

Overview of Changes to the ASP

A RECAP ON THE UPDATED SCOPE OF THE ASP

Enforcement: Breaking the 'participation link'	Reference
<p>The scope of the ASP has been expanded under the Act to allow the CBI to enforce directly against individuals performing controlled functions (CF) including pre-approval CF (PCF) roles in a regulated financial services provider (RFSP).</p> <p>Breaking the 'participation link' is intended to facilitate individual accountability as the CBI will not be required to prove breaches against an RFSP before sanctioning an accountable individual.</p> <p>The updated scope of the ASP (for breaches pre and post-dating the commencement of the Act on 19 April 2023) is summarised below.</p> <p>Breaches occurring prior to 19 April 2023</p> <ul style="list-style-type: none">• Persons concerned in the management of an RFSP who participated in a breach by the RFSP. <p>Breaches occurring on or after 19 April 2023</p> <ul style="list-style-type: none">• RFSPs;• Individuals committing a prescribed contravention; and• A person performing a CF role who participates in a prescribed contravention by an RFSP.	<ul style="list-style-type: none">• Part 4, Chapter 1 of the Act

What new breaches can the CBI investigate under its ASP?	Reference
<p>CBI will now be able to investigate and enforce against:</p> <ul style="list-style-type: none">• Individuals, for suspected breach of the new duty of responsibility which is due to come into effect in mid-2024.<ul style="list-style-type: none">• The CBI has confirmed that the duty of responsibility, a key part of the SEAR framework, won't come into effect until July 2024.• When it comes into effect, PCF holders will have a duty of responsibility to take any steps that are reasonable in the circumstances in order to avoid the occurrence of a prescribed contravention in the area of the RFSP's business for which they are responsible.• RFSPs and individuals, for suspected breach of the new Conduct Standards which are due to come into effect from 29 December 2023.<ul style="list-style-type: none">• When they come into effect, a person who performs a CF, PCF or any other function that allows them to exercise a significant influence on the conduct of the RFSP's affairs will be required to take any steps that are reasonable in the circumstances to ensure that, when commenced, Conduct Standards are met.• There will be three different types of Conduct Standards: business (applicable to RFSPs), common (applicable to CFs) and additional (applicable to PCFs and those exercising significant influence). Read more about these three sets of standards here.	<ul style="list-style-type: none">• s6 of the Act

INVESTIGATION PROCESS

What changes have been introduced to the ASP investigation process?	Reference
<p>The Draft ASP Guidelines incorporate the following changes to the investigation process arising from the Act:</p> <ul style="list-style-type: none"> • a Responsible Authorised Officer (RAO) will be the CBI officer primarily responsible for the running of an investigation; • a new statutory procedure for giving notice of investigations has been introduced: the “Investigation Letter” is now replaced by a “Notice of Investigation”; and • a new statutory power to discontinue an investigation has been introduced. If an investigation is discontinued, the RAO must give reasons for discontinuance. 	<ul style="list-style-type: none"> • s43 of the Act and para 45 of the Draft ASP Guidelines • s15 of the Act and paras 48-54 of the Draft ASP Guidelines • s43(5) of the Act and paras 74-78 of the Draft ASP Guidelines
What changes have been introduced to the disclosure of documents?	Reference
<p>The Draft ASP Guidelines incorporate new guidance on disclosure of documents during an investigation:</p> <ul style="list-style-type: none"> • It is expected that all disclosure be concluded at the investigation stage, prior to the commencement of the statutory inquiry; and • any request for further disclosure after the investigation stage has concluded must be made in writing to the Inquiry Members and must include <i>‘reasonable, cogent and compelling reasons’</i> as to why the further disclosure is necessary. When making their decision, Inquiry Members will have regard to whether the documents requested are relevant and whether the request itself is fair, necessary and proportionate. 	<ul style="list-style-type: none"> • part 3 of Draft ASP Guidelines • paras 191 - 195 of the Draft ASP Guidelines
What changes have been introduced regarding privilege/disclosure agreements?	Reference
<ul style="list-style-type: none"> • The Act expressly allows for the use of disclosure agreements relating to privileged material submitted to the CBI. As discussed in our previous briefing here, ordinarily, an owner of privilege <i>may</i> be deemed to have implicitly waived their entitlement to maintain a claim of privilege by disclosure of documents. However, disclosure agreements, or “safe harbour agreements”, allow persons to voluntarily submit privileged legal material to the CBI without such limited disclosure constituting a waiver of privilege to third parties or in respect of freedom of information requests. • These types of disclosure agreements have been a feature in practice in ASP investigations for some time and they are now expressly addressed in the Draft ASP Guidelines having been put on a statutory footing by the Act. • Separately, the Act also introduced a new provision which allows for absolute privilege from defamation actions arising from investigations and statutory inquiries, communications of an authorised officer, any statement or submission made by or on behalf of any person in the course of the investigation and an investigation report. 	<ul style="list-style-type: none"> • s82 of the Act and paras 64 – 66 of the Draft ASP Guidelines • s60 of the Act and paras 46 - 47 of the Draft ASP Guidelines • s68 of the Act and paras 67 and 160 of the Draft ASP Guidelines • Draft ASP Guidelines

