

REGULATORY INVESTIGATIONS

The New Central Bank Administrative Sanctions Procedure

*Draft Guidelines and
Consultation Paper*

Update and Insights on the
proposed new enforcement
regime for financial services firms

36 MIN READ

CONTENTS

00/ AT A GLANCE – THE PROCESS AND KEY CHANGES	03
01/ COMMENCING AN INVESTIGATION	05
02/ GATHERING EVIDENCE	06
03/ PRIVILEGE AND CONFIDENTIALITY	07
04/ “INVESTIGATION REPORT” PROCESS	08
05/ SETTLEMENT	10
06/ SANCTIONS	12
07/ HIGH COURT CONFIRMATION	16
08/ INQUIRY PROCESS	17
09/ APPLYING THE ASP TO INDIVIDUALS	19
10/ YOUR REGULATORY INVESTIGATIONS TEAM	20

00 / AT A GLANCE – THE PROCESS AND KEY CHANGES

The Central Bank of Ireland’s (**Central Bank’s**) central enforcement tool was introduced in 2004. The Administrative Sanctions Procedure (**ASP**) implemented civil financial penalties and an enforcement investigation procedure for breaches of most primary and secondary statutory requirements applicable to all financial regulated service providers (**RFSPs**).

The Central Bank’s enforcement strategy of adopting an assertive risk-based approach to supervision supported by the ‘credible threat’ of enforcement has been the cornerstone of Irish regulatory engagement for well over a decade.

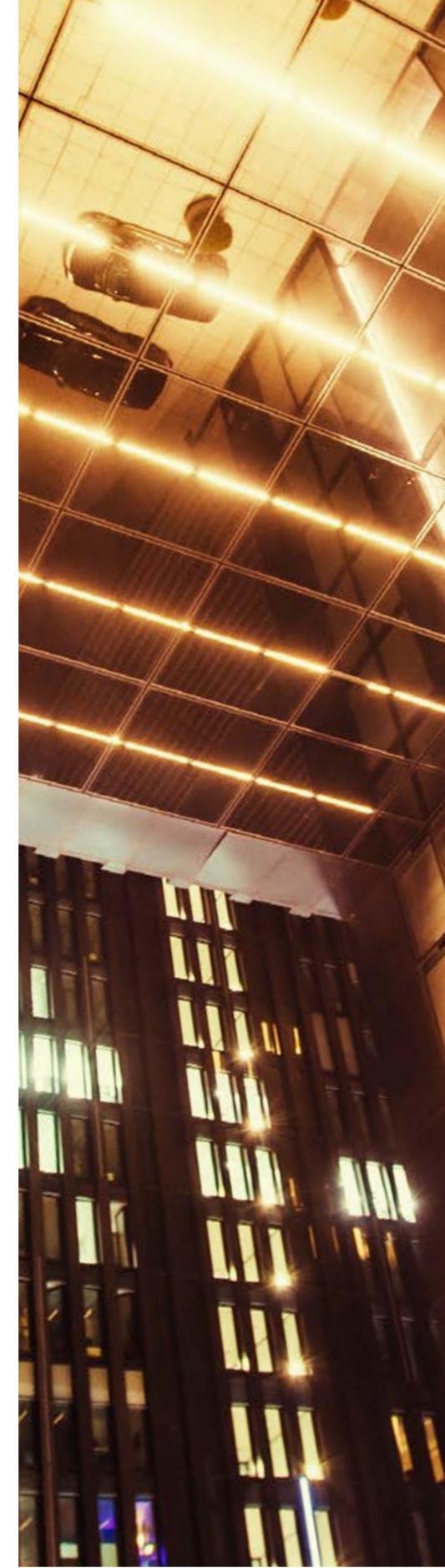
Several investigatory powers were developed and streamlined in the Central Bank (Supervision and Enforcement) Act 2013 (the **2013 Act**).

However, the most significant change over this period has been the continuous development of the Central Bank’s practical approach to commencing, progressing and concluding enforcement investigations.

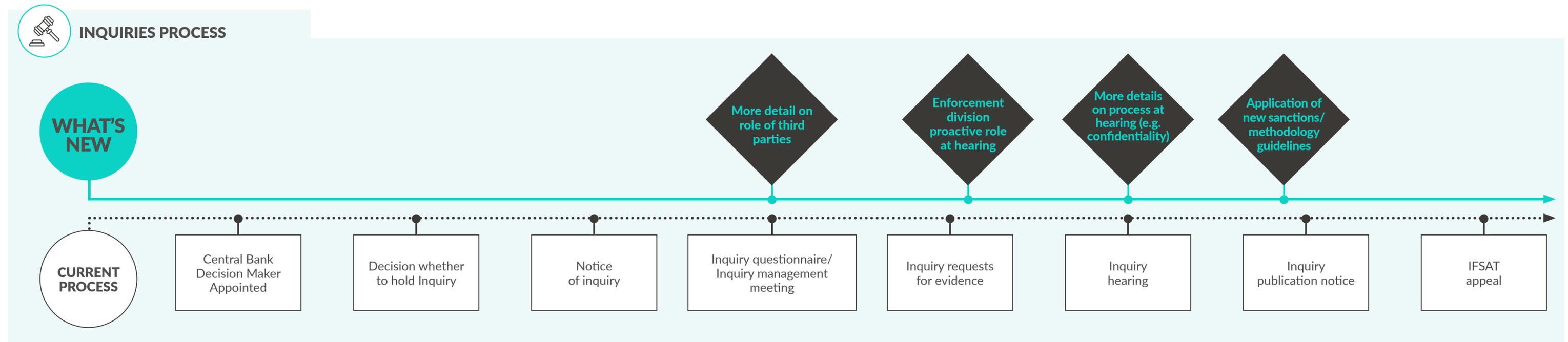
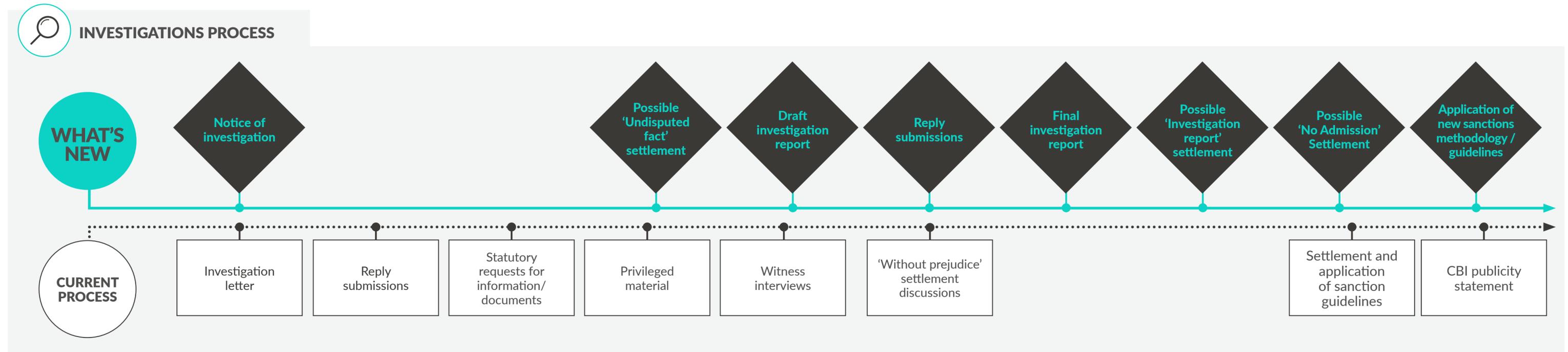
For the first time since the introduction of the ASP, the reforms in the Central Bank (Individual Accountability Framework) Act 2023 (the **IAF Act**) significantly change the architecture for enforcement investigations. They include welcome refinements to the process and updates acknowledging the Courts’ views on fair procedures, including the most recent *Zelewski* decision¹.

