Jersey Financial Services Commission

Civil Financial Penalties on Principal Persons:

Methodology for determining the amount

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1 Introduction

1.1 The methodology set out in this paper describes the Jersey Financial Services Commission's (**JFSC**) **guideline** approach to the determination of the amount of a civil financial penalty to be imposed on a principal person[i]. The circumstances of each case will be different and the JFSC will apply each step in the methodology with the necessary degree of flexibility and discretion that the particular case will merit.

2 Background

2.1 Pursuant to provisions in the Financial Services Commission (Jersey) Law 1998 (**the Commission Law**), where the JFSC is satisfied that a registered person[ii] has, to a significant and material extent, contravened a Code of Practice (**Code**), and that the contravention was:

2.1.1 committed with the consent or connivance of, or is attributable to neglect on the part of a principal person; or

2.1.2 aided, abetted, counselled or procured by a principal person,

the JFSC may impose a civil financial penalty on the principal person concerned.[iii]

2.2 The maximum penalty that the JFSC may impose on a principal person is set out in the Financial Services Commission (Financial Penalties) (Jersey) Order 2015 (**the Order**). There are four penalty bands, which are summarised below:

Penalty Band	Nature of the contravention by the registered person (summary)	Maximum penalty that may be imposed on a principal person
1	A failure to notify the JFSC of certain matters specified in a Code of Practice.	£10,000
2	A contravention of a Code of Practice not falling into Band 2A or Band 3 below and not rectified to the satisfaction of the JFSC within the timeframe determined by the JFSC.	£200,000
2A	A contravention of a Code of Practice committed negligently.	£300,000
3	A contravention of a Code of Practice committed either intentionally or recklessly.	£400,000

3 Determining the amount – what the law says

3.1 Article 21B of the Commission Law states that when considering whether to impose a financial penalty on a principal person and the amount thereof the JFSC must have particular regard to the following factors:

3.1.1 The seriousness of the contravention;

3.1.2 Factors that aggravate or mitigate the position of the principal person (see Appendix 2);

3.1.3 The principle of ensuring that principal persons cannot expect to profit from contraventions;

3.1.4 Penalties imposed on principal persons in other cases; and

3.1.5 The potential financial consequences to the principal person and to third parties (including creditors of the principal person) of imposing the penalty.

3.2 This list is replicated in the Appendix to the JFSC's Decision-Making Process as, "*the principles that the JFSC will apply in determining the imposition and amount of a financial penalty on a principal person.*"

3.3 Principal persons are reminded that Article 21F of the Commission Law provides that a principal person may appeal to the Royal Court against the imposition of a financial penalty or the amount of a financial penalty on the ground that the decision of the JFSC was unreasonable having regard to all the circumstances of the case.

4 The methodology

4.1 The methodology for determining the amount of a financial penalty responds to Article 21B of the Commission Law by requiring a series of steps to be followed that reflect the statutory obligations imposed on the JFSC by that Article.

4.2 The detail of the methodology is set out in Appendix 1 and is self-explanatory in the main. However, Step 1 of the methodology is described in detail below because it is somewhat more complex than the other steps in the methodology.

4.3 Step 1 requires the JFSC to judge how serious it regards the contravention (or the contraventions, in aggregate) on a scale of 1 to 5.

4.4 The seriousness of the contravention will be judged by its impact on the Guiding Principles that Article 7 of the Commission Law requires the JFSC to have regard to when carrying out any of its functions, namely:

4.4.1 The reduction of the risk to the public of financial loss due to dishonesty, incompetence or malpractice by or the financial unsoundness of persons carrying on the business of financial services in or from within Jersey;

4.4.2 The protection and enhancement of the reputation and integrity of Jersey in commercial and financial matters;

4.4.3 The need to counter financial crime both in Jersey and elsewhere.[iv]

4.5 Under the methodology the JFSC will judge the impact of the contravention (or the contraventions, in aggregate) on each of the three Guiding Principles, with Level 1 being the lowest impact and Level 5 the highest.

4.6 The table below summarises the factors that would influence the assessment of impact on each Guiding Principle:

Guiding Principle	Determining the level (sliding scale)
The reduction of the risk to the public of financial loss due to dishonesty, incompetence, malpractice, or financial unsoundness of persons carrying on financial services.	Level 1 – Low risk of loss[v]. ↓ Level 3 – Significant risk of loss or significant occurrence of loss. ↓ Level 5 – Very significant risk of loss or very significant occurrence of loss.
The protection and enhancement of the reputation and integrity of Jersey in commercial and financial matters.	Level 1 – No significant reputational damage. ↓ Level 3 – Significant reputational damage **domestically**. ↓ Level 5 – Significant reputational damage **internationally**.
The need to counter financial crime[vi] in Jersey or elsewhere.	Level 1 – Low risk of financial crime occurring. ↓ Level 3 – Significant risk of financial crime occurring or significant financial crime occurred. ↓ Level 5 – Very significant risk of financial crime occurring or very significant financial crime occurred.[vii]

4.7 For consistency, when evaluating the impact of the contravention against the second of the Guiding Principles (reputation) the methodology works on the assumption that the contravention will, if not already, become public knowledge (which, save in exceptional cases, will always be the case in any event through the issuance of a public statement by the JFSC when the financial penalty is imposed – whether under a settlement agreement or otherwise).

