Determining the size of penalty payments and administrative fines

1 Act on the Financial Supervisory Authority

1.1 Determining the size of penalty payments

Section 41, subsection 2 of the Act on the Financial Supervisory Authority (878/2008) provides as follows:

> "The size of the penalty payment is based on a comprehensive assessment. In assessing the size of the penalty payment consideration shall be given to the nature, extent and duration of the breach and the financial position of the person responsible for the breach. In addition, the assessment shall give consideration to the resulting gain and damage, in so far as they can be determined, the cooperation of the person responsible for the breach with the Financial Supervisory Authority to resolve the situation and measures to prevent reoccurrence of the breach, other and previous offences or failures related to financial market provisions and potential consequences of the breach for financial stability."[1]

The size of the penalty payment is therefore based on a comprehensive assessment in which the factors mentioned in the provision are taken into consideration. These factors are addressed in sections 1.1.1–1.1.8.

In addition, section 1.1.9 highlights certain other general principles[2] to be taken into consideration in the comprehensive assessment that may have relevance when the Financial Supervisory Authorisation (FIN-FSA) considers the size of the penalty payment applicable to a matter. The principles are not exhaustive.

The maximum amounts of the penalty payment are provided for in sections 41, 41a and 41b of the Act on the Financial Supervisory Authority (FIN-FSA Act).

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[1] Section 41, subsection 3 of the Act on the Financial Supervisory Authority provides as follows: "In addition to the provisions of subsection 2, where an infringement of the Benchmark Regulation is involved, in assessing the size of the penalty payment, consideration shall also be given to the impact on the real economy of the breach. Where an infringement of the Regulation (EU) 2017/1129 of the European Parliament and of the Council 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, hereinafter *Prospectus Regulation*, is involved, the impact on retail investors must also be taken into consideration in assessing the size of the penalty payment." These issues are not discussed in more detail in this document.

[2] According to the detailed justifications (Government proposal 39/2014, p. 98) of section 41 of the Act on the Financial Supervisory Authority: "It would be warranted for the FIN-FSA to prepare and disclose the principles it takes into account in the comprehensive assessment of a penalty payment and administrative fine under section 38, subsection 2 and section 41, subsection 2 of the Act."

1.1.1 Nature of the breach

In assessing the *nature of the breach*, consideration is given, for example, to the content and reprehensibility of the act or omission as well as the significance of the violated obligation, in addition to the position of the person responsible in relation to an entity supervised by the FIN-FSA, for example.[3]

In assessing the nature of the breach, consideration is given to how the breach in question has threatened, in material terms, to compromise the objectives of the activities of the FIN-FSA provided for in section 1 of the FIN-FSA Act.[4] In this context, consideration may be given, for example, to the negative impact of the breach on the preconditions and effectiveness of supervision by the FIN-FSA, on financial market stability, on confidence in the financial markets and their functioning as well as on the position or access to information of the customers of the supervised entity.

If the breach is directed at consumers or non-professional customers this, as a rule, may be considered a factor in increasing the penalty payment. If the breach was, or is likely to be, particularly detrimental to customer confidence (e.g. the sale of investment or insurance products unsuitable for customers) or investor confidence, this may be considered a factor in increasing the penalty payment.

If the person responsible for a breach is an entity supervised by the FIN-FSA or an entity otherwise operating professionally in the financial markets this, as a rule, may be considered a factor in increasing the penalty payment.

If the person responsible for a breach is a natural person, the person's position and/or professionalism (for example membership in the management of a supervised entity or a listed company, functioning as a portfolio manager or in the compliance function) may, as a rule, be considered a factor in increasing the penalty payment.

If supervisory findings by the FIN-FSA show that there are widespread deficiencies in the internal governance of the supervised entity (e.g. internal control, risk management), even where the specific breaches of legal or regulatory provisions may in themselves be considered minor, this may generally be considered a factor in increasing the penalty payment. Also serious deficiencies in the organization of control functions (risk management, compliance) are likely to increase the penalty payment. See also sections 1.1.7 and 1.3 below.

If the breach is likely to complicate the supervision practised by the FIN-FSA (e.g. failure to report information relevant to supervision or an error therein or failure to fulfil a prescribed documentation or record-keeping obligation), this is likely to increase the penalty payment.

An act or omission taken intentionally or through gross negligence is likely to increase the penalty payment.

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[3] Government Proposal 32/2012, p. 279, in Finnish.

[4] "The activities of the FIN-FSA are aimed at ensuring financial stability and the necessary smooth operation of credit, insurance and pension institutions, and other supervised entities, so as to safeguard the interests of the insured and to maintain confidence in the financial markets."

Intention of gaining benefit is an indication of particular reprehensibility, so it is likely to increase the penalty payment. With regard to benefit gained, see section 1.1.5 below.

