

# Outline procedures for statutory sanctions in content and content-related cases

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## Introduction

1. This document outlines the procedures that Ofcom will normally follow when considering the imposition of a statutory sanction ('sanction') on a broadcaster for breaches of any content or content related requirements (including breaches of Ofcom's codes) by a broadcast licensee, the BBC or S4C ('a broadcaster'). They are effective from 18 January 2008.

2. Ofcom's powers to impose statutory sanctions come from the Communications Act 2003 ('the Act') and the Broadcasting Acts 1990 and 1996 (as amended). Ofcom may impose a range of sanctions either together or separately, as it deems appropriate. These include a decision to:

- issue a direction not to repeat a programme;
- issue a direction to broadcast a correction or a statement of Ofcom's findings which may be required to be in such form, and to be included in programmes at such times as Ofcom may determine;
- impose a financial penalty;
- shorten a licence (only applicable in certain cases); or
- revoke a licence (not applicable to the BBC, S4C or Channel 4). The procedures for revocation are set out in paragraphs 32 and 33 below.

**‘financial penalty’**

In most cases involving holders of a commercial television or radio licence, the maximum fine is normally £250,000 or 5% of the relevant broadcaster’s ‘Qualifying Revenue’ whichever is the greater. However, for licensed Public Service Broadcasters the maximum is 5% of their ‘Qualifying Revenue’. For the BBC or S4C, the maximum financial penalty payable is £250,000.

3. Ofcom also has the power under a broadcaster’s licence to issue a direction to a broadcaster “in respect of any matter, subject or thing” which Ofcom considers appropriate, having regard to its or the licensee’s duties and all relevant codes and guidance. The procedure for issuing such a direction is a separate procedure from the sanctions procedures and is set out in paragraphs 30 and 31 below. Failure to comply with such a direction is itself likely to lead to consideration of a sanction.

4. Ofcom’s powers to impose a sanction in broadcasting cases apply to the content of all broadcast services (both editorial and advertising).

## 1. Statutory Sanctions

### A. General principles

5. The imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly<sup>1</sup>, or recklessly breached the terms of its licence conditions (in the case of Ofcom licensees) or any relevant enforceable requirement (in the case of the BBC and S4C). This includes any breach of any relevant Ofcom codes from time to time in force<sup>2</sup>.

6. The Outline procedures set out in this document, and any related guidance, may be reviewed and amended at any time. Any major revision will be the subject of prior consultation.

7. Ofcom will not impose any sanction against a broadcaster before the broadcaster has been given a reasonable opportunity to make representations about whether a sanction should be imposed, and if so, what type, and at what level. Ofcom will take account of any such representations. What Ofcom considers to be a ‘reasonable opportunity’ will depend upon the facts and degree of urgency in each case. Where appropriate, broadcasters will be given an opportunity to make oral representations (see paragraph 18). For instance, broadcasters will be invited to give oral

<sup>1</sup> A repeated breach of a licence condition, enforceable requirement or Ofcom code would include, for example: a repeat of the breach of the same condition, term or requirement as has already been recorded; repetition of the same or similar conduct as that which earlier contravened a licence condition, enforceable requirement or Ofcom code; or a breach of another different licence condition, term or requirement to that previously contravened.

<sup>2</sup> At present the codes in force to which this procedure applies include: the Broadcasting Code, the Cross-promotion Code, the Code on Access Services, the Rules on Text Size, the Rules on the Amount and Distribution of Advertising, the Broadcast Committee of Advertising Practice (BCAP) Codes and the Electronic Programme Guide (EPG) Code. This outline procedure does not apply to competition cases.

representations where the Executive recommends that a financial penalty or the shortening or revocation of a licence should be considered.

8. The imposition of sanctions in content and content-related cases has been delegated from the Board to the Content Sanctions Committee.

