



INSTITUTE OF DIRECTORS
IN IRELAND

Institute of Directors in Ireland
Fourth Floor, Block 3
Harcourt Centre
Harcourt Road
Dublin 2
D02 A339
Tel: +353 1 4110010
Email: ceo@iodireland.ie

Central Bank of Ireland
North Wall Quay
North Dock
Dublin 1
D01 F7X3

8th September 2023

Re: Consultation Paper 154 (“CP154”) - Consolidated Guidelines in respect of the Central Bank Administrative Sanctions Procedure (“ASP”) (the “ASP Guidelines”)

To whom it may concern,

Thank you for the opportunity to respond to the proposed approach as set out in CP154 and the draft ASP Guidelines. The Institute of Directors (IoD) in Ireland (“IoD Ireland”) notes that the changes to the ASP are designed to underpin and support the introduction of the Individual Accountability Framework (“IAF”) and in particular the Senior Executive Accountability Regime (“SEAR”) and the conduct standards for firms and individuals, which are more particularly detailed in Consultation Paper 153 on enhanced governance, performance and accountability in financial services (“CP153”). As noted in our CP153 submission, IoD Ireland understands the historical and social context behind the regulatory objectives of the IAF Act, IAF Regulations and the IAF Guidance and, specifically, lessons learnt from the global financial crisis when governance deficiencies and insufficient accountability were revealed. IoD Ireland’s focus in considering CP154 is not on bad faith actors who set out intentionally to breach individual or firm obligations and/or to harm customers or investors but for good faith actors who might find themselves the subject of an investigation / inquiry under the ASP.

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Directors: J Reynolds CDir (President), T McWade CDir,
H Nolan, B O’Sullivan CDir, I Reynolds CDir, M Shanahan, F Tierney CDir

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The Institute of Directors (IoD) in Ireland is a not-for-profit organisation. We are the leading membership body for directors and business leaders in Ireland, with membership across all sectors and industries, but predominantly the financial services sector (31%). Our Vision is for Ireland to be an exemplar of corporate governance. Our Purpose is to instil stakeholder trust and confidence in organisations by educating, informing, and supporting directors and business leaders to lead successfully. Being the voice of directors and an advocate for the highest standards of corporate governance in Ireland is a core strategic pillar for IoD. The IoD has detailed knowledge of best practice standards, codes of practice and the techniques and processes associated with high performing boards.

Why is IoD Ireland Responding to this Consultation?

The Central Bank (Individual Accountability Framework) Act 2023 (the “**Act**”) introduces conduct standards applicable to individuals and a further statutory duty of responsibility for the most senior individuals as detailed in Consultation Paper 153. We note that the ASP has been amended to clarify the Central Bank of Ireland’s (“**Central Bank**”/“**CBI**”) ability to take direct enforcement action against individuals for breaches of those and any other individual obligations that may arise in financial services. We also note that it will remain the case that individuals can also be held accountable for their participation in breaches committed by a firm. The scope of the ASP is also extended by legislation to include individuals in all controlled functions.

We are responding to this consultation as the representative body for directors in Ireland. Many of our members fall within the scope of IAF/SEAR and as such the ASP is directly relevant to them. The comments and observations provided within this response focus predominately on the potential implications of the ASP, as amended, on individual directors and senior executives working within the financial services industry who have endeavoured to act in good faith. This response builds on our response to CP153¹ which we submitted to the CBI on 12th June 2023. We request, therefore, that the CBI consider our submission to CP153 in tandem with this submission. Our submission to CP153 included a cover letter which outlined our key concerns with regard to the Individual Accountability Framework as follows.

1. IAF versus Collective Board Responsibility and Strength
2. Decision-Making Under Uncertainty: Boardroom and Beyond
3. No one Person having Unfettered Control
4. Board Diversity and Inclusion
5. Independent Non-Executive Directors
6. Subsidiary Governance
7. System of Internal Governance
8. Confidence
9. Financial Services Talent Pool

¹ Enhanced governance, performance and accountability in financial services, Regulation and Guidance (IAF Regulation and IAF Guidance) under the Central Bank (Individual Accountability Framework) Act 2023 (IAF Act)

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10. Enforcement and the Rights of the Employee
11. ECB Supervision versus CBI Supervision under IAF

In addition, in Appendix 1 to our CP153 submission, we raised concerns regarding a perceived, existing expectations gap between industry and the CBI on the execution of oversight by non-executive directors. We consider that arising from this expectations gap, the industry is not starting from a positive position in terms of IAF and, by extension, the ASP and recommend engagement with professional/membership bodies such as IoD Ireland to agree a common philosophy and understanding of the practical realities of being a non-executive director and related CBI expectations on role execution. As noted in our response, we consider this to be fundamental to engendering confidence in the IAF and the existing Fitness and Probity regime. This expectations gap is not limited to INEDs. In Appendix 1 of our response to CP153, we also pointed out that the proposal that, where there is outsourcing of a PCF role, the role-holder should fall under the oversight of a PCF role holder within the entity, might be challenging in a global organisation where roles are internally outsourced. This might result in PCF role holders in an Irish based entity being responsible for an activity that, other than due diligence and on-going oversight, is out of his/her/their domain of influence on a day-to-day basis and thus imposes unrealistic expectations on the PCF. We recommended that the CBI reconsider the practicalities and fairness of this approach. There is concern in the industry that these expectation gaps increase the probability that good faith actors will find themselves a subject of an investigation by the CBI. These concerns need to be addressed by the Central Bank before the industry can have full confidence in the ASP process. As such, these concerns are an important backdrop to our response to CP154.

Appendix 1 represents our detailed responses to the specific questions raised in CP154. The responses reflect a detailed review by IoD Ireland of CP154 and the draft ASP Guidelines as well as incorporating member perspectives sought during the drafting of our response to CP153. Included below is a summary of our main observations following our consideration of **CP154 and the draft ASP Guidelines**.

Summary of Main Observations

Benefits of ASP, as amended

We note that the purpose of the draft ASP Guidelines is to provide clarity and transparency as to the steps involved in an ASP following the introduction of changes under the Act and to provide guidance as to how the Central Bank will generally approach these steps. We welcome this approach by the CBI.

