

SCHEDULES

SCHEDULE 10

Section 49(3)

SCHEDULE TO BE INSERTED AS SCHEDULE 16A TO THE 2003 ACT

After Schedule 16 to the Communications Act 2003 insert—

“SCHEDULE 16A

Section 392A

PENALTIES IMPOSED BY OFCOM UNDER PARTS 3A AND 3B

Interpretation

- 1 References in this Schedule to a penalty are to—
- (a) a penalty imposed by a confirmation decision (see [sections 362AZ1\(8\)](#) and [362BS\(8\)](#));
 - (b) a penalty imposed by a penalty notice under [section 362AZ4\(2\)](#) or [362BV\(2\)](#);
 - (c) a penalty imposed by a penalty notice under [section 362AZ7\(6\)](#) or [362BY\(6\)](#).

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 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 the duty or duties specified in the provisional notice of contravention given to the person, or
 - (ii) remedying the failure to comply with that duty or those duties;
 - (b) in the case of a penalty imposed by a penalty notice, any steps taken by the person towards—
 - (i) complying with the duty or duties specified in the confirmation decision given to the person, or
 - (ii) remedying the failure to comply with that duty or those duties.

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- (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 (which requires OFCOM to produce guidelines about their determination of penalties that they impose).

Maximum amount of penalties

- 3 (1) Sub-paragraph (2) applies where—
 - (a) a penalty is imposed on a person in respect of a regulated television selection service that is or was at any time provided by that person,
 - (b) a penalty is imposed on a person other than the BBC or S4C in respect of a designated internet programme service that is or was at any time provided by that person,
 - (c) a penalty is imposed on a person in respect of a designated radio selection service that is or was at any time provided by that person, or
 - (d) a penalty is imposed on a person other than the BBC in respect of a relevant internet radio service that is or was at any time provided by that person,and the person upon whom the penalty is imposed has an accounting period.
- (2) The maximum amount of the penalty that may be imposed is whichever is the greater of—
 - (a) £250,000, and
 - (b) 5% of the person’s qualifying worldwide revenue for the person’s most recent complete accounting period.
- (3) In any case other than that described in sub-paragraph (1), the maximum amount of the penalty that may be imposed is £250,000.
- (4) If (in a case described in sub-paragraph (1)) the first accounting period of the person has not yet ended, sub-paragraph (2)(b) is to be read as referring to 5% 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 (2)(b) is to be increased proportionately.
- (6) If the duration of the accounting period by reference to which an amount of qualifying worldwide revenue is calculated is more than a year, the amount mentioned in sub-paragraph (2)(b) is to be decreased proportionately.
- (7) 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.
- (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.

Maximum amount of penalties: group of entities

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- (1) This paragraph contains modifications of [paragraph 3](#) where, in accordance with [Schedule 16B](#), two or more entities are jointly and severally liable for a penalty.
 - (2) Sub-paragraphs (3) to (6) of this paragraph apply instead of [paragraph 3\(1\)](#) to (4).
 - (3) If the entities do not include the BBC or S4C, the maximum amount of the penalty for which the entities are liable is whichever is the greater of—
 - (a) £250,000, and
 - (b) 5% of the qualifying worldwide revenue of the group of entities that consists of—
 - (i) the entity to which the confirmation decision or the penalty notice relates (“entity E”), and
 - (ii) every other entity which (at the time the confirmation decision or the penalty notice is given) is a group undertaking in relation to entity E.
 - (4) In any case other than that described in [sub-paragraph \(3\)](#), the maximum amount of the penalty for which the entities are liable is £250,000.
 - (5) 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.
 - (6) In a case where the accounting periods of the entities liable for the penalty are different—
 - (a) the reference in [sub-paragraph \(5\)\(a\)](#) 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 \(5\)\(b\)](#) is to apply as if—
 - (i) for “the first accounting period of the entities” there were substituted “the first accounting period of all the entities”, and
 - (ii) for “that period” there were substituted “the accounting period of any of the entities (at OFCOM’s discretion)”.
 - (7) Sub-paragraphs (5) to (7) of [paragraph 3](#) are to be read with necessary modifications for the purposes of this paragraph.
 - (8) 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.
 - (9) 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

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- (b) are to be read with any necessary modifications if applied to an entity formed under the law of a country or territory outside the United Kingdom.

Power to amend paragraphs 3 and 4

- 5 (1) The Secretary of State may by regulations amend any of the following provisions of this Schedule so as to substitute a different amount or a different percentage for the amount or percentage for the time being specified in that provision—
- (a) paragraph 3(2)(a);
 - (b) paragraph 3(2)(b);
 - (c) paragraph 3(3);
 - (d) paragraph 3(4);
 - (e) paragraph 4(3)(a);
 - (f) paragraph 4(3)(b);
 - (g) paragraph 4(4).
- (2) A statutory instrument containing regulations under [sub-paragraph \(1\)](#) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

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.

Qualifying worldwide revenue

- 7 (1) For the purposes of this Schedule, OFCOM must produce a statement giving information about the amounts which it does, or does not, regard as comprising a person's "qualifying worldwide revenue".
- (2) The statement must include provision about the application of that term to a group of entities for the purposes of [paragraph 4](#) of this Schedule.
- (3) The statement may make different provision in relation to different kinds of regulated television selection services, designated internet programme services, designated radio selection services and relevant internet radio services.
- (4) Before producing the statement (including a revised or replacement statement), OFCOM must consult—
- (a) the Secretary of State,
 - (b) the Treasury, and

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- (c) such other persons as OFCOM consider appropriate.
- (5) OFCOM must keep the statement under review.
- (6) OFCOM must publish the statement (and any revised or replacement statement).
- (7) OFCOM must send a copy of the statement (and any revised or replacement statement) to the Secretary of State and the Secretary of State must lay it before Parliament.

Interpretation

8 In this Schedule—

“designated internet programme service” has the same meaning as in Part 3A (and a reference to providing an internet programme service is to be construed in accordance with [section 362AZ12\(2\)](#) to (5));

“designated radio selection service” has the same meaning as in Part 3B;

“regulated television selection service” has the same meaning as in Part 3A;

“relevant internet radio service” has the same meaning as in Part 3B.”