



Sanctions in broadcast cases

A consultation on an outline procedure for sanctions
in cases relating to broadcasting

Consultation

Publication date: 12 July 2007

Closing Date for Responses: [6 September 2007
Amended to 20
September 2007]

Contents

Section		Page
1	Summary	1
2	Background	3
3	Consultation Questions and Draft Proposed Procedure	4
4	Impact Assessment	12
5	Responses	13
Annex		Page
1	Responding to this consultation	14
2	Ofcom's consultation principles	16
3	Consultation response cover sheet	17
4	Legal Framework	19

Section 1

Summary

- 1.1 Ofcom is the regulator for the UK telecommunications industries, with responsibilities across television, radio, telecommunications and wireless communications services. Ofcom's statutory duties are derived from the Communications Act 2003 ("the Act").
- 1.2 Under the Act Ofcom has a duty to set standards for the content of programmes and to ensure that procedures for the handling and resolution of complaints about the observance of those standards are established and maintained.
- 1.3 Under the Act such procedures should be consistent with Ofcom's regulatory principles and be transparent, accountable, proportionate and targeted only at cases in which action is needed. In the interests of the parties, Ofcom considers that they should also be quick and effective, easy to use and understand and in keeping with natural justice.
- 1.4 Such procedures need to be consistent with relevant legislation, including the following:
 - the Act
 - the Broadcasting Acts 1990 and 1996, as amended by the Act
 - Television Without Frontiers Directive 89/EEC, as amended by 97/36/EC
 - Human Rights Act 1998.
- 1.5 A summary of some of the most important legal provisions relevant to this consultation is set out in Annex 4 of this document.
- 1.6 The purpose of this public consultation is to seek views on proposed revision to Ofcom's published procedures for sanctions in cases relating to broadcasting.
- 1.7 This consultation document sets out relevant issues and the proposed changes. The new Draft Proposed Procedure is set out under Section 3 "Consultation Questions and Draft Proposed Procedure".
- 1.8 Under the proposed changes, broadcasters would continue to have the opportunity to comment on successive drafts of the sanctions paper at the two key stages: first when the referral to the Content Sanctions Committee ("the Committee") is proposed where the Executive outlines the seriousness of the breaches of the Ofcom Broadcasting Code or relevant licence condition; and secondly when the nature or level of sanction is recommended by the Executive.

- 1.9 The proposed changes, if introduced, would mean that, rather than Ofcom producing three drafts of a sanctions paper on which the broadcaster can make representations on, Ofcom would produce two versions of the draft paper for the broadcaster to comment on. As before, the broadcaster will continue to have the opportunity to comment on all drafts and all stages. Ofcom believes this change will ensure that cases are dealt with more efficiently in the public interest while still appropriately respecting licensees' human rights and natural justice.
- 1.10 In some clearly defined circumstances Ofcom also proposes to introduce a 'fast-track' procedure for sanctions.
- 1.11 The third most significant change proposed in the new procedure is to set out the procedure for Ofcom of issuing a direction under a broadcasting licence and the revocation procedure. These sanctions have always been available to Ofcom but are now explicitly incorporated in the proposed procedure to offer clarity to broadcasters and give the process greater transparency.
- 1.12 In particular, Ofcom would welcome responses to this consultation from:
- interested members of the public;
 - broadcasters regulated by Ofcom;
 - companies, professional organisations, associations, bodies,
 - groups or individuals who represent the interests of those who may be affected by the Draft Proposed Procedure;
 - companies, professional organisations, associations, bodies, or individuals who work in the broadcasting sector or related sectors; and
 - other regulators
- 1.13 The revised procedure would become effective as from the date of publication of Ofcom's statement implementing them. Ofcom aims to publish the statement by mid November 2007. Ofcom intends to apply the new procedure to all cases as from that date, including those cases which are being considered for the imposition of a sanction at the time of publication.

Section 2

Background

- 2.1 Under the relevant legislation Ofcom has a duty to establish and maintain procedures for the observance of standards in the television and radio services which it regulates.
- 2.2 The current Outline procedure for statutory sanctions in content cases was put in place in March 2004 following a brief consultation. This was on the understanding that a full consultation would follow at a later stage when there had been some experience of how the procedures worked in practice. Informal consultations with relevant stakeholder took place 2006. Taking into account those discussions, Ofcom has now drafted this Draft Proposed Procedure.
- 2.3 Experience of the procedures has demonstrated that they can be lengthy and quite cumbersome. This has the potential to inhibit Ofcom from reaching decisions quickly and efficiently in the interests of broadcasters, consumers and other stakeholders.
- 2.4 The current procedures ensure independence of decision making in the sanctions process through a system of review at increasingly higher levels of management within Ofcom and by the Committee at each stage of the procedure. This independence has been maintained in the Draft Proposed Procedure.

Section 3

Consultation Questions and Draft Proposed Procedure

3.1 We would welcome your comments on the Draft Proposed Procedure for sanctions in broadcast cases set out below, including any suggested amendments to the wording. We would welcome in particular responses to the following questions:

Q1. Do you agree with the new proposed procedure? If not, why not? Please suggest any alternative wording where appropriate.

