



Revising the penalty guidelines

Consultation

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Publication date: 30 July 2015

Closing Date for Responses: 24 September 2015

About this document

Ofcom is required by law to publish guidelines setting out how it proposes to determine the amount of the penalties which it imposes. Ofcom must have regard to these guidelines when setting the amount of any penalty, other than penalties for breaches of competition law.

Ofcom proposes to amend the guidelines, to clarify its approach to setting penalties. Ofcom wants to create a stronger deterrent effect to help reduce the continuing levels of complaints to Ofcom and contraventions of regulatory requirements.

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Section 1

Proposals to revise the penalty guidelines

Executive summary

- 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 1998.¹ Ofcom must have regard to the guidelines when determining the amount of a penalty.
- 1.2 Ofcom proposes to amend the guidelines, to clarify its approach to setting penalties. Ofcom wants to create a stronger deterrent effect to help reduce the continuing levels of complaints to Ofcom and contraventions of regulatory requirements. Ofcom considers that it may, therefore, be necessary in appropriate cases to set higher penalties on the relevant regulated bodies than in previous cases. Penalties set by precedent cases may be relevant to Ofcom's decisions, but are likely to become less relevant to future enforcement work over time, and what will be important will be the circumstances of each case, including the need to create a stronger deterrent effect.
- 1.3 Accordingly, Ofcom proposes to amend its approach, which will provide greater flexibility for there to be higher penalties where appropriate and proportionate, in order to create a stronger deterrent effect to reduce regulatory contraventions. We are therefore consulting on proposals to amend our penalty guidelines. The proposed draft of the guidelines can be found at Annex 4. We would normally consult for 4 to 6 weeks for a consultation of this nature, but in view of the holiday period, we are adding a further 2 weeks to the consultation period. The consultation closes on 24 September 2015. Subject to responses, Ofcom plans to issue a statement and publish the revised guidelines in the autumn.

Background

- 1.4 Ofcom has powers to impose penalties for regulatory contraventions across all areas in which it exercises functions, including telecoms, broadcasting (including on-demand programming), postal services and spectrum. The statutory maximum penalty we can impose differs from contravention to contravention. For example, it can be the higher of a fixed sum or a percentage of turnover of a business. For other contraventions, the maximum penalty is simply a fixed sum, such as £2 million.
- 1.5 Ofcom has discretion about the level of penalties which it imposes, within the limits set by statute and subject to requirements that penalties are appropriate and proportionate to the relevant breaches. Ofcom's penalty guidelines set out the approach we propose to follow in determining the amounts of penalties in each particular case, within these maximum limits. They apply across all the areas in which we exercise functions (apart from penalties set under the Competition Act 1998), so they need to be flexible enough to deal with all the various kinds of cases to which they may apply.

¹ For penalties for breaches of competition law, we, and similarly the sectoral regulators with concurrent competition law powers, apply the CMA's guidelines:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf.

- 1.6 Our current guidelines date from June 2011.² They set out that Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty, and that the central objective of imposing a penalty is to deter breaches of regulatory requirements. They describe a number of potentially relevant factors Ofcom may take into account in making our determination.
- 1.7 Ofcom's experience of applying the current guidelines suggests that the level of penalties imposed may not have created a sufficient deterrent effect to ensure effective compliance with relevant regulatory provisions by providers as a whole across a number of the sectors we regulate. Though it is less of a concern in respect of broadcasting regulation (in which our proposed change of approach is likely to have a more limited impact), Ofcom considers this strengthening of deterrent effect particularly necessary in respect of action we take in relation to consumer protection in the telecoms sector (as described below). A number of points appear to us to be relevant.
- 1.8 Enforcement action to protect consumers against wrongdoing by telecommunications providers and users of networks and services is a key area in which we apply the penalty guidelines, in particular, in taking action against contraventions of the General Conditions of Entitlement by providers and breaches of the provisions of the Communications Act 2003 which prohibit persistent misuse of electronic communications networks and services (for example, by making silent and abandoned calls).
- 1.9 Since June 2011, Ofcom has imposed penalties in seven cases for contraventions of the General Conditions, in addition to having three ongoing investigations, and seven open enforcement programmes (for issues ranging from billing to emergency call numbers). The penalties imposed ranged between £30,000 imposed on Axis Telecom Ltd and £3,037,120 imposed on TalkTalk Telecom Limited and Tiscali UK Limited. In five of the cases the penalty imposed was less than 1% of the relevant provider's relevant turnover, noting that the maximum penalty is 10%. We have also taken formal action in three cases where there was evidence of a breach of the relevant requirements but in which no financial penalty was imposed. In addition, we have taken informal action in a significant number of cases where there was evidence to suggest a breach of the relevant requirements but no formal notification or penalty was imposed, instead securing compliance through informal means.
- 1.10 In the same time period, Ofcom has taken formal action in nine cases of persistent misuse and imposed penalties in seven of those cases, as well as having one ongoing investigation. The penalties imposed ranged between £8,000 imposed on Sambora Communications Incorporated and £750,000 imposed on each of TalkTalk Telecom Limited and HomeServe PLC, as against a maximum that could have been imposed of £2 million. In five of the cases the penalty was less than 1% of the relevant body's turnover. We have also taken informal action in over 180 cases where there was evidence to suggest a breach of the relevant requirements.
- 1.11 As a proportion of the relevant providers' turnovers, the penalties imposed are at a low level. That raises a legitimate question for Ofcom's consideration: whether they are sufficient to provide ongoing deterrents to operators across the relevant sectors. Ofcom has considered that question in the context of the following factors and reached the provisional view that we need to create a stronger deterrent effect to ensure effective regulatory compliance.