We note that one legislative change is the new requirement that inquiry member appointments must be made from a panel established by the Minister for Finance of suitably qualified individuals. Members of this panel will also be appointed as decision makers in relation to certain fitness and probity decisions. We welcome this safeguard and anticipate that all inquiry member appointments will be made based on stringent competency and independence criteria.

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Concerns Related to the Draft ASP Guidelines

1. Utilising the ASP: The Company versus the Individual

We are concerned that the draft ASP Guidelines make very limited distinction between enforcement actions against companies and enforcement actions against individuals. The draft ASP Guidelines are aimed at all persons to whom the ASP may be relevant in order to aid their understanding of the legislative provisions and of the CBI's processes and procedures in utilising the ASP. What they do not do, however, is acknowledge the significant difference between the reputational damage and the psychological damage that an enforcement action imposes on an individual versus a firm. Neither do the draft Guidelines demonstrate how the psychological safety and professional reputation of inquiry subjects who are individuals will be safeguarded. **Our concern is not for bad faith actors but for good faith actors who might find themselves the subject of an investigation / inquiry.**

Legislative Changes that are particularly relevant to our members are:

- The extension of ASP scope to include the ability of the CBI to take direct enforcement action against all individuals in controlled functions for breach of individual obligations amended disqualification sanction for individuals.
- New sanction of imposition of conditions on individuals.
- Non-exhaustive prescribed sanctioning factors for individuals.

We note that the available sanctions for individuals have been amended to provide for a direction imposing conditions on an individual in the performance of any controlled function or controlled functions being performed by such an individual.

(a) Reputational Risk and the Right to Privacy

Per Section 17, paragraph 106, we note that *"Once the Notice of Inquiry has been issued, the Central Bank will publish details of the Notice of Inquiry on the Central Bank's website, including for example details relating to the prescribed contravention, the Subject and any other related firms or individuals"*.

We challenge why the publication of the Notice of Inquiry is necessary in the context of inquiries related to individuals. Companies can withstand (reputationally) being included in a Notice of Inquiry significantly better than an individual can. We request that the CBI reconsider this element of the process given the reputational risk even where it is determined that no prescribed contravention has been committed by the Inquiry Subject.

Section 18, paragraph 107 of the Draft Guidelines states: *"Where the Central Bank suspects on reasonable grounds that a Subject has committed a prescribed contravention, the Central Bank may hold an inquiry. Such inquiries will usually be held in public"*. Per Section 23, paragraph 155, members of the

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public and media will be able to watch and listen to the proceedings in a public gallery located in, or adjacent to the inquiry room, or online.

Section 22, paragraph 147 states that a Subject may apply for the hearing to be held in private. Section 25, paragraph 187 states that Inquiry Members may allow the inquiry to be held in private where a person’s reputation would be unfairly prejudiced unless the hearing is held in private (or part in private). We request that all Inquiries relating to Individuals be held in private as a matter of process unless a public hearing is requested by an individual. We request that no identifying information be included on the CBI website in relation to Inquiries relating to individuals.

Per Section 33, paragraph 269, “As a matter of law, there is no requirement on the Central Bank to publish a public statement at the conclusion of an inquiry where the Inquiry Members have made a finding that no prescribed contravention has been committed. A public statement may be made in these circumstances”.

We request that for Inquires related to individuals that it be required that the Central Bank publish a public statement at the conclusion of an inquiry where the Inquiry Members have made a finding that no prescribed contravention has been committed. This is necessary to counter damage to the reputation of the Inquiry Subject where the individual has already been named by the CBI.

We note that legislative amendments introduced by the Act incorporate changes including the introduction of court confirmation of sanctions before any sanction can take effect as part of early resolution or settlement of an ASP matter where admissions are provided. There seems to be a significant emphasis on early resolution within CP154² and the draft ASP Guidelines. Early resolutions related to undisputed facts settlements may be a sound course of action for an organisation that can bounce back from such events. The situation is significantly different for individuals. As a result, we are concerned at the financial risk facing individual directors or senior executives (who acted in good faith). In particular we are concerned if the individual, who acted in good faith, goes as far as the appeal, coupled with the stress of doing so and the CBI emphasis on early resolution and the offer of discounts on monetary penalties, may inadvertently pressurise Inquiry Subjects into an undisputed facts settlement or an investigation report settlement even where they fundamentally believe that they have taken reasonable steps in executing their responsibilities. Section 5, paragraph 22 of the ASP Guidelines state that the “*Central Bank’s general policy in relation to settlement is to require admissions from a Subject and to publish the details of the admissions and the sanction imposed*”. Section 39, paragraph 309 of the draft Guidelines state that the “*recognition by the Subject of the underlying facts and contraventions committed, together with the acceptance of the imposition of sanctions, promotes public trust and credibility by showing the public that those who contravene financial services legislation will be held accountable and penalised for those contraventions. This policy provides important regulatory*

² We note changes that have not been specifically provided for in the legislation and which represent Central Bank policy changes, the stage at which discounts on monetary penalties are potentially available as part of settlement agreements.

messaging of expected standards of behaviour in financial services and deters reoccurrence of such behaviours both by the Subject and by other firms and individuals". We also note that there will be no discount available to any monetary penalty proposed after a Notice of Inquiry has issued. The professional and personal reputational impact of an undisputed facts settlement and an investigation report settlement and indeed a no admissions settlement, is significantly higher than at the level of the organisation. We reiterate that our concern here is in relation to good faith actors.

We are also concerned that the ASP process may not sufficiently distinguish between good and bad faith actors and that the former could end up in professional limbo or, in some cases, with no future career in financial services. **Our concern is not for bad faith actors but for good faith actors who might find themselves the subject of an investigation / inquiry notwithstanding their actions were the best they could achieve within their context.** We are concerned that Directors and Senior Executives may find themselves in a form of "professional limbo" arising from the ASP. **We understand that the CBI might consider that these risks are the very ones that will act as a deterrent to 'bad behaviour', but we ask the CBI to be mindful of the Directors and Senior Executives who act in good faith, within the constraints of the organisational context to which they belong and who nonetheless find themselves subject to the ASP. The ASP might not go further than the Inquiry stage but has the capacity to cause significant stress and reputational damage to the Inquiry Subject. The draft ASP Guidelines do not reflect an appreciation of the impact of enforcement action against a company versus an enforcement action against an individual.**

Our overarching observation in relation to the monetary penalty methodology is that the methodology for individuals is disproportionate versus the methodology for firms.