Q2. In particular do you believe it is appropriate, in normal cases where a sanction is being considered, for broadcasters to have two opportunities to make representations to Ofcom (once on the seriousness of the case and once on the nature and level of any recommended sanction)?

Q3. Do you agree that it is appropriate for Ofcom to introduce the new proposed fast-track sanctions procedure in the circumstances suggested?

Q4. Do you have any other proposals for making the procedure more effective and/or appropriate?

Outline procedure for sanctions in cases relating to broadcasting

Contents

Section	Page
Introduction	
1. Statutory Sanctions	
A. General	
B. Procedure	
C. Fast-track	
2. Other Matters	
A. Directions Under Licence	
B. Revocation of Licence	
C. Licence Applications	

Introduction

1. This document outlines the procedure that Ofcom will normally follow when considering the imposition of a sanction for licence breaches (including breaches of Ofcom's codes¹) against one of its broadcast licensees, the BBC or S4C ('a broadcaster'). It is effective from [date]

2. Ofcom's powers to impose statutory sanctions come from the Communications Act 2003 ('the Act') and the Broadcasting Acts 1990 and 1996 (as amended). If it deems it appropriate, Ofcom may:

- issue a direction not to repeat a programme;
- issue a direction to broadcast a correction or a statement of Ofcom's findings which may be required to be in such form, and to be included in programmes at such times as Ofcom may determine;
- impose a financial penalty;
- shorten a licence (only applicable to holders of an analogue national, local or community radio licence); or
- revoke a licence (not applicable to the BBC, S4C or Channel 4). The procedures for revocation are set out in paragraphs 32 to 34 below.

¹ At present the codes in force to which this procedure applies include the Broadcasting Code, the Cross-promotion Code, the Code on Access Services, the Rules on Text Size, the Rules on the Amount and Distribution of Advertising and the Broadcast Committee of Advertising Practice (BCAP) Code and the Electronic Programme Guide (EPG) Code. The outline procedure does not apply to competition issues.

‘financial penalty’

in most cases the maximum fine is normally £250,000 or 5% of the ‘Qualifying Revenue’ of the holder of a commercial television or radio licence whichever is the greater, but for Public Service Broadcasters it is 5% of the ‘Qualifying Revenue’. The maximum financial penalty payable by the BBC or S4C is £250,000.

3. Ofcom also has the power under a broadcaster's licence to issue a direction to a broadcaster in respect of any matter, subject or thing which Ofcom considers appropriate, having regard to its or the licensee's duties and all relevant codes and guidance. The procedure for issuing such a direction is a separate procedure from the sanctions procedure and is set out in paragraphs 30 and 31 below.

4. For the avoidance of doubt, Ofcom's powers to impose a sanction in broadcasting cases includes the power to sanction in respect of advertising.

1. Statutory Sanctions

A. General

5. The imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly, or recklessly breached the terms of its licence conditions. This includes a breach of any of Ofcom's codes which are from time to time in force.

6. The outline procedure set out in this document, and any related guidance, may be reviewed at any time but any major revision will be the subject of prior consultation.

7. The procedure have been drafted in the light of the Human Rights Act 1998 ('HRA'). The HRA 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 aims to operate a fair, open and transparent system giving the broadcaster a fair and reasonable opportunity to respond to the case against it.

8. In particular, Ofcom will not impose any sanction against a broadcaster before the broadcaster has been given a reasonable opportunity to make representations about whether a sanction should be imposed, and if so, what type, and at what level. Ofcom will take account of any such representations. What Ofcom considers to be a 'reasonable opportunity' will depend upon the facts and degree of urgency in each case. Where appropriate, broadcasters will be given an opportunity to make oral representations. For instance, broadcasters will be invited to give oral representations where the Executive recommends that a financial penalty or the shortening or revocation of licence should be considered.

9. The application of sanctions in content and content-related cases has been delegated from the Ofcom Board to a Content Sanctions Committee.

The Content Sanctions Committee (the 'Committee') is a committee of the Ofcom Board and consists of five members, three from the Content Board and two

from the Ofcom Board. The Committee is quorate with three Content Board members

10. Decisions on whether to impose a sanction and if so at what level will be taken by the Committee.

11. Under the procedure, broadcasters will be provided with the sanctions papers prepared by the Executive before they are presented to the Committee to allow them to make representations at each stage. Broadcasters will see any information that the Executive has relied on and put before the Committee. Broadcasters will normally be provided with copies of the relevant documentation, subject to the withholding of any material that Ofcom believes is confidential, market sensitive or legally privileged or that it is under a legal obligation to protect from disclosure.

