



Review of procedures for handling broadcasting complaints, cases and sanctions

Final statement

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Section 1

Introduction

- 1.1 Ofcom is the body in the UK responsible for issuing licences to television and radio broadcasters. Broadcasters must adhere to a number of requirements in their licences which enable Ofcom to fulfil our duties. Our duties include:
- ensuring that the public are adequately protected from offensive or harmful material and from unfair treatment or unwarranted infringements of privacy; and
 - ensuring a wide range of TV and radio services of high quality and wide appeal.¹
- 1.2 Ofcom also regulates the BBC and the service provided by the Welsh Authority (“S4C”) in certain respects, including in relation to broadcast content standards and fairness and privacy. In the case of the BBC and S4C, who do not hold a licence, the applicable rules on these matters are called ‘relevant enforceable requirements’.
- 1.3 When Ofcom receives a complaint and/or decides to investigate whether a broadcaster has breached one of the requirements placed on it, and whether a sanction should be imposed, we follow certain published procedures.
- 1.4 Ofcom has published three sets of procedures in this respect concerning:
- broadcasting standards or other licence-related cases;
 - fairness and privacy complaints; and
 - sanctions in cases relating to broadcasting or other licence-related cases.
- 1.5 On 17 December 2010, Ofcom published a consultation document (“the Consultation”) proposing changes to its published procedures and seeking views on those proposals.² The Consultation sought stakeholders’ views on new proposed procedures that Ofcom would normally follow when:
- investigating breaches of broadcast licences³ (including in relation to content standards for television and radio);
 - investigating fairness and privacy complaints; and
 - considering statutory sanctions in breaches of broadcast licences.⁴

What was the purpose for reviewing the procedures?

- 1.6 The assessment of complaints about, and investigations into, possible breaches of broadcasters’ licences and relevant enforceable requirements, and the imposition of

¹ Ofcom also has more specific duties in relation to, for example, the provision of subtitling, signing and audio description. 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.

² Available at <http://stakeholders.ofcom.org.uk/consultations/broadcast-complaints-review/>

³ and relevant enforceable requirements.

⁴ and relevant enforceable requirements.

sanctions in appropriate cases, play a crucial role in ensuring that the public is appropriately protected. It is important that our procedures for carrying out these investigations and imposing sanctions, where appropriate, are as effective and efficient as possible, as well as continuing to meet our statutory duties and ensuring we act fairly towards all stakeholders.

1.7 Following previous periodic revisions to the procedures, we believed that they could be further improved for the benefit of all of our stakeholders. At the same time, Ofcom was generally carrying out a review of its programmatic work to make it as efficient and effective as possible in light of a review of resources in the current economic climate. As part of this wider review of how we carry out our work, we proposed a number of changes to our procedures for investigations and sanctions which would:

- streamline our processes and procedures to eliminate non value adding activities;
- improve the speed with which we carry out investigations;
- allow more responsive decision making;
- simplify stakeholders interactions with us on a day to day basis; and,
- deliver greater value for our stakeholders.

1.8 The proposed changes were designed to ensure continued fairness to those involved in our investigations and complaints procedures, whilst maintaining high quality decision-making.

What were the key proposed changes?

1.9 Some of the key proposed changes were that we would:

- **Move to an “issues based” model for ensuring compliance with relevant requirements.** It was proposed that Ofcom will continue to acknowledge all complaints but would no longer reply to every individual complaint with a ‘tailored’ response. Instead, we would investigate where necessary and prioritise our investigations according to a number of relevant factors (for example, harm to minors, financial detriment and ongoing harm).
- **Introduce a ‘Preliminary View’.** We proposed to reach a ‘preliminary view’ on complaints and investigations earlier in the process. This will enable broadcasters (and complainants in fairness and privacy complaints) to prepare and provide their representations having had sight of Ofcom’s ‘preliminary view’. It was proposed that only after considering those representations would Ofcom reach its decision on whether there has been a breach.
- **Remove the internal review mechanism.** We proposed to remove the opportunity to request an internal review of all of our decisions on breaches of broadcast licence requirements⁵ (including in relation to fairness and privacy adjudications). This would also result in the removal of the Broadcasting Review Committee.

⁵ and relevant enforceable requirements.

- **Remove the Broadcasting Sanctions Committee.** We proposed that the consideration and determination of statutory sanctions would be carried out by any person(s) within Ofcom with appropriate delegation from the Ofcom Board to carry out this function.
- **Clarify Ofcom's approach to the disclosure of information it gathers during investigations.** 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). Information provided to Ofcom as part of a complaint or investigation may need to be disclosed by Ofcom in order to meet such obligations.

1.10 The Consultation closed on 11 February 2011 with Ofcom having received 13 responses, primarily from broadcasters. Two respondents requested that their responses be kept confidential. The remaining responses are available on Ofcom's website⁶.

Ofcom's decisions

1.11 Ofcom has now decided to adopt the procedures listed below (and set out in full at Annexes 1 to 3 to this statement). We have done so in order to meet our statutory duties, and to ensure our procedures are fair, effective and efficient, taking into account the range of views, some conflicting, in the Consultation responses. The new procedures we are adopting (together, "the Procedures") are:

- Procedures for the consideration and adjudication of Fairness & Privacy complaints ("the F&P Procedures") (Annex 1);
- Procedures for investigating breaches of content standards for television and radio ("the Standards Procedures") (Annex 2); and
- Procedures for the consideration of statutory sanctions in breaches of broadcast licences⁷ ("the Sanctions Procedures") (Annex 3).

