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NFU Response to Consultation on reinforcing national sanctioning regimes in the financial sector

About NFU

Nordic Financial Unions (NFU) is an organisation for co-operation between trade unions that organise employees in the banking, finance and insurance sectors in the five Nordic countries. At present, eight trade unions are affiliated to the NFU; two in Denmark, two in Finland, two in Sweden, and one in each Iceland and Norway. Through these trade unions, NFU represents 160 000 employees in the Nordic financial market.

Remarks to the consultation document

NFU welcomes the communication and share the view on present day shortcomings of sanctioning regimes in the financial sector. NFU is, therefore, generally very positive to the suggested policy actions.

NFU agrees with the Commission that sanctions are a very important part of any regulatory system. They provide a deterrent and act as a catalyst to ensure that EU legislation is complied with. In the financial sector, efficient sanctioning regimes are a key element of a supervisory regime which should ensure sound and stable financial markets and ultimately, the protection of consumers and investors.

NFU has maintained the importance of all financial market players being subject to the same duties and controls. This should naturally be the case when it comes to sanctions as well. NFU agrees with the Commission that if sanctions applied in different Member States for similar infringements are considerably different, financial institutions could be tempted to engage in regulatory arbitrage when deciding on their place of establishment or the location of branches in order to benefit from the least stringent sanctioning regimes. This can prevent the development of a level playing field within the Internal Market.

NFU also agrees with the Commission that the shortcomings identified in national sanctioning regimes can have a negative impact on financial supervision. NFU believes that the newly reformed European financial supervisory system must guarantee that all companies are

supervised according to the same criteria, wherever they are based, to ensure a level playing field and sound competition.

As is noted by the Commission, fines vary widely and are too low in some Member States. The expected value of an illegal action depends on the benefit (reward), probability of detection and the size of the fine. Since the probability of detection often is very low, the fine must be significantly higher than the benefit and at no time lower than the benefit. The financial strength and possible cooperative behaviour of the offender should also be given a large impact. As a general rule, fines based on percentage of turnover (or similar flow measure) or assets (or similar level measures), should be preferred over absolute fines. Repeat offenders which display a corporate culture where illegal or semi-illegal activities are accepted or encouraged should face relatively harder sanctions.

NFU agrees with the Commission that public warning and the publication of sanctions may make a significant contribution to general prevention of violations. Sanctioning regimes will better prevent other potential offenders from future violations, if those are aware that the sanctions provided for by law are actively applied and enforced and there is a real risk that violations will be detected and sanctioned by the authorities.

NFU strongly supports the idea of the Commission to establish whistle-blowing mechanisms on national level, since such mechanisms can contribute to more effective application of EU law, to the benefit of all players in financial market.

From the employee perspective, ensuring sound and efficient whistle-blowing systems is a measure that would be appropriate, and NFU strongly supports the idea of introduction of whistle-blowing programs. Whistle-blowing is, indeed, about ensuring that early warnings from the bottom and up will reach the competent supervisory authority which should have the power, the mandate and resources to follow-up on the warnings and, where necessary, investigate the entire company. NFU is of the firm belief that employees are the first to recognize a systemic failure or a risky business, since it is part of their day-to-day-operations.

As pointed out above, sound and efficient whistle-blowing systems functions as early warning mechanisms, and might play a key role in detecting unsustainable lending trends, high-risk business etc., as well as down-right criminal behavior. Whistle-blowing will also increase financial market stability and mitigate the risk for, and effects of, future crisis.

Whistle-blowing would not only ensure a fast and efficient “point of entry” for national supervisors, but also providing employees with a measure where their concerns are taken seriously. This could be done in a way where the national supervisor consults with employee representatives in a suitable fashion, be it through anonymous “hot-lines” or scheduled, consultative meetings with trade unions. It is important to stress that for employees to be able to provide this information in an orderly fashion, the national supervisors must be able to create reliable systems for this, which are not filtered by a strong director or board of directors.

One of the most important aspects of the discussion on establishment of whistle-blowing mechanisms is to ensure proper safe-guards for employees. The identity of employees who chooses to exercise their right to “blow the whistle” must be protected, and there must be no repercussions of any kind for employees who exercise their right to inform supervisory agencies or similar of any types of misconduct in a company.

A regime for allowing companies themselves to alert proper authorities on misconduct to which they have participated should also be considered, similar to the Commission’s leniency policy on cartels. It is, however, of the utmost importance that such a policy is applied under strict and clearly defined conditions, and should only apply when a previously undetected violation is reported.

In addition to this, NFU also believes that the reinforcement of risk management, compliance and other organizational requirements must include the involvement of employees. On a general level, NFU believes that it is necessary to strengthen the independence and authority of the risk management function in financial sector companies, especially in the wake of the crisis. NFU is of the opinion that employee representation ensures a bigger versatility of independence in the board, as well as in other decision-making or advisory bodies. NFU believes that it is important that the views of the employees can be put forward without being filtered through the chain of command. Employees should therefore have a clear role in the risk management system of a company, as well as in other organisational bodies.

NFU believes that there must be sanctions for natural persons when crimes are committed, but it must be ensured that any sanctioning regimes regarding violations of EU financial services rules take the security and well-being of employees into account.

NFU agrees with the Commission that sanctioning natural persons (e.g. the employees involved in an infringement) might be insufficient to encourage financial institutions to take the organisational measures and provide the staff training necessary to prevent infringements. It is of the utmost importance that a company is not able to avoid sanctioning by simply blaming the individual employees. Since any change in requirements for finance institutions also means changes in requirements for finance sector employees, a sanctioning framework must take into account the information and training each employee has received that is relevant to the issue at stake, when sanctions are considered.

NFU supports the proposal to provide fair and proportionate sanctions for both individuals and financial institutions, but, in particular for ordinary employees, the assumption must be that the responsibility rests with their superiors and/or the institution. Any framework for sanctions must clearly state that an employee must never be punished for following instructions or orders by management.

Such a rule must also take into account “unofficial” company policies, where an official policy is contradicted by actions of management, indirect orders or any custom at the workplace. NFU agrees with the Commission that if the person responsible for an infringement acted to the



benefit of a financial institution, the sanction should generally be imposed on the institution rather than the individual employee.

Yours faithfully,

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