

## Annex 3

### Procedures for the consideration of statutory sanctions in breaches of broadcast licences



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Publication date:

1 June 2011

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## Introduction

- 1.1 This document outlines the Procedures that Ofcom will normally follow when considering the determination of a sanction against broadcasters<sup>1</sup> for breaches of any requirement of their licence; or in the case of the BBC or S4C,<sup>2</sup> who do not hold a licence, any relevant enforceable requirement (see paragraph 1.8 below). In this document all these requirements are referred to as “a relevant requirement.” These Procedures are effective from 1 June 2011.<sup>3</sup>
- 1.2 If Ofcom considers that it is necessary to depart from these Procedures in any material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to determine a sanction, it shall write to the broadcaster concerned in advance setting out the nature and extent of its departure, its reasons for doing so and seeking the broadcaster’s response.

## Statutory framework

- 1.3 Ofcom has general duties in relation to broadcasting. These include securing the application, in the case of all television and radio services, of standards that provide adequate protection:
- to members of the public from offensive or harmful material in such services: section 3(2)(e) of the Communications Act 2003 (“the 2003 Act”); and
  - to members of the public and all other persons from both unfair treatment in programmes included in such services and unwarranted infringements of privacy resulting from activities carried on for the purposes of such services: section 3(2)(f) of the 2003 Act.<sup>4</sup>

Ofcom’s general duties also include securing the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests: section 3(2)(c) of the 2003 Act.

- 1.4 More specifically, Ofcom has a duty under section 319 of the 2003 Act to set such standards for the content of programmes to be included in television and radio services as appear to Ofcom best calculated to secure certain “standards objectives”.

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<sup>1</sup> As the context requires, subsequent references in these Procedures to “broadcasters” include any broadcaster licensed and/or regulated by Ofcom.

<sup>2</sup> The Welsh Authority operates its television service under the name “S4C.”

<sup>3</sup> The 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.

<sup>4</sup> By virtue of section 3(4)(g) of the 2003 Act, Ofcom must also have regard to the need to secure that the application of standards in relation to the inclusion of offensive and harmful material is in the manner which best guarantees an appropriate level of freedom of expression.

Those standards objectives are set out under s.319(2), and Ofcom is required to establish codes containing these standards. To meet that duty, Ofcom applies the provisions of the Ofcom Broadcasting Code (“the Broadcasting Code”)<sup>5</sup>, the Cross-Promotion Code,<sup>6</sup> the Code on the Scheduling of Television Advertising (COSTA)<sup>7</sup> and, where appropriate, the UK Code of Broadcast Advertising (the BCAP Code) at <http://www.cap.org.uk/The-Codes/BCAP-Code.aspx>.<sup>8</sup>

- 1.5 Similarly, Ofcom has a specific duty under section 107 of the Broadcasting Act 1996 (as amended)<sup>9</sup> (“the 1996 Act”) to draw up a code giving guidance as to the principles to be observed and the practices to be followed by broadcasters in connection with the avoidance of unjust or unfair treatment<sup>10</sup> in programmes and unwarranted infringement of privacy in programmes (or in connection with the obtaining of material included in them). To meet that duty, Ofcom applies Sections Seven (“Fairness”) and Eight (“Privacy”) of the Broadcasting Code.
- 1.6 Ofcom also has more specific duties<sup>11</sup> in relation to, for example, the provision of subtitling, signing and audio description.<sup>12</sup> Likewise, in relation to securing that the character of a licensed broadcast radio service, as proposed by the licence holder when making its application, is maintained during the period for which the licence is in force.<sup>13</sup>
- 1.7 As well as by the application of the Codes referred to above, Ofcom carries out its duties by:
  - granting broadcast licences under the Broadcasting Act 1990 (“the 1990 Act”) and the 1996 Act; and
  - by including in those licences conditions required by statute or which it thinks are appropriate to help it carry out those duties.

These conditions include those requiring broadcasters to observe the provisions of the Codes described above in the provision of their services and in relation to programmes included in their services. They also include, for example, conditions imposing requirements on broadcasters: to provide information to Ofcom, to offer specific programmes and types of content, and to comply with various other codes issued by Ofcom.

