Notice of Monetary Penalty

In respect of Pearson's reviews of marking in 2016, 2017, 2018 and 2019

In accordance with its powers under Section 151A(2) of the Apprenticeships, Skills, Children and Learning Act 2009 ("the Act"), and pursuant to its obligations under Section 151A(7) and 151A(8) of the Act, the Office of Qualifications and Examinations Regulation ("Ofqual") gives notice that it has imposed a Monetary Penalty in the sum of **£1,200,000** on Pearson Education Limited ("Pearson") for the reasons set out below.

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Summary

1. On 27 June 2022, a Notice of Intention to impose a Monetary Penalty was issued to Pearson.
2. The Notice stated that the amount of the Monetary Penalty shall be **£1,200,000**.
3. The Notice also stated that Ofqual had accepted an undertaking from Pearson on 8 June 2020, in which Pearson agreed to:
    a) pay compensation of £320,510 to affected Centres; and
    b) perform the actions set out in its Action Plan to ensure that its arrangements for reviews of marking for all future exam series would be compliant with its Conditions of Recognition.

4. Pearson was given the opportunity to make representations about the Notice of Intention. Pearson submitted representations to Ofqual on 25 July 2022. Those representations are summarised below.
5. On 31 August 2022, Ofqual published the Notice of Intention on its website. Interested parties were given the opportunity to make representations about the Notice of Intention. No representations were received.
6. On 12 October 2022, Pearson informed Ofqual that it had compensated affected Centres in accordance with its undertaking. In March 2022, Pearson had provided assurance to Ofqual that it had implemented the actions in its Action Plan, that its arrangements for reviews of marking for the Autumn 2021 series were compliant, and that it had appropriate arrangements in place to ensure compliance for all future exam series.
7. On 7 November 2022, Ofqual's Enforcement Committee had regard to the representations made by Pearson on 25 July 2022, as required under section 151A(7) of the Act. The Enforcement Committee's consideration of those representations is summarised below. Following consideration of those representations, the Enforcement Committee decided that there should not be any variation to the amount of the Monetary Penalty.

Representations

8. On 25 July 2022, Pearson submitted representations to Ofqual in response to the Notice of Intention dated 27 June 2022. Those representations are summarised below (**in bold**) followed by a summary of the Enforcement Committee's consideration.

Proportionality

Pearson's Representations

9. **Pearson submitted that proportionality, which is one of the Better Regulation Executive's five principles of good regulation, has not been properly considered. Pearson argue that the scale of the fine in this case cannot be justified as a proportionate response to the concerns and the limited impact of the breach on Learners.**

Enforcement Committee's consideration

10. Ofqual's Notice of Intention acknowledged that "there appears to be no evidence that Pearson's failure to comply with the Conditions had any material impact on the outcome of any review or caused prejudice to Learners" (paragraph 84). This is because Pearson conducted a repeat review of marking for a statistically significant sample of the affected cases in 2019. This found a grade agreement rate of 99.5% (which is higher than normal). However, data was not available to conduct a similar review for the affected reviews in earlier years (2016, 2017, 2018) and therefore it is not possible to completely rule out the possibility that no Learner outcomes were affected.
11. The Enforcement Committee also took into account wider considerations beyond a direct impact on individual Learners in relation to the outcome of their reviews of marking. Ofqual made changes to its rules in 2016 to require awarding organisations to "make sure that reviews of marking are carried out by competent people who have no personal interest in the outcome, and who have not previously been involved with the marking of the assessment.[1]" This was because Ofqual considered that "markers who review their own marking or moderation may find it difficult to be objective. They are, in any event, likely to be perceived to be biased.[2]" The fact that Pearson did not deploy fresh examiners for 46,797 reviews of marking over a four-year period, must have a significant impact on the perceived fairness and objectivity of the review of marking process for Learners and other Users of qualifications, which undermines public confidence.
12. One of Ofqual's statutory objectives is to promote public confidence in regulated qualifications (section 128(4) of the Act) and Ofqual's Taking Regulatory Action ('TRA') policy notes (at page 6) that in line with the Better Regulation Executive's five principles of good regulation, our assessment of risk to public confidence is one of the ways in which we target our regulatory activities and, in particular, we "promote public confidence in qualifications through visible, appropriate and effective regulatory action". Paragraph 106(e) of the Notice of Intention records this as a consideration that the Enforcement Committee took into account. Ofqual's TRA policy also notes (at page 29) that the seriousness of the breach in relation to its effect on public confidence is also one of the factors that we will consider when deciding whether to impose a fine.

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[1] Ofqual's consultation on proposed changes to marking reviews, appeals, grade boundaries and the Code of Practice, page 36.

[2] Page 63

13. Paragraph 84 of the Notice of Intention notes that the Conditions that Pearson breached “are an integral part of the assessment process and fundamental to securing high quality assessment, standards and public confidence in GCSE and A level qualifications. A failure to provide an independent review of marking, particularly across a large proportion of cases over a significant period of time, is therefore likely to seriously undermine public confidence in the review and appeals system and the qualifications system more generally.”
14. The Enforcement Committee considers that Learners’ interests and public confidence were undoubtedly undermined in this case by Pearson failing to comply with its Conditions of Recognition in relation to its reviews of marking arrangements over a four-year period.
15. The Enforcement Committee remains of the view that for those reasons, and in conjunction with the other aggravating factors set out at paragraph 105 of the Notice of Intention, the scale of the fine proposed is proportionate and in line with the Better Regulation Executive’s principles of good regulation.