**The Content Sanctions Committee ('the Committee')** is a committee of the Ofcom Board and consists of five members, three from the Content Board and two from the Ofcom Board. The Committee is quorate with three Content Board members

9. Decisions on whether to impose a sanction and, if so, at what level will be taken by the Committee.

10. Under the Outline procedures, broadcasters will be provided at each stage of the process with the draft sanctions paper prepared by the Executive (this paper summarises the case) to allow broadcasters to make representations at each stage before the paper is presented to the Committee. Broadcasters will be provided with copies of the documentation which will be attached to the sanctions paper that is put before the Committee, subject to the withholding of any material that Ofcom believes is confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the broadcaster will be notified that relevant material has been withheld and the reasons why.

**Executive** means any relevant member/s of staff employed in Ofcom's Content and Standards department

**manager** – a Standards Case Manager or equivalent at the time in Ofcom's Content and Standards department

**more senior manager** - a Senior Standards Manager or Director or Partner, or equivalent at the time in Ofcom's Content and Standards department

## **B. Outline procedures**

### **The consideration of a sanction**

11. Consideration of a statutory sanction begins with a manager writing to the broadcaster<sup>3</sup> in accordance with Ofcom's Guidelines for the handling of standards complaints ('the Guidelines')<sup>4</sup>. The broadcaster will be notified that a breach has been found. A finding will be enclosed with this notification. The manager will inform the broadcaster that a statutory sanction is being considered and that a draft sanctions paper may follow.

### **Confidentiality**

Confidentiality is necessary for the proper performance of Ofcom's functions with respect to cases where a sanction is being considered. All information, correspondence and documents relating to Ofcom sanctions procedures are strictly confidential, unless already in the public domain

<sup>3</sup> Ofcom will already have received representations from the broadcaster on whether a breach of the relevant code has occurred.

<sup>4</sup> Available at <http://www.ofcom.org.uk/tv/ifi/guidance/standards/>

### **First draft of sanctions paper – seriousness of case**

12. Once the breach has been recorded, the manager will send a draft sanctions paper containing details of the code or licence breach and setting out the reasons why it is currently considered that a statutory sanction may be appropriate. This draft sanctions paper should contain a summary of the material on which the Executive has so far relied, and the Executive's comments on any issue raised by the broadcaster that is material to the case. The primary purpose of this first draft sanctions paper is to establish the grounds on which the case is being referred for consideration of a sanction.

### **First draft of sanctions paper – broadcaster representations**

13. On receipt of the draft sanctions paper (see paragraph 12 above) the broadcaster will be invited to make any representations on the case, and particularly on the recommendation to refer the case to the Committee for consideration of a sanction. The broadcaster will be asked to make these representations to a more senior manager. These representations should normally be submitted within ten working days of the broadcaster receiving the draft sanctions paper.

14. Taking account of any representations from the broadcaster, the more senior manager will then independently review the case. He or she may, at this stage, undertake further work (including seeking further information from the broadcaster). It is open to the more senior manager to decide that no sanction is appropriate or that a sanction should be considered.

### **Disposal of cases of insufficient seriousness**

15. If the more senior manager believes that a sanction is not appropriate, then he or she will write to the broadcaster setting out his/her conclusions. The finding of breach will then normally be published in the Ofcom Broadcast Bulletin.

### **Second draft of sanctions paper – type and level of sanction**

16. However, if the more senior manager believes that a statutory sanction should be considered, then he or she will write to the broadcaster enclosing the revised draft sanctions paper (revised as appropriate to take account of any representations received from the broadcaster), and informing the broadcaster that he or she is minded to refer the case to the Committee and recommend a statutory sanction. This draft sanctions paper also normally sets out a provisional recommendation of the type (and, if appropriate), level of sanction and includes an analysis of the reasons for that provisional recommendation. The broadcaster will be advised to make any final written representations, which should normally be submitted within ten working days of the broadcaster receiving the draft sanctions paper.

17. If, having considered the final written submissions of the broadcaster, the more senior manager still considers the case should be referred to the Committee, then he or she will finalise the sanctions paper and the recommendation. The final sanctions paper, which will also contain all the relevant material the Executive has relied on as outlined in paragraph 12, including the final recommendation, is then submitted to the Committee. A copy is also sent to the broadcaster.