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<sup>5</sup> See <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>

<sup>6</sup> See <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/crosspromo.pdf>

<sup>7</sup> See <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/tacode.pdf>

<sup>8</sup> In addition, section 325 of the 2003 Act requires Ofcom to establish procedures for the handling and resolution of complaints about the observance of standards set under section 319. It also requires broadcasters themselves (in addition to Ofcom) to establish their own procedures for the handling and resolution of such complaints.

<sup>9</sup> The Broadcasting Act 1996 was amended by the 2003 Act.

<sup>10</sup> Unjust or unfair treatment is defined by section 130 of the 1996 Act as including treatment which is unjust or unfair because of the way in which material included in a programme has been selected or arranged.

<sup>11</sup> The following are examples, not an exhaustive list of Ofcom’s specific duties.

<sup>12</sup> Derived from sections 303 – 307 of the 2003 Act.

<sup>13</sup> Section 106(1) of the 1990 Act.

- 1.8 The BBC is also subject to relevant Codes pursuant to the BBC Agreement<sup>14</sup> and sections 198 and 338 of, and Schedule 12 to, the 2003 Act. Sections 203 and 338 of, and Schedule 12 (paragraph 12 in particular) to, the 2003 Act further provide that the Welsh Authority (i.e. S4C) must comply with relevant Codes. In the case of the BBC and the Welsh Authority (S4C), who do not hold Ofcom licences, these Codes are “relevant enforceable requirements”.
- 1.9 In the event of a breach of a condition of a licence issued under the 1990 or 1996 Acts (including non-compliance with a relevant Code), Ofcom has the power to impose statutory sanctions (“a sanction”) on the relevant broadcaster under provisions contained in those Acts (or the 2003 Act in some cases).<sup>15</sup> Ofcom’s powers to impose sanctions for breach of a relevant enforceable requirement on the BBC are contained in section 198 of the 2003 Act and the BBC Agreement, and its powers in respect of S4C are contained in section 341 of, and Schedule 12 to, the 2003 Act.
- 1.10 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>16</sup>, or recklessly breached a relevant requirement.
- 1.11 The sanctions available to Ofcom include a decision to:
- issue a direction<sup>17</sup> not to repeat a programme or advertisement;
  - 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;<sup>18</sup>
  - impose a financial penalty;<sup>19</sup>
  - shorten<sup>20</sup> or suspend a licence<sup>21</sup> (only applicable in certain cases); and/or<sup>22</sup>
  - revoke a licence (not applicable to the BBC, S4C or Channel 4).<sup>23</sup>

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<sup>14</sup> An Agreement Between Her Majesty’s Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation, dated 28 June 2006.

<sup>15</sup> The specific provision which empowers Ofcom to impose sanctions for a breach of licence conditions will depend upon the type of licence held (see paragraph 1.11 and accompanying footnotes for examples).

<sup>16</sup> A repeated breach of a relevant requirement, would include, for example: a repeat of the breach of the same requirement as has already been recorded; repetition of the same or similar conduct as that which earlier contravened a requirement; or multiple breaches of other requirements.

<sup>17</sup> Under, for example, section 40(1) of the 1990 Act, section 236(6) of the 2003 Act and, in the BBC’s case, clause 93(5) of the BBC Agreement.

<sup>18</sup> Under, for example, sections 40(1) and 109(3) of the 1990 Act, section 236(2) of the 2003 Act, clauses 93(1) and (2) of the BBC Agreement and paragraph 15 of Schedule 12 to the 2003 Act in S4C’s case.

<sup>19</sup> Under, for example, sections 41(1) and 110(1) of the 1990 Act, clause 94(1) of the BBC Agreement and section 341(2) of the 2003 Act in S4C’s case.

<sup>20</sup> Under, for example, sections 41(1) and 110(1) of the 1990 Act.

<sup>21</sup> Under, for example, 110(1) of the 1990 Act.

<sup>22</sup> In some cases Ofcom may impose more than one sanction.

<sup>23</sup> Under, for example, sections 42 and 111 of the 1990 Act and 238 of the 2003 Act.

## Financial penalty

In most cases the maximum financial penalty for commercial television or radio licensees is £250,000 or 5% of the broadcaster's 'Qualifying Revenue', whichever is the greater.

