

Administrative Sanctions Procedure – Public Consultation  
Central Bank of Ireland  
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Your ref:

Our ref: LF/SMV0.0

**Matter: Response to Central Bank of Ireland Consultation Paper 154 on the ASP Guidelines under the Individual Accountability Framework**

A Chara,

## 1 Introduction

1.1 We refer to the Central Bank of Ireland (“CBI”) Consultation Paper 154 (the “ASP CP”), which includes a draft version of the Administrative Sanctions Procedure Guidelines (the “**Draft ASP Guidelines**”). Thank you for the opportunity provided by the ASP CP to provide our views in relation to the CBI’s proposals to amend the administrative sanctions procedure (“ASP”) to reflect the incoming Individual Accountability Framework (the “IAF”).

1.2 We note from the ASP CP that:

*“The Central Bank is committed to open and engaged consultation with stakeholders to ensure that the updated ASP and associated guidelines are clear and pragmatic, and in order to facilitate a smooth transition to implementation of the new ASP.”*

1.3 The ASP CP refers to the need to ensure fairness in the administration of justice and we note in this regard the recent *Crédit Agricole S.A.*<sup>1</sup> and *Zalewski*<sup>2</sup> decisions. At the outset, and as background to this letter, we refer the CBI once again to the concerns that we raised in relation to the potential exposure of individuals arising from the CBI’s Consultation Paper 153 on the Individual Accountability Framework Regulations and Guidance (the “IAF CP”). We do not intend to repeat those concerns in this response.

1.4 This response is submitted in our personal capacities and is based on our experience as partners in the Financial Services and Commercial Litigation Departments of Mason Hayes

<sup>1</sup> Judgment of the General Court (Second Chamber, Extended Composition) of 8 July 2020 *Crédit agricole SA v European Central Bank* ([here](#))

<sup>2</sup> *Zalewski v An Adjudication Officer and Others* IESC 24

& Curran LLP (“MHC”) advising clients active in the Irish domestic and international financial services markets. Where our comments respond specifically to the Questions that appear at p. 49 of the ASP CP, we give the appropriate cross-reference. We hope that the views expressed herein are of assistance to the CBI in refining its views on the proposed ASP reforms.

## 2 Effective Dates (Question 1)

- 2.1 We note that the Draft ASP Guidelines propose that once they are finalised and published, they will apply to all investigations commenced on or after 19 April 2023. We find it concerning that persons subject to investigations that are commenced on or after 19 April 2023, but before the adoption of the revised ASP Guidelines, will become retrospectively subject to those Guidelines and we wonder how this will work in practice.
- 2.2 Persons subject to investigations commenced on or after 19 April 2023 but before the date on which the revised ASP Guidelines are adopted should have certainty regarding the procedures for conduct of their investigation from the outset. It is unclear when the revised ASP Guidelines will be finalised and adopted and an investigation could, in theory, have been in progress for 12 months or more before this date, only to have the procedures applying to it then changed.
- 2.3 The better and fairer position would be, we believe, that the revised ASP Guidelines should only apply to investigations commenced after the adoption thereof, such that persons subject to investigation have clarity from the outset of an investigation regarding the process that will apply. Should the CBI require to commence or progress investigations in the meantime, it should apply the current procedures on a temporary basis.

## 3 Introduction of a Responsible Authorised Officer (RAO) (Question 2)

- 3.1 We note that the Draft ASP Guidelines seek to codify the roles and responsibilities of the RAO in course of an ASP investigation. The role of the RAO will be important in ensuring fairness in the process.
- 3.2 We are aware that firms and individuals under investigation by the CBI can sometimes experience a lack of clarity and predictability in the investigation process, a lack of communication by the CBI regarding likely timelines and a lack of communication by the CBI by way of progress updates. As individuals become subject to the process to a far greater extent, it is important that the RAO and the CBI work to minimise the distress and anxiety that such issues could cause.
- 3.3 It is, therefore, welcome that the Draft ASP Guidelines require the RAO to keep “... *the Subject informed as to the progress of the investigation.*” These aspects of the Guidelines could, we believe, be expanded to provide greater predictability and clarity to persons under investigation (“**Subjects**”). The Guidelines could for example require the RAO to communicate expected timelines for each expected step in the investigation from the outset, so that Subjects can organise their affairs and resources appropriately to be able to respond to the (often tight) timelines that the CBI imposes. Procedural deadlines should not be imposed during common holiday periods, such as Christmas and Easter when dealing with individuals and greater flexibility should be the norm where deadlines are imposed in the traditional July and August holiday periods.