(b) Confidentiality Requirements

We note that in accordance with this new statutory prohibition on disclosure of confidential information, where confidential information is being disclosed to an external party, including the subject of an investigation, for the purposes of an ASP investigation or investigation report, the recipient is now prohibited from further disclosing that information to anyone other than their legal representative unless required to do so by law or permitted by the Central Bank in writing. We also note per Section 12, paragraph 56 that *"To enable the Central Bank to carry out the investigation in an effective and timely manner, a Subject must submit considered, accurate and timely responses to information requests from the Central Bank. The Central Bank expects a Subject to engage and cooperate fully with the evidence gathering process. A failure to do so may be considered an aggravating factor when determining any sanction that may be imposed (see Part 6 (Sanction)) and/or may constitute a prescribed contravention in itself"*.

We request more clarity on circumstance where the CBI would anticipate granting a Subject permission to provide information to a third party and that this clarity be reflected in the Guidelines. We seek this clarity in the context of Subjects being able to seek information or clarity from colleagues to satisfy 12(56) above and to provide a defence against an alleged breach. We are also concerned that subjects may need psychological support outside their legal counsel. We request

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Chief Executive Officer: Caroline Spillane CDir.
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H Nolan, B O'Sullivan CDir, I Reynolds CDir, M Shanahan, F Tierney CDir

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clarity on whether a subject can seek advice or guidance or emotional support from a trusted friend or colleague. The psychological weight of being part of an investigation must be appreciated and reflected within the Guidelines. We reiterate these comments in relation to the Inquiry process (other than in relation to the provision of information to a witness).

We request that the Central Bank include (for good faith actors – individuals) the following within Table 5 (Other Relevant Considerations) as Other Relevant Considerations will be taken into account within the Monetary Penalty Methodology for Individuals:

1. The reputational damage done to the Subject within and outside his/her/their organisation by virtue of being subject to an investigation / inquiry and the probable loss of future earnings and negative impact on future career progression as a result.
2. The psychological impact of being involved in an investigation / inquiry process.
3. Subject's dependants.

(c) Enforcement Processes versus Supervisory Processes

On page 7 of CP154, the CBI states: *“In the context of individuals specifically, we expect that our existing approach to prioritisation and assessing the seriousness of the behaviour of an individual by reference to primary factors such as culpability (the degree of responsibility of the individual for the contravention), seniority and level of responsibility of the individual and the seriousness of the contravention itself will be continued following implementation of the IAF. Further, given the material costs and significant resources that are involved in bringing formal enforcement proceedings, we would first consider whether our regulatory objectives could be achieved in other ways such as through the use of our supervisory powers”*.

We would welcome clarity on this latter statement. Can the CBI provide examples of the circumstances in which it might opt to use supervisory processes. What might this entail and what might it mean for Directors or Senior Executives?

We are also concerned as to the protections for individuals where an ASP Investigation is commenced but a decision is made not to hold an inquiry. We note (Section 14, paragraphs 74 to 78) that when an ASP investigation is discontinued in respect of all suspected breaches, the RAO will inform the Subject as soon as is practicable in writing of the discontinuance and provide the reason for the discontinuance. **We request that the notice of discontinuance confirms that the subsequent employee/professional rights of the Subject will be protected, and that the investigation issue will not re-surface at a later date impacting professional progression where regulatory approval inside or outside the organisation (where the Subject is employed) is required. This request is made to ensure that individuals have the right to move on with their professional career and don't find themselves caught in professional limbo not knowing whether their next career move will be curtailed.**

2. Enforcement and the Rights of the Employee/Director in Situ

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A significant change will be the Central Bank's ability to take enforcement action under the ASP directly against Individuals for alleged breaches of their obligations rather than only for their participation in breaches committed by a firm. We are concerned that the IAF exposes individuals who have acted in good faith to personal, professional, and financial costs in circumstances where (i) they are not supported by their organisation if the CBI instigates an investigation or (ii) they have left the company when a CBI investigation is instigated and are not entitled to support from their former employer. **The draft IAF Regulations and Guidance are silent on this matter as are the draft ASP Guidelines. We request that this be addressed.**

Further, in circumstances where an individual, who has acted in good faith, and who is subject to an investigation has left the financial service provider at which the alleged incident arose, what rights does that individual have to access information pertinent to his/her/their case from their former employer and what legal obligation does an employer have to provide it? **CP154 and the draft ASP Guidelines do not include a process for safeguarding individuals. We request that the guidelines be as clear and transparent as possible to enable a full understanding of the rights of the individual in circumstances highlighted above.**

Thank you again for the opportunity to present our observations. We would welcome the opportunity to discuss our response with you. In circumstances where the CBI does not accept our comments and related requests above and within Appendix 1, we would appreciate a response in writing outlining the CBI's rationale.

