

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 (Text with EEA relevance)

CHAPTER VIII

ADMINISTRATIVE SANCTIONS AND OTHER ADMINISTRATIVE MEASURES

Article 38

Administrative sanctions and other administrative measures

1 Without prejudice to the supervisory and investigatory powers of competent authorities under Article 32, 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 take appropriate other administrative measures which shall be effective, proportionate and dissuasive. Those administrative sanctions and other administrative measures shall apply at least to:

- a infringements of Article 3, Article 5, Article 6, Article 7(1) to (11), Article 8, Article 9, Article 10, Article 11(1) and (3), Article 14(1) and (2), Article 15(1), Article 16(1), (2) and (3), Article 17, Article 18, Article 19(1) to (3), Article 20(1), Article 21(1) to (4) and (7) to (11), Article 22(2) to (5), Article 23 (1), (2), (3) and (5), and Article 27;
- b failure to cooperate or comply in an investigation or with an inspection or request covered by Article 32.

Member States may decide not to lay down rules for administrative sanctions as referred to in the first subparagraph where the infringements referred to in point (a) or point (b) of that subparagraph are already subject to criminal sanctions in their national law by 21 July 2018. Where they so decide, Member States shall notify, in detail, to the Commission and to ESMA, the relevant parts of their criminal law.

By 21 July 2018, Member States shall notify, in detail, the rules referred to in the first and second subparagraph to the Commission and to ESMA. They shall notify the Commission and ESMA without delay of any subsequent amendment thereto.

2 Member States shall, in accordance with national law, ensure that competent authorities have the power to impose at least the following administrative sanctions and other administrative measures in relation to the infringements listed in point (a) of paragraph 1:

- a a public statement indicating the natural person or the legal entity responsible and the nature of the infringement in accordance with Article 42;
- b an order requiring the natural person or legal entity responsible to cease the conduct constituting the infringement;
- c maximum administrative pecuniary sanctions of at least twice the amount of the profits gained or losses avoided because of the infringement where those can be determined;
- d in the case of a legal person, 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 20 July 2017, or 3 % of the total annual turnover of that legal person according to the last available financial statements approved by the management body.

Status: Point in time view as at 14/06/2017.

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Where the legal person is a parent undertaking or a subsidiary of a parent undertaking which is required 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 in accordance with the relevant Union law in the area of accounting according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking;

- e in the case of a natural person, maximum administrative pecuniary sanctions of at least EUR 700 000, or, in the Member States whose currency is not the euro, the corresponding value in the national currency on 20 July 2017.

3 Member States may provide for additional sanctions or measures and for higher levels of administrative pecuniary sanctions than those provided for in this Regulation.

Article 39

Exercise of supervisory powers and powers to impose sanctions

1 Competent authorities, when determining the type and level of administrative sanctions and other administrative measures, shall take into account all relevant circumstances including, where appropriate:

- a the gravity and the 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, as indicated by the total turnover of the responsible legal person or the annual income and net assets of the responsible natural person;
- d the impact of the infringement on retail investors' interests;
- e the importance of the profits gained, losses avoided by the person responsible for the infringement or the losses for third parties derived from the infringement, insofar as they can be determined;
- f 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;
- g previous infringements by the person responsible for the infringement;
- h measures taken after the infringement by the person responsible for the infringement to prevent its repetition.

2 In the exercise of their powers to impose administrative sanctions and other administrative measures under Article 38, competent authorities shall cooperate closely to ensure that the exercise of their supervisory and investigative powers and the administrative sanctions and other administrative measures that they impose are effective and appropriate under this Regulation. They shall coordinate their action in order to avoid duplication and overlaps when exercising their supervisory and investigative powers and when imposing administrative sanctions and other administrative measures in cross-border cases.

Article 40

Right of appeal

Member States shall ensure that decisions taken under this Regulation are properly reasoned and subject to a right of appeal before a tribunal.

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For the purposes of Article 20, a right of appeal shall also apply where the competent authority has neither taken a decision to approve or to refuse an application for approval nor has made any request for changes or supplementary information within the time limits set out in Article 20(2), (3) and (6) in respect of that application.

Article 41

Reporting of infringements

1 Competent authorities shall establish effective mechanisms to encourage and enable reporting of actual or potential infringements of this Regulation to them.

