SANCTIONS GUIDANCE TO TRIBUNALS
A CONSULTATION PAPER

Comments from ACCA
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GENERAL COMMENTS

ACCA welcomes the opportunity to respond to this consultation paper, which appears well-considered. We agree that a review of the system is required; the objective of transparency is intrinsically valuable; and penalties are in need of review in order to allow for higher fines in very serious cases. The most problematic area is that of the appropriate level of sanction, addressed specifically in relation to fines at question 7.

REQUESTS FOR SPECIFIC COMMENTS

Sanctions Policy

1. Do you agree with the Board's objectives and approach to sanctions guidance?

Yes, in our opinion, the best practice principles are very helpfully articulated in the consultation paper. We applaud the Board's stated objective to apply a principles-based approach, with particular regard to the principle of transparency, and note that prescriptive aspects of the guidance have been kept to a minimum. Such an approach will preserve the autonomy and flexibility of Tribunals.

2. Do you agree that Tribunals need a clear framework for sanctions which reflects the nature of its cases and the wider context in which the accountancy profession operates today?

Yes. In view of the importance of the cases that are heard by AADB Tribunals, it is essential that transparency and consistency are upheld, in order to maintain public confidence in the accountancy profession. Although precedent sanctions provide a guide to achieving consistency, their relevance is limited. Therefore, the proposed guidance framework is welcomed.

ACCA takes the view that best practice requires Tribunals to determine sanction by starting with the minimum sanction (zero in respect of a fine) and working its way up until it has reached a level of sanction or combination of sanctions which it feels is proportionate to the misconduct, taking into account all the circumstances of the case. This is the most flexible approach and the least susceptible to challenge on the grounds of proportionality.

However, we recognise that the disadvantage of this 'bottom up' approach is that stakeholders do not know what level of sanction to expect, and there is a higher risk of inconsistency between Tribunal decisions.

General Principles relating to Sanctions

3. Do you agree that the sanctions imposed by Tribunals should act as a credible deterrent and be proportionate to the seriousness of the misconduct and to all the circumstances of the case, including the financial resources of Members and the size and financial resources of Member Firms?

We would agree that the principles set out in paragraph 3.14 of the consultation paper are necessary to achieve the purposes set out in paragraph 3.5. A framework of appropriate sanctions will act as a deterrent, and also inspire confidence in the regulation of the profession for the general public. In this respect, appropriate, proportionate sanctions are also necessary in order to support the regulations themselves.

However, while ACCA supports the concept of sanctions on both the firm and the individual, flexibility is required in order to take account of the relative level of fault between the individual and the firm. It may be necessary to exercise a great deal of flexibility, as a sanction on a firm will, in some cases, have an indirect impact on the individual, regardless of the sanction imposed directly on that individual.

Determining Sanctions

4. Have we included the sorts of factors in the sanctions guidance that you would expect to see taken into account by Tribunals?

Broadly, we are in agreement with the sorts of factors that should be taken into account. However, we believe there are several areas in which the guidance ought to be clarified.

Firstly, in our view the consultation paper does not adequately explain how the Tribunal should deal with the situation where more than one party has contributed to the misconduct, for example:

a) in the case of a rogue fraud, there may be elements of the firm's systems that were found to be ineffective, but such fault is altogether of a different

seriousness to that of the fraudulent individual;

b) conversely, if the member's conduct was as a result of the poor practices established in the firm, which he had been following, we suggest the firm should bear a significantly higher penalty than the member;

c) it is unclear how the Tribunal would deal with a joint audit situation.

Secondly, paragraph 4.4 of the consultation paper includes consideration of 'factors relating to the impact of the misconduct'. ACCA takes the view that an individual or firm should not be held responsible for incidents of luck or misfortune that had an impact on the outcome of misconduct. Rather, they should only be held responsible for outcomes over which they had control. We note that recklessness would be a factor that would affect the assessment of seriousness, and we would agree with that. However, it would be inconsistent to impose different sanctions on different individuals in respect of the same misconduct, simply because the outcomes (ie impacts) were different.

Thirdly, in our view the guidance needs to draw a distinction between the three types of factors that affect sanction:

i. factors related to the way in which the misconduct was committed (such as the conduct being deliberate or reckless). These will be the circumstances prevailing at the time the misconduct took place;

ii. other factors which may aggravate or mitigate the seriousness of the misconduct (such as a previous disciplinary finding for similar misconduct, or the member having demonstrated insight and contrition);

iii. circumstances prevailing at the time of the determination which could affect a monetary penalty or the manner of publication, but ought to have no effect on a sanction related to fitness to practice (such as the member or member firm's financial means, any admissions made, or a member's personal circumstances).

The guidance appears to conflate i and ii to some extent. For example, paragraph 31 sets out the factors which 'aggravate the misconduct or afford mitigation' and include 'the misconduct involved an abuse of a position of trust'.

It is very difficult to see the distinction between that factor and those in paragraph 31.

