

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 (Text with EEA relevance)

CHAPTER VIII

ADMINISTRATIVE SANCTIONS AND OTHER ADMINISTRATIVE MEASURES

Article 22

Administrative sanctions and other administrative measures

1 Without prejudice to Article 28 and the right of Member States to provide for and impose criminal sanctions, Member States shall, in accordance with national law, provide for competent authorities to have the power to impose administrative sanctions and other administrative measures in relation to at least infringements of Articles 4 and 15.

Where the provisions referred to in the first subparagraph apply to legal persons, Member States shall empower competent authorities, in the case of an infringement, to apply sanctions, subject to the conditions laid down in national law, to members of the management body, and to other individuals who under national law are responsible for the infringement.

2 The administrative sanctions and other administrative measures taken for the purpose of paragraph 1 shall be effective, proportionate and dissuasive.

3 Where Member States have chosen, in accordance with paragraph 1 of this Article, to lay down criminal sanctions for the infringements of the provisions referred to in that paragraph they shall ensure that appropriate measures are in place so that competent authorities have all of the necessary powers to liaise with judicial, prosecuting, or criminal justice authorities within their jurisdiction to receive specific information related to criminal investigations or proceedings commenced for possible infringements of Articles 4 and 15, and to provide such information to other competent authorities and ESMA to fulfil their obligation to cooperate with each other and, where relevant, with ESMA for the purposes of this Regulation.

Competent authorities may cooperate with competent authorities of other Member States and relevant third-country authorities with respect to the exercise of their powers to impose sanctions.

Competent authorities may also cooperate with competent authorities of other Member States with respect to facilitating the recovery of pecuniary sanctions.

4 Member States shall, in accordance with national law, confer on competent authorities the power to apply at least the following administrative sanctions and other administrative measures in the event of the infringements referred to in paragraph 1:

- a an order requiring the person responsible for the infringement to cease the conduct and to desist from a repetition of that conduct;
- b a public statement which indicates the person responsible and the nature of the infringement in accordance with Article 26;
- c withdrawal or suspension of the authorisation;

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- d a temporary ban against any person discharging managerial responsibilities, or any natural person who is held responsible for such an infringement, from exercising management functions;
- e maximum administrative pecuniary sanctions of at least three times the amount of the profits gained or losses avoided because of the infringement where those can be determined by the relevant authority, even if those sanctions exceed the amounts referred to in points (f) and (g);
- f in respect of a natural person, a maximum administrative pecuniary sanctions of at least EUR 5 000 000 or, in the Member States whose currency is not the euro, the corresponding value in the national currency on 12 January 2016;
- g in respect of legal persons, maximum administrative pecuniary sanctions of at least:
 - (i) EUR 5 000 000 or, in the Member States whose currency is not the euro, the corresponding value in the national currency on 12 January 2016, or up to 10 % of the total annual turnover of the legal person according to the last available accounts approved by the management body for infringements of Article 4;
 - (ii) EUR 15 000 000 or, in the Member States whose currency is not the euro, the corresponding value in the national currency on 12 January 2016, or up to 10 % of the total annual turnover of the legal person according to the last available accounts approved by the management body for infringements of Article 15.

For the purpose of point (g)(i) and (ii) of the first subparagraph, where the legal person is a parent undertaking or a subsidiary of the parent undertaking which has to prepare consolidated financial accounts in accordance with Directive 2013/34/EU, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income according to the relevant accounting regime according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking.

Member States may provide that competent authorities have powers in addition to those referred to in this paragraph. Member States may also provide for a wider scope of sanctions and higher levels of sanctions than those provided for in this paragraph.

5 An infringement of Article 4 shall not affect the validity of the terms of an SFT or the possibility of the parties to enforce the terms of an SFT. An infringement of Article 4 shall not give rise to compensation rights from a party to an SFT.

6 Member States may decide not to lay down rules for administrative sanctions and other administrative measures as referred to in paragraph 1 where the infringements referred to in that paragraph are already subject to criminal sanctions in their national law before 13 January 2018. Where they decide not to lay down rules for administrative sanctions and other administrative measures, Member States shall notify, in detail, to the Commission and to ESMA, the relevant parts of their criminal law.

7 By 13 July 2017 Member States shall notify the rules regarding paragraphs 1, 3 and 4 to the Commission and to ESMA. They shall notify the Commission and ESMA without delay of any subsequent amendment thereto.

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Article 23

Determination of administrative sanctions and other administrative measures

Member States shall ensure that, when determining the type and level of administrative sanctions and other administrative measures, competent authorities shall take into account all relevant circumstances, including, where appropriate:

- (a) the gravity and duration of the infringement;
- (b) the degree of responsibility of the person responsible for the infringement;
- (c) the financial strength of the person responsible for the infringement, by considering factors such as the total turnover in the case of a legal person or the annual income in the case of a natural person;
- (d) the importance of the profits gained or losses avoided by the person responsible for the infringement, insofar as they can be determined;
- (e) the level of cooperation of the person responsible for the infringement with the competent authority, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person;
- (f) previous infringements by the person responsible for the infringement.