This Guide summarises key changes to the ASP process and the way in which the Central Bank intends to use that process, as set out in the draft ASP Guidelines (the **Guidelines**) and related Central Bank Consultation.

¹ *Zalewski v An Adjudication Officer and Others* [2022] 1 IR 421



WHAT'S NEW AT A GLANCE



01/ COMMENCING AN INVESTIGATION

OVERVIEW

The Central Bank may decide to conduct an investigation where it has reasonable grounds to suspect that a prescribed contravention has been committed by a firm or individual (the **Subject**).

Responsible Authorised Officer

Where the Central Bank has decided to commence an investigation, a Responsible Authorised Officer (**RAO**) will be appointed to the investigation. They will be responsible for carrying out specific tasks including:

- issuing the 'Notice of Investigation'
- keeping the Subject under investigation informed in respect of the progress of the investigation and
- preparing the 'Final Investigation Report'

Notice of Investigation

The investigation is commenced by issuing a 'Notice of Investigation' to the Subject. This replaces the current 'Investigation

Letter' and is anticipated to provide more detail than previously seen at the commencement of an ASP.

The Notice of Investigation now contains:

- a statement identifying each suspected prescribed contravention (**SPCs**) and the relevant conduct of the firm or individual and
- copies of any material relating to the SPCs and to the conduct of the Subject or individual that the RAO deems to be appropriate.

The RAO is responsible for including any material in the Notice of Investigation they believe demonstrates that the SPC occurred (unless this is restricted by legal professional privilege, professional secrecy or data protection requirements).

The Guidelines note that a response to a Notice of Investigation must be on a full and open basis. This is a continuation of the Central Bank's practice of refusing to engage with detailed written submissions, including concessions as to the occurrence of suspected breaches, which were provided on a solely 'without prejudice' basis.

Discontinuing an Investigation

An investigation can now be discontinued if:

- the Central Bank no longer suspects that an SPC has been committed
- matters have been remediated
- the investigation has been discontinued for resource or policy reasons and
- for other reasons (which are not specified in the Guidelines).

The Central Bank must now give reasons for discontinuing a case. If the Central Bank is made aware of relevant information at a later date pertaining to the discontinued investigation, it may at that stage commence a new investigation into the same matter.

WHAT'S NEW AND WHAT DOES IT MEAN?

- The introduction of the RAO is a welcome step in the process. It may in due course contribute to the consistency of 'messaging' and ongoing dialogue between the enforcement case team and the firm under investigation as the investigation progresses.
- This is important because regular dialogue with the case team on potential future lines of enquiry and timing of upcoming milestones can assist a Subject in focusing their cooperation on areas that will assist the Central Bank's investigation most effectively. It also enables a clear understanding of, and therefore the opportunity to determine or narrow, potential issues of disagreement.
- It will be important to engage substantively and comprehensively with a Notice of Investigation. A Subject's response will shape not only the scope of an investigation but also the scope of discovery and direction of lines of enquiry and other evidence requests (e.g. the focus of witness interviews).
- Whilst the Central Bank's practice had been moving towards issuing preliminary Investigation Letters, which would be supplemented after seeking discovery and other evidence with more detailed particulars outlining their case, these amendments formalise this approach.
- Complexities can arise for firms under investigation if the interests of individuals involved in the underlying events do not align with the firm and its own response to a Notice of Investigation. Care should be taken when establishing a 'core group' of individuals within the firm authorised to prepare and develop the firm's formal response to the Notice of Investigation.
- Firms should also monitor, on an ongoing basis, the potential for conflicts of interest from time to time between the firm's interests and those of members of a 'core group' inputting strategically, or any other individuals in the business (including those who are also required to input factually from time to time).

02/ GATHERING EVIDENCE

OVERVIEW

Statutory Powers

During an investigation, the Central Bank will collect evidence using its statutory information gathering powers. These include the power to request information, documentary evidence, the preparing of reports and to conduct interviews with witnesses (**Statutory Request**).

The Guidelines set out the Central Bank's expectation that a Subject under investigation will engage and cooperate fully with the evidence gathering process, including by providing considered and accurate responses to Statutory Requests in a timely manner.

A failure to do so may constitute an 'aggravating factor' for the purposes of calculating a sanction or may itself be considered an SPC. Importantly, providing this 'expected' level of cooperation is 'neutral' from a sanctioning perspective.

(i.e. it is stated to be expected rather than material mitigation).

Timeframes and Extension Requests

The RAO may extend the timeframe for responding to Statutory Requests provided they are satisfied this would be in the interest of fairness. The Guidelines note that any extension requests must be made in writing and be submitted to the RAO in sufficient time prior to the expiry of the set timeframe. Further, the request must contain "*reasonable, cogent and compelling reasons*" as to why further time is required by the firm or individual.

Use of Information

The information/evidence gathered by the Central Bank during an investigation may be used at any subsequent Inquiry, and in the performance of any of its statutory functions, including in related investigations.

WHAT'S NEW AND WHAT DOES IT MEAN?

- The Guidelines generally reflect the Central Bank's current approach to evidence gathering and deadlines. However, they underline the importance of mobilising immediately a response team to assess the scope of internal investigation required to provide a full response to a Notice of Investigation or Statutory Request for evidence. Early and informed engagement with the regulator is key.
- At the outset of an investigation, or the issuing of a Statutory Request, a firm must strike a careful balance between:
 - » investigating the scope of material available which may be responsive or relevant to a response (and the time required to obtain a clear picture)
 - » preparing submissions explaining the necessary steps (and thereby seeking an extension providing the regulatory has sufficient time to consider your requests).
- The Guidelines state that the Central Bank is not required to provide reasons for withdrawing some, or only part of some, SPCs if the rest of the case continues. However, the withdrawal of individual SPCs or parts of SPCs could be particularly informative as to the direction, focus and potential outcome of an ongoing investigation. They could also be relevant to the proportionate scope of Statutory Requests and what steps a firm should focus on in seeking to cooperate fully in the evidence gathering process.



