



Vodafone's response to Ofcom's consultation: "Revising the penalty guidelines"

24 September 2015

1. Executive Summary

- 1.1. Vodafone opposes both the proposed changes and the apparent justification for them to the penalty guidelines and considers that Ofcom's consultation proposals sets out an inadequate case for change. Any decision to change the guidelines without addressing those inadequacies could harm the interests of consumers by exposing Ofcom and its stakeholders to the needless and unhelpful impact of an appeal.
- 1.2. Vodafone is concerned that Ofcom appears to regard its proposed changes to the existing Penalty Guidelines as a *fait accompli* and has not set out in its consultation the evidence to support its high level thinking on why change is (in Ofcom's view) necessary. Specifically, Ofcom has:
 - (a) not substantiated its arguments that higher penalties will create a stronger deterrent effect.
 - (b) not provided any real evidence of a problem necessitating a regulatory change, and certainly no problem of material "ongoing non-compliance" that is specifically linked to deterrence or a lack of it. Vodafone's reading of Ofcom's existing precedents highlights an absence of support for the weight of the case for change.
 - (c) expressed a preference for the adoption of an assumption that the higher the turnover of the entity, the greater the penalty should be, rather than focussing more properly on what is necessary, appropriate and proportionate in the circumstances of any given case.
 - (d) overstated the significance of its complaints data in attempting to provide evidence to support its conclusions on the lack of deterrent effect of the existing penalties precedents.
- 1.3. On the whole, Vodafone considers that Ofcom has not fully set out the evidence on which a case for change should rest and, as such, has not as yet conducted a rounded consultation.
- 1.4. Vodafone also considers that, in the interests of legal certainty, Ofcom ought to clarify the cases to which any new guidelines will apply. Vodafone considers the position is very clear: if Ofcom decides to adopt new guidelines, those new guidelines must only apply to future conduct. The existing guidelines must continue to apply to conduct that has already occurred.
- 1.5. Vodafone further expands on these points below. It should be noted that Vodafone's comments focus on the imposition of penalties for breaches of the General Conditions of Entitlement.

2. Ofcom has not substantiated its argument that higher penalties will create a stronger deterrent effect

There is no evidence that deterrence (or lack of it) is a problem

- 2.1. The logic for Ofcom's view of the necessity of imposing higher penalties is set out in paragraphs 1.12 – 1.16 of its consultation:

"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. 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. 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."

2.2. There are a number of ways that this logic might be improved before it could be used as a robust basis for Ofcom to reach even a conclusion:

- (a) **A more balanced, less tendentious reading of the previous cases.** There is scope for Ofcom to obtain a better picture as to the likely impact of its proposals if evidence as to the specific concerns with the existing programme could be interrogated in a more granular, and more specific way. Ofcom makes a number of assertions about the existing approach:

“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.”

As Annex 1 shows, in fact, there have been two instances where two or more investigations have led to penalties imposed under general conditions that have occurred in sequence involving broadly the same concerns.

The first is in relation to fixed-line mis-selling, where a penalty was imposed on Just Telecomms in June 2006, Supatel in June 2013 and then on Unicom in July 2015. The second is in relation to complaints handling, where a penalty was imposed on H3G in October 2014 and then on EE in July 2015.

Neither instance supports the weight Ofcom appears to place on this point. Vodafone makes the following observations in this regard:

- i. The existence of two instances of similar breaches involving a very small number of different providers does not support a conclusion that providers are not learning from others’ mistakes (particularly where the penalty decisions span almost a decade) and that there is a wider problem with larger companies. In fact, it suggests the opposite given the low numbers in question. This view is further supported by the fact that neither of those instances involves recidivists.
- ii. The two complaints handling cases involving H3G and EE are not particularly helpful in demonstrating Ofcom’s point. The H3G penalty decision was made public in October 2014, however it appears from Ofcom’s determination in relation to EE that by October 2014, EE had brought itself into compliance with the relevant General Condition under investigation¹. The infringing conduct of each provider commenced around the same time (July 2011). In the circumstances, it is obviously the case that the fact of the imposition of a penalty on H3G could not have had a bearing on EE’s compliance or non-compliance. Further, these cases were not an instance where the *same* form of conduct was occurring in different providers; the two cases involved two different forms of misconduct that fell under the scope of the same general condition. Nothing in these cases suggests that they indicate a wider failure in the market.
- iii. The evidence of the aforementioned cases suggests exactly the opposite of Ofcom’s main conclusion: that the problem with deterrence,

