

1 Factors affecting the size of penalty payments and administrative fines

1.1 Determining the size of penalty payments

Section 41, subsection 2 of the Act on the Financial Supervisory Authority¹ (FIN-FSA Act) provides as follows:

"The size of a penalty payment shall be based on a comprehensive assessment. In assessing the size of a penalty payment, consideration shall be given to the nature, scope and duration of the breach as well as the financial position of the person responsible for the breach. In addition, when making the assessment, account shall be taken of the profits gained or damage caused by the breach, insofar as they can be determined, the cooperation of the person responsible for the breach with the Financial Supervisory Authority (FIN-FSA) in investigating the matter, previous breaches concerning financial market provisions by the person responsible for the breach, as well as the potential impact of the breach on financial stability."

Hence, the size of a penalty payment is based on a comprehensive assessment, where consideration is given to the factors referred to in the provision. These factors are addressed in Sections 1.1.1–1.1.8.

In addition, Section 1.1.9 highlights certain other general principles² to be taken into account in the comprehensive assessment, which may be of significance when FIN-FSA considers the size of the penalty payment applicable to the case. The principles are not exhaustive.

In accordance with Section 41, subsection 1 of the FIN-FSA Act, a penalty payment not exceeding the sum of EUR 1 million shall be imposed by FIN-FSA. In other cases, the penalty payment shall be imposed by the Market Court, upon the proposal of FIN-FSA. This means that the factors and principles stated below shall guide the deliberations by FIN-FSA not only where it imposes the penalty payment itself, but also where it proposes the imposition of a penalty payment to the Market Court.

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 action or omission and the significance of the obligation neglected, in addition to the position of the person responsible for the breach, for example, in relation to an entity supervised by FIN-FSA.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 FIN-FSA

¹ According to the provision on entry into force of Act 611/2014, this provision applies to actions and omissions taken after the entry into force of the Act (15 August 2014).

² According to the detailed justifications (Government proposal 39/2014, p. 98, in Finnish) of Section 41 of the FIN-FSA Act: "It would be warranted for the Financial Supervisory Authority 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."

³ Government proposal 32/2012, p. 279, in Finnish.

provided 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 FIN-FSA, on financial stability, on confidence in the financial markets and their functionality as well as on the position of or access to information by the customers of the supervised entity.

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

If the person responsible for a suspected 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 broker or portfolio manager) may, as a rule, be considered a factor in increasing the penalty payment.

If supervisory observations by 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 violations of legal or regulatory provisions may in themselves be considered minor, this may generally be considered a factor in increasing the penalty payment.

An action or omission taken deliberately or through gross negligence is likely to increase the penalty payment.

1.1.2 Scope of the breach

In assessing the *scope of the breach*, consideration is given, for example, to the financial damage caused by the violation, its impact on the confidence in the financial markets or financial stability, as well as the gain estimated as being achieved.⁵

A violation is generally more severe, where it causes or may cause extensive financial damage, or where it is likely to be particularly detrimental, with a view to investor or customer confidence. See also Section 1.1.5 below.

In assessing the scope of the breach, consideration is given, as stated above in Section 1.1.1 to how the breach in question has threatened, in material terms, to compromise the objectives of the activities of 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 action or omission, to the recurrence, if any, of the violations.⁶

As a rule, the longer the duration of the violation, the higher the penalty payment. In this context, however, it may be taken into account that certain violations (for example the

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

⁵ Government proposal 32/2012, p. 279, in Finnish.

⁶ Government proposal 32/2012, p. 279, in Finnish.

omission of ongoing disclosure obligation by a listed company) may be significant, even if they are brief.

In addition, the recurrence of violations is generally a factor in increasing the penalty payment.

1.1.4 Financial position

In assessing the *financial position* of the person, in addition to their payment capacity, consideration may be given to the likely impact of the penalty payment on the preconditions of the entity to pursue their activities.⁷

1.1.5 Profits gained or damage caused

The *profits gained or damage caused* by a breach in violation of the provisions are always taken into account where they can be determined. A profit gained also comprises a loss avoided through a breach. An indirect profit may also be considered a profit gained.

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

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

1.1.6 Cooperation of the person

Cooperation of the person responsible for the breach with FIN-FSA in investigating the matter refers to, for example, open and active cooperation of the supervised entity with FIN-FSA in investigating the matter and also to the remedying measures taken by the supervised entity on its own initiative in the matter.⁸ Such cooperation is likely to reduce the penalty payment. Correspondingly, if the supervised entity takes a passive stance towards the matter or avoids investigating the matter openly with FIN-FSA, it is likely to increase the penalty payment.

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

1.1.7 Previous breaches

Previous breaches concerning financial market provisions by the person responsible for the breach are likely to increase the penalty payment. In this context, however, as a rule only

⁷ Government proposal 32/2012, p. 279, in Finnish.

⁸ Cf. Section 42, subsections 1 and 2 of the FIN-FSA Act. Remedying measures do not only comprise, for example, the adjustment of the internal processes of the supervised entity but also potential remedying measures targeted at the customers, such as the compensation for damage incurred, if any.

such breaches are taken into account, for which an administrative sanction or another decision by FIN-FSA (e.g. on using supervisory powers) has become legally valid or for which a legally valid judgment has been imposed in criminal proceedings.

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.

1.1.9 Other principles affecting the size of penalty payment

Precedent

In determining the size of a penalty payment (or in making a proposal to the Market Court), FIN-FSA gives consideration to the precedent decisions made by the FIN-FSA, the Market Court and the Supreme Administrative Court.

Other equivalent bodies' precedents

FIN-FSA seeks to monitor the cases decided on by other national supervisory authorities, the European Securities and Market Authority (ESMA) and the ECB (SSM) 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 account if an authority supervising the financial sector in another country has imposed a sanction or has begun 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 account as a factor in reducing the penalty payment.⁹

Previous supervisory measures in the same matter

Where, before imposing a penalty payment, FIN-FSA has made decisions concerning the use of its 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 account as a factor in reducing the penalty payment.

Relationship between a penalty payment and other administrative sanctions

If, in the context of the same cases, legislative or regulatory provisions subject to both a penalty payment and administrative fine and/or public warning have been breached, the administrative fine and/or public warning will not be imposed, but the relevant breaches will be taken into account as a factor in increasing the penalty payment.¹⁰

⁹ Cf. Government proposal 32/2012, p. 280, in Finnish.

¹⁰ Government proposal 32/2012, p. 276–277, in Finnish.

Particular obscurity of provisions

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

Other legislation

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

FIN-FSA shall also take into account the relevant administrative legislation, such as the legal principles of administration provided in section 6 of the Administrative Procedure Act (434/2003).¹¹

1.2 Determining the size of an administrative fine

According to Section 38, subsection 2 of the FIN-FSA Act, 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, scope and duration of the breach.

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 action or omission is particularly reprehensible, 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 in lieu of an administrative fine where the action or omission has been intentional.

¹¹ 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."