1.1.2 Extent of the breach

In assessing *the extent of the breach*, consideration is given, for example, to the financial damage caused by the breach, its impact on confidence in the financial markets or financial market stability, as well as the estimated benefit gained.[5]

A breach is generally more severe where it causes or may cause extensive financial damage or where it is likely to be particularly detrimental in terms of investor or customer confidence. See also section 1.1.5 below.

In assessing the extent of the breach, consideration is given, as stated in section 1.1.1, to how the breach in question has threatened, in material terms, to compromise the objectives of the activities of the FIN-FSA provided in section 1 of the FIN-FSA Act.

1.1.3 Duration of the breach

In assessing *the duration of the breach*, consideration is given, in addition to the duration of the specific act or omission, to any possible recurrence of the breach.[6]

As a rule, the longer the duration of the breach, the higher the penalty payment. In this context, however, it may be taken into consideration that certain breaches (for example the neglect of the ongoing disclosure obligation by a listed company, failure to report relevant information to the FIN-FSA or an error therein) may be significant, even if they are brief.

In addition, the recurrence of breaches is generally a factor in increasing the penalty payment. See section 1.1.7 below.

1.1.4 Financial position

In assessing *the financial position* of entities, in addition to their payment capacity, consideration may be given, for example, to the likely impact of the penalty payment on the preconditions of the entities to pursue their activities.[7]

1.1.5 Benefit gained and damage caused

The benefit gained and damage caused by a breach are always taken into consideration where they can be determined. Benefit gained also comprises a loss or costs avoided through a breach. An indirect benefit may also be considered a benefit gained.

The starting point in determining the size of a penalty payment is that any benefit gained, where it can be determined with a sufficient degree of reliability, shall always

[5] Government Proposal 32/2012, p. 279, in Finnish.
[6] Government Proposal 32/2012, p. 279, in Finnish.
[7] Government Proposal 32/2012, p. 279, in Finnish.

be forfeited. In addition, the size of penalty payment shall also reflect the punitive nature of the penalty, i.e. it is not enough to merely forfeit the benefit gained.

In assessing the benefit gained, consideration may also be given to whether the supervised entity has, on its own initiative, compensated any damage incurred by customers due to the breach.

The greater the benefit gained by the breach, the higher the penalty payment will be. Similarly, the greater the damage caused by the breach, the higher the penalty payment will be.

1.1.6 Cooperation of the person responsible and measures to prevent reoccurrence

The cooperation of the person responsible with the FIN-FSA in investigating the matter refers to a self-initiated notification by the supervised entity or other party subject to sanction to the FIN-FSA in respect of the breach and the corrective measures taken as a result as well as other open and active cooperation with the FIN-FSA in investigating the breach. Such cooperation is likely to reduce the penalty payment. Correspondingly, where the supervised entity or other party subject to sanction takes a passive stance towards the matter or complicates the investigation of the matter in an open manner with the FIN-FSA, this is likely to increase the penalty payment.

The abovementioned does not mean that the supervised entity or other party subject to sanction does not have the right to disagree with the FIN-FSA, for example, on the interpretation of a provision, or to appeal against a decision made by the FIN-FSA.

Measures taken to prevent reoccurrence of the breach refers to corrective measures taken by the supervised entity or other party subject to sanction after the breach has been detected.

1.1.7 Other and previous breaches

Other and previous breaches concerning financial market provisions by the person responsible for the breach are likely to increase the penalty payment.

The comprehensive assessment of the penalty payment takes into consideration all breaches in the same matter as well as previous breaches of financial market provisions. For example, in a situation where a penalty payment would be imposed on a person, the comprehensive assessment of the size of the penalty payment would also take into consideration whether the person has also breached the provisions to which a public warning or administrative fine apply.[8] For the imposition of a combined penalty payment, see section 1.3 below.

In this context, however, as a rule only such breaches are taken into consideration for which an administrative sanction or another decision by FIN-FSA (e.g. on exercising supervisory powers) has become legally valid or for which a legally valid judgment has been imposed in criminal proceedings.

[8] Government Proposal 151/2017, p. 211 (in Finnish).

If the FIN-FSA has previously, due to a similar breach, issued an administrative sanction to the same person or has made a decision to exercise supervisory powers, this demonstrates indifference on the part of the person, which is likely to increase the penalty payment.

1.1.8 Impact on financial stability

Where a breach is likely *to impair financial stability*, this, as a rule, is a factor in increasing the penalty payment.

In such matters, it may be taken into consideration, for example, whether the relevant person is a supervised entity that is significant for the stability of the market or whether the breach otherwise had a wider impact on the financial market.

1.1.9 Other principles affecting the size of the penalty payment

Previous decisions

In determining the size of a penalty payment, the FIN-FSA takes into consideration previous decisions made by the FIN-FSA, the Helsinki Administrative Court, the Market Court and the Supreme Administrative Court in matters of a corresponding nature.

Other equivalent bodies' decisions

The FIN-FSA seeks to monitor the matters decided on by the supervisory authorities of other EU countries, the European Securities and Market Authority (ESMA) and the ECB (Single Supervisory Mechanism) and evaluates their potential influence on FIN-FSA's decision-making.

