



Review of procedures for handling broadcasting complaints, cases and sanctions

Consideration of responses

Publication date: 16 December 2009

Contents

Section		Page
1	Introduction	1
2	Consideration of consultation responses	3

Section 1

Introduction

- 1.1 Ofcom is the body in the UK responsible for issuing licences to television and radio broadcasters. All Ofcom licences contain conditions which broadcasters must adhere to. When Ofcom investigates whether a broadcaster has breached its licence obligations (or in the case of the BBC, a requirement set out in The Agreement¹) it follows certain published procedures.
- 1.2 Ofcom has published three sets of procedures in this respect concerning:
- Broadcasting standards or other licence-related cases (“the Standards Procedures”);
 - Fairness and privacy complaints (“the F&P Procedures”); and
 - Sanctions in cases relating to broadcasting (“the Sanctions Procedures”).
- 1.3 Ofcom has identified a number of areas where improvements to the Procedures could be made to improve the complaints experience for members of the public and broadcasters by allowing more effective and timely enforcement. On 11 June 2009, Ofcom published a consultation document (“the Consultation”) proposing changes to its published Procedures and seeking views on those proposals².
- 1.4 Our objectives are to:
- Create more straight-forward processes aimed at dealing with complaints quicker;
 - Ensure consistency between all of the Procedures;
 - Streamline and simplify the current sanctions process and create a Broadcasting Sanctions Committee with the sole responsibility for considering and determining statutory sanctions;
 - Streamline and simplify the review process by introducing a comprehensive and consistent review procedure with the possibility of reconsidering decisions of the Ofcom Executive; and
 - Introduce a mechanism closing complaints during the initial assessment process where they clearly do not raise any issues that warrant further investigation.
- 1.5 The Consultation closed on 21 August 2009 and Ofcom received a total of 12 responses, primarily from broadcasters. Four respondents requested that their responses be kept confidential. The remaining responses are available on Ofcom’s website³.

¹ Through The Agreement between the BBC and the Secretary of State for Culture Media and Sport, the BBC is required to comply with certain “relevant enforceable requirements”.

² Available at <http://www.ofcom.org.uk/consult/condocs/broadcasting/>

³ Available at <http://www.ofcom.org.uk/consult/condocs/broadcasting/responses/>

- 1.6 Ofcom has now fully considered all responses received and has finalised the Procedures⁴. Each of the Standards Procedures, the F&P Procedures and the Sanctions Procedures are published alongside this document and will come into effect immediately.
- 1.7 The purpose of this document is to address issues raised by respondents and to indicate any changes which Ofcom has made to the proposals in the Consultation.

⁴ Minor stylistic changes and clarifications have been made to the Procedures which are not detailed in this statement.

Section 2

Consideration of consultation responses

2.1 The Consultation closed on 21 August 2009 and Ofcom received a total of 12 responses, primarily from broadcasters. Four respondents requested that their responses be kept confidential. The remaining responses are available on Ofcom's website⁵. Those respondents included:

- the BBC;
- Channel 4;
- Five;
- RadioCentre;
- S4C;
- British Sky Broadcasting Limited;
- Samarbejdsforum for Danske Lytter og Seerorganisationer (the cooperative forum for Danish listener and viewer organisations); and
- STV Group.

2.2 Ofcom has carefully considered the responses to the Consultation and, where appropriate, has reflected any resulting changes in the relevant Procedures. Respondents raised a range of issues and Ofcom sets out below its response to those issues.

Article 6 European Convention on Human Rights

2.3 Channel 4 and Channel 5 noted that the draft Procedures did not contain a reference to Article 6 of the European Convention on Human Rights, despite this having been included in the existing Standards Procedures.

2.4 Ofcom recognises the fact that Article 6 is relevant to the Standards Procedures in ensuring that the rights of parties are protected. Ofcom has therefore reinstated a reference to Article 6 at paragraph 3 of the Standards Procedures.

Complainants

Identity of complainants

2.5 The draft Standards Procedures provided that Ofcom would not usually consider anonymous complaints. Those draft Procedures further stated that the identity of complainants in Standards cases could be withheld from broadcasters where the complainant so requested.

