



# Penalty guidelines

Statement

This is the non-confidential version. Confidential information has been redacted. Redactions are indicated by [ ✕ ].

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# 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 former guidelines dated from December 2003<sup>1</sup>. Experience of applying them across Ofcom suggested 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 therefore consulted on revising the guidelines in December 2010.

## 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.
- 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.
- 1.7 Since we consulted, the revised EC Framework has been implemented. Amongst other things, this requires that penalties must be effective, proportionate and dissuasive. Ofcom considers that these principles were in any event embodied in the guidelines on which we consulted.

## Consultation responses

- 1.8 We received non-confidential responses from BT, Talk Talk, Virgin Media, Channel and Sky, and confidential ones from [X]. We also consulted the Secretary of State, who confirmed he had no comments to make on our proposals.
- 1.9 The responses were split evenly in favour of retaining the existing guidelines and changing them. Several of those in favour of changing them had comments on the way we proposed to change them.

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

*Deterrence*

- 1.10 A majority of respondents agreed with Ofcom that deterrence should be the central objective in imposing a penalty or had no objections to that approach.
- 1.11 One respondent felt that deterrence should be a “subset” of the broader objective that penalties should reflect the seriousness of the infringement. We do not consider that deterrence is a subset of that objective.
- 1.12 Another respondent did not consider that Ofcom had adequately explained why the existing guidelines do not address the need for deterrence. While deterrence has been a factor in determining a penalty under the former guidelines, the revised guidelines refocus Ofcom’s approach, making deterrence more central.

*Transparency*

- 1.13 A key concern expressed by respondents to Ofcom’s proposed guidelines was that the “step by step” approach in the existing guidelines to calculating a penalty increases transparency. A number of respondents did not consider that the existing guidelines are complex and considered that changes to them would increase uncertainty for stakeholders.
- 1.14 As we set out in the consultation, the existing guidelines required that an initial starting point (based on seriousness, precedent, and deterrence) was then adjusted upwards and downwards according to a set of factors most of which arguably overlapped with seriousness and deterrence. On its face, this is a complicated approach to calculating a penalty.
- 1.15 The step in the calculation at which a given factor would be taken into account was not specified and neither was either the initial amount or the scale of possible adjustments. In the circumstances, we do not consider that the “step by step” approach is intrinsically any more transparent than an “in the round” approach.
- 1.16 We do, however, recognise that adjusting our approach should not lead to a reduction in the transparency of Ofcom’s decision-making. We have added to the guidelines an express statement that Ofcom will have regard to the need for transparency in applying these guidelines, particularly as regards the weighting of the factors considered. In calculating a penalty, Ofcom will remain subject to our general duties, to EC law and to administrative law, including our duty to have regard to the principle that regulatory activities should be transparent and accountable.

*Seriousness*

- 1.17 One respondent considered that “seriousness” should continue to be expressly cited as a factor in calculating the amount of the penalty. As set out above, many of the specific factors we set out for consideration are aspects of the “seriousness” of an infringement and seriousness is itself an aspect of proportionality. However, we have added some text making it clear that in setting the overall amount of a penalty, we will have regard to the seriousness of the infringement.

*Factors taken into account*

- 1.18 One respondent wanted “genuine uncertainty” as to whether conduct amounted to an infringement to be a factor. We have not taken this suggestion, as it is for

stakeholders to ensure they comply with their regulatory obligations and in cases of doubt they should take appropriate advice.

- 1.19 One respondent wanted it to be made clear that the exercise of a party's legitimate rights of defence did not amount to non-cooperation. We consider this to be uncontroversial and to require no changes to the text. The same respondent wanted examples of "non-cooperation" to be added to the text, and suggested non-attendance at meetings and not responding to information requests. We did not consider that the addition of such text would be likely to be of much help, since it does not appear to us that stakeholders are likely to be in much doubt about what kinds of behaviour are generally uncooperative.
- 1.20 One respondent argued that a "history of contraventions" should be a "history of contraventions relevant to the contravention under question". Most powers we have to impose penalties arise in a regulated sector – for example, broadcasters operate subject to the conditions in their licences; telecommunications operators are subject to the general conditions of authorisation. A history of breach of these conditions may be relevant in assessing a penalty even where it involves the breach of a different condition, for example if it is indicative of a regulated entity's general approach to compliance.

#### *Annex*

- 1.21 As part of our consultation, we proposed an annex to the revised penalty guidelines which would cover the particular factual situation relating to programming centrally complied on behalf of the regional Channel 3 licensees. Among other things, this outlined a number of factors that we would take into account when considering whether to set penalties for regional licensees other than the compliance licensee. We sought to provide as much guidance as possible, while ensuring that we did not fetter our discretion with respect to considering future cases.
- 1.22 We received several consultation responses seeking further clarification. Having considered these, we have made a number of amendments to the proposed annex, seeking to provide more detailed guidance where appropriate. We would note in particular that one of the points made was to suggest that we place a small cap on sanctions for non-compliance licensees. We do not consider this appropriate, as we need to consider the appropriate penalty on the facts of the case and it could also act as a disincentive to non-compliance licensees to ensure that the material they broadcast does not cause harm or offence. We also had a consultation comment that compliance should be required to be carried out by third parties. We do not consider that it is appropriate for Ofcom to state that an independent third party must carry out any checks the non-compliance licensee requires, as that is for the licensees themselves to decide.
- 1.23 We have taken account of [redacted]'s concern about the term 'centrally complied' and accordingly made small amendments to the text.

### **Ofcom's decision on the penalty guidelines**

- 1.24 Ofcom has decided to adopt new Penalty Guidelines, dated 13 June 2011 at: <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>
- 1.25 The changes are not likely to represent a major change in the activities we carry on or have a significant impact on persons carrying on business or on the general public

in the UK. The changes are intended to make the application of the guidelines more effective.