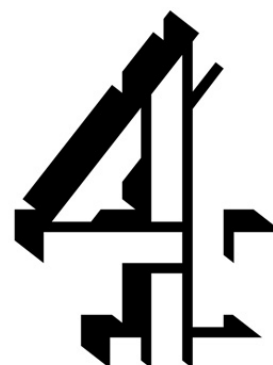


# Channel 4 Response to Ofcom Consultation on the Review of Rules on Party Political and Referendum Broadcasts



## Introduction

Channel 4 are grateful to Ofcom for the opportunity to contribute to this Consultation process. The analysis and proposals we make are intended to ensure that any new Guidelines or Rules for Party Political and Referendum Broadcasts are fair, clear and effective. Our suggestions are directed towards the institution of a set of procedures that both political parties and Licensees can follow swiftly during an election campaign but which retain the Licensees position as the primary decision taker exercising their discretion.

## Channel 4

1. Channel 4 is a public service broadcaster licensed by Ofcom to broadcast, currently, the main Channel 4 core service, three free-to-air digital channels (E4, primarily an entertainment channel, More4, primarily a factual and documentary channel) and Film4 a film channel. All four channels are regulated, **post broadcast**, by Ofcom under its Broadcasting Code ("the Ofcom Code").
2. The Channel 4 main service itself, E4, More4 and Film4 operate under broadly the same regulatory constraints. Channel 4 is obliged under its licence for all these services to ensure compliance with the Ofcom Code and severe sanctions may be imposed by Ofcom for a serious or persistent breach of the Code. In the case of the three digital channels, their licences could be shortened or revoked and in the case of Channel 4 and the other three channels fines of up to 5% of qualifying revenue (i.e. all advertising revenue and sponsorship revenue) can be imposed. All UK broadcasters, including the BBC (with some limited exceptions), ITV, Five and digital channels fall under Ofcom's jurisdiction.
3. The Channel 4 Television Corporation is a public service broadcaster and a statutory corporation with a special and unique statutory remit contained in Section 265(3) of the Communications Act 2003 which provides:

*"The public service remit for Channel 4 is the provision of a broad range of high quality and diverse programming which, in particular-*

- (a) demonstrates innovation, experiment and creativity in the form and content of programmes;*
- (b) appeals to the tastes and interests of a culturally diverse society;*

(c) *makes a significant contribution to meeting the need for the licensed public service channels to include programmes of an educational nature and other programmes of educative value; and*

(d) *exhibits a distinctive character."*

4. As Ofcom are aware Channel 4 transmits Party Election Broadcasts ("PEBs") at General Election times only. Outside General election times Channel 4 also broadcast *The Political Slots* ('the Slots') – four times a week for 4 weeks of the year. Those 16 slots are allocated amongst the main political parties- Conservative, Labour and Liberal Democrats- and the four main minor parties- SNP, Plaid Cymru, Greens and UKIP. The allocation is agreed annually and the schedule for all 16 broadcasts is agreed at the beginning of each year.
5. When Channel 4 came on air in 1982 it undertook to broadcast what were then called *Party Political Comment* as an alternative to the more traditional Party Political Broadcasts then carried by the BBC and ITV. *The Political Slots* replaced *Party Political Comment* when the strand was updated. Unlike Party Political Broadcasts, Channel 4 funds the Slots and provides an experienced production company to assist the political parties in making their allocated Slot. As with party political broadcasts editorial control of the Slots rests with the political party while the Channel's obligations are confined to ensuring compliance with the law and the Ofcom Code and requisite rules.
6. In the case of all PEB's Channel 4 ensures compliance with the law, the Ofcom Code, the Rules on Party Political and Referendum Broadcasts (14<sup>th</sup> October 2004) ("the Ofcom Rules"), and the Guidelines for the Production of PEBs and PPBs (March 2005) ("the Guidelines") drawn up by the Broadcasters Liaison Group ("BLG").
7. The Guidelines were designed to ensure compliance with the due impartiality requirements of the Ofcom Broadcasting Code (following the amendments made to the Representation of the People Act) as those requirements apply to PPBs and PEBs. These Rules and Guidelines are circulated to all parties producing PPBs and PEBs. The Guidelines and Rules ensure compliance with our due impartiality obligations while simultaneously ensuring that there is no interference with the political parties rights to convey their political message. It is these Rules and Guidelines that govern the application of the due impartiality provisions of the Code in so far as they apply to PPBs and PEBs.
8. The Rules and Guidelines set out minimum requirements that Channel 4 are required to follow in determining the length, frequency, allocation and/or scheduling of PPBs and PEBs. As for all the broadcasters licensed by Ofcom within the Rules and Guidelines the decisions as to the length, frequency, allocation and/or scheduling of broadcasts are the responsibility of Channel 4. These decisions are taken by the Channel having regard to the stipulations of the Rules and Guidelines.
9. It should be noted that the legal requirement to provide broadcast time to political parties is for any broadcaster (including Channel 4) an interference with the broadcaster's right to editorial independence and their rights of freedom of expression. Of course the provision of airtime in this way can be seen as a public service duty and necessary in a democratic society, but the decisions

regarding the allocation, length, frequency and/or scheduling of such compulsory broadcasts should remain with the broadcaster. Any regulation and stipulation by Ofcom should be restricted to that which is necessary to ensure compliance with s333 of the Communications Act 2003 ("the Act") and which ensures the political parties rights to convey their political messages.