2.6 Responses considered that Ofcom should never accept anonymous complaints and that complainants' identities should only be withheld from broadcasters where there

⁵ Available at <http://www.ofcom.org.uk/consult/condocs/broadcasting/responses/>

were compelling reasons to do so. STV Group considered that, where a complaint was made by a competitor, that person should be identified as a matter of course.

- 2.7 Ofcom does not accept that it is inappropriate to investigate anonymous complaints under any circumstances. Ofcom has duties towards members of the public in relation to Standards cases and those duties must be fulfilled regardless of the identity of the complainant. Whilst Ofcom would not ordinarily accept anonymous complaints, there may therefore be circumstances in which such a complaint discloses an issue of general interest which is worthy of investigation.
- 2.8 As regards requests to withhold a complainant's identity, the draft Standards Procedures make clear that Ofcom will consider any requests on a case by case basis and reserves the right to disclose a complainant's identity even where such a request has been made. Ofcom remains of the view that this is the most appropriate means of proceeding and requests for confidentiality in this regard will be considered on their merits. Ofcom would not ordinarily expect to withhold a competitor's identity; however, this cannot be excluded where there is a justification for doing so.

F&P Complainants

- 2.9 The draft F&P Procedures set out Ofcom's definition of a "person affected" by a programme for the purposes of identifying those with standing to make an F&P complaint. The Consultation set out that Ofcom would not entertain complaints which were the subject of ongoing legal proceedings or would be better resolved through legal proceedings.
- 2.10 Respondents suggested that Ofcom's approach was not consistent with the terminology of the Broadcasting Act 1996 in this regard. Respondents further argued that Ofcom's approach might lead to a confusion between a "person affected", having a "direct interest in the subject matter" and a "directly affected third party".
- 2.11 Ofcom is satisfied that the criteria set out in the draft F&P Procedures reflect the wording of the Broadcasting Act 1996 and that Ofcom's approach is consistent with that wording. Ofcom does not consider that the notion of a "person affected" and a "directly affected third party" to overlap since those terms arise in different contexts. Ofcom has not therefore amended the F&P Procedures in this regard.

Third Party representations

- 2.12 In the draft Procedures, Ofcom proposed formalising the right of directly affected third parties to make representations to Ofcom in the F&P and Standards Procedures in order to ensure that all parties would be treated fairly in the context of an investigation. Ofcom recognised that an investigation could, in certain circumstances, affect the rights of third parties and therefore they should be able to provide comment to Ofcom during the investigation period.
- 2.13 Respondent's views varied on the rights of third parties to make submissions. Certain respondents considered the proposals to be unnecessary whilst others recognised that it may be necessary in certain circumstances to protect third party rights. Respondents also raised the following issues:
- the proposal was significant and warranted further consultation;
 - the notion of "directly affected" was not sufficiently defined;

- the admission of third party representations risked delaying investigations;
 - no right of review exists against a decision to allow third parties to make representations;
 - third parties might not act in good faith and this could have a chilling effect on broadcasters' ability to co-operate freely; and
 - third parties' rights would be adversely affected since they would not be given full access to investigation information due to confidentiality constraints.
- 2.14 Ofcom remains of the view that it is important for directly affected third parties to be able to participate in the investigation process where their interests may be affected by the outcome of that process. Such a process ensures that all parties which may be affected by Ofcom's decision are treated fairly. Ofcom does not consider that further consultation is needed on this issue since the Consultation clearly set out Ofcom's proposals.
- 2.15 As regards the notion of "directly affected", it is difficult to envisage all situations in which third party rights may be affected. It is therefore necessary to ensure that requests by third parties are dealt with on a case-by-case basis. For the avoidance of doubt, however, Ofcom does not envisage that third parties which are external to the production of programmes, such as special interest groups, would normally be considered directly affected for these purposes. Ofcom's interest is to ensure that those whose personal interests may be affected by Ofcom's decision have the opportunity to be heard prior to any decision.
- 2.16 Ofcom recognises that the inclusion of an additional stage in proceedings through the admission of third party representations has the potential to delay proceedings if not managed effectively. However, Ofcom considers that this concern can be addressed through effective case management and does not warrant a change to the Procedures. Ofcom recognises that it is more efficient and desirable for third party representations to be included as part of broadcasters' submissions rather than being submitted separately at a later stage. We have therefore made a minor amendment to the Procedures⁶ to reflect the expectation that broadcasters will take into account third party views in their submissions.
- 2.17 As regards the ability to review a decision to admit, or not admit, third party representations, parties have the opportunity to request a review of Ofcom's decision, including any procedural steps which have led to that decision. Where it is considered that a third party should not have been given the opportunity to comment in the circumstances of the case, a further investigation may take place. Additionally, parties have the ability to judicially review an Ofcom decision.
- 2.18 Third parties would be expected to act in good faith during proceedings in the same manner as broadcasters. In the event that they did not, Ofcom would consider carefully whether to exclude a third party from the investigations process where that party was considered to be abusing the process. Ofcom has amended the section entitled Confidentiality in the F&P and Standards Procedures to reflect this expectation⁷.

