

SRA financial penalties: 'The sky's the limit'

On 28th June this year the SRA published on its website a consultation paper on plans to update its approach to financial penalties in the light of new powers obtained under the Economic Crime and Corporate Transparency Act 2023.

The consultation's title 'Financial Penalties: further developing our framework' may make this seem straightforward. But the 32-page document holds the potential to substantially increase the SRA's power over the lawyers it regulates. It merits close attention.

Increased fines

The most significant change is the SRA's plan to extend its internal powers to allow for unlimited fines for all forms of misconduct (not just financial).

The SRA first gained the ability to fine law firms and individual solicitors without limit for misconduct related to economic crime in March this year. Five months later (and before an evaluation of how those changes have operated in practice) it wants to apply this power across the board.

Whilst it is true that some other professional regulators have unlimited fining powers, it is startling to see such a rapid escalation in the SRA's capacity to fine.

The SRA says the change 'will help us to deliver a strong and credible deterrent against breaches of our standards'. But it is unclear that such an increase in maximum fines will achieve this. I am unaware of empirical studies showing either that solicitors are behaving worse than before, or that existing sanctions aren't a sufficient deterrent.

The SRA wants to introduce two new higher fining bands for what it considers to be the most serious examples of misconduct.

Under the current system, a firm found in breach of SRA Standards and Regulations can be hit with a maximum fine of 5% of its annual domestic turnover; while the most a solicitor can be fined is 97% of annual gross income.

Under the proposed new band E, the maximum penalty for a firm would double to 10% of its annual turnover. For individuals it would reach up to 145% of annual income. Under proposed new band F there would be no upper limit on the financial penalties on either firms or individual solicitors.

Each fining band has a minimum fine level. The lowest possible fine under band F would be £500,000 for a firm and £100,000 for an individual.

The SRA acknowledges that the new fines could disproportionately impact smaller firms and individuals who earn less money (including those from a BAME background) and states this will be mitigated by 'more explicit' guidance on affordability.

There are implications for international law firms in the SRA proposals too. The regulator is considering fines based on global rather than domestic revenue. If this plan is adopted, we could see law firms with even a small London presence facing mammoth financial sanctions based on the actions of only its UK staff.

Impact on the tribunal

One rationale for the SRA extending its internal powers has been to reduce the number of cases referred to the Tribunal. The impact of this paper, however, could be the opposite.

It has long been the case that firms and solicitors have preferred to settle with the SRA rather than risk the trouble, expense and negative publicity of a hearing at the Tribunal. However, the methodology currently used by the SDT to calculate fines would result in lower penalties than under the SRA's proposed new scheme.

There could be some cases in which individual solicitors and law firms take the view that the difference in potential fine is so great that it is worth facing the risks of a Tribunal hearing rather than settling. Interestingly, the possibility that could happen is accepted by the SRA in its consultation.

Further to this, one wonders what the SRA would do if the Tribunal continues to use its own fining principles rather than follow those of the SRA. Would the SRA appeal? And, if so, how would the High Court choose between the different approaches?

Drink driving

Finally - but not insignificantly - the SRA uses its consultation to clarify its position on drink driving.

There has recently been some controversy about solicitors who pleaded guilty to (and self-reported) a drink driving offence, without apparent aggravating factors, given fines by the SRA many times greater than those imposed by a Court.

In its updated guidance on this topic the SRA states that "the presence of mitigating features without any aggravating features may result in no action being taken. In the majority of cases, where a sanction is required, a letter of warning or a rebuke will be appropriate. The appropriate sanction will depend on the nature of the aggravating features and the balancing of those against any mitigating features. However, we will not impose a financial penalty following a conviction for drink driving."

In my view, the SRA should be given credit for being prepared to change a policy that is plainly wrong. While it remains unclear how the SRA will deal with existing drink driving cases or those referred before any new guidance is implemented, I hope that common sense prevails.

The SRA's consultation on its proposal is open for submissions until Friday 20th September. I would urge all solicitors and law firms to read and consider its plans carefully.

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