Yours sincerely



**Ms Caroline Spillane CDir
Chief Executive Officer
Institute of Directors in Ireland**



**Mr John Reynolds CDir
President
Institute of Directors in Ireland**

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Appendix 1: Detailed Response from IoD Ireland

CP154 Questions	IoD Ireland Response / Observations / Requests
ASP Investigations	
<p>Q1. Do the Central Bank draft ASP Guidelines assist you in understanding the <u>modified ASP investigation process</u> now codified in statute?</p>	<p>We note that the Act places the investigation phase of an ASP case on an express statutory footing. The draft ASP Guidelines describe the amended ASP investigation process and while they do assist our understanding of this process, we have several observations/questions on the process which we have included below and in our responses to the other questions posed by the Central Bank of Ireland (CBI) within the consultation.</p> <p>Observations / Questions</p> <p>1.1 We welcome that a CBI appointed decision maker will consider the final investigation report and any submissions made by the Subject on the draft investigation report in order to make a decision on whether or not to hold an inquiry (per Section 5, paragraph 23).</p> <p>Will the decision maker involved in considering the Final Investigation Report be part of the Enforcement team or will they be functionally separate from the Responsible Authorised Officer (RAO)? Can you confirm that the decision maker will not have been involved in the initial investigation, that the decision maker will review any submissions along with the draft investigation report, and that the decision maker will reach their decision within a reasonable time.</p> <p>1.2 Per Section 15(95), we note that the RAO will provide the decision maker with the Final Investigation Report and the submissions provided by the Subject.</p> <p>Can the CBI clarify whether the RAO will provide, as part of the Final Investigation Report, reasons as to why they arrived at their determination. We suggest this could include details on how the Subject’s submission was considered, what was accepted as counter arguments to the alleged breach and what was rejected? We request that the Guidelines provide clarity on this matter.</p>

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1.3 Section 4, paragraph 13 states that: *“The Central Bank may depart from the procedures set out in the Guidelines where they are not appropriate in the circumstances of a particular case”*.

We request that the guidelines be augmented to reflect the internal governance around this departure (e.g., recommendation made by RAO to who, what, when etc). We request that the Central Bank clarify the grounds under which it may depart from the procedures set out in the Guidelines.

1.4 While the CBI have not asked for comment on the discontinuance of an investigation and the provisions of reasons, we would like to make some observations on same. We note (Section 14, paragraphs 74 to 78) that when an ASP investigation is discontinued in respect of all suspected breaches, the RAO will inform the Subject as soon as is practicable in writing of the discontinuance and provide the reason for the discontinuance.

We request that the notice of discontinuance confirms that the subsequent employee/professional rights of the Subject will be protected, and that the investigation issue will not re-surface at a later date impacting professional progression where regulatory approval inside or outside the organisation (where the Subject is employed) is required.

1.5 We note (Section 14, paragraph 79) that where an ASP investigation of a particular breach is discontinued while continuing in relation to another or other breaches, the RAO and the CBI are not required to give a reason for the discontinuance of that particular aspect of the investigation.

We request that the CBI reconsider this position in the interest of transparency and fairness of process and to support the Subject in his/her/their defence.

1.6 Section 14, paragraph 70 states: *“Notwithstanding any other action taken by the Central Bank, the Central Bank may decide that further action is required in relation to the supervision of a Subject. Such action may include utilising various supervisory tools and powers. For example, the Central Bank may issue directions to, or impose conditions on, a Subject, where appropriate”*.

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We request that the Guidelines provide details on what appeal options would be open to Subjects where such supervisory action is taken.

1.7 In relation to the Draft Investigation Report, we note from Section 15, paragraph 83 that the RAO will provide the draft report to the Subject in electronic form and that the Draft Investigation Report will “*include a notice in writing stating that the Subject is invited to make submissions in writing in response to the Draft Investigation Report. Such submissions must be made within 7 days from the date on which the notice is served, or such longer period as the Responsible Authorised Officer considers necessary to give the Subject an opportunity to respond. If greater than 7 days, the timeframe will be set by the Responsible Authorised Officer following consideration of the complexity of the issues, the contents of the Draft Investigation Report and having regard to what the Responsible Authorised Officer considers would be a necessary period in order to give the Subject a fair opportunity to respond*”.

We consider that 7 days is a challenging and potentially unrealistic period of time for a Subject to respond to the Draft Investigation Report and we consider that the CBI is not making sufficient distinction between investigations of companies (where teams can consider draft reports, collate information etc) and investigations of individuals. While we acknowledge the opportunity to apply for an extension to this timeframe, we consider that the requirements to do so as contained in Section 15, paragraph 84 are unrealistic and unfair. We refer you in particular to the requirement that any request from the Subject for an extension of time to make submissions must be received by the RAO in sufficient time in advance of the expiry of the timeframe set by the RAO in the Draft Investigation Report to allow them to fully consider the extension request. Firstly, that timeframe is too tight and secondly, in the event that the RAO refuses the extension, the Subject will have limited if any time to prepare his/her/their response. In the interest of fairness, we request that the CBI engage with the sector to determine a reasonable initial timeframe with the capacity to request an extension.

1.8 With regard to requesting further information and/or documents, Section 15, paragraphs 87 and 88 state that if “*the Subject, upon receipt of the Draft Investigation Report, requires any further information and/or documents from the Central Bank relating to the Draft Investigation Report, the request must be made in writing and sufficiently in advance of the expiry of the timeframe for making submissions to enable the*

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	<p><i>Responsible Authorised Officer to fully consider the request. The written request for further information and/or documents should include a detailed explanation of the relevance and necessity for any additional information and/or documents concerning the prescribed contravention to which the Draft Investigation Report relates”.</i></p> <p>Again, this timeframe puts the Subject at a distinct disadvantage, and we consider the timeframe to be challenging and potentially unrealistic. We note per Section 15, paragraph 92 that the RAO will finalise the investigation report <u>as soon as practicable</u> following the receipt of submissions, subject to the receipt of any further information and/or clarifications requested from the Subject by the RAO. In the interest of fairness, we request that the CBI engage with the sector to determine a reasonable initial timeframe with the capacity to request an extension. We also request that the CBI provide some clarity within the Guidelines on the Subjects ability to seek assistance from colleagues in collating information in the context of the obligations and expectations regarding confidentiality described in the draft ASP Guidelines. See also our response to question 5 below.</p>
<p>Q2. Do the draft ASP Guidelines assist you in understanding the role of the RAO and <u>the associated functions and responsibilities in respect of ASP investigations?</u></p>	<p>While the draft ASP Guidelines do assist our understanding of the role of the RAO and the associated functions and responsibilities in respect of ASP investigations, we have several observations/questions.</p> <p>Observations / Questions</p> <p>2.1 We note the discretions to be exercised by the RAO and consider these to be too broad. For example Section 11, paragraph 49 states that the subject will be provided with a copy of material relating to the investigation as the Responsible Authorised Officer, in their discretion, considers appropriate. Paragraph 52 provides a large number of examples where the RAO may decide not to provide copies of material. The examples include "where the material relates to a protected disclosure or is subject to professional secrecy, legal professional privilege or data protection requirements; or where providing copies might prejudice an ongoing criminal or other investigation".</p> <p>Given the significant reputational risk to Subjects once a Notice of Investigation is received, we consider that a panel-based assessment is preferable at this stage.</p>