### **The Committee and oral hearings**

18. The Chair of the Committee will then consider the final sanctions paper and decide whether he considers the matter should be considered for a sanction. If so, and the Chair of the Committee believes it appropriate, the broadcaster will be invited to a meeting to give oral representations (see paragraph 7). The broadcaster may

bring legal representation to this meeting. However, the total representation on behalf of the broadcaster should normally not exceed five people (including legal representation). The proceedings will be at the discretion of the Chair of the Committee but will normally be as follows:

- the Chair explains the proceedings, outlines the breaches which have occurred and explains the range of potential sanctions which may be imposed in the particular case;
- the broadcaster makes its oral representations (the Chair will determine in advance the duration of these representations, normally limited to 30 minutes);
- members of the Committee may put questions to the broadcaster; and
- the broadcaster then concludes with a brief final statement, normally limited to 10 minutes following which the broadcaster and its representatives leave the meeting.

### **Committee's decision**

19. The Committee may decide either that a sanction is not appropriate, or that a sanction is appropriate and if so, what type of sanction should be imposed and at what level. The decision of the Committee is final and published.

20. If, after considering all the evidence including any relevant points raised in any oral representations, the Committee believes that the sanction to be imposed should include a financial sanction, then it will, as appropriate, consider the penalty in accordance with the Penalty Guidelines published by Ofcom (see <http://www.ofcom.org.uk/about/account/pg/>). If the Committee believes that the sanction should include revocation of the licence, then the procedure for revocation described in paragraphs 32 and 33 will apply.

### **Publication of decision**

21. The Committee's final decision will be communicated to the broadcaster in writing, setting out the reasons ('the sanctions adjudication'). The broadcaster will normally be provided with the sanctions adjudication only on the day of, and shortly before, publication to allow time for the broadcaster to comment on any factual or typographical errors in that adjudication. In exceptional circumstances the length of time given to the broadcaster to comment may be lengthened at Ofcom's discretion based on submissions made by the broadcaster.

### **Sanctions in fairness and privacy cases and advertising cases**

22. In fairness and privacy cases, the recommendation for consideration of a statutory sanction will originate as appropriate with the Fairness Committee or Executive Fairness Group. In these circumstances, the recommendation is passed to the relevant manager, so he or she can commence consideration of a statutory sanction<sup>5</sup> as appropriate. Paragraphs 12 to 21 then apply.

23. The Advertising Standards Authority ('the ASA') may, under the terms of its Memorandum of Understanding with Ofcom, request Ofcom to consider a statutory sanction in an advertising case. In such cases, the ASA will normally have published a breach of its code. In these circumstances, the consideration of a statutory

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<sup>5</sup> See paragraph 40 of Ofcom's Outline procedures for handling fairness and privacy complaints at <http://www.ofcom.org.uk/tv/ifi/guidance/fairness/>

sanction commences with the manager sending a broadcaster a draft sanctions paper.<sup>6</sup> Paragraphs 12 to 21 then apply.

### C. Fast-track procedure for statutory sanctions

24. Ofcom may consider it appropriate in certain cases to apply a 'fast-track' procedure for considering the imposition of sanctions. The use of this procedure is at Ofcom's discretion but it may be applied in the following circumstances:

- where in Ofcom's view there is a risk of ongoing material harm, including financial loss, to viewers or listeners, or other third parties;
- where a broadcaster or an associate of a broadcaster fails to comply as required with the terms of a direction issued by Ofcom pursuant to the terms of the broadcaster's licence (see paragraph 3 above);
- where there has been a failure by a broadcaster to provide a recording of its output in accordance with its obligations;
- where a broadcaster requests that the fast-track process be used;
- where in Ofcom's view a broadcaster is failing to take steps as required to comply with its licence obligations despite notification from Ofcom of its non-compliance; or
- where Ofcom is satisfied it is in the public interest to do so. (Where Ofcom considers that it is in the public interest to adopt the fast-track procedure, its reasons for doing so, will be provided to the broadcaster(s) concerned.)

#### **'associate'**

'associate' has the same meaning in these Outline procedures as in the Broadcasting Act 1990 (as amended), Schedule 2, Part 1, Paragraph 1

25. Where any of the circumstances referred to in paragraph 24 apply, the fast-track procedure below may replace the procedure set out in paragraphs 12 to 16.

