

By Email: IAFconsultation@centralbank.ie
Subject: Consultation Paper 154 on the ASP Guidelines under the Individual Accountability Framework
Date: 14th September 2023

Dear Sir/Madam,

The Compliance Institute (the 'Institute') is the professional body for compliance professionals. With over 3,500 members, it is the premier provider of education and professional development in compliance, providing an authoritative and balanced voice on matters relating to regulatory compliance and business ethics in industry in Ireland.

The Institute is supportive of the Individual Accountability Framework ('IAF') in its aim to achieve better outcomes for consumers and users of financial services, seeking to improve governance, performance, and accountability in firms providing financial services to individuals and businesses. The associated refinements to the Administrative Sanctions Procedures ('ASP') and the additional guidance is welcome.

The Institute welcomes the publication by the Central Bank of Ireland (the 'Central Bank') of the Consultation Paper on the ASP Guidelines under the Individual Accountability Framework, and the opportunity to provide responses to the questions which are set out in Appendix 1.

The Institute is well placed to provide informed feedback given the key role that the profession will play in the implementation of the new regime and its diverse membership that includes compliance and other professionals from a broad range of sectors subject to different levels of regulation and supervision.

The views expressed in this letter reflect those of the Institute as a professional body for compliance professionals in consultation with a sub-section of its members representing a range of financial services industry sectors.

We hope you find our views constructive and, if helpful, we are available to discuss further.

Yours faithfully,



Michael Kavanagh

CEO

Compliance Institute

APPENDIX 1

General Observations

- **People:** Membership has raised concerns in relation to firms' ability to attract staff and staff retention, including those who are not PCFs though exercise roles of significant influence, CF1s. Members noted that individuals with transferable skills may be incentivized to move to unregulated firms or other industry sectors having regard, inter alia, to the potential for investigation and/or sanctions attaching to controlled functions.
- **Timelines:** The proposed timing affords limited lead in time for firms to prepare or make changes to existing processes given that the Central Bank's feedback to CP153 and CP154 will likely be very close to the initial Individual Accountability Framework implementation deadlines.
- **Conflict:** Further guidance on how conflicts of interest and a divergence of views on responses to an investigation and settlement can be effectively managed as they arise between individual PCFs, CFs and employer firms.
- **Resources:** Members sought further guidance, and asked if greater protections were merited, to address the difficulties presented by the imbalance of resources that exists as regards individual PCFs, CFs and employer firms (e.g., financial resources, insurance cover, access to advisors and subject matter experts) and the associated weakness in bargaining power of individuals compared to more senior colleagues and to the RFSPs themselves.
- **Data Access:** Members noted that clarity was required as to how the six-year look back would work in practice and what are the obligations of the Regulated Financial Service Provider ('RFSP') and the relevant role holder. Members asked if the Central Bank would issue guidelines to firms on expectations where an individual had left the firm and no longer had access to information that they may need in the event of an investigation.

Q1. Do the Central Bank draft ASP Guidelines assist you in understanding the modified ASP investigation process now codified in statute?

- The Guidelines to assist understanding of the modified ASP investigation process are welcomed.
- Additional clarity and guidance on the following items would be helpful:
- The obligations of RFSPs regarding access to information stored by the RFSP, where an individual is subject to an investigation that relates to their period of employment with the RFSP as their former employer. This is particularly important in instances where evidence that the individual under investigation would seek to rely upon to demonstrate the reasonable steps they took exists within the former employer; and
- If additional protections should be afforded to individuals in CF and/or PCF roles who may:
 - have more limited financial means compared to PCFs and/or the RFSP;
 - be less experienced in relation to engaging with investigations and regulatory bodies and have less affordable, readily available access to (independent) expert advice, and/or share access to the same legal counsel for the RFSP;
 - may not be covered by the firm's Director and Officer insurance; and

- be potentially susceptible to undue influence, and be more reliant upon the actions, training, and guidance, from more senior individuals and RFSPs, involving potential conflicts of interest.