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	<p>2.2 We also cross reference you to our Response to Q10 of CP153:</p> <p><i>3. We welcome that the CBI will be mindful to avoid applying standards retrospectively. Notwithstanding this assertion and the guidance on reasonable steps contained in Annex II of the consultation (Paragraphs 3.3, 3.9 to 3.15), we remain concerned as to the subjectivity of the supervisory assessment and the risk (albeit unintended) of supervisors applying a benefit of hindsight interpretation to actions or events. It is very important that PCFs aren't victims of the benefit of hindsight. The probability of this being the case will, in our opinion, be an important influence on whether "a flight from the sector" manifests.</i></p> <p>We request that in any investigation undertaken by the CBI, the steps taken by supervisors to mitigate the risk of applying the benefit of hindsight be clearly documented. Further, where PCFs can demonstrate that the benefit of hindsight is being applied by the CBI, we request that this view and supporting evidence be included in any report presented in advance of taking an enforcement action.</p>
<p>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?</p>	<p>While the draft ASP Guidelines assist us in understanding the proposed approach to the issuing of the Notice of Investigation, we have several observations / questions below:</p> <p>Observations / Questions</p> <p>3.1 Regarding Subject submissions, Section 11, paragraph 49 states that the Notice of Investigation will include a <i>"statement that a response to the contents of the Notice of Investigation will be taken into account if made by the Subject in writing within the timeframe set out in the Notice of Investigation or such longer period as the Responsible Authorised Officer may allow."</i></p> <p>It is critical that the Subject be afforded appropriate time to prepare a response to the Notice of Investigation. No timeframe is provided within the Draft ASP Guidelines. We request, however, that cognisance be given to the time available for the RAO to prepare a Notice of Investigation versus the timeframe for the Subject to respond and request that the timeframe provided be as reasonable and as</p>

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equitable as possible given the reputational risk to the Subject. We recommend that the CBI consult with the sector on a reasonable minimum timeframe which can be extended depending on context, access to information, and whether the subject is still with the organisation etc.

3.2 Section 12, paragraph 56 states that to “*enable the Central Bank to carry out the investigation in an effective and timely manner, a Subject must submit considered, accurate and timely responses to information requests from the Central Bank. The Central Bank expects a Subject to engage and cooperate fully with the evidence gathering process. A failure to do so may be considered an aggravating factor when determining any sanction that may be imposed (see Part 6 (Sanction)) and/or may constitute a prescribed contravention in itself*”.

In the context of the timeliness of the submission of responses to information requests from the CBI, we consider that the accuracy and level of consideration will be inextricably linked to the reasonableness of the timeframe provided to the Subject. We request that cognisance be given to the time available for the RAO to prepare an information request versus the timeframe for the Subject to collate this information and request that the timeframe provided be as reasonable and as equitable as possible given context, access to information, and whether the subject is still with the organisation etc.

3.3 We note that the Notice of Investigation will be in writing and will contain the information included in Section 11, paragraph 49. Section 11, paragraph 52 provides that the “*Responsible Authorised Officer may include copies of material which, in their opinion at that stage of the investigation, evidences the commission of a prescribed contravention. However, circumstances could arise where the Responsible Authorised Officer may not consider it appropriate to provide copies of material with a Notice of Investigation*”.

We request that the Guidelines be amended to state that the RAO will include copies of material which, in their opinion at that stage of the investigation, evidences the commission of a prescribed contravention unless there are legal impediments to doing so at that time in which case this will be explained within the Notice of Investigation (and which align with the examples provided at Section 11, paragraph 52). It is critical that a Subject has sufficient information to support his/her/their response to the Notice of Investigation.

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<p>Q4. Do the draft ASP Guidelines assist you in understanding the Central Bank's proposed approach to disclosure?</p>	<p>While the draft ASP Guidelines assist our understanding of the Central Bank's proposed approach to disclosure, we refer you to our observations in response to Q3.</p>
<p>Q5. What are your views in respect of the obligations and expectations regarding confidentiality described in the draft ASP Guidelines?</p>	<p>Observations / Questions</p> <p>5.1 We note per Section 10, paragraphs 46 and 47 of the ASP Guidelines that in accordance with this new statutory prohibition on disclosure of confidential information, where confidential information is being disclosed to an external party, including the subject of an investigation, for the purposes of an ASP investigation or investigation report, the recipient is now prohibited from further disclosing that information to anyone other than their legal representative unless required to do so by law or permitted by the Central Bank in writing.</p> <p>We also note per Section 12, paragraph 56 that <i>"To enable the Central Bank to carry out the investigation in an effective and timely manner, a Subject must submit considered, accurate and timely responses to information requests from the Central Bank. The Central Bank expects a Subject to engage and cooperate fully with the evidence gathering process. A failure to do so may be considered an aggravating factor when determining any sanction that may be imposed (see Part 6 (Sanction)) and/or may constitute a prescribed contravention in itself"</i>.</p> <p>We request more clarity on circumstance where the CBI would anticipate granting a Subject permission to provide information to a third party and that this clarity be reflected in the Guidelines. We seek this clarity in the context of Subjects being able to seek information or clarity from colleagues to satisfy 12(56) above and to provide a defence against an alleged breach.</p> <p>We are also concerned that subjects may need psychological support outside their legal counsel. We request clarity on whether a subject can seek advice or guidance or psychological support from a trusted friend or colleague. The psychological weight of being part of an investigation must be appreciated and reflected within the Guidelines.</p>

