ESMA's Technical Advice to the Commission on the application of administrative and criminal sanctions under MiFID II/MiFIR. International Bulletin of June 2021.

ESMA has published a final report with technical advice to the European Commission (EC) on the application of administrative and criminal sanctions under Directive 2014/65/EU (MiFID II) and Regulation (EU) 600/2014 (MiFIR) on markets in financial instruments. The report has been published on the ESMA website and was sent to the EC on 3 March.

Article (art.) 90.1.e) of MiFID II states that the EC, after consulting ESMA, will present a report to the European Parliament and the Council on the application of the administrative and criminal sanctions and in particular the need to further harmonise the administrative sanctions for the infringement of the requirements set out in MiFID II/MiFIR.

ESMA received the formal request (mandate) from the EC on 23 May 2019 to provide technical advice on various technical issues of MiFID II/MiFIR, including investor protection issues and, in particular, on the application of administrative measures and sanctions and criminal sanctions, and to further harmonise the administrative measures and sanctions set out for the infringement of MiFID II/MiFIR. The technical advice includes proposals to: a) modify the scope of the obligation to publish and report administrative measures and sanctions; b) facilitate communication between the National Competent Authorities (NCAs) and the judicial authorities to collect information on criminal sanctions; c) include settlement powers as a form of resolving of sanctioning procedures in the list of administrative measures and sanctions, and d) modify the current requirements regarding precautionary measures to be adopted by the NCAs of the host Member States.

1) ESMA proposals on obligations and requirements established in MiFID II regarding administrative measures and sanctions and criminal sanctions that require changes to Level 1 text

1. Background: relevant provisions of MiFID II

Sanctions for infringements of MiFID II/MiFIR. Art. 70 of MiFID II provides that Member States shall lay down rules on and ensure that their competent authorities may impose administrative sanctions and measures applicable to all infringements of MiFID II/MiFIR and take all measures necessary to ensure that they are implemented. Such sanctions and measures shall be effective, proportionate and dissuasive and shall apply to all natural or legal persons responsible for the infringement.

Publication of administrative measures and sanctions imposed for infringements of MiFID II/MiFIR and submission of this information to ESMA. Art. 71 of MiFID II establishes that Member States shall provide that the competent authorities publish any decision imposing an administrative sanction or measure for infringements of MiFID II/MiFIR. In accordance with Recital 146, the purpose of this provision is to ensure that decisions made by competent authorities have a dissuasive effect on the public at large, inform market participants of what behaviour is considered to infringe MiFID II/MiFIR and to promote wider good behaviour amongst market participants. This obligation does not apply to decisions imposing measures that are of an investigatory nature. The publication must be made on the official websites of the NCAs without undue delay after the person on whom the sanction was imposed has been informed of that decision, and must include at least information on the type and nature of the infringement and the identity of the persons responsible. For reasons of proportionality or to protect personal data, market stability or an ongoing investigation, the NCA may postpone publication, publish on an anonymous basis or not publish.

Exercise of supervisory powers and powers to impose sanctions. Art. 72 of MiFID II establishes rules for the exercising of supervisory powers, including investigatory powers and powers to impose remedies (Art. 69) and

sanctioning powers (Art. 70), and indicates that Member States are obliged to guarantee that the NCAs have a non-exhaustive list of criteria (such as the gravity and duration of the infringement or the degree of responsibility of the natural/legal person responsible) that is taken into account when determining the type and level of administrative measures or sanctions.

Reporting of MiFID II/MiFIR infringements and right of appeal. Art. 73 of MiFID II indicates that Member States shall ensure that the NCAs establish effective mechanisms to enable reporting of potential or actual infringements of MiFID II/MiFIR. Art. 74 of MiFID II indicates that Member States shall ensure that the decisions adopted under MiFID II/MiFIR are properly reasoned and subject to the right of appeal, and that certain bodies (public, consumer or professional organisations) are able to take action before the courts or competent administrative bodies in the interests of consumers to ensure that MiFID II/MiFIR are applied.