¹ EE’s conduct apparently spanned the period July 2011 to April 2014.

if any, is not to do with large companies but specifically with *smaller* providers. Given the scope for smaller providers to use phoenix companies, slightly altered trading names and other strategies to avoid enforcement, it is likely that any view on the deterrent effect of fines on such undertakings needs to be considered carefully.

- (b) **Correct understanding of the context of Ofcom's complaints data.** Complaints to Ofcom do not provide evidence of 'non-compliance' and so Ofcom's basic conclusion that complaint levels indicate that providers are not operating 'in compliance with the law' is an error. Ofcom states that:

"The persisting complaints levels suggest that some providers are not doing so and continue to contravene regulatory requirements."

This statement constitutes a mis-reading of Ofcom's complaints data; in particular, Ofcom seems to have overlooked its own disclaimers given in publishing quarterly complaints data that the complaints on which its data is based are unverified.² As such, this volume of data does not equate to similar levels of non-compliance. It could not be such a measure, since it has been developed (as Ofcom makes clear) for another purpose, which is to assist consumers to make judgments about which service provider they might choose in a competitive market and thereby to incentivise better provider performance. Ofcom's error in treating this as a measure of illegality is most obviously seen in the fact that the most significant sources of complaints are not forms of conduct that are regulated by Ofcom: many complaints involve, for example, poor customer service and failure to resolve issues pertaining to contracts.

Furthermore, Ofcom appears to have over-read the complaints data in characterising small variations as increases and failing to fairly characterise the overall trend, which has been a significant reduction in complaints activity. It seems to Vodafone that a more accurate common-sense reading of that data is that complaints have fallen significantly over a number of years, with some specific issues (such as nuisance calls) being outliers rather than indicative of the general position.

- (c) **Rephrasing the question which must be addressed.** Ofcom has in essence asserted that 'there is scope to improve' its effectiveness and that consumers will fare better if levels of compliance in a large complex consumer mass-market were to be 'improved beyond their existing levels'. Such reasoning could be used to support *any* intervention, and relying on it is not only inconsistent with best-practice policy making, but also risks committing an error of law from failing to ask the right questions.

Rather than consider whether there is scope for improvement (which there will always be), Ofcom ought to turn its mind to the question of whether there is a specific problem – linked to an objective or outcome supported by Ofcom's duties – that is apparent on the evidence? If there is such a problem, the next question is: what is the best way to solve or reduce this problem? Is it to

² See paragraph 1.4 of the Q2 2015 Telecoms and Pay TV Complaints summary at <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/complaints/Q2-2015.pdf> by way of example.

promote competition? Or is it necessary to take some other action? This type of questioning will allow Ofcom to assess the proportionality of its proposals, which it currently is unable to do.

Even if Ofcom's concern is valid, there is no evidence that higher penalties will lead to greater industry deterrence

- 2.3. The second concern is a simple point: Ofcom does not provide any basis for its proposition that there is any concern about deterrence that is linked to the quantum of fines – a necessary link for Ofcom to establish in order to lawfully decide to adjust the guidelines in the way that it proposes.
- 2.4. If there are problems with the effectiveness of Ofcom's enforcement programme (as Ofcom appears to have concluded), there are other equally plausible sources of concern and alternative areas for focus to improve matters including, but not limited to, shortening investigation timeframes, making commitments to resourcing levels for investigations and case prioritisation.
- 2.5. If Ofcom is concerned to improve its effectiveness in enforcement, a more rounded approach that does not assume a single answer (that is, that penalties on larger companies must rise) could address what is in truth a more complex picture.