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Confidentiality Obligations	Reference
<ul style="list-style-type: none"> Where confidential information is being disclosed during an investigation/inquiry to an external party, including the subject of an investigation/inquiry, the recipient is now expressly prohibited from further disclosing that information to anyone other than their legal representative unless required to do so by law or permitted by the CBI in writing. Further, an inquiry chair may order, when there are reasonable grounds to do so, that specified information relating to specified proceedings before the inquiry, if such proceedings are being held in public, shall not be disclosed. A person who contravenes such an order shall be guilty of an offence. 	<ul style="list-style-type: none"> s60 of the Act and paras 46 - 47 of the Draft ASP Guidelines s59 of the Act and para 190 of the Draft ASP Guidelines
What changes have been introduced to ASP investigation reports?	Reference
<p>The Act introduced a new requirement for the CBI to provide a <i>draft</i> investigation report, to which the subject has a right to respond, followed by a final investigation report. This requirement is reproduced in the Draft ASP Guidelines.</p> <p>The Draft ASP Guidelines set out further detail in respect of the mechanics of this new process. It is proposed that:</p> <ul style="list-style-type: none"> the RAO will provide a draft investigation report to the subject of the investigation along with a notice inviting the subject to make written submissions on the draft report; these submissions must be made within 7 days, or such longer period as the RAO considers necessary; and following consideration of these submissions, the RAO will issue a final investigation report. 	<ul style="list-style-type: none"> s43 of the Act and para 23 of the Draft ASP Guidelines paras 79 - 98 of the Draft ASP Guidelines
INQUIRY PROCESS	
What changes have been introduced to the ASP inquiry process?	Reference
<p>The Draft Guidelines reflect the following changes to the inquiry process provided for under the Act:</p> <ul style="list-style-type: none"> new independence safeguards which ensure that persons who carry out the investigation process for the CBI are independent of those who carry out the inquiry process. Within the inquiry process, those who present submissions and evidence on behalf of the CBI must be independent of those who make findings; inquiry member appointments will be made from the Regulatory Decision Panel, as established by the Minister for Finance. The panel will include suitably qualified external experts and staff of the CBI; the introduction of a new inquiry notification process: under the Inquiry Guidelines 2014, a 'Notice of Inquiry' issued after inquiry members were appointed. Now, a 'Notice of Inquiry' will issue prior to the commencement of an inquiry and will set out the grounds on which a suspicion is based. A new 'Notice of Inquiry Hearing' will issue in advance of any hearings being held; 	<ul style="list-style-type: none"> s66 (6) - (9) of the Act s69 of the Act and para 113 of the Draft ASP Guidelines s45 of the Act and paras 102 - 106 of the Draft ASP Guidelines

