

Guideline on Exercising Power to Order a Pecuniary Penalty

A Guideline issued by the Monetary Authority under Section 54(1E) of the Payment Systems and Stored Value Facilities Ordinance (Chapter 584)

Introduction

1. Under section 33Q of the Payment Systems and Stored Value Facilities Ordinance (Chapter 584) (Ordinance), the Monetary Authority (MA) may order a pecuniary penalty either on its own or together with other sanctions on a regulated person¹ after having regard to the matters specified in paragraph 10(a) to (n) below if the MA is satisfied that the regulated person has contravened a provision of the Ordinance, a requirement imposed under the Ordinance or a condition attached to a licence, consent or any other instrument granted or given by the MA under the Ordinance. Section 54(1E) of the Ordinance requires the MA to issue guidelines setting out the manner in which the power to order a pecuniary penalty under section 33Q(2)(a) of the Ordinance is to be exercised.
2. This guideline is issued under section 54(1E) of the Ordinance to set out the manner in which the power to order a pecuniary penalty under section 33Q(2)(a) of the Ordinance is to be exercised. The MA will have regard to this guideline when exercising the power under section 33Q(2)(a) of the Ordinance.

¹ A regulated person is defined under section 33P of the Ordinance as (a) a system operator of a designated system; (b) a settlement institution of a designated system; (c) a participant in a designated system; (d) a licensee or an officer of a licensee; or (e) if the system operator or settlement institution is a corporation, an officer of a corporation. The term “regulated person” should also be construed in accordance with sections 33V and 33W of the Ordinance.

Factors to be considered in the exercise of the MA's power to order a pecuniary penalty

3. As a matter of policy, the MA will usually publicise all his decisions to order a pecuniary penalty.
4. When considering whether to order a regulated person to pay a pecuniary penalty and the amount of the penalty, the MA will consider all of the circumstances of a particular case. The MA may have regard to any information or material in the MA's possession that is relevant to the decision, regardless of how the information or material has come into the MA's possession.
5. The MA must have regard to the matters specified in paragraph 10(a) to (n) below and will take into account those factors specified in paragraph 11 below that are relevant to a particular case.
6. An order imposed on a regulated person to pay a pecuniary penalty should act as a deterrent to the regulated person from contravening a provision of the Ordinance, a requirement imposed under the Ordinance or a condition attached to a licence, consent or any other instrument granted or given by the MA under the Ordinance and should also act as a general deterrent to other regulated persons from contravening the same or other provisions, requirements or conditions.
7. Although section 33Q(2)(a)(ii) states that one alternative maximum level of fine that can be ordered is three times the amount of profit gained, or loss avoided, by the regulated person as a result of the contravention in question, the MA will not automatically link his order of a pecuniary penalty in a particular case with the profit gained, or loss avoided.
8. An order imposed on a regulated person to pay a pecuniary penalty should not have the likely effect of putting the regulated person in financial jeopardy. In considering this factor, the MA will take into account the size and financial resources of the regulated person.

9. The more serious the contravention, the greater the likelihood that the MA will order a pecuniary penalty and the larger the size of the pecuniary penalty.

10. The MA must have regard to the matters specified in (a) to (n) below before exercising the power to order the payment of a pecuniary penalty:
 - (a) the circumstances in which the contravention occurred, including the factors occasioning it;
 - (b) the seriousness of the contravention;
 - (c) if applicable, the extent of the failure by the regulated person to co-operate in an investigation under section 33B relating to the contravention;
 - (d) if applicable, the excuse or explanation given by the regulated person for the contravention or failure to co-operate in an investigation mentioned in paragraph (c);
 - (e) the gain, whether financial or otherwise, made by the regulated person or by any other person in which the regulated person has a financial interest as a result of the contravention;
 - (f) the amount of any loss suffered or costs incurred by a person other than the regulated person, or loss or costs avoided by the regulated person, as a result of the contravention;
 - (g) the duration of the contravention;
 - (h) if applicable, the continuation of the contravention after the regulated person was notified of an investigation mentioned in paragraph (c);
 - (i) the extent to which the regulated person knew, or ought to have known, that the contravention had occurred or was occurring;
 - (j) the extent and timeliness of any steps taken to cease the contravention and any steps taken for remedying the consequences of the contravention;
 - (k) whether a sanction in respect of any similar contravention has already been imposed on the regulated person by a court, the MA or another person;
 - (l) whether imposing a sanction is appropriate and proportionate to the seriousness of the contravention and will have sufficient

deterrent effect to ensure that any similar contravention will not occur in the future;

- (m) the repeated occurrence of contraventions of the Ordinance by the regulated person; and
- (n) if applicable, the absence, ineffectiveness or repeated failure of internal mechanisms or procedures of the regulated person intended to prevent contraventions of the Ordinance from occurring.

11. The MA will also take into account the following factors that are relevant to a particular case. The factors listed below are not exhaustive. Some of them may not be applicable in a particular case and there may be other factors which are relevant but are not listed below.

- (a) whether the contravention is potentially damaging or detrimental to the monetary or financial stability of Hong Kong and/or to the reputation or the functioning of Hong Kong as an international financial centre and/or prejudicial to matters of significant public interest as defined in the Ordinance or the interests of the user or potential user of any stored value facility;
- (b) whether the contravention is widespread in the relevant industry (and if so, for how long) or there are reasonable grounds for believing it to be widespread;
- (c) whether the MA has issued any guidelines in relation to the conduct in question – generally the MA will not take disciplinary action against a regulated person for conduct that is in line with the guidelines which were current at the time of the conduct in question;
- (d) what action the MA has taken in previous similar cases – in general, similar cases should be treated consistently;
- (e) whether the contravention was committed by the regulated person alone or whether as part of a group and the role the regulated person played in that group;

- (f) in relation to a regulated person who is an individual, his or her experience in the implementation and/or management of SVF schemes² or the operation of payment systems³; and
- (g) as a mitigating factor, whether the regulated person has promptly, effectively and completely brought the contravention or possible contravention to the attention of the MA and the reasons for the disclosure.

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² SVF scheme means the scheme operated by a licensee (a) for the issue of stored value facilities under the licence granted under section 8F of the Ordinance; or (b) for facilitating the issue of stored value facilities under such licence.

³ Payment system means (a) a clearing and settlement system; or (b) a retail payment system.