BT Response to Ofcom's Consultation – Revising the Penalties Guidelines

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Executive Summary

- BT supports Ofcom's goal of ensuring that deterrence is a central objective of the penalty guidelines.

- However, we disagree with Ofcom's proposal to discard its current approach (focusing on seriousness, precedent and deterrence as a starting point and then adjusting by reference to other specific factors), for a new approach that looks at the facts of the case in the round but places deterrence at the centre of the calculation.

- We do not believe that Ofcom's new approach will provide the level of certainty that industry requires for penalties to have the maximum deterrent effect. We also disagree with Ofcom's conclusions that the current approach is unnecessarily complicated and fails to put deterrence at the heart of the process.

- In our view, penalties will have the greatest deterrent value if parties clearly understand the factors that will influence Ofcom's penalty decisions, in order that they can adjust their behaviour accordingly.

- We, therefore, recommend that Ofcom retains its current approach of establishing a starting point for penalties based on seriousness, precedent and deterrence, and then adjusting up or down based on a clearly defined set of factors.

- We believe that only this approach provides a sufficient level of transparency and fairness, and absent such transparency Ofcom runs the risk having its penalty decisions successfully challenged on appeal.

- Moreover, Ofcom's proposals risk introducing some inconsistency across UK utility regulation, as the penalty regimes of Ofwat, Ofgem and the Office of Rail Regulation more closely reflect Ofcom's current regime, with deterrence used as one of a number of factors in fining decisions.

1. Introduction

It would be a sign of success if a regulator could leave its penalties guidelines to gather dust on the shelf because those who are regulated want to comply with the regime, proactively work to secure compliance and succeed in meeting high compliance standards. The desire to comply should, we believe, come from both an understanding of the commercial benefits of doing so, and an awareness of the significant consequences that will follow if the required compliance standards are not met – standards which are most usually required in the interests of end-users, to foster competition within the UK, or to enable promotion of the UK telecoms market as a good place to do business to overseas investors.

To underpin such cultures of compliance, the penalties regime must be able to deal promptly with wilful non-compliance or breaches which were occasioned by a desire to thwart the safeguards inherent in the regulatory regime in order to secure personal gain. Individuals or companies which are minded to indulge in such behaviour must be made aware that the regulator's enforcement powers are sufficiently broad as to enable it to impose penalties which exceed the gains to be made from non-compliance. At the same time, the penalties regime must be sufficiently adaptable to

enable fair and appropriate sanctions to be imposed to address less intentional non compliance situations which may arise in even the best run organisations.

Communications Providers who put compliance at the heart of their business should have nothing to fear from robust, but fair, penalties guidelines and processes. Indeed, experience having shown that customer dissatisfaction caused by non-compliant behaviour can taint the reputations not only of the transgressor, but also the reputations of the more reputable industry players, they should welcome the prospect that those who could potentially give the industry a bad name will be on the receiving end of a robust deterrence based regime if they do behave inappropriately.

Against that backdrop, we support the Ofcom goal of ensuring that wilful non-compliance be rooted out and sanctioned with suitably deterrent penalties. We also welcome any streamlining of processes that reduces administrative costs, and if it be the case that by producing new guidelines Ofcom believes that the risk of appeals will be reduced, that too must be a worthy end.

With those ends in mind, this response comments on the issues that we have identified in the current draft guidelines. It should be read as our answer to the one question in the consultation document – "*Do you have any comments on the proposed draft penalty guidelines in Section 2?*".

In the sections which follow, we suggest, that whilst we support the objectives as set out above, the draft guidelines now produced fall short of being capable of hitting those worthy targets. Indeed, we believe that the attempts at streamlining may in the long run increase the risk of appeals, and hence the very real possibility that total costs will increase rather than decrease and that they will not provide the certainty that industries requires if the penalties Ofcom imposes are to have a deterrent value.

