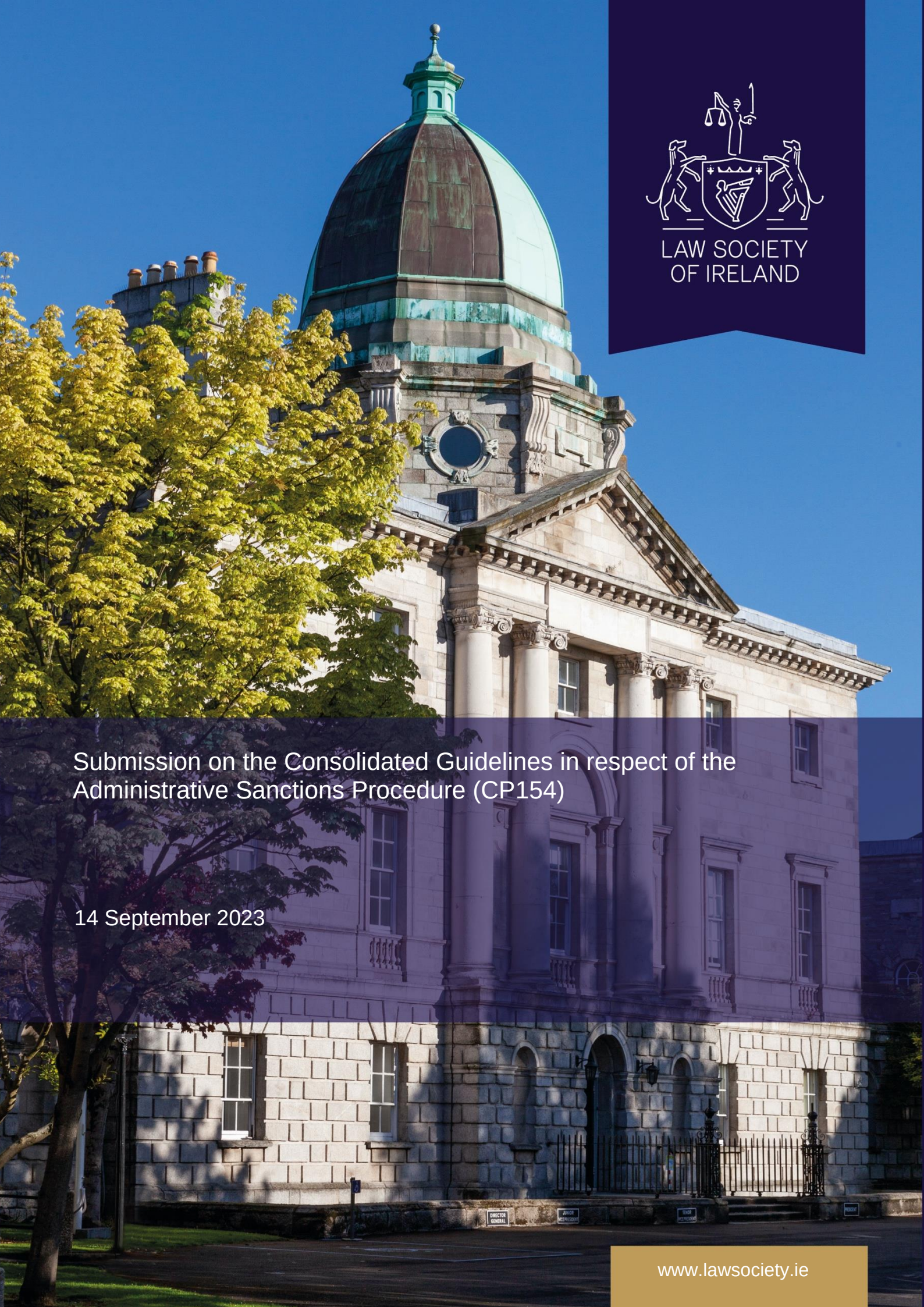

LAW SOCIETY OF IRELAND

Submission on the Consolidated Guidelines in respect of the Administrative Sanctions Procedure (CP154)

14 September 2023

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1. Introduction

This submission is provided in response to Central Bank of Ireland Consultation Paper 154 on the ASP Consolidated Guidelines in respect of the Administrative Sanctions Procedure, Amended in connection with the Central Bank (Individual Accountability Framework) Act 2023 ("the Consultation Paper").

The Law Society welcomes this opportunity to submit views on the Consultation Paper, commends the Central Bank of Ireland (the "Central Bank") for holding a public consultation process, and trusts that the views expressed herein are useful to the Central Bank in ensuring a well-balanced, fair and successful individual accountability regime in the best interests of Irish consumers.

This submission has been prepared by our Business Law Committee (the "Committee") which is comprised of practitioners in the field of corporate and company law with substantial experience and expertise in regulatory and white-collar crime investigations.

Executive Summary

The Law Society refers to the views expressed in its submission to the Central Bank's *Consultation Paper 153 on Individual Accountability Framework (or IAF) Regulations and Guidance* ("CP153"), a copy of which is available online here: Submission on (lawsociety.ie).

In that submission, the Law Society noted that the Individual Accountability Framework exposes significant number of businesspeople to relatively severe and penal sanctions of up to €1 million in fines and/or lifetime work-bans; and (ii) the Central Bank intends to publicise key settlement terms (such as, among other things, the name of the perpetrator, the violation involved, and the sanction) "…*in all cases which are resolved pursuant to settlement processes*" (at para. 329), meaning individuals risk serious public reputational damage too.