Comparison with other similar cases - AQA

Pearson’s Representations

16. **Pearson accepts that it is right for Ofqual to have considered "the nature and circumstances of these breaches in comparison to other similar breaches for which fines have been imposed by Ofqual on other Awarding Organisations” and in particular AQA's case. AQA were required to pay a Monetary Penalty of £350,000 (and settled with Ofqual to make compensation of £735,750) in respect of similar failings with its review of marking arrangements.**
17. **Pearson disagrees with Ofqual’s assessment that its breach is far more factually serious in effect and nature than AQA's. Differences include:**
    a) **Fewer conditions were breached overall[3], AQA's non-compliant reviews affected both marking and moderation and there was no failure to notify by Pearson;**
    b) **Pearson had a lower total number of affected cases than AQA (though acknowledge, a higher percentage of overall reviews of marking were affected at 9% compared to 7% for AQA). Ofqual**

[3] Pearson breached GCE / GCSE Conditions 17.6(a) and (b), General Conditions A5.2 (a) and (e) and A6.1. AQA breached these same conditions, plus GCE / GCSE Condition 14.5(a) and (b) and General Condition B3.1.

described 6.9% in AQA's case as "a relatively small minority" and included it as a mitigating factor whereas 9% was considered in Pearson's case to be "a relatively high amount" though not stated to be either an aggravating or mitigating factor. This difference in weight does not appear to be justified given the 2.1% difference and the otherwise similar nature of the cases;

c) In Pearson's case, a higher proportion of anonymised item levels (97.5% compared to 93%) and a lower number of whole scripts (2.5% compared to 7%) were affected, meaning that the issue was far less likely to have risked impacting on a Learner's overall grade. (As is accepted in the Notice of Intention, there is no evidence to show that these failings resulted in Learners or Centres receiving the wrong outcome and that there appears to be no evidence to suggest that the original review of marking service offered was materially affected by the non-compliance). Pearson incurred additional expense conducting a repeat review of marking for a statistically significant sample after this issue was identified, to ascertain the extent of the impact, and in order to assure itself that there had been no impact on Learners as a result of the non-compliance.

d) Pearson's and AQA's breaches both cover the period 2016 – 2019, and therefore this is not a valid basis upon which to differentiate the seriousness of them (noting AQA's subsequent breaches in 2019 as set out in their Monetary Penalty dated 29 January 2020). We note Ofqual decided that no further action was warranted upon the notification of the further breaches by AQA and that therefore there is a difference of approach that must be borne in mind when considering the 'the circumstances of the breach in comparison to similar breaches for which fines have been imposed'.

e) Both Pearson's and AQA's internal systems did not identify the review of marking by the same examiner, however, only Pearson's systems failure has been counted as an aggravating factor. In addition, AQA did not identify the breach themselves, it was only via Ofqual proactively reviewing the AQA appeals process that the issue was discovered. Once Pearson identified the issue, it notified Ofqual promptly. AQA had also failed to notify Ofqual about possible Adverse Effect incidents in 2016 and 2017.

f) It has been noted as an aggravating factor that the length of time that it took Pearson to identify non-compliance meant that records had been destroyed (in accordance with established processes) and people had left posts, meaning it was not possible to conduct a

review of impact on earlier years and potentially correct grades. This feature is also relevant to AQA's case (noting that due to the normal deletion of data AQA could only estimate the number of affected items level reviews in 2016 and 2017) however this is not listed as an aggravating factor in respect of AQA.

Enforcement Committee's consideration

18. The Enforcement Committee does not consider that Pearson's representations accurately portray the full position in relation to AQA's settlement proposal, without providing additional context. AQA made a settlement proposal to Ofqual not only offering to pay compensation to Centres of £735,570, but also offering, at an early stage of the case, to pay a Monetary Penalty of £350,000 and agreeing to pay Ofqual's reasonable costs in respect of the enforcement case.

19. The Enforcement Committee remains of the view that Pearson's case is factually more serious than the AQA case. In response to Pearson's representations, the Enforcement Committee notes the following:

    a) The seriousness of this case was not solely or primarily based on the number of conditions that were found to have been breached. As in all cases, seriousness was assessed by looking at a range and combination of factors which are set out in Ofqual's TRA policy and exemplified in the Notice of Intention.

       While it is noted that AQA's non-compliant reviews affected both marking and moderation (and Pearson's did not affect moderation) and there was no breach of Condition B3 in Pearson's case, there are other aggravating factors present in the Pearson case which reasonably led the Enforcement Committee to consider that the case was factually more serious than the AQA case. Those reasons are set out at paragraph 109 of the Notice of Intention and are not repeated here.

    b) The Enforcement Committee considered the fact that, in the AQA case, 6.9% of all reviews of marking was considered a relatively small minority and this was cited as a mitigating factor. The Enforcement Committee noted that Pearson's percentage of affected reviews was higher, at 9%, and considered that in comparison, this was too high to be considered a mitigating factor, but not so high as to be considered an aggravating factor. It was therefore noted (at paragraph 106(a)) as a point that the Enforcement Committee had considered, but was neither an aggravating or mitigating feature of the case.

    c) The Enforcement Committee does not consider that the proportion of item level and whole script reviews is a materially relevant factor when

assessing the seriousness of the case. As noted in Pearson's representations, and in the Notice of Intention, there is no evidence to suggest that any of the non-compliant reviews resulted in Learners receiving the wrong outcome, or to show that the original review of marking service was materially affected by the non-compliance, regardless of the type of review that was conducted. The difference between the item level and whole script reviews was reflected in the different breaches that were alleged under GCE / GCSE 17.6(a)[4] and 17.6(b)[5].

It was noted in the Notice of Intention (at paragraph 83) that Pearson had conducted a repeat review of marking for a statistically significant sample of the affected cases in 2019. Whilst Pearson may have incurred an expense in doing so, the Enforcement Committee considers that these were reasonable steps that Pearson was required to take under General Condition A7, in response to an incident that could have an Adverse Effect, which was caused by Pearson's non-compliance.

d) The Enforcement Committee does not consider that Pearson's representations accurately portray the position when referring to AQA's breaches also covering the period between 2016 and 2019, without providing further context for the breaches that took place in 2019.

