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Dear Ms Winter,

Review of procedures for handling broadcasting complaints, cases and sanctions

This letter provides Sky's response to Ofcom's consultation reviewing procedures for handling broadcasting complaints, cases and sanctions (the 'Consultation').

Ofcom's consultation is void

Ofcom's consultation is fundamentally flawed and cannot form the basis for any changes to the various complaints-handling procedures described by Ofcom in the Consultation. Ofcom has mis-described its proposals, and in so doing is likely to have misled stakeholders as to the exact nature of the proposed changes.

First, Ofcom has failed to make clear in its consultation that a key proposed change is the introduction of a new phase in investigations whereby Ofcom will solicit representations from "directly affected third parties". Second, Ofcom has failed to make clear that a further key proposed change to existing practice is Ofcom's desire to place complainants on an apparently equal footing to broadcasters in terms of process in respect of all types of complaint. This proposal appears to give greater rights to complainants than is currently provided for in practice, in particular by requiring publication of Ofcom's findings prior to considering any request for a review.

Each of these proposed changes is a material change to Ofcom's existing published procedures. Ofcom's failure to include a description of these changes, or any analysis of the impact of these changes, is a significant failure in Ofcom's consultation. This failure is compounded by the absence of any impact assessment into the proposals as Ofcom views the changes as not representing a "major change in Ofcom's activities" (paragraph 2.34 of the Consultation). This is clearly not the case.

Third party representations

Ofcom has provided no explanation as to why it believes that it is required to seek relevant third party representations during its investigations. Whilst the ability to take additional information into consideration during investigations is no doubt desirable for Ofcom, Ofcom appears not to have considered the practicalities of such a proposal. Paragraphs 11 to 13 of the proposed guidelines for the handling of Standards complaints and cases (and paragraphs 7



to 9 of the proposed guidelines for the handling of Fairness and Privacy complaints) do not explain when Ofcom would publish the fact of its investigation, how it would incorporate such representations into its procedures, or when it might consider an interest to be "sufficient". This proposed measure appears likely to act as a charter for further complaints and administrative burden on Ofcom, at the expense of licensees who are required to bear the costs of Ofcom's procedures. In addition, the impact on broadcasters of the publication of details of complaints under formal investigation (as opposed to publishing details of programmes about which Ofcom has received more than 10 complaints) would be significant and detrimental. Not only might publication prompt more complaints (it is not clear how Ofcom would distinguish between new complainants and third parties with "sufficient interest"), but might also require broadcasters to respond to public comment on complaints at the same time as responding to Ofcom. Publication might also involve the disclosure of sensitive commercial information, for example where a complaint concerned commercial references or sponsorship.

Furthermore, it is not at all clear when such representations might be relevant or to what end they might benefit Ofcom's investigation, particularly in relation to standard complaints. Under the Communications Act 2003, Ofcom's licences require licensees to comply with its relevant codes. Ofcom has offered no indication as to why it no longer feels able to make such assessments without third party representations. Ofcom has sufficient powers to require the provision of information in support of its regulatory activities as to make this process redundant. This proposed change is unnecessary, and will introduce an additional level of bureaucracy into Ofcom's procedures when Ofcom claims that it is actually simplifying them.

To the extent that Ofcom considers this change necessary to protect itself from legal challenge by parties other than the relevant broadcaster, in the first instance, Ofcom should have set out such reasoning in the consultation, including any relevant legal advice. Second, and as noted above, Ofcom has the means necessary to request information from relevant third parties, and the resources necessary to ensure that its public statements do not give rise to additional rights of action. To the extent that they do, it is an entirely inappropriate and disproportionate response to pollute Ofcom's complaints handling procedures with third party representations. Accordingly, this proposal must be abandoned.

Complainants' rights

Although the current guidance states that complainants may request a review of Ofcom's decision in standards complaints, in practice, this would seem to be a rare occurrence. It is Sky's view that it is inappropriate to grant comparable rights to complainants in standards cases where, in effect, the role of the complainant is to bring to Ofcom's attention a potential breach of Ofcom's Broadcasting Code, rather than acting as an aggrieved party, as might be the case in respect of fairness and privacy complaints. Accordingly, whilst Ofcom might share its decision with the complainant as a matter of courtesy and good regulatory practice in engaging with stakeholders, it is quite another matter to accord a complainant equal rights of defence as broadcasters. In this regard, it would be interesting to understand whether Ofcom considers that complainants whose complaint is rejected without formal investigation have the same rights of review as those which do?