We believe that there is scope to develop guidelines which do achieve the desired objectives and we stand willing to work with Ofcom and with industry to develop such guidelines. The starting point should we suggest be a model which is closer to that which currently exists, rather than the approach currently being advocated in the draft guidelines which are the subject of this consultation. In the sections which follow, we identify why we believe that is, in the long run, in the interests of Ofcom, of industry and of end-users.

Finally, please note that our comments are confined to the proposals contained in Section 2 of the Consultation document. We make no comment in relation to the further provisions, in Annex 1, which relate only to Channel 3 licensees.

2. Achieving deterrence in a proportionate way.

Our introductory comments make it clear that we see prevention as being better than cure. To that end, we recognise that dissuasive sanctions are a key part of the regulatory matrix necessary to secure this. And in considering whether, and if so how, the current penalties guidelines require updating, we bear in mind that Ofcom must have regard to the requirements of the new Article 21a of the Framework Directive which we set out below.

We note, however, that Ofcom states that its rationale for change is that its approach to setting penalties under its current penalty guidelines "*is unnecessarily complicated and does not put deterrence at the heart of the process*".

Whilst as indicated above, we believe that deterrent penalties do have a valuable part to play in ensuring the regulatory regime runs optimally, we have regard to the fact that the requirements of

Article 21a are that "*the penalties provided for must be appropriate, effective, proportionate and dissuasive*".

In other words, there is clearly a balancing exercise to be undertaken – one where dissuasiveness must be balanced with proportionality. The penalty must both be dissuasive whilst at the same time "fitting the crime". That means that deterrence cannot simply be achieved in the way that was explained to Candide at the execution of Admiral Byng:

> "*Dans ce pays-ci, il est bon de tuer un amiral de temps en temps pour encourager les autres*."

Such crude mechanisms still exist today in the criminal courts. We know that where there are good social or policy reasons to want to stamp down on particular types of behaviour[1], in addition to revising sentencing guidelines, judges can occasionally impose sentences of such severity that they make tabloid press headlines – but which are quietly corrected on appeal to a more proportionate level.

This is not, however, an approach which is appropriate in as sophisticated an arena as communications regulation. Communications providers are commercial entities who should know the rules, understand the offences and be able to anticipate what the sanctions for non-compliance will be. But they will watch not just to see what fines Ofcom imposes, but what the final outcomes are after appeals, if necessary. They know that a fine that was clearly disproportionate but which had been imposed simply "pour encourager les autres" would be appealed and hence that of itself it would have little or no dissuasive value.

It follows that a simple threat that a company might be fined a very large sum – up to 10% of turnover – is of itself going to have very little deterrent value. There is far more deterrent value to be had by articulating the relevant factors influencing a particular penalties decision in ways that can be understood by others who might be at risk of failing to comply with a similar requirement.

In short, a fine which is set simply by fixing the amount by "*hav[ing] regard in the round to any factors (including those in the existing guidelines) that are relevant to the facts of the case*" will have far less of a deterrent value than a fine that is imposed in a way which allows those who follow the case to see, for example:

- How serious the offence was
- How much it mattered whether it was a first or second offence
- Whether the approach taken by management made the offence better or worse
- How much personal gain, or loss to others, influenced the decision.

This being the case, we strongly invite Ofcom to reconsider the approach currently proposed and to continue with the sort of approach that currently exists, where the seriousness of the breach is assessed, and a starting point for the fine is determined, but which then takes into account aggravating factors and mitigating factors. Other CPs can then observe and learn the rationale of Ofcom's decisions and take action accordingly.