What changes have been introduced to the ASP inquiry process? (cont'd)	Reference
<p>• at inquiry hearings the CBI function will be to lead evidence, examine witnesses and make submissions. The Draft ASP Guidelines propose that these functions will be carried out by the CBI Enforcement section, or legal practitioners appointed on its behalf;</p> <p>• a new civil remedy has been introduced for non-compliance at an ASP inquiry: where a person engages in obstructive behaviour at an inquiry, the CBI may apply to the High Court for an order requiring the person to comply with any request or requirement under the Act;</p> <p>• it is now codified that the civil standard of proof (i.e. on the balance of probabilities) will apply in ASP inquiries; and</p> <p>• to strengthen fair procedures, before determining any sanction to be imposed on a subject, the inquiry members will first issue an Inquiry Finding to the subject. This will address whether or not a prescribed contravention has occurred. If it is found that a contravention has occurred, the subject will be invited to make written submissions on sanctions and may request an oral sanctions hearing to be held. (<i>See more on sanctions below</i>). Once the issue of sanctions has been determined, the CBI will issue a final Inquiry Decision and will publish an Inquiry Publication Notice.</p> <p>In addition to the amendments provided for in the Act, the Draft ASP Guidelines incorporate the following additional amendments:</p> <p>• The existing guidance on the Inquiry Management Questionnaire (IMQ) under the Inquiry Guidelines 2014 has been expanded by the Draft ASP Guidelines, which now include a longer list of issues that the IMQ may seek responses on, including: whether the subject intends to seek an oral hearing or proceed by way of written procedure; issues of privilege; what matters the subject intends to dispute; and whether the subject intends to seek further disclosure. The aim here is to narrow the issues and deal with procedural issues or applications at any early stage; and</p> <p>• The Draft ASP Guidelines provide greater clarity on the procedure to be followed at an Inquiry Management Meeting (IMM) which may be held depending on the responses to the IMQ. The inquiry participants will be invited to make oral submissions in respect of matters identified in their response to the IMQ and/or in respect of any other relevant matter. The inquiry members will issue directions as appropriate and a timeline for compliance.</p>	<ul style="list-style-type: none"> • s57 of the Act and para 123 of the Draft ASP Guidelines • s61 of the Act and para 163 of the Draft ASP Guidelines • s46 of the Act and para 235 of the Draft ASP Guidelines • s64 of the Act and paras 240 – 243 and 263-270 of the Draft ASP Guidelines • para 147 of the Draft ASP Guidelines • paras 164 - 181 of the Draft ASP Guidelines

SANCTIONS

What changes have been introduced to the sanctions regime?	Reference
<p>Sanctions Applicable to Individuals</p> <p>The Draft ASP Guidelines reflect the following legislative changes in the Act in respect of sanctions that apply to <u>individuals</u>:</p> <ul style="list-style-type: none"> • Change to the disqualification sanction for individuals: individuals may now be disqualified on a more targeted basis from performing any controlled function, a particular controlled function or specified parts of a controlled function. This is different to the previous position whereby individuals were disqualified generally from involvement in the management of a regulated service provider; • A sanction has been introduced allowing for the imposition of conditions on the performance of any controlled function or part of it by an individual; and • New sanctioning <i>factors</i> for individuals: the Act introduced three factors the CBI are to have regard to in sanctioning individuals: (1) the financial position of an individual; (2) the importance of promoting a culture of compliance; and (3) an individual's seniority and level of responsibility (these sanctioning factors are non-exhaustive). 	<ul style="list-style-type: none"> • s27 of the Act and para 346 of the Draft ASP Guidelines • s27 of the Act and para 346 of the Draft ASP Guidelines • s48 of the Act and paras 349 – 359 of the Draft ASP Guidelines

