



6. PENALTY GUIDANCE

6.1 Approach to imposing a penalty

6.1.1 This chapter sets out the matters that will be taken into account by us when determining a "penalty", which includes a financial penalty, public censure or any other enforcement action.

6.1.2 We may also refer to matters described in this chapter when determining an appropriate penalty in settlement agreements, including an EU.

6.2 Deciding to take action

6.2.1 When determining a penalty, we will consider all relevant facts and circumstances, including the factors listed below that may be relevant for this purpose:

- (a) our objectives;
- (b) the deterrent effect of the penalty on:
 - (i) persons that have committed or may commit the contraventions; and
 - (ii) other persons that have committed or may commit similar contraventions;
- (c) the nature, seriousness, duration and impact of the contravention, including:
 - (i) whether the contravention was deliberate or reckless;
 - (ii) the duration and frequency of the contravention;
 - (iii) whether the contravention reveals serious or systemic weaknesses of the management systems or internal controls relating to all or part of a person's business;
 - (iv) the impact (actual or potential) of the contravention on the orderliness of markets, including whether confidence in those markets has been damaged or put at risk;
- (d) if the contravention involved a number of persons, the degree of involvement and specific role of each Person;
- (e) the benefit gained (whether direct or indirect, pecuniary or non-pecuniary) or loss avoided as a result of the contravention;
- (f) the conduct of the person after the contravention, including:



- (i) how quickly, effectively and completely the person brought the contravention to our attention;
 - (ii) the degree of cooperation the person showed during the investigation of the contravention;
 - (iii) any remedial steps the person has taken in respect of the contravention;
 - (iv) the likelihood that the same type of contravention (whether on the part of the person or others) will recur if no action is taken;
 - (v) the nature and extent of any false or inaccurate information given by the person and whether the information appears to have been given in an attempt to knowingly mislead us;
- (g) the difficulty in detecting and investigating the contravention that is the subject of the penalty;
 - (h) whether the person committed the contravention in such a way as to avoid or reduce the risk that the contravention would be discovered;
 - (i) the disciplinary record and compliance history of the person on whom the penalty is imposed, including whether we have taken any previous disciplinary action against the person;
 - (j) where the person reasonably believed that their behaviour did not amount to a contravention and whether they undertook reasonable precautions and diligence to avoid committing such a contravention;
 - (k) whether the person acted in accordance with our guidance and other published materials;
 - (l) action taken by us in previous similar cases; and
 - (m) action taken by other domestic or international regulatory authorities. Where other regulatory authorities propose to take action in respect of the contravention which is under consideration by us, or one similar to it, we will consider whether the other authority's action would be adequate to address our concerns, or whether it would be appropriate for us to take our own action.

Actions against Approved Persons and Recognised Persons

6.2.2 In addition to the general factors listed in paragraph 6.2.1, there are some additional considerations that may be relevant when we decide whether to take action against an Approved or Recognised Person. The list is not exhaustive; not all of these factors may be applicable in a particular case, and there may be other factors, not listed that are relevant. The factors include:



- (a) the approved or recognised person's position and responsibilities. We may take into account the responsibility of those exercising important functions in the firm. The more senior the person responsible for the misconduct, the more seriously we are likely to view the misconduct, and the more likely it is to take action against the Approved or Recognised Person;
- (b) whether disciplinary action against the firm rather than the person would be a more appropriate regulatory response; and
- (c) whether disciplinary action would be a proportionate response to the nature and seriousness of the contravention by the person.

6.3 Financial penalty, public censure or other enforcement action

6.3.1 We will consider all the relevant circumstances of the case when deciding whether to impose a financial penalty, or other enforcement action. As such, the factors set out in paragraph 6.2 are not exhaustive. Not all of the factors may be relevant in a particular case and there may be other factors, not listed, that are relevant.

6.3.2 The criteria for determining whether it is appropriate to issue a public censure or other enforcement action (rather than impose a financial penalty) include those factors that we will consider in determining the amount of a financial penalty, as set out in paragraphs 6.5 to 6.7. In particular, considerations that may be relevant when we determine the penalty are:

- (a) whether deterrence may be effectively achieved by issuing a public censure;
- (b) whether the person has brought the contravention to our attention;
- (c) whether the person has admitted the contravention and provides full and immediate co-operation to us, and takes steps to ensure that those who have suffered loss due to the contravention are fully compensated for those losses; and
- (d) our approach to previous similar cases - we will aim for a consistent approach.