Economic theory suggests that, while fines are important to achieve deterrence, they are just one piece of a wider puzzle

- 2.6. Ofcom's approach to optimal fines follows Becker's basic theory, which is that a rational individual will infringe the law when the expected gain outweighs the expected cost.³ To deter infringement, a policy maker must set the optimal fine such that the expected cost of punishment exceeds the gains.
- 2.7. In paragraph 1.18 of its consultation Ofcom states that:

"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 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 and non-compliant behaviour by and within providers."
- 2.8. This approach to optimal fines, which looks at the marginal impact on a business, is a very useful starting point but it is just one piece of a wider puzzle. In 2011, the OFT commissioned London Economics to conduct a wider study of competition compliance and deterrence resulting from the UK competition regime.⁴ In its report, London Economics noted that there are several alternative theoretical models which move away from Becker's basic theory.⁵ Alternative economic models considered by London Economics include:

³ Becker, "Crime and Punishment: An economic Approach", *Journal of Political Economy* (1968), 76, 169-217.

⁴ London Economics, "An assessment of discretionary penalties regimes" (October 2009), (**London Economics Report**).

⁵ London Economics Report, para 3.14.

- (a) Proportionality: which suggests that fines should be related to the harm caused. This is an “effects” approach and is currently accommodated by the Existing Guidelines, which assesses “[t]he degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants”.⁶
- (b) Marginal deterrence: which suggests that firms choose between a number of harmful acts and that, as a result, more harmful offences should face higher penalties than less harmful offences. This will hopefully generate an incentive on firms to moderate the extent of harm caused.⁷

2.9. London Economics goes on to describe a number of arguments against imposing extremely high fines and concludes that “corporate fines may reach a level above which they can contribute little more to deterrence and other instruments may be required.”⁸ The arguments raised include:⁹

- (a) Over-deterrence: High fines may over-deter by discouraging potential investors away from markets and practices that could raise the possibility of infringement actions.
- (b) Enforcement errors: For example, Type I errors where a regulator falsely finds an infringement and Type II errors where a regulator falsely clears a potential infringement.
- (c) Insolvency: High fines may squeeze infringers out of the market (which, in itself, has wider implications on competition in that market).
- (d) Social costs: In the absence of perfect markets, high fines will impact on all the stakeholders of the firm (e.g. shareholders and employees).

2.10. It is not apparent that Ofcom has engaged with either factual or academic evidence on the value of fines in achieving deterrence and, as such, Vodafone is concerned that Ofcom is seeking to amend its approach without a strong evidential base to support it and as against a consideration of viable alternatives as would be consistent with regulatory best practice.

Ofcom’s approach is not consistent with regulatory best practice

2.11. Ofcom’s conclusion about the need for higher penalties is speculative and based on anecdotal, rather than factual and well-reasoned, evidence.

2.12. For example, Ofcom states at paragraph 1.7 that its “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 [...]”. In support of this, Ofcom notes that, since June 2011, it has imposed penalties in seven cases for contraventions of the General Conditions and has taken formal action in nine cases of persistent misuse.

2.13. This anecdotal evidence is inadequate for Ofcom to base its conclusions. Vodafone considers that Ofcom must assess methodically and in a way that is based on robust evidence what drives compliance among industry operators and the link between higher penalties and better

⁶ Ofcom “Penalty Guidelines” (13 June 2011), para 4. (**Existing Guidelines**).

⁷ London Economics Report, paras 3.17-3.19.

⁸ London Economics Report, para 3.24.

⁹ London Economics Report, para 3.22.

(or more effective) deterrence. There is no justifiable reason why Ofcom has failed to conduct thorough primary analysis of the industry. Vodafone is concerned that Ofcom's approach fails to meet the standards of regulatory best practice (including Ofcom's own regulatory principle that it will be 'evidence-led').

2.14. In different contexts, other public bodies have conducted this type of analysis. For example:

- (a) In the London Economics Report, the OFT commissioned London Economics to analyse: the impact of the OFT's work on deterrence and compliance across different sectors and different business sizes and types; sought the views of firms on UK competition enforcement and how firms managed compliance within their organisations; and conducted a behavioural experiment to analyse how business representatives respond to sanctions.
- (b) Similarly, in 2011 the National Audit Office (NAO) published a report which assessed the effectiveness of consumer law policy and the overall effectiveness of the enforcement system.¹⁰

Ofcom does not explain how turnover fits with the other factors

2.15. A key change proposed by Ofcom is to introduce an explicit link between the "objective of deterrence and the size and turnover of the regulator's body subject to the penalty". In the explanatory note to the Proposed Guidelines, Ofcom states that:¹¹

"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."

