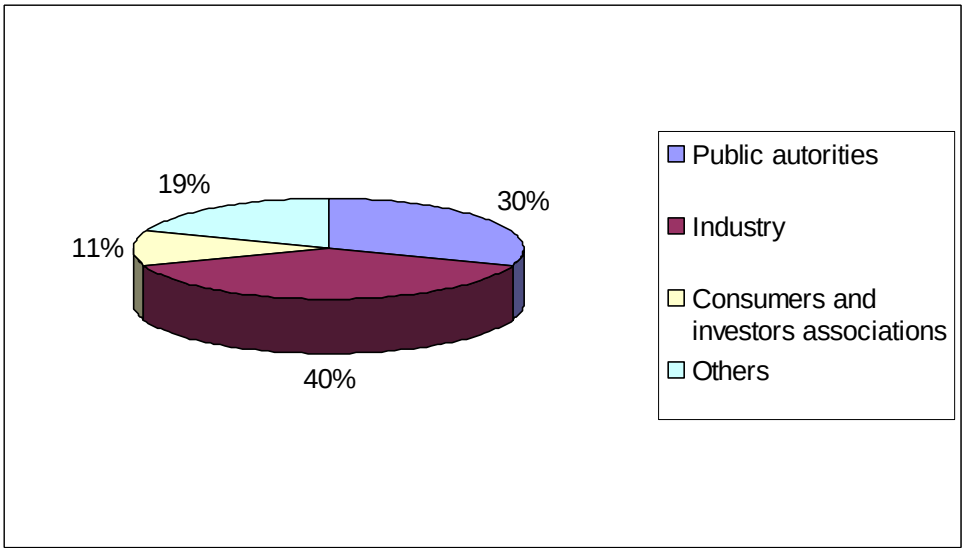
FEEDBACK STATEMENT ON PUBLIC CONSULTATION ON COMMISSION COMMUNICATION - REINFORCING SANCTIONING REGIMES IN THE FINANCIAL SECTOR

1. INTRODUCTION

On 8 December 2010, the European Commission published a consultation document on sanctioning regimes in the financial sector and invited the stakeholders to respond by 18 of February 2011. The Commission received 63 replies. This document summarises the contributions received and informs the public about the next steps.

The public consultation raised interest among a broad range of stakeholders. Responses were categorised in the following broad definitions shown in Figure 1.



Public authorities (governments, regulators and supervisors)
Financial industry (industry associations and individual financial institutions)
Consumers/investors associations
Others (individuals, academics, research bodies, law firms etc)

Among all the responses received, 36% were sent by the interest representatives registered within the EU Register of Interest Representatives.

2. RESPONSES TO THE PUBLIC CONSULTATION

General comments on envisaged legislative approach

A significant majority of respondents shared the Commission's analysis of the shortcomings in the existing national sanctioning regimes in the financial sector in terms of lack of sufficient deterrence and divergences in the application of sanctions across the EU. Different views were expressed on the solution to solve the existing shortcomings.

The majority of the respondents agreed that there should be a minimum harmonisation of national sanctioning regimes while the minority suggested considering alternative solutions. Some minority respondents (two public institutions, some industry representatives) considered that the Commission should provide for non-binding recommendations rather than for binding legislation. Other minority respondents (one public institution, an individual company) were of the view that the Commission should rather act against some individual Member States, which fail to enforce properly the financial services legislation, rather than harmonising the rules.

Comments on key issues for approximation

The majority of the respondents are to a varying degree supportive of a minimum harmonisation of national sanctioning comprising the following issues: appropriate types of sanctions (1), publication of sanctions (2), level of administrative fines (3); addressees of sanctions (4), appropriate criteria to be taken into account when applying sanctions (5), appropriateness to introduce at EU level some mechanisms facilitating enforcement such as whistle-blowing and leniency (6). Numerous comments were also submitted on the introduction of criminal sanctions for the most serious violations of the EU financial services legislation (7).

(1) Appropriate types of administrative sanctions

There is a consensual view among different stakeholders that, to have a level playing field in the EU, a common set of core administrative tools should be available to all national competent authorities to address key violations of the EU financial services legislation. Respondents underlined, however, that this set of tools should be non-exhaustive in the sense that the Member States should be left free to provide their authorities with additional powers. Respondents also stated that the EU initiative should be limited at this stage to a common set of administrative tools. Indeed, the competent national authorities should continue to benefit from a wide flexibility to use the most appropriate tool for each individual violation.

