

The Central Bank of Ireland's Consultation Paper 154
of
The Individual Accountability Framework – Consolidated
Guidelines in respect of the Central Bank's
Administrative Sanctions Procedure

Irish Funds Consultation Response

Introduction:

The Irish Funds Industry Association (Irish Funds) is the representative body for the international investment funds industry in Ireland. Our members include fund managers, fund administrators, transfer agents, depositaries, professional advisory firms, and other specialist firms involved in the international fund services industry in Ireland. By enabling global investment managers to deploy capital around the world for the benefit of internationally based investors, we support saving and investing across economies. Ireland is a leading location in Europe and globally for the domiciling and administration of investment funds. The funds industry employs over 17,000 professionals across every county in Ireland, with over 34,000 of a total employment impact right across the country¹ and provide services to over 8,600 Irish regulated investment funds with assets of just under EUR 3.8 trillion².

Irish Funds' welcome the Central Bank's focus on enhanced governance and are broadly supportive of the Administrative Sanctions Procedure (ASP) and its duty to aid in the implementation of the Individual Accountability Framework (IAF). Strengthening corporate culture and increasing individual accountability to mitigate risks is essential to strong governance and enhanced consumer protection. We wish to highlight that our response to this effort was crafted in conjunction with our feedback to Consultation Paper P153 Enhanced Governance, Performance and Accountability in Financial Services³ where we specifically identified concern regarding the timing of implementation, uncertainty for firms not yet in scope for the Senior Executive Accountability Regime (SEAR) and a need for further clarity and guidance for our members.

While recognising the need for comprehensive powers of investigation and enforcement processes for deterring misconduct, promoting public trust and confidence, investor and consumer protection and market integrity, we would also emphasise the importance of ensuring that the applicable regulatory and supervisory regimes, backed by appropriate enforcement and sanction powers are independent, fair, proportionate, and transparent. This is not only key to attracting financial services firms, but also, the people required to work in the industry in Ireland.

Irish Funds is concerned that the amended ASP as is currently envisaged to operate does not sufficiently recognize the natural and constitutional rights of an individual to due process and fair procedures, in particular where there might be a divergence between the interests of the individual and the interests of the regulated financial service provider. The additional powers that will be provided to the Central Bank are significant, and it is important that the correct balance between these powers and the protection of individuals' constitutional rights is struck.

While many of the changes to the ASP have already been enacted through amendments to the Central Bank Act of 1942, Irish Funds respectfully requests that the Central Bank's Guidelines be implemented in a manner that diligently upholds the constitutional rights of all stakeholders, with a particular focus on protecting the rights of individuals.

The amended ASP and the draft Guidelines highlight the enhanced powers and mechanisms that will apply to information which the Central Bank consider to be confidential during any process, and it is now indicated that non-compliance may amount to an aggravating factor. It

¹ Source: Economic Impact of the Funds & Asset Management Industry on the Irish Economy, Indecon, 2021

² Source: Central Bank of Ireland, May 2023

³ [CP153 - Enhanced governance, performance, and accountability in financial services \(centralbank.ie\)](https://www.centralbank.ie/consultations/CP153-Enhanced-governance-performance-and-accountability-in-financial-services)

is respectfully suggested that consideration needs to be given to the other prevailing duties of individuals who may find themselves involved in an investigation. In particular, the very fact of an investigation into the individual or the conduct of a firm with whom they may hold office or equivalent, will itself require disclosure in order to comply with other legal duties and obligations, and we would ask the Central Bank to give appropriate consideration to these circumstances.

In this document, our members are referred to as regulated financial services providers (RFSPs)⁴.

1 THE CP 154 QUESTIONS:

1.1 Do the Central Bank draft ASP Guidelines assist you in understanding the modified ASP investigation process now codified in statute? Do you agree with our proposed approach to the Inherent Responsibilities?