6.3.3 Some particular considerations that may be relevant when we determine whether to issue a financial penalty rather than impose a public censure or other enforcement action are:

- (a) if the person has made a profit or avoided a loss as a result of the contravention, on the basis that a person should not be permitted to benefit from its contravention;
- (b) if the contravention is more serious in nature or degree, on the basis that the sanction should reflect the seriousness of the contravention; other things



being equal, the more serious the contravention, the more likely we are to impose a financial penalty; and

- (c) if the person has a poor disciplinary record or compliance history, on the basis that it may be particularly important to deter future cases.

6.4 Determining the appropriate level of financial penalty

6.4.1 Our penalty-setting regime is based on three principles:

- (a) disgorgement: a firm or individual should not benefit from any contravention;
- (b) sanction: a firm or individual should be penalised for wrongdoing; and
- (c) deterrence: any penalty imposed should deter the firm or individual who committed the contravention, and others, from committing further or similar contraventions.

6.4.2 The total amount payable by a person subject to enforcement action may be made up of two elements:

- (a) disgorgement of the benefit received as a result of the contravention; and
- (b) a financial penalty reflecting the seriousness of the contravention.

6.4.3 These elements are incorporated in a five-step framework, which can be summarised as follows:

- (a) Step 1: the removal of any economic benefit derived from a contravention;
- (b) Step 2: the determination of a figure which reflects the seriousness of the contravention;
- (c) Step 3: an adjustment made to the step 2 figure to take account of any aggravating and mitigating circumstances;
- (d) Step 4: an adjustment made to the step 3 figure, where appropriate, to ensure that the penalty has an appropriate deterrent effect; and
- (e) Step 5: if applicable, an adjustment for cooperation/early settlement may be made.

6.4.4 These steps will apply in all cases, although the details of Steps 1 to 4 will differ for cases against firms (paragraph 6.5), and cases against individuals (paragraph 6.6).

6.4.5 The lists of factors and circumstances in paragraphs 6.5 and 6.6 are not exhaustive. Not all of the factors or circumstances listed will necessarily be relevant in a particular case and there may be other factors or circumstances not listed which are relevant.



6.4.6 We will not, in determining our policy with respect to the amount of penalties, take account of expenses which we incur, or expect to incur, in discharging its functions.

6.5 Financial penalties imposed on a firm

Step 1: Disgorgement

6.5.1 We will seek to deprive a firm of the economic benefits derived from a contravention (which may include the profit made or loss avoided) where it is practicable to quantify this.

Step 2: The seriousness of the contravention

6.5.2 We will determine a financial penalty figure that reflects the seriousness of the contravention, taking into the following factors:

- (a) factors relating to the impact of a contravention;
- (b) factors relating to the nature of a contravention;
- (c) factors tending to show whether a contravention was deliberate; and
- (d) factors tending to show whether a contravention was reckless.

6.5.3 Factors relating to the impact of a contravention committed by a firm include:

- (a) the level of benefit gained or loss avoided, or intended to be gained or avoided, by the firm from the contravention;
- (b) the loss or risk of loss, as a whole, caused to clients, investors or other market users in general;
- (c) the loss or risk of loss caused to individual clients, investors or other market users;
- (d) whether the contravention had an effect on particularly vulnerable people, whether intentionally or otherwise;
- (e) the distress or inconvenience caused to clients; and
- (f) whether the contravention had an adverse effect on the orderliness of, or confidence in, markets and, if so, how serious that effect was.

6.5.4 Factors relating to the nature of a contravention by a firm include:

- (a) the nature of the FSMR or Rules contravened;
- (b) the frequency of the contravention;



- (c) whether the contravention revealed serious or systemic weaknesses in the firm's procedures or in the management systems or internal controls relating to all or part of the firm's business;
- (d) whether the firm's senior management were aware of the contravention;
- (e) the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the contravention;
- (f) the scope for any potential financial crime to be facilitated, occasioned or otherwise occur as a result of the contravention;
- (g) whether the firm failed to conduct its business with integrity; and
- (h) whether the firm, in committing the contravention, took any steps to comply with the FSMR and Rules, and the adequacy of those steps.

6.5.5 Factors tending to show the contravention was deliberate include:

- (a) the contravention was intentional, in that the firm's senior management, or a responsible individual, intended, could reasonably have foreseen, or foresaw that the likely or actual consequences of their actions or inaction would result in a contravention;
- (b) the firm's senior management, or a responsible individual, knew that their actions were not in accordance with the firm's internal procedures;
- (c) the firm's senior management, or a responsible individual, sought to conceal their misconduct;
- (d) the firm's senior management, or a responsible individual, committed the contravention in such a way as to avoid or reduce the risk that the contravention would be discovered;
- (e) the firm's senior management, or a responsible individual, were influenced to commit the contravention by the belief that it would be difficult to detect; and
- (f) the contravention was repeated.