Executive means any relevant member/s of staff employed in Ofcom's Content and Standards department

manager – a Standards Case Manager or equivalent at the time in Ofcom's Content and Standards department

more senior manager - a Senior Standards Manager or Director or Partner, or equivalent at the time in Ofcom's Content and Standards department

B. Procedure

12. Consideration of a statutory sanction begins with a manager writing to the broadcaster recording the relevant code or licence breach². The manager will explain to the broadcaster that a statutory sanction is under consideration and enclose a draft sanctions paper containing details of the code or licence breach and setting out the reasons why it is recommended that a statutory sanction may be appropriate. This draft sanctions paper should contain a summary of all the relevant material on which the Executive has so far relied, and the Executive's comments on any issue raised by the broadcaster that is material to the case. The primary purpose of this first draft sanctions paper is to establish the seriousness of the case and to explain why a referral to the Committee may be appropriate.

13. In fairness and privacy cases, the recommendation for consideration of a statutory sanction will originate as appropriate with the Fairness Committee or Executive Fairness Group. In these circumstances, the recommendation is passed to the relevant manager, so he or she can commence consideration of a statutory sanction³ as appropriate.

14. The Advertising Standards Authority may, under the terms of its Memorandum of Understanding with Ofcom, request Ofcom to consider a statutory sanction in an advertising case. In these circumstances, the consideration of a statutory sanction

² See paragraph 18 of the Ofcom Guidelines for the handling of standards complaints and cases (in programmes, advertising and sponsorship) at <http://www.ofcom.org.uk/tv/ifi/guidance/standards/>

³ See paragraph 40 of Ofcom's Outline procedures for handling fairness and privacy complaints at <http://www.ofcom.org.uk/tv/ifi/guidance/fairness/>

commences, as with other cases, with a manager sending a broadcaster a draft sanctions paper.

15. On receipt of the draft sanctions paper (see paragraph 12 above) the broadcaster will be invited to make any representations on the case, and particularly on the recommendation to refer the case to the Committee for consideration of a sanction. These representations should be made to a more senior manager. These representations should normally be submitted within seven working days of receiving the draft sanctions paper.

16. The more senior manager will then review the case, together with any representations from the broadcaster. He or she may at this stage undertake further work (including seeking further information from the broadcaster). It is open to the more senior manager to decide that no sanction is appropriate or that a sanction should be considered.

17. If the more senior manager believes that a sanction is not appropriate, then he or she will write to the broadcaster setting out his/her conclusions. The finding will then normally be published in the Ofcom Broadcast Bulletin.

18. However, if the more senior manager believes that a statutory sanction should be considered, then he or she will write to the broadcaster enclosing the draft sanctions paper (revised as appropriate to take account of any representations received from the broadcaster), and informing the broadcaster that he or she is minded to refer the case to the Committee and recommend a statutory sanction. This draft sanctions paper will for the first time set out a provisional recommendation of the type (and, if appropriate, level) of sanction. The broadcaster will be advised to make any final written representations on that provisional recommendation, which should normally be submitted within five working days.

19. If, having considered the final written submissions of the broadcaster, the more senior manager still considers the case should be referred to the Committee, then he or she will finalise the sanctions paper and the recommendation. The final sanctions paper, including the final recommendation, is then submitted to the Committee. A copy is also sent to the broadcaster.

20. The Committee will then consider the final sanctions paper. If the Committee believes it appropriate, it will at that point invite the broadcaster to a meeting to give oral representations (see paragraph 8). The broadcaster may bring legal representation to this meeting. However, the total representation on behalf of the broadcaster should normally not exceed 5 people (including legal representation). The proceedings will be at the discretion of the Chair of the Committee but will normally be as follows:

- the Chair explains the proceedings, outlines the code or licence breaches which have occurred and explains what the potential sanctions in the case are;
- the broadcaster makes its oral representations (the Chair will determine in advance the duration of these representations, normally limited to 30 minutes);
- members of the Committee may put questions to the broadcaster;
- the broadcaster then concludes with a brief final statement, normally limited to 5 minutes

21. The Committee may decide that no sanction is appropriate in which case the adjudication will normally be published at this point; or that a statutory sanction is appropriate. The decision of the Committee is final.

22. If, after considering all the evidence including any relevant points raised in any oral representation, the Committee believes that a sanction should be imposed then it will, if appropriate consider the penalty in accordance with the Penalty Guidelines published by Ofcom (see <http://www.ofcom.org.uk/about/accoun/pg/>). If however the Committee believe that the sanction should be revocation of the licence, the procedure for revocation described in paragraphs 32 to 34 shall apply.

23 The Committee's final decision will then be communicated to the broadcaster in writing setting out the reasons ("the sanctions adjudication"). The broadcaster will normally be provided with the full sanctions adjudication before publication to allow time for the broadcaster to comment on any factual or typographical errors in that adjudication. Ofcom's decision whether to take account of any such comments and on the time of publication will be at its sole discretion. Its decision will be final.