Overall, we have identified a number of potential gaps that do not appear to have been addressed by the ASP Guidelines with respect to the modified investigation process. For example, the ASP Guidelines do not address:

- a. How material information/evidence that comes to light following the issuance of the Final Investigation Report should be treated and whether such information must be considered by the Central Bank in the context of any inquiry and whether the information will be disclosed to the relevant Subject, which is particularly relevant in circumstances where individuals subject to an investigation are unable to gain access to records that are maintained within the control of a past employer RFSP;
- b. The potential disparity and disadvantage that could exist for individuals that are subject to investigation who are no longer within the employment of the RFSP to which the investigation relates, including in particular whether the individual will be entitled to access information that is held by the relevant RFSP (i.e. the previous employer) where, for example, such access is required to address a request for information from the Central Bank and/or to demonstrate the reasonable steps the individual took will exist within the relevant entity's records; or
- c. The impact of extending the scope of the investigation process under the ASP to individuals carrying on controlled functions, including whether additional protections should be afforded to individuals who may:
 - i. Have reduced financial means, compared to PCFs;
 - ii. Be less experienced in relation to engaging with investigations and regulatory bodies; and
 - iii. Be potentially susceptible to undue influence by more senior individuals and RFSPs.

It would be helpful if the Central Bank could provide some guidance as to the obligations on RFSPs to provide past employees with access to information that is relevant to a Central Bank investigation, where the Subject is an individual and not the RFSP itself.

We note paragraph 43 provides that "*in general, an investigation will be carried out by Enforcement*". It would be helpful if the Central Bank could expand upon this to explain (a) how the Central Bank will appoint (i) the RAO (i.e. whether the RAO will be appointed

⁴ Regulated financial service provider as defined in Part 2 Amendment of the Central Bank Act 1942 section 2, g) [Central Bank and Financial Services Authority of Ireland Act 2004, Section 2 \(irishstatutebook.ie\)](#)

in accordance with section 24 of the 1942 Act); and (ii) the decision maker; and (b) the role, if any, the relevant supervisory team within the Central Bank should play in the context of the investigation process.

It would be helpful if Paragraph 41 could be expanded upon to explain what is meant by a "*Subject remains under the general supervision and oversight of the Central Bank throughout the course of an investigation and any subsequent inquiry*". We assume the purpose of this statement is to clarify that the commencement of an investigation will not impact the general supervisory powers of the Central Bank in relation to the entity or person who is the subject of the investigation.

1.2 Do the draft ASP Guidelines assist you in understanding the role of the RAO and the associated functions and responsibilities in respect of ASP investigations?

It would be helpful if Paragraph 45 was expanded to include the full list of responsibilities attaching to the Responsible Authorised Officer (RAO) as the current language "*...has a number of responsibilities in relation to an investigation; for example,*" suggests that the list that follows is not the full list of responsibilities attaching to the RAO role.

In addition, as an officer of the Central Bank, the RAO's role and the exercise of powers and duties by the RAO, including decisions, should be stated to be subject to the applicable principles, including fairness, proportionality etc. We request that the role, full list of responsibilities and powers of the RAO are articulated in the guidelines.

1.3 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?

Nil response.

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

Timeframe for compliance with statutory requests for information/documentation

The draft Guidelines note, at paragraph 56, that a Subject must submit "*considered, accurate and timely responses to information requests from the Central Bank*" and notes, at paragraph 57, that "*any timeframe set by the Central Bank for complying with an information request must be complied with*".

While we agree that the disclosure of documents and information must be accurate and must be made on a timely basis, it is equally important to acknowledge and address the practical challenges that any short timelines for compliance may present particularly in cases requiring consideration of historic documentation or areas of substantial complexity. The requirements relating to production of preserved metadata in response to a statutory request require the use of appropriate data extraction and production platforms and this can increase the lead time for production of documentation, particularly at the start of a statutory request process. This is true for both individuals and for RFSPs, but the issues are perhaps more pronounced for individuals. Please see the below specific example.

Access to responsive documentation: an individual (under investigation or in their capacity as a witness) will require sufficient time to identify and assemble responsive information. In some cases, an individual may no longer work at an institution which holds responsive documentation or where they do continue to work at the relevant institution, they may not have access to such documentation.

