

Ofcom's revised guidelines on fines – a new emphasis on deterrence

Ofcom has published revised guidelines, which set out how it determines the level of its fines.¹ Ofcom has also published an accompanying statement clarifying its approach to setting penalties and outlining the changes made to help to deter breaches of regulatory requirements.² The revised guidelines, which took effect from 3 December 2015, will be applied to future investigations, as well as to current investigations where Ofcom has not yet served a provisional penalty notice.

On the face of it, the amendments are incremental, and not a seismic shift. But the accompanying statement suggests that Ofcom is looking to provide a greater deterrent effect by imposing heftier fines in future in appropriate cases (most likely in the telecoms sector).

Background

Ofcom has powers to impose fines for regulatory breaches across all areas that it regulates, including telecoms, broadcasting (including on-demand programming), postal services and spectrum. Section 392 of the Communications Act 2003 requires Ofcom to publish guidelines on its policy for determining the amount of its penalties (other than penalties under the Competition Act 1998) and to have regard to its then-current guidelines when determining the amount of any penalty.

The guidelines were last updated in June 2011. They stated that Ofcom would consider all the circumstances of the case in the round to determine the appropriate and proportionate amount of any penalty, and that the central objective of imposing a penalty was to deter breaches of regulatory requirements. They described some potentially relevant factors that Ofcom might take into account in making its determination.

Consultation

In July 2015, Ofcom published a consultation in which it proposed to amend the guidelines to clarify its approach to setting penalties.³ Ofcom's provisional view was that a stronger deterrent effect was needed to help to reduce the continuing levels of complaints to Ofcom and breaches of regulatory requirements. In particular, Ofcom considered that, where appropriate, it might be necessary to impose higher penalties on the relevant regulated bodies than in previous cases.

Ofcom explained that its experience of applying the 2011 guidelines suggested that the level of penalties imposed under those guidelines might not have created a sufficient deterrent effect to ensure effective compliance with relevant regulatory provisions. For Ofcom, strengthening the deterrent effect was of particular concern for enforcement of consumer protection in the telecoms sector, but it was less of a concern for broadcasting regulation.

Ofcom reviewed its enforcement actions for breaches of the General Conditions of Entitlement (which apply to all communications networks and service providers) and for persistent misuse of electronic communications networks or services since the 2011 guidelines came into effect, and considered whether the level of penalties imposed were sufficient to deter non-compliance. Ofcom provisionally concluded that there was scope to make consumer-protection enforcement action more effective to reduce breaches and consumer harm. Its provisional view was that this could be achieved by adapting its approach to penalties, so that they had a stronger deterrent effect. Ofcom considered that the level of the penalty should be high enough to change and correct any non-compliant behaviour and

¹ <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.

² <http://stakeholders.ofcom.org.uk/consultations/penalty-guidelines-15/statement/>.

³ http://stakeholders.ofcom.org.uk/binaries/consultations/penalty-guidelines-15/summary/Penalty_Guidelines_2015.pdf.

to encourage a culture of compliance, both within the relevant regulated body and across the wider industry.

The main changes proposed in the consultation were: to set out more clearly the weight to be attributed to any precedent cases in Ofcom's decision-making process; to establish a link between deterrence and the size and turnover of the regulated body; to clarify the approach to calculating the harm and/or gain caused by the breach; and to add "seriousness" as an explicit consideration in the penalty assessment.

The consultation closed on 24 September 2015. Ofcom received 14 responses. Four respondents supported the proposals, but the remainder did not.

Ofcom's decision

Ofcom decided to adopt the revised penalty guidelines substantially as proposed in the consultation.

A key argument raised by respondents was that the proposed changes were unnecessary and inappropriate, and that there was limited evidence or no basis to justify changing the approach. Ofcom disagreed with these comments, saying that it was clear that there was scope for improvement in compliance, bearing in mind the continuing levels of breaches and complaints. In Ofcom's view, the revised guidelines will make it clear that it can impose higher penalties than in previous cases, "where it is appropriate and proportionate to do so", taking into account "all the relevant circumstances in the round", to achieve the necessary deterrent effect.

Some respondents also believed that Ofcom had failed to take adequate account of the impact of the proposed changes and disagreed that there would be no or limited impact on providers. Again, Ofcom disagreed, saying that where a regulated body complies with its regulatory obligations, there should be no impact on it.

Further, Ofcom considered that non-compliance with the law is in itself likely to cause harm to consumers. So Ofcom did not agree with the view that non-compliant providers should be absolved from the full extent of a penalty that is appropriate and proportionate to the breach because it affects their business. For Ofcom: "The very point of an appropriate penalty is to influence positively a business's behaviour."

Revised guidelines

Weight to be attributed to precedent decisions

In the consultation, Ofcom proposed to make clear that precedents are likely to become less relevant to future enforcement work over time, and that it might impose higher penalties in future cases to secure effective deterrence. Following the consultation responses, Ofcom decided to adopt this proposal with one amendment: Ofcom will, where relevant precedents exist, consider them, but may depart from them where necessary.

Link between deterrent effect and regulated body's size and turnover

The consultation proposed an explicit link between the deterrent effect and the size and turnover of the regulated body. Respondents objected that it was unfair and arbitrarily punitive to impose a higher penalty for a similar breach on a larger provider than on a smaller provider. They also argued that this link would not achieve the desired deterrent effect and would, instead, undermine transparency and send the wrong signals to the industry.

