

SCHEDULES

SCHEDULE 13

Section 143

PENALTIES IMPOSED BY OFCOM UNDER CHAPTER 6 OF PART 7

Meaning of “penalty” in this Schedule

- 1 Except as otherwise indicated, references in this Schedule to a “penalty” are to any of the following—
- (a) a penalty imposed by a confirmation decision (see sections 132(5)(b) and 137), whether that is—
 - (i) a penalty of a single amount, or
 - (ii) a penalty calculated by reference to a daily rate;
 - (b) a penalty imposed by a penalty notice under section 139;
 - (c) a penalty imposed by a penalty notice under section 140(5);
 - (d) a penalty imposed by a penalty notice under section 141(6).

Amount of penalties: principles

- 2 (1) In determining the amount of a penalty to be imposed on a person, OFCOM must, in particular, take into account—
- (a) any representations made, and evidence provided, by the person, and
 - (b) the effects of the failure (or failures) in respect of which the penalty is imposed.
- (2) In the case of a penalty imposed by a confirmation decision, OFCOM must also take into account any representations made, and evidence provided, by any other person to whom the earlier provisional notice of contravention relating to the same matter was given.
- (3) OFCOM must also take into account—
- (a) in the case of a penalty imposed by a confirmation decision, any steps taken by the person towards—
 - (i) complying with any duty or requirement specified in the provisional notice of contravention given to the person, or
 - (ii) remedying the failure to comply with any such duty or requirement;
 - (b) in the case of a penalty imposed by a penalty notice under section 139, any steps taken by the person towards—
 - (i) complying with any duty or requirement specified in the confirmation decision given to the person, or
 - (ii) remedying the failure to comply with any such duty or requirement;
 - (c) in the case of a penalty imposed by a penalty notice under section 140(5), any steps taken by the person towards complying with the notice under section 121(1);

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- (d) in the case of a penalty imposed by a penalty notice under section 141(6), any steps taken by the person towards paying any amount of the fee due to OFCOM.
- (4) A penalty must be of an amount that OFCOM consider to be—
 - (a) appropriate, and
 - (b) proportionate to the failure (or failures) in respect of which it is imposed.
- (5) See also section 392 of the Communications Act (which requires OFCOM to produce guidelines about their determination of the amount of penalties that they impose).

Limitation to type and amount of penalties previously proposed

- 3 (1) A confirmation decision or penalty notice may not impose a penalty of a different kind, of a greater amount or (in the case of a penalty calculated by reference to a daily rate) payable over a longer period than that proposed in the earlier notice in relation to the same matter.
- (2) Sub-paragraph (1) applies in a case where a provisional notice of contravention and confirmation decision in relation to the same matter are both given jointly (in accordance with Schedule 15) to the same entities, but does not otherwise apply in relation to a penalty for which two or more entities are jointly and severally liable.
- (3) In this paragraph “penalty notice” means a penalty notice under section 139, 140(5) or 141(6).

Maximum amount of penalties

- 4 (1) Where a penalty is imposed on a person in respect of a regulated service provided by that person, the maximum amount of the penalty for which the person is liable is whichever is the greater of—
 - (a) £18 million, and
 - (b) 10% of the person’s qualifying worldwide revenue for the person’s most recent complete accounting period (subject to sub-paragraph (5)).
 - (2) But if the person does not have an accounting period, the maximum amount of the penalty for which the person is liable is £18 million.
 - (3) The maximum amount of a penalty for which a person not within sub-paragraph (1) is liable is £18 million.
 - (4) If the person’s first accounting period has not yet ended, sub-paragraph (1)(b) is to be read as referring to 10% of the amount that OFCOM estimate to be the person’s likely qualifying worldwide revenue for that period.
 - (5) If the duration of the accounting period by reference to which an amount of qualifying worldwide revenue is calculated is less than a year, the amount mentioned in sub-paragraph (1)(b) is to be proportionately increased.
- If the duration of that accounting period is more than a year, that amount is to be proportionately reduced.
- (6) The amount of a person’s qualifying worldwide revenue for an accounting period is, in the event of a disagreement between the person and OFCOM, the amount determined by OFCOM.