2 The mechanisms referred to in paragraph 1 shall include at least:

- a specific procedures for the receipt of reports of actual or potential infringements and their follow-up, including the establishment of secure communication channels for such reports;
- b appropriate protection for employees working under a contract of employment who report infringements at least against retaliation, discrimination and other types of unfair treatment by their employer or third parties;
- c protection of the identity and personal data of both the person who reports the infringements and the natural person who is allegedly responsible for an infringement, at all stages of the procedure unless such disclosure is required by national law in the context of further investigation or subsequent judicial proceedings.

3 Member States may provide for financial incentives to persons who offer relevant information about actual or potential infringements of this Regulation to be granted in accordance with national law where such persons do not have other pre-existing legal or contractual duties to report such information, and provided that the information is new, and that it results in the imposition of an administrative or criminal sanction, or the taking of another administrative measure, for an infringement of this Regulation.

4 Member States shall require employers engaged in activities that are regulated for financial services purposes to have in place appropriate procedures for their employees to report actual or potential infringements internally through a specific, independent and autonomous channel.

Article 42

Publication of decisions

1 A decision imposing an administrative sanction or other administrative measure for infringement of this Regulation shall be published by competent authorities on their official websites immediately after the person subject to that decision has been informed of that decision. The publication shall include at least information on the type and nature of the infringement and the identity of the persons responsible. That obligation does not apply to decisions imposing measures that are of an investigatory nature.

2 Where the publication of the identity of the legal entities, or identity or personal data of natural persons, is considered by the competent authority to be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data, or where such publication would jeopardise the stability of financial markets or an on-going investigation, Member States shall ensure that the competent authorities do one of the following:

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- a defer the publication of the decision to impose a sanction or a measure until the moment where the reasons for non-publication cease to exist;
- b publish the decision to impose a sanction or a measure on an anonymous basis in a manner which is in conformity with national law, where such anonymous publication ensures an effective protection of the personal data concerned;
- c not publish the decision to impose a sanction or measure in the event that the options laid down in points (a) and (b) are considered to be insufficient to ensure:
 - (i) that the stability of financial markets would not be put in jeopardy;
 - (ii) the proportionality of the publication of such decisions with regard to measures which are deemed to be of a minor nature.

In the case of a decision to publish a sanction or measure on an anonymous basis, as referred to in point (b) of the first subparagraph, the publication of the relevant data may be deferred for a reasonable period where it is foreseen that within that period the reasons for anonymous publication shall cease to exist.

3 Where the decision to impose a sanction or measure is subject to appeal before the relevant judicial or other authorities, competent authorities shall also publish, immediately, on their official website such information and any subsequent information on the outcome of such appeal. Moreover, any decision annulling a previous decision to impose a sanction or a measure shall also be published.

4 Competent authorities shall ensure that any publication, in accordance with this Article shall remain on their official website for a period of at least five years after its publication. Personal data contained in the publication shall be kept on the official website of the competent authority only for the period which is necessary in accordance with the applicable data protection rules.

Article 43

Reporting sanctions to ESMA

1 The competent authority shall, on an annual basis, provide ESMA with aggregate information regarding all administrative sanctions and other administrative measures imposed in accordance with Article 38. ESMA shall publish that information in an annual report.

Where Member States have chosen, in accordance with Article 38(1), to lay down criminal sanctions for the infringements of the provisions referred to in that paragraph, their competent authorities shall provide ESMA annually with anonymised and aggregated data regarding all criminal investigations undertaken and criminal sanctions imposed. ESMA shall publish data on criminal sanctions imposed in an annual report.

2 Where the competent authority has disclosed administrative sanctions, other administrative measures or criminal sanctions to the public, it shall simultaneously report them to ESMA.

3 Competent authorities shall inform ESMA of all administrative sanctions or other administrative measures imposed but not published in accordance with point (c) of the first subparagraph of Article 42(2) including any appeal in relation thereto and the outcome thereof. Member States shall ensure that competent authorities receive information and the final judgment in relation to any criminal sanction imposed and submit it to ESMA. ESMA shall maintain a central database of sanctions communicated to it solely for the purposes of exchanging information between competent authorities. That database shall be accessible only

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to competent authorities and it shall be updated on the basis of the information provided by the competent authorities.

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