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**COMMISSION STAFF WORKING PAPER**

**SUMMARY OF THE IMPACT ASSESSMENT**

*Accompanying document to the*

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**Reinforcing sanctioning regimes in the financial services sector**

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## 1. INTRODUCTION

The financial crisis has put into question whether financial market rules are always respected and applied as they should be.

Following the political mandate received from the ECOFIN Council in 2007, the Commission, along with the Committees of Supervisors conducted a review of the coherence, equivalence and actual use of sanctioning powers among Member States (MS), in the European financial services sector.

## 2. PROBLEM DEFINITION

The preliminary analysis carried out on the basis of the information provided by the Committees of Supervisors shows certain **divergences and weaknesses in national sanctioning regimes**, which do not seem to always ensure sanctions are sufficiently effective, proportionate and dissuasive.

The levels of administrative pecuniary sanctions vary widely across MS and seem too small in some MS, including for the same type of infringement. In the financial sector, where a number of potential offenders are financial institutions with considerable turnovers, fines of a few thousand Euros do not seem to be sufficiently dissuasive.

Some MS do not have at their disposal important types of sanctioning powers (e.g. withdrawal of authorisation) for certain infringement, which may be necessary to effectively sanction violations.

Divergences exist as to the type of persons who may be sanctioned: in some MS sanctions are not applicable to natural persons or to legal persons. Therefore, they will be treated in different ways as regards a specific violation, depending on the MS where it is committed.

The criteria taken into account to determine the level of the sanctions imposed vary substantially and do not always include factors (e.g. the benefits derived from the violation) which are important to ensure proportionality and dissuasiveness of sanctions.

Some MS provide for criminal sanctions for certain violations while other MS provide for administrative sanctions only. Criminal sanctions send out a strong message of disapproval to individual offenders and could have an important dissuasive effect.

A certain divergence exists in the level of application of sanctions in different MS, including those having banking and insurance sectors of similar size.

### **Problems identified**

The divergences and the weaknesses described above may:

1. render the sanctions for breaches of EU financial services legislation **insufficiently effective, proportionate and dissuasive**;
2. create **distortions of competition in the Internal Market**; and
3. have a **negative impact on financial supervision**.

These problems can result in a **lack of compliance with EU financial services rules**, which can increase the risk of market manipulation and lack of transparency, and can ultimately be detrimental to the proper functioning of financial markets.

This situation risks seriously **undermining consumer protection and market integrity**, and can negatively affect the whole economy.

This situation also risks **undermining confidence in the financial sector**.

### **3. ANALYSIS OF SUBSIDIARITY**

Convergence of national sanctioning regimes seems necessary to promote dissuasiveness of sanctions thereby ensuring level playing field, uniform application of EU financial services legislation, and full cooperation between national supervisors across the EU. These objectives can be better achieved through EU action rather than by different national initiatives. Better application of the existing sanctioning powers by competent authorities at national level would not be sufficient to achieve sufficient convergence.

### **4. OBJECTIVES OF EU INITIATIVE**

EU action could satisfy the following general policy objectives:

- Restored confidence in the financial sector
- Better protection of users of financial services
- Safety, stability and integrity of financial markets
- Compliance with EU financial rules contributing to a proper functioning of financial markets.

Reaching these objectives requires the realisation of the following specific objectives:

- The effectiveness, proportionality and dissuasiveness of sanctions
- The development of a level playing field reducing the opportunities for regulatory arbitrage
- The effective supervision of financial institutions.

### **5. POLICY OPTIONS, IMPACT ANALYSIS AND COMPARISON**

The analysis is at this stage limited to a general assessment of the possible options to approximate and reinforce national sanctioning regimes. Policy options considered do not deal with specific measures needed in the specific sectors concerned (banking, insurance, securities), which will be assessed when the Commission makes firm proposals.

#### **5.1. Policy options relating to the content of the measures**

Five issues for potential EU action have been identified. For each issue, different policy options have been analysed and compared.

## **ISSUE 1: Type of administrative sanction and level of administrative pecuniary sanctions**

The issue concerns the type and the level of administrative sanctions envisaged in national legislation.