For licensed Public Service Broadcasters the maximum financial penalty payable is 5% of 'Qualifying Revenue'.

For the BBC or S4C, the maximum financial penalty payable is £250,000.

- 1.12 In cases under these Procedures involving a breach of a relevant requirement relating to the content of a programme, decisions will be made (and, where relevant, preliminary views taken) by two senior members of the Ofcom Executive who have been given appropriate delegated authority by the Ofcom Board, together with a Non-Executive member of Ofcom's Content Board. The Executive officers will normally be the Director of Standards and the Group Director of Content, International and Regulatory Development Group.<sup>24</sup>
- 1.13 In other cases, the decision makers under these Procedures will be the senior members of the Ofcom Executive described in the previous paragraph. Exceptionally in such cases, where Ofcom considers that it is necessary for reasons of fairness and/or in order for Ofcom properly to determine a sanction, a Non-Executive member of Ofcom's Content Board will make decisions together with the Ofcom Executive Officers.
- 1.14 In all cases, when Ofcom writes to the broadcaster in accordance with paragraph 1.17 below, it will identify the decision maker(s).

## Procedures

### Consideration of sanctions

- 1.15 The consideration of a sanction follows a decision by Ofcom that a broadcaster has breached a relevant requirement.<sup>25</sup> A case will normally be considered for the imposition of a sanction when Ofcom considers that a broadcaster has seriously, deliberately, repeatedly, or recklessly breached a relevant requirement.
- 1.16 Ofcom aims to conclude the consideration of the imposition of a sanction within 60 working days from the date Ofcom records the breach(es) of the relevant requirement(s). However, the circumstances of individual cases can vary considerably and completion may in some cases take longer.
- 1.17 If Ofcom considers that a sanction may be appropriate, it will write to the broadcaster with the following information as appropriate:

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<sup>24</sup> Or Directors of equivalent seniority and delegated authority should either of these be unavailable for any reason.

<sup>25</sup> 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.

- details of the breach(es);
  - comments on any issue raised by the broadcaster that is material to the case;
  - details of any relevant cases on which Ofcom has already adjudicated;
  - details of the broadcaster's recent compliance history;
  - details of Ofcom's preliminary view that a sanction may be appropriate;
  - details of Ofcom's preliminary view on the type and level of any sanction considered to be appropriate and proportionate;
  - a summary of the material on which it has relied in reaching its preliminary view; and
  - the relevant documentation<sup>26</sup> that Ofcom has taken into account will also be provided.
- 1.18 Where, at this stage, Ofcom's preliminary view is that the appropriate sanction should include a financial penalty, then it will, as appropriate, consider the penalty in accordance with the Penalty Guidelines published by Ofcom at <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>
- 1.19 Ofcom's preliminary views as set out at this stage are only provisional. They may be subject to change in the light of the broadcaster's representations and any other information provided to Ofcom by the broadcaster (see paragraph 1.21 below).
- 1.20 Ofcom will invite the broadcaster to make representations on its preliminary views that a sanction may be appropriate and of the type and level of any sanction being considered. Depending on the type and level of any sanction, this may be by written and/or oral representations as Ofcom may consider appropriate (see paragraphs 1.21 to 1.23 below).

## **Broadcaster representations**

- 1.21 When invited to make written representations on Ofcom's preliminary views that a sanction may be appropriate and on the type and level of any sanction being considered, a broadcaster should do so within 15 working days, unless otherwise specified. In some circumstances, Ofcom may, at its discretion, invite a broadcaster to submit one or more sets of subsequent representations on a case, as it sees fit (it will also do so in cases where the statutory process requires so). Ofcom may also request any information it requires from the broadcaster, to assist its understanding of the case or if it is necessary to ensure that the process is fair.

## **Oral representations**

- 1.22 If Ofcom considers that, in addition to or instead of making written representations, it is necessary to invite the broadcaster to make oral representations in order to ensure

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<sup>26</sup> Ofcom may withhold material it believes to be 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.

that Ofcom can fairly and properly determine whether to impose a sanction, and the appropriate and proportionate level of any sanction, it will invite the broadcaster to make such representations. Ofcom will normally give the broadcaster at least 15 working days' notice of the date for making those representations. The hearing of such representations will be in private and may take place in England, Northern Ireland, Scotland, or Wales, as appropriate.

