



## **Response of British Sky Broadcasting ('Sky') to Ofcom's consultation "Review of procedures for handling broadcasting complaints, investigations and sanctions"**

### **Introduction**

1. Sky welcomes Ofcom's present initiatives to reduce the costs of regulation borne by industry and to make Ofcom's procedures more efficient and effective.
2. Such measures should not, however, be implemented at the expense of broadcasters' rights of defence. In particular, Ofcom should be conscious of the practical consequences of removing appeal mechanisms, where judicial review remains the only means of challenging Ofcom's decisions. Proposals to materially reduce the periods permitted for broadcasters to respond are also potentially prejudicial to broadcasters' defences, if not justified.
3. Set out below are Sky's substantive comments, focused on the aspects of the proposals that are likely to impact directly on stakeholders.

### **Appeals**

4. Sky's primary concern is Ofcom's proposal to remove the possibility of any form of appeal (save judicial review) in relation to broadcasting complaints (both licence infringements and fairness & privacy matters). These proposals significantly undermine broadcasters' rights of defence and severely limit broadcasters' ability to challenge Ofcom decisions, which can have significant financial consequences, especially if they result in statutory sanctions being considered. Sky contends that the present availability of internal Ofcom review should be retained as the minimum requirement, and that Ofcom should consider how it would give effect to a more appropriate review mechanism, involving a more independent review process.
5. Judicial review is not only procedurally complex and expensive but, given the grounds for review, is also likely to be of limited application in relation to broadcasting complaints which concern subjective assessments of offence, 'undue prominence' and fairness, amongst other things. In practical terms, it is therefore highly unlikely that any broadcaster would consider pursuing such an action in relation to a broadcasting complaint, unless it were certain that it would face the serious censure if unsuccessful, e.g. through licence revocation. Even the risk of the imposition of a substantial fine by Ofcom might not be sufficient to overcome the costs and uncertainty of bringing a judicial review action. Accordingly, to restrict appeals to judicial review actions in relation to broadcasting complaints would be equivalent to an outright prohibition on appealing such decisions.
6. Ofcom is under a duty to have regard, in all cases, to "*the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed*" and "*any other principles appearing to OFCOM to represent the best regulatory practice*".
7. It is well established that the principle of accountability and 'best regulatory practice' require that Ofcom maintain an independent review process in relation to its regulatory activities. For example, under the ['Hampton Principles of Better Regulation'](#), regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take. This principle is expanded on in the BERR publication "[the Statutory Code](#)

[of Practice for Regulators](#)<sup>1</sup> which states that only by establishing effective accountability and transparency structures will regulators make their activities accessible and open to scrutiny. Such procedures would also increase the legitimacy of regulatory activities and enable Ofcom and stakeholders to work together to achieve regulatory compliance. In this regard, the Statutory Code states that:

*“Complaints procedures should include a final stage to an independent, external, person. Where there is a relevant Ombudsman or Tribunal with powers to decide on matters in this Code, the final stage should allow referral to that body. However, where no such person exists, a regulator should, in consultation with interested parties, provide for further complaint or appeal to another independent person, for example, an independent professional body.”*

8. Ofcom has not attempted to justify why it would be appropriate in these circumstances to do away with the current review mechanisms for broadcasting complaints (which are, in any event, insufficient), nor has it assessed the current mechanism’s compatibility with the principles of better regulation.
9. As there is no relevant ombudsman or tribunal in respect of broadcasting complaints, Ofcom is under a duty to implement an independent appeals process to give effect to its statutory obligations.

### **Ofcom procedures for investigating breaches of broadcast licences**

10. Ofcom proposes disclosure of a ‘preliminary view’ to broadcasters as part of its revised procedures. Sky notes that, in effect, Ofcom already provides a preliminary view when it requests comments from a broadcaster in respect of particular Broadcasting Code rules. On receipt, the broadcaster is on notice that Ofcom considers there to be a case to answer in respect of the rules referenced.
11. Accordingly, the proposals will only represent an improvement to the current process if 1) Ofcom is able to address a significant number of complaints without recourse to the broadcaster at all, and 2) should Ofcom believe that there has been an infringement, the ‘preliminary view’ expressed at this initial stage is sufficiently detailed, and includes all relevant evidence and arguments to enable the broadcaster to respond to all the issues likely to form part of any future finding. To the extent that Ofcom envisages the new procedures acting in this way in practice, then they are to be welcomed. This should not, however, be at the expense of any rights of appeal, for the reasons stated above.
12. The revised proposals make no mention of submission of the draft finding to the relevant broadcaster before publication. This is an important step in the current process that should be reflected in the published procedures.
13. In relation to ‘Disclosure’, Ofcom should clarify any distinction between confidential information disclosed to Ofcom by a broadcaster during an investigation, and information relating to the complaint, which is confidential to Ofcom and the parties until publication. Both forms of confidential information should be covered by the published procedures. It would also be helpful for Ofcom to confirm explicitly its policy in relation to disclosure of information relating to ongoing investigations.<sup>2</sup>

### **Ofcom’s procedures for the investigation of Fairness & Privacy complaints**

14. Ofcom proposes, without explanation, to allow 15 working days for broadcasters to respond to an Entertainment Decision, instead of the current 20 working days. Fairness & privacy

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<sup>1</sup> Sky notes that Ofcom is not yet obliged to comply with the code on a statutory basis and that the code does provide useful guidance for regulators such as Ofcom.

<sup>2</sup> Ofcom currently publishes the name of the programme under investigation, channel and date of broadcast and date the complaint is received. It is not clear whether Ofcom provides additional information in response to press enquiries, and a definitive statement that Ofcom will not do so is appropriate in the context of these guidelines.

complaints often involve detailed investigation of production materials, and therefore are much more likely to require broadcasters to liaise with third parties involved in the production of programmes in order to prepare their response. In these circumstances, a reduced period for response to the Entertainment Decision is not justified, and the longer period of 20 days should be retained. It is noted that a longer period for responses would not unduly prejudice Ofcom's administrative burden, and could reduce it by enabling the submission of more complete responses, minimising the need for discussions between the parties regarding extensions or supplemental responses.

15. Ofcom proposes removing broadcasters' ability to request a review of the Entertainment Decision and the provisional decision. For the reasons provided above, rights of appeal should be retained.

#### **Ofcom procedures for the consideration of statutory sanctions in breaches of broadcast licences**

16. Under the proposals it appears that statutory sanctions will only be considered *after* a finding of breach is made, at which time the broadcaster will be informed of the type and level of sanction, and given 15 working days to respond. In order to be able to respond appropriately to a particular complaint, broadcasters should be made aware of the possibility of statutory sanctions at the earliest opportunity. Ofcom states that statutory sanctions will be appropriate only in cases where a broadcaster has "*seriously, deliberately, repeatedly, or recklessly breached a relevant requirement*". Accordingly, Ofcom ought to be in a position at the start of an investigation to say whether, if proven, it might consider a statutory sanction to be appropriate given all the information available to it at the time.
17. Paragraph 5.13 makes no reference to the possibility of an oral hearing in such cases, whilst oral representations are referred to in paragraph 5.12. Ofcom should make it clear whether broadcasters have the right to an oral hearing or not, and if such opportunities are at the discretion of Ofcom, what circumstances would lead it to exercise that discretion in favour of an oral hearing.