6.5.6 Factors tending to show the contravention was reckless include:

- (a) the firm's senior management, or a responsible individual, appreciated that there was a risk that their actions or inaction could result in a contravention and failed to adequately mitigate that risk; and
- (b) the firm's senior management, or a responsible individual, were aware that there was a risk that their actions or inaction could result in a contravention



but failed to check if they were acting in accordance with the firm's internal procedures.

Step 3: Mitigating and aggravating factors

6.5.7 We may increase or decrease the amount of the financial penalty arrived at after Step 2 (excluding any amount to be disgorged as set out in Step 1), to take into account factors which aggravate or mitigate the contravention. Any such adjustments will be made by way of a percentage adjustment to the figure determined at Step 2.

6.5.8 The following list of factors may have the effect of aggravating or mitigating the contravention:

- (a) the conduct of the firm in bringing (or failing to bring) quickly, effectively and completely the contravention to our attention (or the attention of other regulatory authorities, where relevant);
- (b) the degree of cooperation the firm showed during the investigation of the contravention to us, or any other regulatory authority allowed to share information with us;
- (c) where the firm's senior management were aware of the contravention or of the potential for a contravention, whether they took any steps to stop the contravention, and when these steps were taken;
- (d) the nature, timeliness and adequacy of the firm's responses to any supervisory interventions by us and any remedial actions proposed or required by us;
- (e) whether the firm has arranged its resources in such a way as to allow or avoid disgorgement and/or payment of a financial penalty;
- (f) whether the firm had previously been told about our concerns in relation to the issue, either by means of a private warning or in supervisory correspondence;
- (g) whether the firm had previously undertaken not to perform a particular act or engage in particular behaviour;
- (h) whether the firm concerned has complied with any requirements or rulings of another regulatory authority relating to the contravention;
- (i) the previous disciplinary record and general compliance history of the firm;
- (j) action taken against the firm by other domestic or international regulatory authorities that is relevant to the contravention in question;
- (k) whether our guidance or other published materials had already raised relevant concerns, and the nature and accessibility of such materials; and



- (l) whether we publicly called for an improvement in standards in relation to the behaviour constituting the contravention or similar behaviour before or during the occurrence of the contravention.

Step 4: Adjustment for deterrence

6.5.9 If we consider the figure arrived at after Step 3 is insufficient to deter the firm or person who committed the contravention, or others, from committing further or similar contraventions then we may increase the financial penalty. Circumstances where we may do this include:

- (a) where we consider the absolute value of the financial penalty too low in relation to the contravention to meet our objective of credible deterrence;
- (b) where our previous action in respect of similar contravention has failed to improve industry standards;
- (c) where we consider it is likely that similar contraventions will be committed by the firm or by others in the future in the absence of such an increase to the financial penalty; and
- (d) where we considers that the likelihood of the detection of such a contravention is low.

Step 5: Adjustment for cooperation/early settlement

6.5.10 We and the firm upon whom a financial penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, and of the firm's cooperation with us, paragraph 6.8 provides that the amount of the financial penalty which might otherwise have been payable may be reduced to reflect the stage at which we and the firm concerned reached an agreement. Any adjustment for early settlement does not apply to the disgorgement of any benefit calculated at Step 1.

6.6 Financial penalties imposed on an individual

Step 1: Disgorgement

6.6.1 We will seek to deprive an individual of the economic benefits derived from the contravention (which may include the profit made or loss avoided) where it is possible to quantify this. We will ordinarily also charge interest on the benefit.

Step 2: The seriousness of the contravention

6.6.2 We will determine a financial penalty figure that reflects the seriousness of the contravention. In determining such a figure, we will take into account the following factors relating to:



- (a) the impact of the contravention;
- (b) the nature of the contravention;
- (c) whether the contravention was deliberate; and
- (d) whether the contravention was reckless.

6.6.3 Factors relating to the impact of a contravention committed by an individual include:

- (a) the level of benefit gained or loss avoided, or intended to be gained or avoided, by the individual from the contravention;
- (b) the loss or risk of loss, as a whole, caused to clients, investors or other market users in general;
- (c) the loss or risk of loss caused to individual clients, investors or other market users;
- (d) whether the contravention had an effect on particularly vulnerable people, whether intentionally or otherwise;
- (e) the distress or inconvenience caused to clients; and
- (f) whether the contravention had an adverse effect on orderliness of, or confidence in, markets and, if so, how serious that effect was.