#### 4 Confidential Information & Privilege (Questions 4 & 5)

- 4.1 The fact of and information provided in connection with an investigation is confidential and should not be disclosed to third parties, save for a Subject's legal representatives. The existence of this duty of confidentiality is, as the CBI points out, important both for the Bank and the Subject.
- 4.2 However, Subjects can often have legitimate interests in disclosing either the fact of an investigation or the subject matter thereof to third parties other than their legal representatives. For example, input may be needed from advisers other than legal (accounting, actuarial). Firms may be required under internal group reporting protocols to notify group HQ of investigations. Individuals may be insured under D&O insurance and have obligations to report to insurers/brokers. It is not realistic for such an important process to be conducted by a firm or an individual in a complete silo, subject only to having the constitutionally guaranteed right to obtain legal advice.
- 4.3 In our opinion, requiring Subjects to adhere to a strict confidentiality requirement is far too onerous and unrealistic a standard for them to apply. We think that Subjects should be permitted to share information with third parties on a "need to know" basis and subject to strict obligations of confidentiality being accepted by those third parties. It is not acceptable that Subjects should be required to seek the CBI's permission to disclose information in such scenarios, since for example, this requires disclosure to the CBI of aspects of a firm or individual's defence, such as the fact that the Subject is seeking accounting or actuarial advice.
- 4.4 Furthermore, we note that the Draft ASP Guidelines require Subjects, in responding to the CBI, to do so via correspondence that is "*on an open basis, i.e., full and complete disclosure of information should be provided in open correspondence.*" From a procedural perspective, this seems to us quite unfair as a mandatory requirement. It is common in contentious matters of all kinds for the "without prejudice" privilege to be observed as a means of permitting parties to make admissions or discuss matters with a view to settlement without those matters later being held to their detriment in proceedings. The CBI's ASP process appears however to be designed to impose maximum pressure on Subjects to make full admissions, on an open correspondence basis, as a prerequisite to any discussion of settlement. We fail to understand why the CBI sees this as a necessary element of the process. There may be very good reasons why 'without prejudice' engagement, in the absence of full admissions, may result in an acceptable outcome for both the CBI and the Subjects.

#### 5 Investigation Reports & the Investigation Report Settlement Process (Questions 11 & 17)

- 5.1 The ASP CP introduces the concept of an Investigation Report, which is to be provided to Subjects, in draft form, upon the completion of the investigation (a "**Draft Investigation Report**"). The Draft Investigation Report should contain relevant information and evidence gathered throughout the investigation, including investigation notes. Subjects will then be afforded the opportunity to make submissions, on foot of which the CBI may make amendments before a final version of the Investigation Report (the "**Final Investigation Report**") is provided to the CBI appointed decision maker, who will decide whether to hold an Inquiry.

- 5.2 This is potentially a very onerous stage of the process for Subjects, although it does introduce some potential procedural safeguards for them. It is important that the preparation of a Draft Investigation Report and subsequently of a Final Investigation Report does not impose such demands on Subjects in terms of time and resources that it simply operates in practice as a strong incentive for Subjects to settle at the earliest possible stage and before any such report is produced.
- 5.3 The CBI should ensure, particularly where Draft Investigation Reports and Final Investigation Reports are prepared in respect of Subjects who are individuals, that the relevant reports, the detailed content thereof and the time and resources required for individuals to respond are all proportionate to the status of those persons as individuals, who may well not have the financial backing of their (perhaps former) employers. For example, providing a draft report of several hundred pages to an individual with a 7-day timeline for input, especially where that individual may be working full time at another firm and only able to review the materials in the evenings, would not be conducive to fair processes.
- 5.4 It appears that the CBI will afford Subjects only one opportunity to make submissions on the Draft Investigation Report before it is finalised, and that any amendments which may be made on foot of such submissions are at the sole discretion of the RAO. It is unclear to us whether Subjects will have any recourse or protection where it is felt that a Final Investigation Report is unfair in its presentation of the facts of the investigation. It seems to us that (i) the CBI, before submitting the Final Investigation Report to the CBI decision maker, should allow the Subject a final opportunity to view it and suggest any further amendments and (ii) there will need to be an available appeal process that permits the Subject to challenge the Final Investigation Report. We would suggest that the Draft ASP Guidelines are amended to provide clarity on this point.

