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Insights

CHANGES TO OUR PENALTY AND DECISION-MAKING POLICIES

BCLP’s response to the FCA consultation paper CP26/19

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Summary

On the 15 June 2026, the FCA issued a consultation paper: *CP26/19: Changes to our penalty and decision-making policies*. BCLP has responded independently to the consultation, supporting the FCA's commitment to effective enforcement, but raising concerns about the proposal to increase penalties for "wealthier individuals" by taking account of the size of their income or net assets when assessing deterrence. A copy of BCLP’s response can be found below.

Bryan Cave Leighton Paisner LLP (“BCLP”) submits this letter in response to the Consultation Paper (“CP”) issued by the Financial Conduct Authority (“FCA”) entitled “CP26/19: Changes to our penalty and decision-making policies”.

BCLP is a fully integrated global law firm. Our London office provides full-service legal advice in the City, throughout the UK and worldwide. Amongst our clients are a large number of authorised firms. Our specialist Financial Services Disputes Team has significant experience of advising clients, especially individuals, in respect of enforcement investigations in relation to their regulated services.

We welcome the FCA's continued commitment to transparent and effective enforcement and write to address one aspect of the proposals raised in CP26/19. Paragraphs 2.15-2.18 of the CP concern a proposal to enable the Authority to increase financial penalties on “wealthier individuals” pursuant to ensuring credible deterrence. The operable part of the FCA’s policy, Decision Procedure and Penalties manual (“DEPP”), is contained in chapter 6.5B, which sets out guidance in respect of the five-step process for imposing penalties on individuals in non-market abuse cases. Step 4 of that process allows the Authority to uplift the calculated penalty to achieve credible deterrence.

As currently drafted Paragraph 6.5B.4(1) reads as follows:

> If the FCA considers the figure arrived at after Step 3 is insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches then the FCA may increase the penalty. Circumstances where the FCA may do this include:
>
> > a) where the FCA considers the absolute value of the penalty too small in relation to the breach to meet its objective of credible deterrence;
> >
> > b) where previous FCA action in respect of similar breaches has failed to improve industry standards. This may include similar breaches relating to different products (for example, action for mis-selling or claims handling failures in respect of 'x' product may be relevant to a case for mis-selling or claims handling failures in respect of 'y' product);
> >
> > c) where the FCA considers it is likely that similar breaches will be committed by the individual or by other individuals in the future;
> >
> > d) where the FCA considers that the likelihood of the detection of such a breach is low; and
> >
> > e) where a penalty based on an individual's income may not act as a deterrent, for example, if an individual has a small or zero income but owns assets of high value.

The CP proposes to:

- amend (e) to read "where the penalty may not act as a deterrent in light of the size of the individual's income or net assets"; and
- add a further specified circumstance at (f), which reads "where the breach has led to the individual receiving less relevant income than they would otherwise have received, because it
  was a breach or otherwise treated as misconduct under the terms of their employment or other relevant contract."

Our response to this CP is focused on the former, the amendment to (e) ("the Proposed Amendment"). We note that the language is replicated from the equivalent provisions relating to penalties for individuals committing market abuse. However, our interpretation of this revised language is that it effectively affords the FCA the discretion to calculate penalty by considering what proportion of a person's overall wealth may be required to deter future similar breaches by them and others.

Below, we make some preliminary and general comments about the use and application of an uplift at Step 4 of the process. These points inform our response to the Proposed Amendment that follows thereafter. We then go on to provide some suggestions of how those concerns can be addressed or mitigated by alternative approaches.

The exercise of the FCA's discretion at Step 4

We make the following general comments about the FCA's policy on imposing a Step 4 uplift, which serve to support and inform our response to the Proposed Amendment.

i. *The ultimate test: will the Step 3 figure deter future similar breaches?*

Where the Authority relies upon any of the specific circumstances in (a) – (e) above in justifying an uplift at Step 4, it still needs to satisfy itself (and demonstrate) that the figure at Step 3 is insufficient to deter further or similar breaches. To illustrate the point, the fact that the FCA believes that similar breaches will be committed in the future (the qualifying circumstance at (c)), should not of itself justify an uplift.

It is one consideration relevant to an assessment of whether the specific figure produced at Step 3 is insufficient to ensure credible deterrence for future breaches. A likelihood of future, similar breaches, may speak to the need for the Authority to message to the market how seriously it considers the misconduct, in order to reduce the risk of its recommission.

ii. *The need for deterrence assessment to be evidenced*

Relatedly, any assertion that a specific level of penalty is insufficient to deter persons from committing similar breaches in the future should be properly evidenced. Whilst the issue of credible deterrence is commonly referred to as a "matter of regulatory judgment", the application of the discretion must still be informed, transparent and rationally explained. In exercising its discretion to uplift the penalty, the FCA needs to articulate why it considers that the Step 3 amount is insufficient to deter either the subject and / or others from committing similar breaches, and provide evidence to support its claim. If the FCA is proposing a penalty which represents an uplift by any specific multiple, it should show and evidence why the resulting level of penalty is needed to achieve deterrence. We acknowledge that evidencing the level of penalty required to deter similar breaches may not be simple or easy in all circumstances. However, without an evidentially grounded and cogent basis for justifying a particular uplift, there is a clear risk that the process may appear arbitrary and produce ostensibly inconsistent results.