The Law Society respectfully submits that IAF enforcement involves administration of justice as per Article 34.1 of the Irish Constitution (see *e.g.*¸ Zalewski v WRC & the AG [2021] IESC 24).[1] Noting the quite penal nature of IAF sanctions, that deterrence will be "*one of three key CBI principles in determining what sanctions to impose*" (Consolidated Guidelines, at para. 337), and that a stated purpose of the IAF is to show " … *the public that those who contravene financial services legislation will* ***be held accountable and penalised*** *for those contraventions*" (at para. 309, emphasis in original text), the Law Society questions whether

[1] To determine whether a tribunal or State organ is involved in administering justice contrary to Article 34.1 of the Constitution, the long-established "classic", five-pronged test is set out in *McDonald v. Bord na gCon* [1965] I.R. 217 applies. These now long-established indicia are: 1. The resolution of dispute or controversy as to the existence of legal rights, or a violation of the law; 2. A process involving a determination or ascertainment of the rights of parties, or the imposition of liabilities, or the infliction of a penalty; 3. A final determination, (subject to appeal), of legal rights or liabilities, or the imposition of penalties; 4. The enforcement of those rights or liabilities, or the imposition of a penalty by the court, or by the executive power of the State, which is called in by the court to enforce its judgment; 5. The making of an order by the court which, as a matter of history, is an order characteristic of courts in this country. In Zalewski, the Supreme Court held that the exercise of powers by Adjudication Officers pursuant to part 4 of the Workplace Relations Act, 2015 as amended ('the 2015 Act') was the administration of justice under Article 34 of the Constitution. In *re The Solicitors Act 1954*, the former Supreme Court held that power to strike a solicitor off the Roll of Solicitors was, when exercised, an administration of justice, both because the infliction of such a severe penalty on a citizen was a matter which called for the exercise of the judicial powers of the State, and because to entrust such a power to persons other than judges was to interfere with the necessity of the proper administration of justice.

IAF enforcement could be considered to involve matters at least partly criminal.[2] While this question is beyond the scope of our submission, the Law Society notes that Article 37.1 of the Constitution permits exercise by administrate bodies of "… *limited functions and powers of a judicial nature, in matters other than criminal matters*" (emphasis added). To paraphrase McMenamin J in *Zalewski*, "[*t*]*he question, therefore, is twofold. When engaging in enforcement, would the [Central Bank] be engaged in "limited" functions? Would these functions be "criminal" matters?*" (at para. 121).

Even if not unconstitutional *per se*, fundamental constitutional and ECHR rights are clearly implicated, including *due process* rights, rights to work and earn a livelihood, and rights protecting an individual's name and reputation. An IAF prosecution may clearly affect "… *the life, liberties, fortunes or reputations of individuals*" (Cowan v. The Attorney General [1961] I.R. 411 in which a tribunal established to hear whether an elected official was disqualified by law from seeking election). It follows that IAF enforcement practices and procedure must rigorously respect and safeguard procedural and *due process* rights as per Article 40.1 of the Constitution and Article 6 of the ECHR and that, in deciding and settling cases, the Central Bank must act judicially.

In any guilty plea or wrongdoing admission, the Irish Supreme Court has emphasised that the defendant must do so "… *quite freely and willingly, and having been advised by solicitor and counsel of his own choosing*" (see, *e.g.*, Hardiman J, in *The People (DPP) v Hughes* [2012] IECCA 69). Thus, to ensure any settlement is voluntary and in full knowledge of the consequences, the Law Society submits IAF defendants must have full opportunity to take independent legal advice before agreeing a settlement. Attempt to oppose or restrict an IAF defendant's access to legal advice, including via incentivising waiver of legal privilege, would render any settlement liable to challenge, susceptible to revocation, and likely unlawful.

In its submission in response to CP153, 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 people rather than business. 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 20004*). Noting how important a part of the enforcement-toolkit settlement is, and noting how heavily it is used by the Central Bank to sanction violations, the Law Society focuses in this response on the settlement procedure, particularly the so-called Undisputed Facts Settlement procedure (likely the "… *primary settlement procedure utilised*" according to CP154, at page 33), and related parts of the Consolidated Guidelines.

The purpose of this submission is to identify key aspects of the IAF enforcement as proposed by the Central Bank that give rise to Rule of Law concerns. In addition, an aim of the submission is to make recommendations in respect of core aspects proposed, with a view to ensuring IAF enforcement by Central Bank is consistent with applicable provisions of the Irish Constitution and the European Court of Human Rights.

3. Relevant Central Bank Consultation Paper Questions and Reponses from LSI

[2] Consultation Paper 154 further states that "[*s*]*ettlement admissions ensure that there is transparency around wrongdoing and the associated regulatory response. Settlement admissions also increase public confidence in the legitimacy of the enforcement process and the financial system"* (CP154, at page 35).

The following section will provide detailed responses to specific, relevant questions raised by the Consultation Paper.

3. 1 Regarding question 2: Do the draft ASP Guidelines assist you in understanding the role of the RAO and the associated functions and responsibilities in respect of ASP investigations?

Law Society views and comments

3.1.1 A Responsible Authorised Officer or RAO plays a pivotal role in investigating alleged violations, upholding *due process* rights of IAF defendants, adjudicating on the probative value of evidence and, ultimately, opining on whether the Central Bank should open a full inquiry into the case.

According to both the 2023 Act and the Consolidated Guidelines, the Responsible Authorised Officer conducts and is responsible for each IAF investigation. The RAO is charged with issuing a Notice of Investigation to each IAF defendant and to amend that notice in event of any change in material terms of the investigation (2023 Act, Section 33ANJ). In addition, the Consolidated Guidelines require the RAO to keep "… *the Subject informed as to the progress of the investigation."* The Responsible Authorised Officer is also charged with deciding on IAF defendant requests for additional particulars and information provided in any Draft Investigation Report (at para. 89).

