



V
2016

BILLET D'ÉTAT

TUESDAY, 26th JANUARY, 2016

POLICY COUNCIL - DISCRETIONARY
FINANCIAL PENALTIES UNDER THE
FINANCIAL SERVICES COMMISSION
(BAILIWICK OF GUERNSEY) LAW, 1987

BILLET D'ÉTAT

TO
THE MEMBERS OF THE STATES
OF THE ISLAND OF GUERNSEY

I hereby give notice pursuant to Rule 1(4) of the Rules of Procedure of the States of Deliberation that the item contained in this Billet d'État which has been submitted for debate will be considered at the Meeting of the States of Deliberation already convened for **TUESDAY, the 26th JANUARY, 2016.**

R. J. COLLAS
Bailiff and Presiding Officer

The Royal Court House
Guernsey

18th January 2016

POLICY COUNCIL

DISCRETIONARY FINANCIAL PENALTIES UNDER THE FINANCIAL SERVICES COMMISSION (BAILIWICK OF GUERNSEY) LAW, 1987

1. Executive Summary

1.1. The Policy Council has undertaken a review of the level of discretionary financial penalties available to the Guernsey Financial Services Commission (GFSC) under the Financial Services Commission (Bailiwick of Guernsey) Law, 1987.

1.2. In light of:

- one of the findings of the MONEYVAL report on Guernsey's framework for anti-money laundering and combating terrorist financing (AML/CFT) and in order to demonstrate a rapid response to that finding;
- the international expectations for the level of financial penalties which should be available to financial services supervisory authorities; and
- the need to ensure that Guernsey is prepared for future evaluations of its financial supervisory framework,

the Policy Council considers that it is important for the maximum level of discretionary financial penalties to be increased as soon as possible.

2. Existing Guernsey Regime

2.1. The GFSC has power under the Financial Services Commission (Bailiwick of Guernsey) Law, 1987 ("the Law") to impose a discretionary penalty of up to £200,000 on any licensee, former licensee or relevant officer.

2.2. This power can be exercised only where the GFSC is satisfied that a licensee, former licensee or relevant officer:

(a) has contravened in a material particular a provision of, or made under, the prescribed Laws, or

(b) does not fulfil any of the minimum criteria for licensing specified in the regulatory Laws and applicable to him.

2.3. The prescribed laws include the regulatory laws administered by the GFSC and AML/CFT legislation (and regulations and rules made under these laws). Financial penalties can therefore be imposed across the range of regulated and supervised activities. When deciding whether to impose a penalty, and if so the amount, the GFSC must take into account a range of factors:

- (a) whether the contravention or non-fulfilment was brought to the attention of the GFSC by the person concerned;
- (b) the seriousness of the contravention or non-fulfilment;
- (c) whether or not the contravention or non-fulfilment was inadvertent;
- (d) what efforts, if any, have been made to rectify the contravention or non-fulfilment and to prevent a recurrence;
- (e) the potential financial consequences to the person concerned, and to third parties including customers and creditors of that person, of imposing a penalty; and
- (f) the penalties imposed by the GFSC in other cases.

3. International Perspective

- 3.1. In 2015, the Policy Council examined the maximum level of fines applicable to regulatory bodies in Jersey, the Isle of Man and the United Kingdom, and as set out in relevant European Union directives. These are the most appropriate benchmarks for Guernsey and a table providing information on those frameworks is attached in the appendix to this Policy Letter. It should be noted that in 2008 Guernsey became the first of the Crown Dependencies to introduce discretionary penalties for its financial services supervisory authority. Until 2015, it was the only Crown Dependency where the supervisor had the statutory ability to impose fines. In that year, Jersey and the Isle of Man introduced discretionary penalty regimes for their financial supervisory bodies in relation to licensees; these jurisdictions have considerably higher potential penalties than the framework in Guernsey currently allows.
- 3.2. MONEYVAL, which is part of the Council of Europe, is one of several international bodies which undertake independent evaluations of jurisdictions' AML/CFT frameworks. Thirty-four jurisdictions, including Guernsey, are subject to MONEYVAL's evaluation processes. The excellent MONEYVAL report on our AML/CFT framework arose from an evaluation in October 2014. One of the few findings in the report, which suggests an area for further improvement, is that the maximum discretionary penalties available for legal persons (firms) available to the GFSC are not dissuasive and proportionate.
- 3.3. The International Monetary Fund assessed Guernsey's AML/CFT framework and the frameworks for banking and insurance supervision in 2010. At that stage, Guernsey complied with the expectations for sanctions in relation to banking and insurance supervision and received compliant ratings in the IMF's report. However, in one area, AML/CFT, there was a finding in relation to sanctions for individuals and firms that the level of discretionary penalties was not dissuasive and proportionate. The finding for individuals has not been replicated in the