03/ PRIVILEGE & CONFIDENTIALITY

OVERVIEW

Confidentiality

The IAF Act introduces a new statutory prohibition on the onward disclosure of ‘confidential’ information provided by the Central Bank to a third party (including the Subject of an investigation or Inquiry).

The Guidelines state that the RAO will expressly notify the recipient of confidential information provided by the Central Bank, that such information is confidential and that it must not be disclosed to any other external party unless authorised by the Central Bank in writing or where such disclosure is required by law (disclosure to a recipient’s legal representatives is however permitted).

Failure to comply with the Central Bank’s confidentiality obligation is an offence. The Guidelines note that non-compliance may also constitute an aggravating factor at the sanctioning stage or an additional prescribed contravention.

Legal Privilege

Protecting legal professional privilege is a particularly important consideration in all engagements with the Central Bank during an ASP.

Privilege Schedules

The Guidelines state that if a firm or individual asserted privilege as a reason not to disclose material in response to a Statutory Request, they must prepare a schedule in respect of such privileged material in accordance with the Central Bank’s specifications. The Central Bank has various statutory powers, under the 2013 Act, to request information, which could in principle extend to certain information required to justify a claim to privilege.

Limited Waiver and Disclosure Agreement

In certain circumstances, a firm or individual may decide to waive the right to privilege as against the Central Bank only and disclose that privileged material to the regulator in order to progress an investigation or to substantiate its position. The current

practice has been for such disclosures to be made under bespoke negotiated agreements, designed to ensure that any waiver of privilege against the Central Bank would not comprise a waiver against other third parties, following the principles set out in the *Fyffes*¹ decision.

The IAF Act now places such ‘limited waiver’ agreements on a formal statutory footing.

They will now benefit from new statutory protections contained in the IAF Act. These protections include:

- the protection against waiver of privilege as against the Central Bank in certain additional material not disclosed
- the protection against waiver of privilege as against third parties, even if disclosed to the Central Bank and
- the protection against disclosure of such material by the Central Bank in response to third party freedom of information requests made by third parties against the Central Bank.

The IAF Act also provides responses to Statutory Requests with absolute privilege from defamation actions.

WHAT’S NEW AND WHAT DOES IT MEAN?

- Subjects should still consider carefully whether it is appropriate in any given case to provide legally privileged material to the regulator. There are a range of factors that inform the decision in any particular case. The Guidelines note that the Central Bank will require a provision in any agreement that material disclosed can be used for any statutory function including for the purpose of separate investigation, any subsequent Inquiry and any related appeals or litigation.
- Whilst the IAF Act confirms that privileged material provided under a disclosure agreement is ‘confidential information’ for the purpose of the Central Bank’s professional secrecy in Section 33AK of the Central Bank Act 1942, those secrecy obligations purport to include certain exceptions. Again, these should be considered carefully in any particular case, including by assessing the course that any investigation might take.
- If a firm is asserting privilege, particular care is required when completing a ‘privilege schedule’ setting out the justification for asserting privilege. The Central Bank may seek detailed information regarding the basis on which individual privilege claims are made. Consistency in the manner in which claims are explained is also important to ensure clear dialogue with the regulator as to justifications for privilege claims and to avoid unnecessary protracted correspondence or challenge by the regulator to privilege claims.

¹ *Fyffes Plc v DCC Plc and Others* [2009] 2 IR 417

04/ “INVESTIGATION REPORT” PROCESS

OVERVIEW

Draft Investigation Report

Upon completion of an investigation, the RAO will now promptly draft an Investigation Report. This will include:

1. The Notice of Investigation.
2. Relevant information/evidence gathered during the investigation.
3. Responses made by the Subject (and ‘any other relevant submissions made by the subject during the course of investigation’).
4. Material that the RAO considers relevant for the Central Bank decision-maker appointed to decide whether an Inquiry should be held (including an outline of the SPCs). The RAO must also provide a general outline of how the information included was selected and collated.

Extension request

A Subject is invited to make written submissions in response to a Draft Investigation Report. If a Subject requires an extension to respond, they must request this in writing in sufficient time and provide reasonable, clear, and compelling reasons for the extension. The Guidelines note that an extension of further time will only be granted where the RAO is convinced that there are reasonable grounds for the extension.

Request for further information

If the Subject requires further information or documents from the Central Bank in relation to a Draft Investigation Report, a written request may also be made sufficiently in advance of the expiry of the timeframe for making submissions to enable the RAO to fully consider the request. The written request should include a detailed explanation of the relevance and need for any additional information or documents concerning the prescribed contravention. Following this, the RAO will assess whether the request is fair, necessary and proportionate, having regard to the volume,

relevance, and necessity of the request to determine if an inquiry should be held.

Final Investigation Report

Following consideration of any submissions made by the Subject, the RAO will make amendments to the Draft Investigation Report. This will include updating the Draft Investigation Report to reflect the Subject’s submissions that the RAO considers relevant for the Central Bank decision-maker to assess the need for an Inquiry.

The Guidelines clarify that the RAO will not provide any opinion/recommendation in the Final Investigation Report as to whether any SPCs occurred or what sanction might be appropriate. Rather, the purpose of the Investigation Report is to inform a decision as to whether, in light of the SPCs, evidence and Subject’s response, the investigation should proceed to an Inquiry to determine whether the SPCs were committed.

The RAO will then provide the Final Investigation Report to the Central Bank’s decision-maker and to the Subject.



Confidentiality

The Investigation Report process is entirely confidential. The RAO will notify all recipients of any information related to the Investigation that is confidential and that must not be disclosed unless authorised by Central Bank in writing or unless the recipient is legally required by law to disclose it to a third party. However, the Subject is allowed to disclose information to their legal representative.

Non-compliance with these confidentiality restrictions can be an aggravating factor when determining what, if any, sanction should be imposed on the Subject or can itself form the basis of an SPC.

WHAT'S NEW AND WHAT DOES IT MEAN?