4.8 Under the methodology, once the impact of the contravention (or the contraventions, in aggregate) on each of the three Guiding Principles has been judged, the resultant average level[viii] would be that which determines the "seriousness" of the contravention and how much in financial terms the "seriousness" factor will contribute towards the final amount of the penalty, as set out in the table below. Under the methodology, this is known as the **Step 1 figure** – see Table 1 below.

Table 1	
"Seriousness"	**Step 1 figure** Expressed as a percentage of the maximum penalty that could be imposed on the principal person – see Table 2
Level 1	15 %
Level 2	30 %
Level 3	45 %
Level 4	60 %
Level 5	75 %

Table 2				
	Band 1 penalty	**Band 2 penalty**	**Band 2A penalty**	**Band 3 penalty**
Maximum Penalty	£10,000	£200,000	£300,000	£400,000

4.9 The other steps to be followed under the methodology in order to determine the final amount of the penalty are described in detail in Appendix 1 but, in summary, they are as follows:

Step	Description	Contribution towards penalty amount
1	Judge the seriousness of the contravention of the Code of Practice	The £ amount calculated by reference to the table in paragraph 4.8 of this paper. (the **Step 1 figure**)
2	What aggravating / mitigating factors were there? (see Appendix 2)	A (net) additional amount of up to 50% of the Step 1 figure or a (net) deduction of up to 50% of the Step 1 figure.
3	Application of the principle of ensuring that principal persons cannot expect to profit from contraventions.	+ £ xxx, as appropriate (where the quantum of profit can be identified).
4	Have regard to the penalties in other cases.	[The use of the methodology should ensure consistency.]
5	GROSS CALCULATION of penalty to be imposed, before the application of the statutory maximum as set out in the Order. (the Step 5 figure).	[This will be the product of Steps 1 to 4]
6	Reduction, if necessary, to the Step 5 figure so that the maximum penalty permitted under the Order is not exceeded.	[-£xxx, as appropriate.]
7	MAXIMUM-ADJUSTED penalty amount (the Step 7 figure)	£xxx
8	Have regard to the potential financial consequences to the principal person and to third parties (including creditors of the principal person) of imposing the penalty.	[-£xxx, if appropriate.]
9	ACTUAL penalty to be imposed (the Step 9 figure)	[The Step 7 figure as adjusted by Step 8.]
10	Discount for early settlement (where applicable). See the JFSC's Decision-Making Process document.	[% discount expressed in monetary terms.]
11	**DISCOUNTED penalty to be imposed under settlement agreement.**	**[The Step 9 figure as adjusted for the discount in Step 10.]**

4.10 **For illustrative purposes only**, Appendix 3 contains a worked example of how the amount of a financial penalty would be determined using the methodology.

APPENDIX 1 – Methodology for determining the amount of a financial penalty

Step	Narrative description (Articles references are from the Commission Law)	Considerations	Contribution towards penalty amount[ix]
1	Judge the seriousness of the contravention of the Code of Practice. [Article 21B(3A)(a)] For consistency, the evaluation of the impact against this Guiding Principle will assume that the contravention(s) will, if not already, become public knowledge (which, save in exceptional cases, will always be the case through the issuance of a public statement by the JFSC when the financial penalty is imposed – whether under a settlement agreement or otherwise).	Judged by the impact on the JFSC's Guiding Principles[x]. **Principle (a)** **The reduction of the risk to the public of financial loss due to dishonesty, incompetence, malpractice, or financial unsoundness of persons carrying on financial services.** Sliding scale: Level 1 – Low risk of loss[xi]. ↓ Level 3 – Significant risk of loss or significant occurrence of loss. ↓ Level 5 – Very significant risk of loss or very significant occurrence of loss. **Principle (b)** **The protection and enhancement of the reputation and integrity of Jersey in commercial and financial matters.** Sliding scale: Level 1 – No significant reputational damage. ↓ Level 3 – Significant reputational damage **domestically**. ↓ Level 5 – Significant reputational damage **internationally**. **Principle (c)** **The need to counter financial crime[xii] in Jersey or elsewhere.** Sliding scale: Level 1 – Low risk of financial crime occurring. ↓ Level 3 – Significant risk of financial crime occurring or significant financial crime occurred. ↓ Level 5 – Very significant risk of financial crime occurring or very significant financial crime occurred.[xiii]	The Step 1 figure calculated by reference to the table in paragraph 4.8 of this paper.