C. Fast-track procedure for statutory sanctions

24. Ofcom may consider it appropriate in certain cases to apply a 'fast-track' procedure for considering the imposition of statutory sanctions. The use of this procedure is at Ofcom's discretion but it may be applied in the following circumstances:

- Where in Ofcom's view there is a risk of material harm, including financial loss, to viewers or listeners, or other third parties;
- Where a broadcaster or an associate of a broadcaster fails to comply immediately with the terms of a direction issued by Ofcom pursuant to the terms of the broadcaster's licence to do, or cease to do, something (see paragraph 3 above);
- Where there has been a failure by a broadcaster to provide a recording of its output in accordance with its obligations;
- Where a broadcaster requests that the fast-track process be used;
- Where in Ofcom's view a broadcaster is failing to comply in a timely manner with its licence obligations despite notification from Ofcom of its non-compliance;
- Where in any case it appears to Ofcom that there may be a serious failure in the compliance procedures of a broadcaster or an associate of a broadcaster;
- Where Ofcom considers it necessary in the public interest; or
- In any other circumstances where Ofcom considers that there is a need for urgency, and/or Ofcom considers it proportionate and appropriate for the fast-track process to be used.

'associate'

'associate' has the same meaning in this outline procedure as in the Broadcasting Act 1990 (as amended), Schedule 2, Part 1, Paragraph 1

25. Where any of the circumstances referred to in paragraph 24 apply, the fast-track procedure replaces the procedure set out in paragraphs 12 to 18.

26. In such cases, Ofcom (normally a more senior manager) will write to the broadcaster recording the relevant code or licence breach. Ofcom will explain that a

statutory sanction is under consideration and that the fast-track procedure is being invoked. The reasons will be set out in the form of a draft sanctions paper. Unlike the normal procedure for statutory sanctions described in paragraphs 12 to 18, the draft sanctions paper will also at this stage include the provisional recommendation on sanction and a summary of all the relevant material that Ofcom has so far relied on and its comments on any issues that are raised by the broadcaster that is material to the decision as to whether to impose a sanction (and if so at what level). The broadcaster will be requested to make any final written representations on the draft sanctions paper and the provisional recommendation to Ofcom, normally within five working days of the date of the Ofcom correspondence recording the breach and sending the draft sanctions paper.

27. If, in the light of any representations provided by the broadcaster, a more senior manager believes that a sanction is not appropriate, then he or she will write to the broadcaster setting out his/her conclusions.

28. However, if he or she believes that a statutory sanction should be considered, the final sanctions paper, including the final recommendation on sanction, will be presented to the Committee and the broadcaster notified.

29. The consideration of a sanction will then continue as normal, that is, as set out in paragraphs 20 to 23.

2. Other Matters

A. Procedure for issuing a direction under the broadcasting licence

30. Ofcom may deem it appropriate to issue a direction to a broadcaster pursuant to its licence (see paragraph 3 above), in which case the procedure set out below will apply. Such a direction will normally be issued in circumstances where a broadcaster has seriously breached its licence, and in Ofcom's view has failed to comply in a timely manner with its licence obligations despite notification by Ofcom. This procedure is separate from the statutory sanction procedure outlined above. However the sanctions procedure may run parallel to the issuing of a direction under the licence if appropriate. Further, compliance with the direction does not mean that statutory sanctions will not be considered.

31. A direction under a broadcasting licence can be issued by an executive member of Ofcom's Content Board and may require the broadcaster to do, or cease doing, something immediately. After it has been issued, the direction will normally be published in Ofcom's Broadcast Bulletin. A broadcaster's failure to comply with a direction can of itself lead to statutory sanctions being considered, if appropriate under the fast track procedure outlined in paragraphs 24 to 29 above.

B. Procedure for revocation of a broadcasting licence

32. Where Ofcom is satisfied that the holder of a licence is in contravention of a condition of the licence or is failing to comply with a direction of the type described in paragraph 30, and is satisfied further that the contravention or failure, if not remedied, would justify the revocation of the licence, it must serve a notice indicating that the licence will be revoked if the steps specified in the notice are not taken.

33. If, at the end of the period specified in the notice, Ofcom is satisfied that the specified steps have not been taken and that it is necessary in the public interest to revoke the licence, it shall serve a notice revoking the licence. The notice revoking the licence takes effect when it is served on the licensee.

34. No notice revoking the licence will be served unless the licensee has been given a reasonable opportunity of making representations. What is reasonable will depend on the circumstances and urgency of the case but could be no more than 24 hours.

C. Licence applications and changes affecting the nature or status of the Licensee or Licensed Service

35. If Ofcom is considering imposing a sanction against a broadcaster, and until the Committee has reached a decision on the outcome of the sanctions procedure, Ofcom will not generally consider any applications for new licences by the licensee (or where appropriate, an associate of the licensee). Nor will Ofcom take forward any other matters that could affect the nature or status of the licensee and the licensed service (including, but not limited to, requests for consent to transfer and changes to the name and nature of a licensed service), where the potential sanction may be a relevant consideration.