- The introduction of formal Investigation Reports is welcome. It is hoped that they could provide a clearer picture of the grounds on which particular SPCs are suspected and the specific evidence on which those grounds are based.
- Whilst the Central Bank's practice has evolved over recent years, Subjects are often required to respond in detail to alleged SPCs without a particularly detailed indication of the specific evidence on which the individual SPCs are based. Firms must, therefore, consider Draft Investigation Reports and the enclosed information and evidence very carefully as soon as they are received.
- An important initial step for a Subject is to assess the completeness and scope of evidence and supporting information provided with a Draft Investigation Report. There will be limited time within which to request additional materials to inform a Subject's response. Requests should be quick, focused but sufficiently comprehensive to avoid multiple requests as a substantive response is being prepared.
- Subjects should also be alive to the opportunity to inform the content and focus of a Draft Investigation Report through the quality and emphasis in their responses to Notices of Investigation and in their responses to individual statutory requests (e.g. by providing detailed explanations or contextual summaries alongside the evidence and 'raw data' that may have been requested early in an investigation).
- Care should be taken regarding confidentiality. If the Investigation Report can only be disclosed to limited individuals for the purpose of preparing a firm's response, a clear 'core group' tasked with leading a firm's response will be helpful.
- Subjects should continuously monitor their confidentiality arrangements and should anticipate potential conflicts of interest between individuals and the firm as the matter progresses – aim to strike the right balance between affording individuals an opportunity to make representations as to concessions or submissions which could be adverse to their interests with the need to maintain confidentiality and the integrity of the investigation process.



05 / SETTLEMENT

OVERVIEW

The Central Bank may decide that it is appropriate to conclude an investigation by way of settlement. The evidence sets out more structure as to the different points during an investigation at which settlement might be reached and the implications of each.

Appropriateness of settlement as a means of resolution

The Guidelines set out factors which may render a case appropriate for settlement. These include:

- whether such an outcome would be proportionate and in the public interest
- the economic and cost saving benefit, and
- whether an appropriate sanction could be determined.

The Guidelines note that the Central Bank will not consider engaging in settlement until such time as all information requested by the Central Bank has been provided by the firm in open correspondence.

Types of Settlement

There are now three types of settlement:

'UNDISPUTED FACT' SETTLEMENT

- The Undisputed Fact Settlement process is available **before the completion of an investigation**. A discount of up to 30% is available, reflecting the time and cost saved by such early resolution.
- The conditions necessary for this settlement process include the Subject's agreement to a set of undisputed facts (which render the continuation of the investigation unnecessary), admissions in respect of all SPCs and the Subject's consent to the sanction proposed by the Central Bank.
- The Guidelines note that this settlement process may commence where the firm or individual "*has indicated a willingness to engage*" in the process. The engagements between the firm or individual and the Central Bank prior to executing the legally binding settlement agreement are carried out on a 'without prejudice' basis.
- Where an agreement cannot be reached within the timeframe for settlement discussions stipulated by the Central Bank, the investigation will continue towards conclusion by Investigation Report (this emphasises the importance of any stipulated timeframe set by the Central Bank being reasonable in all the circumstances).

'INVESTIGATION REPORT' SETTLEMENT

- The Investigation Report Settlement process is an option **following the completion of the investigation**. It remains available during the Inquiry process and may result in an adjournment of the Inquiry to facilitate settlement.
- A discount of up to 10% is available under this process if it is commenced before the issuing of a Notice of Inquiry (i.e. the commencement of a formal Inquiry process).
- The main conditions for this settlement process include the Subject's admitting all SPCs (as prescribed by the Central Bank following its review of the Final Investigation Report and the Subject's submissions), the Subject's agreement to dispense with the Inquiry and the Subject's consent to the sanction(s) proposed by the Central Bank.
- Again, the Guidelines note that this settlement process may commence where the firm or individual "*has indicated a willingness to engage*" in the process. The engagements between the Subject and the Central Bank prior to executing the legally binding settlement agreement are also conducted on a 'without prejudice' basis in a similar process to that which occurs under the Undisputed Facts Settlement process.
- Where an agreement cannot be reached within the stipulated timeframe the Central Bank may decide to refer the matter to Inquiry by Notice of Inquiry or where the settlement process had commenced during an Inquiry, the Inquiry may continue towards conclusion.

'NO ADMISSIONS' SETTLEMENT

- Notwithstanding the Central Bank's general policy of requiring a firm to make admissions before a settlement can be agreed, the Central Bank has the power to enter into a **settlement agreement whereby admissions are not required**.
- The No Admissions Settlement Process is only available in very limited circumstances. The Guidelines contain a non-exhaustive list of factors the Central Bank may have regard to in concluding that this settlement process is not suitable.
- These factors include:
 - » whether the behaviour was egregious
 - » the extent of any customer harm or a risk posed to the market or customers and the extent of such risk
 - » the extent to which admissions to the SPCs would aid customers or market participants in determining whether to deal with a firm in the future, and
 - » whether the matters under investigation are such that accountability or acceptance of responsibility for contraventions are in the public interest.

The Guidelines do not give specific examples of when a No Admissions Settlement would be appropriate and this therefore remains unclear.

Public Statements and Market Commentary

Following the conclusion of a settlement, the Central Bank will issue a public statement on its website reflecting information, including details of the prescribed contraventions and the sanction imposed. The firm will be required to acknowledge the publication of the statement as a pre-condition to concluding settlement. The Central Bank may also decide to issue market commentary in relation to the outcome of the settlement. Importantly the Guidelines state that the terms of this market commentary are a matter for the Central Bank alone.

WHAT'S NEW AND WHAT DOES IT MEAN?

- The Undisputed Fact Settlement appears to be designed for cases in which the root cause and nature of a regulatory contravention is relatively self-contained (such as technical errors in regulatory reporting). Subjects should consider at a very early stage of an investigation whether they are seeking to engage to achieve this type of settlement. Detailed submissions on the scope of regulatory requirements and the materiality of contraventions, as an example, could complicate the matters under investigation (although Subjects should obviously remain cognisant of their obligation to report certain breaches and provide full and accurate responses to the regulator).
- It remains unclear to what extent the set of core facts, or emphasis of core facts, can be discussed or negotiated as part of an 'undisputed fact' settlement. Whilst the facts may be undisputed, their relevance to the overall message sent to the market regarding a firm's conduct and/or an assessment of appropriate financial sanction are all points of emphasis that may still be an open issue between the firm and the regulator, even though the facts are not contested. Firms looking to reach an undisputed fact settlement should consider this point carefully at an early stage. The Guidelines also appear to suggest that a Subject must agree a statement of undisputed facts before further proposed terms of settlement will be provided by the Central Bank. How this operates in practice remains to be seen, particularly given that the Central Bank sets the timeframe within which a settlement must be agreed.
- Similarly, in the context of an Investigation Report Settlement, whilst all of the facts underlying the commission of an SPC may not be disputed, other facts which are material to the overall outcome of the investigation could be controversial (such as the extent of risk presented to customers or the market or the scope for actual detriment suffered by customers arising from a contravention). Firms should identify and consider the relevance of all key factual inputs at the outset of an investigation, not just those underlying SPCs.
- It remains unclear what is meant by a Subject 'indicating a willingness to engage' in the relevant settlement processes. The Central Bank's prior practice was developing and whereas in earlier processes a formal 'without prejudice' invitation to enter settlement discussions might have issued alongside the first Investigation Letter, more recently the Central Bank has only been willing to discuss the possibility of settlement once it has had an opportunity to assess the overall case. This trend continues in the approach set out in the Guidelines.
- The Guidelines provide little practical indication as to when, if ever, the Central Bank would be willing to enter into No Admissions Settlements. Subjects considering this option, if available, should note that the Guidelines envisage that details of the SPCs would still be published as part of the settlement even they are not admitted.