² <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>.

- 1.12 First, the number of cases we have investigated, formally and informally and whether resulting in the imposition of penalties or not, indicates ongoing non-compliance with the relevant regulatory requirements, notwithstanding the action we have taken. Indeed, we note that where we have taken action against one provider for a particular breach, there have been subsequent cases involving the same breach by other providers.
- 1.13 Second, since April 2011, Ofcom has published data about the numbers of consumer complaints made to us about communications providers.³ One aim of doing so is to incentivise relevant providers to improve their performance. Separately, we also collect and publish data about complaints made to us about silent and abandoned telephone calls (a form of persistent misuse). Both these sets of data show scope for the penalties we impose to have greater deterrent effect.
- 1.14 In this connection, we note that, in general terms, our telecoms complaints data about communications providers shows a general decrease in complaints since 2011. However, since 2013 the rate of decrease has generally slowed, overall complaint levels have been fairly constant for the last year or so and in some cases complaints about providers have increased.⁴ Further, complaints about silent and abandoned calls, meanwhile, have remained at broadly constant, and high, levels since 2012. In both areas, the complaints numbers are at these levels notwithstanding the action Ofcom has taken to date.
- 1.15 In any event, and irrespective of the levels of, and reasons for, the changes in the complaints data, all providers should operate in compliance with the law, taking into account any relevant guidelines as appropriate. The persisting complaints levels suggest that some providers are not doing so and continue to contravene regulatory requirements.
- 1.16 The provisional conclusion to which this draws us is that there is scope for Ofcom to consider how we can make our consumer enforcement action more effective to reduce contraventions of regulatory requirements and the consumer harm they cause. Levels of compliance can and should be improved beyond their existing levels.
- 1.17 As the resources available to us are not unlimited, it is necessary to consider how we should optimise the effect of those that are available to best achieve that improvement. One such means is to adapt our approach to penalties so that, in appropriate cases, they have stronger deterrent effect.
- 1.18 We remain of the view that the central objective of imposing a penalty is deterrence. That is, the level of the penalty must be sufficient to deter the relevant provider from committing further breaches, and to deter other providers across the wider industry from similar breaches. In particular, we are concerned that any penalty should have the appropriate impact on the relevant provider at an organisational level. That is, to incentivise the management (which is ultimately responsible for the provider's conduct and culture) to change the conduct of the provider as a whole and to 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 provider 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

³ <http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/complaints/>.

⁴ See <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/complaints/Q1-2015.pdf>

good practices and a culture of compliance across the organisation. Our penalties should be set at a level that is sufficient to change and correct any non-compliant behaviour by and within providers.

- 1.19 In addition, any penalties we impose should also act as a deterrent to the wider industry. When we impose a penalty on a particular provider, it should act as a signal to the wider industry that, in view of our duties to further the interests of citizens in communications markets and consumers in relevant markets, where appropriate, by promoting competition, we do not tolerate contraventions of the relevant regulatory requirements. Our penalties should also be set at a level which can change and correct any non-compliant, or potential non-compliant behaviour, by and within other providers.
- 1.20 On this basis, we consider that penalties we impose in future cases may need to be higher than those which have been imposed in previous cases, where it is appropriate and proportionate to do so, taking into account all the relevant circumstances of the case in the round in order to achieve the necessary change in behaviour. We are therefore proposing to amend our approach to the setting of penalties, as reflected in the penalty guidelines, in order to give effect to this.
- 1.21 In particular, we propose to make changes that, amongst other things, make explicit the link between the objective of deterrence and the size and turnover of the regulated body subject to the penalty. This would reflect that, although there is not necessarily a direct linear relationship between these variables, the larger the regulated body, the greater the penalty may need to be, in appropriate cases, in order to achieve a deterrent effect on it and others.
- 1.22 We also propose to set out more clearly the value to our decision-making process of precedents set by previous cases and the limits of that value. In particular, we propose to make clear that we will only consider precedents where appropriate and to the extent that they are relevant, and that the older the precedent the less value it has.
- 1.23 The intention of these proposed changes is to make clear that Ofcom will not necessarily be constrained by the amounts of penalties imposed in previous cases, from the point at which revised penalty guidelines are published. In particular, that past penalties should not be seen as acting as an upper threshold for the level of penalties in future and we would in appropriate cases impose higher penalties. This will provide greater flexibility for Ofcom to impose higher penalties in future in such cases, to secure more effective enforcement and deterrence in areas of our work where that is required. There would, in a sense, be a resetting of the bar as far as the level of penalties is concerned.
- 1.24 Although we are consulting on these changes, we do not intend to change the overall ethos of the guidelines. We will continue to 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 would, on the bases proposed, remain deterrence.