Other related sanctions

In determining the size of a penalty payment, it may be taken into consideration if an authority supervising the financial sector in another country has imposed a sanction or has initiated sanction proceedings regarding the same matter.

In addition, any disciplinary sanctions by a self-regulatory body (e.g. stock exchange) in the same matter may exceptionally be taken into consideration as a factor in reducing the penalty payment.[9]

Previous supervisory measures in the same matter

Where, before imposing a penalty payment, the FIN-FSA has made decisions concerning the use of its prescribed supervisory powers in the context of the same breaches and those decisions have been published, and this may be considered to have caused clear damage or significant costs to the supervised entity or person, this may exceptionally be taken into consideration as a factor in reducing the penalty payment.

[9] cf. Government Proposal 32/2012, p. 280, in Finnish.

Particular obscurity of provisions

Where a legislative provision or regulation is particularly obscure, this may be taken into account in determining the size of the penalty payment. If, however, the person responsible for the breach is an entity supervised by the FIN-FSA or an entity or person otherwise operating professionally in the financial markets, this factor may only be considered to decrease the penalty payment in exceptional cases.

Other legislation

The FIN-FSA shall take into account the requirements of the Constitution of Finland (731/1999), such as the requirement of equality prescribed in section 6.

The FIN-FSA shall also take into account the relevant administrative legislation, such as the legal principles of administration prescribed in section 6 of the Administrative Procedure Act (434/2003).[10]

1.2 Determining the size of an administrative fine

Section 38, subsection 2 of the FIN-FSA Act states:

> "The size of an administrative fine shall be based on a comprehensive assessment. In assessing the size of an administrative fine, consideration shall be given to the nature, extent and duration of the breach. The administrative fine payable by a legal person shall amount to no less than EUR 5,000 and to no more than EUR 100,000. The administrative fine payable by a natural person shall amount to no less than EUR 500 and to no more than EUR 10,000."

In determining the size of an administrative fine, sections 1.1.1–1.1.3 and 1.1.9 shall be applied, as applicable.

According to section 38, subsection 4 of the FIN-FSA Act, where the act or omission is particularly reprehensible, the FIN-FSA may impose a penalty payment instead of an administrative fine.

> A penalty payment may be imposed in lieu of an administrative fine, for example, where a supervised entity recurrently neglects its reporting obligation, although an administrative fine for neglecting its reporting obligation has already been imposed.
>
> A penalty payment may also be imposed instead of an administrative fine where the action or omission has been intentional.

[10] The provision states as follows: "An authority shall treat the customers of the administration on an equal basis and exercise its powers only for purposes that are acceptable under the law. The acts of the authority shall be impartial and proportionate to their objective. They shall protect legitimate expectations as based on the legal system."

1.3 Combined penalty payment

Section 41b of the FIN-FSA Act provides for a combined penalty payment. Under the provision, if an administrative fine or penalty payment is imposed at the same time for two or more failures or offences, as referred to in sections 38, 40 or 41a, a combined penalty payment shall be imposed. The combined penalty payment may not exceed the total maximum amount of administrative fines and penalty payments. See also section 1.1.7.

2 Act on Preventing Money Laundering and Terrorist Financing and Act on Certain Powers of the Consumer Protection Authorities

2.1 Determining the size of a penalty payment

Chapter 8, section 4, subsection 1 of the Act on Preventing Money Laundering and Terrorist Financing (444/2017; Anti-Money Laundering Act) provides for determining the size of a penalty payment imposed on a credit or financial institution. Chapter 8, section 5, subsection 1 of the Act provides for determining the size of a penalty payment imposed on an obliged entity other than a credit or financial institution. The provisions are to a large extent equivalent to section 41, subsection 2 of the FIN-FSA Act.

In determining the size of a penalty payment, sections 1.1.1–1.1.9 shall be applied, as applicable.

Chapter 8, section 4, subsections 2–5 and chapter 8, section 5, subsection 2 of the Anti-Money Laundering Act provide for the maximum size of a penalty payment.

Section 5 of the Act on Certain Powers of the Consumer Protection Authorities lays down provisions on the FIN-FSA's right to issue penalty payments, while section 18 of the Act provides for determining the size of a penalty payment on the basis of a comprehensive assessment and for the maximum size of a penalty payment. The provisions are largely consistent with the provisions of section 41, subsection 2 of the FIN-FSA Act. In determining the size of a penalty payment, the provisions of sections 1.1.1-1.1.9 of shall apply, where appropriate.

2.2 Determining the size of an administrative fine

Chapter 8, section 1, subsection 3 the Anti-Money Laundering Act provide for determining the size and the maximum size of an administrative fine. The provision is equivalent to section 38, subsection 2 of the FIN-FSA Act.

In determining the size of an administrative fine, sections 1.1.1–1.1.3 and 1.1.9 shall be applied, as applicable.