06/ SANCTIONS

OVERVIEW

1. TYPES OF SANCTION

Overall, when the Central Bank is considering imposing a sanction it should take into account the principles of proportionality, deterrence and the totality of the case. The assessment of appropriate sanctions depends on various factors, including whether the subject is an individual, a firm, an ECB authorised firm or whether the SPC(s) breach EU or domestic financial regulations.

This table summarises the key sanctions available generally under the ASP:



Sanctions that can be imposed on firms/ individuals:	Sanctions that can be imposed on firms only:	Sanctions that can be imposed on individuals only:	Sanctions that can also be prescribed by certain EU regulatory frameworks:	Other remediation
<ul style="list-style-type: none"> ■ Cautions/reprimands. ■ Monetary penalties: <ul style="list-style-type: none"> » For firms, up to the greater of €10m or 10% of annual turnover in the last financial year before the SPC finding is made. » For individuals, up to €1m. ■ An instruction to stop committing the prescribed contravention. ■ Directions to pay all/part of the costs incurred in holding the investigation. 	<ul style="list-style-type: none"> ■ Directions to refund money charged for the provision of services by the firm. ■ A suspension/revocation of the firm’s authorisation. 	<ul style="list-style-type: none"> ■ A direction imposing conditions on the performance of a Controlled Function (CF) by an individual. ■ Disqualification of an individual from the performance of a CF or part of a CF. 	<ul style="list-style-type: none"> ■ Certain EU financial services regulations, which apply domestically and are designated for the purpose of the ASP, incorporate additional sanctions to be applied following certain contraventions of those frameworks. ■ Separately, other enforcement frameworks exist, for example under the Single Supervisory Mechanism for credit institutions which are ‘Significant Institutions’ and directly regulated by the European Central Bank; and the ESMA Board of Supervisors for certain securities related and rating agency matters. 	<ul style="list-style-type: none"> ■ Outside the scope of the ASP, and in particular under the 2013 Act, the Central Bank also has a number of other remediation powers. ■ These include the power to direct a firm to make ‘appropriate redress’ for customers suffering loss or damage arising from a widespread or regular ‘relevant default’. Examples of this would include overcharging customers, providing unsuitable products or any other prescribed contravention.



2. SANCTIONING FACTORS

The Guidelines set out more detail as to the factors the Central Bank will consider when determining the sanctions to be imposed:

The nature, seriousness, and effect of the prescribed contravention	The conduct of the firm/individual during and after the commission of the prescribed contravention	The firm/individual's previous conduct	Other relevant considerations
<p>The Central Bank will determine the severity of the contravention by considering 12 itemised factors. These include, for example:</p> <ul style="list-style-type: none"> ▪ Whether the conduct was intentional, negligent or dishonest, or separately whether it was reckless. ▪ The duration of the contravention. ▪ Any benefit gained, or loss avoided by the individual. ▪ Whether the contravention has impacted the strength of the financial markets. 	<p>The Central Bank also lists other factors regarding the conduct of the Subject, including:</p> <ul style="list-style-type: none"> ▪ The degree of cooperation by the firm/individual with the regulatory authority. ▪ Remedial steps taken to identify and compensate impacted parties. ▪ The conduct of the Subject in bringing the contravention to the attention of the Subject. 	<p>The Central Bank also lists as relevant a firm or individual's previous conduct, sanctions and compliance history.</p>	<p>The Central Bank also lists the following 'other' relevant factors:</p> <ul style="list-style-type: none"> ▪ The result of the appropriate deterrent effect of the sanction. ▪ Previous positions adopted by the Central Bank in similar cases. ▪ Any pending or possible criminal proceedings and if the sanction may prejudice such proceedings. ▪ In respect of cases involving individuals, his/her financial position could be taken into consideration, and if the sanction involves the breach of the Common and Additional Conduct Standards, under the IAF the Central Bank has the option to assess the promotion of a culture of compliance with these Standards.



3. DETERMINATION OF MONETARY PENALTIES

Where the Central Bank decides that a monetary sanction should be imposed, it will now follow a five-step process to determine an appropriate penalty.

While the penalty calculation mechanism is different for individuals and firms, some overlaps exist with many of the relevant considerations being consistent.

Determine the appropriate 'Starting Point' Figure	Severity Level to be Applied	Aggravation or Mitigation	Consider any further adjustment	Maximum Penalty Adjustment	Consideration of Sanctions to be imposed
<p>For firms, the Central Bank will, usually, take the firm's revenue as the 'starting point'. Significantly, guidance suggests that the Central Bank may also consider revenues generated by a particular service area, product or jurisdiction, which are relevant to the matter under investigation.</p> <p>For individuals, the Guidelines note that the Central Bank will usually take a person's income as the 'starting point', or an appropriate alternative, such as the value of a person's assets.</p>	<p>The Central Bank will then assess the 'nature, seriousness and effect' (as outlined above and in the Guidelines) of the SPCs to conclude their 'severity' on a 'scale' of 1-10.</p> <p>This gives rise to an appropriate percentage of the 'starting point' figure to determine the base figure of the monetary penalty (the Base Monetary Penalty).</p>	<p>The Guidelines state that this Base Monetary Penalty can be increased or decreased to reflect the extent to which the prescribed contravention was aggravated or mitigated by the firm/individual.</p> <p>These aggravating and mitigating factors are detailed in full in the Guidelines, in particular under the 'conduct' (including cooperation) and 'previous conduct' sections outlined above. There is no express limit to the extent to which this 'base' amount can be varied.</p>	<p>The Central Bank may also decide if the Base Monetary Penalty requires further adjustment upwards or downwards.</p> <p>Such adjustment typically reflects any other factors the Central Bank has determined to be relevant, in particular under the 'other factors' sections outlined above.</p> <p>These might also include, for example, ensuring an appropriate level of deterrence and appropriately reflecting the financial position of the firm/individual concerned.</p>	<p>The maximum penalty which can be imposed on firms is €10m or 10% of its annual turnover (whichever is greater), or an amount prescribed by legislation. For individuals, the maximum penalty is €1m.</p>	<p>As a last step, the Guidelines note that the Central Bank may consider any other sanctions it has proposed and will ensure that the Base Monetary Penalty is proportionate, when evaluated together with these other sanctions.</p>

WHAT'S NEW AND WHAT DOES IT MEAN?