In the view of the majority of respondents, the common set should comprise both sanctions and measures taken by competent authorities to address a breach of EU financial services legislation. There is a broad agreement that the Commission should reflect on including at least the following tools: warnings; cease and desist orders; restriction/prohibition of certain activities; removal of individuals from management positions; revocation of authorisation/licence if the activity in question is subject to authorisation/licensing; imposition of monetary sanctions.

(2) Publication of sanctions

The publication of the sanctions triggered numerous comments. Respondents broadly agree that sanctions should be published but there were different views expressed on how to publish the sanctions. Some respondents, in particular the public authorities and consumer associations, considered that there should be a general rule requiring the publication of sanctions. This is because the publication of sanctions creates more transparency in the decisional practice, reinforces deterrence of sanctions and helps customers of the companies concerned and investors to take informed decisions. Other respondents, in particular the industry representatives, believe that the publication should

be decided on a case-by case basis in view of the high reputational damage this could create for an individual company.

As regards the exceptions to the publication, the public authorities considered that the exceptions to the publication should be limited to the situation when disclosure of the sanctions to the public at large would seriously jeopardise the financial markets. Some respondents from the industry considered that there should be a case-by-case assessment whether the publication of the sanction is liable to create disproportionate reputation damage for the company concerned, in which case the sanction should not be published. Others proposed to have a *de minimis* rule, that is not to publish the sanctions imposed on small companies or for small offences.

The respondents provided different answers on when a decision should be published. Some respondents, in particular consumer associations, favoured a maximum of transparency with a wide publication requirement. Other respondents considered that only final decisions of competent authorities punishing an identifiable breach of law should be published (excluding intermediate decisions such as the decision to launch investigation or simple warnings). A group of respondents considered that decisions can only be published when all legal remedies (appeals) available against a decision were exhausted.

(3) Level of administrative pecuniary sanctions

Respondents were in general favourable to harmonising certain aspects related to the level of administrative fines in order to have more deterrent and effective sanctioning regimes in the EU. Only a small minority expressed the view that legislative harmonisation is not warranted in this area.

The public consultation triggered a lot of discussions on which levels should be subject to harmonisation. To increase deterrence, few respondents advocated for a harmonisation of the minimum levels of the fines. However, most of the respondents rejected this idea mainly because of the difficulty to establish an appropriate minimum figure in the EU 27. There is however a broad agreement among the stakeholders that the EU law could provide for a sufficiently high maximum levels to be applied across the EU to allow competent authorities to apply deterrent sanctions to the most serious violations. As regards the issue of how to calculate the levels of fines, some stakeholders expressed their preference for a calculation based on objective criteria such as a percentage of the turnover or based on profits derived from the violation.

(4) Addressees of the administrative sanctions

The results of the public consultation showed that there is a large consensus on the principle that the national competent authorities should be able to impose sanctions on both individuals and financial institutions. Only two public authorities from a Member State and one industry representative considered that it is inappropriate to introduce at EU level the possibility for regulators to impose sanctions on individuals. The two opposing public authorities considered that regulators are not well equipped to scrutinise the subjective elements of an offence (intent, negligence) committed by individuals, which can be better assessed by courts in criminal cases. The industry representative

considered that the issue on whom to impose sanctions should be left to the Member States to decide.

Respondents provided numerous comments on whom to impose a sanction in an individual case. Some respondents are of the view that sanctions should be imposed on individuals only in exceptional cases when they are individually obliged to fulfil some legal requirements (i.e. appropriate qualification required by law). Other respondents favoured a more extensive approach whereby an authority decides on case-by-case basis whether a sanction to be imposed on an individual is appropriate.

(5) Appropriate criteria for sanctions

There is a consensual view among different stakeholders that all the national competent authorities from the EU have to use a common set of appropriate criteria when applying sanctions. As for the types of sanctions, respondents underlined that this set of appropriate criteria should be non-exhaustive in the sense that the Member States may provide any additional criterion to be taken into account by their authorities. Respondents also stated that, at this stage, the EU initiative should not limit the freedom of the competent national authorities to weigh different criteria when determining a sanction in an individual case.