   AQA identified two breaches that occurred in 2019, with the overwhelming majority of breaches (approximately 53,166) occurring between 2016 and 2018. The two breaches in 2019 came to light in November 2019, after Ofqual had issued its Notice of Intention to AQA in respect of the substantive breaches which took place between 2016 and 2018, but before the Enforcement Committee had made a final decision on that case. As soon as the issue was identified, AQA arranged for both of the affected scripts to be reviewed again by an independent reviewer which did not result in any grade changes and therefore there was no Adverse Effect on Learners. AQA accepted the breaches and agreed to pay Ofqual's additional associated costs considering the additional breaches. The Enforcement Committee considered the two additional breaches before reaching its final decision on the case and accepted that the two cases were exceptional and occurred as a result of human error rather

[4] The awarding organisation's arrangements must provide that all reviews of marking will be carried out by Assessors who have appropriate competence and who have no personal interest in the outcome of the review being carried out.

[5] The awarding organisation's arrangements must provide that an Assessor who was previously involved in the marking of a task in an assessment in respect of a Learner must not be involved in a review of marking in respect of that task.

than systemic process failures. For those reasons, the Enforcement Committee decided not to vary or impose a further Monetary Penalty on AQA for the further two breaches in 2019.

This is in contrast to the present case, in which the number of breaches occurred at a consistently high level over a four-year period (11,645 in 2019, 11,841 in 2018, 11,679 in 2017 and 11,632 in 2016) and remained undetected by Pearson until November 2019. This was despite Pearson having had an opportunity to identify and rectify the issue in 2018 when it was contacted by Ofqual, leading to a further year of breaches which could have been avoided. The breaches that occurred in 2019 were therefore not exceptional (like in the AQA case) but rather a result of systemic issues with Pearson's risk management and systems of planning and internal control.

The Enforcement Committee therefore remains of the view that there is a clear and valid basis upon which to differentiate the seriousness of the two cases when looking at the period over which the breaches occurred, and therefore it is appropriate to take a different approach in the two cases in respect of breaches that occurred in 2019.

e) The Enforcement Committee does not consider that it is accurate to say that Pearson's internal systems did not identify reviews of marking by the same examiner (or at the least, this appears to be inconsistent with previous information provided by Pearson).

In the event notification submitted to Ofqual on 19 November 2019, Pearson reported to Ofqual that the systems and processes that it had in place prevented an examiner from conducting a review of marking if that examiner had originally marked the whole script in its entirety and the same principle was applied for item-based scripts with three or fewer items. However, a small number of exceptions were made to this when the availability of other assessors was scarce and/or where the external service level agreement for completion of the review was at risk of being exceeded. For item-based scripts with more than three items, no such control was in place. This was because the chance of any individual examiner being the original marker of a substantial portion of the script was low. (Notice of Intention paragraphs 37-38).

The Enforcement Committee understands from this explanation, that Pearson had a choice over whether or not to put system controls in place which would prevent an examiner being asked to review something that they had originally marked and it chose not to do so in certain cases.

The Enforcement Committee understands from the information that Pearson has provided, that the root cause of the issue in this case is that when the Conditions relating to reviews of marking and moderation were updated in 2016, Pearson did not make changes to its processes to ensure it remained fully compliant. (Notice of Intention paragraph 39).

This is supported by the fact that Pearson stated in a letter dated 6 March 2020 that: "Our investigation into the root cause of the error has determined that we had been operating under the false assumption that our reviews of marking were compliant." (Notice of Intention, paragraph 41). The Enforcement Committee considered that a significant aggravating feature of the case was that Pearson had been knowingly allocating reviews to examiners with previous involvement in the original marking. (Notice of Intention paragraph 105(e)).

This is in contrast to the AQA case in which the root cause was identified as failings in AQA's online marking system, the limited availability of reviewers in low entry qualifications and the relatively small size of some marking and review panels. (AQA Notice of Intention, paragraph 6). It was however noted as an aggravating factor that AQA had not identified risks or had adequate escalation processes in place (AQA Notice of Intention, paragraph 57(d)).

It is acknowledged that Pearson promptly notified Ofqual of the issue once it had been identified, and no breach of B3 has been alleged in this case. However, the Enforcement Committee does not consider that this reduces the factual seriousness of the case when compared to the AQA case when viewing the context of the case a whole. The Notice of Intention recorded as an aggravating factor the fact that Pearson did not identify the risk of non-compliance (under Condition A6) even when the issue was specifically drawn to its attention by Ofqual in 2018 and this is one of the reasons that the Enforcement Committee considered the case to be factually more serious than the AQA case. It was also noted that Pearson did not identify the failings until a review of marking issue in 2019 was viewed in light of regulatory action that Ofqual had taken against AQA and OCR for similar issues.

In both cases, AQA and Pearson missed opportunities to identify and rectify the issue and these are noted as aggravating factors in both Notices of Intention (AQA paragraph 57(d)) and Pearson paragraph 109(g)).

f) The Notice of Intention in the AQA case noted as an aggravating factor the fact that opportunities to identify and remedy the problem in 2016 and 2017 were missed. It is acknowledged that the fact that this meant that

data for 2016 and 2017 had been deleted, was not specifically referenced as an aggravating factor in that case.

The AQA fine was negotiated through a settlement procedure and therefore the Enforcement Committee in that case inevitably took a more ‘broad brush’ approach to the breaches and the factors it took into account when deciding whether or not to accept the settlement proposal from AQA.

That does not preclude the Enforcement Committee in this case from considering this fact to be an aggravating factor.