In most cases the requisite documentation will belong to the relevant financial institution and that in itself will present practical difficulties for an individual. Even where an individual does have access to responsive documentation, there remain challenges, for example, in most institutions there is most likely no central repository of documentation meaning that documents need to be located and compiled. Some of the relevant documents may be stored externally (e.g., company secretary, external legal counsel, archive storage).

Assessment of responsive documentation: individuals will in most cases have less resources and expertise at their disposal and therefore, to ensure any response to a Central Bank statutory request is "*considered, accurate and timely*" as noted in paragraph 56, an individual will require sufficient time to assess and sufficiently contextualise the information it has identified as responsive to the statutory request.

While we acknowledge the option for an individual to seek an extension of time, it would be more efficient for more lenient timelines to be built into the Guidelines from the outset. In this regard, we would note that providing an individual (including any individual summoned to appear as a witness) with sufficient time to assess and respond to a statutory request made in the context of gathering evidence to support a finding of prescribed contraventions against that individual is necessary to satisfy the constitutional right to fair procedure.

Further clarity as to whether the practical challenges in responding to statutory requests will be taken into account in determining timelines for the disclosure of information and documents would be welcomed in the final guidelines as would an express acknowledgement that legitimate and reasoned requests for extensions of time will not be interpreted by the Central Bank as a lack of co-operation on the part of the individual or the RFSP for the purposes of determining a sanction. We would also welcome requests for documents and information to be sufficiently clear and specific such that any unnecessary ambiguity is avoided.

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

We request that the Guidelines are expanded upon to provide details of the information that needs to be provided to the Central Bank when asking for the ability to disclose confidential information to a party other than the Subject's legal advisor. It would also be helpful to set out the right of appeal (if any) which a Subject has in respect of a refusal by the Central Bank to permit such a disclosure.

The Guidelines are silent in relation to the challenge(s) which an individual Subject may encounter either in relation to their current employer or a former employer where they are subject to confidentiality obligations. We request that the Central Bank expands the Guidelines to address these concerns which are more fully summarised below:

- a) Where the Central Bank is considering multiple individuals for a sanction, the individuals are not allowed to share information relating to the investigation. Will there be a similar obligation on the Central Bank to maintain confidentiality between Central Bank investigators investigating the various individuals?
- b) If a director of an entity is under investigation, they cannot declare it until concluded. This obligation of confidentiality means that the individual may have to misrepresent themselves to the Board of Directors in terms of conflicts and the other Board of Directors members are not being given relevant information to consider regarding a potential conflict of interest.
- c) RFSPs provide representations to its clients/ shareholders/stakeholders or other regulators on an ongoing basis. Due to confidentiality provisions, this may mean that a RFSP has to misrepresent itself to comply with the Central Bank requirements for confidentiality. It would be helpful for the Central Bank to clarify that no details should be provided to the stakeholders above if the RFSP is subject to an investigation by the Central Bank. The Guidelines are currently silent as to the actions an RFSP should take in this instance.
- d) RFSPs are required to conduct initial and annual due diligence which would typically include requesting that an individual would advise the RFSP if they have been or are subject to an investigation by the Central Bank. Given the confidentiality requirements, what response can an individual provide in this instance especially given they could be subject to a criminal offence if information relating to a final investigation report is disclosed?

Further to this should the individual be applying for approval for a PCF role within the Individual Questionnaire on the Central Bank Online Portal there is a specific question which asks *“To the best of your knowledge, have you been or are you being investigated, disciplined, censured, suspended or criticised by a regulatory or professional body, a court or tribunal or any similar body, whether publicly or privately, in any jurisdiction?”*⁵ If an individual answers this in the affirmative, and the RFSP can see this response, is this considered to be breaking the confidentiality requirements?

