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The EU Regulatory Enforcement Outlook

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Overview
Although the financial services sector is a global business, responsibility for the regulation, supervision and enforcement of regulatory requirements rests largely with national competent authorities (NCAs). This note highlights points of interest in relation to enforcement against financial services firms by NCAs in ten key EU jurisdictions (our thanks to Arthur Cox for their contribution for Ireland).

Almost all of the NCAs surveyed conduct their own investigations and have information-gathering powers. Fines are often capped and the top level is generally well below typical UK and US fines, though MAR and MiFID II are exerting some upward pressure here. Most NCAs can impose various other types of sanctions. A range of non-enforcement powers (e.g. product intervention) are also being used increasingly in several jurisdictions. Some NCAs have no formal early resolution process; others provide for early resolution with a reduced fine, accepting liability or providing valuable information.

Action against individuals tends to focus on individual misconduct (direct involvement in the breach by the firm, or a direct failure by board / senior managers to prevent such a breach) rather than responsibility for broader managerial or supervisory failings, although several jurisdictions are considering reform in light of the Financial Stability Board’s misconduct toolkit. Several jurisdictions cited AML and counter-terror financing breaches as a key area of focus. A number of jurisdictions reported a general increase in enforcement activity around transparency, in the wake of the implementation of MiFID II.

Despite the financial services sector’s global nature, the enforcement landscape is shaped by national jurisdiction and regulation.

Belgium
National Bank of Belgium (“NBB”), Financial Services and Markets Authority (“FSMA”), Directorate-General Economic Inspection, Ministry for the Economy and Ministry of the Treasury

> FSMA’s powers extend to conducting anonymous inspections by officers posing as clients; the NBB’s powers are more limited
> FSMA does not officially state its enforcement priorities but in practice appears to focus on insider trading, market abuse, and infringements relating to the public offering of investment instruments
> Due to MiFID II, some fine caps were increased and the regulators received increased powers regarding the suspension of trade in certain investment instruments

France
Prudential Supervision and Resolution Authority Authority (Autorité de contrôle prudentiel et de résolution “ACPR”), Financial Market Authority (Autorité des Marchés Financiers “AMF”)

> AMF/ACPR cannot compel attendance at interview, but refusal may constitute a regulatory wrongdoing or the criminal offence of obstruction
> Following an investigation, the AMF may decide to close a case by sending a letter setting a deadline for the remediation of weaknesses
> For the ACPR, AML continues to be a major concern, alongside life insurance and banking recovery resolution plans
> The AMF is turning its attention to EMIR and AIFM compliance, monitoring short selling by market intermediaries, and asset managers’ outsourcing of certain real estate services

Ireland
Central Bank of Ireland (“CBI”)

> The CBI cannot impose a monetary penalty that would put a regulated financial services provider out of business
> An increased focus on individual liability and responsibility is anticipated. A proposed new Senior Executive Accountability Regime will break the “protection link” which presently requires the regulator to find a firm in breach before taking action against an individual
> The CBI’s enforcement work otherwise has no fixed trends, however enforcement in respect of industry-wide issues with tracker mortgages is likely to continue. The quantum of CBI’s penalties is generally expected to increase

Portugal
Portuguese Central Bank ("Bank of Portugal"), Portuguese Securities Market Commission (Comissão do Mercado de Valores Mobiliários “CMVM”)

> CMVM can agree to reduce the sanction amount if the subject makes a full confession and/or provides valuable information and decisive evidence
> Recent changes to the securities market law and CMVM’s enforcement powers have resulted in higher caps for fines for administrative offences, and more severe penalties for breaches of the law relating to inside information and market manipulation
> The Bank of Portugal will likely sustain its focus on conflicts and AML/CTF; other areas include misleading disclosures to the regulator, disclosure of underlying beneficial owners (“UBOs”), and bank transfers without clients’ consent
> CMVM is likely to continue its enforcement emphasis on mis-selling, conflicts of interest between regulated companies and their shareholders, and breach of auditors’ regulatory duties

Spain
National Securities Market Commission (Comisión Nacional del Mercado de Valores “CNMV”), Bank of Spain (Banco de España)

> Enforcement action is generally limited in duration to one year from the decision to initiate proceedings
> Refusal to co-operate with other regulator during enforcement proceedings is a very serious administrative infringement
> The CNMV recently focused on market transparency to improve the general perception of the Spanish market; it now plans to review a sample of entries for compliance in several specific areas including OTCs and binary options, leverage levels, CISI fee models and product suitability
> The Bank of Spain has recently focused on mortgages, consumer credit, marketing activity, pre-contract information in the digital space, transparency in payment services, and establishments which buy and sell foreign and travellers’ cheques

Bank of Italy (“Banca d’Italia”), Commissione Nazionale per la Società e la Borsa (“CONSOB”)

> Prescribed time limits apply to the procedure for determining enforcement proceedings
> For certain breaches of the Italian Financial Act, the subject of an investigation may settle an action by paying twice the minimum monetary sanction within 30 days of service of the Notice of Breach
> The BoI has sanctioned numerous entities for AML violations including internal controls and due diligence obligations
> CONSOB’s enforcement activity is concentrated in the areas of financial products issuers and public disclosure of corporate and financial information, unauthorized provision of regulated services, and conduct of business rules

Luxembourg
Commission de Surveillance du Secteur Financier (“CSSF”)

> Professional secrecy obligations cannot be invoked against the CSSF
> Types of sanctions vary depending on the specific sector under investigation - some sanctions require judicial authority before being imposed
> Caps on administrative fines imposed by the CSSF have increased substantially following Luxembourg’s transposition of recent European directives
> Current areas of focus include concerns around firms’ AML/CTF controls, corporate governance issues and collective investment undertakings