Comparison with other cases – OCR

Pearson’s representations

20. Pearson has asked Ofqual to also consider the OCR case[6] given the similar nature of those breaches. When the circumstances of Pearson’s breaches are compared to these similar breaches for which fines have been imposed, Pearson notes the following key issues:

a) While OCR's review of marking breach affected fewer Learners, it was entirely related to whole scripts meaning it might have been more likely that overall grades would be impacted;

b) OCR were not issued with a fine in 2019 despite two recent significant monetary penalties in 2018 (£175,000 and £125,000). Pearson’s past compliance history has counted against it when it appears to have not been considered in respect of OCR.

c) Ofqual stated in their Letter of Concern that *‘‘Ordinarily, this is a matter in which Ofqual would consider it appropriate to take regulatory action against OCR, in the form of a Monetary Penalty. However, OCR has indicated its willingness to issue credit notes to all affected Centres (including Centres that would not have paid fees for reviews that resulted in a grade change) in acknowledgement of the fact that OCR did not meet their reasonable expectations.’’* Pearson has committed to issuing credit notes to all affected Centres but it would appear it has not benefited to the considerable extent this was considered mitigation in OCR's case.

[6] Ofqual issued a Letter of Concern to OCR on 5 November 2019, regarding failings in its reviews of marking and moderation arrangements in 2017 and 2018.

d) Pearson are of the view that the effect of and the seriousness of the breaches are, on balance, less than AQA's (or alternatively the same level as) and that OCR's outcome should also be considered. We would ask that Ofqual reconsider their assessment in this regard.

Enforcement Committee's consideration

21. The Enforcement Committee has considered the OCR case and does not consider it to be the most relevant or comparable case. In response to Pearson's representations, the Enforcement Committee notes the following:

    a) As noted at paragraph 18(c) above, the Enforcement Committee does not consider that the proportion of item level and whole script reviews is a materially relevant factor when assessing the seriousness of the case. Those comments are not repeated again here.

    b) The decision not to fine OCR was primarily based on the factual circumstances of the case. Notably, the scale of failings was significantly lower than in this case - in OCR's case there were a total of 286 affected reviews over two years; in the Pearson case there were 46,797affected reviews over four years. In accordance with the TRA policy, the Enforcement Committee did consider Pearson's compliance history when deciding whether to fine Pearson but this was not considered to be an aggravating or mitigating factor (Notice of Intention page 24, para 106(f)).

    c) OCR's offer to pay compensation to Centres was not the sole reason why Ofqual considered that a Monetary Penalty should not be imposed in that case. Ofqual's Letter of Concern dated 5 November 2019 also noted that:

        "The Enforcement Committee also took into account what it considered to be significant mitigation, namely that:

        • This affected a relatively small number of Learners;

        • Each of the affected reviews concerned a subject in which OCR had been able to recruit only a very small number of markers. Had the reviews in question not been conducted by the original marker, it would not have been able to be conducted at all;

        • OCR made significant efforts in both 2017 and 2018 to recruit and retain sufficient markers to secure compliance but was unable to do so;

        • Given OCR's efforts to recruit and retain examiners, it is unlikely it avoided costs in any notable sum and in any event, it was prepared to, and attempted to incur all necessary costs;

- OCR submitted an Event Notification to Ofqual in September 2018 notifying us that it had been necessary for original markers to conduct reviews of their own marking, having identified during pre-summer meetings that this was a risk that might occur for some subjects."

Taking all of this into account, the Enforcement Committee considered the circumstances of that case were suitable to be dealt with by way of a Letter of Concern, rather than a Monetary Penalty.

In this case, the Enforcement Committee considered that the 2020 AQA fine was the most relevant and comparable case and considered that the fine imposed on Pearson should be higher than that imposed on AQA (Notice of Intention paragraph 109).

Pearson's offer of compensation to Centres was considered as mitigation (Notice of Intention paragraph 105(b)) but given the number of aggravating factors in the case, the offer of compensation alone could not afford such significant mitigation to the extent that a Monetary Penalty should not be imposed. Rather, had this compensation not been offered, the fine would likely have been higher, to reflect any income Pearson received from non-compliant reviews of marking.

d) The Enforcement Committee does not agree that the effect of and seriousness of the breaches are, on balance, less than or the same level as AQA's, for the reasons set out in the Notice of Intention (paragraph 109). The AQA case was evidently considered to be more serious than the OCR case (given the different disposals) and the Enforcement Committee considers the Pearson case to be the most serious of the three. The Enforcement Committee has considered the outcome in the OCR case but does not consider anything other than a Monetary Penalty to be an appropriate disposal given the seriousness of the case and the aggravating factors listed in the Notice of Intention (paragraph 105). Indeed, it is noted that in its representations to the Notice of Intention, Pearson accepts it should receive a Monetary Penalty for this matter (although it disputes the amount).

Size and turnover

Pearson's Representations

22. **Pearson does not accept that its size and turnover from regulated activities in relation to its total turnover compared to AQA is *"significantly greater"* and does not understand the relevance of AQA being an education charity operating for the public benefit. Pearson reinvests for public benefit and the status of an organisation is not a determining factor in the TRA. For these reasons, we are of the view that the distinction is not a helpful one.**
23. **Pearson is unclear what figures Ofqual have relied upon to compare the turnover of Pearson and AQA, or whether Ofqual has confined its comparison to the turnover of regulated activities rather than total turnover.**
24. **Pearson submits that the turnover from regulated activities including vocational for Pearson and AQA is broadly similar and Pearson's is less when only taking into account GCSE and A Levels. Equally, Pearson is unclear what evidence Ofqual has relied on in determining "size" and would ask that it takes into consideration more than just financial information to give a fuller and more accurate picture.**
25. **Pearson requests specifically that the following is considered[7]:**
    a) **The awarding organisations with the largest market shares in the academic year 2020 to 2021 were AQA (35.0%), Pearson (21.9%), OCR (7.0%) and City & Guilds (5.1%);**
    b) **AQA issues significantly more certificates (GQ and VQ combined) than Pearson, in 2019-2020 AQA issued 58% more and in 2020-2021 59% more;**
    c) **AQA have more than double the GCSE market share compared to Pearson (in 2020-2021 62% compared to 25.2% respectively). AQA has the largest market share in 8 of the 10 highest volume GCSE subjects. Pearson has the largest share in the remaining 2 subjects; mathematics and history. The top 10 highest volume subjects account for 79.9% of all GCSE certificates;**
    d) **AQA have a significantly greater AS market share compared to Pearson (in 2020-2021 43.9% compared to 25.6% respectively). AQA has the largest market share in 6 of the 10 highest volume AS**

