



Penalty Guidelines

Section 392 of the Communications Act 2003

Statutory background

1. Section 392 of the Communications Act 2003 (“the Act”) requires Ofcom to prepare and publish a statement containing the guidelines they propose to follow in determining the amount of penalties imposed by them under the Act or any other enactment apart from the Competition Act 1998.
2. By virtue of section 392(6) of the Act, Ofcom must have regard to the statement for the time being in force when setting the amount of any penalty under this Act or any other enactment (apart from the Competition Act 1998).

General criteria

3. The amount of any penalty must be appropriate and proportionate to the contravention in respect of which it is imposed. In addition Ofcom must have regard to any representations made to them by the regulated body in breach. Accordingly, Ofcom, in setting the level of penalty will consider all relevant circumstances.
4. In general, Ofcom is likely first to consider the following factors in determining the starting figure of any penalty:
 - The seriousness of the contravention;
 - Any precedents set by previous cases; and
 - The need to ensure that the threat of penalties will act as a sufficient incentive to comply.

Specific criteria which may be relevant depending on the contravention

5. Certain specific criteria may be relevant to adjust the starting figure of any penalty depending on the type of contravention. This may include, but would not necessarily be limited to:
 - Any gain (financial or otherwise) made by the regulated body in breach (or any connected body);
 - The degree of harm caused, or increased cost incurred by consumers or other market participants;
 - Size and turnover of the regulated body;
 - The extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the regulated body;
 - The duration of the contravention; and
 - Whether a penalty in respect of the same conduct has already been imposed by Ofcom or another body.

Additionally, in the case of content-related breaches by broadcasters:

- Audience expectations; and
- Scheduling.

Factors tending to lead to an increase in the level of any penalty

6. This may include, but would not necessarily be limited to:

- Repeated contraventions by the same regulated body;
- Continuation of the contravention after either becoming aware of the contravention or being notified of a contravention by Ofcom;
- The extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur; and
- The absence, ineffectiveness or repeated failure of internal mechanisms or procedures intended to prevent contravention by the regulated body concerned or other bodies in the same group.

Factors tending to decrease the level of any penalty

7. This may include, but would not necessarily be limited to:

- The extent to which the regulated body has taken steps in advance to identify and mitigate external factors that might result in a contravention;
- The extent and timeliness of any steps taken to end the contravention in question, and any steps taken for remedying the consequences of the contravention; and
- Co-operation with Ofcom's investigation.

Final amount of penalty

8. Having taken regard of any representations the regulated body may wish to make and having considered the factors listed above (to the extent that they are relevant) and any other circumstances relevant to the particular case under consideration, Ofcom will determine an appropriate and proportionate penalty. In doing so it will ensure that the amount does not exceed the maximum penalty for the particular type of contravention.

Revision of the statement of policy

9. Section 392(2) of the Act provides that Ofcom may from time to time revise their statement as they think fit. Any such alterations must be consulted with the Secretary of State and other such persons, as Ofcom

considers appropriate. This statement will be reviewed in the light of experience in applying it over time. In particular, the guidelines will be reviewed prior to the implementation of fixed penalties in relation to offences under the Wireless Telegraphy Act 1949 as provided for in section 180 (Schedule 6) to the Act.”

Definition

10. In these guidelines, the term ‘regulated body’ means any person or body subject to regulation by Ofcom under any enactment apart from the Competition Act 1998.