Importantly, in addition to this procedural role, the Responsible Authorised Officer also has a quasi-judicial role. An RAO is responsible for preparing a Draft Investigation Report and a Final Investigation Report, which must in each case take account of evidence "*gathered by the RAO*" and "… *any responses made by the [IAF Defendant]*." In so doing, the RAO must decide on what evidence is relevant to the consideration of the Final Investigation Report by the Central Bank, "… *either because it supports or because it undermines the commission of a prescribed contravention"* (Consolidated Guidelines, at para. 84). Further, in the Final Investigation Report, an RAO must "…*include an outline of the prescribed contravention"* (Consolidated Guidelines, at para. 93). It is on the basis of the RAO's Final Investigation Report that the Central Bank's decision maker in each case decides whether an inquiry should be held.

Given the RAO's important procedural and adjudicative role, the Law Society submits that RAOs must act at all times to diligently uphold the rights of defence of IAF defendants. In particular, the Law Society suggests submits that RAOs must disclose to an IAF defendant all evidence in the RAO's possession whether exculpatory or inculpatory at the earliest possible time in any investigation and, in all events, in time to allow an IAF Defendant decide to decide on the merits of settling the case. This should include investigation notes.

While an RAO may not express any opinion on or make any recommendation in the Final Investigation Report as to whether or what sanction might be appropriate, the RAO's Final Investigation Report is doubtless an important procedural and quasi-adjudicative step. Not only does it conclude the investigation stage, the Final Investigation Report must take account of, balance, and assess relevance of evidence "*gathered by the RAO*" and "… *any responses made by the [IAF Defendant]*." In addition, as noted immediately above, the Final Investigation Report must "…*include an outline of the prescribed contravention"* (Consolidated Guidelines, at para. 93).

3.1.2 The Law Society notes the Central Bank's stated expectation that most settlements will be "Undisputed Facts Settlements" (in other words, pre-Draft Investigation Report stage). The Law Society's view is that the Consolidated Guidelines do not provide sufficient clarity on the

RAO's role in any negotiation of an Undisputed Facts Settlement. Is it the RAO's decision whether a case is suitable for settlement via the Undisputed Facts Settlement procedure? What is the legal test applied in deciding this? If this is decided by a separate Central Bank official or team, what interaction between that official or team and the RAO occurs before a Central Bank decision is taken to proceed via the Undisputed Facts Settlement procedure? The Law Society suggests that, to protect and safeguard the rights of each IAF accused, greater clarity on this important aspect of the process should be included in the Consolidated Guidelines.

At a minimum, to check against confirmation bias, the Law Society suggests that the RAO investigation team should be independent from and not engaged in any Central Bank settlement negotiations. The Law Society questions whether a separate more senior Central Bank official from outside Enforcement should be charged with settlement negotiations in a way that fairly balances the rights of defence and ensures adequate checks and balances at this stage. Alternatively, again to check any risk or perception of bias/lack of independence, the RAO could be independent of the enforcement division.

3.1.3 The Consolidated Guidelines state that a Final Investigation Report may be referred to "*a Central Bank decision maker*" (at para. 24). From the Consolidated Guidelines, the Central Bank decision maker decides whether a case may be closed, settled or referred to a more in-depth inquiry phase. According to the Consolidated Guidelines, "[i]f the decision maker so decides, the Central Bank will issue a Notice of Inquiry to the Subject" (at para. 24). The Law Society suggests that this decision maker should be independent of the Responsible Authorised Officer investigating the case and, like a Hearing Officer in the Directorate General - Competition of the European Commission, have a level of impartiality and independence from the Central Bank.

3.1.4 The Law Society also questions whether the proposed approach in the Consolidated Guidelines, by which RAO's are apparently conferred discretion what exculpatory and/or inculpatory material should be disclosed with a draft investigation report, may leave an IAF accused at a serious and prejudicial disadvantage. It may mean that an IAF accused is left without complete understanding of the full case file and evidence therein. This disadvantage is aggravated by the extremely short timeframes proposed in the Consolidated Guidelines for IAF defendants to respond to documents.

3.2. **Regarding question 5: What are your views in respect of the obligations and expectations regarding confidentiality described in the draft ASP Guidelines?**

Law Society views and comments

3.2.1 According to the Consolidated Guidelines, all proceedings of an investigation, including any statement or submission made by an IAF defendant, and all communications of the Responsible Authorised Officer in the course of the investigation, are "*absolutely privileged for the purposes of the law of defamation*" Further, the content of the Draft Investigation Report and the Final Investigation Report, any correspondence from the Responsible Authorised Officer in the course of the investigation report process, and any submissions made by an IAF defendant in response to the Draft Investigation Report, are "*absolutely privileged"* (at para. 67).

The Consolidated Guidelines further provide that the investigation report process is confidential and all information and/or material related to the investigation report is confidential information. The Responsible Authorised Officer will expressly notify the recipient that such

information is confidential and must not be disclosed to any other party unless authorised to do so by the Central Bank in writing or they are required by law to do so. The Subject is not prevented from disclosing information to their legal representative.

A failure to comply with the legal obligations concerning confidentiality in the course of the investigation report process could have serious consequences for the Subject and/or recipient of the confidential information. Non-compliance may be an aggravating factor taken into account in determining any sanction imposed on the Subject and/or may constitute a prescribed contravention in itself. Where necessary, the Central Bank may enforce such non-compliance by making an application to the High Court and/or by taking other appropriate enforcement measures. In addition, the Subject may be held to have committed a criminal offence where the existence or content of the Final Investigation Report is disclosed without having received the prior authorisation of the Central Bank.