Q2. Do the draft ASP Guidelines assist you in understanding the role of the RAO and the associated functions and responsibility?

We welcome the introduction of the RAO role and that incumbents in the role would help support continuity and ensuring the investigation subject(s) are kept informed throughout the investigation process. Further detail around the RAO's ability to exercise their discretion such as in the examples cited would be helpful, including how the appropriateness of such decisions may be assessed or challenged.

Members indicated that a clearer picture of the grounds on which suspected prescribed contraventions are suspected and the specific evidence on which those grounds are based would be useful.

Where in the opinion of the RAO revisions to the draft investigation report are not warranted following the receipt of submissions from the subject of the investigation, members asked if the basis for such opinion would be disclosed to the subject(s).

Q3. Do the draft ASP Guidelines assist you in understanding the proposed approach to the issuing of the Notice of Investigation, what it contains and how it may be amended?

The fact that those subject to an investigation will receive notice of an investigation which will outline what is being investigated is a positive step. However, as the scope could be narrowed or expanded without the subject necessarily being informed of the specifics of the change detracts from the overall benefit of this approach, whereby the initial notification may bear limited relation to the matters ultimately investigated. In addition, it may impact other positive proposed additional protections, e.g., the right to respond to the initial report. The issuing of sufficiently detailed updated notices of investigation would be welcome.

The following additional information would be helpful in the context of the proposed approach to the issuing of the Notice of Investigation:

- The medium through which/how the Notice of Investigation will be provided to the subject(s); and
- What can the subject expect in terms of steps and frequency of updates considered reasonable to be provided by the RAO.

It is recommended that the guidance be adjusted to refer to 'alleged' prescribed contravention where appropriate, e.g., at the Notice of Investigation phase of the process.

Q4. Do the draft ASP Guidelines assist you in understanding the Central Bank's proposed approach to disclosure?

Our comments on Question 1 above are of relevance here, more specifically the accessibility of appropriate legal advice around legal privilege, limited waiver, and disclosure agreements,

particularly for individual controlled functions.

Potential conflicts of interest may also require managing in this context, whereby permitted disclosure to a recipient's legal representatives is to legal counsel engaged for the individual via a relevant RFSP.

Q5. What are your views in respect of the obligations and expectations regarding confidentiality described in the draft ASP Guidelines?

At present the confidentiality obligations within the guidelines do not offer guidance to individuals and/or RFSPs where adhering to the confidentiality requirements under the ASP would create a conflict with other regulatory requirements obliging the disclosure of all relevant information.

For example, where an individual is engaged in an ongoing new PCF role application process for a RFSP and/or has submitted their application to a regulatory authority/approving body. If this individual is currently subject to a pending investigation under the ASP guidelines with the associated confidentiality obligations, it is not clear if/or how the individual should disclose this information to the perspective RFSP and/or the relevant authority in the due diligence screening process.

Q6. Do the draft ASP Guidelines assist you in understanding the revised roles at inquiry?

The formalising of safeguards around the independence of the inquiry decision making process and ensuring that the same persons do not carry out the investigative and adjudicative functions is welcomed.

With respect to third parties requesting a role in the inquiry, it would be helpful to understand more detail around how this would operate in practice, including:

- how will relevant third parties be made aware of the inquiry, including for example where it concerns a former employee or employer.
- will the subject(s) be informed of such applications by third parties and whether their application for a role has been successful.
- if an individual may have the same ability to request a role where the subject is a firm with which they have performed a (P)CF role, and if so, how will the above two items operate in respect of individuals.
- an indication of what factors will lead to successful and unsuccessful applications for a role and the extent to which the rationale of the inquiry members in exercising this discretion and basis for reaching their decision will be made known to the applicant third party.

Q7. Do the draft ASP Guidelines assist you in understanding the revised ASP inquiry process and procedures?