⁶ paragraph 7 of the F&P Procedures; paragraph 11 of the Standards Procedures.

⁷ paragraph 6 of the F&P Procedures; paragraph 10 of the Standards Procedures.

- 2.19 Ofcom is subject to constraints on its ability to disclose confidential information under the Communications Act 2003. Those constraints would apply to any confidential information obtained in relation to a broadcaster during the investigation process. Broadcasters may therefore have confidence that they are able to provide Ofcom with confidential information and that that information will not be passed to any other party, including directly affected third parties. The admission of third party representations should not therefore have a chilling effect on broadcasters ability to express themselves freely. Whilst this may limit the information available to third parties, the alternative would be to exclude directly affected third parties from the process altogether. Ofcom does not consider that such a position could be considered to be fair to all parties.

Appropriate resolution in F&P complaints

- 2.20 The Consultation set out a process for appropriate resolution of F&P complaints whereby a broadcaster may make proposals for resolution to a complainant. Ofcom indicated that, where a proposal was rejected by a complainant, broadcasters would then be required to provide a statement in response to the complaint within 20 working days.
- 2.21 Respondents considered that complainants should also be permitted to offer their own suggestions for appropriate resolution. Other respondents believed that Ofcom should reject any complaint where a complainant did not accept the appropriate resolution measures proposed by the broadcaster.
- 2.22 It is for the complainant and the broadcaster to decide upon appropriate resolution of a complaint which may involve proposals being made by the complainant. Ofcom has a duty to investigate complaints which are validly made to it and cannot therefore refuse to entertain a complaint on the basis that a complainant has failed to accept a proposal by the broadcaster. Ofcom has not therefore made any changes to the F&P Procedures in light of these comments.

Time limits

- 2.23 Certain respondents welcomed the publication of time limits and targets in the Procedures. Others considered that the time limits for broadcasters to produce representations were unduly short.
- 2.24 Respondents supported Ofcom's indication that it would ordinarily expect complainants to have exhausted broadcasters' complaints processes before approaching Ofcom. However, comments were received in relation to the length of time for which Ofcom expected broadcasters to retain recordings in the event of a complaint to a broadcaster. Respondents did not consider that they should be required to retain recordings beyond the statutory minimum period.
- 2.25 Ofcom welcomes respondents' support for the introduction of time limits and target dates in the course of Ofcom's investigation. Ofcom remains of the view that, whilst challenging in certain circumstances, those time limits and targets will ensure the expeditious disposal of complaints for the benefit of all parties. In individual cases, where it is not possible for broadcasters to comply with the time limits laid down in the Procedures, Ofcom would consider, upon request, whether the circumstances of the case were such as to warrant an extension to the timetable for responses.
- 2.26 The retention of recordings is necessarily linked to Ofcom's decision to encourage complainants to exhaust broadcasters' complaints procedures. If broadcasters were

in a position to dispose of recordings at or before the end of their own complaints procedure, complainants approaching Ofcom would not be in a position to have Ofcom effectively investigate that complaint. That, in turn, would encourage complainants to approach Ofcom directly following broadcast. Ofcom therefore expects broadcasters to retain recordings beyond the statutory period where complaints are received directly by the broadcaster in accordance with broadcasters' duties to co-operate with Ofcom under the licensing regime.