10. Exceptionally for broadcast content, and in order to safeguard political parties rights, Channel 4 receive this broadcast material while not having commissioned it or having any editorial control during the production process. Channel 4 therefore seeks legal indemnities from political parties to guard against any possible defamation, infringement of privacy, contempt of court, infringement of intellectual property rights or other legal hazard contained in the broadcasts. Channel 4's still retains its statutory compliance obligations, which it cannot subrogate to the political parties, to ensure that the content of such broadcasts complies with the Code. If the Channel considers that the delivered content raises such legal issues or contravenes the Ofcom Broadcasting Code and relevant guidelines it can and does request that edits be undertaken by the political parties to ensure that their content is suitable for broadcast. Channel 4 has a strict policy that political parties are solely responsible for ensuring that their content complies with the law and the Code, and that any changes prior to broadcast must be made by the political party and will not be undertaken by Channel 4. This is to ensure that editorial control of the content is retained by the political party at all times.
11. With this background we turn to the Consultation. We will make observations and suggestions on both the proposed new Rules on Party Political and Referendum Broadcasts and on the Guideline procedures for determination of disputes under the proposed new PPRB Rules. We will only comment on those items where there are issues relevant to Channel 4:

### **The proposed new PPRB Rules**

12. **Paragraph 3** confirms that decisions as to the precise length, frequency, allocation and/or scheduling of broadcasts offered to political parties are the responsibility of Licensees. Channel 4 considers that the use of the words "in the first place" in this paragraph is unhelpful. For the reasons outlined above regarding freedom of expression, editorial independence and the parameters of the 2003 Act, in Channel 4's view such decisions should always be taken by the broadcaster. Ofcom's role should not be that of a substitute decision maker but rather to review the decision taken by the broadcaster to see whether the broadcaster has complied with PPRB Rules. In the event that Ofcom considers that the broadcaster has not complied with for example the allocation criteria, because insufficient weight has not been attached to past electoral support, then that information along with Ofcom's view on the original decision making process and its adequacy should be provided to the broadcaster and the broadcaster should be asked to take a fresh decision in light of the issues raised by Ofcom.
13. It is important that the Rules do not install Ofcom as a primary decision maker which then imposes broadcasts on a broadcaster. It is not for a State Regulator in a democracy to command broadcasts to take place on the regulator's assessment. It is appropriate for the regulator to set down rules and criteria commensurate with Article 10 of ECHR to ensure political messages are

conveyed in a democracy. It is also appropriate for the regulator to supervise compliance with that regime. However it is not appropriate for the regulator to substitute themselves as the decision maker.

14. If Ofcom are requested by either party to involve themselves in a dispute between a political party and a broadcaster their role should be to review the original decision made by the broadcaster based on the material before the broadcaster at the time the decision was made. Ofcom can then advise if they consider that the decision was erroneous because of an error of fact or law or a wholly unreasonable use of the broadcaster's discretion and ask the broadcaster to reconsider their decision.
15. In addition Ofcom may consider (either with or without receiving further material from a political party or broadcaster) that there is relevant material that should now be assessed when making the decision. In those circumstances it is appropriate for Ofcom to ingather material and request that the broadcaster considers that material along with any guidance Ofcom wishes to provide regarding the original decision. The broadcaster can then assess both the new material and Ofcom's advice and make a new decision regarding the length, frequency, allocation and or/scheduling of the broadcasts offered to the political parties. In the event that the political party disputes this fresh decision it would then be appropriate for Ofcom's Election Committee to review that decision and change it if they considered there was an error of fact or law or an unreasonable use of the broadcaster's discretion. These processes can be carried out expeditiously. What is undesirable is a procedure whereby Ofcom make a new decision on material or evidence upon which a broadcaster has never made a decision.
16. It would be entirely unwelcome to institute a system where Ofcom substitute themselves as the primary decision maker and then dictate to broadcasters the decisions that require to be made. The danger would arise that Ofcom places itself in a position where it can be subject to political lobbying regarding allocation, length, frequency, and or/scheduling and where the decision making process becomes opaque.
17. We are of course aware that Ofcom's Election Committee dealt with two disputes during this year's European Elections regarding UTV and ITV. In dealing with both disputes the Committee stated that the PPRB Ofcom Rules give broadcasters discretion in relation to allocation and scheduling of PEBs. In both cases the Election Committee applied the same criteria as the broadcaster had. In the UTV case the Election Committee did not overturn the broadcaster's decision. However in the ITV case the Election Committee took a fresh decision and considered evidence not previously considered by ITV when making their original decision. In addition it is not clear from the published decision if ITV had an opportunity to respond to the last letter of 18<sup>th</sup> November received by the Election Committee from the political party involved in the dispute and whether ITV would have taken a different view on their initial decision in light of Ofcom's position. In effect Ofcom substituted themselves as a primary decision maker. We consider that approach was regrettable.
18. In **paragraph 4** of the proposed new PPRB Rules we consider it would be helpful to confirm explicitly that issues regarding the content of PEBs and PPBs are not capable of referral to Ofcom. We also consider it would be helpful if political