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[7] Sourced from Ofqual's Annual Qualifications Market Report Academic Year 2020 to 2021.

subjects. Pearson and OCR have the largest share in the remaining 4 subjects; mathematics, mathematics (further), history and chemistry. Pearson has seen the largest decrease (down by 1.5% in the 2020 to 2021 academic year) in its share of the AS market;

e) **AQA also have a significantly greater A level market share compared to Pearson (in 2020- 2021 45.9% compared to 27.0% respectively).**

26. **On 31 August 2022, in response to a B4 Notice from Ofqual, Pearson provided the following information regarding its turnover:**

    a) **Pearson Education Limited's turnover for the most recent business year for which the relevant information is available: £374m for the year ended 31 December 2021.**

    b) **Pearson Education Limited's turnover from regulated activities in relation to its total turnover: £165m for the year ended 31 December 2021.**

Enforcement Committee's consideration

27. The Enforcement Committee was entitled to take into account the fact that AQA is an education charity operating for public benefit. Ofqual consulted on its intention to fine AQA by publishing its Notice of Intention in October 2019. Interested parties, including other awarding organisations such as Pearson, had the opportunity to make representations on that proposal before a final decision was made. Pearson did not make any representations.

28. When a Monetary Penalty is deemed appropriate, the Monetary Penalty must reflect the seriousness of the non-compliance. A fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with Ofqual's rules, in doing so, it is clearly appropriate for the Enforcement Committee to consider the economic realities of the organisation and the most efficacious way of giving effect to the purposes of imposing a penalty.

29. In this case, the Enforcement Committee was satisfied that Pearson's total turnover is significantly greater than AQA's and that was one of the factors that necessitated that the Monetary Penalty should be higher than that imposed on AQA (Notice of Intention, paragraph 109(d)). The Enforcement Committee was satisfied that the proposed Monetary Penalty did not exceed 10% of Pearson's total turnover.

30. The Enforcement Committee has considered the additional information provided by Pearson in its representations to the Notice of Intention in July 2022 and in response to Ofqual's B4 Notice in August 2022.

31. Ofqual considers that the proportion of regulated activity is likely to be most relevant in cases where the proposed fine exceeds or comes close to 10% of an awarding organisation's turnover from regulated activity or, for example, where its regulated activities make up only a very small proportion of its turnover and is not the organisation's primary source of income and therefore it would be disproportionate to impose a fine that did not take regulated activity into account. The Enforcement Committee does not consider that to be the case here.
32. The Enforcement Committee has taken into account Pearson's regulated activity as a proportion of its total turnover but considers that in order to have a deterrent effect, the Monetary Penalty needs to be sufficiently high to have a meaningful impact on Pearson's total turnover. As Pearson's total turnover is significantly greater than AQA's, the Monetary Penalty imposed must be higher in order to have the same amount of impact, before taking into account any other factors in the case.
33. In particular, the Enforcement Committee notes that Pearson's turnover from regulated activity (£165m) is less than half of its total turnover (£374m) during the financial year ending 31 December 2021. However, the proposed fine of £1,200,000 amounts to less than 1% of either figure (around 0.7 % of regulated activity and around 0.3% of its total turnover). AQA's fine amounted to less than 0.2% of its total turnover at the relevant time.
34. The Enforcement Committee has also considered the representations made in regard to market share when compared to AQA and other providers, however it does not consider this to be a relevant factor in the particular circumstances of this case. For example, the market share does not impact on Pearson's ability to have been able to prevent these issues from occurring, or its ability to pay the Monetary Penalty.
35. The Enforcement Committee remains satisfied that in all the circumstances, the proposed Monetary Penalty is proportionate when compared to the Monetary Penalty imposed on AQA, and that it does not exceed 10% of Pearson's total turnover.

Admissions and settlement

Pearson's Representations

36. **Pearson submits that more weight should be given to its early admissions and acceptance of facts. Pearson only ever challenged breaches in good faith, and notes that two alleged breaches (General conditions B1.4(a) and B6.1) which were challenged were ultimately not pursued by Ofqual. In the**

proposed version 3 of Supporting Compliance and Taking Regulatory Action it appears that either a matter is subject to settlement discussions or it is treated as contested, and if this was the approach adopted by Ofqual in this case, we suggest this needed to be made much clearer at an earlier stage of the process. We think this binary approach is perhaps unhelpful given that at no stage did Pearson substantively contest the issues.

37. **In the Notice of Intention the Enforcement Committee reflect that "whilst Pearson made partial admissions to the alleged breaches, it did not at any stage during the enforcement process take up the opportunity to enter into settlement discussions with Ofqual or make any form of settlement proposal. Pearson is therefore not entitled to any settlement discount (a significant discount was afforded to AQA to reflect the settlement proposal that was made)." Pearson is very concerned by this statement that a significant discount was afforded to AQA.**

38. **We note that unlike other regulators[8], Ofqual's current guidance does not set out what the process is for settlement and how this might affect a monetary penalty. Pearson acknowledge that Ofqual is already in the process of amending its TRA policy to include clarity over its approach to settlement of monetary penalties (consultation held at the end of 2019, with further updates scheduled for Autumn 2021). The proposed version 3 of Supporting Compliance and Taking Regulatory Action, states that "awarding organisations may make proposals for settlement at any stage before we make a preliminary decision to impose a fine." This is a transparency issue, and one which Pearson are of the view has unfairly counted against them in this instance. While Pearson understands that it has missed the opportunity now, it had not understood how the settlement process might unfold and had felt that it was not feasible to initiate a settlement proposal without having any indication of the quantum of the fine. Pearson were minded to engage in settlement and would have pressed for this had we understood the way in which Ofqual's process would work.**

39. **Pearson understands that the purpose of a settlement discount might be to reflect in monetary terms the time and expense saved by the regulator, and the steps that have been avoided due to cooperation and/or an early admission. However if a Monetary Penalty is imposed, the Enforcement Committee will consider making an order to require Pearson to pay the costs incurred by Ofqual (under s.152(A) of ASCLA) which would appear to**

[8] See OfS guidance *Regulatory advice 19: The OfS's approach to determining the amount of a monetary penalty*

suggest that Pearson may be punished twice for failing to enter into a settlement negotiation.