- e) As the Guidance notes in paragraph 76, if an investigation is concluded for reasons of *“the matters included in the investigation immediately before the discontinuance were minor in nature, immediate remedial action was taken in respect of them, and full cooperation was provided”*, would the Subject be obliged to report same to their employer or given the confidentiality requirements, must they refrain from doing same?
- f) The Central Bank expects to issue a public statement in all cases where a finding is made at inquiry that a Subject has committed a prescribed contravention and/or a decision is made to impose a sanction. Is it at this point that the Subject can inform their employer of their involvement in the investigation or are they still bound by certain confidentiality requirements? The Guidance notes under paragraph 135 and 198, an individual may be required/summonsed to appear as a witness to provide evidence before an inquiry. What repercussions will this have on their employment

⁵ [Guidance on PI and EMI Specific Requirements \(centralbank.ie\)](https://www.centralbank.ie/guidance-on-PI-and-EMI-specific-requirements)

given they will not be able to advise their employer of their involvement? Would RFSPs ever be made aware that an employee has been summonsed as a witness?

- g) From a transparency standard, the administration of a quasi-judicial process should be transparent and open. We do not believe that it is appropriate for an authority to be seeking to conduct an enforcement process utilising rules to keep quiet the occurrences, and the process or any part of it. It erodes confidence.

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

One of the key policy changes allows for the Central Bank's enforcement division to exercise functions at inquiry of making submissions, leading evidence, and examining witnesses. The Guidance notes under paragraphs 137 and 138 that "*Witnesses are entitled to seek legal advice in relation to their attendance as a witness before an inquiry and the Inquiry Members may, in their discretion, allow a witness to be represented before an inquiry. The Inquiry Members do not have the statutory power to discharge the legal costs or vouched expenses of any witness appearing before the Inquiry. The Inquiry Members may decide to provide witnesses, who have been summonsed and attend to give evidence, with a flat rate payment for expenses (i.e., a viaticum).*" In these instances, the individual that has been summonsed will be subject to the financial burden of arranging their own legal representation which would appear to be an unreasonable burden for a witness to bear given they are not the Inquiry Subject especially given an inquiry has the same legal basis as High Court proceedings.

Further clarity is sought as to whether a witness can exercise the same options as the Inquiry Subject. For example, it is noted that Inquiry Hearings are usually held in public, and it may be determined that a witness may be requested to attend an inquiry hearing to give oral evidence. However, under paragraph 186 the inquiry members or Subject can request that the hearing is private under certain limited conditions such as "*A person's reputation would be unfairly prejudiced unless the hearing is held in private (or part in private).*" We would ask that the Central Bank clarify if a witness that has been identified as someone who may be able to provide relevant information to an inquiry can request that their testimony is held in private. A further example in paragraph 208 of the draft Guidelines states that, "*the Inquiry Members may, on their own initiative or at the request of the Inquiry Participants, refer a question of law arising at an inquiry to the High Court for decision*" however it is not clear if the same request can be made by a witness.

Furthermore, paragraph 116 notes that "*With respect to the examination of witnesses (including witnesses who are outside the State), the Inquiry Members have the same powers as those of a High Court judge in hearing civil proceedings*". However, paragraph 117 goes on to state that the functions of Inquiry Members therefore may include asking questions of witnesses, requesting submissions and any other relevant function necessary for the conduct of the inquiry. However, Inquiry Members may not lead the presentation of evidence, or examine witnesses to the inquiry on behalf of the Central Bank, as this role will be carried out by Enforcement". Can the Central Bank provide further clarity as to how the "examination of witnesses" by Inquiry Members differs from the examination of a witness that must take place by Enforcement?

Further clarity is sought in respect of responses provided by witnesses as part of an inquiry hearing as to how both the content and the quality of information could be used at a later date post-inquiry hearing. This is of particular relevance where the witness is not the Inquiry Subject, and where they do not have their own legal representation. Further

clarity is required in this regard particularly as paragraph 60 provides that *“information gathered in the course of an investigation can be used at any subsequent inquiry and in the performance by the Central Bank of any of its statutory functions including, for example, in any related investigation”*.

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

Nil response⁶.

1.8 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?

Nil response.

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

Nil response.

1.10 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?

Scope of Statement of Undisputed Facts

The Guidelines note, at paragraph 292, that *“once the ‘without prejudice’ admission and agreement have been received by the Central Bank, the Central Bank may provide the proposed terms of settlement under the Undisputed Facts Settlement Process. The proposed terms will set out the details of the proposed sanction and any potential discount offered under the settlement scheme”*.