3. Minimising the risk of penalties decisions being challenged

Moving from the current regime, of identifying the seriousness of the offence and then identifying aggravating and mitigating factors, to a regime where, in effect, all relevant factors in the round

[1] The recent phenomenon of "happy slapping" strangers being a recent example of this.

risks, in our view, a loss of accountability – transparency of decision making. In March 2004 the House of Lords Select Committee commented on accountability as follows[2]:

> "*The elements of accountability can be summarised as:*
>
> - *the duty to explain*
> - *exposure to scrutiny, and*
> - *the possibility of independent review.*
>
> *All three have to be effective if there is to be due accountability of regulators overall, and for the regulators to be challenged where appropriate and held answerable for their actions.*"

It added

> "*The first element of the accountability process relates to the obligation on the regulator to provide information on its activities and, in particular, to explain the basis of decisions. This includes not only the decision itself, but also the thinking used to lead up to the decision, and the thinking as to why the particular decision (or regulatory instrument) was chosen, as compared with other alternatives available*."

We suggest that the approach suggested in Ofcom's consultation document could well lead to communications providers who are fined arguing that Ofcom has failed in its duty to explain, that it has not been properly accountable, and hence that its decision should be scrutinised by independent review (i.e. appeal – with all the costs and resource implications associated with that).

By the same token, we suggest that increasing transparency of the method used to set fines would help provide clarity on the adequacy of a penalty applied to a specific case and the rationale for it, hence reducing the risk of Ofcom's decisions being over-ruled on appeal.

4. Establishing precedents – the need to do so, and the benefits of doing so

Whilst decisions taken "in the round" risk a lack of accountability (and hence being appealled), reasoned decisions which show how serious the breach is in its own right, what has aggravated the breach and what has mitigated it, stand a much better chance of being a useful precedent. With time, this sort of approach could allow a body of precedent to build up. It would also minimise the risk for Ofcom of a challenge to one of its penalties decisions on the grounds of arbitrariness and/or discrimination if there two breaches of the same provision, each considered "in the round" and which resulted in two very different penalties – or two very different breaches which resulted in the same penalties.

There is a need to develop a body of precedents because the range of regulatory obligations which can be breached is immense. By way of example, it covers behaviour that is concerned with the development of competition, such as supply and non-discrimination obligations (which as indicated above overlap with competition law). It also includes obligations such as price controls that are designed to mimic competition in areas where competition does not exist.

It includes obligations that are clearly concerned with individual consumer protection, such as accuracy of billing and silent calls. And it includes obligations for the benefit of society as a whole,

[2] http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/68/6806.htm

such as universal service, to secure social inclusion, and ensuring that critical network infrastructure is maintained to the best possible standards.

With such a broad range of obligations covered by the one enforcement and penalties regime, it follows that some breaches are likely, of themselves, to be viewed very differently from others. Failure of a significant proportion of critical network infrastructure in a particular area[3] could be expected to be more serious than a few isolated instances of silent calling to consumers. But what if the network failure was due to an unfortunate series of events, some reasonably foreseeable, but others less so? And what if the silent calls kept happening again and again, in large volumes, with little sign of management commitment to prevent them? And how do those compare with the seriousness of a breach of cost orientation obligations that may impact on who wins contracts in a prospectively competitive market.

To determine penalties for all of these[4], in the round, without articulating how serious the offence was of itself, how far there were aggravating factors, or to what extent the transgressor had mitigated the situation will not, we suggest, aid transparency, consistency of approach, or dissuasiveness. Reasoned arguments that do articulate Ofcom's thinking, which follow a sequential approach much closer to that which applies to competition law (as described below), will be of far greater value to industry, and have a far greater chance of being considered to be fair.

5. Securing accountability and consistency with Competition Law

Ofcom enjoys jurisdiction as a competition authority under the Competition Act 1998 as well as its responsibilities as a sectoral regulator. It polices both competition law and regulation. At the ends of the spectrum, the obligations being policed under the two regimes may be very different, and have different objectives. But there is undoubtedly a significant degree of overlap in the centre.

Behaviour such as discrimination, unreasonable refusal to supply, and possibly some pricing practices can be policed under either regime. And the potential consequences for non-compliance with each will, for all working purposes, be the same for both once the revised EU Directives are implemented in May 2011.

