



**Insurance Ireland comments on CBI Consultation Paper
154:**

**Consolidated Guidelines in respect of the Central Bank
Administrative Sanctions Procedure**

***Amended in connection with the Central Bank (Individual
Accountability Framework) Act 2023***

14 September 2023

INTRODUCTION

Ireland is a thriving global hub for insurance, reinsurance and captives and Insurtech. Ireland's insurance market is the fifth largest in the EU, and our Reinsurance market is the second largest. Our members represent around 95% of the companies operating in the Irish market, making Insurance Ireland a strong leadership voice for the sector.

Insurance Ireland members are progressive, innovative and inclusive, providing competitive and sustainable products and services to customers and businesses across the Life and Pensions, General, Health, Reinsurance and Captive sectors in Ireland and across the globe.

In Ireland, our members pay more than €13bn in claims annually and safeguard the financial future of customers through €112.3bn of life and pensions savings. Our members contribute €1.6bn annually to the Irish Exchequer and the sector directly employs over 18,000 people in high skilled careers.

The role of Insurance Ireland is to advocate on behalf of our members with policymakers and regulators in Ireland, Europe and Internationally; to promote the value that our members create for individuals, the economy and society; and to help customers understand insurance products and services so that they can make informed choices.

OVERALL OBSERVATIONS

Insurance Ireland welcomes the opportunity to share industry feedback relating to the guidance and implementation of the Consolidated Guidelines in respect of the Central Bank Administrative Sanctions Procedure.

As Insurance Ireland has noted in our previous submissions on the topic of the Individual Accountability Framework (IAF), we agree that where events happen leading to poor consumer outcomes or damage to the integrity of the financial system, the root cause must be identified and rectified, and structures be in place to prevent this from happening again, which is the aim of the Framework. However, without a proportionate and timely approach to the implementation of the overall regime, there is a very real risk to the ultimate aim of clear and transparent oversight and governance within financial services firms.

Overall, we note that the draft guidelines reflect much of the underlying legislative requirements from the Central Bank (Individual Accountability Framework) Act 2023. The finalised guidelines must be applied in a fair and consistent manner across the financial service sector, allowing for the fact that not all breaches are equal. The CBI must therefore provide further clarity on how it intends to assess and categories breaches under the framework.

There is a fundamental lack of fairness in some of the proposed changes to the Central Bank's enforcement approach under the new framework, which should be reviewed.

Our concerns relate mainly to the instance where an inquiry has been formally opened and a Notice of Inquiry is published on the Central Bank website, but no wrongdoing is identified following the full investigation. The proposals outlined in the consultation paper do not reflect any responsibility on the regulator to make public a clear notice setting out that the inquiry concluded with no penalties imposed on the individual. This new regime of individual and personal accountability means a very different level of personal risk for all individuals and particularly those a senior levels of financial services firms.

We have been clear in previous submissions that we expect that (at least initially) this increased risk exposure will lead to a 'chilling' effect on recruitment and retention of staff, at a

time where the sector is already experiencing difficulties in sourcing appropriately skilled and experienced individuals for senior level insurance positions.

From a hiring perspective and (we assume) from a CBI Fitness and Probity (F&P) perspective, there would be material concern if an applicant had ever had an inquiry opened against them, but this is exacerbated if there is to be no evidence that the inquiry concluded no evidence of wrongdoing from the individual. It would effectively end an individual's career within Financial Services, which is unfair if the individual is ultimately found innocent of charges.

Given the materiality of this action on an individual's livelihood, our concerns are heightened by the fact that there is absolutely no external oversight of the decision to open an inquiry, until the point the case is referred to the High Court. The fact that the publication of the notice comes ahead of confirmation by the High Court is worrying and allows the Central Bank to make very subjective decisions based on its own processes, without any independent scrutiny. While the confirmation 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. Any additional safeguard is entirely invalidated 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 reputation of the individual concerned. We note that the underlying legislation does not compel the publication of the notice prior to the High Court confirmation, therefore it is entirely within the CBI's remit to rectify this in the feedback.

While we appreciate the option for an individual who is subject to an inquiry to request a private inquiry, given that the aim of SEAR is transparency we do not see many instances of this being granted. Additionally, even if an inquiry was agreed to be private, in today's world of social media leaks it is highly unlikely that any inquiry would remain private.

The current guidance is silent on the application of the six-year statute of limitations. We note from the legislation that the retrospective six years applies where a breach occurs after 19 April 2023; and where the individual was in the role for six years prior to the date that the inquiry is opened. However, explicit details on the application of this in the feedback is welcomed.

We are also concerned by obligations imposed on certain CF1s such as General Counsel/Heads of Legal and the requirement to disclose privileged information and advice. While we appreciate the Act expressly includes a statutory power for the CBI to enter into a disclosure agreement relating to this material, it will absolutely create a conflict and impact the ability of legal counsel to have open dialogue with the Executive and Board of a financial services firm. The result of this proposal is that no advice or discussion from legal advisers is potentially privileged and exempt from potential legal action in the future.

It is interesting to note that our members are reporting increasing levels of concern from the more junior members of staff, who would not be subject to the Senior Executives Accountability Regime (SEAR) but would be in scope for the Conduct Standards and Fitness and Probity rules, in terms of how dependencies would affect their roles.