If a purely 'bottom up' approach to sanctioning were being considered, the distinction between the i and ii factors would not be particularly important, as the Tribunal would not attempt to decide on the appropriate sanction without having considered all the circumstances of the misconduct in the round. However, where an entry point system is being considered, we believe that in order to minimise appeals and applications for judicial review, and provide greater consistency in decision-making, it will be important to make a clear distinction between the factors which help the Tribunal to identify the appropriate sanction starting point, and the factors that operate to move the sanction away from that starting point.

For the same reasons, we believe it will be important to insert further steps into the guidance on how to determine sanction in paragraphs 22 and 57. For example, paragraph 22 might be amended as follows:

22. The normal approach to determining sanction should be (in outline):

    i. Assess the nature and seriousness of the misconduct taking into account circumstances prevailing at the time the misconduct took place (paragraphs (24) to (47)).
    ii. Consider relevant aggravating or mitigating circumstances affecting the seriousness of the misconduct (paragraph (48)).
    iii. Determine the starting point for the sanction(s).
    iv~~ii~~. Consider any further adjustment for deterrence (~~see~~ paragraph (49)).
    ~~iv~~. Consider whether a discount on any fine for admissions or financial means is appropriate (paragraphs (50) to (56))~~;~~.
    vi. Consider whether a reduction in any fine is appropriate in light of the Member or Member Firm's financial means (paragraph 36).
    vii. Decide which sanction(s) to order and the level/duration of the sanction(s) where appropriate~~; and~~.
    viii. Give an explanation at each of the ~~five~~ stages above, sufficient to enable the parties and the public to understand the Tribunal's conclusions.

The amendments we have suggested to paragraph 22 assume the 'levels' mechanism will be used. Other entry point mechanisms might require the starting point for the sanction to be determined between steps i and ii.

5. Are there any factors you believe Tribunals should take into account when deciding sanction that we have overlooked?

a) The guidance on how to determine sanction does not distinguish between fines on the one hand and sanctions that relate to fitness to practice on the other. It may be worth doing so when considering the effect upon sanction of factors such as an early admission. We suggest that it would be inappropriate, and would reduce public confidence in the disciplinary process, for an admission to have the effect of lowering a sanction affecting fitness to practice. That is the type of approach which has brought such discredit to consent orders in the eyes of the public. The guidance in paragraphs 50 to 56 appears to be rooted in the resource savings which arise from admissions and in our view this should affect only the fine element of the sanction. We have addressed this in our answer to 4 above.

b) We note also that paragraphs 22 and 57 of the guidance, which set out the steps to be taken when determining sanction, omit any consideration of the member or member firm's financial means. It is clear from the guidance (paragraphs 29, 30 ii and 30 iii) that this should be a consideration and we have suggested in our answer to 4 above that it should take place during what are currently steps iv and v.

Determining the Appropriate Level for a Fine

6. Do you agree that there needs to be an adjustment in the level of fines imposed in AADB cases?

Yes. We agree that the guidance needs to allow for higher fines in very serious cases.

7. If so, what adjustment do you consider to be appropriate?

As a matter of principle, we can see that calculating fines as a percentage of a firm's turnover or group turnover has validity for the reason that it may have the effect of deterring poor practices in the firm as the fines will likely be higher than using other methods of calculation. However, it should also be borne in mind that any mechanism which results in significantly higher fines means an increased burden on principals in the firm who have no control over the way in which the audit function is managed, and indeed are not permitted to have control under ACCA's regulations. This could have a damaging effect on the provision of audit services in the UK – see 11(a) below.

8. What is your view of the alternative mechanisms proposed for calculating fines?

a) The minimum starting point mechanism runs contrary to the principle that the Tribunal should operate a 'bottom up' approach by starting at zero and moving up until the proportionate level of fine is reached. It also leaves the potential fine too open-ended as there is no maximum specified – this is more likely to lead to actual or perceived inconsistency in Tribunal decisions and difficulty for firms in assessing what the sanction might be in their particular case.

b) The range of levels 1 to 5 is more helpful in terms of assisting firms and other stakeholders to assess where the starting point is likely to be in a particular case, but again because the mechanism appears to require the Tribunal to start somewhere within the range and then consider moving up or down, it is contrary to the best practice 'bottom up' approach. That could be easily fixed by making it clear that the level 1 figure is not a minimum and that Tribunals should start at zero and work upwards until they reach a level of fine they feel is proportionate to the misconduct.

c) The maximum starting point mechanism is useful for stakeholders, and is more in line with the 'bottom up' approach because it states the Tribunal should start at zero. In any mechanism with a maximum, it should be made clear, as the guidance does, that aggravating factors could increase the fine above that initial maximum level.

d) We believe that a combination of (b) and (c) would be the most appropriate mechanism, in terms of giving maximum transparency, an ability for firms to assess where the starting point is likely to be, and complying as far as possible with the 'bottom up' approach by explicitly stating that level 1 is not a minimum. The Tribunal should be guided to start at zero and, to provide the Tribunal with sufficient flexibility and discretion and to minimise the potential for appeals or judicial review, the guidance should go on to make it clear that the level 5 figure is not a maximum, as aggravating factors could increase the fine above that figure.

