



EUROPEAN COMMISSION
IMPACT ASSESSMENT BOARD

22 OCT. 2010

Brussels,
D(2010)

Opinion

Title **DG MARKT - Impact Assessment on: Communication on
sanctioning regimes in the financial services sector**

(draft version of 27 September 2010)

(A) Context

The existing sanctioning regime for the infringements of EU financial services rules calls for national authorities to detect and punish such violations. Whether "weak, highly variant sanctioning regimes" actually do so in an effective manner has however been put into doubt (de Larosière Report). Answering calls from the Council and the G-20 and on the basis of a review of existing sanctioning powers and their practical application, the Commission is preparing a Communication outlining its strategy to ensure that the new EU framework for financial supervision is backed up by a more effective sanctioning regime. This impact assessment accompanies the Communication and separate impact assessments will be prepared for any legislative follow up.

(B) Overall assessment

The report provides the necessary analysis to support the Communication on sanctioning regimes. It could, however, be further improved in several respects. It should analyse in greater depth the causes of the divergences in national sanctioning regimes and enforcement practices and show more precisely whether these differences have already led to problems or are being dealt with on a precautionary basis. The report should also consider a wider set of intermediate options between the do-nothing and the maximum harmonization alternatives. It should also analyse more extensively whether the preferred options are proportionate to the problem and whether they are compatible with varying national legal systems and financial sector characteristics. Finally, the report should more clearly assess the extent to which differences in enforcement practices and capabilities may remain even when there is greater convergence in the types of sanctions available across the EU and discuss more extensively the ways in which such differences could be addressed.

(C) Main recommendations for improvements

(1) Clarify the nature of the problems and strengthen the accompanying evidence.

The analysis of problems should be strengthened in several respects. The report should more clearly highlight the extent to which the divergences among sanctioning regimes are the result of differences in legal systems and traditions and/or different economic conditions such as the level of development and the absolute and relative size of the financial sector. It should then better substantiate the links between these divergences and the problems identified. This could be done by providing further anecdotal evidence (anonymised if necessary) and by showing the regulatory arbitrage possibilities available for a typical cross-border institution. The report should also clarify whether it is primarily addressing potential problems on a precautionary basis. Finally, the report should assess more explicitly what is the main driver for the problems identified: divergences in legal frameworks or variations in enforcement practices and capabilities. Any international dimension to the latter should also be explicitly discussed.

(2) Extend the scope of the options considered and assess further whether or not they are proportionate to the problem.

The report should analyse a fuller set of intermediate options between the baseline and maximum harmonization. In the specific case of administrative sanctions and pecuniary fines, this could entail considering alternative sub-options in terms of the list of targeted violations and the level and object of proposed harmonisation (for instance considering uniform sanctions for some key violations only or minimum floors for pecuniary fines). The analysis of the baseline should also be strengthened with a more extensive explanation of the role of the new European supervisory authorities. Against this background, the analysis of proportionality should be improved by explaining why it would not be sufficient to foster better enforcement of the existing sanctioning frameworks or to ensure that the same set of sanctioning tools is at the disposal of different national authorities. The report should also clarify why the threat of reputational damage and civil liability would not provide an adequate deterrent effect.

(3) Improve the analysis of transposition and enforcement issues.

The report should analyze in greater depth the compatibility of each preferred option with national legal systems and traditions as well as the appropriateness of common thresholds for pecuniary fines for national financial sectors and entities of different size. It should also discuss more extensively the possibility that enforcement practices and capabilities will continue to diverge even when there is greater convergence in the types of sanctions at the disposal of national authorities, and how this would be addressed (for instance through peer-reviews and/or Commission recommendations). In so doing, it should better justify why common provisions on leniency programmes are identified as a key measure to foster convergence in the application of sanctioning regime.

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report.

(D) Procedure and presentation

The report is written in clear and accessible language. It can be read as a stand alone document and its length is broadly in line with the suggested 30-page text limit once tables and graphs are taken into account.

(E) IAB scrutiny process

Reference number	2010/MARKT/047
External expertise used	No
Date of Board Meeting	20 October 2010