
Consultation Response

CBI Consultation Paper 154 - Consolidated Guidelines in respect of the Central Bank Administrative Sanctions Procedure

14 September 2023

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the CBI's **CONSULTATION PAPER 154 - CONSOLIDATED GUIDELINES IN RESPECT OF THE CENTRAL BANK ADMINISTRATIVE SANCTIONS PROCEDURE**. AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is registered on the EU Transparency Register, registration number 65110063986-76.

We summarise below our high-level response to the consultation, which is followed by answers to the individual questions raised.

Executive Summary

Overall, we consider the guidelines to be helpful in setting out the investigation process and possible conclusions. However, we would like to raise the following areas where additional clarity would be welcomed:

- There are aspects of the confidentiality requirements which appear to require firms or individuals to misrepresent themselves, or where it is unclear how a firm or individual should conduct themselves;
- There are some concerns about the potential vulnerability of individuals called as witnesses, since they may not be able to access the same legal support or evidence trail as the subject of an investigation, may not be subject to the same reputational protections, and may find their evidence used in subsequent investigations which they would not be aware of at the time of providing that evidence;
- Upon the conclusion of the process, there are questions on the status of discontinued investigation, the role of the current employer in any conditions/directions imposed upon an individual and the means by which penalties may be calculated if income is not a suitable measure.

We remain available to discuss any of these points in further detail.

Questions

Q1 – Q3.

AFME has no comments in response to these questions.

Q4. Do the draft ASP Guidelines assist you in understanding the Central Bank's proposed approach to disclosure?

We understand that there is a clear obligation for a subject or witness to disclose the required information on a timely basis. However, we would like to highlight some practical considerations. For example, there is most likely no central repository of such information and some relevant documents may be stored externally, e.g. with a company secretary or external legal counsel. The individual in question may, therefore, not be aware of all of the relevant documentation or be able to access it readily. Further guidance from the CBI would be welcome in this regard.

On a related note, if an individual has been summoned as a witness, will they be permitted to request additional time within which to collate information?

Q5. What are your views in respect of the obligations and expectations regarding confidentiality described in the draft ASP Guidelines?

There are some scenarios for which the application of the confidentiality requirements upon subjects appear unclear and more guidance would be helpful. For example:

- There is some concern that the inability of a firm or individual to disclose that they are under investigation could, in effect, require that firm or individual to misrepresent themselves to clients, the board, directors, other regulators etc. Members would welcome the CBI's advice and clarity on this.
- By way of example to the above, in the course of initial and annual due diligence, firms would typically request that an individual would advise the firm if they have been or are subject to an investigation by the CBI. What response could an individual under investigation provide in this instance, especially given they could be subject to a criminal offence if information relating to a final investigation report is disclosed? Paragraph 46 notes that there is an option that the CBI may authorise a subject to disclose the information, however, they need to obtain this permission in writing from the CBI. Given this clause, can firms continue to request this confirmation as part of due diligence checks?
- Further to this, there is an additional consideration if the individual is applying for approval for a PCF role. Within the Individual Questionnaire on the CBI Online Portal, there is a specific question which asks *"To the best of your knowledge, have you been or are you being investigated, disciplined, censured, suspended or criticised by a regulatory or professional body, a court or tribunal or any similar body, whether publicly or privately, in any jurisdiction?"* If an individual answers this in the affirmative, and the firm can see this response, would this be a breach of the confidentiality requirements?
- Under paragraph 76, an investigation may be concluded for reasons of *"The matters included in the investigation immediately before the discontinuance were minor in nature, immediate remedial action was taken in respect of them and full cooperation was provided."* Would the subject be obliged to report same to their employer or, given the confidentiality requirements, must they refrain from doing so?
- The CBI expects to issue a public statement in all cases where a finding is made at inquiry that a subject has committed a prescribed contravention and/or a decision is made to impose a sanction. At this point, can the subject inform their employer of this ruling or are they still bound by certain confidentiality requirements?
- Similarly, under paragraphs 135 and 198, an individual may be required/summonsed to appear as a witness to provide evidence before an inquiry. However, without being able to advise their employer of their involvement, there is a risk of repercussions on their employment. On this basis, would a firm ever be made aware that an employee has been summonsed as a witness?

- It would be helpful for further Guidance on the rights and obligations of the employer in situations where it is aware of an investigation into an individual. This would also assist in providing training to employees, by confirming the role of the employer and ensuring that it is interpreted consistently across the industry.

In addition, Members would welcome further detail on the CBI's own approach to confidentiality within investigations. For example, would CBI staff working on separate investigations be bound by similar confidentiality rules to the subjects of those investigations? There is a concern that an individual sharing information with the CBI as part of one investigation may not be aware of whether it could be used to inform a separate investigation.