The proposed revised guidelines

- 1.25 We have reviewed our current guidelines and have included the proposed changes to these guidelines at Annex 4. These changes are summarised below:

- Setting out more clearly the value of precedents set by previous cases to our decision-making process: making clear that we will only consider relevant precedents where appropriate and that the older the precedent the less value it has, with the effect that previous penalties should not be regarded as upper thresholds for future penalties;
- Establishing a link between deterrence and the size and turnover of the regulated body. As explained above, the larger the regulated body, the greater the penalty may need to be, in appropriate cases, in order to achieve a deterrent effect (although there is not intended to be a direct linear relationship between these variables);
- Clarifying our approach to calculating the harm and/or gain caused by the contravention. We will not necessarily seek to quantify these amounts, but in the event we do, it is not intended to determine or limit the level of the penalty, but will be considered in the round alongside other relevant factors;
- Adding “seriousness” as an explicit consideration in a penalty assessment, alongside the duration of the contravention, though this is added for clarity and completeness, as the current guidelines already state that the amount of the penalty will be determined having regard to the seriousness of the infringement;
- Re-ordering certain other factors for the sake of clarity; and
- Lastly, removing Annex 1 to the current penalty guidelines, as this no longer serves a useful purpose. This annex sets out Ofcom’s approach to penalties for breaches of licence conditions in relation to programming centrally complied on behalf of the regional Channel 3 licensees.

Impact Assessment and Equality Impact Assessment

- 1.26 The analysis presented in the entirety of this consultation represents an impact assessment, as defined in section 7 of the Communications Act 2003.
- 1.27 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that generally we have to carry out impact assessments where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom’s activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions. For further information about our approach to impact assessments, see the guidelines, Better policy-making: Ofcom’s approach to impact assessment, which are on our website:
http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf
- 1.28 Ofcom’s principal duty, as set out in the Communications Act 2003, is to further the interests of citizens in relation to communications matters, and to further the interests of consumers in relevant markets, where appropriate by promoting competition. In this particular instance, we aim to ensure that those regulated by us do not or are less likely to engage in conduct which causes citizens and consumers to suffer harm. Ofcom’s objective in revising the penalty guidelines is therefore to secure more effective enforcement and deterrence in the interests of citizens and consumers.

- 1.29 Our proposed changes, as set out above, would not be likely to represent a major change in the activities we carry on. We would still assess penalties for contravention of regulatory requirements on the basis of a consideration of all the relevant circumstances in the round and with the central objective of deterrence.
- 1.30 That said, there would be some impacts on some regulated bodies. These would differ according to the circumstances.
- 1.31 In particular, as we propose to take into account the size and turnover of the regulated body when considering the appropriate level of the penalty, the proposals would be likely to have a significant impact on some bodies. So, too, would our proposed changes making clear the limitations on the value of previous cases and that previously imposed penalties should not be seen as upper limits on those in imposed in future.
- 1.32 The effect of proposals like these would be that larger operators, in areas like those described above in relation to consumer protection where higher penalties may be required for deterrence purposes, will be more likely to be subject to higher penalties, where it is appropriate and proportionate. Other operators in these areas might also be subject to higher penalties than might be the case under the existing penalty guidelines.
- 1.33 In addition, although we intend to ensure greater flexibility to impose higher penalties where appropriate and proportionate, we do so within our powers that apply in each sector we regulate. The statutory maximum penalty differs from contravention to contravention and as such, different groups of stakeholders regulated by us may be affected differently by the revisions to the guidelines according to the relevant statutory framework.
- 1.34 Nevertheless, we note that the impact of our revisions to the guidelines to those we regulate should be relatively small and, in the case of compliant operators, there should be no impact. This is because it is the regulated body's responsibility to operate in compliance with regulatory requirements and laws, regardless of the approach taken by Ofcom to setting penalties. We therefore do not expect that our proposals will lead to any cost increases or material impact on providers who, as they must, comply with their regulatory obligations.
- 1.35 Further, and in any event, our proposed approach would not necessarily lead to higher penalties in areas of our work, or cases, where such penalties are not required for deterrence purposes. For instance, for the time being, we do not consider there is a generally a need for additional deterrence in respect of broadcasting matters (though of course we would consider each case on its merits in the round and with the objective of deterrence).
- 1.36 We consider that the proposals would be likely to have a positive effect on the general public, as the flexibility to impose higher fines in appropriate cases may secure more effective enforcement and deterrence, thereby reducing harm to citizens and consumers as a result of contraventions of regulatory requirements.
- 1.37 As to an Equality Impact Assessment (EIA), Ofcom is required under the Equality Act 2010 to have due regard to any potential impacts our proposals may have as a result of any inequality in relation to particular "equality groups" including gender, disability or ethnicity. An EIA is our way of fulfilling this obligation and also assists us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers regardless of their background or identity.