Competent authorities may take into account additional factors to those referred to in the first paragraph when determining the type and level of administrative sanctions and other administrative measures.

Article 24

Reporting of infringements

- 1 The competent authorities shall establish effective mechanisms to enable reporting of actual or potential infringements of Articles 4 and 15 to other competent authorities.
- 2 The mechanisms referred to in paragraph 1 shall include at least:
 - a specific procedures for the receipt of reports of infringements of Article 4 or 15 and their follow-up, including the establishment of secure communication channels for such reports;
 - b appropriate protection for persons working under a contract of employment who report infringements of Article 4 or 15 or who are accused of infringing those articles against retaliation, discrimination and other types of unfair treatment;
 - c protection of personal data both of the person who reports the infringement of Article 4 or 15 and of the person who allegedly committed the infringement, including protection in relation to preserving the confidentiality of their identity, at all stages of the procedure without prejudice to disclosure of information being required by national law in the context of investigations or subsequent judicial proceedings.
- 3 Counterparties shall have in place appropriate internal procedures for their employees to report infringements of Articles 4 and 15.

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Article 25

Exchange of information with ESMA

1 Competent authorities shall provide ESMA annually with aggregated and granular information regarding all administrative sanctions and other administrative measures imposed by them in accordance with Article 22. ESMA shall publish aggregated information in an annual report.

2 Where Member States have chosen to lay down criminal sanctions for infringements of the provisions referred to in Article 22, their competent authorities shall provide ESMA annually with anonymised and aggregated data regarding all criminal investigations undertaken and criminal sanctions imposed. ESMA shall publish, in an annual report, data on criminal sanctions imposed.

3 Where the competent authority has disclosed an administrative sanction or other administrative measure, or criminal sanction to the public, it shall, at the same time, report that information to ESMA.

4 ESMA shall develop draft implementing technical standards to determine the procedures and forms for exchange of information as referred to in paragraphs 1 and 2.

ESMA shall submit those draft implementing technical standards to the Commission by 13 January 2017.

Power is conferred to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 26

Publication of decisions

1 Subject to paragraph 4 of this Article, Member States shall ensure that competent authorities publish any decision imposing an administrative sanction or other administrative measure in relation to infringements of Article 4 or 15 on their website immediately after the person subject to that decision has been informed of that decision.

2 The information published pursuant to paragraph 1 shall specify at least the type and nature of the infringement and the identity of the person subject to the decision.

3 Paragraphs 1 and 2 shall not apply to decisions imposing measures that are of an investigatory nature.

Where a competent authority considers, following a case-by-case assessment, that the publication of the identity of the legal person subject to the decision, or the personal data of a natural person, would be disproportionate, or where such publication would jeopardise an ongoing investigation or the stability of the financial markets, it shall do one of the following:

- a defer publication of the decision until the reasons for that deferral cease to exist;
- b publish the decision on an anonymous basis in accordance with national law where such publication ensures effective protection of the personal data concerned and, where appropriate, postpone publication of the relevant data for a reasonable period of time

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where it is foreseeable that the reasons for anonymous publication will cease to exist during that period;

- c not publish the decision in the event that the competent authority is of the opinion that publication in accordance with point (a) or (b) will be insufficient to ensure:
 - (i) that the stability of financial markets is not jeopardised; or
 - (ii) the proportionality of the publication of such decisions with regard to measures which are deemed to be of a minor nature.

4 Where the decision is subject to an appeal before a national judicial, administrative or other authority, competent authorities shall also publish immediately on their website such information and any subsequent information on the outcome of such an appeal. Any decision annulling a decision subject to appeal shall also be published.

5 Competent authorities shall inform ESMA of all administrative sanctions and other administrative measures imposed but not published, in accordance with point (c) of paragraph 3, including any appeal in relation thereto and the outcome thereof. Member States shall ensure that competent authorities receive information and the final judgement in relation to any criminal sanction imposed and submit it to ESMA. ESMA shall maintain a central database of administrative sanctions, other administrative measures and criminal sanctions communicated to it solely for the purposes of exchanging information between competent authorities. That database shall be accessible only to competent authorities and it shall be updated on the basis of the information provided by the competent authorities.

6 Competent authorities shall ensure that any decision that is published in accordance with this Article remain accessible on their website for a period of at least five years after its publication. Personal data contained in those decisions shall be retained on the website of the competent authority for the period which is necessary, in accordance with the applicable data protection rules.

Article 27

Right of appeal

Member States shall ensure that decisions and measures taken pursuant to this Regulation are properly reasoned and subject to a right of appeal before a tribunal. The right of appeal before a tribunal shall also apply where, in respect of an application for authorisation which provides all of the information required, no decision is taken within six months of its submission.

Article 28

Sanctions and other measures for the purpose of Articles 13 and 14

Sanctions and other measures established in accordance with Directives 2009/65/EC and 2011/61/EU shall be applicable to infringements of Articles 13 and 14 of this Regulation.

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