Q6. Do the draft ASP Guidelines assist you in understanding the revised roles at inquiry?

Under paragraph 132 it is noted that “*A firm who believes that it has an interest in the subject matter of an inquiry involving an individual who is or was performing a controlled function in that firm may make an application to the Inquiry Members to request a role in the inquiry.*” On this basis, are firms obliged to attend the public inquiry if the subject is currently an employee? The reference in paragraph 157 to the publication of the notice on the CBI website only notes that it will include the date, time and location of the hearings. However when is the firm advised an the inquiry is taking place, is there a point when the confidentiality requirements ceases? Would the CBI advise the firm, or would the onus be on the individual in such cases?

Concerns have also been raised regarding the potentially vulnerable position of witnesses in the inquiry process (further to our comments on witnesses under Q4 and Q7). Paragraphs 137 and 138 permit witnesses to seek legal advice and, in some cases, representation. However, while a payment for expenses may be made, the CBI acknowledges that the primary legislation does not provide for the cost of the witness' legal support (whereas provision is made for the subject). This places upon the witness the choice of potential legal vulnerability versus undertaking the potentially high cost of legal support. Furthermore, the witness may not be in a comparable position to the subject in terms of their ability to produce an audit trail or other documentation for the events under investigation, particularly if they are no longer at the relevant firm.

In addition, paragraph 186 states that inquiry members or subjects can request that a hearing takes place in private, under certain limited conditions. However, this does not appear to be an option available to witnesses. Given that one of the conditions referred to is the potential for a hearing to unfairly prejudice a person's reputation, we strongly encourage the CBI to afford this protection also to witnesses.

Finally, paragraph 208 states that “*The Inquiry Members may, on their own initiative or at the request of the Inquiry Participants, refer a question of law arising at an inquiry to the High Court for decision*”. We request clarity as to whether the same is also allowed for a witness.

Q7. Do the draft ASP Guidelines assist you in understanding the revised ASP inquiry process and procedures?

Paragraph 60 states that “*Information gathered in the course of an investigation can be used at any subsequent inquiry and in the performance by the Central Bank of any of its statutory functions including, for example, in any related investigation.*” We would welcome confirmation that evidence obtained in an oral hearing would be recorded, for example by stenographer.

In addition, concerns have been raised that witnesses could find themselves in a situation in which evidence provided in the course of one investigation could be used in another investigation, even if the circumstances have changed in the intervening period, or the witness is aware of new information that casts their previous evidence in a different light. The CBI's thoughts on this would be welcome.

Q8. Do the draft ASP Guidelines assist you in understanding the process to be followed at the conclusion of an inquiry, including notifying the inquiry decision and issuing an inquiry publication notice?

Paragraph 70 states “Notwithstanding any other action taken by the Central Bank, the Central Bank may decide that further action is required in relation to the supervision of a subject. Such action may include utilising various supervisory tools and powers. For example, the Central Bank may issue directions to, or impose conditions on, a Subject, where appropriate.” If the CBI were to impose further action on a subject based on actions taken in a previous employer, could the CBI clarify the role of the current employer in relation to the oversight of those conditions/directions?

Under paragraph 74ff, it is noted that the CBI may decide to discontinue an investigation for a number of reasons. We would appreciate clarity as to whether or not such discontinued investigations are considered “closed”. While we appreciate that the CBI will need to consider all the information available to it when considering potential patterns of behaviour, without confirmation of such a status, concerns have been raised as to whether a discontinued investigation could impact a future PCF application from the subject, or whether the Subject would, in effect, have the investigation hanging over them for the remainder of their career.

Q9 to Q21.

AFME has no comments in response to these questions.

Q22. Do the sanctioning factors assist you in understanding the Central Bank’s proposed sanctioning approach, and what are your views on the sanctioning factors?

On page 95, Table 3 gives “*the firm or individual provides legally privileged material to the Central Bank*” as an example of exemplary cooperation during an investigation. The right to assert privilege with respect to legally privileged advice and guidance is an important legal protection for firms and individuals and we are concerned by the CBI seeming to encourage firms and individuals to forego this right in order to be seen as highly cooperative with an investigation. Indeed, it could be interpreted that declining to provide legally privileged material could penalise a firm or individual, or make them ineligible for “exemplary co-operation” discounts. We request that this example is removed from Table 3.

Q23. What are your views on the monetary penalty methodologies?

Table 7 notes that “*there may be cases where income is not an appropriate starting point, and in those cases the Central Bank will use an appropriate alternative, including for example, an individual’s assets.*” Would it be possible for the CBI to provide further information relating to these alternatives, e.g. worked examples of various scenarios?

Q24 to Q26.

AFME has no comments in response to these questions.

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