Initial assessment

- 2.27 In the draft Standards Procedures, Ofcom outlined its Procedures for an initial assessment of a complaint and the process to be followed in the event that Ofcom decided it was not appropriate to proceed further with the complaint. Ofcom also set out in the draft F&P Procedures its process for an initial assessment of F&P complaints and the process for reaching an Entertainment Decision on whether or not to take the complaint further.
- 2.28 Respondents expressed concern, in relation to the draft Standards Procedures, that it appeared that, where Ofcom had decided not to open an investigation, complainants would be informed but the broadcaster would not. Both the draft Standards and F&P Procedures indicated that Ofcom would not expect representations from broadcasters during the initial phase where Ofcom requests a recording of the programmes and broadcasters expressed views that they thought they should be able to provide information during this period.
- 2.29 The draft Standards Procedures contained an ambiguity as to the manner of informing complainants and broadcasters of a decision not to open an investigation at the conclusion of an initial assessment. Ofcom has therefore deleted paragraph 30 of the draft Standards Procedures which may have led to this ambiguity. Where Ofcom does not propose to investigate a complaint, it will not normally write to a complainant or a broadcaster but will indicate that a complaint has been closed in Ofcom's Broadcast Bulletin. In the case of F&P complaints, Ofcom will send a copy of the Entertainment Decision, indicating whether or not Ofcom will open an investigation, to both the complainant and the broadcaster.
- 2.30 Ofcom remains of the view that it is not appropriate for broadcasters to make representations during the initial assessment period. That assessment is not an appraisal of the merits of a complaint, rather it is an assessment of whether or not the issues raised in the complaint warrant further investigation. Ofcom does not consider that broadcasters' representations are required in order for Ofcom to reach this conclusion.
- 2.31 It should be noted that Ofcom receives a large number of complaints and does not proceed to investigation in all cases⁸. In particular, Ofcom does not consider complaints about broadcasting in general, and would not investigate frivolous complaints or those which do not reveal any case to answer in the initial assessment phase.

⁸ Ofcom's Annual Report gives full details of the numbers of complaints that Ofcom investigated under the Broadcasting Code. For the period 2008-9, please see: http://www.ofcom.org.uk/about/accoun/reports_plans/annrep0809/.

Publication

Investigation Phase

- 2.32 In the Consultation, Ofcom proposed publishing details of investigations on its website in order to make third parties aware of ongoing investigations to enable them, where appropriate, to make submissions to Ofcom.
- 2.33 Respondents felt that this proposal was insufficiently reasoned, that it was unclear at what stage this would occur and that the publication of details of an investigation implied culpability on the part of a broadcaster. Five further considered that insufficient details of the investigation would prejudice third party rights and excessive details may breach confidentiality.
- 2.34 Ofcom remains of the view that publication of details of the opening of an investigation is an important step in allowing third parties the opportunity to comment where their interests are affected. Ofcom recognises that it may not have been clear at what stage details of the investigation would be published and has sought to clarify this in the final Procedures⁹. Ofcom will publish details of the investigation at the stage of formally requesting comment from broadcasters on any complaint. Ofcom does not accept that the publication of details of the investigation implies culpability on the part of broadcasters, rather it indicates that there are reasonable grounds for Ofcom to investigate. Ofcom will subsequently make a decision as to whether a breach has occurred which is Ofcom's substantive response to the complaint.
- 2.35 Ofcom recognises concerns over confidentiality and will ensure that details published are consistent with the requirement of the Communications Act 2003 in relation to confidential information. Within these constraints, Ofcom will seek to ensure that the details of any investigation are sufficiently clear to enable third parties to assess whether or not the outcome of Ofcom's investigation may be prejudicial to their interests.