40. **Under the new proposed procedures Ofqual has indicated that the procedural arrangements for a settlement process will involve first Ofqual explaining its concerns to the awarding organisation and then the awarding organisation being given an opportunity to admit any non-compliance and to consider whether to make proposals for settlement of the case. The draft states "We will always allow a reasonable period of time for an awarding organisation to make a settlement proposal. The period of time allowed will depend on the nature and complexity of the case. Settlement will not normally be a reason to reduce any part of the fine which relates to identifiable financial gain arising from non-compliance, but the settlement procedure allows the awarding organisation to consider making restitution or paying compensation in lieu of sums which might otherwise be included in any fine." The settlement period largely also fell within Covid-19, where both Ofqual and Pearson's focus was on ensuring that the effect on Learners was as minimal as possible.**

Enforcement Committee's consideration

41. While Ofqual's current TRA policy does not set out a process for settlement, Ofqual has been successfully operating an informal settlement procedure for many years with examples published our website – most recently the fines imposed on AQA in January 2020 and on City & Guilds in June 2021. The published decision documents include reference to the settlement proposals and explain how this was taken into account by the Enforcement Committee. Notably, the fine imposed on Pearson in 2016 was negotiated through a settlement procedure and therefore Pearson has availed itself of this process previously.

42. The Enforcement Committee considers that Ofqual acted in a transparent way in this case and that the possibility and method of entering into settlement discussions was made clear to Pearson on a number of occasions. In particular, it notes the following specific examples:

    a) In a letter to Pearson dated 19 December 2019, Ofqual said:

    > **"Confidential Discussions**
    > As you are aware, we have agreed with your [legal counsel] to begin confidential settlement discussions in the New Year in respect of the further case concerning Pearson – Short Course certificates – which was commenced recently. We would be pleased to have such discussions in relation to this matter also, and see no reason the two matters could not be discussed concurrently should you agree.

Given much of the factual background has already been established, we consider such discussions could commence immediately, prior to the preparation of a Case Narrative.

We would invite you to consider this possibility and instruct your counsel accordingly before arrangements are made for any meeting in relation to the other matter.

If you do not consider that confidential settlement discussions would be appropriate, then we shall prepare a Case Narrative on the basis that this matter will be contested by Pearson before the Enforcement Committee. We will set out a timetable for the proceedings, which will allow Pearson an opportunity to respond to the Case Narrative in draft, and to make its case to the Enforcement Committee.

…

Next Steps

We would be grateful if you would reply to this letter before 4pm on 10 January 2020:

- confirming whether or not you wish to commence confidential settlement discussions in respect of this matter…"

b) On 13 January 2020, Pearson replied:

"Thank you for your letter of 19 December 2019, suggesting that we might discuss the Review of Marking and Moderation (ROMM) matter concurrently with the Short Course certificates case.

We have discussed this internally, and we consider that it would be of benefit for a Case Narrative to be prepared on the ROMM case ahead of any next steps. We understand we will be given an opportunity to respond to the Case Narrative and we will then be in a position to advise whether we wish to engage in confidential settlement discussions, or make representations to the Enforcement Committee on a suggested enforcement action.

In respect of the Short Course certificates, we have further discussed our approach to the suggested confidential settlement discussions and have reached the decision that we would like to move straight to making representations on the enforcement action suggested by the Enforcement Committee, rather than initiate confidential settlement discussions up-front.

As such, it seems unlikely that treating the two matters concurrently will be practical."

c) On 7 July 2021, Ofqual wrote to Pearson enclosing a copy of a draft Case Narrative and a proposed new version of the TRA policy which was being consulted on at the time, and specifically highlighted the sections of the policy that related to settlement process:

"Pearson now has the opportunity to make written representations on the draft. Following the submission of written representations, we may confirm or amend the Case Narrative before it is considered by an Enforcement Committee. You will be provided with a copy of the final Case Narrative.

> The Enforcement Committee will then consider the Case Narrative and any written representations made by Pearson and will determine whether Pearson has breached its Conditions of Recognition. If it finds that Pearson has breached its Conditions of Recognition, it will then be asked to consider whether or not a fine is an appropriate regulatory outcome in this case, and if so, what amount of fine is proportionate to impose.
>
> **Taking Regulatory Action policy**
>
> Any enforcement action that we take will be taken in accordance with our Taking Regulatory Action policy. The current version of this policy can be found on our website. As you will be aware, we are currently consulting on a new version of that policy and we attach a PDF version of that for information. In particular, you may wish to have regard to the section of the new policy which makes some changes to how we express our process in relation to settlement in fining cases (see procedural arrangements at page 28, and Annex A at page 37).
>
> If you wish to enter into our settlement process before this matter is considered by an Enforcement Committee, please indicate this in your response and mark any such correspondence as 'confidential'."

d) On 21 February 2022, Ofqual sent Pearson a final version of the Case Narrative and indicated that an Enforcement Committee would be convened to consider a fine and that we intended to seek to recover our full costs. Pearson was given the opportunity to provide any additional evidence, information or representations it would like the Enforcement Committee to consider and was given the opportunity to contact the enforcement team to discuss any aspect of the case.

e) On 30 March 2022, Ofqual wrote to Pearson to confirm the date the Enforcement Committee would be meeting to consider the case, which documents would be made available to it and also offered an opportunity to discuss any aspect of the case.