In consequence, complainants should not have a right to have a decision by Ofcom reviewed (save clearly in respect of fairness and privacy decisions). This also removes the need to publish decisions that are the subject of a review, the consequences of which are set out below.



Under Ofcom's published procedure in relation to standards complaints, the broadcaster is afforded sight of Ofcom's decision prior to its publication. If the broadcaster requests an appeal it is Ofcom's current practice to refrain from publishing its decision until any appeal has run its course. This ensures that Ofcom only publishes its final determinations.

Under the draft guidelines for the handling of Standards complaints, Ofcom now proposes that its decision will be published in Ofcom's Broadcast Bulletin prior to any review.

Ofcom's complaints procedures are quasi-judicial between Ofcom and the broadcaster concerned. As such, Ofcom should be mindful to ensure that its procedures do not undermine the broadcaster's right of defence. Publication 'subject to appeal' (irrespective of whether and how the fact of the appeal is made public) not only harms the interests of the broadcaster by damaging its reputation (in the case of a finding of breach), but also risks considerable uncertainty for other broadcasting industry stakeholders who rely on the published decisions to provide guidance on Ofcom's interpretation of the Broadcasting Code, and who may be misled by decisions that are subsequently overturned.

In the light of these comments, Ofcom should not implement the proposals giving complainants equal rights to broadcasters in respect of standards complaints.

General comments

Although of lesser importance in the light of the above failings, Sky is also concerned that Ofcom's stated desire for 'streamlining' and 'conforming' its complaints procedures risks losing sight of the position of broadcasters in the process and their fundamental rights of defence.

The Ofcom complaints procedure is, by its very nature, quasi-judicial with Ofcom playing prosecutor and judge in the process. Accordingly, there is a clear onus on Ofcom to ensure that its Ofcom's procedures comply with its regulatory duties under the Communications Act 2003, and in particular that they are proportionate and reasonable. The proposed procedures risk infringing these duties by reducing overall flexibility in respect to Ofcom's timetable for written submissions. Furthermore, Ofcom has failed to take this opportunity to implement a more rigorous and independent appeals process.

Each of these points is elaborated on below.

Timetable

The proposed guidelines for both Standards complaints and Fairness and Privacy complaints set a rather exacting timetable for the submission of written responses by broadcasters. For Standards complaints, respondent broadcasters must provide "*written responses within 10 working days*".¹ For Fairness and Privacy complaints, respondent broadcasters must submit "*either a proposal for 'appropriate resolution' or a statement in response to the complaint within 20 working days*".² By comparison, Ofcom affords itself only "*targets*" for the resolution of complaints.³ While Sky appreciates the need for expediency, the timely resolution of cases should not come at the expense of due process. In Sky's view, Ofcom's procedures should

¹ Paragraph 31 of Section 3.

² Paragraphs 26 of Section 4.

³ Paragraphs 15-16 of Section 3 and 12-13 of Section 4.



allow for an element of flexibility given the differing level of complexity of cases, which may not necessarily be limited to “*exceptional*” circumstances.

Review Process

Ofcom proposes a shortened appeal (or review) process. In place of an ascending three tier review procedure within Ofcom, reviews will be considered by the Broadcasting Sanctions Committee. Appeal from this body’s decision will lie with the courts through judicial review. Given the limitations of judicial review, and their expense, it is incumbent on Ofcom to ensure that its review procedures are appropriately independent. At internal review risks being seen as insufficiently transparent. Ofcom’s review procedures would benefit from the introduction of an independent review process, for example, similar to that employed by the ASA in relation to standards complaints regarding advertising.

In addition, the omission of the details on the structure of the Broadcasting Review Committee and Broadcasting Sanctions Committee from the Consultation further undermines the Consultation, and may require further consideration by stakeholders.

As set out above, Sky considers that Ofcom’s Consultation is fundamentally flawed. In the light of the failings identified by Sky Ofcom must revise its proposals so as to remove those elements that it has not drawn to stakeholders’ attention or explained or whose impact it has not assessed in the light of all other comments received in response to the published Consultation.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Joanna O'Sullivan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Joanna O’Sullivan
Legal Advisor
Regulatory & Competition

Encl.

cc. Daniel Austin – Senior Legal Advisor