



## **Response of British Sky Broadcasting ('Sky') to Ofcom's consultation "Revising the penalty guidelines"**

### **The existing guidelines should be retained with modifications**

1. Ofcom is proposing changes to the current penalty guidelines as Ofcom's experience in applying them *"suggests"* that they *"may be unnecessarily complex and inflexible"* and *"may not make deterrence central enough in setting the level of penalties"*.
2. When compared to the existing penalty guidelines,<sup>1</sup> nothing in the revised guidelines appears to deal with the potential concerns raised by Ofcom. Deterrence is already a relevant factor in Ofcom's consideration of the appropriate level of penalty. The existing guidelines state that Ofcom will consider *"the need to ensure that the threat of penalties will act as a sufficient incentive to comply"* when determining the starting figure of any penalty. Ofcom has, therefore, failed to explain how the current guidelines are inadequate, and therefore why changes are necessary.
3. Similarly, Ofcom has failed to demonstrate that the existing guidelines are *"unnecessarily complex and inflexible"*. Stakeholders might reasonably expect that Ofcom would have provided examples of situations where it had felt constrained by the guidelines in setting an appropriate financial penalty, or where a particular (e.g. deterrent) outcome had not been achieved as a direct result of the current penalty guidelines. Ofcom has provided no such examples.
4. The processes proposed appear to have a similar number of steps as the procedure currently followed by Ofcom. Ofcom's proposed approach appears to be: (1) arrive at a level of penalty taking all relevant circumstances into account except for the level of cooperation, (2) increase it for "non-cooperation" (which is not defined or explained), and (3) ensure that the statutory maximum has not been reached. This compares with the current guidelines which envisage (1) arriving at a starting figure; (2) considering factors tending to lead to an increase in the level of any penalty; (3) considering factors tending to decrease the level of any penalty; and (4) arriving at a final amount of penalty, taking all other matters into consideration, including ensuring that the statutory maximum has not been reached.
5. The key difference would appear to be a reduction in transparency and accountability in setting the level of penalty. It is not clear how the proposals *"would be simpler and clearer than the current guidelines"* or how a reduction in *"the number of discretionary calculations to be made before coming to the final figure"* would be beneficial. It appears that Ofcom now proposes a discretionary calculation taking into consideration the same (discretionary) factors as it currently does under the existing guidelines.
6. Although it is not clear whether Ofcom discloses to the relevant party the calculations made under the current guidelines, the discipline of making separate calculations (and their disclosure) must be beneficial in ensuring that the final outcome is *"transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed"*,<sup>2</sup> as required under Ofcom's statutory duties. Those benefits would be lost as a result of the current proposals.

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<sup>1</sup> <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.

<sup>2</sup> Section 3(3) Communications Act 2003.

7. Accordingly, Sky considers that the present guidelines should be retained, but additional guidance provided on what constitutes “*non-cooperation*” and for this to be added to the explicit factors tending to lead to an increase in the level of penalty.
8. Only by following the steps outlined in the existing guidelines can stakeholders have any confidence in such penalties being proportionate. This would also be consistent with best regulatory practice, which Ofcom is obliged to follow under section 3 of the Communications Act 2003.<sup>3</sup>
9. Ofcom also suggests including helpful guidelines for “*some stakeholders whose circumstances are unusual*”. Ofcom has included, as an annex to the draft Penalty Guidelines, guidance for situations where programming has been centrally complied on behalf of the regional Channel 3 licensee. It would seem inappropriate to include such specific guidance/advice in guidelines. Specific advice to specific licensees would be better presented as separate policy papers published on Ofcom’s website rather than attached to “general” penalty guidelines, applicable in a variety of circumstances.

#### **Further comments of draft Penalty Guidelines**

10. In relation to the factors listed in paragraph 4, in relation to a regulated body’s history of contraventions, such contraventions must be relevant to the contravention under consideration.
11. New paragraph 7 states that “*Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with [Ofcom’s] investigation*”. It is not clear why non-cooperation is not simply a factor taken into account under paragraph 4 (as it is in the existing guidelines). As noted above, Ofcom should give an indication of what might constitute non-cooperation for these purposes, e.g. not responding to requests for information, non-attendance at meetings, etc. Non-cooperation should not include the exercise of legitimate rights of defence including exhaustion of any and all legal and administrative appeals.
12. Notwithstanding Sky’s views on the retention of the existing guidelines, should Ofcom persist in adopting the “Draft penalty guidelines” in section 2, Ofcom should also consider a statement as to the level of detail it will publish as part of its penalty decisions. Clear statements of the factors taken into consideration in setting the level of fines in cases (subject to appropriate treatment of confidential information) would be of greater benefit to stakeholders than the proposed revised penalty guidelines.

**Sky**

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<sup>3</sup> For example, see the penalties principles and characteristics identified in [“Regulatory Justice: Making Sanctions Effective, Final Report”](#) dated November 2006 by Professor Richard B. Macrory, which include recommend that regulators “enforce in a transparent manner” and “be transparent in the way in which they apply and determine administrative penalties”.