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CZECH REPUBLIC

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Communication from the Commission on reinforcing sanctioning regimes in the financial services sector

Opinion of the Czech National Bank

A. General comments

The Czech National Bank generally supports initiatives towards a better functioning of financial markets and agrees with the view that the manner and level of enforcement are important for financial markets. However, in view of the need to respect the principles of subsidiarity and proportionality in this area, we regard the scope for changes in enforcement at the EU level as very limited.

Enforcement regimes cannot be assessed without the context of particular cases and the conditions wherein the cases occur (legislation, tradition, nature of the market, etc.). Cases of serious and intentional violations of the rules should be addressed very differently from cases of less serious neglect, especially in the area of prudential rules (often connected with principles that allow large room for discretion). Depending on the seriousness of the case, the option that the supervisory authority will only discuss the violation with the institution concerned before imposing a fine, or impose only a remedial measure (without a sanction), must be preserved.

The shortcomings in banking in some – not all – EU countries that contributed to the recent financial crisis were caused by failures in risk identification and management, not by failures in enforcement. Pressure towards more frequent imposition of fines will not foster better identification of risks.

B. Comments on specific proposed measures

In addition to the above general comments on the intended initiative, we add some notes on the proposed particular measures:

Defining a basic set of sanctions can be supported, but only if it is a non-exhaustive basic set of instruments and if its application is sufficiently flexible. A common upper limit for fines may also be set, but full harmonisation of the fine amounts is unacceptable in view of the large differences in the size of financial institutions, the extent of domestic markets, the size of economies and the legal traditions, as well as the principle of subsidiarity with regard to sanctions. The opportunity principle, which allows taking into account the circumstances of each case, must also be maintained. Therefore we also disagree with setting a harmonised minimum amount of fines. In this context we point out that in the past the Czech Constitutional Court repealed a provision introducing a minimum fine amount (around EUR 20,000), arguing that "the challenged provision […] seriously prevents distinguishing according to [the offender's] financial situation" with an intensity incompatible with the principles of the rule of law.[1] This conclusion must be interpreted more generally, not only for the situation in the Czech Republic, and applied as a general principle in the area of measures towards harmonisation of sanction regimes within the EU.

The list of proposed criteria is acceptable, but at least the criterion of the impact of the offence on third persons (i.e. the consequence in general, which does not have to equal the offender's enrichment) is missing. It must also be insisted that the list is non-exhaustive.

It is problematic to define cases where priority should be given to sanctioning natural persons in the management of financial institutions given the need to prove the subjective aspects (intention or neglect). To deal with this type of investigations goes beyond the framework of supervisory activity. We regard the situation where the supervisory authority may only fine the financial institution as appropriate. Among other things, it is up to the financial institution to select the persons appointed to its management and to introduce control mechanisms that will eliminate shortcomings. The responsible natural person may be sanctioned indirectly, by recourse, if the institution requires that the natural person pay compensation for the damage caused (i.e. the fine),[2] and in serious cases the natural person may also be sanctioned directly in criminal proceedings if they commit a criminal offence. We regard interventions of EU law in the area of criminal law as inappropriate because of the different systems, degree of detail (inappropriate casuistry) etc. They should be restricted to cases where no other solution is possible. However, that is not the case of financial markets.

As regards *whistleblowing* and *leniency* programmes, it is not apparent how broad and intensive the use of such practices is in Member States, and therefore we would regard any formal steps from the EU as premature. At this juncture, we believe that reviewing the experience in using these tools in Member States through the ESAs would be sufficient.

[1] Ruling promulgated under No. 405/2002 Coll.

[2] For example, in the past the supervisory authority in the Czech Republic insisted that a fined pension fund should obtain compensation from its senior officers and therefore the fine should not affect the pension scheme participants.