



Penalty guidelines

s.392 Communications Act 2003

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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, having regard to the seriousness of the infringement.
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 will consider some of these factors where programming has been compiled on behalf of the ITV Network by a compliance licensee.

6. 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.
7. Ofcom will have regard to the need for transparency in applying these guidelines, particularly as regards the weighting of the factors considered.
8. Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with our investigation.
9. Ofcom will ensure that the overall amount does not exceed the maximum penalty for the particular type of contravention.
10. Ofcom will have regard to any representations made to us by the regulated body in breach.

Revision of the statement of policy

11. 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.
12. This statement will be reviewed in the light of experience in applying it over time.

Definitions and interpretation

13. 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

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

Background

- A1.1 A regional Channel 3 licensee that 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 regional 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 complied on their behalf by third parties.
- 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*¹ (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.

¹ See http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/complaints-sanctions/complaints_sanctions.pdf

A1.6 We do not expect each of the licensees to duplicate the functions of the compliance licensee. When considering whether and to what extent a licensee other than the compliance licensee might itself be at fault for broadcasting programming in breach of its licence, we would consider the extent to which it was reasonable for that licensee to 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. We would therefore expect licensees to be able to demonstrate that they had implemented a risk-assessment system for identifying potential compliance risks in forthcoming network programming. Such a system could either be developed individually by each licensee or in conjunction with and for use by other licensees, including the compliance licensee. We would expect such a system to be risk based and derived from available information, such as programme synopses or information from the compliance licensee. For example:

- 1.7.1 High: programmes with significant compliance risks either because of the nature of the material or because serious breaches had occurred in the past. These might include programming involving the use of premium-rate services via competitions or voting or content that carries a significant potential risk of harming children (including sexually explicit or very violent content).
- 1.7.2 Medium: programmes with a higher than normal likelihood of provoking compliance issues. This might include live programming or material relating to significant public controversy.
- 1.7.3 Low: programmes that are unlikely to generate compliance issues.

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 We would expect a non-compliance licensee to be able to show that it is in a position to take appropriate action when necessary. The means by which it could demonstrate this might, for example, include appointing a member of its senior executive team with responsibility for keeping abreast of compliance issues, implementing an appropriate system for identifying compliance risks in network programming and liaising on a regular basis with similar senior executives from the other regional Channel 3 licensees to discuss compliance concerns and ways of mitigating risk in network programming.
- A1.12 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.
- A1.13 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. Examples we would expect to take into account might include:
 - i. 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;

- ii. evidence of periodic audits of compliance processes followed by compliance licensees;
- iii. evidence of spot checks on programming identified as being a higher risk;
- iv. demonstrable evidence showing the allocation of adequate resources to compliance; and
- v. evidence that licensees had taken account in their compliance practices of findings reported in our Broadcast Bulletin.

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

A1.14 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.