6.6.4 Factors relating to the nature of a contravention by an individual include:

- (a) the nature of the FSMR or Rules contravened;
- (b) the frequency of the contravention;
- (c) the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the contravention;
- (d) the scope for any potential financial crime to be facilitated, occasioned or otherwise occur as a result of the contravention;
- (e) whether the individual failed to act with integrity or abused a position of trust;
- (f) whether the individual committed a contravention of any professional code of conduct;
- (g) whether the individual caused or encouraged other individuals to commit contraventions;
- (h) whether the individual held a prominent position within the industry;



- (i) whether the individual is an experienced industry professional;
- (j) whether the individual held a senior position with the firm;
- (k) the extent of the responsibility of the individual for the product or business areas affected by the contravention, and for the particular matter that was the subject of the contravention;
- (l) whether the individual acted under duress; and
- (m) whether the individual took any steps to comply with Regulatory rules, and the adequacy of those steps.

6.6.5 Factors tending to show the contravention was deliberate include:

- (a) the contravention was intentional, in that the individual intended, could reasonably have foreseen or foresaw that the likely or actual consequences of his actions or inaction would result in a contravention;
- (b) the individual intended to benefit financially from the contravention, either directly or indirectly;
- (c) the individual knew that his actions were not in accordance with his firm's internal procedures;
- (d) the individual sought to conceal his misconduct;
- (e) the individual committed the contravention in such a way as to avoid or reduce the risk that the contravention would be discovered;
- (f) the individual was influenced to commit the contravention by the belief that it would be difficult to detect;
- (g) the individual knowingly took decisions relating to the contravention beyond his field of competence; and
- (h) the individual's actions were repeated.

6.6.6 Factors tending to show the contravention was reckless include:

- (a) the individual appreciated there was a risk that his actions or inaction could result in a contravention and failed to adequately mitigate that risk; and
- (b) the individual was aware there was a risk that his actions or inaction could result in a contravention but failed to check if he was acting in accordance with the firm's internal procedures.



Step 3: Mitigating and aggravating factors

- 6.6.7 We may increase or decrease the amount of the financial penalty arrived at after Step 2 (excluding any amount to be disgorged as set out in Step 1), to take into account factors which aggravate or mitigate the contravention. Any such adjustments will be made by way of a percentage adjustment to the figure determined at Step 2.
- 6.6.8 The following list of factors may have the effect of aggravating or mitigating the contravention:
- (a) the conduct of the individual in bringing (or failing to bring) quickly, effectively and completely the contravention to our attention (or the attention of other regulatory authorities, where relevant);
 - (b) the degree of co-operation the individual showed during the investigation of the contravention by us, or any other regulatory authority allowed to share information with us;
 - (c) whether the individual took any steps to stop the contravention, and when these steps were taken;
 - (d) any remedial steps taken since the contravention was identified, including whether these were taken on the individual's own initiative or that by us or another regulatory authority;
 - (e) whether the individual has arranged his resources in such a way as to allow or avoid disgorgement and/or payment of a financial penalty;
 - (f) whether the individual had previously been told about our concerns in relation to the issue, either by means of a private warning or in supervisory correspondence;
 - (g) whether the individual had previously undertaken not to perform a particular act or engage in particular behaviour;
 - (h) whether the individual has complied with any requirements or rulings of another regulatory authority relating to the contravention;
 - (i) the previous disciplinary record and general compliance history of the individual;
 - (j) action taken against the individual by other domestic or international regulatory authorities that is relevant to the contravention in question;
 - (k) whether our guidance or other published materials had already raised relevant concerns, and the nature and accessibility of such materials;



- (l) whether we publicly called for an improvement in standards in relation to the behaviour constituting the contravention or similar behaviour before or during the occurrence of the contravention; and
- (m) whether the individual agreed to undertake training subsequent to the contravention.

Step 4: Adjustment for deterrence

6.6.9 If we consider the figure arrived at after Step 3 is insufficient to deter the individual who committed the contravention, or others, from committing further or similar contraventions then we may increase the financial penalty. Circumstances where we may do this include:

- (a) where we considers the absolute value of the penalty too small in relation to the contravention to meet our objective of credible deterrence;
- (b) where our previous action in respect of similar contraventions has failed to improve industry standards. This may include similar contraventions relating to different products;
- (c) where we consider it is likely that similar contraventions will be committed by the individual or by other individuals in the future; and
- (d) where we consider that the likelihood of the detection of such a contravention is low.

Step 5: Adjustment for cooperation/ early settlement

6.6.10 We and the individual on whom a penalty is to be imposed may seek to agree on the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, and of the individual's cooperation with us, paragraph 6.8 provides that the amount of the financial penalty which might otherwise have been payable may be reduced to reflect the stage at which we and the individual concerned reached an agreement. Any adjustment for early settlement does not apply to the disgorgement of any benefit calculated at Step 1.

