

38, Methley Street,
London,
SE11 4AJ

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Anna Colban,
Secretary to the AADB,
Financial Reporting Council,
5th floor, Aldwych House,
71-91 Aldwych,
London
WC2B 4HN

By email only

Dear Ms Colban,

AADB Consultation on Sanctions Guidance to Tribunals

I support the plan that the AADB should issue guidance on sanctions.

I am sympathetic to the idea that such guidance should adopt what I take to be high-level themes of the Consultation Paper and its attached draft, namely the desirability of sanctions being severe enough to meet public interest requirements and being sufficiently consistent and understandable to meet reasonable expectations of both public and professional stakeholders in the AADB.

I offer the following comments.

Severity

In cases of major public interest involving firms and members with access to substantial financial resources, I suspect that 'severe enough' will lead the AADB

- to confirm its Consultation thinking about approaching monetary fines by way of fee income, and with fee income to be measured on an 'all up' basis.
- to settle on '% of fee income' figures that, irrespective of the particular mechanism adopted, are likely to, and are intended to, result in materially greater fines than hitherto in the event of future adverse findings by Tribunals in 'big cases'.

If this is the case, then I recommend that:

- the AADB be even more explicit about this than is, I believe, the case in the Consultation paper.
- the AADB decide, and publish such a decision with the Guidance, that there should be a review in, say, 3 years' time as to the consequences of having issued the Guidance.

I say this, because it seems to me that issuing the Guidance may turn out to be an instance of the law of unintended consequences. For example, the intention that the Guidance will be an influence towards speedier resolution of cases may prove mis-

placed; if the scale of post-Guidance fines is to be high enough to meet 'severity' objectives, then that very severity may cause a major firm that faces a serious complaint to fight longer and harder against it. If it turns out that there is indeed something of a trade-off between severity and speed, then it may be valuable to the reputation of the ADB to have signalled this possibility from the start – and so be as well placed as possible for a further review in due course.

Where will fines go?

Fines large enough to meet the 'severity' objective may exacerbate the difficulty that, within the framework of professional regulation and the AADB, the monetary outcome of a 'public interest' process goes to the 'private sector' aspect of the profession, namely the net amount of costs of the professional body or bodies that have to be recovered in fees from firms and members (including firms and members found liable to pay the fines). Recent publicity about this mis-match in relation to the FSA will no doubt already be under consideration by the AADB. But there does not seem to be an easy or credible way for this Guidance to become a vehicle for the AADB to amend its relevant governing framework in the way has been stated will be done for the FSA. So it may be important again for the AADB future reputation and public confidence in the AADB regime for something to be said at the time of issuing the Guidance to show that the AADB is at least aware of the issues and is not taking some fresh policy decision deliberately to decline to follow down the road of ensuring the fines go to the public purse.

Misconduct proved and misconduct admitted

To my reading, the Consultation Paper (and draft Guidance) does not get to the bottom of the issues that arise where a defendant firm or member is minded to admit some or all of the charges in the Formal Complaint brought by AADB Executive Counsel.

Some of such issues exist irrespective of Guidance about sanctions, in particular issues about (as I understand it) the absence of any role for the Tribunal to opine on the acceptability of Executive Counsel deciding not to pursue a contested hearing of a Formal Complaint in its prior, more serious, form and instead to reduce the overall seriousness of the Formal Complaint as part of a negotiated settlement (where the Tribunal retains a responsibility to accept or reject the proposed sanctions agreed between Executive Counsel and the defendant(s)). The Guidance does not, and probably cannot, address these issues (nor the related issue as to the proper procedure for 'starting again' down a contested tribunal route in the event that the Tribunal decides not to accept the sanction proposed in the negotiated settlement),

But one aspect of 'negotiated settlement' issues should, I suggest, be addressed in Guidance on sanctions. This relates to the risk that it may be wrong, in at least some cases, to allow a further discount (for settlement) in deriving sanctions from admitted misconduct, if the reality is that the defendant has already 'benefited' by Executive Counsel deciding not to pursue one or more of the more serious elements of the original Formal Complaint. The consultation speaks of the Tribunal 'considering the full circumstances'; but in cases of a negotiated settlement, that is exactly what the Tribunal cannot do – it can only consider what is admitted, without seeing or hearing

the evidence behind those admissions, let alone evidence on any wider perspective of the case.

Given the 'public interest/public confidence' pressures for cases being brought to a conclusion without undue delay, the risks here may be greater than is at present apparent (particularly if the issue of Guidance ushers in a step-change towards more severe sanctions). I therefore suggest that it would again be wise for the AADB, at the time of issuing its Guidance, to signal that it will be keeping the effects of the Guidance under review and if further adjustment proves desirable, it will revise or extend its Guidance.

Yours sincerely,

Jeremy Orme