## **6 The Undisputed Facts Settlement Process and Investigation Report Settlement (Questions 10 & 18)**

- 6.1 The CBI envisages that an Undisputed Facts Settlement Process will be the primary avenue by which investigations will be resolved. It appears that the CBI's expectation is based on Subjects' expected keenness to avail of the 30% discount which is available under this method of settlement.
- 6.2 As it stands however, a Subject can only avail of an Undisputed Facts Settlement if the investigation has not concluded and no Investigation Report, either Draft or Final, has been provided to the Subject. An individual Subject is therefore required, in order to benefit from an Undisputed Facts Settlement, to fully admit a regulatory breach, without first having had sight of the full facts and indication of the potential sanction they are likely to face. The Draft ASP Guidelines contain no indication that the CBI will invite input from a Subject as part of an Undisputed Facts Settlement, save to admit the relevant SPCs.
- 6.3 In relation to the proposed investigation report settlement procedure (pre-notice of Inquiry), we note the potential discount available for that process is significantly lower (10%) which will place significant pressure on an individual (in particular, an individual without recourse to funds and without the means to pay for advice and support on the ASP process) to engage in the Undisputed Facts Settlement. We note the CBI cites optimising resources and minimising costs as the rationale behind this approach. While we appreciate the need for the CBI to focus on efficiencies, in the case where an individual's livelihood and reputation is at

stake and/or significant penalties are a possibility, administrative efficiency should not be the primary matter of concern. The impact of an administrative sanction on an individual could be to bring an end to that person's career and means of livelihood and it is important that they do not feel under disproportionate pressure from their regulator to admit allegations at the earliest possible opportunity.

## **7 The No Admissions Settlement Process (Question 13)**

- 7.1 Whilst the Draft ASP Guidelines provides a list of factors that it will consider before offering a 'No Admissions Settlement', we note the CBI states in the ASP CP that a No Admissions Settlement "*as a general rule will not be acceptable to the Central Bank*". There has been no guidance as to when, if ever, the CBI would be willing to enter into No Admissions Settlements in practice notwithstanding the fact this process is explicitly provided for under Section 33 AV of the Central Bank Act 1942.
- 7.2 We think that the CBI's unwillingness to use its statutory powers in this respect does not operate to the benefit of fair administrative procedures, not to mention Ireland's international reputation. Settlements without admissions are a common feature of other highly reputable regulatory regimes (such as that of the US SEC) and we believe that the ability for firms and individuals to engage meaningfully with the CBI on a settlement without admissions would be a very attractive one that could operate without any loss of regulatory effectiveness (since firms and individuals engaging in such a settlement could still be required to demonstrate that they have taken remediating actions).
- 7.3 We therefore strongly encourage the CBI to revise the Draft ASP Guidelines to make more extensive provision for No Admissions Settlements, particularly in cases where the Subject is an individual and a settlement with admissions could severely damage that person's career and livelihood going forward.

## **8 Sanction Calculation (Question 23)**

- 8.1 The CBI will be aware that, for some time now, there has been an industry wide desire for greater clarity and transparency in relation to the calculation of sanctions. In that light, the inclusion of the broad mechanics through which the CBI calculates its sanctions in the Draft ASP Guidelines is encouraging.
- 8.2 There remains, in our view, more that the CBI could do to allay industry concerns. For example, Draft ASP Guidelines provide that the CBI can adjust the penalty on the basis of "*any other factor which the Central Bank considers to be relevant such as deterrence.*" We do not feel that this provides sufficient detail to allow Subjects to fully understand exactly what is being taken into account in this aspect of the calculation. By comparison, we would draw the CBI's attention to the level of detail included by the FCA in its literature surrounding the calculation of fines under the SMCR.
- 8.3 Furthermore, our understanding of the settlement procedure under the current ASP process is that the CBI does not invite submissions with regards to the level of the sanction. From our reading of the Draft ASP Guidelines, it appears that the CBI intends on maintaining this stance. This is, in our view, of even greater importance where the Subject in question is an individual or where the investigation is resolved via an Undisputed Facts Settlement. We would question how this aligns with the principle of fairness in the administration of justice

and would ask that the CBI gives strong consideration to enshrining the right for Subjects to make submissions on the level of the fine in the finalised ASP Guidelines.

- 8.4 We note that recent European case law emphasises the requirement that in the application of sanctions sufficient reasoning must be supplied in the relevant decision. In this respect, it is worth citing the approach of the General Court in *Credit Agricole* which stated that:

*“It is important to recall that, according to settled case-law, the obligation to state reasons laid down in the second paragraph of Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. From that point of view, the statement of reasons required must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which such a decision is based is, therefore, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged.”*

## 9 High Court Confirmation of Settlements (Question 25)

- 9.1 According to Section 33(AWA) of the Central Bank (Individual Accountability Framework) Act 2023 (the “**Act**”), the High Court will confirm the imposition of a sanction by consent, that is, imposed by way of settlement, unless the Court is satisfied that such sanction is “*manifestly disproportionate*.” Given the limited nature of the High Court review, we would reiterate the importance of the draft ASP Guidelines including sufficient protections for the individual throughout the ASP process.

We trust that this response is of further assistance to the CBI and are happy to provide further input as required.

Yours faithfully

*Sent by email, no signatures.*

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