In the absence of any evidential grounding, an exercise of the FCA's discretion at Step 4 risks being used (and perceived as such) as a tool to increase the penalty simply where the figure generated at Step 3 is considered inadequate and not proportionate to the conduct. Such an approach would be inconsistent with the terms of Step 4 in the policy, which does not allow uplifts to punish, but only to achieve deterrence. They are separate and distinct policy objectives.

iii. *Prior use of comparator cases*

Regarding the use of supporting evidence, we note that the Authority has regularly sought to use comparator cases to justify a proposed uplift at Step 4. In doing so, the Authority will typically (and rightly) acknowledge that, given no two cases are identical, one needs to give prior cases appropriate evidential weight. There have been lines of very similar or connected enforcement actions taken by the Regulator in the past (e.g. defined benefit pension transfer cases). However, outside of those very limited examples, we suggest that the practice of relying on comparator cases rarely assists to evidence that a specific level of penalty would be insufficient to deter others from committing similar breaches in the future. That is especially the position where the comparator cases relied upon concern conduct that is fundamentally different in nature and culpability from the breach being pursued. For example, reliance on penalties imposed for dishonest conduct or deliberate market abuse are highly unlikely to be appropriately comparable to an alleged negligence failing. Conduct concerning such different culpabilities could not appropriately be described as *"similar breaches"* for the purposes of 6.5B.4.

Indeed, the Upper Tribunal, albeit in a different context, criticised reliance on comparator cases in the case of FCA v De Havilland Bank and Others noting: *"It does not seem to us that these cases, or any of the cases cited by the Bank, are really comparative to the present case. One might legitimately ask the question of why a penalty of £10m is appropriate in this case rather than a penalty of £20m or £5m. We were provided with no quantitative or qualitative answer to that question. We agree with the Bank's submission that a £10m penalty appears to be an arbitrary figure"*.

These statements not only question the assistance of (purported) comparator cases, but also articulate the requirement for any uplift for deterrence to be evidentially grounded. The FCA needs to explain and demonstrate why any level of penalty is appropriate. In the absence of such explanation the resulting figure, and hence the exercise of the FCA's discretion itself will appear arbitrary.

iv. *The use of Step 4 for certain conduct and culpability*

Related to the prior point, in assessing whether any penalty amount is insufficient to deter similar breaches, the nature of the breach and the culpability of the subject, are important factors to consider. We suggest that, in applying the discretion at Step 4, the Authority should recognise that there is a significant distinction between cases which, for example, involve deliberate misconduct, dishonesty and / or behaviour committed for financial benefit, compared with negligent failings. Increasing a financial penalty to achieve credible deterrence is a policy better suited and more appropriate to the former category of conduct. For example, a person inclined to commit deliberate market abuse for profit may readily be deterred where the likely penalty imposed is a considerable multiple of the amount to be made. The application of the policy in such circumstances is cogent.

Conversely, the application of the discretion at Step 4 in respect of a failure to act with due skill, care and diligence is, we suggest, far less compelling as a matter of policy. Persons who are acting negligently and, hence, have not been found to have acted without integrity (whether through dishonesty or recklessness), may be otherwise well intentioned. The fact that the

Regulator is willing to initiate and pursue a lengthy enforcement process for such failings, which will result in public outcomes, reputational damage and harm or curb their professional development would seem to present a considerable deterrent for most persons within the industry. A claim that, over and above those consequences, the financial penalty needs to be increased in order to credibly deter others from making similar negligent breaches is less persuasive and may rightly be more difficult to evidence.

Our Response to the Proposed Amendment

'Relevant Income' is the central and foundational component of the FCA's calculation of penalties in cases of non-market abuse conduct committed by individuals. Relevant Income is defined as the gross amount of all benefits received by the individual from the employment in connection with which the breach occurred. Accordingly, Relevant Income is connected with, and typically commensurate with, a person's role in regulated financial services, which the Authority is responsible for. DEPP assumes, that a person's Relevant Income is related to the size of the financial penalty necessary to act as a credible deterrent:

> This approach reflects the FCA's view that an individual receives remuneration commensurate with his responsibilities, and so it is reasonable to base the amount of penalty for failure to discharge his duties properly on his remuneration. **The FCA also believes that the extent of the financial benefit earned by an individual is relevant in terms of the size of the financial penalty necessary to act as a credible deterrent'** (DEPP 6.5B.2(3)G).

The relationship is unsurprising: a person's behaviour would likely be impacted by the prospect of a penalty set at a level which correlates to how much they earn or are compensated. How much they earn (i.e. Relevant Income) is determined by the industry and market, which the FCA regulates.