If the current proposal is adopted by Ofcom it means that Ofcom could be faced with a situation where it had to decide whether to take action in relation to, say, undue discrimination, under the Competition Act 1998 or the Communications Act 2003.

If it chooses the former (the Competition Act 1998), it would, if abuse was found, be required to set a financial penalty by reference to the "OFT's Guidance as to the appropriate amount of a penalty". This guidance requires, put shortly, that Ofcom follow a five step approach:

- Calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking
- Adjustment for duration
- Adjustment for other factors
- Adjustment for further aggravating or mitigating factors, and
- Adjustment if the maximum penalty of 10% of the worldwide turnover of the undertaking is exceeded and to avoid double jeopardy.

[3] Consider by way of comparison, the consequences of the failure of the water network in Northern Ireland in December 2010.

[4] We note also, by way of comparison, that the OFT has separate regimes for consumer protection enforcement and competition enforcement – it does not lump them all together and treat them identically.

If it chooses the latter (the Communications Act 2003), it would just take the range of listed factors into account in the round and then just look at whether there was non-cooperation in the investigation.

We suggest that it is inequitable and inappropriate that Ofcom should be able to free itself of (or side-step) the transparency and fairness principles set out in the OFT guidance, just by choosing to use regulatory powers rather than competition law to police these types of behaviour.

We believe that in these circumstances, and in the absence of a reasoning as to the factors taken into account in reaching the decision, any significant variance from the sort of outcome that could have been expected to have been imposed as a result of application of competition law principles would be likely to lead to an appeal, with associated increased costs.

6. Securing consistency with other sectoral regulators.

We have not undertaken a full analysis of the processes used by other sectoral regulators to set penalties. However, it is clear that they take an approach that is along similar lines to that which has hitherto been used by Ofcom (see Annex 1). That is, deterrence is one of a number of factors that they consider in calculating and setting the penalty.

We set out, in Annex 2, examples of the ways in which other sectoral regulators have approached the setting of fines in cases that have come before them. Whilst we have only shown here one example from each of the water, electricity, gas, mail and rail industries, it nonetheless clearly demonstrates how far out of kilter Ofcom's current proposal is with other regulators. For this reason. again, we invite Ofcom to reconsider its proposal.

7. Avoiding the chilling of innovation and the dampening of competition.

The UK communications industry is characterised by innovation, growth of competition from the retail level to the deepest levels of the network and consumers who are offered some of the widest range of offerings at some of the world's best prices.

We believe that there is a marked risk that a lack of transparency of how Ofcom will approach the setting of penalties for breaches, and an inability to learn from Ofcom's decisions on fines what factors matter and which do not, will mean that communications providers operating in novel areas will be forced to "err on the side of caution" in the commercial decisions they make, because they are unclear just how seriously any inadvertent transgression may be viewed – and because they will not know how best to mitigate the risks they are taking.

Similarly, by way of example, when it comes to securing the availability of particular services or, even just securing that legacy networks are maintained, a communications provider may need to make significant commercial investment decisions in relation to "end of life" products. When doing so, that communications provider should not have to fear that the decades of investment it has made and the profits it has sought to secure in the latter stages of the product's life will be wiped out by decisions which interfere with, and sanction, end of life decisions that the communications provider considered were a reasonable balance between its own interests, and the interests of the last few customers for that service.

If this happens, it will potentially disbenefit both end-users and lead to a dampening of competition. Again, we believe that the answer lies in the articulation of Ofcom's thinking on how it has

determined a penalty in a particular case so as to provide industry with a reasonable degree of certainty. This also hence suggests that the approach being proposed now would, when seen in the context of the "bigger picture" of regulatory objectives, be sub-optimal.

