

ITV's Response to Ofcom's Consultation on Revising the Procedures for handling content standards and licensing investigations and sanctions

ITV welcomes the opportunity to comment on Ofcom's various proposals for changing the procedures relating to investigating breaches of content standards and broadcast licences, the consideration of fairness and privacy complaints, the consideration of sanctions, and procedures relating to on demand services.

We have discussed the proposals with our fellow Channel Three licensee STV, and they support our response below.

We respond to specific elements of the consultation question below:

Consideration and investigation of breaches of content standards

We appreciate that in contrast to the regulation of the other broadcasters, Ofcom's approach to the regulation of the BBC is to some degree determined by the new Royal Charter and Framework Agreement for the BBC. However our view is that, as far as possible, Ofcom should seek to harmonize and operate the same procedures for dealing with complaints and investigations about the BBC's UK Public Broadcasting Services programme output as it does for all other licensed broadcasters. Subject to statutory limits, it should also approach the consideration of sanctions in a consistent manner.

A4.12 - Whilst we do not object to Ofcom's proposed "BBC First" approach to BBC standards complaints, requiring complainants to exhaust the BBC's internal complaints system before Ofcom considers such complaints, we would ask Ofcom to now apply the same approach to all other broadcasters – in other words to adopt a "Broadcaster First" approach to these matters. Whilst the existing procedures have paid lip service to encouraging complainants to raise complaints with broadcasters first, we would suggest that the revision of the procedures gives Ofcom an excellent opportunity to now apply an explicitly even-handed approach, and to "normally" direct complainants to seek to resolve complaints with broadcasters first, before considering such complaints itself.

We agree of course that Ofcom can and should reserve the ability to launch investigations on its own initiative, as well as to investigate complaints.

A4.14 – we suggest complainants should also include in their complaint to Ofcom the outcome of their complaint to the broadcaster, and attach copies of all correspondence with the broadcaster to Ofcom. If they have not complained to the broadcaster, they should be directed to do so.

If the complainant is unsatisfied with the outcome of their complaint to the broadcaster, then the complainant can ask Ofcom to consider their complaint and the broadcaster's response.

A4.16 – other than in relation to whistleblowers, we can see no rationale for complainants remaining anonymous, and the complainant should normally be identified to the broadcaster, if they have not already identified themselves to the broadcaster when making their initial complaint. Indeed, there are some circumstances where it could be potentially unfair for the broadcaster not to be told the identity of the complainant. An example would be a complaint about the due accuracy or impartiality of a programme, made by a person, organization or government criticized in that programme, or opposed to particular viewpoints represented in that programme.

A4.27 – we do not agree that it could ever be reasonable for Ofcom to come to a Preliminary View on a breach of the Code, without first seeking representations from the broadcaster, unless of course that broadcaster had already accepted that the breach in question had occurred, or there are matters of fact which are not in dispute.

We do not agree that reference to flashing images should be listed as an example here. Intensity of flashing images is supposedly a matter of objective fact, but our experience is that the same programme material can on occasion produce different results when using different digital measuring equipment widely used in the industry. We suggest Ofcom should therefore take into account any test result data in the broadcaster's possession before issuing a Preliminary View on these matters.

A4.30 – we agree with this clarification of the roles of Ofcom Content Board members and Executive members in the preparation of the Preliminary View.

A4.33 – we agree that the introduction of the ability of broadcasters to request to make oral representations is a useful addition to the procedures.

A4.35 - we agree with this clarification of the roles of Ofcom Content Board members and Executive members in the preparation of the final Decision, and that those personnel will be different to those involved in the preparation of the Preliminary View.

A4.36 – we consider it would be entirely unreasonable for Ofcom to provide any broadcaster with only one working day's notice of the text of a Final Decision. The text itself might well contain factual errors, and the broadcaster will require a reasonable time to consider that final text, and provide Ofcom with any comments in this regard.

Ofcom's current practice is working well and should not be altered, namely that it provides the broadcaster with a copy of the Decision several working days before the proposed date of publication in the Bulletin, and provides the broadcaster with at least two working days to provide any corrections for the purposes of factual accuracy. We see no justification whatever for changing this practice, and the consultation provides no rationale for doing so.

We also urge Ofcom to state in its procedures that it will normally publish full Decisions, when these have been reached following the submission of full responses by the broadcaster, even where those Decisions do not find a breach of the Code. We are concerned that sometimes complaints require extensive work by the broadcaster to answer, and generate significant publicity in the press when Ofcom announces in the Bulletin that the programme is being investigated, but little or no publicity when those programmes are cleared. On occasion Ofcom has failed even to list these non-breach outcomes at the back of the Bulletin. Therefore Ofcom should publish in full those Decisions that do not find the broadcaster in breach, as well as those that do. This will benefit the public in better understanding Ofcom's deliberations, and just as importantly will provide helpful guidance to other broadcasters when considering similar Code issues in future.

