



European Securities and
Markets Authority

Final Report

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



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1. Executive Summary

Reasons for publication

Article 90 of Directive 2014/65/EU (“MiFID II”) provides that the European Commission (“Commission”) shall, after consulting the European Securities and Markets Authority (“ESMA”), present a report to the European Parliament and the Council on certain aspects of the functioning of MiFID II and of Regulation (EU) No 600/2014 (“MiFIR”).

ESMA received a formal request (mandate) from the Commission on 23 May 2019 to provide technical advice on several technical issues stemming from MiFID II and MiFIR, including certain investor protection topics. The mandate focuses on technical issues which follow from MiFID II and MiFIR and is available on the Commission website¹.

Contents

This final report solely deals with technical advice in relation to certain investor protection topics under MiFID II. In this respect, in the mandate from the Commission, ESMA was requested to focus on the application of the administrative and criminal sanctions and in particular the need to further harmonise the administrative sanctions set out for the infringement of MiFID II/MiFIR requirements.

Next Steps

The final report has been submitted to the European Commission on 29 March 2021.

¹ See: Formal request to ESMA for technical advice on the reports to be submitted by the Commission under Article 90 of Directive 2014/65/EU and Article 52 of Regulation (EU) No 600/2014. https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190523-mifid-mifir-esma-technical-advice-request_en.pdf.

2. MiFID II requirements on sanctions and measures

Background/Mandate

The sanctioning framework for infringements of MiFID II/MiFIR

1. A review of the Markets in Financial Instruments Directive (EC) No 39/2004² (MiFID I) resulted in a revised Directive (Directive (EU) No 65/2014³ (“MiFID II”)) and a new Regulation (Regulation (EU) No 600/2014⁴ (“MiFIR”)), which inter alia included a review of the requirements related to sanctions and measures for infringements of this regulatory framework. MiFID II and MiFIR entered into application on 3 January 2018.
2. Article 70(1) of MiFID II requires Member States to lay down rules on and to ensure that their NCAs can impose administrative sanctions and measures.⁵ Those sanctions and measures⁶ must be effective, proportionate and dissuasive, and apply to infringements even where they are not specifically referred to under MiFID II/MiFIR as requiring an administrative sanction or measure. In addition, Member States can lay down criminal sanctions instead of administrative sanctions. However, the respective criminal law provisions must be communicated to the Commission (Article 70(1) of MiFID II) and appropriate measures must be in place, so NCAs have all necessary powers to receive the relevant information from judicial authorities within their jurisdiction and provide it to other NCAs and ESMA, according to the requirements (Article 79(1) of MiFID II).
3. Furthermore, Article 70(2) of MiFID II stipulates that sanctions and measures have to be applicable to the management body of the firm (and any other natural persons responsible for the infringement), even if those sanctions and measures are subject to conditions laid down in national law in areas that are not harmonised by MiFID II.
4. Articles 70(3) to (5) of MiFID II establish the minimum scope of the MiFID II/MiFIR sanctioning framework. Accordingly, Article 70(3) of MiFID II lays out a list of MiFID II/MiFIR provisions and requires that at least the breach of any of those provisions must

² OJ L 145, 30.4.2004, p. 1–44

³ OJ L 173, 12.6.2014, p. 349–496

⁴ OJ L 173, 12.6.2014, p. 84–148

⁵ This is without prejudice to the supervisory powers of NCAs, including investigatory powers and powers to impose remedies in accordance with Article 69 of MiFID II and Member States’ right to provide for and impose criminal sanctions (Article 70(1) of MiFID II).

⁶ MiFID II refers to sanctions and measures in order to cover all actions applied after an infringement, and which are intended to prevent further infringements, irrespective of their qualification as a sanction or a measure under national law (Recital 148 of MiFID II).

be regarded as an infringement of MiFID II/MiFIR and must be subject to administrative sanctions and measures.⁷

5. Additionally, the provisions setting out the minimum scope for sanctioning MiFID II/MiFIR breaches also specify that
 - the provision of an investment service or the performance of investment activities without the required authorisation or approval (Article 70(4) of MiFID II); and
 - the failure to cooperate or comply in an investigation or with an inspection or request (Article 70(5) of MiFID II);

must both be considered an infringement of MiFID II/MiFIR.

