

Channel's Response to Ofcom Consultation on Revising the Penalty Guidelines

1 Summary of Response

- 1.1 Channel broadly welcomes Ofcom's intention to issue revised Penalty Guidelines. Such revised Guidelines are overdue: there was no basis on which Ofcom could properly evaluate the benefits and detriments of the new collective sanctions regime which it adopted under the NWA 2008 without appropriate Penalty Guidelines being established for that regime. As a result of Ofcom's failure to issue revised Guidelines alongside the NWA 2008, substantial legal uncertainty has been created resulting in Channel in particular (but the other licensees as well) incurring considerable legal and management costs. These will only increase for Channel if the outstanding judicial review has to go to trial.

- 1.2 Channel particularly welcomes the statement that Ofcom will provide an annex to give further information on how it would address specific facts – and in particular the liability of the non-compliance licensee which is a novel situation created by the NWA 2008 decision and to which Channel's attached response is directed.

- 1.3 The acid test of new Guidelines is whether ITV plc (and other licensees) will be encouraged to double comply individual programmes to avoid sanction. ITV plc cannot be put into a situation where double compliance (which breaches the merger undertaking) is a rational response.

- 1.4 At the moment, the Draft Guidelines are far too vague. The solution is for Ofcom to state precisely what sort of action will release non-compliance licensees from the threat of sanction (obviously short of double compliance) and indicate a tariff of sanctions it will impose now that it appears that the Sanctions Committee is to be abolished.

- 1.5 None of these proposals need fetter Ofcom's discretion in any way or diminish deterrence of culpable or seriously negligent behaviour. Benchmarking by reference to other regulators' penalty guidelines shows both that Ofcom's proposals are currently vague and that the "fettering of discretion" argument against a benchmarked tariff has no foundation.

Background to the Draft Guidelines

1. Before dealing with the new Draft Guidelines, it is necessary for Channel to rehearse some of the background. When Ofcom decided to bring about a fundamental change to compliance arrangements in the NWA Review of 2008 by imposing collective sanctions, Channel wrote to Ofcom on 16 September 2009 asking Ofcom what it expected of the non-compliance licensees in concrete terms so that they could avoid sanctions.
2. At paragraph 4.17 of the Decision Ofcom had stated that “non-compliance licensees need to keep themselves informed about and satisfy themselves that any other licensee acting on their behalf has robust compliance procedures”. This was hopelessly vague and offered no guidance to non-compliance Licensees about the kind of steps that they would be expected to take.

At paragraph 3.21 Ofcom provided a little bit more detail stating that

“although the action taken by licensees should depend on the particular circumstances, it is our expectation that within such a system (of collective sanction) licensees should seek to inform themselves of how compliance is achieved in relation to network programming and satisfy themselves about the effectiveness of the processes in place rather than repeating compliance work done by other licensees. (our emphasis) For example, although it is for the Channel licensees to decide how to share information about programme compliance and raise concerns about compliance matters, it is our view that regular meetings between compliance officers and ITV Network could serve as a basis for co-operation and risk-based assessment”.

3. While this paragraph indicated that full double compliance was not necessary, it did not assist non-compliance licensees in determining what steps they were required to take in order to avoid sanctions. However, even this indication that double

compliance was not necessary was immediately cast into doubt by the approval given in broad terms to ITV plc's decision to institute a double compliance policy. It was for this reason that Channel had to write to Ofcom on 16 September 2009. In the letter of 8 October in response, Stewart Purvis, referring back to a letter of Kate Stross of 25 September 2009, said that the double compliance proposals from ITV plc "open a useful and potentially productive dialogue with the other licensees about managing compliance risk through sensible and robust compliance procedures." Clearly, at this stage Ofcom did not believe that there was anything wrong in principle with double compliance. Paragraph 3.21 of the Decision looked to have been abandoned.