In the view of the majority of respondents, the common set of criteria should comprise at least the following: seriousness and duration of the violation; financial strength and size of the offender; benefits deriving from the violation when those can be established; impact on the market/losses incurred by third parties; repeated breach; cooperation by the offender during the investigation; survival of the company as a result of the sanction.

(6) Mechanisms facilitating administrative enforcement and cooperation among enforcers

The results of the public consultation show that there is a broad agreement among stakeholders that some mechanisms, such as the whistle-blowing and to a lesser degree leniency, could considerably facilitate the enforcement of the EU financial services legislation. The views are, however, divided on the necessity to foresee any harmonisation in this area at the EU level. Some stakeholders support the idea of some degree of harmonisation while others consider that any EU action at this stage is still premature in the light of the limited knowledge about the national practices.

Respondents expressed a bigger interest for whistle-blowing than for leniency. The respondents, who were in favour of harmonisation in the area of whistle-blowing, considered that the EU initiative should be limited to general principles. Some respondents, in particular some industry representatives and companies, considered that the EU initiative could require the Member States to introduce only internal (intra-company) whistle-blowing. Other respondents, in particular the public authorities, were of the view that the EU initiative should cover also the external whistle-blowing (i.e. whistle-blowing directly to the competent authorities).

Some respondents also pointed out that any successful whistle-blowing procedure should provide for an adequate protection for whistle-blowers against the retaliation of the offender by preserving their anonymity and/or providing for immunity from any judicial

action against *bona fide* whistle-blowers. As to the issue of financial incentives for whistle-blowers, some respondents, including a consumer association, expressed a negative opinion in view of the risk of abuse.

Fewer comments were received on leniency. A respondent (academic) indicated that leniency should be available only for infringements involving several individuals/companies, such as for instance the insider dealing rings. Some other respondents stated that leniency should only be available for undetected breaches since cooperation in the ongoing investigation is already taken into account to reduce sanctions. A law firm insisted on the right incentives to be provided for leniency applicants.

There is a large consensus that a good cooperation between enforcers is key to ensure a convergent decisional practice across the EU. Many respondents underlined the important role of the new European Supervisory Authorities (ESAs) in that respect.

(7) Criminal sanctions

The respondents are divided on requiring the Member States to introduce criminal sanctions for some violations of the EU financial services legislation. Although respondents generally agree that criminal sanctions could considerably increase deterrence, different views were expressed on whether the EU should act in this area.

Some respondents, including public authorities, a consumer association and to a lesser degree some industry representatives, are favourable for introducing the obligation for the Member States to foresee criminal sanctions under strict conditions. Thus in their view, criminal sanctions could be introduced for the most serious violations for which administrative sanctions are not sufficiently deterrent and under strict compliance with fundamental rights and with proportionality and subsidiarity principles.

Other respondents, in particular some public authorities and to larger degree the industry, are not favourable for requiring the Member States to criminalise certain violations of the EU financial services legislation. Some respondents, who shared the view that criminal sanctions could be more deterrent than administrative sanctions in some cases, considered that it should be left to the Member States to decide when and for which infringements to introduce criminal sanctions. Other respondents questioned the assumption that the criminal sanctions are more efficient than administrative sanctions. In their view, it is in general more difficult to handle criminal cases because of the higher procedural and evidence requirements in criminal proceedings and because of the reliance on criminal courts, which are not always well prepared to assess complex financial issues. Other respondents with a negative view on criminal sanctions pointed at the risk of having divergences in the application of the EU law since it is not easy to foresee a cooperation mechanism among criminal courts within the EU.

3. NEXT STEPS

Based on the results of the public consultation and available information the Commission envisages establishing minimum common standards that Member States should respect in designing and using their administrative sanctioning regimes for the EU financial services legislation. At this stage, the Commission decided to introduce those minimum

standards as appropriate in each specific piece of EU legislation when that legislation will be reviewed.

The Commission will also assess whether and in which areas the introduction of criminal sanctions may prove to be essential in order to ensure the effective implementation of EU financial services legislation.