

Response to Ofcom's consultation on “Revising the Penalty Guidelines”.

23 September 2015

Ofcom's Consultation on Revising the Penalty Guidelines

Ombudsman Services' (OS) response

1. Summary - About OS

Established in 2002, The Ombudsman Service Ltd (TOSL) is a not for profit private limited company which runs national, multi sectorial private sector ombudsman schemes for the communications, energy, property (including being the sole provider for the Royal Institution of Chartered Surveyors (RICS) and one of the three redress schemes approved by the Department for Communities and Local Government (DCLG) for letting and managing agents), copyright licensing, the glass and glazing sectors, the Green Deal, the Asset Based Finance Association (ABFA), reallymoving.com, Which? Trusted Traders and, from October 2015, Parking on Private Land Appeals (POPLA).

We are an independent organisation. We help our members to provide independent dispute resolution to their customers and each scheme is entirely funded by its users (participating companies). Our aim is to raise public trust and confidence in the sectors we work with by providing effective independent redress when problems arise.

We have in the region of 10,000 participating companies. During the last year we received 215,968 initial contacts from complainants and resolved 62,806 complaints. The company currently employs more than 550 people in Warrington and has a turnover in excess of £27 million.

In August 2015 we formally launched our new service for consumer complaints – The Consumer Ombudsman. We have developed a new portal (www.consumer-ombudsman.org) which will help consumers to raise a complaint about a product or service in any sector where there is no existing redress provision. This includes retail, travel and home improvement. The site guides consumers through our process, or signposts them appropriately.

Our complaints resolution service operates once a company's own complaints handling system has been exhausted, and we have the authority to determine a final resolution to each complaint. Our enquiries department handles primary contacts and makes decisions on eligibility. If a complaint is not for us, or has been brought to us too early, we signpost the consumer and offer assistance. Eligible complaints are then triaged. The simplest can be resolved quickly, usually by phone in two or three hours. Around 10% are dealt with in this way. For the majority of complaints we collect and consider the evidence from both parties, reach a determination and seek agreement; about 55% are settled like this. The most complex cases require a more intensive investigation; they may require more information and lead to further discussion with the complainant and the company to achieve clarification. The outcome will be a formal and binding decision. Whatever process is followed there is always a right of appeal and escalation. An ombudsman can issue a final decision in any one of the processes where it is clear that there is no evidence that would require changes to the initial determination.

Our service is free to consumers and, with the exception of an annual subscription from Department of Energy and Climate Change (DECC) for the Green Deal, operates at no expense to the public purse. It is paid for by the participating companies under our jurisdiction – usually by a combination of subscription and case fee. Participating companies do not exercise any financial or other control over the company. OS governance ensures that we are independent from the companies that fall under our jurisdiction.

2. Specific response to Ofcom's questions

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

The principal objective

The new draft guidelines are extremely clear in explaining Ofcom's principal objective when imposing penalties – i.e. to deter both the company at hand and the wider industry from breaching regulatory requirements. This objective is clearly articulated in the "explanatory note" which, in turn, helps to contextualise the significance of a company's size/turnover as a key factor when calculating a penalty.

The consultation document explains that, in the future, a company's size/turnover will be a key consideration in determining the level of any penalty imposed. OS agrees it is therefore important for Ofcom to explicitly state this interrelationship. This is because the penalties incurred by two differing companies may actually be dissimilar even when they have undertaken misconduct of a similar type or gravity. This superficial disparity could cause confusion if not properly explained – consumers, the media and other stakeholders, may only "see" the amount of the penalty and might conclude "smaller" businesses appear to incur smaller fines when they transgress.

In view of the above, we agree it is important for Ofcom to make its decision making processes as clear as possible. We feel that the draft "explanatory note" goes a long way in fulfilling this objective.

Penalty calculations

Given that, on the face of it, a company's size/turnover will always be a relevant (likely a principal) factor when calculating a penalty, it might be that Ofcom should consider publicising the penalties it imposes, especially substantial ones, in terms of a percentage of turnover as well as a monetary sum. Such an approach would serve a dual purpose. First, it would make the consistency of your decision making all the more transparent (at paragraph 20 of the draft document you highlight the need for "transparency in applying these guidelines"). Consumers would be able to see that, although two companies may have received differing monetary penalties, there is a coherent justification for this and the penalties are, in fact, comparable.

Secondly, such an approach might provide a potentially useful metric through which penalties could be measured over time. In fact, the percentage of turnover might provide a more insightful gauge as to the “severity” of a penalty than the raw monetary sum, which may not give a clear indication of market or economic conditions at the time the penalty was imposed.

