this paragraph. The Commission recommends that paragraph 2(d) of the Terms of Reference be reconsidered to take account of these concerns.

3. Paragraph 6(c)

The Terms of Reference require amendment to clarify that the Commission is not required to investigate any aspect of the business of Irish Nationwide Building Society prior to its merger with Anglo Irish Bank.

22.6. **Meaning of Capital loss**

22.6..1. The Commission intends to arrive at a concluded view as to the meaning of "*capital loss*" in the near future and before doing so would welcome clarification of the intended meaning of that term.

22.7. **Siteserv Plc**

22.7..1. Siteserv was dissolved with effect from 6th August 2015. The consequences of this are that if, and to the extent, that the Commission is to investigate any transaction involving Siteserv, unless the company is restored to the Register of

Companies, it will not exist in corporate form and will not be in a position to engage with the Commission. The liquidator of Siteserv has indicated his willingness to apply to the High Court to restore the company.

22.8. **Conflicts of Interest and Second Member of the Commission**

22.8..1. Given the conflicts of interest which will arise and the amount of transactions under investigation, the Commission recommends that a second person should be appointed to the Commission. This would mean that any conflicts of interest could be properly managed.

22.9. **Other Matters of Public Concern**

22.9..1. The Special Liquidators have written to the Commission outlining certain matters that might be considered by the Commission to fall within paragraph 1(b) of its Terms of Reference. The Commission is not yet in possession of sufficient information for the purpose of determining whether such matters give "*rise or likely to give rise to potential public concern, in respect of the ultimate returns to the taxpayer."* As a result, the Commission has not yet commenced investigating any potential issues under paragraph 1(b) of the Terms of Reference.

22.10. **Management of workload**

22.10..1. The duration of the investigation could be shortened significantly by the appointment of one or more members of the Commission (with the required additional legal resources).

22.10..2. In the circumstances, the Commission is of the view that one or more additional members of the Commission should be appointed as soon as possible. As each transaction is a separate investigation, it would be possible for each member of the Commission to investigate transactions separately and simultaneously. This would substantially reduce the duration of the investigation.

22.10..3. The Commission intends to exercise its discretion to investigate the largest twelve transactions on the Schedule first. The largest six transactions involve write offs greater than €100 million. The next six largest transactions involve write offs greater than €50 million. The combined total write offs of these transactions is €1.3 billion (which represents 68% of all write offs associated with the 38 transactions).

22.10..4. The Commission would expect that if an additional one or more members of the Commission were appointed (with additional legal resources) then these twelve investigations could be concluded within 18 months to two years (after the legal obstacles have been resolved).

22.11. **Request for an Extension of Time**

22.11..1. At present, it appears that there are at least 38 transactions which require investigation. The scope and intensity of the investigation of each transaction may be varied as the Commission considers necessary and appropriate. However, a proper consideration and investigation of the matters set out in the Terms of Reference will take several years and will result in substantial costs. That is inevitable given the current Terms of Reference and the number of transactions captured by these Terms of Reference.

22.11..2. In addition, there may be other matters which potentially give rise to public concern in respect of the ultimate returns to the taxpayer.

22.11..3. For the reasons set out in this report, it is not possible to make an accurate assessment of the time required to complete the investigation. The Commission therefore requests, for the purposes of section 6(6) of the Act, a revision of the timeframe for submission of its final report.

Signed: _____

The Hon. Mr. Justice Brian Cregan
Sole Member