6. Article 70(6) of MiFID II requires Member States to provide their NCAs with the powers to impose a minimum set of types of administrative sanctions and measures in case of infringements of MiFID II/MiFIR requirements.⁸
7. MiFID I did not contain any specific obligation related to sanctions and measures to be imposed for infringements of those rules. Article 51(1) of MiFID I only required Member States to provide for “appropriate administrative measures” and “administrative sanctions” in case of an infringement and required Member States to ensure that these measures were effective, proportionate and dissuasive. In contrast, MiFID II has limited the wide legislative and administrative discretion previously granted by MiFID I.

Requirements for the publication of decisions related to sanctions and measures imposed under MiFID II/MiFIR

8. Article 71 of MiFID II lays out obligations for NCAs’ public reporting on decisions related to sanctions and measures imposed for infringements of MiFID II/MiFIR. The purpose of publishing this information is to ensure that “decisions made by competent authorities have a dissuasive effect on the public at large” and to inform market participants of what

⁷ This list includes MiFID II requirements related to, inter alia, investment firms’ obligation to identify and to prevent or manage conflicts of interests (Article 23) and the rules for receiving inducements (Article 24(7)-(10)). The list also encompasses MiFIR provisions, such as on pre- and post-trade transparency requirements for trading equity instruments on trading venues (Article 70(3) of MiFID II).

⁸ This minimum set of types of administrative sanctions and measures contains, inter alia, a public statement indicating the natural or legal person and the nature of the infringement; a withdrawal or suspension of the authorisation of, for example, investment firms. This list also includes minimum/floor thresholds for maximum administrative fines (Article 70(6) of MiFID II).

behaviour is considered an infringement of MiFID II/MiFIR and “to promote wider good behaviour amongst market participants“ (Recital 146 of MiFID II).

9. In particular, the MiFID II requirements for public disclosure on decisions on the imposition of sanctions and measures include the following core provisions:

- that NCAs are obliged to publish any decision imposing an administrative sanction or measure for infringements of MiFID II/MiFIR on their official websites without undue delay, after the person on whom the sanction was imposed has been informed accordingly. However, that obligation does not apply to decisions imposing measures that are of an investigatory nature (Article 71(1) MiFID II);
- requirements on the extent of information which NCAs must publish (among others, on the type and nature of the infringement and identity of the responsible person), including the conditions for deferring, restricting or exempting this disclosure⁹ (Article 71(1) MiFID II).

10. Article 71 of MiFID II also sets out the obligations for NCAs’ reporting regarding their imposed sanctions and measures to ESMA. Those requirements encompass, inter alia that:

- NCAs must inform ESMA of all administrative sanctions imposed but not published (in accordance with the conditions for the non-publication of the decision to impose a sanction or measure set out in the second subparagraph of Article 71(1) and Article 71(1)(c) of MiFID II, including any related appeal and the outcome thereof (second subparagraph of Article 71(3) of MiFID II);
- Member States are obliged to ensure that NCAs receive information and the final judgement in relation to any criminal sanction imposed and submit it to ESMA. ESMA is required to maintain a central database of sanctions communicated to it solely for the purposes of exchanging information between NCAs. That database must be accessible to NCAs only and it must be updated

⁹ For example, where NCAs consider, inter alia that the publication of the personal data of the natural persons is disproportionate following a case-by-case assessment conducted on the proportionality of the publication of this data. Accordingly, Member States must ensure that NCAs apply certain criteria to the disclosure of this information. Those criteria include (i) to defer the publication of the decision to impose the sanction or measure until the moment where the reasons for non-publication cease to exist; or (ii) publish the decision to impose the sanction or measure on an anonymous basis in a manner which complies with national law, if such anonymous publication ensures an effective protection of the personal data concerned (Article 71(1) of MiFID II). Moreover, NCAs’ obligation to publish any decision imposing an administrative sanction or measure for MiFID II/MiFIR infringements does not apply to decisions imposing measures that are of investigatory nature (Article 71(1) of MiFID II).

on the basis of the information provided by the NCAs (second subparagraph of Article 71(3) of MiFID II);