1.12 The purpose of this statement is to explain Ofcom's decisions, including changes we have made to the proposals in the Consultation (see section 2). The Procedures set out in the Annexes to this statement are also published on the relevant section of Ofcom's website. They will come into effect on 1 June 2011.⁸

Summary of key issues

1.13 Key issues on which Ofcom has made decisions that are reflected in the Procedures include the following (explained in more detail in Section 2 below):

- In the F&P Procedures, Ofcom will give broadcasters a chance to make a statement on a complaint once Ofcom has decided to entertain it. Ofcom will then prepare a preliminary view on the substance of the complaint. This will first be provided to the complainant for representations. The broadcaster will then be

⁶ Available at: <http://stakeholders.ofcom.org.uk/consultations/broadcast-complaints-review/?showResponses=true>

⁷ And other relevant enforceable requirements

⁸ Save in relation to complaints and investigations already underway and to which Ofcom's current published procedures are already being applied as at that date, where those procedures will continue to apply.

given the opportunity to respond to both the preliminary view and the complainants' representations, so that it can make representations on all matters Ofcom will consider before making its final decision.

- In the Standards Procedures, there will be an 'initial assessment' stage in which the broadcaster has an opportunity to make representations on a complaint and the particular provisions of the Broadcasting (or other) Code that are relevant and applicable, before Ofcom drafts a preliminary view, as well as the opportunity subsequently to make representations on that preliminary view.
- In light of the decisions referred to in the two bullet points above, we consider that the F&P and Standards Procedures are fair to broadcasters (and others), as well as effective and efficient, without a mechanism for the internal review of Ofcom's decisions. Broadcasters will have opportunities to make statements/representations at early and appropriate stages in those Procedures, so as to ensure they can comment on all matters Ofcom will consider (before we make decisions about the breach of any requirements).
- Ofcom has decided to adopt the Sanctions Procedures substantially as proposed. However, having considered the need for fairness, and concerns raised by some respondents, Ofcom has made some changes. In particular, to ensure decision makers are identifiable and have relevant expertise and seniority, and that there is consistency in their identity. We have also made clear that broadcasters' opportunity to make representations on Ofcom's preliminary view as to penalty includes making representations on whether a penalty should be imposed at all. We have similarly made more explicit the position on broadcasters making oral representations.

Consultation responses

1.14 The Consultation responses, which Ofcom has considered in making our decisions, put forward a range of views, some agreeing with some of our proposals and some disagreeing. A very broad summary of some key points is set out below:

- no respondents objected to the adoption of an "issues based" model for ensuring compliance with relevant requirements;
- some broadly agreed with the introduction of a 'Preliminary View,' some considering that it would assist broadcasters to focus their representations and contribute to efficiencies, but others raised significant concerns with this proposal;
- some respondents raised strong objections to the proposed removal of the internal review mechanism and the Broadcasting Review Committee, though others gave some agreement; and
- some respondents raised strong concerns about the removal of the Broadcasting Sanctions Committee and others raised issues about the levels of transparency and consistency in the identity of sanctions decision makers, while some agreed that the Ofcom Executive is best placed to determine statutory sanctions.

Section 2

Ofcom decisions

2.1 Ofcom has decided to adopt the Procedures to meet our relevant statutory duties, and to ensure the Procedures are effective, efficient and fair. In doing so, we have taken into account the responses to the Consultation. In the following section, Ofcom sets out the relevant statutory duties, the principal decisions we have made and the reasons we have made them.

Ofcom's statutory duties

General

2.2 Ofcom has general duties in relation to broadcasting which 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 Communications Act 2003 ("the 2003 Act");
- the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services: section 3(2)(e) of the 2003 Act; and
- the application, in the case of all television and radio services, of standards that provide adequate protection 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.

Standards

2.3 More specifically in relation to Standards matters, 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". Those objectives are in section 319(2), and Ofcom is required to establish codes containing these Standards. By virtue of section 3(4)(g) of the 2003 Act, Ofcom must 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.

2.4 For the purposes of those duties, Ofcom applies the provisions of the Ofcom Broadcasting Code (including the Cross-Promotion Code) ("the Broadcasting Code") and other Codes such as the Code on the Scheduling of Television Advertising ("COSTA") and, where appropriate, the UK Code of Broadcast Advertising (the BCAP Code). Pursuant to section 325(1) of the 2003 Act, broadcasters are required by the terms of their licences to observe the Standards in the provision of their services.

- 2.5 The BBC is also subject to relevant Codes pursuant to the BBC Agreement⁹ 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 provide that the Welsh Authority (i.e. S4C) must comply with relevant Codes.¹⁰
- 2.6 Section 325(1) of the 2003 Act requires broadcasters themselves (in addition to Ofcom) to establish their own procedures for the handling and resolution of complaints about the observance of the Standards. Under section 325(2) Ofcom must also establish procedures for the handling and resolution of complaints about the observance of Standards set under section 319.

Fairness and Privacy

- 2.7 In relation to Fairness and Privacy, Ofcom has a similarly specific duty under section 107 of the Broadcasting Act 1996 (“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 in programmes and unwarranted infringement of privacy in programmes (or in connection with the obtaining of material included in them). 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. By virtue of section 3(4)(g) of the 2003 Act, Ofcom must have regard to the need to secure that the application of Standards in relation to Fairness and Privacy is in the manner which best guarantees an appropriate level of freedom of expression.
- 2.8 To meet the duty in section 107 of the 1996 Act, Ofcom applies sections seven and eight of the Broadcasting Code. Again, broadcasters including the BBC and S4C must observe these Code provisions in connection with the provision of their services and in relation to programmes included in those services. In the case of broadcasters licensed by Ofcom under the Broadcasting Acts that obligation arises under conditions included in their licences pursuant to section 326 of the 2003 Act. Similar obligations apply to the BBC pursuant to the BBC Agreement, sections 198 and 338 of, and Schedule 12 to, the 2003 Act and relevant provisions of the 1996 Act. Sections 203 and 338 of, and Schedule 12 to, the 2003 Act, and relevant provisions of the 1996 Act, provide that the Welsh Authority (i.e. S4C) must comply with the relevant Code provisions.
- 2.9 Under section 110 of the 1996 Act Ofcom also has a specific duty to consider and adjudicate on complaints of unjust or unfair treatment in programmes or of unwarranted infringements of privacy in programmes (or in obtaining of material included in them) (“fairness and/or privacy complaints”). Sections 111 to 130 of the 1996 Act provide for certain statutory criteria which must be satisfied before Ofcom is entitled to proceed to consider fairness and/or privacy complaints, in addition to certain procedures to be followed by Ofcom, complainants and broadcasters.