4. In succeeding months, Channel made increasingly urgent requests for clarification of how the new collective sanctions policy announced in the NWA Review 2008 would be implemented on the ground and specific guidance on the issue of what sort of compliance steps would be required from non-compliance sanctions in order to avoid the risk of the imposition of fines. In the letter of 4 December 2009 prior to Channel's application for judicial review (intimated by a letter from Channel of 19 November 2009), Ofcom indicated at paragraph 10 that it would expect the degree of the culpability of the individual licensee in relation to the breach in question to be of central importance to that consideration (of the type of sanction). However, the issue of culpability depends entirely on what each licensee can be expected to do in order to promote compliance. As a consequence this response provided no additional clarity to licensees. Ofcom also reiterated that it would have regard to its Penalty Guidelines. These Guidelines were repeated and the various items in them rehearsed. However, as Ofcom has now accepted – over a year later – Penalty Guidelines issued without reference to the new collective sanctions regime can provide no assistance to licensees in relation to the application of that new policy.

Ofcom's responses, therefore, did nothing to assuage the legal uncertainty facing licensees. As a result, legal proceedings had to be initiated.

5. One of the grounds of review in Channel's application for review was this very failure by Ofcom to provide guidance on what compliance steps would be required to avoid fines being imposed under the new collective sanctions regime. The point was made as follows in Channel's grounds for review submitted to the High Court:

"it is incumbent upon Ofcom in adopting new compliance/sanctions policy to provide proper guidance in that policy to non-compliance licensees about the steps that they are required to take in order to avoid sanctions. This was required both as a matter of legal certainty and because without such guidance Ofcom could not properly form any view about the benefits and disadvantages of its new approach since without clear guidance the licensees might adopt an entirely different approach that involves different benefit and disadvantages."

6. Without that guidance, the new collective sanctions regime encouraged double compliance and consequently a breach of the merger undertakings on the part of ITV plc. Channel's complaint is now before the OFT who have opened an investigation.
7. While Ofcom is over 18 months late in producing new Penalty Guidelines, for the reasons set out above, it is vital that guidelines are established that provided clarity for licensees and steer a clear path between conflicting policy imperatives.
8. What has clearly happened since permission was granted by the Administrative Court for Channel to pursue its judicial review application, is that Ofcom is now seeking to justify the collective sanctions decision it took in 2009 by adopting Penalty Guidelines which will remedy some of the legal uncertainty created by that decision. Channel welcomes any increase in clarity about its legal obligations; however it can't

refrain from pointing out that it has incurred considerable amount of costs in judicial review proceedings to get to a point where Ofcom is bringing forward an element of the new policy which should have been an essential component from the start and without which Ofcom was in no position to evaluate the benefits and detriments of collective sanctions. While new penalty guidelines will not correct the deficiencies in the decision making process which led to Ofcom's decision to adopt a collective sanctions regime, in the interests of at last providing some clarity, it is vital that all parties concentrate on coming up with some practical and meaningful details of the sorts of behaviour which will be likely to attract financial sanctions and those that will not. The recitation of formulae will not suffice.

Ofcom's proposals

9. The draft Guidelines speak about the need to achieve deterrence. Ofcom is clearly concerned that there has been a degree of repeat offending in that ITV plc and the BBC have been deficient on a number of occasions without apparently factoring the penalties that had been imposed into their behaviour. This is not a criticism that can be made of Channel which has only ever been fined once. As a general rule Channel would expect that were Channel before Ofcom for deficiencies as a primary compliance licensee its relatively trouble free history should be acknowledged and taken into account.
10. However, for commercial reasons Channel has to be most concerned about what is expected of the non-compliance licensee (both when Channel is the compliance licensee and when Channel is itself the non-compliance licence).
11. In its opposition to the judicial review Ofcom said that it was not its job to stipulate any particular operational procedure for licensees and it is in general up to the regulated person to decide how best to meet its regulatory obligations. In paragraph

31 it is specifically stated that the current Guidelines were correct. The present consultation confirms that Ofcom was not correct in that assertion.

12. This was already apparent from paragraph 9 of Ofcom's letter of 4 December 2009 where it stated that "in relation to non-compliance licensees we (Ofcom) would not seek to hold them vicariously liable for errors of compliance licensee but would normally expect to consider the extent to which it was reasonable for them to rely on the compliance licensee to ensure that broadcasting standards were met (our emphasis)". This indicated that there were principles, not laid down in the guidelines or elsewhere, which would establish when non-compliance licensees would be liable for sanctions. However, Ofcom's failure to set out those principles left non-compliance licensees without any clarity about Ofcom's requirements.

