

Central Bank of Ireland issues ASP Sanctions Guidance, November 2019.

In November 2019, the Central Bank of Ireland (“CBI”) published a guidance document on its Administrative Sanctions Procedure (“ASP”). The guidance provides further clarity on the approach the CBI undertakes when determining the appropriate sanction to be imposed on regulated financial services firms and individuals for certain regulatory breaches. The guidance has been welcomed by the industry and it adds to the existing ‘*Outline of the Administrative Sanctions procedure*’ and any publicly available statements issued after particular settlement cases.

In the ASP guidance document the CBI indicates it will take into account all of the circumstances of a particular case. Those factors come under four broad headings:

- The nature, seriousness and impact of the contravention.
- The conduct of the regulated entity after the contravention.
- The previous record of the regulated entity.
- Other general considerations.

The Nature, Seriousness and Impact of the Contravention

The CBI outlines a number of factors it will consider when assessing the nature, seriousness and impact of the contravention. These include:

- Whether the contravention was deliberate, dishonest or reckless.
- The duration and frequency of the contravention.
- The amount of any benefit gained or loss avoided due to the contravention.
- Whether the contravention reveals any serious or systemic weakness of the management systems or internal controls relating to all or part of the business.
- The extent to which the contravention departs from the required standard.
- The impact or potential impact of the contravention on the orderliness of the financial markets, including whether public confidence in those markets has been damaged, or put at risk.
- The nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the contravention.

It also specifies the meaning and importance given to each of these factors, e.g. it is stated that (in general) contraventions that occur over a longer period of time will be more serious. However to contextualise this further a one off contravention could be deemed very serious depending on other factors such as the amount of any benefit gained, or loss avoided and the impact or potential impact on the orderliness of financial markets.

The Conduct of the Regulated Entity after the Contravention

By far the lengthiest section of the guidance is dedicated to the ‘*conduct of the regulated entity after the contravention*’. The ASP guidance states that the CBI will consider how quickly, effectively and completely the regulated entity brought the contravention to the attention of the CBI or any other relevant regulatory authority. It also details a number of other factors the CBI will consider including:

- The degree of co-operation with the CBI or other agency provided during the investigation of the contravention.
- Any remedial steps taken since the contravention was identified, including whether customers have suffered loss or detriment and compensating them. This includes taking disciplinary action against staff involved (where appropriate) or addressing any systemic failures, and taking action to ensure that similar problems do not arise in the future.
- The likelihood that the same type of contravention will recur if no administrative sanction is imposed.
- Whether the contravention was admitted or denied.

The supporting guidance notes for each of the factors is reasonably detailed, with each following the same format; that is an outline of a specified behaviour and whether it will be treated as an **aggravating, neutral or mitigating factor** in the CBI’s assessment.

For example:

Factor

The degree of co-operation with the CBI or other agency provided during the investigation of the contravention.

Guidance

*A failure to report a contravention in full will ordinarily be treated as an **aggravating factor**. Examples of this include but are not limited to instances where the regulated entity:*

- knew about the behaviour that constituted the contravention, but failed to report it;
- wilfully withheld information about wrongdoing by the regulated entity;
- failed to report the contravention(s), despite it being obvious;
- failed to report the contravention(s), despite it continuing for a lengthy period of time;

In instances where the regulated entity has made adequate disclosure in a timely fashion but has not gone above and beyond this basic level of reporting, this will ordinarily be treated as a neutral factor that neither aggravates nor mitigates the conduct in question.

Where there has been exemplary self-reporting, this will ordinarily be treated as a mitigating factor. Examples of this include but are not limited to:

- disclosure of all relevant information known to them, and adoption of an attitude of constructive engagement and a willingness to facilitate the CBI's investigation in whatever way possible;
- reporting immediately when the contravention came to light;

The Previous Record of the Regulated Entity

In making an assessment on a particular case the CBI stated that it will consider three key elements in respect to the prior record of the regulated entity. These are detailed as follows:

- Whether it has taken any previous enforcement action including instances resulting in a settlement or sanctions or whether there are relevant criminal convictions.
- Whether the regulated entity has previously undertaken not to do a particular act or engage in particular behaviour.
- Whether the regulated entity has previously been requested to take remedial action and the extent to which such action has been taken.

Other General Considerations

Other general considerations include:

- Prevalence of the contravention.
- The appropriate deterrent impact of any sanction on the regulated entity and on other regulated entities.
- Action taken by the CBI in previous similar cases.
- The level of turnover of the regulated entity in the last complete financial year prior to the commission of the contravention.

Summary

Both the content and timing of the publication of this guidance paper is pertinent. The CBI is building out an agenda whereby accountability is key. The proposed Senior Accountability Regime combined with the existing Fitness and Probity regime, recent speeches and the publication of this ASP guidance paper (with its examples of aggravating, mitigating and neutral based responses) suggests a regulator ready to challenge firms and individuals where its standards are not being met.

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