26. In such cases, the manager, who has recorded a breach, in accordance with the Guidelines, will notify the broadcaster that Ofcom is invoking the fast-track procedure and that the case has been passed immediately to the more senior manager for assessment. If the more senior manager agrees that it is appropriate to invoke the fast-track procedure, he or she will write to the broadcaster enclosing a draft sanctions paper. Unlike the normal Outline procedures for statutory sanctions described in paragraphs 12 to 16, the draft sanctions paper will also at this stage include the provisional recommendation on sanction and a summary of all the relevant material that Ofcom has so far relied on and its comments on any issues that are raised by the broadcaster that are material to the decision as to whether to impose a sanction (and if so at what level). The broadcaster may be requested to provide further information. The broadcaster will be requested to make any final written representations on the draft sanctions paper and the provisional recommendation to Ofcom, normally within ten working days of the date of receiving the draft sanctions paper.

27. If, in the light of any representations provided by the broadcaster, the more senior manager believes that a sanction is not appropriate, then he or she will write to the

<sup>6</sup> For more information on the criteria for referral from the Advertising Standards Authority to Ofcom, please see the Memorandum of Understanding available at [http://www.ofcom.org.uk/consult/condocs/reg\\_broad\\_ad/update/mou/](http://www.ofcom.org.uk/consult/condocs/reg_broad_ad/update/mou/)

broadcaster setting out his/her conclusions. The finding of breach will then normally be published in the Ofcom Broadcast Bulletin.

28. However, if he or she believes that a statutory sanction should be considered, the final sanctions paper, including the final recommendation on sanction, will be presented to the Committee and the broadcaster notified and provided with a copy.

29. The consideration of a sanction will then continue as normal, that is, as set out in paragraphs 18 to 21.

## **2. Other Matters**

### **A. Procedure for issuing a direction under the broadcasting licence**

30. Ofcom may deem it appropriate to issue a direction to a broadcaster pursuant to its licence (see paragraph 3 above), in which case the procedure set out below will apply. Such a direction will normally be issued in circumstances where a broadcaster has seriously breached its licence, and in Ofcom's view has failed to comply in a timely manner with its licence obligations. This procedure is separate from the statutory sanctions procedures outlined above. However the sanctions procedures may run parallel to the issuing of a direction under the licence if appropriate. Further, compliance with the direction does not mean that sanctions will not be considered.

31. A direction under a broadcasting licence can be issued by an executive member of Ofcom's Content Board. After it has been issued, the direction will normally be published in Ofcom's Broadcast Bulletin. A broadcaster's failure to comply with a direction can of itself lead to statutory sanctions being considered, if appropriate under the fast-track procedure outlined in paragraphs 24 to 29 above.

### **B. Procedure for revocation of a broadcasting licence**

32. Where Ofcom is satisfied that the holder of a licence is in contravention of a condition of the licence or is failing to comply with a direction of the type described in paragraph 30, and is satisfied further that the contravention or failure if not remedied would justify the revocation of the licence, it must serve a notice indicating that the licence will be revoked if the steps specified in the notice are not taken. The holder of the licence will be given a reasonable opportunity of making representations about the matters set out in the notice. What is reasonable will depend on the circumstances and urgency of the case but could be no more than 24 hours.

33. If, at the end of the period specified in the notice, Ofcom is satisfied that the specified steps have not been taken and that it is necessary in the public interest to revoke the licence, it shall serve a notice revoking the licence. The notice revoking the licence takes effect when it is served on the licensee.

### **C. Licence applications and changes affecting the nature or status of the Licensee or Licensed Service**

34. If Ofcom is considering imposing a sanction against a broadcaster, and until the Committee has reached a decision on the matter, and the matter is fully resolved (eg by payment of any financial penalty) Ofcom reserves the right to postpone the consideration of any applications for new licences by the licensee (or where appropriate, an associate of the licensee). Ofcom also reserves the right to postpone consideration of any other matters that could affect the nature or status of the licensee and the licensed service and/or the nature or status of an associate and/or

its licensed service. (including, but not limited to, requests for consent to transfer and changes to the name and nature of a licensed service).