Publication of Provisional Decision

- 2.36 In the draft Standards Procedures, Ofcom proposed drafting a Provisional Decision where it had identified a breach of the Broadcasting Code or licence provisions, as appropriate. That decision would then be published. Ofcom further indicated that there may be situations in which it considered it appropriate to publish a Provisional Decision where it had not found a breach.
- 2.37 The BBC considered that it was unclear from the draft Standards Procedures as to those situations in which Ofcom would publish a breach decision as a result of inconsistencies in the drafting of that section. Other respondents considered that Ofcom should always publish a decision where no breach had been identified.
- 2.38 As regards breach decisions, Ofcom recognises the concerns of the BBC and has amended the Standards Procedures, at paragraphs 34 to 36, to clarify the position. In particular, Ofcom has removed the reference to a "Provisional Decision" and replaced it with a "Decision". Ofcom recognises that this may have given rise to confusion as to whether or not a decision at this stage was final. It is Ofcom's intention that a decision at this stage is final, subject to any request for review. The parties will not be given a further opportunity to make representations unless a review is granted.

⁹ at paragraph 7 of the F&P Procedures and paragraph 11 of the Standards Procedures.

- 2.39 As regards no-breach decisions, Ofcom does not consider it appropriate to publish all such decisions. Whilst Ofcom recognises that this may be attractive in providing guidance and precedent, Ofcom receives a large number of complaints and it would be impractical for Ofcom to prepare and publish a formal decision in all cases where it has not identified a breach. Where a no breach decision which raises particular issues meriting publication (for example, where there are multiple complainants or issues of general concern to broadcasters have been identified), Ofcom would nevertheless publish its decision.

Review of decisions

Timing

- 2.40 The Consultation proposed that requests for a review of decisions in Standards cases would only be possible by complainants or broadcasters after publication of Ofcom's decision.
- 2.41 Respondents commented that the proposal puts complainants and broadcasters on an equal footing despite the fact that complainants had a different standing to broadcasters. Respondents further considered that it would be disproportionate, confusing and damaging to publish a decision which could then be subject to review.
- 2.42 Ofcom's duties in carrying out its functions are, as set out in section 3 of the Communications Act 2003, to further the interests of citizens in relation to communications markets. In doing so, Ofcom is required to secure the application of standards for television and radio services to protect members of the public from the inclusion of offensive and harmful material.
- 2.43 Ofcom does not therefore accept that broadcasters should benefit from increased standing in the investigation of complaints. In order to ensure fairness as between complainants and broadcasters, it is important to ensure that all parties concerned benefit from equal rights. Ofcom has not therefore made changes to its proposals in this respect.
- 2.44 Ofcom recognises concerns relating to the fact that a decision which may be subject to internal review will be published. However, Ofcom receives a number of complaints from multiple complainants. It is therefore important that all parties are made aware of Ofcom's decision in order to consider whether or not to request a review. In instances of multiple complainants, it may be impractical to provide each complainant with a copy of Ofcom's decision individually. Ofcom has not therefore amended its proposals in this respect.

Standard of review

- 2.45 Ofcom proposed that a request for a review would only be granted where evidence was put forward that a decision was materially flawed and that the case had a reasonable prospect of success or there was a compelling reason why the request should be granted.
- 2.46 Certain respondents considered that the threshold for a review was too high and that a case with an arguable prospect of success should also be entertained. respondents also questioned what compelling reasons might allow a review despite a case not having a reasonable prospect of success. Others considered that a request for a review should be made to a party independent of Ofcom.

- 2.47 The review Procedure is designed to allow parties to make representations to Ofcom where they consider that a judicial review of Ofcom's decision might be successful. This internal review process provides parties with a cheaper and faster means of obtaining a review of a decision than the judicial review process. The threshold for a review is therefore that used in judicial review cases. All cases are potentially arguable and therefore Ofcom does not consider it appropriate to make any amendment to the Procedures in this respect.
- 2.48 It is not possible to identify compelling reasons for the grant of a review in all cases. However, these may include those cases in which issues of principle are raised which are likely to have a significant effect on dealing with cases more generally. Ofcom does not, however, consider it appropriate to amend the Procedures themselves since this would unnecessarily restrict the circumstances in which compelling reasons might be sufficient to justify a review.
- 2.49 Ofcom does not consider it appropriate to establish an independent review body for the purposes of a review under the Procedures. Any final decision by Ofcom, whether following a review or otherwise, is subject to judicial review before the Administrative Court. That body acts as an independent review body for Ofcom decisions. It is not therefore necessary to replicate that function.