In practice, this means that a RFSP or individual will be required to agree to a set of undisputed facts before it is made aware of the proposed sanction and before it is presented with the Central Bank's draft publicity statement. This sequencing raises the question of whether the individual is limited to the undisputed facts agreed at the admissions stage in terms of making separate and further submissions as to:

- (i) The level of sanction; and
- (ii) Negotiating the publicity statement.

We would note in this regard that there may be a difference between the facts relevant to prove segregated portfolio companies (SPCs) (and which would be included in any Undisputed Facts statement) and the facts that could be relevant to the level of any sanction or which may be relevant to contextualising the content of the publicity statement and which may or may not be disputed.

We are therefore concerned that by agreeing an Undisputed Facts statement before the sanction and publicity statement have been agreed, it permits a situation whereby the

⁶ Please note any questions to which a nil response is provided is intentional and Irish Funds has no feedback to provide.

RFSP or individual cannot meaningfully engage in these important elements of the settlement process. In light of these observations, we would submit that the Undisputed Facts settlement process in its current formulation may present significant challenges in practice.

Negotiating the Statement of Undisputed Facts

We would welcome further clarity on the scope for the individual or RFSP to engage in or input into the final statement of Undisputed Facts. In this regard, we would note that while there may be broad agreement between the individual or RFSP and the Central Bank as to the facts, the subject matter of the investigation may nonetheless be of such a technical or complex nature that it is the presentation or expression of those facts that would need to be carefully agreed between both parties.

An important point to note in this regard is that the without prejudice element of the content of the Undisputed Facts statement leads to the inability of an individual or RFSP to challenge the content of the statement of Undisputed Facts at a later stage. While we acknowledge the need for the settlement talks to be on a without prejudice basis so that both parties can engage in a meaningful path towards resolution, it nonetheless puts the Central Bank in a significantly more powerful position than the Subject and we would submit that the Subject's right to input into the Undisputed Facts is acknowledged.

Indicating a "willingness to engage"

Paragraph 291 of the draft Guidelines that the Central Bank may commence the settlement process *"where a Subject has indicated a willingness to engage in the Undisputed Facts Process"*. We would welcome further clarity around how, and when, in practice, a RFSP or individual may demonstrate its *'willingness to engage'*. Specifically, it would be useful if the Central Bank could clarify whether the onus is on the RFSP or individual to make the first move and expressly communicate at the outset of the investigation that it is interested in exploring this type of settlement.

High Court Confirmation

We welcome the introduction of the requirement to seek High Court confirmation in respect of any sanction imposed under the Undisputed Fact Settlement process and note that this development is an important factor in achieving the fair administration of justice. We refer to our more detailed observations in respect of the High Court confirmation as set out below in response to Question 25.

- 1.11 **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?**

Observation on the Investigation Report

Timeframe for providing submissions on the draft Investigation Report

Paragraph 83 of the Guidelines note that the Subject will have 7 days (or any longer period that the Responsible Authorised Officer considers necessary) to provide submissions in response to the draft investigation report which will be considered by the RAO in its finalising of the Investigation Report. We note that (notwithstanding (i) the discretion of the RAO to designate a period longer than 7 days; or (ii) the option for an

RFSP or individual to seek an extension of time) a 7-day time-period is, in most investigations, likely to be too wholly inadequate and impractical for an RFSP or individual to meaningfully consider and prepare submissions on the draft investigation report. We would note that the Investigation Report is an extremely important document as it is the basis upon which the decision is made as to whether an inquiry is required in respect of the Subject. We would therefore note that a longer minimum timeframe should be built into the Guidelines to provide an individual or RFSP sufficient time to be able to assess the contents of the investigation report, seek legal advice on relevant aspects of the investigation report and to prepare substantive submissions in response to the investigation report.

Importantly, we would note that the current practice of the Central Bank is typically to provide the Subject of an investigation with a number of weeks to respond to an investigation letter. As such, we would expect a similar timeframe to be suitable to provide submissions on an investigation report.

Separately, we note in the context of the European Central Bank's sanctioning regime for those subject to the SSM, a 'reasonable' time-period must be provided and in practice a number of weeks is afforded.