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What changes have been introduced to the sanctions regime? (cont'd)	Reference
<p>Sanctions Applicable to RFSPs</p> <p>The Draft ASP Guidelines state that the CBI proposes to delete certain sanctioning factors in respect of RFSPs contained in the ASP Sanctions Guidance 2019, namely: (1) the likelihood that the same contravention will recur if no sanction is imposed; (2) prevalence of the contravention; (3) the level of turnover of a firm in its last financial year prior to the contravention; and (4) whether there are a number of smaller issues which individually may not justify a sanction but which do so when taken collectively. This means that the CBI will no longer take these factors into account when considering the appropriate sanction for an RFSP.</p>	<ul style="list-style-type: none"> • paras 349 – 359 of the Draft ASP Guidelines
What Guidance has been published regarding the methodology used by the CBI for the determination of monetary penalties?	Reference
<p>Significantly, the Draft ASP Guidelines publish the <i>methodology used by the CBI for the determination of monetary penalties</i> for firms and individuals.</p> <p>This involves the application of the following seven-step framework:</p> <ol style="list-style-type: none"> 1. <u>Determining an appropriate Starting Point Figure</u>. According to the Draft ASP Guidance, this will usually be the revenue of the entire firm or the income of the individual; 2. <u>Identifying and applying the severity level to determine the Base Monetary Penalty</u>. The CBI will apply a severity level based on a scale of 1-10 with reference to the sanctioning factor “Nature, Seriousness and Effect”, and any other relevant factors. Using that severity level, the CBI will then decide on an appropriate percentage of the Starting Point Figure to determine the base amount of the monetary penalty; 3. <u>Calculating any aggravation or mitigation</u>. The CBI may increase or decrease the Base Monetary Penalty after an assessment of the sanctioning factors “Conduct of the Firm or Individual” and “Previous Record” and any other relevant factors. There is no upper or lower limit on the extent of the increase/decrease that may be applied; 4. <u>Consider any further adjustment</u>. This will be assessed with reference to the sanctioning factor of “Other Relevant Considerations” and any other factor; 5. <u>Consider whether any maximum penalty adjustment is required</u>. The CBI must ensure that the figure does not exceed the maximum penalty of €10,000,000, (or, if sanctioning a firm, an amount equal to 10% of the annual turnover of a firm, whichever is the greater, or an amount prescribed by regulations); 6. <u>Consider the sanctions to be imposed in their totality</u>. The CBI will consider the proportionality of the sanctions in totality with any other sanctions imposed; and 7. <u>Final Monetary Penalty</u>. This is the amount arrived at following Steps 1 to 6. 	<ul style="list-style-type: none"> • paras 360 – 362 of the Draft ASP Guidelines

SETTLEMENT

What guidance is available regarding settlements?	Reference
<p>The Draft ASP Guidelines incorporate detail on how the three distinct settlement processes provided for under the Act will operate.</p> <p>Undisputed Facts Settlement:</p> <ul style="list-style-type: none"> • May be utilised where the investigation subject has: <ul style="list-style-type: none"> • Agreed to the undisputed facts provided by the CBI and further investigation is unnecessary; • Admitted to the contravention and consented to the proposed sanction(s); and • Acknowledged the proposed publication of the details of the contravention and the agreed sanction(s). • The Draft ASP Guidelines propose that the CBI may in its absolute discretion apply a percentage reduction of up to a maximum of 30% of any agreed monetary penalty proposed under the terms of the settlement. • An undisputed facts settlement is only available prior to the conclusion of the investigation process. This settlement process will not be available during the period following completion of the investigation, during which the CBI is required to prepare a draft investigation report, consider any submissions in respect of the draft report and deliver the final investigation report. • The CBI notes that the rules under the Act in respect of when these settlement procedures become available create a “settlement availability gap”. This is because the only settlement procedure available to parties between the completion of the investigation and the delivery of the final investigation report will be the no admissions settlement and the consultation paper emphasises that a no admissions settlement will not usually be accepted by the CBI. <p>Investigation Report Settlement:</p> <ul style="list-style-type: none"> • May be utilised where: <ul style="list-style-type: none"> • The CBI has considered both the final investigation report and the submissions and suspects on reasonable grounds that the investigation subject has committed and/or participated in a prescribed contravention(s); • The investigation subject has admitted to the prescribed contravention as set out in the final investigation report and consented to (1) dispense with an ASP inquiry and (2) the proposed sanction(s); and • The investigation subject has acknowledged the proposed publication of the details of the contravention and the agreed sanction(s). • The ability to enter an investigation report settlement can only arise after the investigation process has been completed and after the final investigation report has been considered by the CBI. • The Draft ASP Guidelines propose that the CBI may in its absolute discretion apply a percentage reduction of up to a maximum of 10% of any agreed monetary penalty proposed under the terms of the settlement. • The CBI Consultation Paper notes that, although this form of settlement may be open until a finding has been made at inquiry, it will not be incentivised beyond a certain point. <p>No Admissions Settlement:</p> <ul style="list-style-type: none"> • The Draft ASP Guidelines confirm the general policy of the CBI to require admissions prior to settlement. They also specify some non-exhaustive factors which indicate a lack of suitability for a no admissions settlement - these include whether the behaviour was egregious; the extent of any customer harm; risk to market; deterrence value; and whether it is in the public interest that there be accountability. • The Draft ASP Guidelines require that ASP subjects agree in writing not to deny the commission of, and/or participation in, the breach in order to successfully conclude a no admissions settlement. • The Draft ASP Guidelines provide that there is no potential discount proposed on any monetary penalties under the no admissions settlement process. 	<ul style="list-style-type: none"> • s47 of the Act and paras 289 - 297 of the Draft ASP Guidelines • para 285 of the Draft ASP Guidelines • s47 of the Act and para 285 of the Draft ASP Guidelines • para 285 of the Draft ASP Guidelines • p34 of the Consultation Paper • paras 309 - 315 of the Draft ASP Guidelines • para 285 of the Draft ASP Guidelines • p34 of the Consultation Paper