1. SANCTION CALCULATION METHODOLOGY

- The implementation of a more 'formulaic' approach to calculating sanctions might be welcomed if it ensures a more informed dialogue between firms, individuals and the Central Bank on their respective positions regarding a proportionate outcome for any investigation.
- There is also very limited information in the Guidelines as to how any engagement between the Subject and the Central Bank may be conducted regarding the parties' respective views on a proportionate financial sanction.
- However, there is less clarity in the methodology than that provided by other regulators, such as that set out in the UK Financial Conduct Authority's Decision Procedure and Penalties Manual.
- The approach Subjects should take when seeking to inform the regulator's view of a proportionate financial sanction remains as unclear as it is under the current ASP. An Investigation Report and Final Report (following submissions from the Subject) will not include any recommendation as to whether or what sanction might be appropriate.
- However, a response to an Investigation Report can, in principle, include a Subject's view, supported by evidence, as to the materiality, severity and impact of any alleged contraventions which will be relevant to the calculation of sanctions because there does not appear to be an express prohibition on including those observations (and any associated evidence) in any response at that stage.
- There also does not appear to be any other bar to firms raising more technical points at this stage, such as their views as to the appropriate revenue or 'starting point' for sanctioning purposes. Indeed the regulator may, in principle, request information relevant to this issue during the course of the investigation.
- There is little detail on how the Central Bank will assess the appropriate 'starting point' in any particular case. The focus appears to be on the amount of revenue earned by a firm by reference to the matters under investigation. This is in contrast to other regulators, such as the UK FCA who provide more detailed guidance and are more focused on assessing the financial benefit to a firm or individual or any particular contravention, rather than the overall financial 'materiality' of the product line or area affected by the contravention(s) as a whole or the overall size of the relevant part of a Subject's business.
- There is also little detail on how the Central Bank will assess the relevant 'severity level' to be applied. Again, this is in contrast to other regulators, such as the UK FCA, which lists out specific factors in determining severity such as whether a firm had previously been told about the regulator's concerns regarding an issue, whether the regulator had issued published materials setting out these concerns or whether the regulator had called publicly for an improvement in standards in a particular area. Subjects might therefore consider other sanctioning regimes as a 'checklist' of factors to consider when making any submissions as to the 'severity' level that should be applied in any particular case.

2. SANCTIONING FACTORS

- Broadly the sanctioning factors remain similar to those set out in the Central Bank's 2019 Sanctions Guidance (**2019 Guidance**), with some updates including for individuals.

As an example, the Guidelines now refer to four levels of awareness giving rise to higher sanctions:

- » dishonesty
- » intention
- » negligence (this is a new addition)
- » recklessness
- The Central Bank gives no further guidance on how to distinguish these. The borderline between negligence and recklessness can be complex in some cases. This is in contrast with the UK FCA which gives more guidance by, for example, referring to recklessness as including appreciating there was a risk that actions/inaction could result in a breach and failing to adequately mitigate that risk.
- There are additional factors that are stated to be relevant only to sanctions against individuals. For example, if an aggravating factor applies regarding a firm's narrowing the scope of redress/compensation or failing to address systemic weaknesses, an individuals' involvement in such failures is expressly called out. An individual's seniority and level of responsibility/nature of any role they performed at the time of any breach is relevant. There are also bespoke sanctions for individuals. For example, any matter relevant to the financial position of the individual and the importance of promoting a culture of compliance with the IAF Conduct Standards through the setting of sanctions could be relevant.
- There are some clarifications compared to the 2019 Guidance. In order to be considered a neutral or mitigating factor, any reporting of a contravention by a Subject must be specific to the underlying contravention, open and transparent and cannot be included in more 'general' reporting. Additionally, there is now reference to a failure to 'appropriately escalate' a contravention, alongside a failure to report, which reflects expectations in the new IAF Conduct Standards.
- There are also some important changes to be noted. A section on cooperation from the 2019 Guidance appears to have been deleted which referred, as a mitigating factor, to firms proactively identifying methodologies for document identification during the investigations which could facilitate saving time, cost and resources for the regulator. This might indicate a heightening of the regulator's expectation as to a Subject's cooperation during discovery exercises. The specific factor of a Subject voluntarily providing privileged material is also now listed as a mitigating factor (although given the fundamental entitlement to assert legal privilege, failure to do so is not and cannot be an aggravating factor).

07/ HIGH COURT CONFIRMATION

OVERVIEW

Confirmation of Sanctions Agreed by way of Settlement

It will be necessary for the High Court to confirm any sanctions which are agreed through one of the settlement processes. The High Court will do so, unless it determines that the sanction imposed is “manifestly disproportionate”.

Where the High Court does not confirm a sanction agreed under a settlement process, it will remit the matter for reconsideration by the Central Bank and the firm together with its recommendations.

Confirmation of Inquiry Decision

An Inquiry Decision (or where appealed and not set aside, an IFSAT decision) will also not take effect until the sanction imposed is confirmed by the High Court.

The High Court will confirm the sanction unless it determines that either:

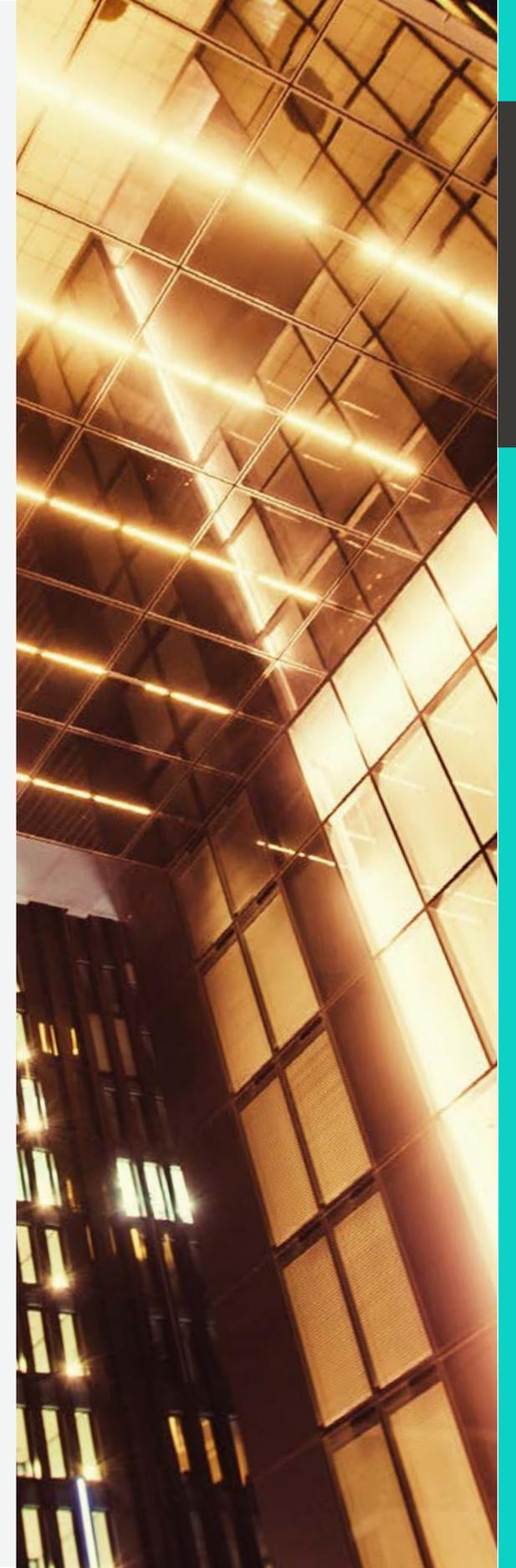
- the Inquiry/IFSAT “*made an error of law, which is manifest from the record of the decision and fundamental so as to deprive the decision of its basis*”; and/or
- any sanction imposed is “*manifestly disproportionate*”.