While the publication of the draft guidelines are welcome in terms of providing an understanding of the CBI's approach to enforcement under the framework, we also believe there are a number of areas that could benefit from some further clarity:

1. Access to historical information once individual has ceased employment

The removal of the participation link will create a greater challenge for individuals to get access to records and provide a defence. Under the existing regime, the firm would also be under

investigation, however now with the removal of the participation link, the firm (depending on the circumstances being investigated) may be unwilling to share information with the individual under investigation. The guidelines do not make specific reference to whether the evidence collected as part of the inquiry would be shared with the individual who is subject to it. We note that the individual would receive a copy of the draft investigation report but would not necessarily have access to any evidence which might address some of the findings. Without this clarity, we may see swathes of information being retained by ex-employees, which of course raises serious data protection and commercial sensitivities concerns.

There is a genuine concern amongst the PCF community that they will have no way of defending themselves in the future once they leave a role as they will have no access to files and it is impossible to keep track of every compliance recommendation or action that went ignored. Access to printing is generally tracked and at risk of being reported as a confidentiality breach. It is unlikely a company would go out of their way searching through files to defend the interests of a PCF/CF no longer in their employment.

2. Length of time a notice remains publicly available

The proposals do not suggest that a notice would be time-bound. This, again, raises reputational concerns for an individual if a notice remains available infinitely, especially where no evidence of wrongdoing is actually proven. It also conflicts with an individual's Right to be Forgotten under the General Data Protection Regulations (GDPR). We are aware that the current practice on the CBI website for prohibition notices is that they continue to publish the notice publicly after expiry but note that it is expired.

It is also unclear from the guidance whether a 'no admissions settlement' process would be published or not, as per the public statement settlement process.

3. Length of time an individual remains sanctioned

The proposals are also unclear on whether any disbarment would be total and permanent or time-bound. We understand that under the current ASP, there are a number of categories of disbarment e.g., from any Controlled Function (CF)/Pre-Approved Control Function (PCF); from a specific CF/PCF; from certain parts of CF/PCF etc. In the absence of any changes in the consultation, we expect this to continue but we would appreciate confirmation of the time-bound element. There will need to be clear guidelines and documentation on how a previously sanctioned but now rehabilitated individual can be employed.

There is also the question of an individuals' right to be forgotten and how long such information would remain available through a "google" search for instance. It would be necessary for the Central Bank to have consulted with the Office of the Data Protection Commissioner to check with its expectations vis a vis the collection and publication of personal data, ensuring that this is in line with current GDPR legislation. It is likely that a Data Protection Impact Assessment (DPIA) would be required for this regulation and making this public would go some way to reassuring the sector that GDPR considerations have been addressed in the proposals.

4. Application of the framework to all CF roles

We would question whether it is appropriate for CF's to be scrutinised to the same extent as PCF's who are aligned against specific Prescribed Responsibilities. The objective of this regime is to allocate personal responsibility to the most appropriate senior person and while all CFs may be in scope for the framework, it is not logical that all CFs would be held to the same level of account. Therefore, we expect that those individuals and more junior members of staff, will have a reduced responsibility in terms of conduct breaches.

5. Application to foreign based CF and PCF role holders

Insurance Ireland has previously raised the logistical issues around changes to contracts and job specifications for in-scope employees in other jurisdictions, and for firms with international branches and CF's in multiple locations, this is a core issue. The ASP changes would need to reflect the fact that holding inquiries and proceeding with investigations may take longer owing to the need to furnish translations, and engage interpreters, among other matters.

The application of the sanctions on foreign based CFs/PCFs is somewhat unclear from the proposals, including how the Central Bank expects to be able to follow through where the individuals are outside the jurisdiction and possibly outside the EU. Other issues relate to how local legal protections might apply such as Employment Law, Data Protection and unions. There may also be restrictions/ delays concerning how these individuals are contacted / brought into the process later and it is likely that translation of requests / process could be required, again taking more time. The feedback should specifically cover the application of IAF and SEAR in an enforcement situation to international firms, particularly legal explanations in terms of publication of notices.

6. Comments on the Settlements Procedure

Insurance Ireland would welcome some guidance in relation to the discounts process. The consultation paper includes comparator regimes and processes for approaches to settlement. We note that there is no discount available for no admission settlements, however it is unclear whether this was also a point in comparator regimes. It is also noteworthy that the UK is not included as a comparator regime, given how much the UK approach influenced the CBI approach. We appreciate this may be due to Brexit however many other jurisdictions have also implemented such a regime and it would be good to understand whether the UK has a similar approach to the no admissions settlement.

In view of the fact that discounts are discretionary in nature, it is not clear what are the factors that would drive the discount. Whether, for example, a subject may be entitled to the maximum discount where they challenge on factual accuracy. Further confirmation on the approach would be welcomed.

7. New Sanctioning Factors for Individuals

There is no definition of what the CBI considers an individual's 'financial position' to be; whether this relate solely to the remuneration they would have received while in the role where the breach was identified or whether this would include other considers such as personal savings, pensions, other salaries etc. This should be clarified in the feedback.

8. Disclosure of privileged information

It would be good to understand if the CBI intends to use a template disclosure agreement or any disclosure would be for the firm/CBI to negotiate depending on the circumstance of the inquiry.

Ends