6.7 Serious financial hardship

6.7.1 Our approach to determining financial penalties described in paragraphs 6.5 and 6.6 is intended to ensure that financial penalties are proportionate to the contravention. We recognise that financial penalties may affect Persons differently, and that we should consider whether a reduction in the proposed financial penalty is appropriate, including if such penalty would cause the subject of enforcement action serious financial hardship.



6.7.2 Where an individual or firm claims that payment of the financial penalty proposed by us will cause them serious financial hardship, we will consider whether to reduce the proposed financial penalty only if:

- (a) the individual or firm provides verifiable evidence that payment of the financial penalty will cause them serious financial hardship;
- (b) the individual or firm provides full, frank and timely disclosure of the verifiable evidence, and co-operates fully in answering any questions asked by us about their financial position; and
- (c) the onus is on the individual or firm to satisfy us that payment of the financial penalty will cause them serious financial hardship.

Individuals

6.7.3 In assessing whether a financial penalty would cause an individual serious financial hardship, we will consider the individual's ability to pay the financial penalty over a reasonable period, including agreeing to payment of the financial penalty by instalments where the individual requires time to realise his assets, for example, by waiting for payment of a salary or by selling property.

Firms

6.7.4 We will consider reducing the amount of a financial penalty if a firm will suffer serious financial hardship as a result of having to pay the entire financial penalty. In deciding whether it is appropriate to reduce the financial penalty, we will take into consideration the firm's financial circumstances, including whether the financial penalty would render the firm insolvent or threaten the firm's solvency. We will also take into account our statutory objectives, for example, in situations where clients would be harmed or market confidence would suffer. We may also consider if it is appropriate to reduce a financial penalty in order to allow a firm to continue in business and/or pay redress.

6.7.5 There may be cases where, even though the individual or firm has satisfied us that payment of the financial penalty would cause serious financial hardship, we consider the contravention to be so serious that it is not appropriate to reduce the financial penalty. We will consider all the circumstances of the case in determining whether this course of action is appropriate, including whether:

- (a) the individual or firm directly or indirectly derived an economic benefit from the contravention and, if so, the extent of that economic benefit;
- (b) the individual or firm acted fraudulently or dishonestly with a view to personal gain;



- (c) previous action by us in respect of similar contraventions has failed to improve industry standards; or
- (d) the individual or firm has spent money or dissipated assets in anticipation of enforcement action with a view to frustrating or limiting the impact of action taken by us or other authorities.

Withdrawal of authorisation or registration

- 6.7.6 We may withdraw a firm's Financial Services Permission, or the status of an Approved or Recognised Person or Principal Representative, as well as impose a financial penalty. Such action by us does not affect our assessment of the appropriate financial penalty in relation to a contravention.
- 6.7.7 However, the fact that we have withdrawn such Financial Services Permission or registration, as a result of which the firm or individual may have less earning potential, may be relevant in assessing whether the financial penalty will cause the firm or individual serious financial hardship.

6.8 Adjustment for cooperation/early settlement

- 6.8.1 It is our policy to encourage and recognise cooperation. A cooperative approach to dealing with us will be taken into consideration when assessing what type of enforcement action to pursue and/or what remedy we will seek. Cooperation can take many forms, including but not limited to:
 - (a) self-reporting any misconduct to us and disclosing all the relevant information;
 - (b) assisting us voluntarily during the investigation;
 - (c) admitting any misconduct that the person or firm had committed or was involved in committing.
- 6.8.2 For the avoidance of doubt, merely fulfilling the person's or firms legal obligations will not be considered as cooperation for the purpose of assessing any adjustment to the financial penalties imposed on a firm or an individual.
- 6.8.3 Subject to enforcement action, we may be prepared to agree on the amount of any financial penalty, and other conditions which we seek to impose by way of such action, for example, the amount or mechanism for the payment of compensation to consumers. We recognise the benefits of such agreements, in that they offer the potential for securing earlier redress or protection for clients and the saving of cost to the Person concerned, and us, in contesting the financial penalty. The financial penalty that might otherwise be payable, in respect of a contravention by the person concerned, may, therefore, be reduced to reflect the timing of any settlement agreement.

6.8.4 In appropriate cases our approach may be to negotiate with the person concerned to agree in principle on the amount of a financial penalty having regard to our policy as set out in Chapter 5 of this document. Where part of a proposed financial penalty specifically equates to the disgorgement of profit accrued or loss avoided, then the percentage reduction will not apply to that part of the financial penalty.