If the High Court does not confirm the relevant decision, it may substitute, set aside, or remit the matter to the Inquiry Members or IFSAT for reconsideration.

In all cases, a confirmed decision will take effect as a Court order on either the date of the High Court’s decision or such later date as specified in its decision.

WHAT’S NEW AND WHAT DOES IT MEAN?

- This entirely new process is introduced to address the fair procedures requirements laid down in the *Zalweski* judgment. The fact that the High Court must consider whether a sanction imposed is ‘manifestly disproportionate’ will require some level of assessment of the reasons for reaching a particular sanction.
- It remains to be seen in practice how much detail the Central Bank will disclose to a Subject and/or the High Court to facilitate this assessment. Under the current ASP, little explanation is often provided during settlement engagements as to how a particular potential sanction was arrived at and this may change as a result of the Court confirmation process.



08 / INQUIRY PROCESS

OVERVIEW

The Central Bank may decide to hold an Inquiry, which is held in public, where it believes that an SPC has been committed by a firm or individual. As before, the Guidelines emphasise that although the Central Bank must observe the rules of procedural fairness, it does not have to adhere to the rules of evidence and that the Inquiry process is intended to be as efficient as possible.

Members of the Inquiry

Inquiry Proceedings Chair

The Inquiry Chair is the person who oversees the Inquiry and who has functions and powers during the Inquiry proceedings. If a committee of Inquiry Members are appointed, then a legally qualified chairperson will be appointed to act as the Inquiry Chair.

Role of the Enforcement Division

A ‘qualified person’ is assigned to present the evidence and findings of the investigation to the Inquiry, which will likely be by the Enforcement Division team. It will

be the Enforcement team’s responsibility at the Inquiry to:

- deliver the opening and closing statements
- make submissions to the Inquiry
- lead evidence and examining witnesses
- manage settlement discussions, and
- manage any other functions necessary to the previous listed functions and to the presentation of the results to the Inquiry.

Role of the Regulatory Decisions Unit (RDU)

The RDU acts as a registrar to the Inquiry by performing administrative duties. In addition, the RDU provides advice to the Inquiry Members in respect of Inquiry procedures, drafting and research. It is important to note that it is not the RDU’s role to provide legal advice to the subject matter of the Inquiry or to adjudicate on matters that are before the Inquiry.

Legal Advisor to the Inquiry Members

Inquiry Members can request that one or more legal practitioners, who can be either solicitors or barristers, act as their legal advisers. The legal advisor will, for example, provide advice on questions of law, submit

legal submissions and intervene during the Inquiry hearing, as required.

Third Party Firms

Any other firm can make an application to the Inquiry Members to request to have a role in the Inquiry, when that firm has an interest in the subject matter of an Inquiry involving an individual who is presently or previously is/was in a CF role in a firm. Following such an application, the firm may be invited to make submissions to the Inquiry in respect of:

- the nature of its interest, and
- the type of role the firm is seeking to fulfil.

Further information and legal submissions may also be sought by the Inquiry member, the Subject or Enforcement Division.

Witnesses

A witness in the context of the Inquiry process is an individual who can provide relevant information to an Inquiry (this can include an expert witness or the Subject themselves). In order to provide evidence to the Inquiry, the witness may have to submit a written statement and certain documents to the Inquiry, as well as attend the Inquiry hearing

itself to give oral evidence. Witnesses can seek legal advice in respect of their attendance before an Inquiry and, subject to permission from the Inquiry Member, a witness may be allowed to be represented before an Inquiry.

Commencing an Inquiry

The Inquiry process starts with the issuing by the RDU of a Notice of Inquiry. This summarises, at a very high level, the nature of contraventions being referred. This is therefore an important framework for the proceedings before the Inquiry, together with the final Investigation Report.

Once the Inquiry is established, an Inquiry Management Questionnaire will be issued to participants. This is designed to narrow any issues ahead of the Inquiry hearing and to decide if an Inquiry Management Meeting is required. The purpose of an Inquiry Management Meeting is to consider any preliminary applications and issue any directions in respect of the Inquiry. Applications can include requests that hearings be heard in private (with the presumption being they will be in public), seeking discovery, the provision of witness evidence or the referral to the High Court on a point of law.

Treatment of Confidential Information

The Guidelines importantly clarify that a participant in the Inquiry may disclose confidential information to a witness, if they obtain prior written consent from the Inquiry, to assist in witness familiarisation or the preparation of witness statements.

Determining Contraventions and Sanction at Inquiry

Whilst the Inquiry may request that any submissions on the alleged contraventions be dealt with in writing, many will likely also involve an oral hearing. This will involve preliminary submissions from the parties if necessary, the taking of oral evidence from witnesses and closing submissions from the parties. Before determining any appropriate sanction, the Inquiry will also invite submissions from the participants by reference to the sanction guidance outlined above.

Where a Subject has acknowledged the commission of a contravention under a settlement process, the Central Bank may still move to an Inquiry to determine the appropriate sanction if that was not included in the settlement.

Inquiry Publication Notice

A public statement will be issued when a determination is made at the Inquiry stage if the Subject of the investigation has committed a prescribed contravention and/or a sanction is imposed on the Subject. Certain findings and details cannot be published, such as any publications or details:

- that are confidential or relate to the commission of an offence;
- that would unfairly prejudice a person's reputation; and
- that would disclose certain confidential information.

If deemed appropriate, the Central Bank may give participants and third parties the opportunity to provide submissions on the Inquiry Publication Notice where they are affected by the material in the publication. Ultimately, however, the Inquiry Members will determine the information that will be published.

Lastly, the Guidelines provide that the Central Bank can issue a market commentary on the outcome of the Inquiry, which can focus on firstly, the market aspects of the case, and secondly, how it aligns with the objectives of the Central Bank.