<b>Options</b>
1: no EU action
2: minimum common provisions on type of administrative sanctions and level of pecuniary sanctions for key violations
3: uniform type of administrative sanctions and level of pecuniary sanctions for key violations
4: uniform type of administrative sanctions and level of pecuniary sanctions across EU for all violations

Under **Option 1**, MS would hardly be willing to compare type of sanctions and level of pecuniary sanctions they envisage with those envisaged in other MS, and to question the effectiveness of their own regime. Divergences would persist.

**Option 2** would help to ensure that violations are dealt with in a similar way in all MS, which reinforces the development of a level playing field in European financial markets. This would increase consumer confidence and may lead to more cross border selling of financial services products. Providing competent authorities with equivalent minimum sanctioning powers would improve cross-border supervision. Dissuasiveness of sanctions would increase at least in the MS which currently have too low levels of sanctions. Risks of violations of EU legislation would be reduced, to the benefit of consumer protection, competition between financial institutions, safety and integrity of financial markets. MS would be allowed to go beyond the EU minimum criteria and to adapt sanctions to the specificities of the different national legal systems. Changes in national legislations would be required only in certain MS. Compliance costs for MS are expected to be limited.

**Option 3** would be effective in ensuring a level playing field as it would reduce the potential for financial services providers to engage in regulatory arbitrage between the sanctioning regimes in place in different Member States. It would increase the dissuasive effect of sanctions and consequently reduce risks of violations of EU law, which would be beneficial to consumer protection, competition, safety and integrity of financial markets. However, Member States would not be able to provide for further types of sanctions or higher levels of fines than those provided for in the uniform EU framework. This option would probably require significant changes in all national legislations.

**Option 4** would be the most effective in terms of ensuring level playing field and increasing trust between supervisors, as it would eliminate any divergence. However, it would probably require major changes in all national legislations and would eliminate any flexibility in dealing with violations of EU law. Compliance costs could be significant and the uniform regime could not fit national legal system and culture in different MS.

## **ISSUE 2: Addressees of administrative sanctions**

This issue deals with the possibility to apply sanctions to natural persons and/or to legal persons, responsible for a violation of EU financial services rules.

<b>Options</b>
1: no EU action
2: sanctions applicable to both natural and legal persons

Under **Option 1**, MS would probably not extend the personal scope of sanctions as currently provided in their legislations, which would probably not ensure optimal dissuasiveness.

On the contrary, **Option 2** would significantly increase dissuasiveness of sanctions, which would ensure better compliance with EU legislation, with positive impacts on consumer protection, fair competition, safety and integrity of financial markets. This option would have a positive impact on the level playing field in the European financial market, and would increase consumer confidence and mutual trust between supervisors. Legislative measures would be required only in MS where the scope of sanctions does not cover both natural and legal persons.

## **ISSUE 3: Factors taken into account when determining the sanctions**

This issue concerns the elements considered by competent authorities when deciding the type of administrative sanctions and/or the amount of the administrative pecuniary sanction to be applied to the author of a specific violation.

<b>Options</b>
1: no EU action
2: some key factors to be taken into account by all authorities
3: list of exhaustive and identical factors to be taken into account by all national authorities

Under **Option 1**, while all MS take into account the gravity of the violation, other factors would be taken into account only in some MS or for certain violations. This would probably be insufficient to ensure optimal dissuasiveness.

**Option 2** would permit to better adapt the sanctions imposed to the impact of the violation and the personal conditions of the offenders, which would help ensuring their effectiveness, proportionality and dissuasiveness. Increased convergence in the way sanctions are applied across Europe would ease the cooperation between competent authorities. Proportionality of sanctions would be better ensured and dissuasiveness of sanctions will be increased, which would reduce risks of violations of EU. Taking into account the cooperative behaviour of the offender would help in detecting violations. Compliance costs for MS are expected to be limited.

Under **Option 3** uniformity in the way sanctions are applied would ensure better cross border supervision. Uniform application of the factors foreseen in option 2 would have the same impacts as option 2, in terms of proportionality and dissuasiveness of sanctions and better detection of infringements. However, the list would include only factors that can be applied in

the same way in all national legal systems, which would preclude the possibility to take also into account other factors possibly relevant in some legal systems. Compliance costs may be significant, as this option implies a revision of all provisions concerning the way sanctions are applied.