Members noted that the use of the civil standard of proof, the balance of probabilities basis, could be viewed as potentially unfair in an administrative sanction's regime. It was submitted that to move through an investigative process from potential, to suspected, to actual prescribed contravention(s), to enforcement and thereafter sanction, where one side has extensive resources (e.g., legal, and

financial) and ownership of the process should involve the principle of proof beyond reasonable doubt. Members noted that the Central Bank is seeking to get court approval for its settlements to put them on a statutory footing, without affording potentially sanctioned individuals the same level of protection and requiring the same burden of proof that the courts would if they were deciding upon outcomes. It was submitted that the resource imbalance to deal with such matters through the courts appeared inequitable.

Q8. Do the draft ASP Guidelines assist you in understanding the process to be followed at the conclusion of an inquiry, including notifying the inquiry decision and issuing an inquiry publication notice?

While the inclusion of the requirement to have any proposed sanction confirmed by the High Court appears to add a further and welcome safeguard to the process, this appears to only be in relation to the settlement procedure and the timing of the confirmation. The additional safeguard is limited by the fact that the notice of the inquiry is published prior to the confirmation. In the scenario where the High Court takes a different view, it is too late to remedy the reputational damage for the individual concerned. We note that the underlying legislation does not compel the publication of the notice prior to the High Court confirmation and would ask that consideration be given to the sequencing of this.

Q9. Do the draft ASP Guidelines assist you in understanding how an ASP inquiry would work in practice?

Members welcomed the guidance and had no further questions on this aspect apart from the foregoing.

Q10. Do the draft ASP Guidelines assist you in understanding the new undisputed facts settlement procedure particularly in terms of when it may be available and the Central Bank's proposed approach to it?

Members requested clarity as to what extent the set of core facts, or emphasis of core facts, can be discussed or negotiated as part of an undisputed fact settlement. It remains unclear to what extent the set of core facts, or emphasis of core facts, can be discussed or negotiated as part of an 'undisputed fact' settlement. Whilst the facts may be undisputed, their relevance to the overall message sent to the market regarding a firm's conduct and/or an assessment of appropriate financial sanctions are all points of emphasis that may still be an open issue between the firm and the Central Bank, even though the facts are not contested. Firms looking to reach an undisputed fact settlement would need consider this point carefully at an early stage and further guidance would be helpful.

Q11. Do the draft ASP Guidelines assist you in understanding the new investigation report settlement procedure particularly when such settlement procedure may be available and the Central Bank's proposed approach to it?

Further information around what a subject 'indicating a willingness to engage' in the relevant settlement processes means would be welcome and at what point in the process this would be assessed or discussed. The Central Bank's prior practice was developing, and whereas in earlier

processes a formal ‘without prejudice’ invitation to enter settlement discussions might have issued alongside the first Investigation letter, more recently the Central Bank has been willing to discuss the possibility of settlement once it has first had an opportunity to assess the overall case. This trend continues in the approach set out in the Guidelines.

Q12. Do the draft ASP Guidelines assist you in understanding the no admissions settlement process and the Central Bank’s continuing policy approach of seeking settlement with admissions?

The guidelines are helpful and the use of a zero discount for no admissions basis settlements seems appropriate. However, members request some indication as to the circumstances under which the Central Bank would be willing to enter no admissions settlements.

Q13. What are your views regarding the factors set out in the draft ASP Guidelines indicating a lack of suitability for the no admissions settlement process?

The factors set out here appear sensible and members had no observations to note.

Q14. Do the draft ASP Guidelines assist you in understanding the Central Bank’s proposed approach to the updated Settlement Scheme?

Yes, members welcomed the guidelines in this respect and had no specific queries in relation to this item.

Q15. Do you agree with the Central Bank’s proposed approach regarding the application of the Settlement Scheme to monetary penalties only?

The approach here appears logical, and members did not voice any disagreement with this aspect.

Regarding non-monetary penalties please note our comments in response to Question 24 having regard to welcome policy objectives of a penalty being both proportionate and ‘protective in nature as much as it is punitive’.

Q16. Do you agree with the Central Bank’s proposed approach to undisputed facts settlements?

