

Communications Consumer Panel and ACOD response to Ofcom's consultation on revising the penalty guidelines

The Communications Consumer Panel (the Panel) and the Advisory Committee on Older and Disabled People (ACOD) welcome the opportunity to respond to Ofcom's consultation on revising the penalty guidelines.

The Panel works to protect and promote people's interests in the communications sector, including the postal sector. We are an independent statutory body set up under the Communications Act 2003. The Panel carries out research, provides advice and encourages Ofcom, governments, the EU, industry and others to look at issues through the eyes of consumers, citizens and microbusinesses.

The Panel pays particular attention to the needs of older people and people with disabilities, the needs of people in rural areas and people on low incomes, and the needs of micro businesses, which have many of the same problems as individual consumers.

Four members of the Panel also represent the interests of consumers in England, Northern Ireland, Scotland and Wales respectively. They liaise with the key stakeholders in the Nations to understand the perspectives of consumers in all parts of the UK and input these perspectives to the Panel's consideration of issues. Following the alignment of ACOD with the Panel, the Panel is more alert than ever to the interests of older and disabled consumers and citizens.

Response

For the communications market to function effectively and in the best interests of consumers, citizens and micro-businesses, it is vital that standards of compliance improve beyond their existing levels.

We note that Ofcom has discretion about the level of penalties that 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 it proposes to follow in determining the amounts of penalties in each particular case, within these maximum limits.

The guidelines set out that Ofcom will consider all the circumstances of the case in the round in order to determine the amount of any penalty and, importantly, that the central objective of imposing a penalty is to deter breaches of regulatory requirements.

We believe that Ofcom's review of the penalty guidelines is both appropriate and timely, particularly as the current guidelines date from June 2011. We note that Ofcom proposes to amend the guidelines as it wants to create a stronger deterrent effect to help reduce contraventions of regulatory requirements and the levels of complaints that it receives. Greater clarity, a stronger deterrent effect and flexibility are all elements to be welcomed.

We note that the consultation document states that Ofcom's experience of applying the current guidelines suggests that the level of penalties imposed to date "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" that it regulates.

The consultation highlights that, since June 2011, Ofcom has imposed penalties in seven cases for contraventions of the General Conditions. 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%. In the same time period, Ofcom has taken formal action in nine cases of persistent misuse and imposed penalties in seven of those cases. In five of the cases the penalty was less than 1% of the relevant body's turnover.

We agree that, as a proportion of the relevant providers' turnovers, the penalties imposed are at a low level and this therefore begs the question of whether they are sufficient to provide strong and enduring deterrents to operators across the relevant sectors. We agree with Ofcom's provisional view that a stronger deterrent effect is required to ensure effective regulatory compliance so that consumers' interests are better protected.

We believe that 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. Currently this does not appear to be the case. We are aware of occasions where action has been taken against one provider for a particular breach, yet there have been subsequent cases involving the same breach by other providers. We also agree that the persisting complaints levels are of significant concern.

It is important that Ofcom makes explicit the connection between the objective of deterrence and the size and turnover of the regulated body subject to the penalty. We agree that precedents should be considered only where appropriate and to the extent that they are relevant, and that the older the precedent the less value it has. Given the fast moving nature of the communications market and the now fundamental nature of communications services to people's lives and businesses, we fully agree that past penalties should not be seen as acting as an upper threshold for the level of penalties in future. The impact of non-compliance should also be assessed.

The Panel would particularly encourage a strong and clear link between penalties and consumer harm. The document mentions as a factor to be taken into consideration "increased cost incurred by consumers" which raises the question of how those consumers are compensated for those increased costs. We note that the Office of Rail and Road proposed to impose a £2 million financial penalty on Network Rail due to its impact on Govia Thameslink (GTR) and Southern services for performance failures last year.

However Network Rail had the opportunity to offer reparations for affected passengers instead of having to pay the fine in terms of providing "passenger improvements", such as more customer information staff or screens, to the value of £2 million. This approach may also have some merit within the communications sector and we also recommend that further consideration be given to the principle of compensating consumers who have been most affected by the harm caused by a particular breach. We would also encourage consideration of the further 'naming and shaming' of companies who have been found in breach.

Within the proposed draft penalty guidelines, we would suggest that in terms of the detriment suffered by consumers, citizens and small businesses, other elements of harm - e.g. wasted time, inconvenience, distress etc. - should be considered in addition to financial cost.

Finally, we would encourage Ofcom to consider holistically the range of factors that may lead to better compliance, rather than lead to operators thinking that non-compliance is an option. In other words, not only the size of the fine but also the motivating factors that may encourage more compliance, for example: the risk of a breach being discovered; the likelihood of a penalty; the scale and impact of any penalty; and the appetite of the regulator to exercise its powers.

In summary:

- We fully support the review of penalty guidelines;
- We believe that a stronger deterrent is required for regulatory non-compliance;
- We believe that Ofcom must retain an element of flexibility in relation to setting an appropriate and proportionate penalty;
- Precedents should not unduly influence penalties for contemporary non-compliance - the market may well have changed;
- There should be a clear link between the level of penalty and the consumer harm caused or likely to have been caused;
- Other forms of penalty, including 'naming and shaming' may be appropriate on occasion; and
- In addition to penalties, we encourage Ofcom to consider wider motivations for regulatory compliance and conversely, regulatory non-compliance.