43. At no stage throughout this exchange of correspondence did Pearson indicate to Ofqual that it wished to enter into a settlement discussion or discuss any aspect of the case.

44. The fact that Pearson did not enter into settlement discussion is not a factor that counted against it - it was not considered by the Enforcement Committee to be an aggravating factor. Pearson was entitled to challenge the alleged breaches and contest the case, however, it was not entitled to any settlement discount in the absence of a settlement proposal being made.

45. The purpose and benefits of settlement procedures are not solely in relation to the time and expense saved by the regulator. Settlement allows us to focus our resources more effectively and can save costs for the awarding organisation as

well as reducing the uncertainty of a contested procedure. A settled case brings a degree of finality to the case as an awarding organisation is highly unlikely to appeal a Monetary Penalty that it has agreed to pay.

46. Separately, Ofqual has the power to recover its costs under section 152(A) of the Act when it imposes a Monetary Penalty on an awarding organisation. This is not punitive and it is right that as a public body, Ofqual seeks to recover the costs it has incurred when taking statutory enforcement action against an awarding organisation that has failed to comply with its Conditions of Recognition.

47. The Enforcement Committee is satisfied that the possibility of settlement was explained to Pearson on a number of occasions between December 2019 and July 2021 (details set out above). Substantive work on the case was paused during the pandemic by agreement, to allow both parties to prioritise work relating to the exceptional arrangements for awarding grades in 2020 and 2021. Ofqual specifically mentioned settlement again when the case was resumed in summer 2021, and a copy of Ofqual's new TRA policy was provided to Pearson (letter dated 7 July 2021) highlighting the section on settlement.

48. Pearson had the opportunity to make a proposal for settlement at any stage before Ofqual made a preliminary decision to impose a fine. Pearson was provided with the date the Enforcement Committee were meeting to consider the case and had a number of opportunities to provide representations, additional evidence or comments on the documents being considered by the committee. Pearson did not make any attempt to enter into settlement discussion at any stage of the case.

49. The Enforcement Committee remains of the view that appropriate weight was given to all of the relevant factors in this case.

Compliance history

Pearson's Representations

50. In relation to, "Whether the awarding organisation has breached regulatory requirements in the past and, if so, how frequently" and "the level of co-operation with any investigation we have carried out", Pearson has never failed to comply with undertakings or special conditions made by Ofqual, and while it has received a previous fine for breaches in 2016, none of the breaches have been intentional or resulted in any financial or competitive gain. Once it had identified the issue, Pearson notified Ofqual of these breaches promptly. Pearson has always been open and transparent with Ofqual, and has worked tirelessly and in partnership with Ofqual and DfE

throughout Covid-19 to put in place measures to protect Learners. Pearson is not a recalcitrant Awarding Organisation and seeks at all times to be in full compliance with the Conditions of Recognitions.

Enforcement Committee's consideration

51. The Enforcement Committee considered Pearson's compliance history and noted that it had received a previous fine in 2016. This was noted in the Notice of Intention (at paragraph 106(f)) as a consideration but not an aggravating factor.
52. The Enforcement Committee notes the representations that Pearson has made in respect of its conduct and co-operation with Ofqual throughout the pandemic, however it does not consider this is directly relevant to the amount of the fine in this case given that the events pre-date the pandemic.

Deterrent factor

Pearson's Representations

53. In relation to "Whether a fine is likely to improve compliance with regulatory conditions in the future (including by other awarding organisations)", Ofqual has cited that the need to deter Pearson and other awarding organisations from making similar failings in the future as one of the other factors considered. In this specific case, Pearson submits that limited weight should be attributed to this, because no deterrent factor is required for either Pearson or any other awarding organisation. The error arose as a result of Pearson operating under a false assumption that its reviews of marking were compliant, there has never been any evidence that Pearson or any of the other awarding organisations intentionally sought to disregard the condition. It was only when an appeal was upheld in November 2019 that Pearson identified that (like AQA and OCR) its processes were not compliant with the revised conditions for allocation of Post Result ROM. There is no basis to suggest that any awarding organisation would intentionally incur the costs and damage to relationships that inevitably result from an error like this. The breaches by a number of awarding organisations perhaps suggest that this specific aspect of the revised expectations was not perhaps clearly communicated or understood.

Enforcement Committee's consideration

54. The Enforcement Committee has not suggested that the breaches in this case were intentional, but it is of significant concern that an awarding organisation such as Pearson had not put in place steps to ensure its compliance with its Conditions of Recognition when the requirements changed in 2016. A large fine is considered to have a deterrent effect, not only on the awarding organisation receiving the fine, but also on other awarding organisations who will be aware of the fine when it is published. If no action was taken, there would be no incentive for awarding organisations to comply. Ofqual needs to take enforcement action against awarding organisations that fail to comply with their conditions of recognition so that other awarding organisations know what the requirements are and know that Ofqual is willing to take action when those requirements are breached.

55. The Enforcement Committee further notes that the failings in this case only came to light because Ofqual had published enforcement action against AQA and OCR for similar failings.

56. The Enforcement Committee considers that the changes to the review of marking rules were clearly communicated and should have been understood by awarding organisations. As set out in the Notice of Intention (at paragraphs 17-21) Ofqual consulted on the proposed changes in 2015-2016 and Pearson is listed as a respondent. The table at appendix 1 of the consultation summarised the key proposals and changes, explaining that the reason for the proposed change was that "markers who review their own marking or moderation may find it difficult to be objective. They are, in any event, likely to be perceived to be biased.[9]" It explained that the key change to the existing arrangements was that "the Code of Practice requires that, wherever possible, the review of marking is undertaken by someone other than the original marker (emphasis added).[10]

57. While Ofqual has taken regulatory action against other awarding organisations (AQA and OCR) in relation to these rules, Pearson is the only awarding organisation to assert that it did not know of or understand the rule changes.