Sanctions

- 2.10 Ofcom also has powers under the Broadcasting Act 1990, the 1996 Act and the 2003 Act (and, in the BBC’s case, under the BBC Agreement) to impose statutory

⁹ An Agreement Between Her Majesty’s Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation, dated 28 June 2006.

¹⁰ In the case of the BBC and the Welsh Authority, who do not hold Ofcom licences, the requirements of the relevant Codes are “relevant enforceable requirements”.

sanctions on broadcasters who are found in breach of relevant requirements. The sanctions available to Ofcom include decisions to:¹¹

- issue a direction 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, 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 (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));
- impose a financial penalty 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);
- shorten (under, for example, sections 41(1) and 110(1) of the 1990 Act) or suspend (under, for example, 110(1) of the 1990 Act) a licence; and¹²
- revoke a licence under, for example, sections 42 and 111 of the 1990 Act and 238 of the 2003 Act (not applicable to the BBC, S4C or Channel 4).

Effective, efficient and fair

2.11 Ofcom's view is that effective procedures are those which meet, and enable us to continue to meet, our duties in connection with Standards and Fairness and Privacy.

2.12 That is, procedures which, in particular:

- help Ofcom to secure the application of Standards that protect members of the public from offensive and harmful material in television and radio services;
- help ensure the Standards objectives for the content of programmes in television and radio services are met;
- help Ofcom to secure the application of standards that provide adequate protection to members of the public and all other persons from unfair treatment and from unwarranted infringements of privacy in line with our duties; and
- take account of the need to secure that the relevant Standards are applied in the manner which best guarantees an appropriate level of freedom of expression.

2.13 Ofcom considers that the Procedures achieve these things in a number of ways. They enable members of the public and other persons to make relevant complaints to Ofcom. They enable Ofcom properly to investigate and adjudicate upon breaches of relevant requirements, and to impose sanctions in appropriate cases. They also enable Ofcom to identify and determine complaints that are not well-founded and do not involve breaches of relevant requirements. And, in particular by affording broadcasters proper opportunity to make representations before Ofcom makes

¹¹ The specific provision which empowers Ofcom to impose sanctions for a breach of licence conditions will depend upon the type of licence held.

¹² In some cases, Ofcom may impose more than one sanction.

decisions, they enable Ofcom to take proper account of broadcasters' rights and interests (in, for example, freedom of expression). By these means the Procedures ensure the appropriate application of the applicable Standards and encourage broadcasters' compliance with those Standards and other relevant requirements.

2.14 Efficient procedures, in Ofcom's view, are those which can achieve the ends described in the previous paragraph by means that are no more burdensome than is necessary. In particular, as outlined in the Consultation, by:

- being streamlined so as to eliminate non value adding activities;
- improving the speed with which we carry out investigations;
- allowing more responsive decision making;
- simplifying stakeholders' interactions with Ofcom; and
- delivering greater value for our stakeholders.

2.15 Fairness requires that each of the Procedures, considered as a whole, provide for a decision making process that is fair for all relevant parties. In particular, by:

- (where appropriate, especially in Fairness and Privacy cases) affording complainants proper opportunity to make their complaint and to comment on Ofcom's preliminary views before Ofcom makes decisions;
- affording broadcasters opportunities to respond to all matters under consideration by Ofcom, before Ofcom make decisions about the breach of any requirements and the imposition of any sanctions; and
- providing for decisions by competent decision makers taking into account representations from all relevant parties.

2.16 Ofcom considers that the Procedures meet, and will enable Ofcom to continue to meet, our statutory duties, and that they are effective, efficient and fair in the ways outlined above.

Consultation responses

2.17 The Consultation closed on 11 February 2011. Ofcom received a total of 13 responses to it, primarily from broadcasters. Two respondents requested that their responses be kept confidential (though they have nonetheless been taken into consideration). The remaining responses are available on Ofcom's website¹³. The respondents included:

- Bauer Media
- the BBC;
- British Sky Broadcasting Limited;
- Channel 4;

¹³ Available at <http://stakeholders.ofcom.org.uk/consultations/broadcast-complaints-review/?showResponses=true>

- Channel 5 Broadcasting;
- GMG Radio;
- Information TV Ltd;
- Radio Centre; and
- Mr Les Simon.

2.18 Ofcom has carefully considered the Consultation responses in taking the view that the Procedures meet our statutory duties, and are effective, efficient and fair, and in making our decisions to adopt the Procedures. Where we consider it appropriate to do so in light of our aims, we have made changes to the Procedures.

The Procedures

2.19 The Procedures are at Annexes 1 to 3 to this statement. In the remainder of this section we explain the principal decisions we have made in light of our aims outlined above and the Consultation responses. We begin by dealing with issues common to more than one of the Procedures and then consider each Procedure in turn.