MONEYVAL report. Nevertheless, the Policy Council's conclusion is that, in light of the statutory levels of penalty which are now expected and being put in place in other jurisdictions, and the way in which international standards are developing, the levels of financial penalty available to the GFSC for individuals and licensees should be increased as soon as possible across its supervisory activities. A swift change to the legislation will have the benefit of demonstrating to the international community that Guernsey is responding rapidly to MONEYVAL's finding as well as preparing Guernsey for future evaluations of its financial supervisory framework.

- 3.4. In order to be able to respond quickly to changing circumstances, an enabling power should also be introduced so as to enable the provisions in the Law on discretionary penalties to be revised by Ordinance.

4. Policy Council Proposal

- 4.1. The Policy Council recommends that the framework for fines (and, therefore, the Law) should be revised in the following ways:
- the maximum level of fine available to the GFSC for licensees and former licensees (other than personal fiduciary licensees) should be increased from the current level of £200,000 to £4,000,000, with any fine over £300,000 being limited to a maximum of 10% of the turnover of the licensee/former licensee in question;
 - the maximum level of fine available for relevant officers (that is, directors and other officers of licensees and former licensees) and personal fiduciary licensees should be increased from £200,000 to £400,000 with an additional criterion required to be considered by the GFSC being the emoluments arising in respect of the relevant officer's (or personal fiduciary licensee's) position;
 - a power should be included for the Policy Council to make regulations on such matters as it considers appropriate in relation to discretionary penalties, and by way of example these should include the meanings of "turnover" and "emoluments"; and the bandings of fines within the new maximum levels taking into account the factors (a) to (f) above as revised by the proposals in this Policy Letter. The Policy Council will make regulations only after consultation with the GFSC and the Policy and Finance Committee of the States of Alderney and the Policy and Performance Committee of the Chief Pleas of Sark. It is the intention of the Policy Council to make such regulations;
 - a requirement for the GFSC to issue a policy on how it will apply the Law and the regulations and the enforcement powers referred to in this Policy Letter; and

- an enabling provision should be introduced so as to enable the provisions in the Law on discretionary penalties to be revised by Ordinance.

5. Checks and Balances

- 5.1. The GFSC has a risk based approach to the supervision of its licensees, and it seeks to underpin this with an effective and proportionate enforcement regime. General or specific prohibitions alongside public statements can also be used by the GFSC separately from or in addition to fines. The GFSC's powers in these areas are broadly compatible with international expectations so no changes are proposed at present.
- 5.2. Furthermore, the GFSC maintains a panel of Senior Decision Makers comprising experienced QCs from the United Kingdom. Senior Decision Makers are required to sit and hear those cases involving serious findings against a licensee and/or individual Directors (and other officers) where those findings are contested by the licensee/Director. Where a case is proven, the Senior Decision Maker will determine what penalties should be imposed upon the licensee and or Directors including the level of fine to be paid, any period of prohibition from practising in the industry and the contents of any public statement that is to be issued by the Commission. This approach delivers an independent assessment of enforcement cases.
- 5.3. The ability of the GFSC to impose fines is constrained to contraventions in a material particular of a provision of statutory or regulatory requirements or to not fulfilling any of the requirements of the statutory minimum criteria for licensing. There are also factors which must be taken into account before imposing a fine and the level of the fine. The GFSC can only impose a penalty in respect of a contravention or non-fulfilment by looking at the contravention or non-fulfilment itself, which already encapsulates its nature (for example, the essence, intrinsic quality, type, description of the contravention/non-fulfilment, and the type of regulatory or supervisory regime under which it arises). These, together with the issue of regulations by the Policy Council and guidance by the GFSC, as well as the statutory rights of appeal where the GFSC does not act reasonably, proportionately and within its powers will provide safeguards and help to balance the proposed increased maximum level of fees with proportionality and additional transparency.
- 5.4. It is clearly important to be able to strike the right balance between ensuring that, on the one hand the Bailiwick's regulatory regime is underpinned by an effective and proportionate approach to enforcement, and on the other hand that firms are able to obtain the services of good quality people as directors and other officers. With that in mind, it is recommended that an additional statutory requirement should be placed upon the GFSC when it is determining the extent of any fine that should be levied against an individual or "relevant officer" or personal fiduciary licensee. Specifically, the GFSC should be required to take another factor into account, namely total emoluments that an officer or personal fiduciary licensee