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	<p>We reiterate these comments in relation to the Inquiry process (other than in relation to the provision of information to a witness).</p>
<p>ASP Inquiries</p>	
<p>Q6. Do the draft ASP Guidelines assist you in understanding the revised roles at inquiry?</p>	<p>While the draft ASP Guidelines assist us in understanding the revised roles at inquiry, we have several observations.</p> <p>Observations / Questions</p> <p>6.1 We note per Section 18, paragraph 111 that <i>“Inquiry Members may depart from the Guidelines in certain instances where they are not appropriate in the circumstances of a particular case.”</i> We would ask the CBI to provide examples of situations or circumstances when inquiry members may depart from the ASP Guidelines and from whom approval of this departure is sought (i.e., can an outline of the system of internal governance around such departures be included within the Guidelines).</p> <p>6.2 Section 18, paragraph 113 of the Guidelines states that <i>“the Regulatory Decisions Panel is a panel of decision makers established by the Minister for Finance. The panel comprises both externally recruited experts and Central Bank staff. The Central Bank will select suitably qualified members of the panel for appointment as Inquiry Members, taking account of their experience and expertise, availability and any conflicts of interest”</i>.</p> <p>Can you confirm that externally recruited experts will never be operating in the sector in which the Subject operates to safeguard the independence of the process?</p> <p>6.3 We note that the Act specifically amends Part IIIC of the 1942 Act to introduce express Central Bank functions at inquiry of leading evidence, examining witnesses, making submissions and any other functions that are necessary for the proper conduct of an ASP inquiry. As per the draft ASP Guidelines, it is envisaged that Enforcement (or legal practitioners appointed on its behalf) will take up a more active role at an ASP inquiry and will carry out the Central Bank functions of leading evidence, examining witnesses, and making submissions. We note that Enforcement will also be empowered to carry out any other Central Bank functions</p>

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ancillary to the performance of these functions for the purposes of presenting the ASP investigation report to the inquiry members at inquiry. As such, the Enforcement function will have significant involvement from investigation to inquiry completion.

We request that the Guidelines be augmented to describe the organisational structure in place within and outside the Enforcement function to safeguard the objectivity within the process.

We note the intention that both the amended provisions of Part IIIC of the 1942 Act and the draft ASP Guidelines ensure the functional separation between Enforcement and the inquiry members in the performance of their respective functions (in relation to the inquiry) to protect the independence of the inquiry members' adjudicative functions but challenge how having CBI staff on the panel safeguards the independence, objectivity of the process and safeguards against confirmation bias.

6.4 We note that while the 1942 Act does not expressly provide for any third parties to have a role at an ASP inquiry, the draft ASP Guidelines propose that a firm who believes that it has an interest in the subject matter of an inquiry may apply to the inquiry member(s) to request a role in the inquiry. Such an application could be made where the inquiry subject is an individual who is or was performing a controlled function in that firm. We note that whether the firm will be afforded any role at an inquiry in which they are not the subject and the nature of any such role will be at the absolute discretion of the inquiry members.

We consider that this is a pivotal issue in relation to inquiries against an individual. To give reassurance to the sector, this should not be a discretionary issue. We refer you to our response to CP153 where we referred to circumstances where PCFs are part of a global organisation, working within cross-jurisdictional, global governance infrastructures and leveraging off and/or relying on the work of colleagues in other functions or indeed jurisdictions. We are concerned that CFs or PCFs operating in Ireland as part of a global organisation and acting in good faith become the subject of an inquiry due a suspected breach of conduct standards related to a failure of a colleague within their organisation. It is critical that the organisation in question can support any defence that the Subject acted in good faith and/or provide information critical to the inquiry.

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<p>Q7. Do the draft ASP Guidelines assist you in understanding the revised ASP inquiry process and procedures?</p>	<p>While the draft ASP Guidelines assist us in understanding the revised ASP inquiry process and procedures, we have several observations / questions.</p> <p>Observations / Questions</p> <p>7.1 Per Section 17, paragraph 103, we note that the Notice of Inquiry will include the grounds on which the Central Bank’s suspicions are based.</p> <p>Can you opine on why these grounds cannot be reflected in the Notice of Investigation?</p> <p>Can you also clarify whether the grounds will include, if relevant, information provided via a protected disclosure or Another source that would prohibit material being shared with a Subject at the time of the Notice of Investigation?</p> <p>7.2 Per Section 17, paragraph 106, we note that <i>“Once the Notice of Inquiry has been issued, the Central Bank will publish details of the Notice of Inquiry on the Central Bank’s website, including for example details relating to the prescribed contravention, the Subject and any other related firms or individuals”</i>.</p> <p>We challenge why the publication of the Notice of Inquiry is necessary in the context of inquiries related to <u>individuals</u>. Companies can withstand (reputationally) being included in a Notice of Inquiry significantly better than an individual can. We request that the CBI reconsider this element of the process.</p> <p>7.3 Section 18, paragraph 107 of the Draft Guidelines states: <i>“Where the Central Bank suspects on reasonable grounds that a Subject has committed a prescribed contravention, the Central Bank may hold an inquiry. <u>Such inquiries will usually be held in public</u>”</i>. Per Section 23, paragraph 155, members of the public and media will be able to watch and listen to the proceedings in a public gallery located in, or adjacent to the inquiry room, or online.</p> <p>Section 22, paragraph 147 implies that a Subject can request to have the Inquiry held in private. Section 25, paragraph 187 states that Inquiry Members may allow the inquiry to be held in private where a person’s</p>
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	<p>reputation would be unfairly prejudiced unless the hearing is held in private (or part in private). We request that all Inquiries relating to Individuals be held in private as a matter of process unless a public hearing is requested by an individual.</p> <p>7.4 Per Section 25, paragraph 189, “Irrespective of whether an inquiry is being held in public or private, the Inquiry Members may direct that any directions, decisions or transcripts of an inquiry or records of an inquiry in respect of procedural matters be published on the Central Bank’s website. The Inquiry Members may, where they are satisfied that doing so would not unfairly prejudice a person’s reputation, decide to publish such records, including information identifying those taking part in the inquiry. Alternatively, the Inquiry Members may direct that such identifying information be redacted”.</p> <p>We request that no information be included on the CBI website in relation to Inquiries relating to individuals.</p>
<p>Q8. Do the draft ASP Guidelines assist you in understanding the process to be followed <u>at the conclusion of an inquiry</u>, including notifying the inquiry decision and issuing an inquiry publication notice?</p>	<p>While the draft ASP Guidelines assist us in understanding the process to be followed <u>at the conclusion of an inquiry</u>, we have some observations / questions.</p> <p>Observations / Questions</p> <p>8.1 Per Section 33, paragraph 269, “As a matter of law, there is no requirement on the Central Bank to publish a public statement at the conclusion of an inquiry where the Inquiry Members have made a finding that no prescribed contravention has been committed. A public statement may be made in these circumstances”.</p> <p>We request that for Inquires related to individuals that it be <u>required</u> that the Central Bank publish a public statement at the conclusion of an inquiry where the Inquiry Members have made a finding that no prescribed contravention has been committed. This is necessary to counter damage to the reputation of the Subject where the individual has already been named by the CBI.</p>
<p>Q9. Do the draft ASP Guidelines assist you in understanding how an ASP</p>	<p>Please see observations regarding Q7 above.</p>