- Member States are also required to provide ESMA annually with aggregated information on all sanctions and measures imposed under MiFID II/MiFIR (Article 71(4) of MiFID II). That obligation does not apply to measures of an investigatory nature. ESMA is required to publish that information in an annual report.¹⁰ Additionally, (provided Member States have chosen to lay down criminal sanctions for MiFID II/MiFIR infringements in accordance with Article 70 of MiFID II), NCAs are required to provide ESMA annually with anonymised and aggregated data regarding all criminal investigations undertaken and criminal sanctions imposed. ESMA is also obliged to publish that information in an annual report (Article 71(4) of MiFID II)¹¹ and;
- NCAs must report to ESMA any administrative measure, sanction or criminal sanction they have disclosed to the public (Article 71(5) of MiFID II).¹²

11. Under MiFID I, Article 51(3) only stipulated that Member States must allow their NCAs to publish sanctions and measures imposed for breaches of the legal framework, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

Rules on the exercise of NCAs' powers to supervise and impose sanctions

12. Article 72(1) of MiFID II lays out general rules related to supervisory powers, including powers on investigation and enforcement, for NCAs.¹³ Furthermore, Member States are obliged to ensure that NCAs take into account a non-exhaustive list of criteria (including gravity and duration of infringements or degree of responsibility of the natural/legal

¹⁰ ESMA also provided an Implementing Technical Standard (ITS) which aims to harmonise NCAs' annual reporting to ESMA on imposed sanctions, measures and criminal investigations (Commission Implementing Regulation (EU) 2017/1111 of 22 June 2017 laying down implementing technical standards with regard to procedures and forms for submitting information on sanctions and measures in accordance with Directive 2014/65/EU of the European Parliament and of the Council).

¹¹ ESMA has published such annual reports, ie,

- a Report on sanctions and measures imposed under MiFID II in 2018: https://www.esma.europa.eu/sites/default/files/library/esma35-36-1711-report_on_mifid_ii_sanctions_measures_investigations.pdf and;

- respectively for 2019: https://www.esma.europa.eu/sites/default/files/library/35-43-2427_report_mifid_ii_sanctions_2019.pdf.

¹² Further detailed information on public sanctions and measures issued by NCAs, inter alia under MiFID II/MiFIR, can be found on the ESMA register available on the ESMA website (<https://registers.esma.europa.eu/publication/searchSanction>).

¹³ Accordingly, NCAs can exercise their supervisory powers, inter alia, directly or in collaboration with other authorities (Article 72(1) of MiFID II).

person responsible for the infringement) when determining the type and level of administrative sanctions and measures they impose (Article 72(2) of MiFID II).

Obligations related to the reporting of MiFID II/MiFIR infringements and the right of appeal

13. Article 73 of MiFID II obliges Member States to ensure that their NCAs establish effective mechanisms to protect whistle-blowers who report potential or actual infringements of MiFID II/MiFIR requirements. This Article also sets out minimum features for such mechanisms.¹⁴
14. Article 74 of MiFID II requires Member States to provide the right of appeal (before the tribunal) against all decisions taken under laws, regulations and administrative provisions adopted in accordance with MiFID II or MiFIR (Article 74(1) of MiFID II).
15. Additionally, this Article obliges Member States to provide the right to take action (before courts or competent administrative bodies), in consumers' interest and in accordance with national law, to ensure that the MiFID II/MiFIR provisions are applied - to at least one of the following entities: (i) public bodies, (ii) consumer organisations or (iii) professional organisations (Article 74(2) of MiFID II)¹⁵.

Extract from the Commission's mandate for advice

ESMA is therefore invited to provide technical input to the Commission on each of the following topics.

[...]

(e) the application of the administrative and criminal sanctions and in particular the need to further harmonise the administrative sanctions set out for the infringement of the requirements set out in this Directive and in Regulation (EU) No 600/2014; [...].¹⁶

¹⁴ The minimum features for effective mechanisms to enable reporting of potential or actual MiFID II/MiFIR infringements include, inter alia, (i) specific procedures for the receipt of reports on potential or actual infringements and their follow-up, inter alia, via establishing secure communication channels for such reports and (ii) appropriate protection for financial institutions' employees reporting infringements committed within the financial institution (at least against retaliation, discrimination or other types of unfair treatment) (Article 73(1)(a) and (b) of MiFID II).

¹⁵ Entities referred to under (ii) and (iii) are required to have a legitimate interest in protecting consumers (Article 74(2) of MiFID II).

¹⁶ See: Formal request to ESMA for technical advice on the reports to be submitted by the Commission under Article 90 of Directive 2014/65/EU and Article 52 of Regulation (EU) No 600/2014.