Section 4

Impact Assessment

Introduction

- 4.1 An impact assessments ("IA") provides a valuable way of assessing different options for regulation and showing why the preferred option was chosen. It forms part of best practice policy-making and it is commonly used by other regulators. This is reflected in section 7 of the Act, which means that generally we have to carry out IA where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities.
- 4.2 However, there are some circumstances, as a general rule, where an IA will not be required. For example, where Ofcom is publishing guidelines detailing how it will undertake investigations. In our view the Draft Proposed Procedure for sanctions in cases relating to broadcasting do not constitute a major change of policy or an important proposal which would be likely to have a significant effect on our stakeholders, such as to require an IA. Also, we do not consider the Draft Proposed Procedure will have any significant economic impact or effect on competition. In these circumstances, we believe that carrying out an IA would be disproportionate.
- 4.3 Nevertheless when drafting the Draft Proposed Procedure we took into account racial equality, disability equality, gender equality and effects on Northern Ireland. We consider the draft proposed Outline to be neutral in their consequences for different stakeholders. This is because they have been drafted in a way that allows Ofcom significant flexibility to accommodate anyone who Ofcom believes might otherwise be at a disadvantage.
- 4.4 If you have any comments on the likely impact of our Draft Proposed Procedure you should send them to us by the closing date for this consultation. We will consider all comments before deciding whether to implement our proposals

Section 5

Responses

5.1 In particular, Ofcom would like responses to this consultation from:

- interested members of the public;
- broadcasters regulated by Ofcom
- companies, professional organisations, associations, bodies, or individuals who represent the interests of those who may be affected by the procedure;
- companies, professional organisations, associations, bodies, or individuals who work in the broadcasting sector or related sectors;
- other regulators.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on Thursday 20 September 2007..**
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/sibc/>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email andrew.morgan@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Consultation on Outline Procedure for Sanctions
Floor Five
Dept Content, Legal and International
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7981 3806

- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Section 3. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Andrew Morgan on 020 7981 3944.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify

what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement implementing the revised procedure as soon as practicable. Ofcom aims to publish this statement by mid November 2007.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW
Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organizations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

☐

Name

Signed (if hard copy)

Annex 4

Legal Framework

Ofcom's Duties under the Communications Act 2003

For reference purposes we summarise below some of the most important legislative provisions relating to sanctions which Ofcom can impose on the holders of broadcasting licences.

- A4.1 Ofcom was set up under the Communications Act 2003 ("the 2003 Act") to replace the following five regulators: the Independent Television Commissions (ITC), the Radio Authority, the Broadcasting Standards Commission, the Office of Telecommunications and the Radio-communications Agency.
- A4.2 Ofcom has a general duty under section 3 of the 2003 Act to further the interests of citizens in relation to communications matters and the interests of consumers where appropriate, by promoting competition.
- A4.3 In discharging its functions, Ofcom is also required under section 3(2) of the 2003 Act to secure a number of other matters including:
- The availability throughout the UK of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests (section 3(2)(c));
 - The maintenance of a sufficient plurality of providers of different television and radio services (section 3(2)(d));
 - The application in the case of all television and radio services of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services (section 3(2)(e));
 - The applications, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both – (i) unfair treatment in programmes included in such services; and (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services (section 3(2)(f)).
- A4.4 In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, a number of other considerations including:

- The desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom (section 3(4)(a));
 - The need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g));
 - The vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection (section 3(4)(h));
 - The desirability of preventing crime and disorder (section 3(4)(j)).
- A4.5 Under section 319 of the 2003 Act, Ofcom has a duty to set standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives listed in section 319(2). Standards set by Ofcom in accordance with section 319 are set out in Ofcom's Broadcasting Code ("the Code") which came into force on 25 July 2005.⁴
- A4.6 By virtue of section 325 of the Act, a condition is included in broadcasters' licences requiring the broadcaster to secure observance with the Ofcom Code in connection with the provision of their services and the programmes included in their services.

The Human Rights Act 1998

- A4.7 Under section 6 of the Human Rights Act 1998, there is a duty on Ofcom (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention of Human Rights ("the Convention").
- A4.8 Article 6 of the Convention provides for the right to a fair trial. It states that *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly necessary in the opinion of the court in the special circumstances where publicity would prejudice the interests of justice."*
- A4.9 Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster's right to *"impart information and ideas"* and also the audience's *"right to receive information and ideas without interference by public authority"*. Such rights may only be restricted if the restrictions are *"prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the*

⁴ The Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary” (Article 10(2) of the Convention).

Sanctions for Channels 3, 4 and 5

A4.10 Section 40 of the Broadcasting Act 1990 (as amended) (“the 1990 Act”) provides Ofcom with the power to direct the licensee of Channels 3, 4 or 5 to broadcast a correction or statement of findings or not to repeat a programme on contravention of a licence condition:

s.40 Power to direct licensee to broadcast correction or a statement of findings or not to repeat programme

(1) If Ofcom are satisfied –

- a. that the holder of a Channel 3 or Channel 5 licence has failed to comply with any condition of the licence, and*
- b. that the failure can be appropriately remedied by the inclusion in the service of a correction or a statement of findings (or both) under this subsection,*

they may (subject to subsection (2)) direct the licence holder to include in the licensed service a correction or a statement of findings (or both) in such form, and at such time or times, as they may determine.

(2) Ofcom shall not give any person a direction under subsection (1) unless they have given him a reasonable opportunity of making representations to them about the matters complained of.

