



Revising the penalty guidelines

Consultation

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Section 1

Revising the penalty guidelines

Introduction

- 1.1 Section 392 of the Communications Act 2003 requires Ofcom to publish guidelines on our policy in determining the amount of any penalty we impose (other than under the Competition Act 1998). Ofcom must have regard to the guidelines when determining the amount of a penalty.
- 1.2 Our current guidelines date from December 2003¹. Experience of applying them across Ofcom suggests that:
 - they may be unnecessarily complex and inflexible; and
 - they may not make deterrence central enough in setting the level of penalties.
- 1.3 We are therefore consulting on revising the guidelines.

Contraventions to which the guidelines apply

- 1.4 The guidelines cover penalties imposed in relation to about 40 different types of contravention, ranging from breaches of the broadcasting code to failure to pay Ofcom's administrative fees. Contraventions to which the guidelines apply may be committed by different types of person, from individuals with little knowledge of Ofcom, to sophisticated multinational telecommunications providers with billions of pounds in annual turnover.
- 1.5 The statutory maximum penalty differs from contravention to contravention. For example, it is often the higher of a fixed sum or a percentage of the turnover or qualifying revenue of an enterprise (e.g. 3% or 10%). For other contraventions, it is simply a fixed sum, e.g. £1,000 or £2 million.
- 1.6 Ofcom's penalty guidelines need to be flexible enough to deal with all the kinds of cases to which they may apply.

The guidelines

- 1.7 We have reviewed our current penalty guidelines. Under them, we establish a "starting point" based on seriousness, precedent; and deterrence. We may then adjust the starting point. We look first at a (non-exhaustive) set of factors, most of which arguably overlap with seriousness and deterrence. We then look at factors tending to increase the penalty; then factors tending to reduce it. At the end, we check we have not exceeded the maximum.
- 1.8 Our current view is that this is unnecessarily complicated and does not put deterrence at the heart of the process. Ofcom has experience of stakeholders who have committed very serious and repeated contraventions of the Broadcasting Code without apparently being deterred by the prospect of penalties. It may be that the

¹ The guidelines are available here: <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>.

penalty guidelines are insufficiently clear that such behaviour is likely to lead to a substantially increased fine.

- 1.9 Accordingly, we are consulting on revisions to the guidelines to establish deterrence as the central objective. In deciding the level of the penalty, we propose to have regard in the round to any factors (including those in the existing guidelines) that are relevant to the facts of the case. We propose to take precedent into account as part of this process. Having reached a figure, we propose to adjust upwards for non-cooperation if need be and then check we had not exceeded the maximum.
- 1.10 This would be simpler and clearer than the current guidelines, reducing the number of discretionary calculations to be made before coming to the final figure. It would be more flexible when it came to securing deterrence.
- 1.11 We consider it may be helpful to some stakeholders whose circumstances are unusual, if we included within the penalty guidelines a steer on how they may apply. We could provide annexes to the penalty guidelines to give further information on how we would address specific facts. In particular, we are considering providing such guidance for situations where programming has been centrally complied on behalf of the regional Channel 3 licensees.
- 1.12 Our proposed changes would not be likely to represent a major change in the activities we carry on or, for the most part, to different penalties overall. They would, however, be likely to tend to an increase in penalties for repeat offenders. On the other hand, there is likely to be a saving in Ofcom resources both in determining the amount of a penalty and in dealing with the multiple contraventions of those undeterred by existing penalties.
- 1.13 A proposed draft of the penalty guidelines, prepared based on this approach, is presented in Section 2 of the consultation.

Question 1: Do you have any comments on the proposed draft penalty guidelines in Section 2?

Section 2

Draft penalty guidelines

Statutory background

1. Section 392 of the Communications Act 2003 (“the Act”) requires Ofcom to prepare and publish a statement containing the guidelines it proposes to follow in determining the amount of penalties imposed by Ofcom under the Act or any other enactment apart from the Competition Act 1998. This statement contains Ofcom’s penalty guidelines.
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).

How Ofcom will determine the amount of a penalty

3. Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance.
4. The factors taken into account in each case will vary, depending on what is relevant. Some examples of potentially relevant factors are:
 - The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;
 - The duration of the contravention;
 - Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention;
 - Any steps taken for remedying the consequences of the contravention;
 - Whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties);
 - Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention;
 - The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur;
 - Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it; and
 - The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body.
5. Annex 1 sets out how Ofcom considers some of these factors where programming has been centrally compiled on behalf of the regional Channel 3 licensees.

6. Ofcom will have regard to any precedents set by previous cases, but may depart from them depending on the facts and the context of each case.
7. Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with our investigation.
8. Ofcom will ensure that the overall amount does not exceed the maximum penalty for the particular type of contravention.
9. Ofcom will have regard to any representations made to us by the regulated body in breach.

Revision of the statement of policy

10. Section 392(2) of the Act provides that Ofcom may from time to time revise our statement as we think fit. Ofcom must first consult the Secretary of State and other such persons as we consider appropriate.
11. This statement will be reviewed in the light of experience in applying it over time.