In this regard, we note that paragraph 87 permits a Subject to request further information and/or documents from the Central Bank upon receipt of the draft investigation report and notes that any such requests must be made, *"sufficiently in advance of the expiry of the timeframe for submissions"*. Paragraph 88 notes that such requests must include a, *"detailed explanation of the relevant necessity for additional information and documents"*. Paragraph 90 notes that, *"where further information and/or documents are being provided by the RAO, they will engage with the Subject in respect of next steps"*. Our understanding based on this is that a longer time frame for submissions will be permitted in cases where a Subject requests documents/information from the RAO however we would welcome any further clarity in this regard it be reflected in finalised guidelines.

Observations on the Investigation Report Settlement Process

Indicating a "Willingness to Engage"

Paragraph 301 of the draft Guidelines notes that the Central Bank may commence the settlement process *"where a Subject has indicated a willingness to engage in the Investigation Report Settlement Process"*. We would welcome further clarity around how, and when, in practice, an RFSP or individual may demonstrate its 'willingness to engage'. Specifically, it would be useful if the Central Bank could clarify whether the onus is on the RFSP or individual to make the first move and expressly communicate at the outset of the investigation that it is interested in exploring this type of settlement.

High Court Confirmation

We welcome the introduction of the requirement to seek High Court confirmation in respect of any sanction imposed under the Investigation Report Settlement process and note that this development is an important factor in achieving the fair administration of justice. We refer to our more detailed observations in respect of the High Court confirmation as set out below in response to Question 25.

1.12 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?

Use of No Admissions Settlement in Practice

Paragraph 310 notes that, *"in certain very limited circumstances the Central Bank may consider utilising the No Admissions Settlement Process"* and paragraph 311 notes that *"it is expected that the use of this process will seldom arise in practice"*. This indicates that there are certain instances in which the Central Bank envisages permitting the use of this settlement process and we would therefore welcome further clarity in the finalised Guidelines as to the circumstances in which the Central Bank envisages utilising this process.

We acknowledge in this regard the list of factors set out at paragraph 311 of the Guidelines indicating a lack of suitability for the no admissions settlement process. However, our view is that this list is so broadly drafted that it does not provide sufficient clarity as to when the settlement procedure may actually be used in practice. For example, can the Central Bank confirm whether it is envisaged that the No Admissions Settlement process will only be an option when none of the factors on the list in paragraph 311 are present?

Use of No Admissions Settlement by individuals

We would note that the No Admissions Settlement process is likely to be the preferred option for use by individuals considering the negative impact of an admissions settlement on the future career and reputation of an individual. We would welcome further detail from the Central Bank as to the suitability of this settlement option in the settlement of an investigation concerning an individual.

1.13 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?

Please note our observations on the Central Bank's proposed approach to the No Admissions settlement process recorded in response to Q12 of the Consultation.

1.14 Do the draft ASP Guidelines assist you in understanding the Central Bank's proposed approach to the updated Settlement Scheme?

General Comment concerning the Suitability of Concluding an Investigation by Way of Settlement Agreement

We note that the early resolution of investigations by way of settlement agreement is incentivised for RFSPs by the inclusion of a scale of financial discounts which will be applied to any monetary sanction imposed under the relevant settlement option. We note that such discounts may not pose the same incentive for individuals under investigation who will in most cases be concerned with their reputation and future employment. We would welcome an acknowledgement by the Central Bank in the finalised guidelines reflecting the fact that there may be circumstances in which alternative approaches to early settlement may be of more relevance to individuals, such as the 'No Admissions' process.

General Comment Concerning the Availability of the Public Statement for Consideration by the Subject of the Investigation Prior to the Execution of the Settlement Agreement

In each of the settlement options, it is noted that the Central Bank will publish a public statement following the conclusion of the settlement agreement. It is our view that it would be proportionate and reasonable for the Central Bank to share with the Subject of the investigation, most particularly in the case of an individual, the public statement at an earlier stage in the settlement process and in any event before its conclusion.