2.16. Ofcom appears to be driven by two related, but distinct, motives:

- (a) First, it wishes to deter an individual operator from carrying out similar conduct again; and
- (b) Secondly, it wishes to send a signal to the wider industry that similar non-compliant conduct would result in large financial penalties for similarly placed operators.

2.17. First, in response to deterring individual operators, Vodafone considers that drawing a direct link between an operator's turnover and the relevant penalty may lead to arbitrary decisions and creates a very real risk that penalty decisions will be appealed. For instance, it is difficult to understand how Ofcom will penalise a large operator that has committed conduct which falls at the "light" end of the other penalty guideline factors (e.g. is not serious and results in very little harm). Under Ofcom's proposal, such conduct may be arbitrarily and unjustifiably penalised simply because of the level of the contravening operator's turnover.

2.18. If, on the other hand, the link between penalty and turnover is simply a mechanism to further penalise particularly egregious contraventions, Vodafone questions whether the link is, in fact,

¹⁰ National Audit Office, "Protecting consumers – the system for enforcing consumer law" (15 June 2011).

¹¹ Proposed Guidelines, Annex 4, para 6.

needed. Ofcom currently has the discretion to penalise operators up to the statutory maximums and can apply the factors set out in the Existing Guidelines to achieve the appropriate penalty. In fact, the Existing Guidelines allow Ofcom to assess the “extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body”.¹² In our view, this proportionality assessment is the better approach and reduces the risk of arbitrary decisions.

- 2.19. Secondly, in response to deterring the wider industry, Vodafone considers that Ofcom’s intention to deter the wider industry is confused by the fact that it also proposes to weaken the value of past decisions. We consider this proposal in more detail in section 3, however the best way to “change and correct” the behaviour of other operators is to send a direct signal that they will face similar penalties from Ofcom for similar conduct. Moving away from a precedent-based approach undermines this signal. Vodafone submits that Ofcom reconsider this policy decision.

3. The proposed guidelines reduce transparency and accountability

Ofcom is not bound by its past decisions and the current guidelines give Ofcom the flexibility to set higher penalties in cases where it is justified

- 3.1. Ofcom is concerned that, by placing weight on past decisions, it may restrict itself to imposing penalties of a similar magnitude to those imposed in past decisions. Specifically, Ofcom states at paragraph 1.23 that:

“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.”

- 3.2. The Existing Guidelines state that “Ofcom will have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and context of each case.”¹³
- 3.3. By characterising past penalties as an “upper threshold”, Ofcom is mis-stating the intent of the Existing Guidelines. The “upper threshold” is the statutory maximum penalty set for each contravention in the Communications Act (e.g. the maximum penalty for a contravention of conditions under section 97 of the Communications Act is 10% of the contravening party’s turnover).
- 3.4. The Existing Guidelines explicitly state that Ofcom must have regard to its past decisions but retains the flexibility to depart from them, depending on the facts and context of each case. Ofcom has complete flexibility to apply the factors set out in the Existing Guidelines to

¹² Existing Guidelines, para 4.

¹³ Existing Guidelines, para 6.

determine where a contravention lies on the scale from zero up to the maximum statutory penalty.

4. Ofcom's current approach to penalties is in line with the approach taken by other regulators

- 4.1. There is no evidence from the experience in other sectors that Ofcom's objective of establishing a deterrent that applies to all providers, regardless of size, requires an express statement in the guidelines that larger companies may face harsher penalties, all other things being equal, than smaller companies.
- 4.2. Ofgem, for example, has guidelines for setting penalties that adopt broadly similar approaches and concepts as Ofcom's existing guidelines (Table 1 sets out a few indicative similarities and differences).¹⁴ Apart from the lack of any reference to the size of the undertaking facing a penalty (which is obviously unhelpful to Ofcom) there are a number of features that might be worth exploring in any future revision of Ofcom's penalty guidelines – for example, outlining the relevant strategic objectives for enforcement, rather than relying exclusively on statutory concerns of proportionality and what is 'appropriate'.