The Law Society questions whether this approach may be prejudicial to the person under investigation, runs counter to fundamental transparency requirements and infringes requirements for justice to be administered in public. The Law Society also questions whether requirements in the Consolidated Guidelines that IAF defendant responses should be "*on an open basis, i.e. full and complete disclosure of information should be provided in open correspondence"* (at para. 50) are proportionate, justified and fair.

3.2.2 More specifically, in Central Bank investigations of a violation by the business, testimony and cooperation of businesspeople allegedly involved in the infraction may be critical to the business in defending its case. Similarly, in an investigation alleging violation by an individual, where the business is not under investigation (a so-called "participation break" case), testimony and cooperation of other businesspeople, who may themselves be under investigation, may be vital to the first defendant's defence. To ensure due process, the Consolidated Guideline restrictions on confidentiality must not be used unduly to prevent an IAF accused fairly defending their case. Accordingly, the Law Society requests that the Consolidated Guideline provisions on confidentiality be fully caveated to ensure no restriction therein will be used unfairly to prevent an IAF accused lawfully defend their case. The Law Society submits that, as a general rule, disclosure of confidential material gathered/created in the course of an enforcement investigation should be disclosed to an IAF accused if that information is necessary to enable that third party to fully avail of their own rights of defence, if investigated themselves in due course. Further, an IAF accused should not be restricted by the confidentiality provisions in the Consolidated Guidelines from full defending their case, including via use of testimony and evidence from other executives.

3.2.3 The Law Society could envisage conflicts arising as regards a director's duties to a company and this duty of confidentiality as well as the expectation of disclosure. We could also see conflicts between this duty of confidentiality and other legal obligations under, for example, market abuse rules. Furthermore, under the Fitness and Probity regime (F&P), a director would typically commit to inform the business if there is any material change to answers furnished to the business in their assessment for F&P purposes which would be compromised by the duty of confidentiality in the Consolidated Guidelines. An IAF defendant also supervised in another jurisdiction that required disclosure of material issues would face the dilemma of conflicting obligations. The Law Society submits that a clearer carve out in the Consolidated Guidelines could address this.

3.3 .Regarding questions 10 and 16. Do the draft ASP Guidelines assist you in understanding the new undisputed facts settlement procedure particularly in terms of

when it may be available and the Central Bank's proposed approach to it? Do you agree with the Central Bank's proposed approach to undisputed facts settlements?

Law Society views and comments

3.3.1 In CP154, the Central Bank says it expects that the Undisputed Facts Procedure "… *will be the primary settlement procedure utilised in the early resolution of ASP matters*" (at page 32) and notes that "[*t*]*his policy approach is underpinned by the potentially available incentives*" (*ibid)*.[3]

The Law Society notes that the 2023 Act permits the Central Bank to dispense with an inquiry and to settle a case with sanction in two relatively restricted circumstances only. Specifically, Section 33AR of the 2023 Act permits the Central Bank to settle cases without inquiry either: (i) "… *after considering the final report of an investigation, and any submissions, provided*;" or (ii) "… *where there are undisputed facts that in the reasonable opinion of the Bank render an investigation unnecessary*."

The Law Society questions whether Section 33AR can be read to permit adoption by the Central Bank of a policy approach to use the Undisputed Facts Settlement as the main settlement procedure. The Law Society submits that Section 33AR(ii) should rather be read to apply in exceptional circumstances only, precisely because it provides for settlement even before an investigation is completed. Settlement while an investigation is ongoing and before any investigation report is finalised should occur only exceptionally, *i.e.*, where material facts are not in dispute ***and*** where the agreed facts are such that completion of the investigation is, in the reasonable opinion of the Bank, unnecessary (as per Section 33AR(ii)).

3.3.2 From our reading of the Consolidated Guidelines, to commence the Undisputed Facts Settlement procedure, a person under investigation must first "*indicate a willingness to engage in the Undisputed Facts Settlement*" (at para. 291).[4] At this point in the process, however, the sole information available to the person under investigation may be a Notice of Investigation "… *outlining each prescribed contravention and the relevant conduct which is under investigation*." The Law Society understands that the Undisputed Facts Settlement must commence before completion of the investigation and, from an ASP Process Diagram at page 12 of the Consolidated Guidelines, that any investigation report (draft or otherwise) is provided only after completion of the investigation.[5] To avail of the Central Bank's primary or main settlement procedure, in other words, the Consolidated Guidelines purport to require an IAF defendant to accept that he/she will not dispute the facts even before he or she learns what facts are alleged by the Central Bank.

3.3.3 What will be, by the Central Bank's own account, the main way it resolves cases (the "Undisputed Facts Settlement" procedure) appears to require executives to admit culpability upfront before an investigation concludes and commit at the same time not to contest evidence or fact findings of the investigation even though, at this point, they will have no idea of the

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3 In an Undisputed Facts Settlement case, fines may be reduced by up to 30%. This compares to what the Central Bank considers "*significantly lower*" reductions of up to 10% in for Investigation Report Settlements and zero potential reduction for No Admission Settlements (CP154 at page 33).

4 Thus, the Consolidated Guidelines state that "[*w*]*here a Subject has indicated a willingness to engage in the Undisputed Facts Settlement Process, the Central Bank may commence the process by way of a letter issued to the Subject on a "without prejudice" basis*" (at para. 291).

5 According to the Consolidated Guidelines, "[*a*]*s a matter of law, the Undisputed Facts Settlement Process is no longer an option once an investigation has been completed*" (at para. 290). Similarly, the Consultation Paper states that "*the undisputed facts settlement procedure … ceases to be available on completion of an ASP investigation*" (at page 33).

case against them and, worse, will not know what sanction they will get. The Law Society recalls that IAF defendant executives face settlement sanctions of fines up to €1million and/or lifetime work bans, material terms of which will (absent exceptional circumstances) be publicised by the Central Bank, meaning reputational harm.