Common issues

Uncertainties

- 2.20 We have decided that, in the following respects, fairness requires extra certainty in the Procedures.
- 2.21 First, the proposed Procedures each stated that, “If Ofcom considers that it would be more fair and appropriate to follow a different procedure in any particular case or category of cases, we will explain our reasons for departing from these procedures”. Second, both the proposed F&P and Sanctions Procedures contained fewer details about when and how broadcasters would have the opportunity of making oral representations.
- 2.22 Ofcom has decided that fairness requires that those making, and broadcasters facing, complaints should know in advance the procedure that will apply to them, so that they can represent their interests properly. That also goes to securing the effectiveness and efficiency of the Procedures.
- 2.23 Accordingly, we have made clear in each of the Procedures that, where Ofcom considers that it is necessary to depart from the Procedures, we shall write to the parties concerned in advance setting out the nature/extent of the departure, our reasons for doing so and seeking the relevant parties’ response.
- 2.24 As to the hearing of oral representations, in the F&P Procedures we have made clear the persons who may be invited to attend and make oral representations. We have also made clear that we will write to the parties in advance of any hearing of oral representations to explain the procedure that will apply.
- 2.25 Ofcom has also decided that the Sanctions Procedures should be more explicit than we proposed about when and how broadcasters may make oral representations. Whilst it does not widen the circumstances in which Ofcom is likely to invite such oral representations, we have made expressly clear that if Ofcom considers it is

necessary, in addition to or instead of making written representations, to invite the broadcaster to make oral representations in order fairly and properly to determine whether to impose a sanction, and the appropriate and proportionate level of any sanction, we will invite the broadcaster to make such representations. As we make clear in the Procedures, we will normally give the broadcaster at least 15 working days' notice of the date for making those representations.

- 2.26 In the case of both relevant Procedures, the changes we have made in relation to oral representations will help ensure relevant parties know in advance the procedures Ofcom will apply. Those changes will also enable Ofcom to adopt in any particular case the procedure for hearing oral representations that is appropriate to ensure the case is dealt with fairly, taking into account, for example, the procedure applied for hearing oral representations in similar cases.
- 2.27 In making these decisions we have taken into account relevant Consultation responses. These include the response that the Procedures should be "clear and predictable" and that it is "unreasonable" for Ofcom to tailor procedures to particular cases in an ad hoc manner. That response said "... both broadcasters and complainants are entitled to know in advance how alleged breaches of broadcast licences will be investigated and adjudicated upon".
- 2.28 The same response also raised specific concerns with the F&P Procedures and oral hearings. It stated that "..... in order to fulfil its obligations to provide a fair hearing Ofcom should publish in these Procedures detail as to how any oral hearing would be conducted". In relation to the Sanctions Procedures and oral representations that response said the broadcaster should have the choice to make oral representations if it so wished. Other responses said a broadcaster's right to a fair hearing required that it should have a chance to make oral representations, especially where a decision is so important it could end the broadcaster's business. Another said Ofcom should make clear when we would hear oral representations.
- 2.29 The changes described above reflect the extent to which we agree with these submissions, and the extent to which we consider that fair, effective and efficient procedures require predictability and the ability to make oral representations.

Third Party Representations

- 2.30 The proposed Standards and F&P Procedures in the Consultation referred to representations from "directly affected third parties". These parties were described as "individuals or bodies who are directly affected by a case."
- 2.31 Ofcom has decided that fair and effective procedures require us to be more specific about the third parties who might be entitled to make representations under the relevant Procedures. We are concerned to ensure that third parties, often those involved in the production process, who may be directly affected by the outcome of our investigations and determinations and whose interests are independent of the relevant broadcaster, have the appropriate opportunity to represent those interests prior to Ofcom making a decision. But, equally, we are concerned that the group of third parties to whom this applies is not drawn so widely as unduly to affect the proper interests of the broadcaster, including to a fair decision making process.
- 2.32 Ofcom has therefore amended the relevant Procedures to make clear that third parties who are to be given opportunities to make representations and to be included in the decision making process are, "... persons/bodies who may be directly affected by the outcome of Ofcom's investigation and determination of a complaint(s) and who

may have interests independent of the relevant broadcaster of that programme (e.g. presenters, producers and/or independent programme-makers).”

- 2.33 In reaching this view we have taken into consideration the Consultation response which raised concerns about the drafting of the proposed Procedures in relation to third-party representations. It was submitted that the undefined term “directly affected” third parties is easily confused with the statutory concept of the “person affected” (for fairness and/or privacy complaints) under Part V of the 1996 Act. The response stated that the Procedures should be clearer so that they are not open to abuse by individuals and/or interest groups with no involvement with the production process who may have their own agenda in pressing for the right to make third party representations.

Review of decisions

- 2.34 In the Consultation we proposed that the Procedures would not provide for the opportunity for parties to request an internal review of Ofcom’s decisions (including “Entertainment Decisions” in Fairness and Privacy cases). Ofcom has decided to adopt this proposal and the Procedures do not provide for internal reviews.
- 2.35 The principal reason is this. In light of the additional opportunities to make representations that Ofcom has decided should be afforded to parties at early stages and throughout the Procedures, including as set out further below, Ofcom does not consider that fair and effective procedures also require the inclusion of review mechanisms. In particular, broadcasters will have both the first and last chance to make representations in fairness and/or privacy and Standards complaints (and investigations), which gives those Procedures the end to end fairness required of them.
- 2.36 For example, the Standards Procedures provide for broadcasters to make representations as part of Ofcom’s initial assessment of a complaint(s) (or matter under investigation), as well as in response to Ofcom’s preliminary view. The F&P Procedures similarly provide broadcasters with two opportunities to comment on an entertained complaint, one after Ofcom’s Entertainment Decision and one on Ofcom’s preliminary view. Complainants similarly have two opportunities to put their position in a fairness and/or privacy complaint: once when making their complaint and once in response to Ofcom’s preliminary view.
- 2.37 These opportunities would include the chance for relevant parties to put to Ofcom the kinds of points that might otherwise be part of an appeal (albeit at a different stage). The broadcaster’s first representations in a fairness and/or privacy complaint could include comments on Ofcom’s Entertainment Decision if the broadcaster wished to make them. Representations on Ofcom’s preliminary views give all parties the opportunity to make representations about, for example, possible errors of law and fact. And, in fairness and/or privacy complaints, the broadcaster’s opportunity is to make representations on both Ofcom’s preliminary view and the complainant’s representations on that view. That is, an opportunity to comment on all the matters Ofcom will take into account in making our decision, before we make it.
- 2.38 Ofcom considers that each Procedure, viewed as a whole, therefore provides each relevant party with fair opportunities to state their “case” at appropriate stages. Ofcom considers that this should help secure the appropriate application of the relevant Standards, taking into account both complainants’ and broadcasters’ interests, meeting our duties and ensuring the Procedures are effective. Achieving