(3) Where the holder of a licence includes a correction or a statement of findings in the licensed service in pursuance of a direction under subsection (1), he may announce that he is doing so in pursuance of such a direction.

(4) If Ofcom are satisfied that the inclusion in the holder of a Channel 3 or Channel 5 licence of any programme in the licensed service involved a failure by him to comply with any condition of the licence, they may direct him not to include that programme in that service on any future occasion.

(5) This section shall apply in relation to Channel 4 as if any reference to a Channel 3 licence were a reference to the licence to provide Channel 4.

(6) For the purposes of this section a statement of findings, in relation to a case in which Ofcom are satisfied that the holder of a licence has contravened the conditions of his licence, is a statement of Ofcom’s findings in relation to that contravention.

A4.11 Section 41 of the 1990 Act provides Ofcom with the power to impose a financial penalty on the licence holder of Channels 3, 4 or 5 of a maximum of 5% of the licensee’s qualifying revenue. Ofcom may also shorten the licence period for Channels 3 or 5. Ofcom cannot however shorten Channel 4’s licence.

s.41 Power to impose financial penalty or shorten licence period

(1) If Ofcom are satisfied that the holder of a Channel 3 or Channel 5 licence has failed to comply with any condition of the licence or with any direction given by Ofcom under or by virtue of any provision of... Part 3 of the Communications Act 2003 they may (subject to the following provisions of this section) serve on him –

- a. a notice requiring him to pay, within a specified period, a specified financial penalty to Ofcom; or*
- b. a notice reducing the period for which the licence is to be in force by a specified period not exceeding two years.*

(1A) The amount of financial penalty imposed on a person in pursuance of subsection (1)(a) shall not exceed 5 per cent of the qualifying revenue for the licence holder's last complete accounting period falling within the period for which the licence has been in force ("the relevant period"). ...

(2) [repealed]

(3) Ofcom shall not serve on any person such a notice as is mentioned in subsection (1)(a) or (b) unless they have given him a reasonable opportunity of making representations to them about the matters complained of.

(4) Where a licence is due to expire on a particular date by virtue of a notice served on any person under subsection (1)(b), Ofcom may, on the application of that person, revoke that notice by a further notice served on him at any time before that date, if they are satisfied that, since the date of the earlier notice, his conduct in relation to the operation of the licensed service has been such as to justify the revocation of that notice.

(5) It is hereby declared that any exercise by Ofcom of their powers under subsection (1) of this section in respect of any failure to comply with any condition of a licence shall not preclude any exercise by them of their powers under section 40 in respect of that failure.

(6) This section shall apply in relation to Channel 4 as if—

- a. any reference to a Channel 3 licence were a reference to the licence to provide Channel 4; and*
- b. subsection (1)(b) were omitted.*

A4.12 Section 42 provides Ofcom with the power to revoke a Channel 3 or 5 licence. This sanction does not apply to Channel 4.

s.42 Power to revoke Channel 3 or 5 licence

(1) If Ofcom are satisfied —

- a. that the holder of a Channel 3 or Channel 5 licence is failing to comply with any condition of the licence or with any direction given by them under or by virtue of any provision of... Part 3 of the Communications Act 2003 and*

- b. that the failure is such that, if not remedied it would justify the revocation of the licence,*

they shall (subject to subsection (8)) serve on the holder of the licence a notice under subsection (2).

(2) A notice under this subsection is a notice—

- a. stating that Ofcom are satisfied as mentioned in subsection (1);*
- b. specifying the respects in which, in their opinion, the licence holder is failing to comply with any such condition or direction as is there mentioned; and*
- c. stating that, unless the licence holder takes, within such period as is specified in the notice, such steps to remedy the failure as are so specified, Ofcom will revoke his licence under subsection (3).*

(3) If at the end of the period specified in a notice under subsection (2) Ofcom are satisfied—

- a. that the person on whom the notice was served has failed to take the steps specified in it, and*
- b. that it is necessary in the public interest to revoke his licence,*

they shall (subject to subsection (8)) serve on that person a notice revoking his licence.

...

- (8) Ofcom shall not serve any notice on a person under this section unless they have given him a reasonable opportunity of making representation to them about the matters complained of.*

Sanctions for Satellite and Cable TV services

A4.13 Section 236 of the 2003 Act states that Ofcom may direct the licence holder of a satellite or cable television service ("television licensable content services" or "TLCS") to broadcast a correction or a statement of findings (or both) or a direction not to repeat a programme on contravention of a licence condition. The provisions contained in section 236 mirror closely those set out in section 40 of the 1990 Act above.

A4.14 Under section 237 of the 2003 Act Ofcom may require a TLCS licence holder to pay a financial penalty on contravention of a licence condition or an Ofcom direction. The maximum penalty is whichever is the greater of £250,000 and 5% of the licence holder's qualifying revenue.

A4.15 Under section 238 of the 2003 Act, Ofcom may revoke a TLCS licence if it is satisfied that the licence holder has contravened a licence condition and that it is necessary in the public interest to revoke the licence. These provisions mirror those contained in section 42 of the 1990 Act.