ANNEX 1

Ofwat

Ofwat has produced a statement of policy with respect to financial penalties (effective as of 1 November 2010). The statement of policy was the result of a consultation in 2009. It revises the previous statement of policy published in March 2005. Ofwat's decisions on appropriate sanctions are informed by the Macrory penalties principles[5]:

- a sanction should aim to change the behaviour of the offender
- a sanction should aim to eliminate any financial gain from non-compliance
- a sanction should be responsive and consider what is appropriate for the offender and regulatory issue
- a sanction should be proportionate to the nature of the offence and harm caused
- a sanction should aim to restore the harm caused by regulatory non-compliance
- a sanction should aim to deter future non-compliance.

(i.e. deterrence is the first and last of these principles, but only two out of six)

Macrory also advocates a transparent penalties policy, stating that Regulators should be transparent in the way that they apply and determine administrative penalties. Macrory provides a balanced approach with a range of criteria as a benchmark for a fining policy which is not focused solely on punishment. It could be argued that Ofcom's proposed penalties guidance with its central objective of deterrence and lack of transparency does in fact depart from the Macrory principles.

When considering the broad level of the penalty Ofwat will take into account:

- the seriousness and duration of the infringements
- the degree of harm to consumers
- deterrence
- any gains made by the licensee
- damage to competitors
- damage to the environment
- whether the breach was of a trivial nature
- whether the breach or possibility of breach would have been apparent to a diligent licensee
- precedents set for equivalent breaches.

Once the broad level of the penalty has been considered Ofwat will then look at aggravating and mitigating factors:

- repeated violations
- continuation of breach
- involvement of senior management
- level of cooperation with investigation
- attempts to conceal the breach
- proactive reporting of breach to the authority
- taking appropriate action to rectify breach
- activities to provide restitution and compensation

[5] Macrory report – "Making sanctions effective" November 2006 available at http://www.bis.gov.uk/files/file44593.pdf

Having considered the broad level of penalty and appropriate additional factors, the enforcement authority will determine the appropriate level of penalty and will ensure that the statutory maximum is not exceeded.

Although there have been no enforcement notices since the revised guidelines have become effective, it is clear from Ofwat's decision-making practice that a very clear step-by-step calculation of the proposed penalty is carried out. See Notice of Ofwat's 17 August 2007 proposal to impose a penalty on United Utilities Water plc.

The decisions set out step-by-step analyses of: the starting point for the penalty calculation (9-10% of relevant turnover for serious contraventions, 0.5% for minor), duration, seriousness, degree of harm, precedent, decision-making precedent for similar breaches, any uplift for aggravating factors, and downward adjustment for mitigating factors.

Conclusion on Ofwat – Ofwat's penalty guidelines could partly be described as considerably more detailed and structured than Ofcom's proposed guidelines. Deterrence features in the guiding principles and in the calculation criteria, but to a measured degree. Moreover, they are recently adopted following a full consultation procedure.

Ofgem

Ofgem's policy in relation to penalties is set out in its "Statement of Policy with respect to financial penalties" October 2003. As was the case with Ofwat, although Ofgem's guidelines represent a broad statement of policy, Ofgem could be said to adopt a more structured approach than Ofcom when the approach is compared to Ofcom's proposed guidelines.

Ofgem's "General criteria" (i.e. as to whether it will impose a penalty at all) include a reference to deterrence. In full, Ofgem's factors "tending to make the imposition of a financial penalty more likely" are:

- the contravention or the failure has damaged the interests of consumers or other market participants
- to do so would be likely to create an incentive to compliance and deter future breaches

There are other general factors making a penalty "less likely".

The remainder of Ofgem's guidance relates to quantum. In determining the level of penalty Ofgem will look at:

- the seriousness of the breach
- degree of harm or increased cost incurred by customers or other market participants
- duration
- any gain to the licensee

Ofgem will then look at the aggravating/mitigating factors that might lead to an increase/decrease in that level of penalty:

Aggravating factors include:

- repeated breaches

- continuation of breach
- involvement of senior management
- absence of internal mechanisms to prevent breach
- extent of attempt to conceal breach

Mitigating factors include:

- steps taken to secure compliance (eg compliance policy, management supervision)
- whether the breach was accidental
- action taken to remedy the contravention
- reporting the breach
- cooperation with Ofgem's investigation

The final penalty must not exceed the statutory maximum.