this without the additional steps that internal reviews would require goes to Ofcom's efficiency aims set out above.

- 2.39 In reaching this decision, Ofcom has considered that some Consultation responses made strong objections to the proposed removal of internal review mechanisms. Some said that as a matter of natural justice a right of review is required. Others said the removal of reviews would significantly undermine broadcasters' rights of defence and severely limit their ability to challenge Ofcom's decisions. Some respondent also stated that the proposal would separate Ofcom's procedures from other regulators' and from standard regulatory practice, and would result in much more expense for Ofcom, broadcasters and individuals as the need for Judicial Review becomes more likely.
- 2.40 Ofcom has also noted that some respondents supported the proposed removal of internal reviews. They linked that support to the introduction of Ofcom's preliminary views and early opportunities to make representations before Ofcom makes decisions. For the reasons set out above, Ofcom agrees with that view.

Fairness and Privacy Procedures

Making an F&P complaint

- 2.41 The F&P Procedures Ofcom proposed in the Consultation maintained the position in our current published procedures that, in exceptional circumstances, Ofcom may consider fairness or privacy issues in the absence of a complaint from the affected party.
- 2.42 Many respondents raised concerns with this proposal. In particular, some suggested that it is the right of the individual, not Ofcom, to decide whether they wish to proceed with a formal complaint, and this proposal is beyond Ofcom's powers.
- 2.43 Ofcom considers that the F&P Procedures should provide for the situation where Ofcom may, in exceptional circumstances, consider fairness or privacy issues in the absence of a complaint from "the person affected". This is in order to fulfil our general duty under section 3(2)(f) of the 2003 Act to secure the application of standards that provide adequate protection to members of the public (and all other persons) from unfair treatment in programmes and unwarranted infringements of privacy. As the Procedures state, Ofcom envisages that it would only consider such issues in the absence of a complaint in exceptional circumstances.
- 2.44 One respondent submitted that the inclusion of this provision would give rise to a number of procedural problems in considering fairness or privacy issues. We have added to the Procedures that, if relevant exceptional circumstances ever did arise, Ofcom would set out in advance the procedures that we intend to follow and allow any relevant parties to respond. Those procedures would be similar to the F&P Procedures, but adapted as appropriate to ensure that they are fair, effective and efficient in the particular circumstances.

Time Limits

- 2.45 In the proposed F&P Procedures Ofcom proposed that broadcasters would be given 15 working days to make a (first) statement in response to a complaint once Ofcom has decided to entertain it. Ofcom has decided that a fair and effective procedure – one that gives broadcasters proper opportunity to know and make representations on

the complaint against them before it is decided - requires this to be increased to 20 working days.

- 2.46 In making this decision we have taken account of some Consultation responses which raised strong objections to our proposal. Respondent broadcasters said 15 working days is too short fully to research, draft and finalise statements, and would lead to them asking for extensions in most cases. They also made the point that fairness and/or privacy complaints are the most contentious and difficult to deal with, and that this difficulty can be compounded if the (often freelance) production staff has been disbanded, left employment or is working on other projects.

Representations, preliminary views and appropriate resolution

2.47 In the proposed Procedures set out in the Consultation Ofcom proposed:

- (as set out above) broadcasters would be given 15 working days to make a statement responding to a complaint on receipt of Ofcom's Entertainment Decision (before Ofcom takes a preliminary view on whether a relevant requirement has been breached);
- the removal of a specific stage for "appropriate resolution" of a complaint; and
- the adoption of a preliminary view as to breach, and on which the complainant and broadcaster would be given 10 working days to make representations, before and subject to which Ofcom would make our decision as to breach.

2.48 Ofcom has decided to adopt these proposals, but with the following modifications, which we consider improve the Procedures' fairness, effectiveness and efficiency.

2.49 First, and as explained above, we have increased to 20 the number of working days for broadcasters to make their statements on entertained complaints. We have also decided that, at the time we provide the broadcaster with our Entertainment Decision in such a complaint, Ofcom will set out the provisions of the Broadcasting Code we consider relevant and applicable to our subsequent consideration of the complaint, and seek the broadcaster's statement/ representations on that basis.

2.50 Second, we have decided that, once Ofcom has taken a preliminary view, having considered the broadcaster's post-Entertainment Decision statement, that view will first be provided to the complainant (with 10 working days to make their representations on it). Ofcom's preliminary view will then be provided to the broadcaster together with the complainant's representations, with the broadcaster given 10 working days to make its representations.