How a person under investigation can, while the facts of the case remain to be determined and under investigation, decide the facts are undisputed is unclear to the Law Society. Nor is it clear to the Law Society how a solicitor can legally and/or ethically advise a client to admit wrongdoing and commit not to contest alleged facts at such an early stage of the process. According to the principle of equality of arms, which is inherent in the concept of a fair trial, a defendant must have "… a *reasonable opportunity of presenting his case*."

The Law Society notes that the Consolidated Guidelines suggest that the Central Bank proposes unilaterally to decide "*undisputed facts*" without meaningful input from or negotiation with IAF defendants. The Consolidation Guidelines state, for instance, that the Undisputed Facts Settlement procedure will be available where the executive under investigation "… *has agreed to the undisputed facts provided by the Central Bank for the purposes of the undisputed facts settlement process*" (at para. 290). Similarly, the Consolidated Guidelines state that an undisputed facts settlement is dependent on whether the defendant " … *has agreed to the undisputed facts provided by the Central Bank*" (*ibid*).[6] The Law Society submits that this is not what is permitted or contemplated by the legislation and that such an approach would be *ultra vires*. The Undisputed Facts Settlement procedure must allow defendants advance opportunity to input fairly into what are "undisputed facts." Nor, the Law Society submits, can the Central Bank decide unilaterally "undisputed facts" and put those to an IAF defendant on a take-or-leave-it basis as part of a settlement offer.[7]

After an IAF defendant indicates willingness to engage in the Undisputed Facts Settlement procedure, the next step according to the Consolidated Guidelines is for the Central Bank to provide, on a without prejudice basis, a "*Statement of Undisputed Facts to be admitted and agreed by the Subject*" (Consolidated Guidelines, at para. 291). The Consolidated Guidelines do not explicitly provide opportunity for the defendant to contest or otherwise influence the contents of the Central Bank's Statement of Undisputed Facts and, clearly, for facts to be truly and fairly undisputed such opportunity must be provided.

According to the Consolidated Guidelines, the Central Bank's without prejudice Statement of Undisputed Facts " … *may not issue until such time as the Central Bank has sufficient factual information to understand the nature and gravity of the prescribed contravention*" (*ibid*). This suggests that, at a minimum, an investigation must have progressed to a stage where the

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6 Statements to this effect in the Consolidated Guidelines could fairly be read to suggest that an Undisputed Facts Settlement will be possible solely and exclusively at the unsolicited initiative of an IAF accused. If this is the intention, the Consolidated Guidelines should state this clearly.

7 The Law Society questions whether Consolidated Guidelines sufficiently clearly indicate the process and/or scope for an IAF defendant to agree a schedule of undisputed facts: facts are not only relevant to whether a contravention occurred, but also to the context (public view of the accused's conduct in due course) and materiality (highly relevant to a proportionate sanction). For example, under the current early resolution procedure, often the Central Bank may not investigate the level, if any, of harm on customers/consumers, with the result that the Central Bank does not engage in this as a relevant sanctioning factor at the very late settlement discussion stage. Every IAF accused should be afforded a reasonable opportunity to comment on the proposed 'undisputed facts', including an opportunity to supplement those facts with relevant context (if undisputed). Failure to do so would fail to afford the Subject sufficient opportunity to exercise their rights of defence even at this early stage in the investigation.

Central Bank has "*sufficient factual information*" on the alleged violation. But this does not require the Central Bank to hear the IAF defendant's case or to take account of facts or evidence provided by the IAF defendant in the "Statement of Undisputed Facts." The Law Society submits that such protections must form part of the Undisputed Facts Settlement.

After the Central Bank's without prejudice correspondence, the next step in the Undisputed Facts Settlement is for an IAF defendant, again on a without prejudice basis, to admit and agree the Statement of Undisputed Facts (Consolidated Guidelines, at para. 292). According to the Consolidated Guidelines, "[*o*]*nce the "without prejudice" admission and agreement have been received by the Central Bank, the Central Bank may provide the Subject with the proposed terms of settlement under the Undisputed Facts Settlement Process*."[8] This suggests to the Law Society that the terms of the settlement, most notably the sanctions involved, may not be provided at the outset to a party opting for an Undisputed Facts Settlement. Attempts by a State entity to press an accused to accept a guilty plea (and, with that, penal sanctions that transgress fundamental rights) without opportunity to contest the evidence against them would, the Law Society submits, risk violating outright Irish Constitutional and ECHR norms. What happens if these is "*a direct conflict of evidence*" as per *Zalewski v Adjudication Officer and WRC, Ireland and the Attorney General* [2021] IESC 24?

3.3.4 For a plea bargain or IAF-style settlement to be given unequivocally, be voluntary and made in full knowledge of the facts, and on the basis of informed consent without constraint the terms of the bargain must be made known to and understood by the accused. Accordingly, the Law Society submits that the terms of a proposed Undisputed Facts Settlement must be provided to the defendant earlier in the process when the Central Bank first provides its Statement of Undisputed Facts.

3.4. Regarding question 18. What are your views and comments regarding the proposed Settlement Scheme?

Law Society views and comments

3.4.1 An enforcement strategy, policy or practice favouring settlement in lieu of prosecution, that results in most if not all defendants waiving fundamental trial rights in return for lower fines, raises complex constitutional and ECHR issues. As Charleton J stated *obiter* in E.R. v DPP [2019] IESC 001, "[*p*]*lea bargaining has no place in our constitutional architecture*" (at para. 40).[9] Similarly, in *The People (DPP) v Heeney* , Keane CJ made clear in a unanimous decision of the Supreme Court was that there could be "… *no question … of any form of*

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8 The Consolidated Guidelines state on this front that "… *the proposed terms will set out the details of the proposed sanction and any potential discount offered under the settlement scheme (where the proposed sanction is a monetary penalty), and will include a requirement to consent to the proposed sanction and to acknowledge the proposed publication of the details of the admitted prescribed contravention and the sanction proposed in a public statement*" (*ibid*).