2. ESMA analysis and technical advice

ESMA sought information from the NCAs about their experiences and proposals for possible changes to the MiFID II/MiFIR sanctions framework. The responses led to the general conclusion that MiFID II/MiFIR are a clear step forward in the application of the sanctions framework due to the greater specificity and development of the regulations (e.g. allowing sanctions on legal persons and maximum levels of fines to be imposed), which has enhanced their deterrent effect and has increased pressure for regulatory compliance. Some NCAs also pointed out that the lack of harmonisation in the rules on administrative sanctioning procedures may hamper the efficient application of the MiFID II sanctions framework. ESMA shares this view although the technical advice only covers possible changes to MiFID II/ MiFIR and other issues to be addressed through convergence tools, so that the differences that exist in national administrative law pose a limit to the level of harmonisation that can be achieved in this area.

Diverging requirements relating to the reporting of sanctions and measures to ESMA under MiFID II and other relevant financial service legislation, in the following areas:

1) Aggregated in contrast to individual reporting of administrative sanctions and measures. Most provisions (MiFID II, UCITS Directive, Market Abuse Regulation (MAR), Insurance Distribution Directive (IDD), Prospectus Regulation and PRIIPS Regulation) establish the individual and aggregated reporting of administrative sanctions and measures. However, the European Market Infrastructure Regulation (EMIR) does not establish any obligation to report to ESMA, the Benchmark Regulation only requires aggregated reporting and the Alternative Investment Fund Managers Directive (AIFMD) only requires individual reporting of administrative sanctions and measures.

2) Reporting of published and unpublished sanctions and measures. The MAR and PRIIPS regulations require NCAs to report individually only publicly disclosed administrative sanctions and measures, in contrast to MiFID II, which establishes the obligation to report individually to ESMA both unpublished and published administrative sanctions and measures.

3) Individual reporting of unpublished sanctions and measures. MiFID II, UCITS and the Central Securities Depositories Regulation (CSDR) refer only to unpublished administrative sanctions but not unpublished administrative measures, while the PRIIPS Regulation obliges NCAs to report individually both unpublished administrative sanctions and measures.

4) Inconsistent terminology, which means that while the obligations are similar, they are not identical in all legal texts, creating potential confusion in their implementation.

Proposal: The Commission should consider the possibility of aligning the relevant requirements for NCA disclosure and reporting to ESMA of administrative sanctions and measures across legislative frameworks.

Lack of consistency in the obligation for NCAs to report criminal sanctions to the European Supervisory Authorities (ESAs) under MiFID II and other legislations. MiFID II (in addition to the UCITS Directive and the Prospectus Regulation) establishes the possibility that each Member State may establish criminal sanctions in the event of infringement of a set of specific articles, but they lack clarity on whether the reporting obligation refers to any criminal sanction (under national criminal law) or only to criminal sanctions imposed if the Member State has not laid down administrative sanctions for infringements and has instead provided for criminal sanctions. The MAR establishes this obligation for cases in which the Member States have decided not to lay down rules for administrative sanctions where the infringements were already subject to criminal sanctions in their national law on 3 July 2016. Lastly, the PRIIPS Regulation does not require NCAs to report criminal sanctions although it also recognises the right of the Member States to impose them.

Proposal: the EC should clarify the sanction reporting procedure under MiFID II relating to the scope of NCAs` reporting obligations of criminal sanctions, by specifying whether those requirements apply to any criminal sanction imposed in relation to MIFID II/MiFIR infringements or to criminal sanctions imposed for MiFID II/MiFIR infringements only in those Member States that have not laid down administrative sanctions for such infringements and have instead provided for criminal sanctions.

Lack of consistency in the obligation of NCAs to liaise with judicial authorities to gather information on criminal sanctions under MiFID II and other legislative acts, resulting in a lack of clarity over the circumstances under which they are obliged to liaise with judicial authorities (of their jurisdictions) to receive information on criminal sanctions. Furthermore, the MiFID II requirement is burdensome and complex to put in place.