Analysis and technical advice

Overview

16. As part of its work on the abovementioned mandate¹⁷, ESMA sought feedback from the NCAs of the Member States to
- (i) gain insights on NCAs` experiences with the current MiFID II/MiFIR sanction regime and;
 - (ii) gather NCA`s proposals for potential amendments of the MiFID II/MiFIR sanctioning framework.

The feedback received from NCAs provided the basis for the following analysis.

17. Most NCAs stated that the MiFID II sanctions and measures framework has helped to ensure an efficient enforcement and application of the MiFID II/MiFIR rules in their jurisdictions. Those NCAs further specified the contribution of this framework for their enforcement work, by highlighting, inter alia that:
- the more concrete and extensive criteria introduced by MIFID II facilitated the application of sanctions (e.g. the MiFID II provisions enabling to impose sanctions on legal persons and maximum levels of fines) and enhanced their deterrent effect; and that
 - the MiFID II framework has increased pressure on firms to comply with rules due to NCAs` (potential) imposition of sanctions in case of infringements.
18. Nevertheless, some of those NCAs also highlighted certain factors which are not directly related to the MiFID II sanctioning framework but can still hamper the efficient enforcement of those rules. In particular the enforcement of MiFID II/MiFIR rules can depend strongly on procedural rules that are not harmonised among Member States (e.g. administrative requirements for enforcement procedures).
19. ESMA shares the NCAs` view that the lack of harmonisation of national procedural rules on sanctioning can reduce the effectiveness of the MIFID II requirements in their enforcement work. ESMA however notes that the technical advice contained in this Report covers only issues and possible changes related to Level 1 legislative provisions of MiFID II. Nevertheless, ESMA will continue – beyond this technical advice – to address

¹⁷ In January 2019, ESMA wrote to the Commission with its plan for the delivery for the MIFID II reports and noted it planned to submit its report on sanctions by March 2021 (https://www.esma.europa.eu/sites/default/files/library/esma70-156-907_letter_chair_to_eu_commission_on_the_mifid_review_reports.pdf).

the issues identified through its supervisory convergence work and tools, while noting the differences that exist in national administrative law and that 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 between MiFID II and other relevant EU financial service legislation

20. A few NCAs also pointed out divergences in relation to reporting requirements on sanctions and measures under MiFID II and other relevant EU regulatory frameworks in financial services (inter alia, MAR¹⁸, UCITS¹⁹, IDD²⁰, AIFMD²¹, EMIR²², PRIIPs²³, Prospectus²⁴, SFTR²⁵, Benchmark Regulation²⁶, (ie, “other relevant EU financial service legislation”)), which may hamper the functioning of those sanction regimes. Those NCAs highlighted that further harmonisation of the reporting obligations across those EU legislative texts would be required to enhance the functioning and effectiveness of the MiFID II sanctioning framework. This harmonisation would also enable the sanctioning regimes of key financial legislation to more effectively promote sound EU financial markets and thereby ultimately fostering the protection of investors.
21. MiFID II and other relevant EU financial services legislation, include requirements for NCAs’ reporting of sanctions to the competent European Supervisory Authority (ESA) (i.e. the European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA) or ESMA). Whereas those reporting requirements aim at achieving the same objective, their scope and modalities are not harmonised and lack consistency across the relevant EU financial service legislation. The following information was provided to highlight this point.

¹⁸ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

¹⁹ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

²⁰ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast).

²¹ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.

²² Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

²³ Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

²⁴ Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

²⁵ Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012.

²⁶ Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014.

22. The type of applicable NCA reporting to the competent ESA varies across the different legislative texts with regards to the following features:

- Aggregated in contrast to individual reporting of sanctions and measures
 - certain frameworks require NCAs to report both aggregated and individual administrative measures and/or sanctions to the competent ESA²⁷, which may differ as to whether the respective sanction or measure was publicly disclosed or not;
 - whereas other regulatory frameworks only require aggregated reporting by NCAs²⁸; and
 - finally, some legislative texts do not provide for any reporting obligation at all.²⁹
- Reporting of published and unpublished sanctions and measures
 - whereas some legislative texts oblige NCAs to report individually both unpublished and published administrative sanctions and measures;
 - other relevant regulatory frameworks require NCAs to report individually only publicly disclosed administrative sanctions and measures.³⁰
- Individual reporting of unpublished sanctions and measures
 - whereas some legislative texts require NCAs to report individually unpublished administrative sanctions, but not unpublished administrative measures³¹;
 - other relevant regulatory frameworks oblige NCAs to report individually both unpublished administrative sanctions and measures³².