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SUPERVISORY ROLE OF THE HIGH COURT

What role does the High Court have under the ASP?	Reference
<p>The Act introduced changes in relation to the role of the High Court in confirming (1) sanctions agreed by way of settlement and (2) inquiry decisions or appeals or decisions of the Irish Financial Services Appeals Tribunal (IFSAT). The Draft ASP Guidelines reflect the new High Court process as outlined below:</p> <ol style="list-style-type: none"> <u>High Court Confirmation of Sanctions agreed by way of Settlement:</u> <ul style="list-style-type: none"> The Act introduced a new requirement that sanctions agreed as part of the undisputed facts settlement procedure and the investigation report settlement procedure be confirmed in the High Court in order to take effect. The Draft ASP Guidelines propose that, as soon as practicable after a relevant settlement is agreed, the CBI will apply to the High Court for confirmation of the sanction. If the subject provides written consent, the CBI may proceed with the High Court confirmation hearing without the subject present in court (i.e. on an ex parte basis). The High Court will not confirm a sanction if it is of the view that the sanction is manifestly disproportionate; if it decides not to confirm a sanction, it will remit the matter back to the CBI. Sanctions under the no admissions settlement process will not require confirmation by the High Court. <u>High Court Confirmation of Inquiry Decision or Irish Financial Services Appeals Tribunal Appeal's Decision:</u> <p>The Act also now makes clear that an inquiry decision or an appeal decision by IFSAT will only take effect if it has been confirmed by the High Court. The Draft ASP Guidelines indicate that, if the High Court does not confirm the relevant decision, it may substitute the relevant decision for one that could lawfully have been made in the matter or remit the matter back to the CBI.</p> 	<ul style="list-style-type: none"> s53-54 of the Act paras 370 – 373 of the Draft ASP Guidelines paras 378 – 384 of the Draft ASP Guidelines

RECAP ON TRANSITIONAL ARRANGEMENTS

Do the legislative changes to the ASP apply to investigations or inquiries which were ongoing as at 19 April 2023?	Reference
<p>Where investigations or inquiries were ongoing as at 19 April 2023, the new legislative changes to the ASP apply as follows:</p> <p><i>Ongoing investigations:</i></p> <ul style="list-style-type: none"> All legislative changes to the ASP as introduced by the Act apply to ongoing investigations except for certain procedural requirements including: (1) the requirement that the RAO gives the subject a Notice of Investigation; (2) the requirements in respect of amending a Notice of Investigation; and (3) the duty of the RAO to give reasons for discontinuing an investigation. <p><i>Ongoing inquiries:</i></p> <ul style="list-style-type: none"> Only the following legislative changes to the ASP introduced by the Act apply to ongoing inquiries: (1) the requirements in respect of High Court confirmation of inquiry decisions; and (2) appeals to the Irish Financial Services Appeals Tribunal. 	<ul style="list-style-type: none"> Part 7 of the Act
Do the legislative changes to the ASP apply to new investigations or inquiries?	Reference
<p>The legislative changes to the ASP apply to all new investigations and inquiries commenced after 19 April 2023.</p>	<ul style="list-style-type: none"> Part 7 of the Act