

Outline procedure for statutory sanctions in content cases

Consultation document

These guidelines outline the procedure which Ofcom will follow if one of its broadcast licensees, the BBC or S4C face the possibility of a statutory sanction for content or content-based breaches.

The deadline for comments is: **Friday 23 January 2004**

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Introduction

1. These guidelines outline the procedure which Ofcom will follow if one of its broadcast licensees, the BBC or S4C face the possibility of a statutory sanction for content or content-based breaches.
2. Ofcom's powers to impose statutory sanctions come from the Communications Act 2003 ('the Act') and the Broadcasting Acts 1990 and 1996 (to the extent that they are not repealed). If it deems it necessary, Ofcom may:
 - issue a Direction not to repeat a programme;
 - issue a Direction to broadcast a correction or a statement of Ofcom's finding;
 - impose a financial penalty (including a maximum fine of £250,000 on the BBC and S4C);
 - shorten a licence (not applicable to the BBC, S4C and Channel 4); or
 - revoke a licence (not applicable to the BBC, S4C and Channel 4).

General

3. The imposition of a statutory sanction against a broadcaster is a serious matter. Ofcom will impose a statutory sanction if it believes that a broadcaster has repeatedly, deliberately or seriously breached the terms of its licence conditions or Ofcom's statutory Codes.
4. The procedure outlined below must be applied in all cases where a statutory sanction against a broadcaster may be imposed in content or content-based cases.
5. This outline, and any specific guidance, may be revised in the light of experience and any major revision will be the subject of prior consultation with licensees.
6. These guidelines have been drafted in the light of the Human Rights Act 1998 ('HRA'). The Act does not provide for a process of appeal from Ofcom's decisions. The only remedies available are under judicial review in the Courts. However, mindful of Article 6 (right to a fair trial) under the European Convention of Human Rights, Ofcom has set out to design and operate a fair, open and transparent system giving the broadcaster the opportunity to respond to the case against it at every stage as well as the chance to have oral representations (for fines and/or shortening or revocation of licence).
7. Therefore Ofcom will not impose any sanction against a broadcaster before it has been given a reasonable opportunity to make written representation (and in the case of fines and/or shortening or revocation of licence an opportunity to give oral representations) about any alleged breach, and Ofcom has considered those representations and taken proper account of them. What will constitute as 'reasonable' will depend upon the facts and degree of urgency in each case.

8. The application of content sanctions has been delegated from the Ofcom Board to a 'Content Sanctions Committee'. This committee consists of five members, three from the Content Board and two from the Ofcom Board. The committee will be quorate with three Content Board members.
9. Decisions on whether to impose a statutory sanction (and at what level) will be taken by the Content Sanctions Committee.
10. Under these procedures, broadcasters will be provided with the information that the executive has relied on and put before the committee. Ofcom will not rely on any evidence which is not set out in its report. Broadcasters will be provided with copies of the relevant documentation subject to the withholding of any material which Ofcom believes is confidential, market sensitive or legally privileged or it has a legal obligation to protect from disclosure.

Outline procedure

11. This procedure applies to all standards (e.g. taste and decency/harm and offence; impartiality and accuracy; and sponsorship issues) cases which could result in the imposition of a statutory sanction. If, having followed the procedure for the handling of complaints the relevant line manager believes that a statutory sanction may be warranted, he or she will inform the case officer.
12. The request for an investigation for the consideration of a statutory sanction in fairness cases will come either from the Fairness Committee or from the executive (see *Guidelines for the Handling of Fairness and Privacy Complaints*). In either circumstance, the investigation on whether there has been a breach commences, as with other cases, with a case officer (from paragraph 12 onwards).
13. The case officer will write to the broadcaster explaining that a statutory sanction is under consideration and setting out the reasons (normally in the form of a draft report). The case officer will have already been in correspondence with the broadcaster about the case, before the possibility of a sanction was considered. The broadcaster will be required to make any final representations (normally within ten working days) to the case officer on the basis of the case officer's written assessment of the case.
14. If, on reviewing all the relevant information (including the arguments put forward by the broadcaster), the case officer remains satisfied that a sanction may be appropriate, s/he submits a report, normally to the Head of Standards or Partner. The report should contain the relevant material that the case officer has so far relied on and any recommendation on sanction.
15. The broadcaster is notified by the case officer that his/her report has been passed to the Head of Standards or Partner. The case officer should enclose that report and advise the broadcaster to make any further representation to the Head of Standards or Partner (normally within seven working days).
16. The Head of Standards or Partner reviews the case, together with any further representations from the broadcaster. He or she may undertake further work (including seeking further information from the broadcaster). The judgement that he or she may reach is that there has been no breach;

there has been a breach but no sanction is appropriate; or that a breach has occurred and a sanction should be considered.

17. If the Head of Standards or Partner believes that there has been no breach, or that there has been a breach but a sanction is not appropriate, then he or she will write to the broadcaster setting out his/her conclusions.
18. However, if the Head of Standards or Partner believes that there has been a breach and that a statutory sanction should be considered, then he or she will write to inform the broadcaster enclosing the report with his/her recommendation and advising it to make any final representations (normally within seven working days) before it is presented to the Content Sanctions Committee.
19. The Content Sanctions Committee will then consider the report. If they consider that a financial sanction or shortening or revocation of licence may be appropriate then the Content Sanctions Committee will invite the broadcaster to a meeting where they may give oral representation. The procedure will normally be as follows:
 - the chair explains the proceedings;
 - the broadcaster briefly summaries his/her case (the chair will determine the length of presentation);
 - members of the committee may put questions to the broadcaster; and
 - the broadcaster then concludes with a brief final statement.
20. The Content Sanctions Committee may decide that there has been no breach; there has been a breach but no sanction is appropriate; or that a breach has occurred and a statutory sanction is appropriate. The decision of the Content Sanctions Committee is final.
21. If, after considering all the evidence including any material points raised in the oral representation, the committee believe that a sanction should be imposed then it will consider the appropriate penalty in accordance with the Penalty Guidelines published by Ofcom. This decision will be communicated to the broadcaster in writing setting out the reasons. The broadcaster will have the opportunity to comment on any factual errors in the finding and press release (if one is released).

Annex 1

Ofcom's consultation principles

Ofcom has committed to meeting the seven tests for consultations set out below:

1. Hold discussions with stakeholders before issuing a major consultation document – so that Ofcom's thinking is subject to an early sense-test. If this is not possible, an open meeting to explain the proposals will be held soon after publication.
2. Be clear about who is being consulted, why, on what questions and for how long.
3. Make the document as simple and concise as possible – with a summary of no more than two pages - and make it easy to respond to. This may involve issuing a shorter version aimed at hard-to-reach groups, like SMEs.
4. Allow ten weeks for responses to major consultations, other than on dispute resolution.
5. Analyse responses with care and an open mind. This involves giving reasons for subsequent decisions, and an account of the views expressed.
6. Monitor and evaluate consultations, and designate a consultation champion – an evangelist within Ofcom for better consultation and reach out, and a contact point for comments on our process.
7. Explain why Ofcom is departing from any of these tests if it has to – for example, because of urgency or confidentiality. If a shorter period is required, Ofcom will draw this to the attention of stakeholders, as a red flag item.