Channel's proposals

13. In Channel's view, this statement (in the letter of 4 December) would be a useful starting point for Draft Guidelines (albeit that substantial additional detail would need to be provided). Unfortunately, it is not contained in the current annex of the Draft Guidelines. **Channel therefore submits that in the new Guidelines, a clear statement should be inserted that there will be no vicarious liability imposed upon non-compliance licensees (or alternatively that fines for vicarious liability will be limited to a small cap, perhaps £5,000 for each licence held) and that the only occasions where fines should be imposed are where some evidence of fault on the part of the non-compliance licensee has been established by Ofcom.**

14. In its current form, the Annex contains very little which would help any non-compliance licensee to satisfy itself of the relationship between culpability and sanction. Indeed all the points in A.I.16 are misconceived as they require the non-compliance licensee to demonstrate that he was reasonable. This is an effective

(and unacceptable) reversal of the normal burden of proof. In order to fine a non-compliance licensee, Ofcom should have to demonstrate that it acted unreasonably in all the circumstances.

15. The Guidelines should also make explicit that double compliance will not be necessary. This is fundamental since double compliance by ITV plc would breach the merger undertakings. To make assurance double sure, therefore, **it should be made absolutely explicit in these Guidelines that double compliance of individual programmes is not a legitimate response to the new fining policy and that ITV plc will not be sanctioned under one set of rules for “failing” to act in breach of another set (the merger undertakings).**

16. It is a bizarre consequence of the new policy that when non-compliance licensees are also non-consolidated licensees such as STV and UTV, they are not prevented from carrying out individual double compliance of programmes but that ITV is because of the merger undertakings. This is an additional reason for the Guidelines to contain an unequivocal statement to the effect that failure to double comply will not result in a sanction for any non-compliance licensee.

17. However, it obviously remains the case that Ofcom will expect the non-compliance licensees to have some engagement with the issue of compliance, albeit one falling short of double compliance. It is absolutely vital that the new Guidelines provide clear indications of what involvement in compliance issues, non-compliance licensees are expected to have. The current draft provides nothing of assistance in this regard.

18. In relation to the steps that non-compliance licensees should take, Channel considers that the present temporary position of licensees having regular meetings should be sufficient. Any more onerous requirement would in practice require full double compliance to take place for some programmes at least.

Channel's proposals will not fetter Ofcom's discretion

19. In our conversations with Ofcom, much reference has been made to the fact that any tariff would be fettering its discretion. This is not a valid objection to Channel's proposals. We attach two penalty guidelines from the vastly different fields of health care¹ on the one hand and the Office of Fair Trading² on the other. The guidelines are detailed, practical and set out the sorts of penalties that will be considered to be appropriate in certain situations. In so doing, they provide legal certainty and ensure penalties are imposed on a consistent basis.
20. Clearly, these well-advised organisations felt that there was no difficulty in being rigorous and detailed in the penalty guidelines that they operate. Public law therefore does not allow Ofcom to say that it is unable to provide guidance on the circumstances in which it will impose penalties on licensees. Far from fettering its discretion, some detailed guidance is necessary to provide legal certainty. Ofcom's continued failure to provide this guidance would be an abdication of its responsibility.
21. Channel accepts that there is a substantial range of failures by a non-compliance licensee that might take place and is quite happy to provide practical examples of where graded or banded levels of penalties may well be appropriately imposed upon the non-compliance licensee. However, unless there is clarity that non-compliance licensees will not face penalties (or at least not substantial penalties) for faults by the compliance licensee, it is inevitable that licensees will move towards double compliance. This in turn could have an adverse impact on Channel's business which the merger undertakings were designed to safeguard. Channel regrets that Ofcom failed to give the interface with the merger undertakings any consideration before

¹ [http://www.hpc-uk.org/assets/documents/10000A9CPractice](http://www.hpc-uk.org/assets/documents/10000A9CPracticeNote%20Sanctions.pdf)Note Sanctions.pdf

² [http://www.of.gov.uk/shared_of/business_leaflets/ca98](http://www.of.gov.uk/shared_of/business_leaflets/ca98guidelines/oft423.pdf)guidelines/oft423.pdf

adopting its collective sanctions policy. However, the present exercise provides an opportunity to put this right at least.

Channel Television 11th February 2011