parties were compelled to nominate to Ofcom in advance of the Election one officer who would be responsible for such referrals and any subsequent correspondence.

19. In **paragraph 6** we suggest that the footnote 5 be incorporated into the rule so that parties are aware that indemnities may be sought. As that is the practice of broadcasters such as Channel 4 and 5 it would be prudent to retain the wording in the existing rules that broadcasters are advised to seek such indemnities rather than deal with this important issue in a footnote.
20. In **paragraph 11** the use of the phrase “at present” before the definition of “major parties” may give rise to the idea that this definition is capable of change in advance of the next General Election. We are not aware that there is any discussion to change this definition before the 2010 election and we suggest the deletion of “at present.”
21. **Paragraphs 12, 13, 15 and 17** are confusing from the perspective of a broadcaster like Channel 4 which only broadcasts on a pan-UK basis. At the last General Election Channel 4 advised parties that the Channel would provide election broadcasts to :
  - (a) the “major” parties;
  - (b) to those parties who stood candidates in at least one sixth of the seats in Great Britain who would qualify for one UK-wide broadcast, or alternatively ;
  - (c) to any party which was standing in less than one sixth of the seats in Great Britain but who had significant levels of electoral support in England or Scotland and who would then qualify for one UK wide broadcast.

This position was clearly in accordance with Rules A5.10 to A5.13 of the existing Rules. In fact the last category was more generous than the Rules provided for.

22. The proposed new rules and in particular the reference in **paragraph 12** “to the nation in which it is held” and the entirety of **paragraph 15** confuse this previously clear position.
23. It is stated in **Paragraph 15** :

“In determining allocations of PEBs at elections, the four nations of the UK should be considered separately.”

This lacks the clarity of the existing rule A5.11 which makes it clear that parties which qualify in all three of England, Scotland and Wales would be offered broadcasts on Channel 4, Five and national commercial radio.
24. We can see that **Paragraph 17** tries to maintain this existing clarity but the use of the word “additionally” read in conjunction with Paragraph 13 makes matters entirely unclear.

25. Furthermore the wording of **Paragraph 15** introduces the concept of a fourth “nation”, presumably Northern Ireland, and suggests that in determining allocations each nation should be considered separately.
26. Given the terms of Paragraph 17 it does not seem that Ofcom wishes to change the existing status quo. However as the proposed new rules are drafted at present they give rise to the possibility in practice that political parties will expect an entitlement to PEBs on Channel 4 if they stand in one sixth of seats in an individual nation.
27. For a UK wide broadcaster such as Channel 4 it would be an expensive and weighty burden on airtime and scheduling at election time to have to try and accommodate such an entitlement. We foresee that such an entitlement would lead to large numbers of our audience receiving political broadcasts of no relevance to them. This would dilute the democratic effect of truly UK wide broadcasts. We propose that the new rules either revert to the wording in the existing rules or adopt the criteria employed by Channel 4 and set out in paragraph 20 of this submission.
28. In **Paragraph 14** rather than using the term “other registered parties” we suggest that reference to “non-major parties” would assist clarity.
29. In **Paragraph 18** it would be helpful if this requirement was specified as a Channel 3 licensee obligation only as it is in **Paragraph 9**.
30. In **Paragraph 19** it would be helpful to tie this into **Paragraph 8** to make it clear that this only applies to UK wide broadcasters in the case of a UK wide referendum.