has received from the relevant position held by him during the time that they have been employed or served in that position (for example as a non-executive director of the company in relation to which there has been a contravention). In any particular case, the gravity of the offence(s) committed is also a consideration.

- 5.5. In addition, in relation to licensees other than personal fiduciary licensees a proportionate and balanced approach can be achieved by increasing the maximum fine available but, above a specified level, limiting the actual fine imposed to a percentage of turnover.

6. Consultation carried out by the Policy Council

- 6.1. The Guernsey International Business Association's (GIBA) Council has been consulted and supports the recommendations.
- 6.2. The Commerce and Employment Department has been consulted and supports the recommendations.
- 6.3. The Law Officers have been consulted and raise no legal objection to the recommendations.
- 6.4. The GFSC has been involved in developing, and supports, the recommendations.

7. Alderney and Sark

- 7.1. The Policy and Finance Committee of the States of Alderney and the Policy and Performance Committee in Sark support the recommendations in this Policy Letter.

8. Resource implications

- 8.1. There are no additional financial or staff resource implications for the States with the proposals set out in this Policy Letter.

9. Recommendations

- 9.1. The States are recommended to revise "The Financial Services Commission (Bailiwick of Guernsey) Law, 1987" as follows:
- (a) to increase the maximum level of fines available to the Guernsey Financial Services Commission for licensees and former licensees (other than personal fiduciary licensees) from the current level of £200,000 to £4,000,000, with any fine over £300,000 being limited to a maximum of 10% of the turnover of the licensee/former licensee in question;

- (b) to increase the maximum level of fine available for relevant officers and personal fiduciary licensees from £200,000 to £400,000 together with the inclusion of an additional criterion for consideration by the Guernsey Financial Services Commission, namely emoluments arising in respect of the relevant officer's or personal fiduciary licensee's position;
- (c) to empower the Policy Council to make regulations which it considers to be appropriate in relation to discretionary penalties, and by way of example, these should include the meanings of "turnover" and "emoluments"; and the bandings of fines within the new maximum levels taking into account the factors specified in section 11D(2) of the Law as revised by Recommendations 9.1 (a) and 9.1 (b) above. Such regulations shall only be made after consultation with the GFSC, the Policy and Finance Committee of the States of Alderney and the Policy and Performance Committee of the Chief Pleas of Sark;
- (d) to require the Guernsey Financial Services Commission to issue and publish guidance as to its general approach to enforcement; and
- (e) to include an enabling provision permitting the States to revise the provisions on fining powers in the Financial Services Commission (Bailiwick of Guernsey) Law, 1987, by Ordinance.

J P Le Tocq
Chief Minister

11th January 2016

A H Langlois
Deputy Chief Minister

G A St Pier
Y Burford
D B Jones

P L Gillson
K A Stewart
M G O'Hara

R W Sillars
P A Luxon
S J Ogier

Appendix

Jurisdiction	Maximum Level of Financial Penalty
Jersey	<p>Jersey Financial Services Commission</p> <p>Financial penalties can be imposed on firms for a contravention of a Code of Practice to which Article 21A of the Financial Services Commission (Jersey) Law 1998 applies. Depending on the nature of the contravention there are 3 levels of fines:</p> <p><i>Band 1</i> 4% of relevant income up to a maximum of £10,000.</p> <p><i>Band 2</i> 6% of relevant income up to a maximum of £4,000,000.</p> <p><i>Band 3</i> 8% of relevant income up to a maximum of £4,000,000.</p> <p>Relevant income refers to income arising under the specific business licence to which the contravention relates.</p> <p>The maximum fine possible is £4,000,000.</p>
Isle of Man	<p>Isle of Man Financial Supervision Commission</p> <p>Depending on the nature of the contravention there are 2 levels of fines that can be imposed on firms:</p> <p><i>Band 1</i> Up to 5% of the licence holder's relevant income.</p> <p><i>Band 2</i> Up to 8% of the licence holder's relevant income.</p> <p>Relevant income refers to the accounting turnover of the licence holder for the financial year end immediately prior to the licence holder's notification of, or the Commission's identification of, a significant and material regulatory failing except that, where appropriate and where such information is available, the relevant income will be limited to the turnover of the relevant business line(s) of the licence holder for that period.</p> <p>There is no maximum limit for a financial penalty separate to the foregoing.</p>
UK	<p>Financial Conduct Authority</p> <p>Depending on the severity and impact of the misconduct, a fine of up to 20% of relevant income can be imposed on a firm or individual. There are 5 levels of penalties, which increase depending on the severity of the breach:</p> <p>Level 1 – 0% Level 2 – 5% Level 3 – 10% Level 4 – 15% Level 5 – 20%</p>