A4.16 Pursuant to sections 236(7), 237(7) and 238(8) of the 2003 Act, where any of the above directions or notices are served on a BBC company, Ofcom must send a copy of the direction or notice and any representations received from the BBC to the Secretary of State.

A4.17 Under section 239, Ofcom has the power to revoke a TLCS licence where the service broadcast material that is likely to encourage or incite crime or lead to disorder:

s.239 Action against licence holders who incite crime or disorder

(1) Ofcom must serve a notice under subsection (2) on the holder of the licence to provide a television licensable content service if they are satisfied –

- a. that the holder of the licence has included in the service one or more programmes containing material likely to encourage or to incite the commission of crime, or to lead to disorder;*
- b. that, in doing so, he has contravened conditions contained by virtue of Chapter 4 of this Part in the licence to provide that service; and*
- c. that the contravention is such as to justify the revocation of the licence.*

(2) A notice under this subsection must –

- a. state that Ofcom are satisfied as mentioned in subsection (1);*
- b. specify the respects in which, in their opinion, the licence holder has contravened the condition mentioned in paragraph (b) of that subsection;*
- c. state that Ofcom may revoke the licence after the end of the period of twenty-one days beginning with the days on which the notice is served on the licence holder; and*
- d. inform the licence holder of his right to make representations to Ofcom within that period about the matters appearing to Ofcom to provide grounds for revoking the licence.*

(3) The effect of a notice under subsection (2) shall be to suspend the licence as from the time when the notice is served on the licence holder until either —

- a. the revocation of the licence takes effect; or*
- b. Ofcom decide not to revoke the licence.*

(4) If after considering any representations made to them by the licence holder within the period specified for the purposes of subsection 2(c), Ofcom are satisfied that it is necessary in the public interest to revoke the licence, they shall serve a notice of revocation on the licence holder.

- (5) *The revocation of a licence by a notice under subsection (4) takes effect from such time as may be specified in the notice.*
- (6) *A notice of revocation under subsection (4) must not specify a time for it to take effect that falls before the end of the period of twenty eight days beginning with the day on which the notice is served on the licence holder.*

Sanctions for Radio services

A4.18 Section 109 of the 1990 Act provides Ofcom with the power to direct radio licensees to provide Ofcom with any scripts, particulars of programmes or recordings as well as to broadcast a correction or a statement of findings on contravention of a licence condition. Unlike with television services, there does not appear to be any power to direct the service not to repeat a programme.

s.109 Power to require scripts etc. or broadcasting of correction or a statement of findings

- (1) *If Ofcom are satisfied that the holder of a licence granted under this Chapter has failed to comply with any condition of the licence or with any direction given by Ofcom under or by virtue of any provision of this Part, they may serve on him a notice –*
 - a. *stating that Ofcom are so satisfied as respects any specified condition or direction;*
 - b. *stating the effect of subsection (2); and*
 - c. *specifying for the purposes of that subsection a period not exceeding twelve months.*
- (2) *If, at any time during the period specified in a notice under subsection (1), Ofcom are satisfied that the licence holder has again failed to comply with any such condition or direction as is mentioned in that subsection (whether or not the same as the one specified in the notice), Ofcom may direct him –*
 - a. *to provide Ofcom in advance with such scripts and particulars of programmes to be included in the licensed service as are specified in the direction; and*
 - b. *in relation to such of those programmes as will consist of or include recorded matter, to produce to Ofcom in advance for examination or reproduction such recordings of that matter as are so specified;*

And a direction under this subsection shall have effect for such period, not exceeding six months, as is specified in the direction.
- (3) *If Ofcom are satisfied –*
 - a. *that the holder of a licence has failed to comply with any condition of the licence; and*

- b. that that failure can be appropriately remedied by the inclusion in the licensed service of a correction or a statement of findings (or both) under this subsection,*

they may (subject to subsection (4)) direct the licence holder to include in the licensed service a correction or a statement of findings (or both) in such form, and at such time or times, as they may determine.

- (4) Ofcom shall not give any person a direction under subsection (3) unless they have given him a reasonable opportunity of making representations to Ofcom about the matters complained of. ...*

A4.19 Section 110 of the 1990 Act provides Ofcom with the power to impose a financial penalty or to suspend or shorten a radio licence on the contravention of a licence condition. The maximum penalty for the holder of a *national licence* is either £250,000 or 5% of the licensee's qualifying revenue, whichever is greater. However, for all other licensees, the maximum is £250,000.

s.110 Power to impose financial penalty or suspend or shorten licence period

- (1) If Ofcom are satisfied that the holder of a licence granted under this Chapter has failed to comply with any condition of the licence or with any direction given by them under or by virtue of any provision of this Part, they may (subject to the following provisions of this section) serve on him*
—

- a. A notice requiring him to pay, within a specified period, a specified financial penalty to Ofcom;*
- b. A notice reducing the period for which the licence is to be in force by a specified period not exceeding two years; or*
- c. A notice suspending the licence for a specified period not exceeding six months.*