Definitions and interpretation

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

Annex 1 to the draft guidelines

Annex 1

Ofcom's approach to penalties for breaches of licence conditions in relation to programming centrally complied on behalf of the regional Channel 3 licensees

Background

- A1.1 A regional Channel 3 licensee which broadcasts programming which does not comply with the Broadcasting Code is in breach of its licence. Under sections 40-42 of the Broadcasting Act 1990 ("the 1990 Act"), Ofcom is empowered to impose a sanction upon the holder of that licence. A financial penalty is among the range of sanctions that may be imposed on a licensee under those provisions. Thus, it is the case that all regional Channel 3 licensees which broadcast a programme in breach of the Broadcasting Code may be liable for a penalty.
- A1.2 Under the networking arrangements for Channel 3, programming for broadcast on the Channel 3 network by the regional Channel 3 licence holders is collectively commissioned and complied. While commissioning is the responsibility of ITV Network, a company of which all the Channel 3 licensees are members, compliance of network programming with the Broadcasting Code is generally assessed by a single regional Channel 3 licensee, known as the compliance licensee, on behalf of all the licensees.
- A1.3 In addition, the regional Channel 3 licensees broadcast national news programming, and spot advertising, which are centrally complied on their behalf.
- A1.4 The following paragraphs are intended to provide guidance as to the circumstances Ofcom is likely to consider relevant when deciding whether to impose a penalty on a Channel 3 licensee for broadcasting programming in breach of its licence but which it did not comply itself. This guidance should not be regarded as exhaustive since Ofcom will decide each case on its facts.

Ofcom's approach to penalties for breaches by Channel 3 licensees where there is a compliance licensee

- A1.5 In line with our *Procedures for the consideration of statutory sanctions in broadcasting or other licence-related cases*² (the "Procedures") we will consider a sanction, including a penalty, against a regional Channel 3 licensee where we take the view that a licensee has seriously, deliberately, repeatedly or recklessly breached the conditions of its licence. In assessing this, we will look at both the nature of the breach and the extent to which the breach can be attributed to the fault of the licensee.
- A1.6 When considering whether and to what extent a licensee other than the compliance licensee might itself be a fault for broadcasting programming in breach of its licence, we would consider the extent to which it was reasonable for that licensee to

² See http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/complaints-sanctions/complaints_sanctions.pdf

rely on the compliance licensee to ensure that programming adhered to the requirements of the Broadcasting Code. That will depend on the facts of each case, including, for example:

- The extent to which the particular programme or the type of programme represented a known compliance risk;
- The steps, if any that a non-compliance licensee took to satisfy itself that the measures implemented by the compliance licensee were sufficient to address that risk; and
- Whether a non-compliance licensee did or should have taken additional measures to address the risk given the facts of which it might reasonably be expected to be aware.

- A1.7 The more serious the risk that the programme represented (either because of the nature of the programme or because of a previous relevant history of compliance failings), the more likely it is that we will expect that a non-compliance licensee either knew or should have known of the risk and should have taken steps to mitigate it.
- A1.8 Likewise, the steps that we may expect a non-compliance licensee to have taken will depend on the nature of the risk in question. For example, where the nature of the particular programme raises a material risk of breach but there are no other grounds for concern, the non-compliance licensee, or ITV Network on its behalf, might be expected to have sought confirmation from the compliance licensee, prior to broadcast, that the programming is compliant. It might also be appropriate for the non-compliance licensee to have made enquiries as to the compliance steps taken in order to verify that the risk of compliance failures has been minimised.
- A1.9 Where a particular genre of programmes is considered to raise particular compliance risks (for example, in the case of some live programmes), it might be expected that all the licensees would satisfy themselves in advance that the compliance processes in place are adequate to minimise the risk of compliance failures.
- A1.10 Where risk arises because of previous compliance failings on the part of the compliance licensee, greater intervention by the non-compliance licensee (or ITV Network on its behalf) may be appropriate to assure itself that there should be no recurrence of similar failings. That intervention could, for example, be obtaining comfort from the compliance licensee that previous weaknesses in its compliance processes have been addressed. Where such comfort is not forthcoming to the satisfaction of the licensee, however, individual compliance checks may be necessary.
- A1.11 If we conclude that a penalty is appropriate against one or more regional Channel 3 licensees, the amount of that penalty will be determined by Ofcom having regard to these penalty guidelines.
- A1.12 Any penalty imposed on a Channel 3 licensee by Ofcom must be appropriate and proportionate to the contravention in question. Among the factors that appear to be relevant to Ofcom's consideration in setting the level of the penalty for the compliance and non-compliance licensees are:
- The deterrent effect of the penalty;
 - Whether or not the licensee in question was acting as the compliance licensee;

- The nature of the programme in question and the level of compliance risk the programme might reasonably have been expected to represent;
- The degree of harm caused to consumers;
- The appropriateness of any steps taken to prevent contravention or the timeliness and effectiveness of steps taken to bring it to an end (for example, the application of a system of risk-based assessment to determine the appropriateness of additional compliance measures and/or further compliance checks on individual programmes deemed to represent a particular compliance risk, as set out above.)

Ofcom's approach to penalties for breaches by Channel 3 licensees where no compliance licensee is involved

A1.13 In the case of programming for which there is no compliance licensee, responsibility will rest collectively with all regional licensees who broadcast material in breach of the Broadcasting Code. The same applies to licence obligations which the Channel 3 licensees must discharge collectively, for example in relation to production quotas. The guidance set out in paragraphs A1.5 – A1.12 above also applies to the consideration of the appropriateness and scale of a penalty, in relation to breaches arising in these circumstances.

Appendix 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 11 February 2011**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/penalty-guidelines/>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Appendix 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email jess.hinings@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Jess Hinings
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3519
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the question asked in this document, which is at Appendix 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Jess Hinings on 020 7981 3102.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in Spring 2011.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Appendix 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Appendix 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Appendix 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Appendix 4

Consultation question

Question 1: Do you have any comments on the proposed draft penalty guidelines in section 2?