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- (7) In the case of a confirmation decision that imposes a penalty of a single amount and a penalty calculated by reference to a daily rate, references in sub-paragraphs (1) to (3) to the maximum amount for which a person is liable are to the maximum amount of both those penalties taken together.
- (8) In this paragraph “accounting period”, in relation to a person, means a period in respect of which accounts are prepared in relation to that person or, where that person is an individual, in respect of that individual’s business of providing a regulated service.
- (9) Regulations made by OFCOM under section 85(1)(a) (including regulations making provision of a kind mentioned in section 85(3), (4) or (5)) apply for the purpose of determining the qualifying worldwide revenue of a provider of a regulated service for an accounting period as mentioned in this paragraph as they apply for the purpose of determining the qualifying worldwide revenue of a provider of a regulated service for a qualifying period for the purposes of Part 6.

Maximum amount of penalties: group of entities

- 5 (1) This paragraph contains modifications of paragraph 4 in a case where, in accordance with Schedule 15, two or more entities are jointly and severally liable for a penalty.
- (2) Sub-paragraphs (3) to (5) of this paragraph apply instead of paragraph 4(1) to (4).
- (3) The maximum amount of the penalty for which the entities are liable is whichever is the greater of—
 - (a) £18 million, and
 - (b) 10% of the qualifying worldwide revenue of the group of entities that consists of—
 - (i) the entity that is the provider of the regulated service to which the decision or notice in question relates (“entity E”), and
 - (ii) every other entity which (at the time the decision or notice is given) is a group undertaking in relation to entity E.
- (4) In sub-paragraph (3)(b), the reference to the qualifying worldwide revenue of a group of entities is to—
 - (a) the amount of the group’s qualifying worldwide revenue for the most recent complete accounting period of the entities liable for the penalty, or
 - (b) if the first accounting period of the entities liable for the penalty has not yet ended, the amount that OFCOM estimate to be the group’s likely qualifying worldwide revenue for that period.
- (5) In a case where the accounting periods of the entities liable for the penalty are different—
 - (a) the reference in sub-paragraph (4)(a) to the accounting period of the entities is to be read as a reference to the accounting period of any of the entities (at OFCOM’s discretion), and
 - (b) sub-paragraph (4)(b) is to apply as if—
 - (i) for “the first accounting period of the entities” there were substituted “the first accounting period of all of the entities”, and
 - (ii) for “that period” there were substituted “the accounting period of any of the entities (at OFCOM’s discretion)”.

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- (6) Sub-paragraphs (5), (6) and (7) of paragraph 4 are to be read with the necessary modifications in their application for the purposes of this paragraph.
- (7) In this paragraph—
“accounting period”, in relation to an entity, means a period in respect of which accounts are prepared in relation to that entity;
“group undertaking” has the meaning given by section 1161(5) of the Companies Act 2006.
- (8) For the purposes of this paragraph, sections 1161(5) and 1162 of, and Schedule 7 to, the Companies Act 2006—
(a) are to apply in relation to an entity which is not an undertaking (as defined in section 1161(1) of that Act) as they apply in relation to an undertaking, and
(b) are to be read with any necessary modifications if applied to an entity formed under the law of a country outside the United Kingdom.
- (9) OFCOM may by regulations make provision about how the qualifying worldwide revenue of a group of entities is to be determined for the purposes of this paragraph.
- (10) Before making regulations under sub-paragraph (9) OFCOM must consult—
(a) the Secretary of State,
(b) the Treasury, and
(c) such other persons as OFCOM consider appropriate.
- (11) Regulations under sub-paragraph (9) may make provision subject to such exemptions and exceptions as OFCOM consider appropriate.

Recovery of penalties

- 6 (1) In England and Wales, a penalty is recoverable—
(a) if the county court so orders, as if it were payable under an order of that court;
(b) if the High Court so orders, as if it were payable under an order of that court.
- (2) In Scotland, a penalty may be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.
- (3) In Northern Ireland, a penalty is recoverable—
(a) if a county court so orders, as if it were payable under an order of that court;
(b) if the High Court so orders, as if it were payable under an order of that court.