Similarities	Differences
Both Ofgem's and Ofcom's guidelines emphasise that <u>deterrence</u> is the key purpose of imposing penalties – eg, Ofgem says its vision is to achieve a culture where businesses put consumers first (2.2). Ofcom similarly says its central objective is deterrence (3).	Ofgem's statement provides for consumer redress orders <u>and</u> penalties. However, Ofgem says that when it determines what a reasonable penalty is, it will have regard to the level of redress ordered or which is being or has been provided (1.5)
Both sets of guidelines set out that the matters and factors set out are <u>not</u> exhaustive (Ofcom: 4; Ofgem: 3.5) and the appropriate penalty has to be determined "in the round"/is reasonable in all the circumstances of the case.	Unlike Ofcom, Ofgem also outlines its strategic objectives for enforcement: eg, achieving the greatest positive impact by targeting its enforcement resources and powers (2.2). It provides much more detail about the underlying objective (as opposed to Ofcom's broad reference to "deterrence"), including that regulated persons should not benefit from a contravention, and that penalties may be imposed even where the detrimental has been mitigated in full (2.5).
Most of the factors to be considered in terms of quantum are similar, eg: <ul style="list-style-type: none"> - the degree of harm caused and the duration of the contravention - the gain made by the regulated person - the extent to which the regulated body has a history of contraventions - the steps were taken by the regulated body to prevent the contravention, including whether the regulated entity should have been aware of it, and the 	Ofcom refers to the size and turnover of the entity as relevant to the amount of the penalty, but <u>only</u> in the context of working out "the extent to which the level of penalty is <u>proportionate</u> " (4). There is no express reference to size of the undertaking under investigation as a factor that is directly relevant to the penalty in Ofgem's statement.

¹⁴ Ofgem's 2014 Statement of Policy in respect of Financial Penalties and Consumer Redress is available at https://www.ofgem.gov.uk/sites/default/files/docs/2014/11/financial_penalties_and_consumer_redress_policy_statement_6_november_2014.pdf

<ul style="list-style-type: none"> - degree of intention and/or recklessness what the regulated entity has done to mitigate, including to stop the contravention when the regulated entity becomes aware of it - the degree of cooperation with the regulatory investigation 	
	Ofgem goes into more detail about the process and where in each step the particular factors will be considered. For example, repeated contraventions are treated as aggravating factors and adjust the penal element after it has been determined. Ofcom seems to take a more “finger in the air” approach

Table 1: Ofgem’s penalty guidelines compared to Ofcom’s guidelines.

- 4.3. Those guidelines have been applied by Ofgem in a way which is broadly consistent with the approach that Ofcom could take under its existing guidelines. There is little reason to conclude that it is necessary to have an explicit skew in favour of fining large companies in order to use penalties as an effect deterrent.
- 4.4. Table 2 sets out a sequence of Ofgem decisions in 2014/15, and the resultant penalties. As can be seen, Ofgem appeared to have no difficulty in using the full range of penalty decisions open to it, including imposing penalties of tens of millions of pounds.

Amount	Company	Breach
£450,000*	GDF Suez/IPM	61.4% shortfall in carbon reductions
£2.4m*	ScottishPower	30% shortfall in carbon reductions
£1.75m*	SSE	9% shortfall in carbon reductions
£10.6m*	BG	37% shortfall in carbon reductions
£500,000*	BG	4.5% shortfall in home insulation targets
£28m	Drax	62.9% shortfall in energy saving program compliance
£11m	Intergen	93.6% shortfall in energy saving program compliance
£3m	EDF Energy	Consumer complaint handling breaches over 6 months (eg calls cut out, long wait times)
£750,000	ScottishPower	Imposing charges for payment methods that did not reflect costs
£12m	E.ON	Failing to provide proper information while selling during 06/10-12/13
£3.325mil	Npower	Not submitting accurate supply data
£4mil	BG	Blocking 39k churns without good cause
£3.5mil	Npower	Failed to provide required information while selling

**Indicative or provisional*

Table 2: Ofgem penalty decisions, 2014/15

- 4.5. Based on this experience, there seems to Vodafone to be no obvious reason why Ofcom’s objectives cannot be secured using the existing guidelines (and without the disproportionality and uncertainty associated with an unnecessary change in the guidelines).