	<p>Relevant income refers to revenue derived by the firm during the period of the breach, or in the 12 months preceding the end of the breach if the breach was a one-off event or lasted less than 12 months.</p> <p>There is no maximum level of financial penalty separate to the foregoing.</p> <p>Prudential Regulation Authority When calculating the level of financial penalty consideration will be given to the seriousness of the breach and the size and financial position of the firm or the income of the individual that committed the breach.</p> <p>There is no limit to the maximum financial penalty that can be imposed.</p>
EU	<p>Markets in Financial Instruments Directive 2 (2014/65/EU) <i>Article 70</i> For firms: A maximum administrative fine of at least €5,000,000 (or the equivalent in the national currency); or up to 10% of total annual turnover; or at least twice the amount of the benefit derived from the infringement.</p> <p>For individuals: A maximum administrative fine of at least €5,000,000 (or the corresponding value in the national currency on 2nd July 2014); or at least twice the amount of the benefit derived from the infringement.</p> <p>4th Money Laundering Directive (2015/849/EU) <i>Article 59</i> For firms: Maximum administrative pecuniary sanctions of at least at least €5,000,000 or 10% of the total annual turnover of a credit institution or financial institution.</p> <p>For individuals: Maximum administrative pecuniary sanctions of at least twice the amount of the benefit derived from the breach where that benefit can be determined, or at least €1,000,000.</p> <p>Alternative Investment Fund Managers Directive (2011/61/EU) <i>Article 48</i> For firms: The measures must be effective, proportionate and dissuasive. No level of financial penalty is specified.</p> <p>For individuals: The measures must be effective, proportionate and dissuasive. No level of financial penalty is specified.</p>

(N.B. As there are no resource implications in this Policy Letter, the Treasury and Resources Department has no comments to make.)

The States are asked to decide:-

I.- Whether, after consideration of the Policy Letter dated 11th January, 2016, of the Policy Council, they are of the opinion:-

1. To revise “The Financial Services Commission (Bailiwick of Guernsey) Law, 1987” as follows:
 - (a) to increase the maximum level of fines available to the Guernsey Financial Services Commission for licensees and former licensees (other than personal fiduciary licensees) from the current level of £200,000 to £4,000,000, with any fine over £300,000 being limited to a maximum of 10% of the turnover of the licensee/former licensee in question;
 - (b) to increase the maximum level of fine available for relevant officers and personal fiduciary licensees from £200,000 to £400,000 together with the inclusion of an additional criterion for consideration by the Guernsey Financial Services Commission, namely emoluments arising in respect of the relevant officer's or personal fiduciary licensee's position;
 - (c) to empower the Policy Council to make regulations which it considers to be appropriate in relation to discretionary penalties, and by way of example, these should include the meanings of “turnover” and “emoluments”; and the bandings of fines within the new maximum levels taking into account the factors specified in section 11D(2) of the Financial Services Commission (Bailiwick of Guernsey) Law, 1987, as revised by the above Proposition 1 (a) and 1 (b); such Regulations shall be made only after consultation with the Guernsey Financial Services Commission, the Policy and Finance Committee of the States of Alderney and the Policy and Performance Committee of the Chief Pleas of Sark;
 - (d) to require the Guernsey Financial Services Commission to issue and publish guidance as to its general approach to enforcement; and
 - (e) to include an enabling provision permitting the States to revise the provisions on fining powers in “The Financial Services Commission (Bailiwick of Guernsey) Law, 1987”, by Ordinance.
2. To direct the preparation of such legislation as may be necessary to give effect to the above decision.