Step	Narrative description (Articles references are from the Commission Law)	Considerations	Contribution towards penalty amount[ix]
2	What aggravating / mitigating factors were there? [Article 21B(3A)(e)]	See Appendix 2 for a non-exhaustive list of aggravating / mitigating factors. (Step 2 will not take into account aggravating or mitigating factors considered in other steps of the methodology.)	A (net) additional amount of up to 50% of the Step 1 figure or a (net) deduction of up to 50% of the Step 1 figure.
3	Application of the principle of ensuring that principal persons cannot expect to profit from contraventions. [Article 21B(3A)(c)]	Did the principal person receive an identifiable quantum of income/avoid a reduction in income/avoid incurring expense as a result of the contravention? (N.B. This is not an exhaustive list.)	Where, as a result of the contravention, the principal person received income/avoided a reduction in income/avoided incurring expense, the penalty amount will be increased by that quantum.
4	Have regard to the penalties in other cases. [Article 21B(3A)(d)]	As part of Step 4, where necessary and appropriate, the JFSC will look to other jurisdictions in order to consider how a similar contravention has been treated (in terms of the scale of seriousness but not the quantum of financial penalty imposed).	A quality control check will be carried out to ensure the JFSC is being consistent. The use of this methodology should ensure consistency.
5	GROSS CALCULATION of penalty to be imposed, before the application of the statutory maximum as set out in the Order (**the Step 5 figure**).		[This will be the product of Steps 1 to 4.]
6	Reduction, if necessary, to the Step 8 figure so that the maximum penalty permitted under the Order is not exceeded.		[- £xxx, as appropriate.]
7	MAXIMUM-ADJUSTED penalty amount (**the Step 7 figure**)		[The product of Step 5 as adjusted by Step 6]
8	Have regard to the potential financial consequences to the principal person and to third parties (including creditors of the principal person) of imposing the penalty. [Article 21B(3A)(b)]	› To what extent would the amount of the penalty endanger the principal person's capacity to pay his or her creditors? › To what extent would the amount of the penalty endanger the solvency of the principal person? (N.B. This is not an exhaustive list)	[-£xxx, if appropriate.]
9	ACTUAL penalty to be imposed (**the Step 9 figure**)		[The Step 7 figure as adjusted by Step 8.]

Step	Narrative description (Articles references are from the Commission Law)	Considerations	Contribution towards penalty amount[ix]
10	Discount for early settlement (where applicable)	The JFSC's Decision-Making Process document states that the following discounts will apply: › Settlement before Stage One – a maximum discount of 50%. › Settlement before Stage Two – a maximum discount of 25%. › Settlement before Stage Three – a maximum discount of 5%.	[% discount expressed in monetary terms.]
11	**DISCOUNTED penalty to be imposed under settlement agreement.**		**[The Step 9 figure as adjusted for the discount in Step 10.]**

APPENDIX 2 - Aggravating and mitigating factors

Factors that the JFSC will regard as aggravating the position of a principal person include (i.e. this is a non-exhaustive list):

› A failure by the principal person to take action appropriate to his or her position with the registered person on becoming aware of the contravention (determination of the level of aggravation under this factor will take into account, amongst other things, the extent to which the principal person has executive management responsibility for the part of the registered person's business affected by the contravention and/or for the particular matter that was the subject of the contravention)

› The principal person supporting (whether implicitly or explicitly) a business model that encourages a disregard for requirements of the Codes of Practice

› The registered person having a poor compliance record (this will include a failure to follow any direction(s)[xiv] issued) and the principal person's past actions or inactions being a contributory factor to that record

› A failure by the principal person to pay appropriate attention to relevant guidance issued by the JFSC

› A failure by the principal person to follow the registered person's own procedures

› A failure by the principal person, where it was his or her responsibility, to ensure that the registered person had in place relevant procedures.

Factors that the JFSC will regard as mitigating the position of a principal person include (i.e. this is a non-exhaustive list):

› The principal person taking action appropriate to his or her position with the registered person on becoming aware of the contravention

› The principal person co-operating fully with any investigation

› Where the registered person has an evidenced previously strong compliance record, the principal person's contribution to that.

APPENDIX 3

Worked example – for illustrative purposes only

- Calculating the amount of a Band 2A penalty.
- The maximum penalty permitted is £300,000.