- 1.38 We have not identified any particular impact of our proposals in relation to the identified equality groups. Specifically, we do not envisage the impact of any outcome to be to the detriment of any particular group of society.
- 1.39 Nor have we seen the need to carry out separate EIAs in relation to the additional equality groups in Northern Ireland: religious belief, political opinion and dependants. This is because we anticipate that our proposals will not have a differential impact in Northern Ireland compared to consumers in general.

Consultation question

Q1: Do you have any comments on the proposed draft penalty guidelines in Annex 4?

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 24 September 2015**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/penalty-guidelines-15/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses – particularly those with supporting charts, tables or other data – please email penaltyguidelines@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Louisa Li
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3333
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the question asked in this document, which is listed together with the proposed draft penalty guidelines at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Louisa Li on 020 7981 3000.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your

response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/terms-of-use/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in Autumn 2015.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: <http://www.ofcom.org.uk/email-updates/>

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Tel: 020 7981 3601

Email Graham.Howell@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at <http://stakeholders.ofcom.org.uk/consultations/consultation-response-coversheet/>.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing Name/contact details/job title

Whole response Organisation

Part of the response If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 4

Proposed draft penalty guidelines

Q1: Do you have any comments on the proposed draft penalty guidelines below?

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).

Explanatory note

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 value of precedents set by previous cases to 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.
- ~~3.4.~~ 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.
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.
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.

7. In making this assessment, Ofcom may 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.

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.

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.

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). That is, 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

4.11. 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.

5.12. 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;
- 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-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; ~~and~~
 - Any steps taken for remedying the consequences of the contravention; and
 - 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.
 - ~~The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body.~~
- ~~6. 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.~~
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.
- ~~7-14. Ofcom will may 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.~~
- ~~8-15. Ofcom will have regard to the need for transparency in applying these guidelines, particularly as regards the weighting of the factors considered.~~
- ~~9-16. Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with our investigation.~~
- ~~10-17. Ofcom will have regard to any representations made to us by the regulated body in breach.~~
18. 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.
- ~~11-19. Ofcom will ensure that the overall amount does not exceed the maximum penalty for the particular type of contravention.~~

~~12.20. Ofcom will have regard to the need for transparency in applying these guidelines, particularly as regards the weighting of the factors considered.~~

~~13.21. Ofcom will have regard to any representations made to us by the regulated body in breach.~~

Revision of the statement of policy

~~14.22. 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.~~

~~15.23. This statement will be reviewed in the light of experience in applying it over time.~~

Definitions and interpretation

~~16.24. 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

A4.1—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.

A4.2—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.

A4.3—In addition, the regional Channel 3 licensees broadcast national news programming, and spot advertising, which are complied on their behalf by third parties.

A4.4—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

A4.5—In line with our *Procedures for the consideration of statutory sanctions in broadcasting or other licence-related cases*⁵ (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.

⁵ See http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/complaints-sanctions/complaints_sanctions.pdf

~~A4.6—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.~~

~~A4.7—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:~~

~~4.7.1—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).~~

~~4.7.2—Medium: programmes with a higher than normal likelihood of provoking compliance issues. This might include live programming or material relating to significant public controversy.~~

~~4.7.3—Low: programmes that are unlikely to generate compliance issues.~~

~~A4.8—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.~~

- ~~A4.9—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.~~
- ~~A4.10—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.~~
- ~~A4.11—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.~~
- ~~A4.12—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.~~
- ~~A4.13—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~~

~~A4.14—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.~~