Proposal: The EC should clarify the scope of NCAs' obligation to liaise with judicial authorities to gather information on imposed criminal sanctions in the jurisdiction, by specifying: a) whether those obligations apply to any criminal sanction imposed in relation to MIFID II/MiFIR infringements or to criminal sanctions imposed for MiFID II infringements only in those Member States that have not laid down administrative sanctions for such infringements and have instead provided for criminal sanctions, and b) whether those obligations apply to all criminal sanctions (published or not by the judicial authority) or only those that the judicial authority has not published.

Proposal for new types of measures to increase the efficiency of sanction proceedings. ESMA considers the current minimum set of types of administrative sanctions and measures listed in Art. 70.6 of MiFID II should be expanded to include settlement powers, to provide a more efficient and effective enforcement of administrative sanction proceedings. The national legislation of some Member States already explicitly provides such settlement powers. In these jurisdictions, these powers have proven to be useful for expediting the conclusion of enforcement proceedings. ESMA understands that settlement powers can provide an alternative enforcement approach and contribute to a more efficient and effective enforcement of MiFID II/MiFIR requirements. The amendment to MiFID II should not aim at setting out details on the settlement process as the aspects are normally regulated by national administrative law.

Proposal: the EC should enlarge the list of types of sanctions and measures set out in Art. 70.6 of MiFID II and empower NCAs with settlement powers, a type of power that a few NCAs already explicitly have in accordance with national legislation.

Amendments to Art. 86.1 of MiFID II on precautionary measures to be taken by host Member States when an investment firm acting within its territory under the freedom to provide services regime infringes requirements. The experience reported to ESMA by the NCAs on the application of these measures shows that: a) the burden of proof is high since a host NCA is required to have "clear and demonstrable grounds" for believing there is an infringement, and they have no supervisory powers and hence no information about the infringements; b) the process is often lengthy and could benefit from clear deadlines to ensure that requests from a host NCA are processed efficiently and expeditiously by the home NCA, and c) when precautionary measures are adopted, the IF can simply decide to shift its activities to other EU Member States to the detriment of their clients. ESMA believes that some improvements could be made to improve cross-border supervisory cooperation, ensure a higher level of protection of EU investors and ultimately increase confidence in the single market for investment services.

Proposal: the EC should consider amending Art. 86.1 of MiFID II along the following lines: a) requiring a host NCA to demonstrate "reasonable grounds" and add a recital specifying that the receipt of a significant number of investor complaints in relation to the same IF are reasonable grounds, supported by sufficient supporting documents; b) including a deadline (e.g. 60 days) in which the host NCA must take the measures or initiate the process to take measures, c) specify that when a host NCA takes measures, the NCA of any other host Member State may take precautionary measures regarding that investment firm if it has reasonable grounds to believe that there is an infringement of MiFID II; and d) specify that if an IF is subject to preventive measures it should not be able to submit new investment services and activities passport notifications for a specified period (e.g. one year from the adoption of the precautionary measures) and, in any case, at least until the home NCA has assessed that adequate measures have been taken by the firm to address the infringements that gave rise to the precautionary measures in one or more host Member States.

2) Issues related to the MiFID II sanctions framework that do not require legislative changes to the Level 1 text and that can be addressed through the different supervisory convergence tools.

ESMA has identified another series of issues to improve the MiFID II sanctions framework that do not require

legislative changes to the Level 1 text and that it plans to address through convergence tools: a) lack of clarity relating to the concepts of “sanctions” and “measures” under MiFID II/MiFIR; b) differences across jurisdictions in the extent to which NCAs publish their sanctioning decisions (ranging from disclosing the complete decision to a short summary or anonymous information) and additionally differences in applying exemptions from publication, which may hamper the deterrence effect; c) lack of clarity with regard to circumstances and conditions under which NCAs apply administrative measures under MiFID II/MiFIR (inter alia, relating to cease and desist orders); d) a lack of rules on certain aspects of the application of financial penalties (for instance, the methodology for the determination of the appropriate amount of fines), which could hinder the appropriate enforcement of the MiFID II/MiFIR requirements, and e) obstacles to the recovery of cross-border penalties due to the absence of mutual recognition and lack of enforcement of administrative decisions among EU Member States under MiFID II/MiFIR.

Useful link:

Final report on ESMA’s Technical Advice to the Commission on the application of administrative and criminal sanctions under MiFID II/MiFIR