Ofcom "carefully considered" the objection, but decided to adopt the proposal nonetheless, saying that penalties should be set at "levels that can impact and change behaviour" to achieve the necessary deterrent effect. In Ofcom's view, it was reasonable that a penalty might, in some cases, need to be

higher for larger providers than smaller providers, to have an equivalent impact on them, and turnover was “a good indicator”.

Calculating harm and/or financial gain

Ofcom’s practice under the 2011 guidelines was to consider the degree of harm caused by the breach, whether actual or potential. Harm can manifest itself in a number of ways, including financially or by other means such as wasted time or distress.

In the consultation, Ofcom proposed to clarify that, in cases where it quantified the harm or gain, this would only be one factor in its assessment and would not be determinative of the eventual level of the penalty, which might be greater than Ofcom’s calculation of any harm or gain. This was because, Ofcom explained, a penalty is imposed “to penalise wrongdoing by the provider, and deter non-compliance, and is not merely to remove the gain or ‘balance out’ the harm”. So Ofcom decided to adopt this proposal.

Adding “seriousness” as a factor

The consultation proposed to add “seriousness” as an explicit factor to be taken into account. Ofcom explained that, since the 2011 guidelines already stated that the amount of any penalty was calculated with regard to the seriousness of the infringement, the proposed change was intended for clarity and completeness. One respondent was unclear how this factor would be assessed when the other factors (such as degree of harm and duration of breach) already went to assessing seriousness.

Ofcom said that, although other factors were relevant to “seriousness”, the nature, quality or gravity of a breach was, of itself, relevant. So Ofcom decided to adopt its proposal. In reaching this decision, Ofcom had had regard to the fact that it was not intended to result in any additional or arbitrary penalisation.

Comment

The revisions that Ofcom has made to its penalty guidelines are incremental, and by no means a sea-change. But Ofcom’s statement of 3 December 2015 suggests that Ofcom is looking to impose heftier fines in future in appropriate cases (most likely in the telecoms sector) to provide a greater deterrent effect. It seems unlikely, however, that increased fines will in practice achieve Ofcom’s stated goal of reducing overall numbers of complaints. In the social media age, it is now easier than ever for consumers to complain and, indeed, consumer complaints on issues that have widespread impact or appeal can gain traction and multiply exponentially.

For broadcasters, it is questionable whether the revised guidelines will have any material impact. It has long been clear to broadcasters that Ofcom does not consider itself bound to cap its fines at the level of financial harm. An example is the fine of £1,200,000 imposed on Granada in 2008 for the early finalising and overriding of viewer votes in the 2007 series of Soapstar Superstar, when the financial harm was estimated by ITV to be just over a third of that sum, at £415,000.⁴ Of course, harm, as Ofcom interprets it in a broadcast context, is not limited to financial harm, but non-financial harm is difficult, if not impossible, to quantify. So Ofcom has always had a substantial margin of discretion when setting the level of any fine to be imposed on a broadcaster. An example is the £150,000 fine imposed on the BBC in 2009 for breaches of the harm and offence and privacy sections of Ofcom’s Broadcasting Code in relation to “Sachsgate”.⁵

⁴ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/granada.pdf>.

⁵ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/BBCRadio2TheRussellBrandShow.pdf>.

Broadcasters have also been aware for many years that, while fines imposed in previous cases were a factor that Ofcom would take into account, those fines would not operate as a cap on future fines. A case in point is the record £3 million fine imposed on LWT for the unfair conduct of viewer competitions in a number of series of Ant & Dec's Saturday Night Takeaway.⁶ Before that fine, the largest fine imposed on a broadcaster by Ofcom or its predecessor regulators was £2 million, which was imposed by the ITC on Carlton in 1998 for The Connection, a faked "documentary" in which actors pretended to be drug traffickers.

In any event, it is extremely difficult to draw meaningful comparisons between the fines imposed by Ofcom on broadcasters, as they are almost invariably fact-specific. Contrast, for example, the £150,000 fine imposed on the BBC for "Sachsgate" with the £50,000 fine imposed on the BBC for unfair conduct of a viewer competition and failing to take due care over the physical and emotional welfare of under-18s in an edition of Blue Peter.⁷ In addition, there are different caps that apply to the fines that can be imposed on different broadcasters, which adds to the difficulty of making comparisons. For example, the maximum fine that Ofcom can impose on the BBC on any occasion is £250,000 (under section 198(5) of the Communications Act 2003), while for ITV and Channel 4, the maximum is 5% of their qualifying revenue (under section 41 of the Broadcasting Act 1990).

While Ofcom's penalty guidelines apply across all areas that it regulates, including telecoms, broadcasting and postal services, it is perhaps of some comfort to those regulated by Ofcom that the revised guidelines will not be a "one-size-fits-all approach", and that it does not intend simply to uplift all fines across the board for all types of breaches in all sectors. Instead, Ofcom says that the changes will enable it, in appropriate circumstances, to increase penalties "to achieve a greater deterrent effect", where needed. That may not be necessary in each case, Ofcom says, and it will also consider the sanctions and other enforcement actions available to it (as it currently does), before determining whether a penalty is appropriate and, if so, at what level.

Overall, the potential impact on larger entities in any of the Ofcom-regulated sectors may be significant, and Ofcom's 2015 consultation and statement suggest that the revisions to the penalty guidelines are directed particularly at the telecoms sector. But as Ofcom concludes in its statement (rather stating the obvious): "A provider can avoid the costs of a contravention and what it claims is the inevitable passing-on of those costs to consumers by avoiding the contravention in the first place."

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⁶ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/lwt.pdf>.

⁷ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/bbc.pdf>.