Step	Description	Considerations	Contribution towards penalty amount	Amount
1	Judge the seriousness of the contravention of the Code of Practice	Risk to the public = Level 3 Reputational damaged = Level 3 Risk of financial crime = Level 3 Average = Level 3	45% of the maximum penalty permitted.	£135,000 (**the Step 1 figure**)
2	What aggravating / mitigating factors were there?	Aggravating: Principal person was responsible for the registered person's inadequate procedures. Mitigating: Co-operated fully with JFSC investigation. Promptly ensured contraventions were remediated. Promptly ensured revised procedures were put in place.	A net -10% of the Step 1 figure.	-£13,500
3	Application of the principle of ensuring that principal persons cannot expect to profit from contraventions.	None identified.	N/A	£0
4	Have regard to the penalties in other cases.	Consistency check done.	N/A	£0
5	GROSS CALCULATION of penalty to be imposed, before the application of the statutory maximum as set out in the Order. (the Step 5 figure).			£121,500
6	Reduction, if necessary, to the Step 5 figure so that the maximum penalty permitted under the Order is not exceeded.	A Band 2A penalty on a principal person may not exceed £300,000.	N/A	£0
7	MAXIMUM-ADJUSTED penalty amount (the Step 7 figure)			£121,500
8	Have regard to the potential financial consequences to the principal person and to third parties (including creditors of the principal person) of imposing the penalty.	The Step 7 figure can be borne by the principal person and without materially adverse impact on third parties.	N/A	£0
9	ACTUAL penalty to be imposed (the Step 9 figure)			£121,500

10	Discount for early settlement. See the JFSC's Decision-Making Process document.	Settled before Stage One of the Decision-Making Process.	50% discount	-£60,750
11	**DISCOUNTED penalty to be imposed under settlement agreement.**			**£60,750**

Endnotes

[i] "principal person" is defined in Article 1 of the Commission Law.

[ii] "registered person" is defined in Article 1 of the Commission Law.

[iii] The JFSC may, should it consider it appropriate, also impose a civil financial penalty on the registered person.

[iv] It is considered that the other Guiding Principle that the JFSC must have regard to – "*the best economic interests of Jersey*" – is not relevant in the context of assessing the seriousness of a contravention. See endnote (x) for more information.

[v] "Loss" in this context includes profits foregone or returns not realised.

[vi] "financial crime" in this context includes financial crime by a registered person or its customers/clients.

[vii] Notwithstanding this methodology, where financial crime has occurred this would not preclude a referral to Her Majesty's Attorney General (Jersey's criminal prosecuting authority) and where breaches of the relevant Code of Practice have also occurred consideration of a regulatory sanction other than, or in addition to, a civil financial penalty.

[viii] Where the averaging calculation results in a fraction, the nearest whole number will be used.

[ix] Where a step in the methodology indicates an increase or decrease would be made to the Step 1 figure the maximum percentages shown are not immutable: where the JFSC considers that the specifics of a case means that a larger or smaller percentage adjustment would be appropriate, it reserves to itself the discretion to make whatever adjustment it considers reasonable.

[x] The Guiding Principle of "having regard to the best economic interests of Jersey" is excluded, on the basis that it is not appropriate in this context. In this regard, the Memorandum of Understanding that the JFSC has signed with the Chief Minister sets out the shared interpretation of that guiding principle:-

> "3.4 The Chief Minister accepts the JFSC's interpretation of the Guiding Principle to have regard to "the best economic interests of Jersey', namely that:
>
> 3.4.1 the JFSC should not compromise regulatory standards in order to allow a line of business which a section of the Industry might find attractive;
>
> 3.4.2 the JFSC should have regard to the Strategic Plan for Jersey approved by the States of Jersey from time to time, and in particular its objectives in relation to jobs and economic growth;
>
> 3.4.3 the JFSC should take full account of the costs and other burden of regulation recognising the international nature of the Island's finance industry and the need to be competitive from the perspective of persons carrying on the business of financial services and users of such services;
>
> 3.4.4 subject to the need to maintain regulatory standards, the JFSC should assist in the development of business by resourcing and organising itself to provide timely responses to proposals from persons that are, or are seeking to, carry on the business of financial services and by adopting a regulatory approach that is proportionate to the risks posed by the business concerned;
>
> 3.4.5 the JFSC should facilitate innovation by persons carrying on the business of financial services."

[xi] "Loss" in this context includes profits foregone or returns not realised.

[xii] "financial crime" in this context includes financial crime by a registered person or its customers/clients.

[xiii] Notwithstanding this methodology, where financial crime has occurred this would not preclude a referral to Her Majesty's Attorney General (Jersey's criminal prosecuting authority) and where breaches of the relevant Code of Practice have also occurred consideration of a regulatory sanction other than, or in addition to, a civil financial penalty.

[xiv] A direction issued under Article 23 of the Financial Services (Jersey) Law 1998 or its equivalent in the other regulatory laws.