2.51 Ofcom considers the Procedures, with the modifications described, to be fair, effective and efficient. In particular, they provide for both parties to state their "case" fully, effectively and meaningfully, before Ofcom makes its decision. As far as the broadcaster is concerned, they provide for it to comment on the complaint first before Ofcom's takes a preliminary view on its substance, and in the clear knowledge of the scope of that complaint, *and* then to make representations before Ofcom makes a decision on the basis of the whole complaint Ofcom will consider. We agree fairness requires the broadcaster to know the "case" against it, and the matters Ofcom will consider, at these stages, and that it is given the chance properly to respond at each one.

- 2.52 These procedural steps will also ensure that Ofcom considers and adjudicates on all relevant matters in a complaint. That increases the possibility of appropriate findings and applications of the relevant Standards, taking into account all relevant rights and interests (including, for example, the broadcaster's right to free expression).
- 2.53 In other words, the Procedures provide for steps that contribute to their effectiveness. And, they do so in a way that goes to Ofcom's efficiency aim. They do not provide for procedural steps that are not necessary to achieve the fairness and effectiveness outlined.
- 2.54 In particular, in its statements and representations, it is still open to a broadcaster to offer (or take) steps to resolve a complaint. Ofcom would consider them as part of the broadcaster's statement/representations and in deciding our next steps. So, the Procedures retain the possibility of early resolution, but do so without the need for specific extra procedural steps (and the time they would take) that can always happen anyway.
- 2.55 There were a range of Consultation responses which Ofcom has considered in making these decisions. Those considerations are reflected in the decisions and explanations set out above.
- 2.56 One respondent, for example, said it is misconceived that Ofcom should take a preliminary view on the merits of a complaint before representations are closed. Some opposed the proposed Procedures on the basis they allowed for parties to make statements to Ofcom that are unseen and unchallenged by the other, resulting in the unfairness of a preliminary decision being taken without parties seeing all relevant submissions. It was said that the proposed lack of an opportunity for parties to comment sequentially on one another's representations was unfair to both broadcasters and complainants. Some respondents, however, acknowledged that the Procedures would provide them with opportunities to respond to the complaint against them before Ofcom takes a view on its substance.
- 2.57 Some respondents also said the "appropriate resolution" stage should be retained in the interests of informal mediation and a quick and effective remedy of complaints. Some said the removal would require complainants to pursue fully-fledged complaints (possibly with an oral hearing) when they may just be interested in having their grievance recognised by the broadcaster and some undertaking given for the future.

Issuing Directions

- 2.58 In the F&P Procedures in the Consultation, Ofcom proposed to retain (from the current published procedure we follow) the provision under which, in an upheld or partly upheld complaint, Ofcom may direct the broadcaster to broadcast a summary of our adjudication. We have decided that a fair and effective procedure should retain this provision.
- 2.59 In reaching this decision we have considered the provision of the 1996 Act pursuant to which the proposal was included in the proposed Procedures – section 119 – and the following Consultation response.
- 2.60 That response said such a Direction is a very serious matter which may have both editorial and financial implications – amounting to an interference with broadcast output and (possibly) displacing commercially valuable airtime. It was suggested that such Directions should be subject only to the Sanctions Procedures and issued only

after the broadcaster has had an opportunity to make representations about their issue.

- 2.61 Section 119 of the 1996 Act expressly provides for the issue of the proposed Directions in addition to directions issued to licensed broadcasters in respect of breaches of relevant requirements which are also licence breaches (see section 119 (7B)). That is, in addition to directions that Ofcom may impose on broadcasters as a sanction under the Sanctions Procedures (under, for example, sections 40(1) and 109(3) of the 1990 Act, section 236 of the 2003 Act and clause 93(5) of the BBC Agreement).
- 2.62 Given this statutory acknowledgement that it may be appropriate for more than one direction to be issued in respect of a fairness and/or privacy complaint, Ofcom does not consider it inappropriate or unfair for its procedures to preserve that possibility. In particular, for use in cases where the issuing of directions enhances the effectiveness of the Procedures in the senses referred to above.
- 2.63 Ofcom has also taken into account that even where complaints are considered under the Sanctions Procedures (and not all upheld complaints are), this may not result in the imposition of a sanction. There may, nonetheless, be reasons why Ofcom considers it fair and appropriate to issue a Direction under the F&P Procedures.
- 2.64 As the relevant part of the Procedures indicate, any decision by Ofcom to issue a direction will reflect our duties to be proportionate and consistent and to target action only at cases in which, in our view, it is merited. This does not preclude Ofcom seeking a broadcaster's comments before issuing a Direction under the F&P Procedures where we consider doing so appropriate to ensure fairness.

Standards Procedures

Scope

- 2.65 The procedures Ofcom proposed in the Consultation were, "Ofcom procedures for investigating breaches of broadcast licences." We proposed procedures Ofcom would normally follow when considering complaints or initiating our own investigations about broadcasters' compliance with all licence requirements or, in the case of the BBC or S4C who do not hold licences, with any relevant enforceable requirement. In other words, both compliance with Standards-related requirements and other, non-Standards requirements.
- 2.66 Ofcom has re-considered the scope of the Standards Procedures in light of its aims of fairness, effectiveness and efficiency, and of the provisions of sections 319 and 325 of the 2003 Act. In particular, our obligations under section 319(1) to set Standards for the content of programmes in television and radio services to secure the section 319(2) Standards objectives, under section 319(3) to embody those Standards in one or more codes and under section 325(2) to establish procedures for the handling and resolution of complaints about the observance of the Standards we set.
- 2.67 We have decided that fairness and effectiveness requires that the Procedures are both clear and appropriate for dealing with the matters subject to them. That way, complainants and broadcasters have the best opportunity to know and understand the procedures that apply and those procedures can deal appropriately with the

issues that arise (so meeting Ofcom's duties and aims). Ofcom considers those things less likely to be achieved if the Procedures seek to deal with a disparate range of matters (that could span both the content and the administrative requirements placed on broadcasters).