²⁷ For instance, see MiFID II (Article 71(3), second subparagraph of Article 71(4) and Article 71(5)), UCITS (Article 99(e)(1) and (2)), MAR (Article 33(1) (2) and (3)), IDD (Article 36(1), (2) and (3)), Prospectus (Article 43(1), (2) and (3) and PRIIPS (Articles 27(1) and (2)).

²⁸ Article 45(5) of the Benchmark Regulation

²⁹ For instance, EMIR.

³⁰ For instance, in contrast to MiFID II (second subparagraph Article 71(3) and Article 71(5)) and IDD (Article 36(1) and (3)), PRIIPS (Article 27(1)) and MAR (Article 33(3)) limit the individual reporting obligation to administrative sanctions and measures that have been disclosed by NCAs.

With regards to criminal sanctions: for instance, UCITS (Article 99(e)(2) and PRIIPS (Article 27(1))

³¹ For instance, MiFID II (Article 71(3), second subparagraph), UCITS (Article 99b(2)) and CSDR (Article 62(1), fifth subparagraph).

³² For instance, PRIIPs (Article 29(2) and IDD (Articles 32(3) and 36(1)).

- Terminology used when setting out the obligations – the various legislative texts contain numerous cases of similar, but non identical, obligations creating potential confusion in their implementation by NCAs and ESMA.³³

Proposal

The Commission should consider the possibility to align the relevant requirements for NCAs' disclosure and reporting of sanctions and measures across legislative frameworks on the issues set out in the analysis above.

Scope of NCAs' reporting requirements related to criminal sanctions

23. ESMA's analysis also shows that the scope of NCAs' reporting obligation of criminal sanctions to the ESAs (related to individual and aggregated reporting) is not consistent across the relevant EU financial service legislations, thereby creating legal uncertainty and diverging views as to its exact scope.
24. The provisions on NCAs' reporting of criminal sanctions are not always phrased consistently and in certain cases are not clearly specified. This can lead to difficulties in determining the scope of the reporting requirements for criminal sanctions and as a result, diverging interpretations may emerge. A few NCAs highlighted that in practice, they lack clarity on whether their reporting obligation refers
 - to any criminal sanctions imposed in their respective Member State or;
 - only to criminal sanctions imposed, if the Member State has not laid down administrative sanctions for infringements of the relevant EU legislation and has instead provided for criminal sanctions.
25. In MiFID II, for instance, the provisions on NCAs' reporting of criminal sanctions (Articles 71(4) and 79(1), second subparagraphs respectively) apply in situations where "*Member States have chosen, in accordance with Article 70, to lay down criminal sanctions for infringements of the provisions referred to in that Article*". The reference to Article 70 of MiFID II lacks precision and consequently may raise questions in practice as to the circumstances in which the requirements of those aforementioned articles apply (or not).

³³ For instance, while Article 71(5) of MiFID II requires that when a "competent authority has disclosed an administrative measure, sanction or criminal sanction to the public, it shall, at the same time, report that fact to ESMA" the UCITS Directive requires such a reporting to be done "simultaneously".

Accordingly, criminal sanctions are only addressed in the first paragraph of Article 70 of MiFID II, whereas not in other paragraphs of this provision³⁴. In addition, Article 70(1) of MiFID II contains two references to criminal sanctions:

- (i) the first subparagraph of Article 70(1) contains a mere provision for the general right of Member States to provide for and impose criminal sanctions, which continues to apply notwithstanding the Member States' obligation to lay down rules on and ensure that their NCAs may impose administrative sanctions and measures applicable to all infringements of MiFID II/MiFIR (and the national provisions adopted in the implementation); and
- (ii) the second subparagraph of Article 70(1) of MiFID II provides for an exception to the rule set forth in the first subparagraph and authorises Member States not to lay down rules for administrative sanctions for infringements which are subject to criminal sanctions under their national law.³⁵

26. In comparison, certain of other relevant EU financial service legislation include a wording similar to the one used in MiFID II. Those legislative texts also contain a non-specific reference to a paragraph including two references to criminal sanctions (for example, Article 43(1), second subparagraph of the Prospectus Regulation and Article 99(e)(1) of the UCITS Directive).