We acknowledge that the public statement to be published by the Central Bank is a statement of the Central Bank. However, it is nonetheless an important public message in respect of which the subject of the investigation must be provided with a reasonable opportunity to meaningfully consider and engage with.

We would welcome further clarity from the Central Bank regarding the instances in which the 'No Admissions' settlement option will be utilised.

We acknowledge the Central Bank's statement in paragraph 309 of the Guidelines regarding the requirement for admissions in "most" cases and notes that further clarity would be welcomed in respect of those cases in which admissions would not be required.

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

We note that it would be favourable for the Central Bank to consider widening the scope of the settlement scheme to permit early resolution even where the penalty is non-monetary in nature. We note that there may be certain limited instances in which settlement may be a suitable resolution mechanism despite the fact that the sanction is non-monetary. This would also ensure that flexibility should be built into the proposed settlement scheme.

We note that the early conclusion of investigations with non-monetary penalties would serve the Central Bank's objectives in that it would be an efficient and cost-effective resolution and may be of benefit to certain RFSPs and individuals who may see the value in settling an investigation rather than progressing through the costly and public Inquiry process.

1.16 Do you agree with the Central Bank's proposed approach to undisputed facts settlements?

Please note our observations on the Central Bank's proposed approach to the Undisputed Facts settlement process recorded in response to Q10 of the Consultation.

1.17 Do you agree with the Central Bank's proposed approach to investigation report settlements?

Please note our observations on the Central Bank's proposed approach to the Investigation Report settlement process recorded in response to Q11 of the Consultation.

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

Please note Irish Funds responses to the Central Bank's approach to proposed Settlement Scheme recorded in response to Q10, 11, 12 and 14 of the Consultation.

1.19 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?

Nil response.

1.20 Are the different sanctions which may be imposed on RFSPs and individuals sufficiently clear in the draft ASP Guidelines?

The consultation paper articulates the following amendment to sanctions, *"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"*.

The guidelines are not clear how RFSPs should consider and incorporate these conditions as part of any fitness and probity assessment of individuals' post-sanction.

Furthermore, it is not clear if individuals will be able to undertake PCF roles and hold prescribed responsibilities with conditions attached or will individuals only be able to perform CF roles with conditions attached.

The Guidelines should be enhanced to reflect what form these conditions may take and how they would be applied in practice by individuals and RFSPs.

1.21 Are the different sanctioning factors which may be applicable to RFSPs and individuals sufficiently clear in the draft ASP Guidelines?

At paragraph 337 of the Guidelines, it is noted that 'totality' is among the general principles that the Central Bank considers in its approach to sanctioning. The principle of totality is explained further at paragraph 340 which states that the Central Bank may determine that multiple sanctions should be imposed in any particular case. We acknowledge and welcome the Central Bank's statement in paragraph 340, as follows: *"When the Central Bank determines that a combination of sanctions is warranted, it will consider, in light of all circumstances, the appropriateness of each sanction individually and as part of the overall suite of sanctions imposed."* We nonetheless submit that the principle of totality must be very carefully balanced against the general principle of proportionality. In this regard we submit that the financial sanction cap applicable in respect of financial sanctions imposed on RFSPs and individuals respectively, must be taken into account when assessing the cumulative financial impact of any combination of sanctions imposed - i.e. we submit that in order to ensure a proportionate and fair approach to the imposition of multiple sanctions, there is a need to ensure that the cumulative impact of the sanctions imposed does not exceed the financial sanction cap.

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

Nil response.

1.23 What are your views on the monetary penalty methodologies?

Whilst the Central Bank has been applying penalties to RFSPs for many years, it is a change for penalties to apply to junior individuals now directly on a personal level. Additionally, there are concerns regarding whether personal financial penalties might

affect the regulated industry's ability to attract and retain talent which could impact RFSPs. Accordingly, we urge the Central Bank to be very mindful of the impact of this change to the industry and to be cognisant of the potential knock-on impact. We are also asking for greater clarity to be provided regarding how fines are derived at and requesting that the cap is tied to earnings rather than defining a significant amount in absolute terms. There is also a requirement for greater detail regarding situations where individual assets are pursued as an alternative.