- 1.23 The procedure for making oral representations will be at the discretion of Ofcom. Ofcom will write to the broadcaster in advance of the date for hearing the representations, to set out what the procedure will be.

## Disposal

- 1.24 After consideration of written and/or oral representations from the broadcaster, Ofcom may decide that no sanction is appropriate in a particular case. Where this occurs, the broadcaster will receive a notification to this effect.

## Sanctions decision

- 1.25 If, after considering all the evidence and representations from the broadcaster, Ofcom believes that a sanction is appropriate, it shall consider which of the available sanctions is appropriate and will reach a decision to this effect. Where Ofcom decides that the appropriate sanction should include a financial penalty, then it will, as appropriate, have regard to the Ofcom Penalty Guidelines published at <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>

## Revocation of licence

- 1.26 In cases where the broadcaster is an Ofcom licence holder and Ofcom considers that the sanction to be imposed should be revocation of the licence, it will follow the statutory provisions governing the revocation of that licence.<sup>27</sup> In the majority of cases, this will require Ofcom to serve a notice indicating that the licence will be revoked if the steps specified in the notice are not taken. 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.<sup>28</sup> The notice revoking the licence takes effect when it is served on the licence holder.
- 1.27 Where there is no statutory procedure prescribed for the revocation of a licence, for example where a person is no longer considered to be "fit and proper" to hold a licence, Ofcom will follow a comparable procedure in which the licensee will be given an opportunity to make representations on Ofcom's proposal to revoke the licence. Depending upon the urgency of the situation, the period for representations may be very short, possibly a matter of hours.

## Publication of Sanction Decision

- 1.28 The Sanction Decision, with a statement of reasons, will be sent to the broadcaster 24 hours before its publication. Where the sanction includes a financial penalty, the

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<sup>27</sup> See, for example, sections 42 and 111 of the 1990 Act and section 238 of the 2003 Act.

<sup>28</sup> The precise procedure we will follow will depend on the relevant statutory provisions. For example, the provisions may require a licence holder to be given a second opportunity to make representations before a notice of revocation is served.

level of the penalty will be omitted. The broadcaster will be notified of the level of any financial penalty immediately before the publication of the decision.

1.29 Ofcom will then proceed to publish its decision on its website. A summary of the Sanction Decision will normally be published in Ofcom's Broadcast Bulletin at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>

1.30 Ofcom's decision is final.

## Non Disclosure

1.31 Subject to any relevant considerations, it is essential to the integrity of Ofcom's processes and its ability to regulate fairly that the parties concerned abide by all Ofcom's published rules and procedures. These require, for example, that parties to the consideration of a sanction should not disclose any correspondence, documents and other material concerning the consideration of the sanction<sup>29</sup> during the course of the investigation (see text box below).

### Non Disclosure

Ofcom expects broadcasters to keep all information, correspondence and documents relating to sanctions cases strictly confidential, unless already in the public domain. In particular, Ofcom expects broadcasters to keep strictly confidential any information provided to them by Ofcom as part of the sanctions process, including any provisional indication/decision on the type and level of any sanction that may be imposed.<sup>30</sup>

Moreover, once Ofcom has started a sanctions process, the broadcaster should not take any steps which could - whether intentionally or not - compromise or risk compromising, a fair decision on the matter by Ofcom or otherwise constitute, in Ofcom's opinion, an abuse of process. This does not limit what Ofcom can publish in its decision at the end of the investigation.

## Time limits

1.32 Broadcasters should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or properly to make decisions relating to sanctions) to amend or adapt the time limits in a particular case. Any broadcaster requiring an extension to a time limit should explain in writing to Ofcom why it believes the relevant time limit should be extended.

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<sup>29</sup> Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Such obligations do not allow the use of exemptions by Ofcom in an arbitrary fashion. Information provided to Ofcom as part of a complaint may need to be disclosed by Ofcom in order to meet such obligations and nothing in these Procedures can prevent Ofcom from doing so.

<sup>30</sup> Ofcom may withhold material it believes to be 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.