9 Charleton J.'s observations in the Supreme Court on the 'plea-bargaining' aspects of E.R. are, strictly speaking, not legally binding (as the case was disposed of on the basis that judicial review was not a remedy lawfully available to an accused during the currency of a criminal trial). Nevertheless, as at least one legal commentator has stated, "*it can be expected that they will be relied on as authority for the proposition that 'plea-bargaining', even in the diluted form that it took in this case, has no place in Irish criminal law"* (Plea-Bargaining in Ireland by Andrea Scheiber, 20 December 2019,, University of Kent, available at Plea-Bargaining in Ireland – Criminal Justice Notes (kent.ac.uk)).

bargain being entered into in private which would determine in advance the sentence to be imposed by the court."

In an article cited approvingly by the Irish Supreme Court, *Constitutional Implications of Plea Bargaining* Charleton and McDermott [2000] The Bar Review 476,[10] UK law guidelines on plea bargaining are dismissed as inconsistent with the requirement in Article 34.1 that justice should be "… *save in such special and limited cases as may be prescribed by law … administered in public*." Among objections to UK-style plea bargaining, that Article identifies concerns with counsel repairing to a judge's chambers, away from the public scrutiny of open court, with the media acting as the watchdog for the general public, danger of inadequate information being given the judge, inhibition on the judge imposing a more severe sentence, the "incorrect atmosphere" of chambers in contrast to that in open court, misunderstanding among the parties, and possible pressure on the accused.

Commenting on any supposed agreement on sentence through the prosecution having the power to limit sentence or by resort to the judge in chambers, Charleton and McDermott state, "[*i*]*t would be wrong … to move from a system where the judge after an open hearing has that responsibility, and from a system where it is the job of lawyers to estimate what the sentence will be, to a situation where the prosecution and defence can sit down together and knock out a bargain whereby the maximum sentence will be limited to a particular number of years, or to a particular tariff on a basis which is again private and which lacks the fundamental safeguard of transparency. … Plea bargaining has no constitutionally permissible* place in our system of law."

3.4.2 While the ECHR does not outright prevent incentives to encourage guilty pleas, the ECHR has found that guilty pleas amount to a waiver of fundamental rights including to a public hearing, to provide evidence and cross examine witness, and the presumption of innocence. Two leading ECHR cases on plea bargaining are Natsvlishvili and Togonidze v. Georgia App No. 9043/05, 29 April 2014, and in Dewey v. Belgium App. No. 6903/75, 27 February 1980.

In Natsvlishvili, the ECHR concluded that despite relatively strong incentives to plead guilty being present, the decision of a defendant to waive trial rights had "undoubtedly" been a "conscious and voluntary" decision (at para. 97).11 The ECHR noted that the process of plea-bargaining (in which a defendant could obtain a lesser charge or a reduction in sentence in exchange for a guilty plea) was a common feature of European criminal justice systems and that there was nothing improper about the process itself. However, the ECHR also confirmed the potential for trial rights to be breached if waiver of such rights is not valid. For an agreement to plead guilty to be valid, the ECHR held that the defendant must: (i) accept the plea bargain in full awareness of the facts of the case; (ii) accept the plea bargain with full awareness of the legal consequences; and (iii) accept the plea bargain in a genuinely voluntary manner (at para. 92).

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10 Cited by Charleton J in E.R. v DPP, at para. 26.

11 In *Natsvlisvili*, the relevant applicant was charged with various company-law offences. Agreement was reached between the prosecution and the defence, according to which the applicant would maintain innocence but be convicted without an examination of the merits of his case, in exchange for a reduced sentence. The applicant later complained that this "plea-bargaining" procedure violated his fair trial rights under Article 6 of the ECHR. Among other things, the applicant argued that his decision to accept a plea bargain could not be said to be truly voluntary because the plea was the only real opportunity for him to avoid a lengthy term of imprisonment given the 99 per cent conviction rate in the Georgian criminal justice system. He emphasized systemic poor physical conditions in post-conviction custodial institutions in Georgia, and that when he accepted the plea bargain he was detained in poor conditions.

The majority in Natsvlishvli found no violation of Article 6. Regarding the requirement that a plea be made in a genuinely voluntary manner, after noting that the plea was arranged at the request of the applicant himself, that the applicant had unequivocally expressed his willingness to repair the damage caused to the state, that the applicant was represented by lawyers, and that the applicant had confirmed he was not subjected to undue influence in negotiations, the Court majority judgment concluded that the decision to plead guilty had "undoubtedly" been "conscious and voluntary."

In reaching this conclusion, the majority judgment notes that the decision could not be said to have resulted from any duress or false promises made by the prosecution, was accompanied by sufficient safeguards against possible abuse of process, and did not run counter to any important public interest.

In contrast, in Dewey, the ECHR held that the applicant's fair trial rights had been violated.[12] In so holding, the ECHR stated that waivers of rights in civil and criminal matters did not in principle offend against the constitution, but that the applicant would have, during a period of months, been "deprived of the income from his trade," would have "incurred the risk of having to continue to pay his staff and of not being able to resume business with all his former customers once his shop reopened," and would have "suffered considerable loss as a consequence." This meant that the applicant's waiver of fair trial rights was "tainted by constraint," and thus in breach of Article 6 of the ECHR.