OS would raise a potential issue for Ofcom to bear in mind, however. We note that communications providers have tended to become more diversified over time (i.e. with some providing services across a range of platforms, including mobile telephone, broadband, television, international services, etc). As such, it is unclear whether a penalty would take into account the turnover of the organisation as an entirety or whether it would be calculated to take into account the organisation’s “size” within a specific portion of the communications sector. This could be significant. For example, a very large communications provider, overall, may have a relatively modest stake in the mobile communications sector. If such a company were to breach a regulation in relation to their mobile telephone business, it could be argued it would be unfair to impose a penalty based upon turnover generated in cable television, broadband, etc. This concern could be further exacerbated in relation to companies that offer services entirely outside of the communications sector (e.g. utilities companies who provide energy, etc, in addition to communications products).

Consequences of the amendments

You explain that one consequence of the proposed amendments is that the penalties you impose will likely increase. You suggest that the penalties imposed in the past have not necessarily been successful in deterring poor behaviour or regulatory breaches. You explain that “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”.

We entirely agree that the monetary sum of any penalty is likely to be determinative in driving compliance. Additionally, though, we believe that the probability of being

investigated and punished constitutes a significant deterrent, too. You explain that Ofcom's resources are not unlimited. OS appreciates you must channel your energies to achieve maximum value to consumers. Even so, we believe it is vital Ofcom continues to be attentive in ensuring allegations of serious misconduct are investigated. If not, the risk remains that companies may not be adequately deterred – instead rationalising that, while the consequences of being penalised may be severe, the possibility of being caught looks to be relatively remote.

Complaints data

You point out that since 2011 you have published data regarding the volume of complaints raised directly with Ofcom. You explain that one aim of doing this was to incentivise providers to improve their performance but say that any downturn in complaint numbers actually looks to be nominal.

Our own data shows that complaints brought to OS have increased over a similar period;

Period	Number of complaints resolved
2012-13	10,331
2013-14	12,909
2014-15	15,173

The “number of complaints resolved” represents the number of complaints that fall within our terms of reference and to have subsequently been investigated or otherwise resolved by us (e.g. via a mutually agreeable settlement).

Possible drivers for complaint behaviours (other than company performance)

While there is undoubtedly a causal link between communication provider performance and the number of complaints received by Ofcom, it might be that other factors have a significant impact in driving complaining behaviour types, too.

A possible explanation for the modest decrease in complaints received directly by Ofcom, for example, could be that consumers have become increasingly aware that Alternative Dispute Resolution (ADR) is available and have instead contacted OS directly. Ofcom signposts consumers to the ADR schemes upon its own website and service providers have also become more proactive in signposting complainants directly to ADR (following on from recent Ofcom investigations into breaches of General Condition 14). OS has also worked hard to promote consumer awareness of the scheme. The recent entry into force of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 – and the attention this has garnered – may act to raise awareness further, driving more complaints directly to ADR rather than to Ofcom.

Moreover, factors other than an awareness of ADR could also be driving complaints behaviours. As you fully appreciate, over the last few years there have been significant changes in both the nature and delivery of communications technology as well as in the ways that the consumers use it and the expectations they have as to how it should work.

Our Consumer Action Monitor (“CAM”) research, published January 2015, indicates that the “communications sector” is the second most complained about sector in the United Kingdom (after “general retail”).¹ In our experience, the roll out of new technologies, such as the 4G network and superfast broadband, combined with rapid consumer uptake in them, has likely impacted upon complaint volumes. In short, with companies offering more devices, faster broadband and greater connectivity (e.g. connectivity via tablets and mobile devices), the scope for things to go wrong is heightened.

OS would suggest that such shifts in the market complicate the task of assessing performance over time. Complaint volumes, viewed in isolation, offer a useful insight

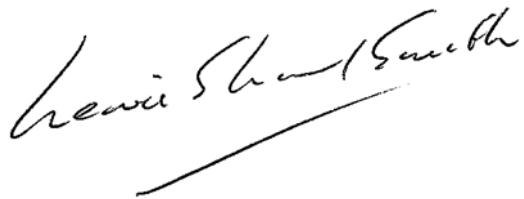
¹ You can find out more about our CAM research at; <http://www.ombudsman-services.org/downloads/CAMFinal2015.pdf>

into the state of the sector, but the perspective they provide is ultimately partial and such data needs to be considered within the context of the wider industry landscape.

More information

Ombudsman Services is more than happy to discuss the points raised in this response with Ofcom further, to share our CAM research findings and other information about our experiences as expert providers of ADR. In the first instance, please contact Daniel Fox, policy officer, (email; dfox@ombudsman-services.org, tel; 01925 772 625).

Yours sincerely



Lewis Shand Smith
Chief Ombudsman / Chief Executive

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