WHAT'S NEW AND WHAT DOES IT MEAN?

- The Guidelines appear to attempt a balance between ensuring efficiency of an Inquiry and avoiding uncertainties from limited detail in any procedural rules. This balance is welcome, particularly the clarification of the role of the Enforcement Division in 'leading' the evidence to be put forward and assessed in determining whether contravention(s) have occurred.
- For Inquiries dealing with individuals, the role of a firm which has admitted a contravention which the individual is alleged to have 'participated in' can become complex. Whilst the firm has already admitted the contravention, depending on the level of detail now included in Investigation Reports during the investigation into the firm, new information and/or new emphasis on the facts, materiality or seriousness of the matters considered could be presented at the Inquiry in a public forum. This is an important consideration for a firm in deciding whether and/or how to participate in an Inquiry into current or former employees.
- The treatment of confidential information is covered, to some extent, including the ability for the parties to request that an Inquiry move to private session to deal with confidential information. Further engagement with both the Enforcement Division during the early stages of an investigation and with the Inquiry will become more necessary and critically important if a firm has provided legally privileged material to the Central Bank at any stage of the process. This is to ensure adequate procedures are agreed between the parties and put in place for the Inquiry Hearing and avoid this being referred to at a public Inquiry hearing and/or otherwise risking losing that privilege as against any other parties.
- If the Central Bank's enforcement approach going forwards may involve more careful scrutiny against individuals, firms should consider carefully how the risks arising from a settlement can be managed if an Inquiry proceeds by reference to individuals. This is the case even if enforcement is commenced against individuals relating to a contravention of IAF Conduct Standards, rather than for 'participation' in a contravention by the firm, if the underlying facts are closely linked.

09 / APPLYING THE ASP TO INDIVIDUALS

OVERVIEW

The Central Bank may decide to commence an investigation in respect of any individual performing a Controlled Function in two ways:

- for participating in the commission of a prescribed contravention by the firm; and/or
- for committing a prescribed contravention directly themselves.

An individual “participating” in the commission of an prescribed contravention by the RFSP

Under the current ASP regime, the Central Bank can only bring an enforcement action against an individual in circumstances where that individual:

- is or was a “*person concerned in the management*” of a firm and
- who “*participated in the commission of a prescribed contravention*” by that firm.

While this latter ‘participation’ mechanism is technically retained within the new ASP regime, it has been altered to apply in respect of persons in Controlled Functions rather

than the narrower “*person concerned in the management*” of the firm.

While this is technically a broadening of the scope of who may be pursued for breaches committed by the firm, enforcement actions are likely to remain a regulatory focus in relation to persons in more senior positions with responsibility for oversight of an area or specific project. In the Consultation paper accompanying the Guidelines, the Central Bank suggests that it would prioritise enforcement action in respect of individuals by reference to factors such as seniority, the level of responsibility of the individual and the degree of responsibility of the individual for the relevant breach committed by the firm.

An individual “committing” a prescribed contravention

The ‘participation link’ referred to above is also removed for many circumstances given the scope of the new Duty of Responsibility under SEAR and the Conduct Standards under the IAF more generally. The IAF Act has further expanded the Central Bank’s enforcement powers vis-à-vis individuals by providing that an enforcement action may

now be brought directly against an individual for breach of the SEAR Duty of Responsibility or of any of the Additional Conduct Standards or Common Conduct Standards. For example, if a firm commits a prescribed contravention:

- the Central Bank may allege that a PCF failed to take ‘reasonable steps’ to prevent that contravention occurring and therefore did not comply with the SEAR Duty of Responsibility;
- the Central Bank may allege that a PCF or CF1 failed to take ‘reasonable steps’ to e.g. ensure that the relevant business area for which they were responsible was controlled effectively and therefore did not comply with the Additional Conduct Standards; and/or
- the Central Bank may allege that a CF did not comply with a Common Conduct Standard e.g. when engaging with customers and that this involved a breach of those Standards by that individual.

WHAT’S NEW AND WHAT DOES IT MEAN?

- It is important to note that personal liability for breaching the SEAR Duty of Responsibility or the Additional or Common Conduct Standards is not one of ‘strict liability’: in each case it must be proven that the individual failed to take relevant ‘reasonable steps’ to prevent a firm’s contravention or to comply with the requisite conduct standard.
- In practice, although across the industry references are made to the ‘participation link’ being ‘broken’, an investigation against an individual for failing to comply with the SEAR Duty of Responsibility or an aspect of the Conduct Standards will still require a relatively detailed factual enquiry into what controls were in place, and what steps the individual actually took to prevent the firm’s contravention or to comply with the relevant aspect of the conduct standards. This in turn will likely still require a detailed factual investigation by the regulator before an investigation can be settled or move to Inquiry.
- As with enforcement investigations into prescribed contraventions by firms, ultimately if a matter proceeded to Inquiry, the Inquiry would need to be satisfied that a contravention of the SEAR Duty of Responsibility or relevant aspect of the Conduct Standards had been proven to the requisite standard (balance of probabilities). Again, this means in practice that a relatively detailed factual enquiry may be necessary as part of any enforcement investigation into individuals under SEAR or the Conduct Standards.

10/ YOUR REGULATORY INVESTIGATIONS TEAM

Our Regulatory Investigations and Financial Regulatory Advisory teams work seamlessly to navigate technical and strategic issues during any regulatory supervisory engagement or enforcement investigation.

We work hand in hand with other financial services specialists in our Insurance, Banking, Corporate Governance and Investment Funds practices to bring you market knowledge and industry expertise.

Our approach combines technology led investigation solutions through our ALGSolutions Group and draws on our market leading experience of implementing and training on SEAR and IAF conduct requirements.

FINANCIAL REGULATION & INVESTIGATIONS



Dario Dagostino
Partner
Head of Regulatory Investigations Group



Patrick Brandt
Partner



Mark Devane
Partner



Kevin Allen
Partner



Chloe Culleton
Partner



Christopher Martin
Of Counsel



Laura Corrigan
Senior Associate



Sinead Hayes
Senior Associate



Aisling Ennis
Solicitor

INSURANCE



James Grennan
Partner



Laura Mulleady
Partner



Sinead Lynch
Partner



Emma Martin
Of Counsel

ASSET MANAGEMENT & INVESTMENT FUNDS



Kerill O'Shaughnessy
Partner



Stephen Carson
Partner



Lorena Dunne
Partner

EMPLOYMENT



Duncan Inverarity
Partner



Noeleen Meehan
Partner



Michael Doyle
Partner

CORPORATE GOVERNANCE



Paul White
Partner

BANKING



Peter Walker
Partner

ALG SOLUTIONS



Charles Carroll
Partner



Gillian McDonald
Partner