Members observed that the change to the level of discount available to those who settle after an investigation (10% versus 30% for undisputed cases) could likely result in pressure from senior management and/or insurers to settle on an undisputed basis, which seems may be the intended behaviour. Guidance as to how to manage the challenges associated with instances where the firm, directors, PCFs and CFs may be in disagreement as to whether or not to avail of undisputed facts settlement, having regard for example to an individual’s motivation to maintain a clear reputation versus a firm’s relative ability to absorb the impact of same (combined with a firm’s likely objective to address the matter as quick as possible while minimising cost and wider brand impact).

Please also refer to our response to Question 10 above in this context.

Q17. Do you agree with the Central Bank’s proposed approach to investigation report settlements?

Members did not have any specific observations on the proposed approach to investigation report settlements.

Q18. What are your views and comments regarding the proposed Settlement Scheme?

Members had no further observations to raise regarding the proposed Settlement Scheme.

Q19. Do the draft ASP Guidelines assist you in understanding the Central Bank’s proposed approach to the determination of sanctions and what are your views in this regard?

Further guidance was requested on what leads to higher sanctions (e.g., defining recklessness as including appreciating there was a risk that action/inaction could result in a breach and failing to adequately mitigate that risk).

Members indicated that more information on how any engagement between the subject(s) and the Central Bank may be conducted regarding the parties’ respective views on a proportionate financial sanction and clarity on the methodology. In this regard, it was noted that there was somewhat limited detail on how the Central Bank will assess the appropriate ‘starting point’ for a case and how the Central Bank will assess the relevant ‘severity level’ to be applied.

Q20. Are the different sanctions which may be imposed on firms and individuals sufficiently clear in the draft ASP Guidelines?

Members noted that the use of targeted individual sanctions, such as directions and conditions attaching to roles seemed pragmatic and had no further comments save as is otherwise set out herein.

Q21. Are the different sanctioning factors which may be applicable to firms and individuals sufficiently clear in the draft ASP Guidelines?

The guidelines provide that "the second key change to the individual sanctions is the introduction of a sanction providing for a direction imposing conditions on the performance of any controlled function or part of it by an individual." Members were of the view that the guidelines were not clear as to how RFSPs should consider and incorporate these conditions as part of any screening or fitness and probity assessment of an individual post-sanction.

Members observed it was not clear if individuals would be able to undertake PCF roles and hold prescribed responsibilities with conditions attached, or would individuals only be able to perform CF roles with conditions attached.

It would be helpful if the guidelines could be enhanced to reflect more specifically what form these conditions may take and how they would be applied in practice by individuals and RFSPs.

Q22. Do the sanctioning factors assist you in understanding the Central Bank’s proposed sanctioning approach and what are your views on the sanctioning factors?

No further observations to note here apart from the foregoing.

Q23. What are your views on the monetary penalty methodologies?

Members asked if the CBI could expand on how an individual’s income will be assessed for the purposes of the Starting Point Figure for the calculation of a monetary penalty.

Q24. Is there any other aspect of the Central Bank’s sanctioning approach which would benefit from further consideration or explanation?

Members observed that the impact of sanctions on PCFs and CFs could vary significantly depending on the resources available to the individual (e.g., financial standing, insurance coverage) and asked if the approach to addressing the challenges associated therewith could be expanded upon in the guidance.

Members questioned the likelihood in practice of firms appointing individuals with sanctions applying to them and felt it improbable. Members would welcome examples of how this might work and guidance to inform the screening and onboarding policy and process.

Q25. Do the draft ASP Guidelines assist you in understanding the new requirement for High Court confirmation of sanctions agreed as part of (a) an undisputed facts settlement procedure and (b) an investigation report settlement procedure, and the Central Bank’s proposed approach to it?

Please refer to our response to Questions 8 above.

Q26. Do the draft ASP Guidelines assist you in understanding the revised confirmation and appeal procedures?

Please refer to our response to Questions 8 above in the context of likely detriment to the individual due to the sequencing contemplated for publication and High Court confirmation, notwithstanding right to appeal.