27. In contrast to MiFID II, the reporting obligation on criminal sanctions is set out more precisely in MAR and IDD:

³⁴ Article 70(1) of MiFID II provides that: "Without prejudice to the supervisory powers including investigatory powers and powers to impose remedies of competent authorities in accordance with Article 69 and the right for Member States to provide for and impose criminal sanctions, Member States shall lay down rules on and ensure that their competent authorities may impose administrative sanctions and measures applicable to all infringements of this Directive or of Regulation (EU) No 600/2014 and the national provisions adopted in the implementation of this Directive and of Regulation (EU) No 600/2014, and shall take all measures necessary to ensure that they are implemented. Such sanctions and measures shall be effective, proportionate and dissuasive and shall apply to infringements even where they are not specifically referred to in paragraphs 3, 4 and 5. Member States may decide not to lay down rules for administrative sanctions for infringements which are subject to criminal sanctions under their national law. In that case, Member States shall communicate to the Commission the relevant criminal law provisions. By 3 July 2016 Member States shall notify the laws, regulations and administrative provisions transposing this Article, including any relevant criminal law provisions, to the Commission and ESMA. Member States shall notify the Commission and ESMA without undue delay of any subsequent amendments thereto."

³⁵ See also recital 150 of MiFID II which sets out: "Even though nothing prevents Member States from laying down rules for administrative and criminal sanctions for the same infringements, Member States should not be required to lay down rules for administrative sanctions for the infringements of this Directive or of Regulation (EU) No 600/2014 which are subject to national criminal law. In accordance with national law, Member States are not obliged to impose both administrative and criminal sanctions for the same offence, but they should be able to do so if their national law so permits. However, the maintenance of criminal sanctions instead of administrative sanctions for infringements of this Directive or of Regulation (EU) No 600/2014 should not reduce or otherwise affect the ability of competent authorities to cooperate, access and exchange information in a timely way with competent authorities in other Member States for the purposes of this Directive and of Regulation (EU) No 600/2014, including after any referral of the relevant infringements to the competent judicial authorities for criminal prosecution". Similar recitals are included in other relevant EU financial service legislation (for instance, MAR (Recital 72), Prospectus (Recital 76), IDD (Recital 59)).

- Under MAR, the reporting obligation of criminal sanction laid down in Article 33(2) applies *"where Member States have, in accordance with the second subparagraph of Article 30(1), laid down criminal sanctions for the infringements referred to in that Article"*. The reference is more specific and refers only to situations where 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 by 3 July 2016). Article 33(2) of MAR does not refer to the first subparagraph of Article 30(1), which contains the provision for the general right of Member States to impose criminal sanctions in addition to their obligation to lay down administrative sanctions and measures.
- The relevant reference in IDD (second paragraph of Article 31(6)³⁶) is also more specific³⁷ and refers to situations where Member States have chosen to lay down criminal sanctions for some infringements, which are thus not required to be subject to administrative sanctions.

28. Finally, PRIIPs differs from the aforementioned legislative texts, as this framework does not require NCAs to report criminal sanctions. Accordingly, Article 27(1) and (2) of PRIIPs limit NCAs' individual and aggregated reporting obligations to administrative sanctions and measures. However, PRIIPs allows Member States not to lay down administrative sanctions for infringements that are subject to criminal sanctions (Article 22(1), second subparagraph of PRIIPs).³⁸

³⁶ The second subparagraph of Article 31(6) of IDD states that: "Where Member States have chosen, in accordance with paragraph 2 of this Article, to lay down criminal sanctions for infringements of the provisions referred to in Article 33, they shall ensure that appropriate measures are in place so that competent authorities have all the necessary powers to:

(a) liaise with judicial authorities within their territory to receive specific information relating to criminal investigations or proceedings commenced for possible infringements under this Directive; and

(b) provide such information to other competent authorities and EIOPA to fulfil their obligation to cooperate with each other and with EIOPA for the purposes of this Directive."

³⁷ This reference links to Article 31(2) of IDD which provides that "Member States may decide not to lay down rules on administrative sanctions under this Directive for infringements which are subject to criminal sanctions under their national law. In that case, Member States shall communicate to the Commission the relevant criminal law provisions."

³⁸ This is without prejudice to Member States' rights to provide for and impose criminal sanctions (first subparagraph of Article 22(1) of PRIIPs).