- 2.68 Accordingly, the scope of the Procedures has been changed. It is now limited to the handling and resolution of complaints (or for the conduct of Ofcom's own investigations) about broadcasters' compliance with the content Standards set under section 319 of the 2003 Act. Ofcom will publish separately, and as soon as possible, procedures for the handling and resolution of other complaints (and the conduct of Ofcom's own investigations into other matters).

Identity of complainants

- 2.69 Ofcom's current published procedures for the handling of broadcasting standards investigations says Ofcom will usually not consider anonymous complaints. The Standards Procedures we proposed in the Consultation did not contain this provision. Instead, they said that, unless a complainant specifically requests at the time they complain that their identity remain confidential, Ofcom reserves the right to disclose it to the broadcaster.
- 2.70 In other words, we proposed that Ofcom may consider anonymous complaints (or complaints in which a complainant requests their identity be withheld from the broadcaster), but also to reserve the right to disclose that identity to the broadcaster in some cases if, for example, we considered in a particular case that disclosure is required fairly to consider complaints or carry out an investigation.
- 2.71 Ofcom has decided to retain the provision as proposed for the following reasons.
- 2.72 Ofcom's duty in respect of Standards is to secure the application, in the case of all television and radio services, of Standards that provide adequate protection to members of the public (as a class) from the inclusion of offensive and harmful material in such services. In applying the Standards Procedures Ofcom will be following an issues based approach, in which we will be considering the objective question of whether a broadcaster has breached a Standards-related requirement (in order ultimately to secure the application of those standards).
- 2.73 Ofcom will not be considering complaints in order to determine the grievances and rights of individual complainants. Indeed, once they have properly made their complaint(s), complainants will have no further role under the Standards Procedures and Ofcom will not normally correspond any further with individual complainants.
- 2.74 In this context, issues of complainants' credibility and motives, which might otherwise be reason for disclosure of their identities, do not appear to Ofcom to be particularly relevant (in the generality of cases, at least). Nor does Ofcom see why a broadcaster would necessarily need to know a complainant's identity in order properly to defend its position on the question of whether a Standards requirement has been breached. But, we reserved the right to disclose that information in some cases if, for example, fairness requires it.
- 2.75 Ofcom's view, therefore, is that a fair and effective procedure does not, in the generality of cases at least, necessarily require the disclosure to a broadcaster of a complainant's identity. We consider the Procedures as proposed to be fair in this respect.

- 2.76 In reaching this view Ofcom has taken into account, and responds above to, Consultation responses including the following.
- 2.77 Some Responses objected to Ofcom's proposal, suggesting that, for reasons of transparency, the complainant should be known to both Ofcom and the broadcaster. Some considered that Ofcom should never accept anonymous complaints, and that broadcasters can only properly defend themselves and their Article 10 rights if they know who alleges a breach of standards. They said they (and Ofcom) can only properly assess credibility/motives if they know the complainant's identity.

Representations

- 2.78 In the proposed Standards Procedures Ofcom put forward a process in which broadcasters would have one opportunity to make representations, once Ofcom had taken a preliminary view, before Ofcom made our decision. The preliminary view would contain a summary of the complaint(s) (or matter(s) under investigation) and Ofcom's preliminary view on whether any breaches of a relevant requirement have occurred. This would be provided to the broadcaster for its representations, following and taking into account which Ofcom would decide whether a breach had occurred.
- 2.79 Ofcom has decided, for similar reasons as set out above in relation to "Review of decisions" and "Representations, etc.," that a fair and effective procedure requires that broadcasters also have an earlier opportunity to make representations at an "initial assessment" stage. We have also decided, again for similar reasons, that, together with this initial assessment stage, the preliminary view stage/process we proposed is fair. Likewise, that the Standards Procedures containing both stages are fair, effective and efficient (on account, amongst other things, of the first and last chances to make representations that are given to the relevant broadcaster).
- 2.80 In particular, Ofcom agrees that it is fair for the broadcaster to make representations on a complaint (or matter under investigation) and the particular provisions of the Broadcasting (or other) Code that are relevant and applicable, before Ofcom has taken even a preliminary view on it. It is fair that Ofcom should take into account what a broadcaster has to say about the complaint, at the earliest stage when it should be well placed to do so in terms of, for example, access to relevant production staff and evidence, in taking our preliminary view.
- 2.81 One exception to this that Ofcom has decided to make is in complaints (or investigations) where the question of whether there is a breach of a relevant Standards requirement is a matter of objective fact. For example, a question of the number or length of advertisements.
- 2.82 In such cases, Ofcom will not usually seek the broadcaster's representations at an initial assessment stage, and would only do so in response to our preliminary view. Unlike in the generality of cases, Ofcom does not consider that fairness requires us to seek the broadcaster's comments before we take a preliminary view in this limited category of cases. These would be cases in which there would be little, if anything, the broadcaster could meaningfully add at this stage and which could not, in any event, be addressed in representations in response to Ofcom's preliminary view. So, Ofcom has decided to take this approach in the interests of an efficient procedure.
- 2.83 The second opportunity broadcasters are given to make representations, after Ofcom has taken a preliminary view – which Ofcom will set out in sufficient detail, including the nature and details of the matters being considered by Ofcom, and is only provisional and subject to change – means broadcasters can make effective and

meaningful representations on all the matters Ofcom is considering before we make a decision as to breach. In taking those representations into account in making our decision, we may change our view.