The enforcement notices published by Ofgem do look at each of the factors in turn and provide a detailed rationale as to the Authority's decision under each relevant factor. See for example the proposal to impose a financial penalty on EDF and decision in relation to the Npower group. Unlike Ofwat, however, the step-by-step calculation of penalties is not revealed.

Conclusion on Ofgem – Ofgem's penalty guidelines are also more detailed and structured than Ofcom's proposed guidelines. Deterrence features as a main guiding principle but is not described as a central focus and is not a factor in quantum. It is notable, for instance, that Ofgem still has separate lists of aggravating and mitigating factors, unlike Ofcom's proposed general menu of criteria.

Office of Rail Regulation (ORR)

ORR's "Economic enforcement policy and penalties statement" (April 2009) demonstrates a detailed approach to fining policy, a marked difference from Ofcom's revised approach.

In determining whether a penalty is appropriate, ORR will take the six Macrory principles into account and the related five principles of good regulation: proportionality, targeting, consistency, transparency and accountability in its fining policy.

In calculating the amount of the penalty, ORR will ensure that:

a) the penalty imposed is proportionate to the seriousness of the breach

On pages 25 and 26 of the April 2009 statement, ORR sets out in detail the % of relevant turnover it will apply to ensure that the starting point of the fine reflects the seriousness of the breach. There are five level of seriousness of breach of licence: de minimis (no penalty) less serious (up to 0.04% of turnover), moderately serious (0.04-0.2%), serious (0.2% - 0.5%) and very serious (0.5% +).

In setting the penalty and considering seriousness, the ORR will also look at: actual and potential harm caused to third parties; and the culpability of the offender including whether the licence holder has acted negligently or recklessly, knowingly or intentionally.

b) adjustments for mitigating or aggravating factors

The ORR will consider:

- any steps which have been taken to rectify the breach
- any steps which have been taken to minimize the risk of the breach recurring (e.g. internal procedures)
- any actions which may have been taken to make worthwhile restoration to those who suffered the consequences of breach
- involvement of directors or senior management
- repeated or continuing infringements
- cooperation with the ORR's investigation.

c) financing duty

ORR will consider the penalty in light of it duty to act in a manner that does not make it unduly difficult for a network licence holder to finance its functions. ORR will consider it appropriate to impose a penalty sufficient to change future behaviour or incentivise compliance.

Conclusion on ORR – as with Ofgem and Ofwat, ORR's enforcement activity results in reasoned fining decisions. Like Ofwat's, it is recently adopted. Its penalty guidelines are more detailed and structured than OfCom's proposed guidelines, with deterrence as a guiding principle (but not as a factor in the quantum of a penalty).

Annex 1

ANNEX 2

Examples of the approach taken by other sectoral regulators to the setting of financial penalties

WATER

COMPANY	ISSUE	FACTORS DETERMINING ACTION		BASIS AND AMOUNT OF PENALTY
		AGGRAVATING	MITIGATING	
United Utilities Water ("UUW") 22.06.07	• non-compliance with transfer pricing (intra-group trading rules) of trading arrangements with associate companies • breach of licence condition whereby UUW was required to market test for services that it procures from companies within the UUW group	• damage caused to UUW customers - likely to pay higher prices than would otherwise be necessary • breaches were over a long period of time (between October 2005 and March 2007) due to a failure to follow internal compliance procedures • failure to heed recommendations from independent reports, commissioned by UUW, which indicated a disparity with market rates • repeated contravention - Ofwat had already adjusted UUW's price limits downwards in 1999 and 2004 because of intra-group trading • senior management were fully aware of the breach • possible damage to interests of other market participants	• UUW fully co-operated during Ofwat investigation • UUW offered an acceptable section 19 undertaking • UUW remedied the breach by amending a number of trading arrangements with associates onto an 'at cost' charging basis so as to reduce the scope for cross-subsidy	£8.5m - approx. 0.7% of turnover • Ofwat considered 0.8% of turnover to be the appropriate starting point "having regard to the penalties levied by other regulators and other relevant precedents" • after considering aggravating factors, Ofwat adjusted the penalty upwards by 0.2% which led the figure up to 1.0% of turnover • after considering mitigating factors, Ofwat adjusted the penalty downwards by 0.3% • Ofwat said that the penalty was a proportionate response and provides an incentive for water companies to comply with their licence conditions • size of penalty reflects the seriousness of the failure