#### **ISSUE 4: criminal sanctions**

This issue concerns the application of criminal sanctions to violations of EU financial services legislation.

<b>Options</b>
1: no EU action
2: introduction of criminal sanctions for the most serious violations

Under **Option 1**, it is unlikely that MS would revise their criminal laws in order to achieve further convergence in that area.

**Option 2** would send out a strong message of disapproval that could increase dissuasiveness of sanctions and have a positive impact on the public perception of the appropriateness of sanctions. Not all violations would be subject to criminal penalties but only the most serious ones, for which criminal sanctions are the most efficient, effective, and dissuasive tool to achieve the proper enforcement of EU financial services rules. Criminal sanctions would be provided for only in areas where this is strictly necessary.

#### **ISSUE 5 EU action to support effective application of sanctions**

This issue concerns the mechanisms that MS may put in place to improve the application of sanctions, particularly detection of violations. EU action envisaged would focus on (1) key powers and investigatory tools provided to all competent authorities, and (2) cooperation between national authorities.

<b>Options</b>
1: Coordination by ESAs - no additional EU action
2: additional EU action to ensure all MS provide for key investigatory powers and tools,

Under **Option 1**, while certain MS would continue to provide for rules on whistleblowing, the large majority of them would probably not put in place consistent and predictable programmes to protect whistleblowers and to exempt them from sanctions when they are involved in the infringement (leniency programmes). The objective of reinforcing national sanctioning regimes could be achieved to a certain extent through the coordination activity of the new European Supervisory Authorities.

**Option 2** would be more effective in terms of better enforcement of sanctions, as new instruments would be available to detect violations. When violations are regularly detected and punished, dissuasiveness and effectiveness of sanctions would be increased. The perception that the authors of infringements are usually discovered and effectively punished would also restore confidence in the financial sector.

### **5.1.1. Preferred policy options package**

The following options have been selected for the five issues addressed:

- ISSUE 1: introducing minimum common criteria on type and level of administrative sanctions.
- ISSUE 2: sanctions applicable to both natural and legal persons.
- ISSUE 3: some key factors taken into account by all national authorities.
- ISSUE 4: introduction of criminal sanctions for the most serious violations.
- ISSUE 5: reinforcement of mechanisms facilitating detection of infringements/enforcement sanctions.

### **5.2. Options relating to the nature of the measures**

Four options have been considered as to the nature of the measures that may be taken to implement the set of policy options identified in section 5.1.

- Option 1: non binding measures facilitating approximation of sanctioning regimes

In the absence of any obligation, it would not be ensured that all MS take all measures required, and the relevant issues would be probably dealt with differently by each MS.

- Option 2: minimum approximation of sanctioning regimes - sectoral approach

This option appear to be very effective, as it would permit to introduce the provisions which are the most appropriate in the specific sector, and for the specific EU legal act concerned. MS would still enjoy discretion in the choice and application of sanctions and would be allowed to provide for rules more stringent than the minimum standards. This option would not necessarily require important changes in national sanctioning regimes.

- Option 3: minimum approximation of sanctioning regimes – cross-sectoral approach

This option would allow for the implementation of the policy options selected for all issues except for the issue 4, as a sectoral approach seem essential to identify the most serious violations for which criminal sanctions are necessary. As the EU framework could cover very general issues only, MS would maintain considerable discretion in implementing the common rules, which would reduce the effectiveness of this option.

- Option 4: full approximation of sanctioning regimes – sectoral approach

This option is in any case excluded for issue 4, given that the European legislator has not the power to fully harmonise criminal sanctions. Full approximation of sanctioning regimes would not be suitable for the implementation of the policy measures selected for the issues 1 and 3, which exclude the introduction of uniform rules.



### **5.2.1. Preferred policy instruments**

The most appropriate option is considered to be a legislative action aiming at minimum approximation of national sanctioning regimes, covering potentially all the issues to be addressed.

The most effective approach is considered to be the sectoral approach, which could be combined with the cross-sectoral approach by establishing some basic principles common to all sectors.

## **6. MONITORING AND EVALUATION**

The policy options selected will be presented in the Communication in order to allow all stakeholders to comment on the actions proposed. The Commission will evaluate the feedback received and take it into account when coming forward with firm proposals.