5. The existing guidelines adequately address Ofcom's concerns and should be retained

The existing guidelines provide Ofcom with sufficient flexibility to penalise contraventions and incentivise deterrence

- 5.1. Vodafone supports Ofcom's focus on deterrence as a central objective of the penalty regime, but considers that the Existing Guidelines adequately address Ofcom's objective.
- 5.2. Deterrence is the ethos of the Existing Guidelines. The Existing Guidelines state that Ofcom's "central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an incentive to compliance, having regard to the seriousness of the infringement."¹⁵
- 5.3. Despite this, Ofcom proposes to amend the guidelines to "create a stronger deterrent effect to help reduce the continuing levels of complaints to Ofcom and contravention of regulatory requirements."¹⁶
- 5.4. Ofcom hopes to achieve better deterrence by setting penalties at a "level that is sufficient to change and correct any non-compliant behaviour by and within providers".¹⁷ In effect, Ofcom intends to amend the Existing Guidelines to provide it with the discretion to impose higher penalties when those penalties are appropriate and proportionate, in order to improve deterrence.
- 5.5. Vodafone considers that Ofcom already has that discretion. Subject to the statutory maximum penalties set for each contravention in the Communications Act, Ofcom has the discretion to impose "sufficient" penalties to incentivise compliance. In the Proposed Guidelines, Ofcom comments that in five of the cases it imposed penalties for contraventions of the General Conditions, the penalty imposed was less than 1% of the relevant provider's relevant turnover. The statutory maximum penalty for these types of contravention is 10%. The decision not to impose higher fines in other cases is not attributable to the guidelines – and the cases, by and large, do not involve large companies on any systemic basis in the way that Ofcom appears to argue. In any event, Ofcom has imposed the maximum fine in one case – which is hardly compelling evidence that it is unable or unwilling to do so.
- 5.6. Concerns about the level of fines for persistent misuse expressed as a percentage of turnover simply miss the point, which is that the penalty for such conduct is set by statutory instrument as an absolute maximum. This maximum can and has been increased by Government substantially in the past; if Ofcom feels that further increases would be in the interests of consumers, then it can share that view with Government for due consideration.
- 5.7. In our view, before amending the guidelines to widen Ofcom's discretion, Ofcom needs to ask itself why it has not applied its existing discretion. Vodafone considers that the policy basis in

¹⁵ Existing Guidelines, para 3.

¹⁶ Proposed Guidelines, section 1, para 1.2.

¹⁷ Proposed Guidelines, section 1, para 1.18.

the Existing Guidelines adequately addresses Ofcom's focus on deterrence. Therefore, the Existing Guidelines should be retained.

6. If Ofcom decides to adopt new guidelines, the new guidelines must only apply to future conduct

- 6.1. The statutory requirement to publish penalty guidelines is set out in section 392(1) of the Communications Act. That section requires Ofcom to publish a statement containing the guidelines it intends to follow in determining the amount of penalties imposed by Ofcom under the Communications Act. In addition, section 392(6) states that Ofcom has a duty to have regard to the guidelines contained in the statement for the time being in force.
- 6.2. If Ofcom chooses to adopt the penalty guidelines as set out in its consultation, the new guidelines should only apply to future conduct (i.e. conduct which occurs after the Proposed Guidelines come into force).
- 6.3. This is consistent with the long-standing presumption that changes in law should not take place retrospectively unless the intention that it is to do so is expressed clearly and unambiguously.¹⁸ This common law presumption is confirmed by section 16(1)(d) and (e) of the Interpretation Act which states:

"Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears – [...] (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that enactment; (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

- 6.4. It logically flows that to rebut this presumption, the relevant statutory provision must expressly permit retrospective application. While section 392(6) of the Communications Act states that Ofcom must have regard to the guidelines in force, it is not sufficiently clear that this extends retrospectively to conduct carried out before the guidelines were enacted.¹⁹
- 6.5. This approach is consistent with Ofcom's determination in the Rapture / Sky dispute (2007).²⁰ In November 2005, Rapture and Sky entered into an agreement for the provision of electronic programme guide (EPG) services. Rapture raised a dispute with Ofcom on 10 November 2006 that Sky was not providing EPG services on fair, reasonable and non-discriminatory terms. Oftel issued guidelines on the terms of supply for services including EPGs in 2002. Ofcom revised those guidelines in September 2006 and the new guidelines came into force on 1 January 2007. Ofcom published its final determination on the Rapture / Sky dispute in

¹⁸ See, for example, *Phillips v Eyre* (1870) LR 6 QB 1, 23 where Willes J stated that retrospective legislation is "[...] contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."