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inquiry would work in practice?	
ASP Settlement	
Q10. Do the draft ASP Guidelines assist you in understanding the new <u>undisputed facts settlement</u> procedure particularly in terms of when it may be available and the Central Bank's proposed approach to it?	The draft ASP Guidelines assist us in understanding the new undisputed facts settlement procedure.
Q11. Do the draft ASP Guidelines assist you in understanding the new <u>investigation report settlement</u> procedure particularly when such settlement procedure may be available and the Central Bank's proposed approach to it?	The draft ASP Guidelines assist us in understanding the new investigation report settlement procedure.
Q12. Do the draft ASP Guidelines assist you in understanding the <u>no admissions settlement procedure</u> and the Central	The draft ASP Guidelines assist us in understanding the no admissions settlement procedure.

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Bank's continuing policy approach of seeking settlement with admissions?	
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?	Observations / Questions 13.1 The factors as set out in Section 39, paragraph 311 are too broad. We request that the Central Bank narrow this list of factors, or is obliged to provide valid supporting evidence where it determines that this process is not appropriate on the basis of such factors.
Q14. Do the draft ASP Guidelines assist you in understanding the Central Bank's proposed approach to the updated Settlement Scheme?	The draft ASP Guidelines assist us in understanding the Central Bank's proposed approach to the updated Settlement Scheme.
Q15. Do you agree with the Central Bank's proposed approach regarding the <u>application of the Settlement Scheme to monetary penalties only</u> ?	Observations / Questions 15.1 To be able to opine on this question, we would welcome an understanding of any alternative considered by the CBI and how they could support a Subject in moving on where the contravention was not intentional or done in bad faith.
Q16. Do you agree with the Central Bank's proposed approach to <u>undisputed facts settlements</u> ?	No comment

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Q17. Do you agree with the Central Bank's proposed approach to <u>investigation report settlements</u> ?	No comment
Q18. What are your views and comments regarding the proposed <u>Settlement Scheme</u> ?	<p>Observations / Questions</p> <p>18.1 Per Section 40, paragraph 322: <i>“A settlement agreement will form part of a Subject’s compliance record”</i>. Per paragraph 323: <i>“The fact and contents of a settlement agreement may be taken into account by the Central Bank in the performance of any of its functions under financial services legislation. As such, it may influence any Central Bank decision to commence future enforcement action in relation to the Subject”</i>.</p> <p>Can the CBI indicate whether this the case for Individuals as well as companies?</p> <p>18.2 Per Section 40, paragraph 325: <i>“A settlement agreement entered into with an individual may be considered by the Central Bank in assessing that individual’s fitness and probity to perform a controlled function, including but not limited to a pre-approval controlled function, under Part 3 of the 2010 Act”</i>. Per Section 40, paragraph 326: <i>“Previous settlement agreements may be taken into account in determining appropriate sanctions in other enforcement actions involving the Subject”</i>.</p> <p>In the interest of fairness, can the CBI include within the Guidelines the circumstances when these powers would apply in the context of the sanctioning factors.</p>
ASP Sanctions	
Q19. Do the draft ASP Guidelines assist you in <u>understanding the Central Bank’s proposed approach</u> to the determination of	<p>While the draft ASP Guidelines assist us in <u>understanding the Central Bank’s proposed approach</u> to the determination of sanctions, we have several observations / questions.</p> <p>Observations / Questions</p>

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<p>sanctions, and what are your views in this regard?</p>	<p>19.1 Per Section 43, paragraph 338: <i>“When determining sanctions, the Central Bank has a duty to act proportionately. This means deciding on the appropriate sanction or combination of sanctions to impose having regard to the particular prescribed contravention, the circumstances of the contravention, and the circumstances of the relevant firm or individual”</i>.</p> <p>We suggest that the above paragraph be amended to: “When determining sanctions, the Central Bank has a duty to act proportionately. This means deciding on the appropriate sanction or combination of sanctions to impose having regard to the sanctioning factors used by the Central Bank for the determination of sanctions”.</p> <p>19.2 Per Section 44, paragraph 344: <i>“The Central Bank may impose...A direction to pay to the Central Bank a monetary penalty not exceeding a prescribed amount. For individuals, the monetary penalty cannot exceed €1,000,000 or an amount prescribed by regulations. For firms, the monetary penalty cannot exceed €10,000,000, or an amount equal to 10% of the annual turnover of a firm, whichever is the greater, or an amount prescribed by regulations”</i>.</p> <p>Further to our point above, while we recognise that that the Central Bank wants to deter poor practices (specific and general per paragraph 339) and noting the Monetary Penalty Methodology for Individuals in table 7, we consider that the maximum monetary amount is excessive, particularly in the context of the equivalent amount for firms. We request that the Central Bank reconsider this maximum monetary amount.</p>
<p>Q20. Are the <u>different sanctions</u> which may be imposed on firms and individuals, sufficiently clear in the draft ASP Guidelines?</p>	<p>Observations / Questions</p> <p>20.1 Section 44, paragraph 346 states that a Bank may impose one or a combination of the following sanctions on an individual:</p> <ul style="list-style-type: none"> ▪ A direction imposing such conditions as the Central Bank considers appropriate on the performance by an individual, in relation to all firms or such firm(s) as may be specified in the direction, of any controlled function, specified controlled function(s), or specified part(s) of controlled function(s).