If the Central Bank determines that a monetary penalty should be imposed, it will generally follow a stepped methodology to identify what it considers to be the appropriate monetary penalty. The methodology for RFSPs is described in Table 6 page 105. The methodology for individuals is described in Table 7 (page 109 et seq.):

- a) The monetary penalties methodology states that a person's salary is the starting point for calculating the penalties but further on it notes a cap of €1m which is a very high number and, in most cases would represent financial ruin for individuals. We recommend that a proportionate approach should be taken for calculating the penalties.
- b) Table 7 notes that *"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. This could represent financial ruin for individuals and so we believe that in the interests of transparency that the Central Bank should provide further clarification of how this would operate and in what circumstances. It would be most helpful if the Central Bank could provide worked examples.

1.24 **Is there any other aspect of the Central Bank's sanctioning approach which would benefit from further consideration or explanation?**

We note that in paragraph 355 of the Guidelines include examples of *"exemplary co-operation"*, which will be treated as a mitigating factor in the sanctioning process.

The examples listed in the Guidelines include, in particular, where *"the RFSP or individual provides legally privileged material to the Central Bank"*. Accordingly, the draft Guideline appears to encourage RFSPs and individuals to forego certain natural and constitutional rights of an individual to due process and fair procedures, in particular the right to assert privilege with respect to legally privileged advice and guidance. An alternative view of this is that RFSP or individuals will be penalised by not being able to avail of *"exemplary co-operation"* discounts for not handing over privileged material. In this context, we recommend that this particular example is removed.

In addition, it is not clear whether privileged material which might be provided to achieve *"exemplary cooperation"* could later be used against an individual or RFSP in future court or criminal proceedings. Paragraph 65 of Guidelines refers to disclosure agreements in respect of privileged material and that such agreements will include a provision confirming that the Central Bank *"can utilise the disclosed material for the performance of any of its statutory functions and any other purpose specified in the agreement, including for the purposes of that investigation, any related investigation, any subsequent inquiry, and any related procedure such as an appeal to the Irish Financial Services Appeals Tribunal or an application to the High Court."*

To the extent that privileged material is provided by an individual or RFSP in the interests of being cooperative in the context of an ASP investigation, such material should not be used against them in subsequent criminal proceedings.

It would also be helpful if the Guidelines clarified that “*exemplary cooperation*” can only be treated as a mitigating factor and that a level of cooperation that is below “*exemplary*” cannot be treated by the Central Bank as an aggravating factor in the sanctioning process (including, for example, if an individual or an RFSP appropriately asserts legal privilege with respect to certain information and documentation that has been requested by the Central Bank).

1.25 "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?"

As stated above we welcome the introduction of the requirement to seek High Court confirmation in respect of any sanction imposed under the Undisputed Fact Settlement process and the Investigation Report Settlement process. We note that this development is an important factor in achieving the fair administration of justice.

Further clarity from the Central Bank is requested in relation to the sequencing of the High Court confirmation and the issuing of the Central Bank’s public statement following the conclusion of a settlement agreement.

Specifically, we note that paragraph 377 states that “*If the High Court does not confirm a sanction agreed as part of a settlement agreement concluded under the Undisputed Facts Settlement Process or the Investigation Report Settlement Process, it will remit the matter for reconsideration by the Central Bank and the Subject along with any recommendation the High Court has in respect of the matters to be reconsidered.*”

We would also welcome further clarity as to whether the Central Bank proposes to issue a public statement regarding the details of a settlement agreed under the Undisputed Facts process or Investigation Report process before the High Court provides confirmation as to the appropriateness of the sanction.

If the Central Bank is proposing to publish a public statement before the proposed sanction has been confirmed by the High Court, will the Central Bank include details of the sanction (and the relevant sanctioning factors) in the public statement, or will such details remain confidential until such time as the High Court has provided confirmation as to the appropriateness of the sanction?

We note that should the details of any sanctioning factors be disclosed publicly before the High Court confirmation has been provided, there is likely to be substantial reputational damage to the Subject, in any case where the High Court (subsequent to the issuing of the public statement) refuses to confirm the proposed sanction.

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

Nil response.

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