**The proposed new Guideline procedures for determination of disputes under the PPRB Rules.**

31. As we discussed in our introductory comments we submit that these Guidelines should not create a process whereby Ofcom become the primary decision maker. We also consider that they should be Rules not Guidelines. The procedure should be clear and fair and not subject to ad hoc alteration which can lead to a risk of unfairness.
32. In **Paragraph 2** it is stated that unresolved disputes between political parties and broadcast licensees will be “determined” by Ofcom’s Election Committee. We propose that the role of this Committee should be a two stage process as outlined in paragraphs 11, 12, 13 and 14 above. That role would be to review the initial decision by the broadcaster and to refer that decision back to the broadcaster if there has been an error of fact or law, or where the broadcaster has exercised their discretion in a wholly unreasonable manner or to ask the broadcaster to consider new information and consider the matter again. The broadcaster can then assess both the new material and Ofcom’s advice and make a new decision regarding the length, frequency, allocation and or/scheduling of the broadcasts offered to the political parties. In the event that the political party disputes this fresh decision it would then be appropriate for Ofcom’s Election Committee to review that decision and change it if they considered there was an error of fact or law or an unreasonable use of the broadcaster’s discretion. These processes can be carried out expeditiously. What

is entirely undesirable is a procedure whereby Ofcom make a new decision on material or evidence upon which a broadcaster either did not consider at all or did not attach sufficient weight to. .

33. We also suggest that the identities of the members of the Committee are publicised well in advance of any election so that any concerns regarding their role including possible conflicts of interest can be aired in advance of the Committee's adjudications.

34. In **Paragraph 3** we propose that the last sentence should read :

"If the Party wishes to dispute any element of the Licensee's decision *regarding the length, frequency, allocation and/or scheduling of broadcasts* (our additions in italics), it should first make representations direct to the Licensee to enable the Licensee to reconsider its decision."

35. In **Paragraph 4** we propose that an element of compulsion be introduced so that political parties *are required* to refer unresolved disputes to the Election Committee at Ofcom. Such compulsion would hopefully prevent entirely, or at least prevent initial recourse to costly and unnecessary court proceedings.

36. In **Paragraph 5** we consider it would be best to set out how these rules would apply if it was a Licensee who made the referral. The present wording of this paragraph leaves open the possibility of ad hoc procedure which would be inappropriate in this quasi-judicial process.

37. In **Paragraph 6** we understand the need for expediency but we would suggest that all emails to Ofcom are also sent by hard copy letter.

38. In **Paragraph 8** we propose that the "supplementary information" should clearly be set out as firstly, information which was before the Licensee as primary decision maker and secondly information which the Party now wishes to be considered. The second category of information should not form the basis of a substitute decision by Ofcom but may be relevant to a decision to ask the Licensee to reconsider their initial decision.

39. In **Paragraph 9** we propose again that any relevant further information provided by the Party to Ofcom is returned to the Licensee for a fresh decision to be made.

40. In **Paragraphs 10 and 11** Ofcom sets out a procedure where the Election Committee will provide the Referral letter and any other documentation provided by the Party to the Licensee seeking comments. Also Ofcom proposes that the Party will have an opportunity to provide further comments to Ofcom before the Election Committee determines the dispute.

41. As you are aware from this submission Channel 4 consider the imposition of the Election Committee as a primary decision maker is flawed. However even if such a system were to be instituted, a procedure that permits final submissions by a political party to Ofcom without any further opportunity for response by a broadcaster is unfair, contrary to natural justice and the right to a fair hearing.

42. In **Paragraph 15** Ofcom states that "*the Election Committee may also consult any relevant third parties (eg the Electoral Commission) in order to obtain or confirm any factual or contextual information relevant to determining the dispute.*"

“ Then “where *appropriate*” the Committee will give an opportunity for the Party or Licensee to respond to such information.

43. The procedure set out in **Paragraph 15 and 18** illustrates the great difficulty with the procedures proposed by Ofcom in this Consultation paper. As we argue above the decisions regarding the allocation, length, frequency and/or scheduling of such compulsory broadcasts should remain with the broadcaster. What Ofcom proposes is that the Election Committee ingathers information from third parties which may or may not be provided to an independent broadcaster and then makes a decision which is unappealable and imposes a requirement to broadcast material during the broadcasters airtime.
44. Such a system is neither fair nor consistent with Article 10 of ECHR. It goes beyond the requirements of the Act and leads to the unpalatable outcome where a Regulator imposes upon a broadcaster a decision by the Regulator to provide airtime in a certain form based on material that the broadcaster may or may not have seen. This negates the broadcaster’s discretion. For example we can readily foresee a situation where a Party or a third party produces to Ofcom opinion poll or other material of dubious validity which a broadcaster would not accept as persuasive. Ofcom may also be susceptible to pressures from political parties or third parties that do not affect a broadcaster who is schooled in resisting challenges to their editorial independence in such circumstances.
45. In our view the system proposed by Ofcom (and regrettably operated against ITV in the European Elections earlier this year) requires to be reconsidered and recast in accordance with our proposals.

**Channel 4 Television**  
**25<sup>th</sup> November 2009**