Proposal

The Commission should clarify the sanction reporting procedure under MiFID II relating to the scope of NCAs' reporting obligations of criminal sanctions³⁹, 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.

NCAs' obligation to liaise with judicial authorities to gather information on criminal sanctions

29. A few NCAs also highlighted unclarity due to the differences between MiFID II provisions and those included in other pieces of legislation relating to NCAs' obligations with regards to the circumstances under which they are obliged to liaise with judicial authorities (of their jurisdictions) to receive information on criminal sanctions. This information relates to criminal sanctions imposed by those judicial authorities for infringements of provisions of the relevant EU financial service legislation (or its national implementing rules). In particular, the question emerged whether, NCAs' obligation to liaise with national judicial authorities in order to receive information on imposed criminal sanctions:

- only applies where a Member State has laid down criminal sanctions, instead of administrative sanctions; or
- whether it applies where a Member State has provided for criminal sanctions, while also laying down administrative sanctions for the same infringements.

30. Several NCAs also noted that the MiFID II requirement for Member States to ensure that NCAs receive information and the final judgement relating to any criminal sanction imposed has proven operationally very burdensome and complex to put in place. Additionally, several NCAs highlighted that even though they diligently requested information on imposed criminal sanctions from the judicial authorities of their jurisdiction,

³⁹ Referred to in the second subparagraph of Article 71(3) and Article 71(5) of MiFID II.

they have not always received this data. Consequently, this has affected those NCAs' reporting of criminal sanctions imposed under MiFID II to ESMA and ESMA's publication of this respective information.

Proposal

The Commission should clarify the scope of NCAs' obligation to liaise with judicial authorities to gather information on imposed criminal sanctions in the jurisdiction⁴⁰, by specifying 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
- 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.⁴¹

New types of measures to increase the efficiency of sanction proceedings

31. Article 70(6) of MiFID II provides that, in the cases of infringements of MiFID II/MiFIR, Member States shall, in conformity with national law, provide that competent authorities have the power to take and impose at least the following administrative sanctions and measures:

- a public statement;
- an order requiring the natural or legal person to cease the conduct and to desist from a repetition of that conduct;
- a withdrawal or suspension of the authorisation of the institution;

⁴⁰ Referred to in the second subparagraph of Article 71(4), of MiFID II, second subparagraph of Article 71(3) of MiFID II and second subparagraph of Article 79(1) of MiFID II.

⁴¹ By analogy to the reporting of unpublished administrative sanctions referred to in the first sentence of the second subparagraph of Article 71(3) of MiFID II.

- a temporary or permanent ban against any member of the investment firm's management body or any other natural person, who is held responsible, to exercise management functions in investment firms;
 - a temporary ban on any investment firm being a member of or participant in regulated markets or MTFs or any client of OTFs;
 - in the case of a legal person, maximum administrative fines of at least EUR 5 000 000;
 - in the case of a natural person, maximum administrative fines of at least EUR 5 000 000; and
 - maximum administrative fines of at least twice the amount of the benefit derived from the infringement where that benefit can be determined, even if that exceeds the maximum amounts in points (f) and (g).
32. The current minimum set of types of administrative sanctions and measures listed in Article 70(6) of MiFID II does not contain any provision that grants settlement powers to NCAs. However, the national legislation of a few Member States currently already explicitly provides such settlement powers. In these jurisdictions, such powers have proven to be useful to expedite the conclusion of enforcement proceedings between NCAs and firms.
33. ESMA believes that the inclusion of settlement powers within Article 70(6) of MiFID II can provide NCAs with an alternative enforcement approach and contribute to a more efficient and effective enforcement of MiFID II/MiFIR requirements. ESMA also acknowledges that 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 Commission should enlarge the list of types of sanctions and measures set out in Article 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.

