



**The Hon. Mr. Justice Brian Cregan  
Sole Member**

An Taoiseach,  
Department of An Taoiseach,  
Government Buildings,  
Merrion Street,  
Dublin 2

13<sup>th</sup> November 2015

**Re: Terms of Reference of IBRC Commission**

Dear Taoiseach,

This letter is written pursuant to section 6 of the Commissions of Investigation Act 2004. The purpose of this letter is to seek certain amendments to the Terms of Reference of the Commission which are set out in the Schedule to Statutory Instrument No. 253 of 2015 dated 16<sup>th</sup> June 2015 (a copy of which is enclosed for your ease of convenience).

The requested amendments are set out and discussed below.

**1. Paragraph 2(c)**

1.1. 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]

- 1.2. The Commission requests that the following words be removed from paragraph 2(c) of the Terms of Reference: *“having regard to the purposes of the Irish Bank Resolution Corporation Act 2013 set out in Section 3 thereof”*.
- 1.3. The transactions that are the subject matter of paragraph 2(c) are confined by paragraph 1 of the Schedule to transactions that occurred between 21<sup>st</sup> January 2009 and 7<sup>th</sup> February 2013. The Commission is of the view that because the Irish Bank Resolution Corporation Act 2013 was enacted on 7<sup>th</sup> February 2013, it would be inappropriate to have any regard to the purposes of that Act as set out in section 3 thereof in making the assessment of transactions that is required by paragraph 2(c).
- 1.4. In particular, in the view of the Commission, to have regard to the provisions of an Act that was not in force during the Relevant Period would amount to a breach of the obligations of fair procedures and constitutional justice owed to those affected by the Commission’s investigation as it would involve giving retrospective effect to the relevant provisions of that Act.

## **2. Paragraph 2(d)**

- 2.1. 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...”*  
[Emphasis added]

- 2.2. Paragraph 2(d) of the Terms of Reference presents several difficulties. Before listing these, the Commission would set out its interpretation of paragraph 2(d).

- 2.3. The Commission interprets paragraph 2(d) as follows:

- (i) It applies only to transactions, activities and management decisions that fall within paragraph 1 of the Terms of Reference (i.e. in the main, transactions which resulted in a capital loss of at least €10 million during the Relevant Period) and does not apply to transactions with borrowers that are outside the criteria specified in paragraph 1; and
- (ii) It applies to two stated categories of transactions, as follows:

- a) transactions involving interest rates 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; and
- b) transactions involving any extension to interest rates or any periods for repayments given by IBRC on preferential terms that were unduly favourable to any borrower where the amendments give rise to, or are likely to give rise to, potential public concerns.

2.4. Paragraph 1 of the Terms of Reference provides that the Commission shall investigate all transactions where there is a capital loss of at least €10 million during the Relevant Period. Paragraph 2 of the Terms of Reference provides that the purposes for which each such transaction are to be investigated are set out in subparagraph (a) to (f).

2.5. Subparagraphs 2(a), (b), (c), (e) and (f) all specifically refer in their wording to the transactions defined in paragraph 1 of the Terms of Reference. Subparagraph 2(d), in contrast, does not refer to the transactions defined in paragraph 1 of the Terms of Reference.

2.6. However, the Commission interprets subparagraph 2(d) as being referable only to the transactions, activities and management decisions under investigation where pursuant to paragraph 1. This follows from the first sentence of paragraph 2.

2.7. In relation to the wording of paragraph 2(d) the Commission would make the following points:

(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 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) As these loans by definition involve significant losses of capital, it seems unlikely that any change in interest or repayment arrangements would materially affect the total loss incurred on the loan.

2.8. In summary, given the above issues, in the view of the Commission, it is not possible to undertake an investigation under paragraph 2(d) in its current form.

### 3. Paragraph 6(c)

3.1. The third 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:*

*(a) 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”.*

3.2. The proposed amendment is to make it clear that the Terms of Reference do not extend to transactions, activities and management decisions made by or on behalf of Irish Nationwide Building Society prior to its merger with Anglo Irish Bank.

3.3. The Commission suggests that Paragraph 6(c) of the Terms of Reference be amended to read as follows:

*“References to IBRC shall be construed as including references to Irish Nationwide Building Society and any subsidiary of Irish Nationwide Building Society from the date of the merger between Anglo Irish Bank and Irish Nationwide Building Society to 7<sup>th</sup> February 2013; and as including references to Anglo Irish Bank, any subsidiary of Anglo Irish Bank and any subsidiary of IBRC for the Relevant Period”.*

The Commission is satisfied that any amendments made to the Terms of Reference as a consequence of the matters raised in this letter would not prejudice the legal rights of any person who has cooperated with or provided information to the Commission in the investigation to date.

Yours sincerely,

*Brian J. Cregan*

---

**The Honourable Mr Justice Brian Cregan**  
**Sole Member**