



## Update on Changes to the CBI's Administrative Sanctions Procedure Business Law Committee

February 2024

### Overview

The Central Bank of Ireland (**CBI**) has published updated Administrative Sanctions Procedure (**ASP**) Guidelines together with a Feedback Statement following its consultation on the draft guidelines last year.

The Law Society of Ireland participated in this public consultation and made a submission to the CBI in June 2023.

The Feedback Statement and ASP Guidelines outline a number of changes to how the ASP will operate. The main changes relate to improving the rights of the defence at the investigation phase, more flexibility on its rules on confidentiality, permission to bring an independent legal representative at investigations and better protection for legal privilege.

The recent Irish Financial Appeals Tribunal (Ifsat) decision<sup>1</sup> which concerned the CBI's procedures for assessing fitness and probity applications of executives will likely also have implications for the CBI's ASP procedures.

### 1. Introduction

- a. The CBI recently adopted revised guidelines containing procedures that it will apply when investigating and sanctioning senior executives and other employees for violations of financial services rules. Under the new rules set out in the Central Bank (Individual Accountability Framework) Act 2023 (the **IAF Act**) and associated guidelines, the CBI can fine people up to €1 million and can also impose other sanctions like lifetime work bans.
- b. A CBI public consultation on the Individual Accountability Framework (**IAF**) procedures attracted submissions from 13 stakeholders, including one from the Law Society of Ireland. The primary focus of the Law Society submission was due process rights of defendants under investigation.
- c. The IAF has its roots in the tracker mortgage scandal in Ireland and the CBI first outlined proposals for the IAF in its report, *Behaviour and Culture of the Irish Retail Banks*, which was published in July 2018. The stated aim of the IAF is to establish individual accountability of financial services executives in order to establish healthy cultures and effective governance in regulated financial services providers.
- d. The CBI concluded in the Behaviour and Culture Report that the IAF, which allows the CBI to pursue individuals directly for their misconduct, was

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<sup>1</sup> AB v. CBI Ifsat Appeal No. 029/2022

necessary to help bring about significant cultural change in the Irish financial services industry. The CBI has taken the position that this would need to apply regardless of whether or not the firm for which an individual works has breached financial services legislation.

- e. On 9 March 2023, the IAF Act was signed into law.<sup>2</sup> Following the introduction of the IAF Act, the CBI published: Consultation paper 153 (Enhanced governance, performance and accountability in financial services) (CP153) containing a number of regulations.<sup>3</sup>
- f. In June 2023, the CBI commenced a second public consultation exercise on its ASP Guidelines and. following completion of that public consultation exercise in September 2023, the CBI published its [Feedback Statement](#) in November 2023 to respond to stakeholders' submissions in terms of resulting changes to the proposed approach to the ASP.
- g. A very recent development is important to mention here. In January 2024, the Irish Financial Appeals Tribunal (Ifsat) issued a decision that is highly critical of CBI due process and procedural safeguard standards (*AB v. CBI* Ifsat Appeal No. 029/2022). While that decision concerned the CBI's procedures for assessing fitness and probity applications of executives, it will likely also have implications for the CBI's IAF procedures. In the decision, former Supreme Court judge John MacMenamin said the CBI's decision-making process in the case was flawed and the appellant was "*denied fair procedures at every stage of the process.*"
- h. According to this Ifsat decision, "[a] person subject to [CBI] investigation would undoubtedly be entitled to the range of procedural rights set out in the case law. These would include the right to fair notice of the issues to be covered or the allegations made; notice of the evidence to be relied on; the right to examine and cross-examine accusers; the right to legal representation; and the right to an independent decision maker, free from bias or prior involvement" (at para. 295).
- i. Whether the CBI's IAF procedures and guidelines fully or adequately observe and protect these procedural and due process rights may be open to question. Following this Ifsat decision, the CBI is reportedly commissioning independent review of its fitness and probity procedures. Whether this review may extend to the CBI's IAF procedures is not clear.

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<sup>2</sup> The IAF Act amends the following pieces of legislation: · The Central Bank Reform Act, 2010 (2010 Act). · The Central Bank (Supervision and Enforcement) Act, 2013. · The Central Bank Act, 1942 (1942 Act).

<sup>3</sup> Annex 1 to CP153, which contains the following draft regulations:

- Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Senior Executive Accountability Regime) Regulations 20XX (SEAR Regulations);
  - Central Bank Reform Act 2010 (Section 21(6)) Regulations 20XX (Certification Regulations); and
  - Central Bank Reform Act 2010 (Sections 20(1) and 22(2A) – Holding Companies) Regulations 20XX (Holding Company Regulations) (Collectively, "the Regulations").
- Annex 2 to CP153, which contains draft detailed guidance setting out the CBI's expectations for the implementation of the SEAR, the Conduct Standards (which will be applied to individuals) and certain aspects of the enhancements to the Fitness and Probity regime (IAF Guidance).