Review of Broadcast Summary Decision

- 2.50 The BBC asked Ofcom to make clear in its Procedures whether a direction to a broadcaster by Ofcom to broadcast a summary of its Fairness & Privacy Adjudication was open to review.
- 2.51 The decision to direct a broadcaster to broadcast a summary of its Adjudication forms part of Ofcom's breach decision, and is therefore open to review in the context of a review of a Provisional Decision. We do not consider it necessary to make this explicitly clear as the Procedures already state that parties may request a review of a Provisional Decision.

Review prior to Sanctions decision

- 2.52 Certain respondents considered that, where sanctions were being considered, a Standards decision should not be published before giving broadcasters the opportunity to seek a review of that decision.
- 2.53 As set out in the draft Standards Procedures, parties will have the opportunity to request a review of a Standards decision following its publication on Ofcom's website. Where that decision proposes that the matter be referred to the Broadcasting Sanctions Committee for consideration, Ofcom would not proceed with the consideration of sanctions in the event of a request for a review until such time as that request had been determined. Ofcom had not intended for a review and a consideration of sanctions to proceed in parallel and has therefore amended both the Standards Procedures¹⁰ and the Sanctions Procedures¹¹ to clarify this.

Sanctions decisions

- 2.54 The Consultation proposed a review process only in the case of F&P and Standards decisions but not in respect of Sanctions decisions.

¹⁰ at paragraph 46

¹¹ at paragraph 17

- 2.55 Respondents argued that, as a Sanctions decision was the most serious decision to be taken by Ofcom and should itself be subject to internal review. They considered that judicial review was a costly and burdensome process for broadcasters and therefore urged Ofcom to adopt an alternative. This might take the form of a review to a differently constituted Broadcasting Sanctions Committee or a Sanctions Review Committee.
- 2.56 Ofcom accepts that a Sanctions decision is the most serious decision taken by Ofcom in this area. It is for this reason that such a decision is taken by a sub-committee of the Ofcom Board. Were Ofcom to grant internal reviews of Sanctions decisions, this would require the constitution of further sub-committees with different members. This would be impractical as a matter of process. Since the rights to a fair hearing of broadcasters under Article 6 of the European Convention on Human Rights are respected through the judicial review process, Ofcom does not consider it appropriate to establish an internal review of a Sanctions decision.

Broadcasting Review Committee

- 2.57 Both the draft F&P and Standards Procedures proposed the introduction of Broadcasting Review Committee to consider internal review of F&P and Standards decisions.
- 2.58 Respondents supported Ofcom's proposal but requested further information as to the make up of the Broadcasting Review Committee.
- 2.59 The Broadcasting Review Committee is a sub-committee of the Ofcom Board acting under delegated authority whose members will be comprised of members of the Ofcom Content Board. Ofcom has included in the F&P and Standards Procedures details of the make up of the Broadcasting Review Committee¹² and its terms of reference will shortly be published on the Ofcom website.

Sanctions cases

Representations

- 2.60 The draft Sanctions Procedures provided for the Chair of the Broadcasting Sanctions Committee to decide upon the appropriate means for broadcasters to make representations, either written, oral or both. Where appropriate, written representations would ordinarily be required from broadcasters within 15 working days.
- 2.61 A respondent requested that broadcasters always be given the opportunity to make written representations and oral representations at a hearing. Another respondent considered that the time limit for written representations should be extended to 20 working days.
- 2.62 Ofcom does not consider that it will be appropriate in all cases for broadcasters to make both written and oral representations. The Chair of the Broadcasting Sanctions Committee will consider carefully the appropriate representations required, taking into account the type and level of sanctions under considerations. Ofcom also remains of the view that a period of 15 working days is sufficient for broadcasters to make written representations so as to ensure that a decision may be reached in an

¹² paragraph 46 of the F&P Procedures; paragraph 42 of the Standards Procedures

appropriate timeframe. Should this not be the case, the Chair of the Committee will consider whether to extend the time period and, if so, by how long.