ELECTRICITY

COMPANY	ISSUE	FACTORS DETERMINING ACTION		BASIS AND AMOUNT OF PENALTY
		AGGRAVATING	MITIGATING	
Yorkshire Electricity Distribution plc and Northern Electric Distribution Limited owned by CE Electric UK ("CE") 06.06.07	• Both licensees failed to comply with reporting obligations in 2004/5 and 2005/6 and part of 2006/7 which breached Condition 49 of electricity distribution licences • CE failed to record and report certain information regarding quality of service performance – including information relating to: a) customer interruptions (in supply of electricity to customers through the distribution network) b) customer minutes lost (duration of loss of supply to customers as a result of interruptions) and the quality of the licensee's telephone response to calls to its enquiry service	• CE re-categorised as "not-reportable" over 4,000 low voltage faults recorded in the fault reporting system on the basis that there was no outstanding paperwork relating to records, when this subsequently transpired was not the case • CE introduced an automated process to suppress uncompleted electronic fault records over one month old • CE did not have in place adequate processes and procedures to record pre-arranged outages and check the validity of manual suppressions at high voltage • CE had operating processes and procedures in place which meant that not all the relevant telephony data that should have been sent was sent to Ofgem's telephony agent • CE systematically classed "irate" customers as ex-directory so that they would not be sampled as part of the telephony survey undertaken on behalf of Ofgem • CE filtered out additional categories of customers before sending the customer lists to Ofgem's telephony agent • Following the investigation, Ofgem concluded that the significant portion of data was not provided	• CE took independent action to investigate and address the misreporting, including taking appropriate action with respect to the staff concerned • CE ended the breach by introducing new procedures, which provided greater management oversight • CE separated the service delivery from performance reporting • CE voluntarily reported the breach to Ofgem • CE fully co-operated with the investigation • CE took steps to ensure that customers were not disadvantaged as a result of the misreporting • CE accepted the recommendations of the investigation	No financial penalty was imposed Licence modifications were made instead which: • corrected the £5.5m that any misreporting would have yielded and • subjected both companies to a combined reduction of £2.1m (£0.9m for Northern Electric and £1.2m for Yorkshire Electric) from the revenues to which they would be entitled if they had reported correctly Ofgem stated that these modifications had the effect of a financial penalty The £2.1m net "penalty" equates to approx. 0.0045% of turnover for each company