## 2. Rights of Defence improved at the Investigation Stage

- a. In its Feedback Statement the CBI states that “ ... *the subject of the investigation will be given sufficient opportunities to engage with the responsible authorised officer at each stage of the investigation*”.<sup>4</sup>
- b. Reflecting this commitment, the procedures now provide an opportunity for a person under investigation to respond to allegations against them at an earlier stage in the investigation process.<sup>5</sup> This is new and welcome.
- c. Every investigation starts with issuance of a Notice of Investigation to the executive under investigation. This notice sets out “... *each prescribed contravention and the relevant conduct which is under investigation*”.<sup>6</sup> The Notice of Investigation is followed by an evidence gathering stage and, on completion of the investigation, an Investigation Report.
- d. The procedures now provide opportunity for the defence team to respond to the Notice of Investigation, and also to any amendment to a Notice of Investigation following evidence gathering by the CBI investigating team. This improves the rights of defence at the investigation phase.<sup>7</sup>
- e. The procedures also now provide that a Draft Investigation Report will be issued to the party under investigation in advance of issuance of a final Investigation Report. This too is new and welcome. By providing for this additional opportunity to challenge and contest the investigation’s preliminary findings, the CBI improves process rights and the rights of defence at this important stage in the process.
- f. Greater clarity and specification on the important role of the responsible authorised officer (**RAO**), charged with investigating suspected breaches and drafting an Investigation Report, in the Guidelines is also welcome. Following the public consultation exercise, the CBI has made clear in the Guidelines that the RAO is obliged to keep the subject of an investigation up to date on developments in the investigation.
- g. The CBI has also taken on board comments regarding the timeframe for a defendant to respond to the Draft Investigation Report, and has taken a more nuanced outlook on the period for such response. The final form guidelines provide the period to respond “ ... *will vary from case to case but will not be less than 7 days*”.<sup>8</sup>

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<sup>4</sup> Feedback Statement, Page 9.

<sup>5</sup> ASP Process Diagram, at page 12, repeated in a new Investigation Process Diagram, at para. 42 page 16.

<sup>6</sup> Procedures at para 20, page 9

<sup>7</sup> A person under investigation will also have sight of and opportunity to respond to a Draft Investigation Report, which response must be taken into account by the CBI investigator in the Final Investigation Report.

<sup>8</sup> The draft IAF Guidelines provided that responses to the Draft Investigation Report, “...must be made within 7 days from the date on which the notice is served, or such longer period as the Responsible Authorised Officer considers necessary to give the Subject an opportunity to respond” (at para. 88). In its Feedback Statement, the CBI states that “ ... in many cases a period of 7 days for making submissions in respect of a draft investigation report would be insufficient to allow the subject of the investigation to

- h. Furthermore, the IAF guidelines state that “[t]he period stated will be set by the Responsible Authorised Officer following consideration of matters such as the complexity of the issues, the contents of the Draft Investigation Report, the period necessary to give the Subject a fair opportunity to respond, and the timely progression of the investigation report process” (*ibid*). This enhances the fairness of the process and allows a longer timeframe where this is merited based on the Responsible Authorised Officer’s consideration of such issues.
- i. The IAF guidelines also make some enhancements to due process safeguards. They now contemplate additional checks and balances, clarifying that important investigative and decision-making functions will be split between separate CBI officials. Thus, the final report of the CBI official investigating the alleged wrongful conduct will be subject to review by a CBI “decision maker... who has had no involvement in carrying out the investigation”. This adds a greater degree of objectivity to the process.

### 3. More Flexibility on Confidentiality

- a. According to the IAF guidelines, “... all investigations are confidential and all information and/or material related to an investigation is confidential information”.<sup>9</sup> Disclosure of any such information, other than with the CBI’s prior written consent or as is required by law is a serious and sanctionable violation that could have “serious consequences” for the defendant.<sup>10</sup>
- b. In its Feedback Statement, the CBI states that “... recipients of confidential information may disclose it where required to do so by law or to their legal advisor”. Further, the Feedback Statement clarifies that “... the Central Bank’s authorisation is not required in such circumstances” (*ibid*).
- c. As to when this “required by law” exception may apply, the CBI explains that it “... is not in a position to determine such matters for firms or individuals. It would be for the recipient to seek legal advice on what obligations they may have and satisfy themselves as to whether a disclosure of information is required by law” (*ibid*). Examples listed in the CBI’s Feedback Statement were “... a director’s duties to a company, market abuse rules, fitness and probity obligations, securities law and other regulatory requirements” (*ibid*).
- d. Further, the CBI also recognises that there may be other circumstances where information needs to be shared. According to the CBI’s Feedback Statement, “... it is clear from the responses received to the ASP Consultation, that there are other circumstances where a recipient will legitimately need to disclose confidential information to another person. The Central Bank will authorise such disclosure where it is considered reasonably necessary to do so. Any

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consider the report and, if necessary, collate information and take advice before making submissions” (at page 14). Accordingly the final form Guidelines provide the period to respond “... will vary from case to case but will not be less than 7 days” (at para. 999).