Sanctions proposals by the Chair of the Broadcasting Sanctions Committee

- 2.63 The Consultation proposed that the Chair of the Broadcasting Sanctions Committee would have the power to dispose of Sanctions cases or to write to the broadcaster indicating a provisional decision on a sanction where this was considered appropriate.
- 2.64 A respondent indicated its view that the full Broadcasting Sanctions Committee should be involved at all stages. It considered that the views of the Chair in any final decision would be vitiated by his/her involvement in reaching a provisional decision on a sanction. The respondent therefore believed that the proposals were contrary to the rules of natural justice.
- 2.65 Ofcom does not accept that the proposals are contrary to the rules of natural justice. The Chair of the Broadcasting Sanctions Committee acts as the initial stage in the sanctions process, reaching a preliminary view, subject to broadcaster representations. The Broadcasting Sanctions Committee as a whole will then consider the proposal along with the broadcaster's representations in reaching a final decision. Neither the Chair nor the Broadcasting Sanctions Committee more generally is bound by the provisional decision of the Chair in reaching that decision.

Level of sanctions

- 2.66 Respondents underlined their view that in deciding upon sanctions, the Broadcasting Sanctions Committee should take into account Ofcom's Penalty Guidelines and any relevant precedent. Respondents further indicated that they considered Ofcom should also consider the financial climate in deciding upon the appropriate level of sanction, together with the penalty structure employed by other regulators. One respondent also considered that any final Sanctions decision should not differ substantially from the provisional view of the Chair.
- 2.67 Paragraph 26 of the draft Sanctions Procedures set out that the Broadcasting Sanctions Committee would take account, in deciding upon the level of any financial sanction, of Ofcom's Penalty Guidelines and the Precedent List published on Ofcom's website. As regards the consideration of other factors, the Broadcasting Sanctions Committee will consider carefully any representations made by broadcasters during a Sanctions investigation in deciding upon the appropriate level of sanctions, within the confines of the statutory framework. Given the need for the Broadcasting Sanctions Committee to take full account of broadcaster representations, it would not be appropriate to commit to ensuring that any final Sanctions decision did not differ substantially from the Chair's provisional view.

Publication of Sanctions decisions

- 2.68 The draft Sanctions Procedures proposed that a final Sanctions decision would be given to broadcasters 24 hours before its publication to allow broadcasters the opportunity to comment on factual accuracy, errors or omissions. The decision so provided would not contain the level of any financial penalty.
- 2.69 Respondents argued that 24 hours was insufficient to provide comment on issues of fact since some errors may be sufficiently material to affect the level of sanction. Respondents therefore requested between 48 hours and 5 working days in which to

provide comments, in certain cases to allow the broadcaster to inform senior members of staff and to prepare a media response.

- 2.70 Respondents also considered that the financial penalty should, in certain circumstances, be included in the decision provided in advance of publication. One respondent suggested that this should be included where the level of a financial penalty was outside a range of 10% of the level included in the provisional view of the Chair whilst another considered that the level of financial penalty should be provided to broadcasters prior to publication in all cases.
- 2.71 The purpose of allowing broadcasters the opportunity to comment at this stage is to comment on factual accuracy, errors and omissions alone. Ofcom will not be inviting representations on its decision. The previous Procedures state that Ofcom will provide the sanctions decision on the day of publication or shortly before publication. Ofcom considers that a period of up to 24 hours is sufficient to enable broadcasters to assess whether there are issues of fact which need correction. Ofcom does not consider it necessary to provide advance warning of the level of the financial penalty to broadcasters prior to publication. It is unclear to Ofcom what purpose this would serve and it has therefore not modified the proposals set out in the Consultation.

Next steps

- 2.72 These Procedures will now be published on 16 December 2009 and will come into force with immediate effect.