9. What level of turnover / income do you consider would be appropriate in respect of each mechanism?

We have chosen not to comment on the percentage of turnover which might be appropriate to each mechanism. However, we believe that, because the guidance has a number of checks and balances built into it, giving the Tribunal the ability to disapply or adjust the turnover approach where appropriate, there appears to be sufficient flexibility built in to deal with any anomalies or injustice that might result.

10. Do you agree that Tribunals should not take account of the costs that it is considering awarding against a Member or Member Firm when determining the appropriate level for a Fine?

Yes, costs should be irrelevant when determining the appropriate level of a fine. Different principles apply to determining sanction from determining costs in light of the different purpose of each. If Tribunals conflate the decision-making process (at any stage), appeals/applications for judicial review are more likely. According to page 282 of *Disciplinary and Regulatory Proceedings (6th edition)* by Brian Harris OBE QC, the Divisional Court in R v Northallerton Magistrates' Court, ex parte Dove (1999) 163 JP 894 stated:

If the total of the proposed fine and the costs sought by the prosecutor exceeded the sum which the defendant could reasonably be ordered to pay, it was preferable to achieve an acceptable total by reducing the sum of costs ordered than by reducing the fine.

It is worth mentioning that when deciding whether costs ordered against a member or firm should be reduced in light of his or its financial circumstances, a relevant factor which the Tribunal may be entitled to take into account is whether costs would be paid by the member/firm or by their insurers.

11. Do you have any other comments about the proposed structure or content of the sanctions guidance?

a) There is much comment in the consultation paper about the need for sanctions, and particularly fines, to act as a deterrent against future misconduct. However, we believe that there has been insufficient consideration of the effect such fines may have on factors such as recruitment to the profession and the way in which the provision of audit services is structured. Unintended consequences are mentioned in paragraph 5.9 of the consultation paper, but dismissed, and we recommend that a more detailed impact analysis be carried out.

b) We would wish to highlight that, even over the period during which fines have not increased and firms have grown, there have been a number of factors which have made the audit profession in particular less attractive to new entrants, for example, naming of the audit partner in the auditor's report, restrictions on the ability to provide non-audit services, increased demands of regulation, and falling profitability.

c) The proposed calculation of fines by reference to the percentage of group turnover might result in firms distancing themselves from their audit functions, such that they would then form fully independent, much smaller firms (with no obvious ties to the original firms or networks). Those smaller audit firms might then merge to benefit from economies of scale, and there is a danger that this might result in just one audit firm in the UK having the capacity and competence to carry out audits of large companies and other public interest entities.

d) Calculating sanction by reference to a firm's group turnover may lead to a disproportionate amount of Tribunal time being taken up with trying to determine what is group turnover. Further direction would be required in the sanctions guidance concerning how to identify turnover (or the income of an individual).

e) The nature of a system based on group income is that the same type of misconduct could attract wildly different fines in different cases. Also, at the lower end of the scale, incomes may not be very different between firms of different sizes.

f) Paragraph 6 of the draft guidance states '[t]he guidance should be considered alongside any precedents emerging from cases decided by AADB Disciplinary Tribunals and Appeal Tribunals.' However, we believe that, once the sanctions guidance is in place, precedents should not be referred to, as the two systems are incompatible with each other.

g) It is important to base the assessment of seriousness of the misconduct on the potential worse case scenario (ie risk of harm) not actual harm (para 4.4). A significant loss could arise from an inadvertent error, and while that might be a matter for the firm's PII insurers, it ought not to attract a heavier sanction in disciplinary proceedings. However, we recognise that where the misconduct is particularly serious it would be unusual for the decision on sanction not to involve consideration of whether there has been actual harm. In such cases, where there has been no actual harm this should not operate as a mitigating factor to reduce sanction.

h) Among the factors to be considered regarding possible waiver or repayment of fees (paragraph 38), care needs to be exercised so that complainants are not compensated for amounts already claimed through other channels such as the Courts.

i) The draft guidance lists all the factors to take into account when determining each type of sanction (for example, paragraph 42). Therefore, it is very repetitious, as many of the factors are common to all sanctions. The guidance may be easier to digest and navigate if all the factors which are common to all sanctions could be listed first (this would also achieve consistency of wording) and then under each sanction only the additional factors that are relevant to that sanction could be set out.

j) In paragraph 44, it would be best practice instead to advise the Tribunal to start with the lowest possible sanction and work their way up until they get to the one which is proportionate, taking into account all the circumstances of the case.

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k) The use of the phrase 'impact of a Fine' is confusing throughout the draft guidance because it is used to both reflect the assessment of the deterrent effect (which may result in adjusting the fine upwards) and to identify any unreasonable hardship (which may result in adjusting the fine downwards). We suggest further clarity is required, or different terminology.

l) We believe that paragraphs 17 to 21 of the guidance (Combination of Sanctions) should be expanded to consider how fines might interact with other sanctions and the consequences for firms of different sizes. We are also of the view that the Tribunal should have available to it remedial sanctions, and we propose to address this in our response to the consultation on the amended Accountancy Scheme.

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