Consideration and adjudication of Fairness and Privacy complaints

A5.7 - As Ofcom is aware, ITV and other licensed broadcasters do not agree that Ofcom's duties under S3(2)(f) of the 2003 Act impose upon it a requirement, much less a statutory power, to consider fairness or privacy issues in the absence of a complaint from "the person affected". Section 111 of the Broadcasting Act 1996 is specific that a fairness or privacy complaint "shall not be entertained" by the regulator unless made by the person affected, or someone authorized by them to make the complaint. The 2003 Act did not alter that position when it transferred duties in the 1996 Act to Ofcom. It should not be necessary for broadcasters to have to test this legal position via judicial review proceedings, should they ever be presented with an investigation in the absence of a complaint. Therefore we urge Ofcom to now take the opportunity to reconsider its position, and to omit these references in its published procedures.

A5.9 – we suggest that Ofcom should normally direct rather than simply encourage complainants to complain to the broadcaster first, before considering entertaining a complaint of fairness and/or privacy.

A5.11 – the complainant should also provide to Ofcom the outcome of their complaint to the broadcaster, and attach copies of all correspondence with the broadcaster to Ofcom.

A5.36 – we suggest this paragraph is unclear without further explanation of what is meant by the complainant's "legitimate interests", and what constitutes "serious" damage to those interests. In any case we consider the paragraph is unnecessary, and in conflict with Ofcom's sanctions procedures, given that a direction to broadcast a summary of Ofcom's findings is already among the sanctions available in appropriate cases under paragraph A7.14 of the sanctions procedures, and the criteria for the imposition of such a sanction is already established and set out in paragraph A7.13.

General procedures for investigating breaches of broadcast licences

In general we agree with the proposed procedures.

We do not however agree that the provision of only one working days notice of a Decision at paragraph A6.45 is reasonable, for the reasons given above in relation to paragraph A4.36.

Consideration of sanctions for breaches of content standards

In general we agree with the proposed procedures, save for paragraph A7.31 ie we refer Ofcom to our submissions above regarding paragraph A4.36 in relation to provision of only one working day's notice.

However, we also remain of the view that the absence of any form of appeal procedure in relation to the imposition of financial sanctions or the revocation of a licence is incompatible with natural justice, and should now be considered afresh by Ofcom.

Consideration and investigation of breaches of rules for on demand programme services

We suggest that the revision of the procedures gives Ofcom an excellent opportunity to apply an explicit "ODPS-first" approach to content complaints, and to "normally" direct complainants to seek to resolve complaints with the ODPS first, before considering such complaints itself (save where paragraphs A8.4 and A8.9 might apply).

A8.17 – we consider this paragraph is wholly misconceived. Broadcast content and on demand content are governed by two entirely different sets of regulatory rules (other than for the BBC ODPS), and this distinction is founded in statute. If viewers complain about on demand content, their complaints should be entertained by Ofcom only if the complaint falls within the Administrative Rules or the Editorial Content Rules set out in paragraphs A8.11 and A8.12. Ofcom should therefore not seek to apply the Broadcasting Code to "catch-up" on-demand content, where the complainant has not chosen to complain about the linear broadcast.

A8.19 – the complainant should also provide to Ofcom the outcome of their complaint made to the ODPS, and attach copies of all correspondence with the ODPS to Ofcom.

A8.21 - other than in relation to whistleblowers, we can see no rationale for complainants remaining anonymous, and the complainant should normally be identified to the ODPS, if they have not already identified themselves to the ODPS when making their initial complaint. Indeed, there are some circumstances where it could be potentially unfair for the ODPS not to be told the identity of the complainant. An example would be a complaint from a commercial competitor of the ODPS.

A8.42 – we refer Ofcom to our submissions on paragraph A4.36 in relation to only providing one working day's notice.

Consideration of statutory sanctions in the context of on-demand programme services

In general we agree with the proposed procedures.

We do not agree with paragraph A9.24 ie we refer Ofcom to our submissions above regarding paragraph A4.36 in relation to providing only one working day's notice.

However, we also remain of the view that the absence of any form of appeal procedure in relation to the imposition of financial sanctions or a direction to suspend or restrict the entitlement to provide the ODPS is incompatible with natural justice, and should now be considered afresh by Ofcom.

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