<sup>9</sup> at para. 50, page 19

<sup>10</sup> at para 51, page 19

*requests from a recipient for such disclosure will be considered by the Central Bank in a timely manner.”*

- e. Consistent with this commitment, the IAF guidelines provide that “[t]he Central Bank will authorise disclosure where it is considered reasonably necessary in the circumstances. Any request by a recipient for such authorisation will be considered by the Central Bank in a timely manner”.<sup>11</sup>
- f. In addition, the IAF guidelines confirm that a suspect “... is not prevented from disclosing the confidential information to their legal representative”.<sup>12</sup> Whether this extends to expert witnesses (e.g., corporate governance or economic experts) engaged by the legal team to defend the case is unclear, however.

#### **4. Improved Access to Lawyers & Legal Privilege**

- a. The CBI has amended certain parts of the IAF guidelines to enhance the provisions around a defendant’s right to a lawyer and independent legal representation when under investigation. The final form IAF guidelines explicitly state that “[w]hen attending interview, an interviewee may be, though is not expected or required to be, accompanied by an independent legal representative”.<sup>13</sup> Even if caveated, this explicit affirmation of ability to be accompanied by a lawyer is welcome.
- b. Why the IAF guidelines state that a lawyer is “not expected or required” at interview stage (when a defendant may be expected to give a formal statement) is not explained. It is notable too that the IAF guidelines seek to restrict the role of a lawyer at any such meeting somewhat. The IAF guidelines state that “[t]he role of such a representative is advisory only and they will not be permitted to respond to questions on behalf of the interviewee” (*ibid*). This stipulation is questionable to the extent it may unduly limit a solicitor from protecting a client’s fundamental rights, for example, the right against self-incrimination.
- c. As regards legal privilege, the Central Bank’s Feedback Statement “... accepts that the assertion of privilege is a legal right and that the subjects of investigations are entitled to assert it and may wish to do so”.<sup>14</sup> Accordingly, the Central Bank states that “[t]he decision not to provide privileged material will be considered by the Central Bank to be a neutral factor and will not impact on whether the subject of an investigation is otherwise given credit for cooperating with the investigation” (*ibid*).
- d. At the same time, however, the IAF Guidelines continue to encourage the provision of privileged material as an example of exemplary cooperation. Where the subject of an investigation chooses to waive their right to assert privilege and in so doing provides the Central Bank with access to information

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<sup>11</sup> at para. 53, page 19

<sup>12</sup> at para. 52, page 19

<sup>13</sup> at para. 67, page 22

<sup>14</sup> at page 32

that might not otherwise be available to it, the Central Bank considers that it is correct to recognise this as exemplary cooperation.<sup>15</sup>

## **5. Softened Approach to Settlement Negotiations**

- a. The IAF guidelines no longer state that the controversial Undisputed Facts Settlement procedure will be the CBI's primary or preferred settlement procedure. This is welcome. The Undisputed Facts Settlement procedure is available only before a CBI investigation is completed and, as the name suggests, allows defendants limited opportunity to contest the CBI's findings of fact.
- b. The CBI's policy is likely still, however, to try to settle cases whenever possible and this will doubtless be the CBI's preferred approach in the vast majority of cases. Advising a client facing large fines, work-bans, and damage to their good name to settle the case raises complex issues for the defendant's lawyers.
- c. In its submission to the public consultation process, the Law Society expressed concern that the Central Bank's settlement procedure, used to date to impose fines of over €400 million on firms, may lawfully be so heavily used when prosecuting individuals rather than businesses. The Law Society understands that the settlement procedure has accounted for all, or substantially all, fines imposed by the Central Bank since first establishment of the Central Bank's administrative fining process in 2006 (by the Central Bank and Financial Services Authority of Ireland Act 2004).

## **Conclusion**

The recent IFSAT's decision is a significant one, as it highlights the importance of fair procedures and natural justice in the CBI's decision-making process, and the role of IFSAT in ensuring the accountability and transparency of the Central Bank. This is illustrated by the Central Bank's decision to commission an independent review of the fitness and probity approval process on foot of IFSAT's findings.

The Law Society welcomes with some caution the new ASP Guidelines and Feedback Statement from the CBI. These new guidelines consolidate and enhance the previous guidance from the CBI and underpin and support the IAF, including the senior executive accountability regime. It is important to note, however, that a question remains whether the CBI's IAF procedures, guidelines and practices fully or adequately observe and protect minimum procedural and due process rights and safeguards consistent with the recent IFSAT ruling.

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<sup>15</sup> CBI Feedback Statement, at page 32