34. Article 86(1) of MiFID II sets out the process that a competent authority of a host Member State shall follow, and the measures it can take, when it has clear and demonstrable grounds for believing that an investment firm acting within its territory under the freedom to provide services is infringing MiFID II requirements⁴².
35. This same article clarifies that the measures the host competent authority can take, after having gone through the steps set out in Article 86(1) and in order to protect investors and the proper functioning of the markets, include the possibility of preventing offending investment firms from initiating any further transactions within their territories.
36. Supervisory experience in the use of these precautionary measures by competent authorities has shown that:
 - The burden of proof required by Article 86(1) of MiFID II is significantly high as a host NCA is required to have “clear and demonstrable grounds” for believing there is an infringement of MiFID II in order to be able to take the measures set out under the same Article. However host NCAs do not have any supervisory powers on a firm acting within its territory under the freedom to provide services; hence they do not have access to the firm’s records and information to allow the assessment of firms’ compliance with relevant requirements.
 - Furthermore, the process set out by Article 86(1) of MiFID II results in often lengthy interactions between host and home NCA that could benefit from clearer deadlines to ensure that requests from a host NCA are processed efficiently and expeditiously by the home NCA.
 - Finally, when precautionary measures are adopted by the host NCA, in line with Article 86(1) of MiFID II, firms can simply decide to shift their activities to other EU Member States while persisting in acting contrary to the European Union’s rules and in such a way as to prejudice the interests of clients.
37. In light of the above, ESMA believes that some improvements could be made to the current Article 86(1) 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.

⁴² Article 86(1) also applies to the provision of services by branches, in relation to provisions under the remit of home NCAs. To the extent the activity of branches does not fall under the supervisory remit of host NCAs, the proposals in this chapter are also relevant for branches.

Proposal

The Commission should consider amending Article 86(1) of MiFID II along the following lines:

- Modifying subparagraph 1 to by requiring a host NCA to have “reasonable grounds” rather than “clear and demonstrable grounds” for believing there is an infringement of MiFID II to trigger the process described in the same Article. In this respect, a recital could be added to MiFID II to specify that, in fulfilling this requirement, NCAs may deem that, amongst other things, the reception of a significant number of investors’ complaints in relation to the same firm providing services on the basis of the freedom to provide services, supported by sufficient supporting documents, constitutes a reasonable ground for believing there is an infringement to MiFID II and to trigger the process in accordance with Article 86(1) of MiFID II;
- Including in subparagraph 1 a deadline (for example, 60 days) within which the home NCA is required to take any measures deemed necessary or to begin the necessary administrative process aimed at taking such measures and to communicate information on any measures being taken to the host NCA. Subparagraph 1 should also specify that the home Member State authority shall proceed without undue delay, taking into account the complexity of the issue and the measures necessary.
- Modifying subparagraph 1 to specify that where a host competent authority takes measures pursuant to point (a) of paragraph 1 with respect to an investment firm, the competent authority of any other host Member State where the same investment firm is performing activities or providing services to retail clients under the freedom to provide services may take precautionary measures regarding that investment firm, if it has reasonable grounds for believing there is an infringement of MiFID II which also gives rise to significant investor protection concerns in that Member State. In any case, not later than seven days before taking the precautionary measures, the competent authority of the host Member State shall inform the competent authority of the home Member State and ESMA of its findings and the reasons for the measures it intends to adopt.
- Specifying that if a firm, having infringed the obligations arising from the MiFID II provisions, is subject to precautionary measures ex Article 86(1), it should not be able to submit a new investment services and activities passport notification (made in accordance with Article 34(2)) for a certain period (for example, 1 year from the adoption of 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.

3. Issues related to supervisory convergence

38. This section sets out other issues identified by ESMA, in its analysis of the MiFID II sanctions and measures framework, that however do not require legislative changes to the Level 1 text. Instead ESMA aims at addressing those issues through ESMA's supervisory convergence work.
39. The NCAs pointed out, inter alia, the following challenges:
- Lack of clarity related to the concepts of “sanctions” and “measures” under MiFID II/MiFIR;
 - differences across jurisdictions in the extent to which NCAs publish their sanctioning decisions (ranging from disclosing the complete decision to a short summary or anonymised information) and additionally differences in applying exemptions from publication. If too restricted information is published, this may hamper the deterrence effect of such sanctioning decisions;
 - lack of clarity with regards to circumstances and conditions under which NCAs apply administrative measures under MiFID II/MiFIR (inter alia, relating to cease and desist orders);
 - 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). This could hinder the appropriate enforcement of the MiFID II/MiFIR requirements; and
 - 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.
40. As mentioned in the previous sections of this document, while understanding the importance of these issues, ESMA believes that they do not seem to require changes to Level 1 at this stage. ESMA however will continue to address the issues identified through its supervisory convergence work and tools, in order to assist in the consistent implementation and application of rules and the creation of a level playing field of high quality regulation and supervision between Member States.