

Response to Ofcom's Penalty Guidelines consultation

ITV is pleased to have an opportunity to comment on the proposed revised Penalty Guidelines. This response has been discussed with, and is submitted on behalf of all the Channel 3 Licensees ie ITV Broadcasting Ltd ("ITV"), STV, and UTV.

We note that Ofcom states that the background to the revision of the Guidelines is concern that they may not have created a sufficient deterrent effect to ensure effective compliance across a number of sectors, but that this is "less of a concern in respect of broadcasting regulation". We note the examples given in the Background section of the Consultation all concern the telecoms sector, and welcome the suggestion that Ofcom does not consider that there is generally a need for "additional deterrence" in respect of broadcasting matters.

Nevertheless we would like to make some general observations in relation to the proposed revisions as they might affect compliance with the Ofcom Broadcasting Code, and some comments in relation to the proposed removal of the Annex to the Guidelines, which deals specifically with the Channel 3 Licensees.

The Proposed Revised Guidelines

We note Ofcom's proposed changes relating to a) the value and weight given to precedent decisions; b) establishing a link between deterrence and the size and turnover of the regulated body; c) its approach that calculating harm or gain caused by the contravention should not determine or limit the penalty; and d) adding "seriousness" as an explicit consideration alongside duration of the contravention. We have some concerns in relation to a), b) and c).

ITV is concerned about the proposed change to paragraph 14 of the guidelines, which formerly read that Ofcom "will" have regard to relevant precedents, but may depart from them depending on the facts and contexts of each case. The amendment now proposed is that Ofcom "may" have regard to relevant precedents. Given that such precedents have never been binding on Ofcom, and there has never been any fetter on exceeding the largest penalty previously imposed, ITV considers that it would be unreasonable (in the *Wednesbury* meaning of the word) for Ofcom not to take into consideration previous sanctions imposed for similar offences, whether against the same or a different broadcaster, or to impose vastly disproportionate penalties (within the maximum penalty available under statute) for similar breaches.

We would submit that the general aim of deterrence should be treated somewhat differently in relation to penalties arising from breaches of the Ofcom Broadcasting Code, where Ofcom has an additional legal responsibility to consider Article 10 ECHR rights of freedom of expression, and whether as

a regulatory body the imposition of penalties for breaches of programme standards might have a “chilling effect” on freedom of speech.

Previous breaches of the Code that have resulted in financial sanctions have not always involved pursuit of a commercial advantage or causing financial harm to consumers (as in the telecoms sector), but from failures of editorial judgment or of compliance processes. Sanctions in the broadcasting area, particularly in relation to breaches relating to individuals, rather than viewers as consumers (for example breaches of Sections 7 & 8), should properly be considered in the context of legal remedies for related causes of action such as privacy or defamation. UK law and ECHR jurisprudence does not recognise the concept of increasing an award of damages against one defendant “pour encourager les autres”. The effect of disproportionate awards for libel on defendants is an issue that the ECHR has considered on previous occasions. For example in *Tolstoy Miloslavsky v UK*¹ an award of £1.5m to Lord Aldington for a defamatory accusation of war crimes was overturned by the ECHR on the ground that it was not proportionate and therefore not necessary in a democratic society.

Under current UK law mere negligence is also not enough to justify an award of exemplary damages, as the defendant must be at best reckless or have deliberately committed the tort. Furthermore it is insufficient that the defendant is engaged in activity aimed at profit (such as broadcasting), there must be a clear link between the act, which has been done and an actual or

¹ App no 18139/91, Ser A, Vol 316, 323 (1995) 20 EHRR 442

intended increase in profits and a degree of calculation before the act took place.

We also note that in relation to ITV's principal PSB competitor, namely the BBC, Ofcom is explicitly limited by statute in relation to the maximum size of the penalty that it can impose for Code breaches to £250K, which clearly bears no relation to size or turnover. ITV would submit that it is only in very exceptional circumstances that a financial sanction should be increased against any commercial broadcaster due to its size or turnover.

Annex 1

Ofcom will recall that the existing guidance in the Annex came into being to address issues of liability for financial sanction for Channel 3 licensees for broadcast of material where they are not the compliance Licensee, or where there was no compliance Licensee ie where programme content is complied by third party suppliers, such as the national news, or where breaches of Licence obligations arose from a failure to meet quotas arising from the ITV Network's centralised commissioning decisions.

Ofcom proposes to dispense with the Annex entirely without any rationale other than "this no longer serves a useful purpose". We acknowledge that the Networking Arrangements that now govern the relationship between the Channel 3 Licensees provide that the vast majority of programmes commissioned by ITV are delivered to the other Licensees on an "affiliate"

basis having been complied by ITV Broadcasting Ltd or Channel Television Ltd, both companies being wholly owned non-direct subsidiaries of ITV plc. Nevertheless, a small number of programmes produced by STV and commissioned for broadcast on “the ITV Network” (as it is still referred to) are complied by STV on behalf of the other Licensees. Moreover some programming (eg the National News) is still commissioned to be delivered to all Licensees and is complied by the third party producing it (ie ITN).

Therefore we consider that there is a remaining need for simplified and updated Guidance, setting out clearly the remaining responsibilities of non-Compliance Licensees in relation to programmes they have not complied themselves. Since this issue has relevance only to Channel 3 Licensees, we respectfully suggest that the appropriate way to proceed would be for Ofcom to confer informally with the Channel 3 Licensees on suitable proposed replacement Guidance, outside the confines of a public Consultation.

ENDS