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## **Penalty guidelines**

Section 392 Communications Act 2003

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## About this document

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Ofcom is required by law to publish guidelines setting out how it proposes to determine the amount of the penalties which it imposes. This document sets out those guidelines, which replace the penalty guidelines dated 3 December 2015.

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## Statutory background

- 1.1 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.
- 1.2 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).

## Explanatory Note

- 1.3 Ofcom has powers to punish those who act unlawfully or in breach of the relevant regulatory requirements. Ofcom has updated the penalty guidelines to clarify its approach to setting penalties. In particular, to ensure that we can impose penalties at the appropriate level effectively to deter contraventions of regulatory requirements, and to explain the weight to be attributed to any precedents set by previous cases in the process of deciding an appropriate and proportionate penalty. Decisions made under the previous penalty guidelines may be relevant to Ofcom’s future decision-making. However, they are likely to become less relevant to future enforcement work over time, and Ofcom may, in light of the circumstances of each case, impose higher penalties in future cases than in previous ones to secure effective deterrence.
- 1.4 All businesses should operate in compliance with the law, taking into account any relevant guidelines where appropriate. As such, the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient to deter the business from contravening regulatory requirements, and to deter the wider industry from doing so.
- 1.5 In particular, the level of the penalty must be sufficiently high to have the appropriate impact on the regulated body at an organisational level. It should incentivise the management (which is ultimately responsible for the conduct and culture of the regulated body) to change the conduct of the regulated body as a whole and bring it into compliance, achieving this, where necessary, by changing the conduct at different levels within the organisation. The level of the penalty should be high enough that the management recognises that it is not more profitable for a business to break the law and pay the consequences, than it is to comply with the law in the first instance, and that it should therefore discourage bad conduct and encourage good practices and a culture of compliance across the organisation.
- 1.6 A relevant factor in securing this objective of deterrence is the turnover of the regulated body subject to the penalty. Penalties should be set at levels which, having regard to that turnover, will have an impact on the body that deters it from misconduct in future and

which provides signals to other bodies that misconduct by them would result in penalties having a similar impact. That is, it must be at a level which can also change and correct any non-compliant behaviour, or potential non-compliant behaviour, by other providers.

- 1.7 In making this assessment, Ofcom will have regard to precedents set by previous cases where they are relevant. However, Ofcom may depart from them depending on the facts and context of each case. Our penalty decisions will therefore focus the discussion of precedents to cases we consider particularly relevant, if any.
- 1.8 If, in making our assessment in any particular case, we consider that the level of penalties set in previous cases is not sufficient effectively to enforce against the regulatory contravention concerned, and to deter future breaches, Ofcom may set higher penalties under these revised guidelines. Regulated bodies with a large turnover, for example, may be subject to higher penalties in order for a deterrent effect to be achieved. These revised guidelines provide Ofcom with the flexibility to impose higher penalties in appropriate cases and penalties Ofcom has previously imposed should not be seen as placing upper thresholds on the amounts of penalties we may impose.
- 1.9 This is not to say there is a direct linear relationship between the size and turnover of the regulated body and the level of the penalty. While a body with a larger turnover might face a larger penalty in absolute terms, a body with a smaller turnover may be subject to a penalty which is larger as a proportion of its turnover, for example. We will impose the penalty which is appropriate and proportionate, taking into account all the circumstances of the case in the round together with the objective of deterrence.
- 1.10 Amongst the other relevant considerations we may take into account, Ofcom may consider the degree of harm caused by the contravention and/or any gain made by the regulated body as a result of the contravention. We may seek to quantify those amounts in appropriate cases. However, Ofcom will not necessarily do so in all cases and, even where it does, the calculation does not determine or limit the level of the penalty, which, as explained above, is to ensure that the management of the regulated body is incentivised to modify the behaviour of that body (and deter other regulated bodies accordingly). Any quantified harm/gain is only one of the factors in determining the appropriate and proportionate level of the penalty.

### **How Ofcom will determine the amount of a penalty**

- 1.11 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, having regard to the seriousness of the infringement. Ofcom will have regard to the size and turnover of the regulated body when considering the deterrent effect of any penalty.
- 1.12 The factors taken into account in each case will vary, depending on what is relevant. Some examples of potentially relevant factors are:
- The seriousness and duration of the contravention;

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- The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;
  - Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention;
  - 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 deliberately 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;
  - 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); and
  - The extent to which the regulated body in breach has cooperated with our investigation.
- 1.13 When considering the degree of harm caused by the contravention and/or any gain made by the regulated body as a result of the contravention Ofcom may seek to quantify those amounts in appropriate cases but will not necessarily do so in all cases.
- 1.14 Ofcom will have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case. We will not, however, regard the amounts of previously imposed penalties as placing upper thresholds on the amount of any penalty.
- 1.15 Ofcom will have regard to any representations made to us by the regulated body in breach.
- 1.16 Ofcom will ensure that the overall amount of the penalty is appropriate and proportionate to the contravention in respect of which it is imposed, taking into account the size and turnover of the regulated body.
- 1.17 Ofcom will ensure that the overall amount does not exceed the maximum penalty for the particular type of contravention.
- 1.18 Ofcom will have regard to the need for transparency in applying these guidelines, particularly as regards the weighting of the factors considered.

## Discount for settlement in a regulatory case

- 1.19 As set out in our *Enforcement Guidelines for regulatory investigations*<sup>1</sup>, and in our *Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences*<sup>2</sup>, Ofcom may consider that it is appropriate to settle a regulatory investigation

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<sup>1</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf)

<sup>2</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0017/102518/Procedures-for-investigating-breaches-of-competition-related-conditions-in-Broadcasting-Act-licences.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0017/102518/Procedures-for-investigating-breaches-of-competition-related-conditions-in-Broadcasting-Act-licences.pdf)

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falling within the scope of those Guidelines and Procedures.<sup>3</sup> Settlement is a voluntary process in which the regulated body admits it has breached relevant regulatory requirements and accepts that the remainder of the investigation will follow a streamlined administrative procedure. In successful settlement cases, Ofcom will apply a discount to the level of the penalty in light of the resource savings involved in following a streamlined administrative procedure.

- 1.20 Our aim will be to conclude the settlement process as swiftly as possible. In line with this aim, the earlier the settlement, the greater the discount available, as the resource savings that Ofcom could achieve would be greater.
- 1.21 The settlement discount is a separate matter, intended to reflect resource savings achieved by Ofcom as a result of the settlement process, and is applied after other mitigating factors have already been taken into account in determining the appropriate level of the penalty.
- 1.22 The discount will be considered on a case-by-case basis. We normally expect this discount to be:
- up to 30% where a successful settlement process is commenced before the provisional breach notification is issued;
  - up to 20% where a successful settlement process is commenced after the provisional breach notification is issued but prior to written representations being received; or
  - up to 10% where a successful settlement process is commenced after the provisional breach notification is issued and after written representations are received.
- 1.23 Where we are concerned that the process is not progressing as swiftly as possible due to delays or inefficiencies caused by the regulated body or that it is not showing its full co-operation with the settlement process, Ofcom may reduce the available discount on account of the time taken and resources used. We will give the regulated body notice that we are minded to do so at that point.

## Revision of the statement of policy

- 1.24 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.
- 1.25 This statement will be reviewed in the light of experience in applying it over time.

## Definitions and interpretation

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

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<sup>3</sup> This excludes investigations into potential breaches of consumer protection legislation, which are covered separately in the Enforcement Guidelines for regulatory investigations.