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**An Bille um Choimisiún Imscrúdúcháin (Corparáid na  
hÉireann um Réiteach Baine), 2016**

**Commission of Investigation  
(Irish Bank Resolution Corporation) Bill 2016**

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*Meabhrán Mínitheach*  
*Explanatory Memorandum*

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**AN BILLE UM CHOIMISIÚN IMSCRÚDÚCHÁIN (CORPARÁID  
NA hÉIREANN UM RÉITEACH BAINC), 2016**  
**COMMISSION OF INVESTIGATION  
(IRISH BANK RESOLUTION CORPORATION) BILL 2016**

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**EXPLANATORY MEMORANDUM**

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**Purpose of Bill**

The Commission of Investigation (Irish Bank Resolution Corporation) [“the IBRC Commission”] was established by the Government in June 2015.

The purpose of this Bill is to address a number of matters raised by the Sole Member of the IBRC Commission in the following Interim Reports and Determinations published under the Commissions of Investigation Act 2004 [“2004 Act”]:

- Determination 1 of 5 November 2015 (pursuant to section 21(2) of the 2004 Act) on the duty of confidentiality and legal professional privilege over certain documents as asserted by the Special Liquidators of IBRC;
- Determination 2 of 6 November 2015 (pursuant to section 21(2) of the 2004 Act) on the duty of confidentiality and legal privilege over certain documents as asserted by the Department of Finance;
- First Interim Report of 13 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 2004 Act;
- Determination 3 of 16 December 2015 (pursuant to section 21(2) of the 2004 Act) on the duty of confidentiality over certain documents as asserted by the Irish Stock Exchange Plc.;
- Second Interim Report of 15 April 2016 submitted pursuant to a request from the Taoiseach and with a request for the revision of the time frame for submitting a final report under section 6(6) of the 2004 Act.

**Issues raised and outlined in Determinations and Interim Reports**

The Interim Report in November raised a series of issues which had arisen in the course of the IBRC Commission’s work, including:

- the Commission’s determination that the issue of confidentiality precluded it from receiving documents into evidence;
- the Commission’s determination that the issue of legal privilege precluded it from admitting documents into evidence;

- the Commission's determination that the duty of professional secrecy under section 118 of the Companies Act 1990 precluded it from admitting documents into evidence;
- potential conflicts of interest and the appointment of additional member(s) to the Commission.

### **Provisions of Bill**

This Bill will introduce a bespoke piece of legislation which will effectively apply the Commissions of Investigation Act 2004, with specific amendments, to the IBRC Commission.

Nine sections are proposed.

### **Definitions**

*Section 1* is a technical provision providing for definitions in the Bill.

### **Powers of Commission**

*Section 2* provides for additional powers to be assigned to the IBRC Commission which will address the conclusions reached by the Commission to the effect that where the Commission has determined that a duty of confidentiality applies to certain documents, then those documents cannot be admitted into evidence under the 2004 Act. The Commission recommended legislative change to address this issue (see First Interim Report, conclusion 22.1).

Subsection (1) confirms that the IBRC Commission may make such orders and determinations, and give such directions, as is necessary for the performance of its functions and for that purpose shall have all such powers, rights and privilege as are vested in the High Court or a judge of that court. There is similar provision in relation to Tribunals of Inquiry under the Tribunals of Inquiry (Evidence) Act 1921 as amended.

Subsection (2) addresses the finding of the IBRC Commission set out in the Determinations and First Interim Report (Part 6) to the effect that the Commission did not have the necessary statutory powers to admit into evidence documents in relation to which a duty of confidentiality was found to apply. Subsection (2) allows the Commission to compel the disclosure of such information, where it is necessary to enable the Commission to perform its functions, and to admit that information into evidence.

Paragraph (b) of subsection (2) allows the IBRC Commission to compel information which may otherwise be subject to Article 27 of the EU Market Abuse Regulation which will come into force on 3 July 2016. Article 27 prohibits the disclosure of any confidential information received, exchanged or transmitted pursuant to that Regulation on the grounds of professional secrecy unless otherwise provided for under law. Paragraph (b) makes the necessary provision to ensure that, where requested, information may be disclosed to the Commission which may otherwise be prohibited from disclosure under Article 27.

Subsection (3) defines 'document' for the purpose of this section.

This section is addressed solely to the work of the Commission of Investigation into IBRC.

### **Application to High Court**

*Section 3* confirms that the IBRC Commission may seek the directions of the High Court in relation to the performance of any of the functions of the Commission. Again this provision will be limited to the work of the Commission of Investigation into IBRC.

It is clear from the Determinations of the Commission, that the Commission had considered seeking the directions of the Courts in respect of certain matters but that the 2004 Act does not provide any mechanism for a Commission to seek such directions (see Part 8 of Determination 1 and Part 9 of Determination 2). This section ensures the necessary mechanism will be available.

#### **Referral of question of law to High Court**

*Section 4* confirms that the IBRC Commission may refer any question of law in relation to the performance of its functions to the High Court for determination.

#### **Divisions of Commission**

*Section 5* will allow the IBRC Commission to sit and report in Divisions. This provision is introduced in light of the potentially extensive nature of this investigation, and to ensure that any conflicts of interest which may arise are avoided by providing that the Commission can sit in Divisions. A report of a Division shall be deemed to have been prepared by the Commission as a whole. The provision is based on a similar provision contained in the Tribunals of Inquiry (Evidence) (Amendment) Act 1997, as amended. The need for a provision to avoid such conflicts was identified by the Commission in its First Interim Report (conclusion 22.8).

#### **Special Liquidator appointed under Irish Bank Resolution Corporation Act 2013**

*Section 6* amends the Irish Bank Resolution Corporation Act 2013 to accommodate the waiving of professional legal privilege by the Special Liquidators to IBRC under a direction from the Minister for Finance. This section addresses the finding of the IBRC Commission set out in the First Interim Report (conclusion 22.2) to the effect that the Commission did not have the necessary statutory powers to admit into evidence documents in relation to which a claim of legal privilege had been asserted by the Special Liquidators to IBRC and was found to apply.

A direction to the Special Liquidators will only be made where it is requested by the Commission and the Commission is satisfied that it is necessary to enable the Commission to perform its functions and it is in the public interest to do so.

#### **Disapplication of section 118 of Companies Act 1990**

*Section 7* will amend section 118 of the Companies Act 1990 to enable the Irish Stock Exchange to provide confidential information to the IBRC Commission who may admit it into evidence. Determination 3 of the IBRC Commission concluded that certain documents sought from the Stock Exchange were confidential pursuant to section 118 of the Companies Act 1990 which provides for professional secrecy in respect of documents obtained by the Stock Exchange in pursuance of its functions under Part V of the 1990 Act in relation to insider dealing.

This section will disapply that section in respect of the disclosure of information to the Commission.

#### **Amendment of Act of 2004**

*Section 8* amends the 2004 Act insofar as it applies to the IBRC Commission.

Paragraph (a) amends the definition of ‘document’ under the 2004 Act so that it replicates the definition under section 2 of this Bill.

Paragraph (b) amends section 34 of the 2004 Act. Under that section, a draft of any report produced by the Commission must be distributed,

in advance of submission to the specified Minister, to any person who is identified or identifiable. It is proposed to limit the distribution, in relation to the IBRC Commission, to persons in relation to whom there is an adverse finding.

**Short title and commencement**

*Section 9* is a technical provision setting out the short title and commencement provision.

*An Roinn Dlí agus Cirt agus Comhionannais,  
Meitheamh, 2016.*