- (1A) The maximum amount which the holder of a national licence may be required to pay by way of a financial penalty imposed in pursuance of subsection (1)(a) is the maximum penalty given by subsection (1B).*

- (1B) The maximum is whichever is the greater of (a) £250,000; and (b) 5 per cent of the qualifying revenue for his last complete accounting period falling within the period for which his licence has been in force ("the relevant period")...*

- (2) [revoked]*

- (3) The amount of any financial penalty imposed in pursuance of subsection (1)(a) on the holder of any other licence shall not exceed £250,000.*

- (4) Ofcom shall not serve on any person such a notice as is mentioned in subsection (1)(a), (b) or (c) unless they have given him a reasonable opportunity of making representations to them about the matters complained of.*

- A4.20 Section 111 of the 1990 Act further provides Ofcom with the power to revoke radio licences. The provisions contained in section 111 mirrors those set out under section 42 of the 1990 Act above.
- A4.21 Section 111A of the 1990 Act provides that where Ofcom serve a section 109, 110 or 111 notice on a BBC radio company, it shall send a copy of the direction, notice or any written representation from the BBC company to the Secretary of State.
- A4.22 Section 111B of the 1990 Act states that Ofcom may revoke a satellite or cable radio service if it is satisfied that the licence holder has included any material likely to encourage or incite crime or to lead to disorder. The licensee has 21 days to make representations but the licence will be suspended until Ofcom's decision on revocation is made. Ofcom must be satisfied that it is in the public interest to revoke the licence in question. These provisions mirror closely those set out in section 239 of the 2003 Act above.

Sanctions for Restricted Service Licences (RSLs)

- A4.23 Television restricted service licences ("RSLs") are provided for by sections 42A and 42B of the 1990 Act. Section 42B states that the sanctions set out in sections 40 to 42 of the 1990 Act also apply to television RSLs as they do to the Channel 3 service. However, unlike the Channel 3 service, the maximum penalty is whichever is the greater of £250,000 and 5% of the licence holder's qualifying revenue :

s.42B Licensing etc. of restricted services

- (1) An application for a licence to provide a restricted service shall be made in such manner as Ofcom may determine, and shall be accompanied by such fee (if any) as Ofcom may determine.*
- (2) Subject to subsections (3) to (3C); sections 40 to 42 shall apply in relation to such a licence as they apply in relation to a licence to provide a Channel 3 service.*
- (3) In its application to a licence to provide a restricted service, section 41 shall have effect with the omission of subsections (1A) to (1C), and the maximum amount which the holder of such a licence may be required to pay by way of financial penalty imposed in pursuance of subsection (1)(a) of that section is the maximum penalty given by subsection (3A).*
- (3A) The maximum penalty is whichever is the greater of –*
- a. £250,000; and*
 - b. 5 per cent of the qualifying revenue for the licence holder's last complete accounting period falling within the period for which his licence has been in force ("the relevant period").*

...

- A4.24 Radio RSLs are licensed by Ofcom under section 104(6) of the 1990 Act. Sections 109 to 111 of the 1990 Act state that the sanctions relating to radio

services apply to any “holder of a licence granted under this Chapter” (see above). Seemingly as section 104 is contained in the same Chapter as sections 109 to 111, radio RSLs will be subject to the same sanctions as other radio services.

Sanctions for the BBC

- A4.25 Although the BBC is not an Ofcom licensee, under section 198 of the 2003 Act Ofcom is required to regulate the BBC’s services as well as other activities connected to the provision of the BBC service. Ofcom’s duties and powers in relation to the BBC are conferred on it under statute and the BBC Charter and Agreement. Section 198(3) requires the BBC to pay penalties to Ofcom in respect of any contraventions of the conditions contained in these provisions. Section 198(5) states that “*the maximum penalty that may be imposed on the BBC on any occasion by Ofcom in exercise of a power conferred by virtue of the BBC Charter and Agreement is £250,000.*”
- A4.26 Clause 46 of the BBC Agreement states that the BBC must observe certain standards set by Ofcom under section 319 of the 2003 Act; i.e. those relating to:
- the protection of persons under the age of eighteen (s.319(2)(a));
 - the omission of material likely to encourage or incite any crime or disorder (s.319(2)(b));
 - the exercise of responsibility with respect to the content of religious programmes (s.319(2)(e));
 - the application of generally accepted standards so as to provide adequate protection for the public from harmful or offensive material (s.319(2)(f)); and
 - the refraining from use of techniques which convey a message or influence viewers’ minds without their being aware (s.319(2)(l)).
- A4.27 Clauses 93 and 94 of the BBC Agreement set out the possible sanctions that Ofcom can impose against the BBC in relation to a breach of the Code. These are:
- A direction to broadcast a correction or statement of Ofcom’s finding, or both (Clause 93(1));
 - A direction not to repeat a programme (Clause 93(5));
 - Imposition of a financial penalty up to a maximum of £250,000 on any occasion (Clause 94).
- A4.28 The BBC must be provided with a reasonable opportunity to make representations in respect of any of these sanctions (Clauses 93(3) and 94(3)).