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	<ul style="list-style-type: none"> ▪ A direction disqualifying an individual, for such a period as the Central Bank considers appropriate from performing, in relation to all firms or such firm(s) as may be specified in the direction, any controlled function, a particular controlled function, or a specified part of a controlled function or functions”. <p>In relation to “conditions” referred to in the first bullet point, can the Central Bank provide examples of what those conditions might be versus sample contraventions and relate them back to the Central Bank’s objective of proportionality and the sanctioning factors outlined in Section 45.</p> <p>Can the Central Bank provide clarity on the relationship between these conditions and the ability and the timeframe within which the Subject will be able to apply for more senior PCF/CF roles inside or outside their current employment firm?</p> <p>In relation to the disqualification of an individual, can the Central Bank provide examples of the periods of qualification that might apply to different contraventions and relate them back to the Central Bank’s objective of proportionality and the sanctioning factors outlined in Section 45.</p> <p>Can the Central Bank opine on whether disqualified individuals, once their period of disqualification has past, will be able to apply for PCF/CF roles inside or outside their employment firm where the contravention occurred?</p>
<p>Q21. Are the <u>different sanctioning factors</u> which may be applicable to firms and individuals, sufficiently clear in the draft ASP Guidelines?</p>	<p>Observations / Questions</p> <p>21.1 We consider that the Factors are too broad. For example, “Other relevant considerations” is a factor. We request that the CBI be obliged to provide valid supporting evidence where it determines sanctions on the basis of these factors.</p>
<p>Q22. Do the sanctioning factors assist you in understanding the Central Bank’s proposed sanctioning</p>	<p>While the sanctioning factors assist us in understanding the Central Bank’s proposed sanctioning approach, we have several observations / questions.</p> <p>Observations / Questions</p>

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approach, and what are your views on the sanctioning factors?

22.1 Table 2: Can the Central Bank insert “or not” after “whether” in each factor. So, for example: Factor 1 - Whether or not the prescribed contravention or conduct by the firm or individual was intentional, negligent, or dishonest.

22.2 Factor 11 – *“Whether the prescribed contravention committed by the firm or individual reveals any serious weakness or systemic issues in all or in part of the firm. This factor applies to firms and individuals. Serious weakness or systemic issues, particularly where they result in widespread or severe actual or potential detriment to consumers, customers or investors, or a threat to financial stability, will ordinarily mean that the matter is viewed more seriously by the Central Bank. This factor is relevant to an individual where they have facilitated these systemic weaknesses, including by a failure of supervision or oversight”.*

Can you confirm that the “failure of supervision or oversight” is a complete absence of supervision or oversight OR not taking steps the Central Bank would consider reasonable OR Another?

We would welcome a description within the Guidelines of how the Central Bank, in conducting investigations/inquires of an individual, will safeguard against unconscious bias to the detriment of the individual in circumstances where the individual’s employment firm, but not the individual, has been subject to prior enforcement actions by the Central Bank.

22.3 In Section 45, Table 5: We request that the Central Bank include (for good faith actors – individuals) the following within Table 5 (Other Relevant Considerations) as Other Relevant Considerations will be taken into account within the Monetary Penalty Methodology for Individuals:

- 4. The reputational damage done to the Subject within and outside his/her/their organisation by virtue of being subject to an investigation / inquiry and the probable loss of future earnings and negative impact on future career progression as a result.**
- 5. The psychological impact of being involved in an investigation / inquiry process.**
- 6. Subject’s dependants.**

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<p>Q23. What are your views on the monetary penalty methodologies?</p>	<p>Observations / Questions</p> <p>Our overarching observation is that the methodology for individuals is disproportionate versus the methodology for firms.</p> <p>23.1 Per table 7, <i>“For the majority of cases, the Central Bank considers an individual’s income to be an appropriate starting point (the “Starting Point Figure”) for the calculation of a monetary penalty. Income may include but is not limited to, salary, bonus, pension contributions, share options and share schemes. However, there may be cases where income is not an appropriate starting point, and in those cases the Central Bank will use an appropriate alternative, including for example, an individual’s assets”</i>.</p> <p>We consider that it is not appropriate to take into account an individual’s assets (for good faith actors).</p> <p>23.2 We consider the methodology for individuals to be overly subjective, particularly given that individuals operate within a wide organisational infrastructure with key dependencies across functions and even jurisdictions. For example per Table 7: <i>“Having determined the Starting Point Figure (which will be rounded), the Central Bank will consider the nature, seriousness and effect of the prescribed contravention by reference to the factors in Table 2 (Nature, Seriousness and Effect Factors, page 85 et seq.) and any other relevant factors in order to assess the severity level of the prescribed contravention on a scale between 1 and 10....Using that severity level, the Central Bank will then decide on an appropriate percentage of the Starting Point Figure to determine the base amount of the monetary penalty (the “Base Monetary Penalty”)”</i>.</p> <p>Per 19.2 above, we consider that the maximum monetary amount is excessive, particularly in the context of the equivalent amount for firms.</p>
<p>Q24. Is there any other aspect of the Central Bank’s sanctioning approach which would benefit from further consideration or explanation?</p>	<p>We refer the Central Bank to our response to CP153 (cover letter and Appendix) and the range of concerns expressed therein related to the Central Bank’s perception of a prescribed contravention that leads to an individual finding themselves in an investigation / inquiry process and potentially being sanctioned. These concerns need to be addressed by the Central Bank before the industry can have faith in the ASP process, including in relation to sanctions.</p>

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ASP Court Confirmations and Appeals	
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?	No Comments
Q26. Do the draft ASP Guidelines assist you in understanding the revised confirmation and appeal procedures?	No Comments

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