According to one legal commentator, "[t]he cases, when viewed together and alongside existing and important socio-legal literature, suggest that where incentives to plead guilty: (i) make it unreasonable to expect the defendant to exercise their right to a full trial, (ii) are independent of the projected outcome at trial, and (iii) cause the defendant to plead guilty, such incentives should be found to violate Article 6 rights."[13]

Thus, while the Central Bank (Individual Accountability Framework) Act 2023 (the "2023 Act") provides statutory basis for the Central Bank to settle IAF cases in certain circumstances, the Law Society submits that it does not permit undue pressure, coercion or incentive for individuals to settle. The Law Society questions on this front whether the proposed "Undisputed Facts Settlement" procedure, as described in the Consolidated Guidelines, may be compatible with EU and Irish law.14

The Law Society notes on this front that a settlement agreement effectively forms part of an individual's compliance record. The Consolidated Guidelines state that the Central Bank may take account of prior settlement agreements in future fitness and probity assessments of individuals. In addition, "[p]revious settlement agreements may be taken into account in determining appropriate sanctions in other enforcement actions involving the Subject" (ibid).

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12 The applicant owned a small business and was accused of infringing a ministerial decree fixing the selling price of beef and pork. The applicant was faced with a decision either to pay a fine in recognition of the infringement or to face an order for closure of his shop until judgment was given in a criminal prosecution. Under these conditions, the applicant paid the fine. He then contended that the fine was paid under constraint of provisional closure of his establishment and that this represented a violation of his fair trial rights underArticle6.

13 Constrained Waiver of Trial Rights? Incentives to Plead Guilty and Right to a Fair Trial, Rebecca K. Helm, Journal of Law & Society, Vol. 46, N. 3, September 2019, ISSN: 0263-323, pp 423 – 447.

14 More generally, in regard to 'No Admission' Settlements, the Law Society suggests that examples of the type of cases in which this would be appropriate (in addition to the list out factors that would render this kind of settlement inappropriate currently in the Consolidated Guidelines) would be helpful.

To this end, the Law Society submits that additional due process safeguards must be included. The Central Bank must ensure individuals under investigation have full access to independent legal representation. Attempt to restrict such access, including via incentivising waiver of legal privilege, would likely be unlawful.

- **Anonymous Witnesses**

In *Windisch v Austria* (1990) 13 E.H.R.R. 281, a conviction based to a large extent on statements by two anonymous witnesses heard, in the absence of the accused and with no counsel present, only by the police but not by the trial court was found to violate Article 6 ECHR. The result was that the applicant had not had a fair trial since he was denied opportunity to challenge the witnesses' credibility.

The Consolidated Guidelines state on this front that "… *circumstances could arise where the Responsible Authorised Officer may not consider it appropriate to provide copies of material with a Notice of Investigation. For example, where the material relates to a protected disclosure or is subject to professional secrecy, legal professional privilege or data protection requirements; or where providing copies might prejudice an ongoing criminal or other investigation*" (at para. 51).

If the Central Bank's case against an executive rest largely on whistle-blower or protected-disclosure testimony, there must be proper safeguards to counterbalance the resulting disadvantages for the defence if this evidence is used in the case. It should not be the only or decisive evidence to ground a violation.

- **Impartiality**

To ensure independence and impartiality of the Undisputed Facts Procedure, the Law Society submits that important checks and balances should be included. Specifically, the Law Society submits that a senior official from outside the Enforcement Division, with no involvement in investigating the case, should be appointed to rule on any conflict between the Central Bank and an IAF defendant on "undisputed facts," having taken account of submissions from both the Responsible Authorised Officer and the IAF defendant, and to decide on material procedural questions (see, *e.g.*, *Findlay v. United Kingdom* (1997) 24 E.H.R.R. 221).

- **Access to Legal Representation**

In any guilty plea or wrongdoing admission, the Irish Supreme Court has emphasised that the defendant must do so "… quite freely and willingly, and having been advised by solicitor and counsel of his own choosing" (see, e.g., Hardiman J, in The People (DPP) v Hughes [2012] IECCA 69. Similarly, waiver of a right guaranteed by the ECHR in civil and criminal cases "… must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent . . . and without constraint" (see, e.g., D.H. and Others v. the Czech Republic, App. no. 57325/00, 13 November 2007, at para.202). It must be a conscious, voluntary and informed decision.

To ensure an IAF defendant's admission and settlement is sufficiently free and voluntarily, defendants must have full access to independent legal representation of their choosing. To restrict access to legal representation would likely constitute a "fundamental denial of justice" as per Denham CJ, at para. 66 in FX v Clinical Director of the Central Mental Hospital [2014] IESC 1.

The Law Society also notes that the Central Bank's proposed settlement procedure raises complex questions for defence counsel. According to Hardiman J in The People (DPP) v Hughes [2012] CCAIE 69, "[b]oth legally and ethically, counsel for an accused are not entitled to indicate a plea of guilty unless that plea is a statement that the accused committed the offence" (at para. 27). Hardiman J goes on to state that "[p]leading guilty means just that: the accused admits the offence. In our system that occurs both in the context of legal advice and within a matrix of facts as alleged by the prosecution in the book of evidence served well prior to trial. By pleading guilty the accused accepts responsibility for the facts and mental element relevant to the count on the indictment which he or she admits" (ibid).

It follows that, if material facts are contested or if a violation is contested, a lawyer may not advise a client to accept to agree to an admission of culpability. This is particularly a concern in respect of the Undisputed Facts Settlement procedure. Whether defence counsel can or should advise a client to settle at such an early stage of the process, where no opportunity has yet arisen to assess the strength of evidence, particularly any witness testimony relied on by the Central Bank, is an issue the Law Society considers critically important.