- 2.84 Taken together, these provide for Procedures that, viewed “end to end,” give broadcasters a fair chance to know the “case” against them and to put their “case” in response, before Ofcom makes decisions. That, in turn, gives Ofcom the opportunity to make appropriate decisions to secure the application of the Standards, taking into account all relevant interests: an effective and efficient procedure.
- 2.85 In their Consultation responses, respondents put forward a range of views about Ofcom’s proposals on opportunities to make representations. We have taken these into account in making the decisions described above.
- 2.86 We have made our decision having considered in particular some respondents’ strong objections to our proposals on the grounds that a single opportunity to make representations, only after Ofcom has taken a preliminary view, is unreasonable, unjust and unfair. Specific concerns included that:
- Ofcom’s preliminary view would be formed without the context and required information of the steps taken by the broadcaster to comply with the Broadcasting Code;
 - the proposed procedures may add further delay and thus disadvantage the broadcaster because production staff may have moved on to other projects;
 - the proposed procedures only allowed a broadcaster to make representations once Ofcom had prejudged the complaint, leaving the broadcaster with the “uphill task” of persuading Ofcom to change its mind once it has already formed a substantive (albeit provisional) view on the merits; and
 - for these sorts of reasons, the proposed procedure was contrary to legal principles of natural justice as well as the rights to a fair hearing.

Ofcom’s decisions described above reflect our consideration of and response to these concerns.

Sanctions Procedures

- 2.87 In the Consultation, Ofcom proposed some changes to the Sanctions Procedures. One key proposed change was to remove the Broadcasting Sanctions Committee and for the consideration and determination of statutory sanctions to be carried out by any person(s) within Ofcom with appropriate delegation from the Ofcom Board to carry out this function.
- 2.88 Ofcom has decided to adopt the Sanctions Procedures substantially as proposed, on the basis they are fair, effective and efficient. We have, however, decided to make significant changes in relation to the identity of the decision makers. We have also changed the way Ofcom will set out its preliminary view and the matters on which broadcasters may make representations in response to it.¹⁴

¹⁴ In addition to those described beneath the “Common issues” heading above, and other more minor changes.

Decision makers

2.89 Ofcom considers that a fair and effective procedure – one that provides parties with a proper opportunity to put their “case” to a suitably qualified decision maker before the decision is made and contributes to the appropriate application of, and compliance with, regulatory rules – requires that decision makers:

- are identifiable and known in advance to relevant parties;
- have relevant expertise and seniority; and
- are consistent (in the sense, in this context, that there is consistency in their identity across cases).

2.90 Ofcom has therefore decided that those who will usually make Ofcom’s decisions in sanctions cases should be explicitly identified in the Sanctions Procedures. As set out in the Procedures, sanctions decisions will normally be made (and, where relevant, preliminary views taken):

- in cases involving a breach of a relevant requirement relating to the content of a programme, by Ofcom’s Director of Standards and the Group Director of Ofcom’s Content, International and Regulatory Development Group, who are two senior members of the Ofcom Executive who have appropriate delegated authority from the Ofcom Board,¹⁵ together with a Non-Executive member of Ofcom’s Content Board; and
- in other cases, by those two members of the Ofcom Executive (though, 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).

Ofcom considers that this meets the requirements of identifiability, expertise and seniority and consistency that a fair and effective procedure requires.

2.91 There were a range of responses to the Consultation that Ofcom has taken into account in reaching this decision. Some respondents opposed the removal of Ofcom’s Broadcasting Sanctions Committee from the decision making process. They said it is “unsatisfactory” that the identities of those who will adjudicate on sanctions would not be disclosed to broadcasters in advance and that the potential pool of decision makers would be so widespread. They contended that Ofcom should identify exactly who would determine sanctions, and that an ad hoc system of delegated responsibility could not ensure a consistent and fair approach that maintains a “level field” from decision to decision. They also said that the Committee would ensure that decisions of such seriousness as the sanctions that could apply were taken by a body of appropriate seniority, weight, experience and expertise.

2.92 Others, while not necessarily opposing the removal of the Committee from the Procedures, said that when a case is considered serious enough to warrant a sanction, it should from that point be dealt with by a panel of at least three Ofcom officers who are different (and preferably more senior) to the Ofcom officer(s) who dealt with the original (breach) complaint (or investigation). Some said that, if the

¹⁵ Or Directors of equivalent seniority and delegated authority should either of these be unavailable for any reason.

Committee is to be removed, Ofcom must be transparent about the identity of the decision makers, so that the broadcaster subject to any potential sanctions decision is aware of those making the decision.

- 2.93 Although they are not entirely uniform in their specific content and/or detail, Ofcom considers that these responses each relate to the underlying ideas that decision makers should be identifiable, expert and consistent in the senses described above, and which Ofcom has reflected in its decisions about decision makers in a fair and effective (and efficient) procedure.

Preliminary view

- 2.94 Ofcom proposed that the Sanctions Procedures would provide for a preliminary view by us that would set out a number of matters and on which we would invite a broadcaster's representations. We have decided that a fair procedure should enable a broadcaster to make representations not only about the type and level of any sanction Ofcom may impose but also on our preliminary view about whether a sanction should be imposed at all.

- 2.95 We have therefore amended the Sanctions Procedures to provide for this opportunity. It reflects the fair point that, at the preliminary view stage, Ofcom has taken only a provisional view that a sanction may be imposed. We may decide, having considered a broadcaster's representations, that no sanction should be imposed. We have made this decision taking into account the range of views expressed in Consultation responses about fairness requiring that parties have the opportunity to make representations about matters on which Ofcom will make decisions before we make them.

Next steps

- 2.96 The Procedures will now be published on 1 June 2011 and will come into force immediately.¹⁶

¹⁶ Save in relation to complaints and investigations already underway and to which Ofcom's current published procedures are already being applied as at that date, where those procedures will continue to apply.