



Ofcom consultation on revising the penalty guidelines

Response from the Mobile Broadband Group

1. The Mobile Broadband Group ('MBG', whose members are the UK businesses of EE, Three, Telefonica UK [O2] and Vodafone) welcomes the opportunity to respond to Ofcom's consultation on revising the penalty guidelines.
2. We acknowledge that it is good regulatory practice to review the burdens on industry on a regular basis and that regulatory enforcement tools have to be effective if the market is going to function properly.
3. Before commenting in detail on Ofcom's proposals, the MBG would like to make a couple of general points.
4. First, we feel there is quite a limited body of evidence to underpin Ofcom's view that it needs "to create a stronger deterrent effect to ensure effective regulatory compliance" and that penalties being imposed are insufficient to deter others from similar offences. For example, with respect to the significant fines levied on some mobile operators for complaints handling, the cases were effectively concurrent so that it would not be possible to infer any change (or lack of change) in behaviour after the first case was published.
5. The second general point is that fines levied are remitted to the Treasury. While we recognise that the regulator needs a fining capability, any excessive fining withdraws money from the sector and this is not necessarily to the benefit of consumers.
6. Penalties imposed must be well judged, to promote compliance while remaining proportionate, transparent and consistent.
7. It should also be borne in mind that not all breaches of General Conditions are deliberate, or where the issues at hand are cut and dried. Considerable judgement may be needed on the part of the provider, and on the part of Ofcom, on how compliance can be achieved, taking account of some of the complex requirements (e.g. GC 23 Guidance alone runs to 10 pages). Fining as a deterrent, particularly making a scapegoat of one provider, thus does not necessarily have the intended impact.
8. Finally, if Ofcom concludes that a stronger fining regime is appropriate, it should be clear that a new policy would apply *prospectively* i.e. applying to cases where the offence is committed after they come into force.

Detailed comments on proposals

9. In paragraph 5, the MBG suggests the insertion of the words '*in cases of intentional or negligent breach*, the level of penalty should be high enough... etc.' As we have mentioned above, not all breaches are deliberate; it only makes sense to frame the guidelines in this way where it is clear that a business has made the deliberate calculation to carry on business in breach and pay any fines from profits thus generated.
10. Cases stemming from other causes such as misunderstandings and inadvertent breach in spite of robust processes and a culture of compliance need to be distinguished from those which are deliberate or reckless.
11. With respect to paragraph 6, the MBG is very concerned with the apparent increased emphasis on corporate turnover as a key determinant of the size of fine, particularly as there does not seem to be any reference to it being the turnover in the activity relevant to the breach, which is surely the key point. While the MBG acknowledges that, for some types of breach, a percentage of turnover sets the upper limit of the fine, we strongly believe that the level of consumer harm caused and the nature of the breach (e.g. was it deliberate?) should be much more important factors in determining what is a proportionate fine in the circumstances.
12. Ofcom must avoid fines that are arbitrarily punitive (or calculated but on an arbitrary basis). This simply removes money from the sector to the detriment of both industry and consumers.
13. Paragraphs 7 to 10 – The MBG's problem with these paragraphs is that they do not appear to constrain how Ofcom will behave in any way or indeed give meaningful guidance as to how it will behave.
14. The important points to emphasise within these paragraphs are as follows:
 - That Ofcom will impose a penalty that is appropriate and proportionate, taking account of all the circumstances
 - In making this assessment, Ofcom will have regard to relevant precedent
 - Quantified harm is only one of the factors in determining the appropriate and proportionate penalty
15. With respect that latter point, a provider with causes harm to 50% of 100k customers should be considered comparable to a provider that causes harm to 5% of 1m customers. One would not expect to see the latter incur a larger fine simply by virtue of its greater turnover. The amount of harm actually caused should weigh heavily in the regulator's decision.

How will Ofcom determine the amount of a penalty?

16. Paragraph 11 – the MBG is unsure as to what is meant by 'size', if it is not related to the turnover of the relevant activity. We would suggest the deletion of 'size' and the replacement of 'will' to 'may', as turnover may not always be a relevant factor, depending on the nature of the breach.

17. The MBG welcomes the inclusion of 'the extent to which the regulated body has co-operated'. It would be helpful if Ofcom could flesh out this element so as to promote provider's understanding of Ofcom's expectations (Note: we would not like to see providers' legitimate rights to query the scope of S.135 requests curtailed).
18. A related matter, not mentioned in Ofcom's reform proposals, but which may lead to more efficient enforcement by Ofcom, would be if Ofcom were to expressly consider discounts from penalties for self-reporting of compliance incidents by a body.
19. There could be instances where internal audits and other checks reveal instances of management controls being overridden and breaches occurring. A self-reporting regime could reduce considerably a draw on Ofcom resources.
20. There is no reason for paragraph 13 not to be framed more positively; Ofcom will seek to quantify the degree of harm, where possible. The same goes for paragraph 14. There is no reason for Ofcom not to have regard to relevant precedent – the word 'will' should be retained here.
21. Finally with reference to paragraph 18, as mentioned above, we recommend the deletion of 'size' and the insertion of 'where appropriate' after 'turnover of the regulated body'.

Possible reprieve for Annex 1

22. Ofcom is proposing the deletion of Annex 1, on the grounds that it is no longer relevant. However the Annex deals with a number of practical matters in relation to third parties that may have relevance in other contexts (for example in relation to General Condition 23). It thus may be worth retaining valuable elements of the Annex in a more generalised form.
23. For example, Ofcom's approach set out in A1.6 of considering the extent to which it was reasonable for the regulated body to rely on the third party to ensure that its acts were compliant is also likely to have wider application, in particular the factors stipulated of:
 - a. The extent to which the activity or type of activity represented a known compliance risk;
 - b. The steps, if any that the regulated body took to satisfy itself that the measures implemented by the third party were sufficient to address that risk; and
 - c. Whether the regulated body did or should have taken additional measures to address the risk given the facts of which it might reasonably be expected to be aware.
24. Additionally, paragraphs A1.8, A1.10 and A1.13 all set out relevant guidance and practical measures Ofcom might expect to take into account when considering the steps a provider has taken to prevent contravention of General Conditions or any other regulatory requirement.