Further, according to Charleton in E.R v. DPP "… any solicitor or barrister representing and advising the accused should immediately withdraw once the accused seeks to go back on his or her formal admission of guilt. That leaves their evidence available to accused who is not obliged to waive legal professional privilege but who thereby is given that option" (at para 36). Accordingly, Charleton J stated that "[c]ounsel and solicitors faced with a request by their client to go back on their guilty plea should thus immediately withdraw and make their evidence available to the accused and the accused's fresh advisors" (para. 37). Charleton J also states on this front that "[i]t should be noted that since the advice given by an accused's lawyers is central to any decision as to whether a plea of guilty was voluntarily made, those representing an accused should discharge themselves, thereby giving him or her the opportunity to waive legal professional privilege. In that way, the context in which the plea was made can be properly explored" (para.4)

- **Waiver of Legal Privilege**

We note the Consolidated Guidelines state that provision of legally privileged material by a defendant to the Central Bank will be considered "exemplary cooperation" that will "ordinarily be treated as a mitigating factor" (at para. 355). This suggests the Central Bank may seek effectively to condition a settlement offer on waiver of legal privilege by an executive under investigation.

The Law Society submits that refusal to waive legal privilege, (i.e., lawful exercise of a fundamental right) cannot be considered as less than "exemplary cooperation." Lawful and wholly reasonable exercise of a defendant's fundamental rights, including to take privileged and confidential legal advice in the context of a serious investigation, cannot be construed as failure to fully cooperate in exemplary fashion.15

The Law Society understands that current practice of the Central Bank in enforcement investigations regarding legally privileged material (including attorney – client discussions and notes), is to require in practice a higher standard to justify claims to legal privilege than in High

[15] Although a refusal to waive is not formally listed as an aggravating factor in the Consolidated Guidelines, the Law Society submits that incentivising of waiver of privilege in this way is inconsistent with the fundamental nature of the right to legal privilege and could operate to override privilege. For completeness, in the US the 'Thompson Memorandum' on principles of for prosecution of business organisations was amended in the following 'McNulty Memorandum' for similar reasons (although the McNulty Memorandum stopped short of rendering an agreement to waive privilege as being irrelevant to assessing a corporate's level of cooperation in an investigation).

Court proceedings (e.g. requiring statutory attestations as to the employment status of an author/recipient of legal advice at the relevant time). When there are no limitation provisions applicable to the use of the ASP, often matters are investigated which occurred more than 10 years ago with limited documentation available to provide this level of attestation to justify claims to privilege.

- **The Public Interest in Settling**

The Law Society notes that the Consolidated Guidelines state that "[t]he Central Bank will only settle a matter where it is in the public interest to do so" (at para. 22). What this means in practice is unclear, however.

According to the Consolidated Guidelines, "[t]here can be circumstances where the public interest is best served by early resolution of an investigation or inquiry. Settling appropriate cases as early as possible may achieve regulatory objectives including the effective use of time and resources and the minimisation of costs" (at para. 276).

Further, the Consolidated Guidelines stat that "… for settlement to be considered as an option, the Central Bank must be satisfied that the basis for settlement is appropriate" (at para. 278) In assessing whether settlement is appropriate in this regard, the Consolidated Guidelines state that the Central Bank may take into account "all relevant matters including, without limitation, the following: The relevant facts and circumstances in each case. Whether all concerns have been or are being addressed to the Central Bank's satisfaction. The nature and quality of engagement by the Subject with the Central Bank during an investigation and/or inquiry" (at para. 278). Further, the Consolidated Guidelines state that "[t]he settlement processes can be beneficial to both the Subject and the Central Bank by offering a means of achieving an earlier resolution of appropriate ASP matters and avoiding the additional costs, time commitment and administrative burden involved in the lengthier processes of completion of an investigation and/or inquiry" (at para. 281).16

This suggests that the Central Bank effectively considers the public interest invariably favours settlement. We note in particular that no (or limited) reference to countervailing requirements and benefits of administration of justice in public are referenced by the Consolidated Guidelines.

The Law Society urges the Central Bank to clarify what test the Central Bank will apply in determining it is in the public interest to settle a matter.

3.5. Regarding questions 25 and 26. Do the draft ASP Guidelines assist you in understanding the new requirement for High Court confirmation of sanctions agreed as part of (a) an undisputed facts settlement procedure and (b) an investigation report settlement procedure, and the Central Bank's proposed approach to it? Do the draft ASP Guidelines assist you in understanding the revised confirmation and appeal procedures?

Law Society views and comments
A key legal question, for the Law Society, is whether statutory provision for High Court confirmation of a settlement, as provided for in the 2023 Act (Section 33AR(5), is sufficient to

16 According to the Consolidated Guidelines, "[*a*] *Subject does not have a legal entitlement to settlement. The Central Bank is under no obligation to enter into a settlement agreement with a Subject at any stage. The Central Bank will only resolve an ASP matter by way of settlement where it is satisfied that it is appropriate in all of the circumstances taking account of the Central Bank's policy and expectations around settlement*" (at para. 272).

save the settlement process? According to Section 33AR(5), the imposition of a settlement sanction does not take effect unless confirmed by the High Court under section 33AWA. According to Section 33(AWA), "… the High Court shall confirm the imposition of the sanction unless it is satisfied that the sanction imposed is manifestly disproportionate."

While beyond the scope of this submission, the Law Society would note obiter comments of McMenamin J in Zalewski – on a similar-type High Court approval saver. According to McMenamin J in that case, a key question on this front is whether the High Court is vested "…with true curial powers recognised under the Constitution as protection fair procedures" (at para. 35). Likewise, the ECtHR noted that the content of a plea bargain and fairness of the manner in which it had been reached must be subject to sufficient judicial review and that the bargain must not run counter to any important public interest.

Conclusion

We hope that our recommendations will assist the Central Bank in your consideration of these issues and would welcome the opportunity to engage further on the matter.

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