¹⁹ Section 392(6) states: "It shall be the duty of OFCOM, in determining the amount of any penalty to be imposed by them under this Act or any other enactment (apart from the Competition Act 1998) to have regard to the guidelines contained in the statement for the time being in force under this section."

²⁰ Rapture Television plc / British Sky Broadcasting Ltd (CW/00920/09/06).

March 2007. In assessing whether to deviate from the 2002 guidelines in the final determination, Ofcom held that:²¹

“Deviating from the 2002 Guidelines would only be appropriate if there were reasons to find that the application of the 2002 Guidelines would not result in an outcome that was fair, reasonable and non-discriminatory or would otherwise be compatible with Ofcom’s statutory duties [...]”

- 6.6. On this basis, Vodafone requests that Ofcom amend the Proposed Guidelines to expressly state that the Proposed Guidelines will only apply to future conduct (i.e. conduct which occurs after the Proposed Guidelines come into force).

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²¹ Ofcom “Determination to resolve a dispute between Rapture Television plc and British Sky Broadcasting Ltd about EPG listing charges” (9 March 2007), para 4.41.

Annex 1: Ofcom penalties imposed for contraventions of general conditions, 2003 - 2015

Case reference	Provider	General condition	Detail of contravention	Fine	Date of fine
CW/01125/02/14	Universal Utilities (t/a Unicom)	GC24 (sales & marketing) and GC9 (min terms)	Unicom misled customers transferring their fixed line services to Unicom that a) they would not incur ETCs and b) there would be no effect on their existing broadband services	£200k	29 July 2015
CW/01120/01/14	EE	GC14.4 - Complaints handling	EE did not notify customers of their rights in relation to ADR. Aggravating circumstances included duration, number of people affected and multi-faceted nature of the breach	£1m	3 July 2015
CW/01129/05/14	BT	GC15.3 and 15.5 - (NGTR)	BT failed to launch Next Generation Text Relay (NGTR) at the agreed date. Ofcom found the cause was BT not employing proper project structure, processes and practices resulted in detriment to vulnerable users which it considers to be a sizeable contravention	£800k	17 March 2015
CW/01112/09/13	Hutch 3G UK Ltd	GC14.4 - Complaints handling	Three a) narrowly interpreting the definition of a complaint, failing to comply with its Customer Complaint Code and closing complaints prematurely. And b) sending paper bills to customers that did not refer to their right to ADR. Ofcom treated as a 'continuing contravention' and found that the conduct was 'serious and having systemic aspects'.	£250k	8 October 2014
CW/01096/11/12	Supatel Limited t/a TimeTalk	GC24 (sales & marketing)	Supatel was 'slamming'. Ofcom noted the distress to customers from Supatel engaging in this behaviour. This was defined as a "continuing contravention" which had systemic aspects.	£60k	24 June 2013
CW/01051/07/10	Talk Talk Group	GC11 (billing)	Talk Talk Group was billing customers for services not rendered, particularly cancelled services. Talk Talk took steps to address the issue, but it did not prevent the contravention from happening. Ofcom found that the contravention was "serious and longstanding".	£3.04m	18 August 2011
CW/00857/08/05	Just Telecomms UK Ltd ('JTUK'), trading as Lo-Rate Telecom	GC14.3(b) (sales and marketing) and GC13.1 (payment and disconnection).	JTUK misrepresented to customers (during sales calls) that JTUK was part of, or working on behalf of, BT; and failing to explain to customers the long minimum contract terms into which new customers were being entered. Ofcom noted the seriousness of the matter and also imposed a monitoring programme to ensure all impacted customers were refunded.	Undisclosed (maximum fine imposed)	27 June 2006