58. Ofqual's TRA policy (v2 page 6) states that:

    > "We take action when we believe it is appropriate… In particular, when an awarding organisation is in breach of, or likely to breach, its conditions of recognition, we act as appropriate to:

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[9] Page 36

[10] Page 63

- deter other awarding organisations from similar breaches"

59. The Enforcement Committee considers that it attached appropriate weight to the deterrent factor when determining the amount of the fine.

Compensation

Pearson's Representations

60. **In relation to "the provision of restitution and compensation (where appropriate) to those affected by the breach", Pearson submits that reimbursement or compensation appears to have been treated very differently in different cases. OCR's willingness to issue credit notes of £14,674.25 counted in its favour whereas this appears to have been given far less weight in Pearson's case despite our immediate offer to fully refund to all affected Centres.**

Enforcement Committee's consideration

61. This representations is addressed at paragraph 21 above and is not repeated here.

Avoided costs

Pearson's Representations

62. **In relation to *"the provision of restitution and compensation (where appropriate) to those affected by the breach",* it is difficult to understand the restitutive (avoided costs) element included in the figure. In Pearson's case the Enforcement Committee has indicated that it took a holistic view and considered that any penalty imposed *"should include both a deterrent and restitutive element to reflect the fact that Pearson has avoided some costs by being non-compliant with its Conditions of Recognition for a prolonged period of time, noting however that Pearson would still incur costs in the future*." It is unclear how these calculations have operated and Pearson fears there have been elements of double counting. Pearson has given an undertaking to comply with an action plan to secure future compliance. It is acknowledged by Ofqual that Pearson will still incur system development costs when implementing its action plan going forward. We do not know how the quantum of "avoided costs" has been**

calculated given that the £423,000 of avoided costs are, in the most part, still expected to be incurred as part of implementation and the Enforcement Committee themselves say it was difficult to make a determination as to the extent of avoided costs. We also note that reference is also made to Pearson's fine then also being higher because:

a) **its undertaking to pay compensation to Centres does not include a figure to reflect its avoided compliance costs;**

b) **It may have accrued financial benefit in comparison with other AOs for or failing to put in place adequate systems of planning and internal control and a workforce of appropriate size and competence.**

63. **In OCR's case, Ofqual stated that "given OCR's efforts to recruit and retain examiners, it is unlikely it avoided costs in any notable sum and in any event, it was prepared to, and attempted to incur all necessary costs". We are unclear how the costs of recruitment could be equivalent to the actual cost of hiring, training and retaining staff, and how Ofqual could be satisfied that OCR had not avoided costs in any notable sum.**

Enforcement Committee's consideration

64. It was acknowledged in the Notice of Intention (at paragraphs 97-98) that the costs Pearson avoided while non-compliant in 2016-2019 would still be incurred by Pearson in the future. This relates to Pearson's short and long-term systems-based solutions (which are explained in more detail at paragraphs 90-95 of the Notice of Intention). However, the Enforcement Committee considered that Pearson's avoided costs could not be solely related to systems-based solutions. For example, Pearson referred to costs associated with not having sufficient examiners (paragraphs 96). While the Enforcement Committee considered the figures provided by Pearson in this regard, it noted that it was difficult to make a determination of fact regarding the specific amount of costs that Pearson had avoided through non-compliance over a prolonged period of time.

65. The Enforcement Committee was satisfied that Pearson had avoided some costs over the four-year period and considered that this should be reflected in the fine. The Enforcement Committee was entitled to take a holistic view and is not required to identify a specific figure.

66. Had Pearson's offer of compensation to Centres included a sum to reflect that it avoided some costs (like AQA's did), then it is likely that the amount of the Monetary Penalty would have been reduced accordingly to ensure that this aspect was not double-counted.

67. This approach is in accordance with Ofqual's TRA policy which includes 'whether an awarding organisation has benefited financially from a breach of its conditions of recognition', as a factor to consider whether deciding whether to impose a fine and if so how much.
68. In the OCR case, Ofqual was satisfied that OCR had not avoided costs in any notable sum. It is notable that the scale of the failings in the OCR case, and the period of time which they occurred over, were significantly smaller and shorter than in this case.

Concluding comments

Pearson's Representations

69. In conclusion, Pearson submits that the Monetary Penalty should be reduced substantially and in any event should not exceed £750,000.

Enforcement Committee's consideration

70. The Enforcement Committee has had regard to all of Pearson's representations in response to the Notice of Intention, but has decided that there should not be any variation to the amount of the Monetary Penalty for the reasons set out above, and in the Notice of Intention dated 27 June 2022.

Final Decision

71. For the reasons set out in the Notice of Intention to impose a Monetary Penalty dated 27 June 2022, and having had regard to all of Pearson's representations dated 25 July 2022 as required under section 151A(7) of the Act, the Enforcement Committee has decided that Pearson will be required to pay a Monetary Penalty in the sum of **£1,200,000** in relation to its reviews of marking arrangements in 2016, 2017, 2018 and 2019.

Payment

72. Pearson must pay the Monetary Penalty within 28 days of the date of this Notice, in accordance with the Payment Instructions provided with this Notice.
73. In the event of non-payment, interest may be charged and the outstanding amount may be recovered as a debt, in accordance with section 151D of the Act.

Appeals

74. Pearson may appeal to the First Tier Tribunal in respect of Ofqual's decision to impose the Monetary Penalty and / or in respect of the amount of that penalty, in accordance with section 151C of the Act.

75. An appeal may be made on the grounds that:

    a) The decision was based on an error of fact;

    b) The decision was wrong in law;

    c) The decision was unreasonable.

76. Any appeal must be made within 28 days of the date of this Notice. Further information is available from HM Courts and Tribunals Service at: https://www.gov.uk/guidance/exam-boards-appeal-to-a-tribunal-against-a-monetary-penalty.

Name: Susan Barratt

Chair of the Enforcement Committee

Date: 29 November 2022

Enforcement Committee:

Susan Barratt (Chair)

Mike Thompson

Matt Tee

NOTE: Ofqual will publish this Notice on its website