GAS

COMPANY	ISSUE	FACTORS DETERMINING ACTION		BASIS AND AMOUNT OF PENALTY
		AGGRAVATING	MITIGATING	
Transco plc 19.05.04	• in April 2002 Ofgem received a number of complaints from a Utility Infrastructure Provider in relation to the connection services provided by Transco • Ofgem's investigation of these complaints indicated there was cause for concern and a need to investigate more widely in order to determine whether the problems were widespread • this constituted a breach of section 9(1)(a) of the Gas Act 1986	• Transco failed to report these breaches prior to the start of the investigation • Transco failed to provide connection services in an economical and efficient manner adversely affecting end customers and industry organisations • negative impact on the reputation of other market participants • competitors of Transco stated that they incurred additional administrative and operational costs and suffered reputational damage and may have lost future customers • even when Transco became aware of the investigation, it continued to perform poorly • senior management failed to manage effectively the way in which its connection service provider carried out its connection activities • senior management managed the business with the intention of deliberately contravening its obligations under the Act • Transco's audit and check compliance procedures failed to identify these breaches and thus prevent problems in Transco's performance	• Transco co-operated with the investigation • Transco contravened in relation only to Transco's connections business (which accounts for 6% of total revenue) • Transco made significant efforts to address the problems in its connections business. For example, it provided information regarding a new management team being introduced in early 2003. However, these initiatives had a limited effect on the short term and performance continued to deteriorate until the end of 2003 after which performance had improved • Transco attempted to remedy the situation and agreed on the need for a new licence condition • in some cases customers had already received financial compensation for failures in certain elements of the work investigated. In total approximately £2.6m in statutory compensation was paid by Transco between March and December 2003	£1m – approx. 0.00012% of turnover

MAIL

COMPANY	ISSUE	FACTORS DETERMINING ACTION		BASIS AND AMOUNT OF PENALTY
		AGGRAVATING	MITIGATING	
Royal Mail 18.12.03	• penalty for customer service failures relating to two of Royal Mail's services used by business customers: first class post paid impression (PPI) and first class response services, where Royal Mail's performance was around 6% below the agreed licensed targets for the year for both products	• there was no mechanism to directly compensate customers affected by the poor service • Royal Mail had early indications of the need to improve its performance from the figures it prepared under its licence and it had clear knowledge of the likelihood of breach from the time when notice of an enforcement order was first discussed with it. Royal Mail had time to take more effective remedial action than it managed to take • the failure to comply with its own specifications, which Royal Mail itself had considered reasonable and necessary, continued during the period of application of the final order	• Royal Mail, subsequent to the investigation, increased its audit resource and overhauled its audit procedure • Royal Mail took steps to illustrate the importance of quality of service to its staff in particular through its internal career magazine • Royal Mail made changes at senior management level in the personnel responsible for quality service	• £7.5m -0.00119% of turnover • Postcomm considered that the amount of the penalty should be increased by 25% (starting point of £9.48m increased to the proposed penalty to approximately £12m.) due to the aggravating factors • the penalty was subsequently reduced from £12m to £7.5m

RAIL

COMPANY	ISSUE	FACTORS DETERMINING ACTION		BASIS AND AMOUNT OF PENALTY
		AGGRAVATING	MITIGATING	
Network Rail 06.09.07	• ORR found that there were weaknesses in the planning and execution of the Portsmouth resignalling scheme, a breach of licence condition 7	• Network Rail failed to identify the risks effectively and to develop adequate mitigation measures to address the possibility of extended disruption to services and the potential effect on third parties • failed to manage the Project competently • ORR stated that the aggravating factors set out in the Penalties Statement (which are essentially the same factors as those contained in Ofwat's Penalties Statement) have contributed to the finding of the breach and/or the assessment of its seriousness and have therefore already been taken into account	• Network Rail installed temporary signalling at a cost of £6.3m to increase the number of services running from 3 per hour to 5 per hour • Network Rail confirmed that it is applying lessons of Portsmouth to future major signalling projects • Network Rail put in additional checks and balances in position to minimise the risk of similar problems occurring again	£2.4m - 0.000436% of turnover • The failures were said to have affected more than 3m passenger journeys and cost passengers in the region of £5-8m. This amount however was not used directly to assist ORR in calculating what penalty was appropriate to deter Network Rail from contravening its licence again – but rather assisted in assessing how serious the breach is and what might be appropriate for the level of penalty • financial penalty initially proposed was £6m. Taking all factors into account, ORR considered that, within the range of £2-10m would be appropriate for a "moderately serious" breach, and that a figure of £6m was proportionate • ORR considered the mitigating effects of the case and reduced the penalty by 60% to £2.4m