The implication of the Proposed Amendment is that, where, for any reason, a person's Relevant Income is considered inappropriately correlated to their wealth, the FCA will be minded to exercise its discretion to increase the penalty proportionately. In effect, this will make a person's overall wealth the determinative data point for calculating penalties in enforcement cases. This risks having three consequences, which will undermine the quality, transparency and certainty of the regulatory process.

First, the application of the Step 4 process will generate penalties that are inappropriately disconnected from the actual underlying nature and seriousness of the breach. It will produce penalties, imposed for certain misconduct across different cases, that are wildly inconsistent, creating a body of enforcement outcomes that cannot be reconciled and therefore appear arbitrary.

Second, the approach will result in penalties that are unrepresentative of the financial circumstances of other comparable persons in the industry, to whom the deterrent effect is targeted. A person's wealth may bear no similarity to the financial position of others who operate in similar roles and markets. In such circumstances, an individual's wealth cannot properly be a yardstick by which the FCA should assess the effective deterrence of others, who may be liable to commit similar breaches in the future. This is especially important given that, in reality, the FCA will (and should) be more focused on the deterrence of others rather than the deterrence of the same individual committing further breaches. For many reasons, including reputational impact, ancillary orders like prohibition and the impact of enduring a long stressful investigation – the prospects of a person reoffending through similar breaches is, in practice, low.

The risk that the Proposed Amendment creates a disconnect, between an individual's wealth and the conditions of other persons who sit in comparable industry roles, is more acute given that the Proposed Amendment does not limit the components of a person's wealth which the FCA would consider for the purposes of its penalty calculation. "Net assets" will encompass a wide range of wealth, including inherited wealth, contingent entitlements and assets accumulated in a prior employment entirely unconnected with the activities, role or industry from which the alleged breach stems.

Third, the reliance on wealth, in part because of the preceding concerns, will significantly increase the risk that the application of Step 4 will be seen to be used (if not actually used) as a penal measure, rather than a tool for actual deterrence. That would not be welcome, as it would undermine the legitimacy of the process and open the Authority up to greater public scrutiny, including by the Upper Tribunal.

The Proposed Amendment reflects the same language in the equivalent penalty framework for market abuse cases. However, the frameworks remain different in other ways. This reflects the fact that the policy considerations when imposing penalties for market abuse are different from those that apply to much of the conduct captured under DEPP 6.5B (non-market abuse cases). For example, the base figure in a market abuse case is the larger of either Relevant Income, profit made / loss avoided or (currently) £100,000. This amounts to a recognition that the penalties need to take account of the profit made / loss avoided pursuant to achieving deterrence, and that one cannot assume that Relevant Income should be an initial benchmark.

For the reasons set out above (in our general comments) evidencing that any level of penalty is insufficient to deter non-deliberate conduct and / or conduct not driven by financial gain is more difficult. To that extent, one can understand why the scope of the Authority's discretion to apply an uplift at Step 4 may need to be wider in market abuse cases. We suggest that any attempt by the FCA to increase a penalty in the context of a negligence case should be heavily scrutinised. However, allowing that discretion to be exercised by reliance on a person's wealth presents an even greater risk that the application of Step 4 may produce outcomes that lack transparency, are not evidentially supported through the lens of deterrence and are perceived as being, in reality, penal in nature.

As above, in order to ensure that the penalty process is transparent and applied consistently, it needs to be evidence-based. On any view, the proposed approach provides significant evidential challenges. One wonders how the Authority will provide evidential support for what proportion of a person's wealth may be necessary to bring about credible deterrence. In the absence of an evidential grounding, the FCA risks producing arbitrary results.

Proposed Alternatives

To address or mitigate the risks that emerge from the Proposed Amendment, we suggest the following alternative approach.

First, instead of using wealth as an alternative metric by which the Step 4 is to be determined, we suggest it would be far preferable for the FCA to rely upon the remuneration received by others in similar positions and similar industries. If the FCA's objective is genuinely deterrence, then, it should be principally focused on deterring other individuals from committing similar breaches in the future. For the reasons set out above, in reality, deterring others, rather than deterring the same person from reoffending, is likely to be a more compelling and applicable policy objective. It therefore follows that the appropriate benchmark for assessing whether a penalty is adequate for deterrence purposes is not the individual's own personal wealth, but rather the remuneration of an average person employed in a similar role, across a similar industry.

A penalty uplift calibrated by reference to such benchmark would avoid the subjectivity and inconsistency inherent in relying on an individual's net assets. It also has the advantage of being rooted in data that directly pertains to the industry which the FCA regulates, and which it is seeking to deter. In doing so, the approach would produce better and more transparent regulatory outcomes. Relatedly, it must therefore be a far more credible and effective measure by which deterrence can be evidenced.

Second, where the FCA is minded to retain its reliance on wealth, we suggest that any assessment of wealth should be limited to that generated through the regulated financial services sector. As above, this would better align the figure, imposed for the purposes of deterrence, with the industry whose behaviour the Authority is trying to impact.

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