

Annex 2

Procedures for investigating breaches of content standards for television and radio



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Introduction

- 1.1 This document outlines Ofcom's Procedures for the handling and resolution of complaints (or for the conduct of its own investigations) about broadcasters'¹ compliance with the content standards set out under section 319 of the Communications Act 2003 ("the 2003 Act").² These Procedures are effective from 1 June 2011.³ Separate procedures apply to the consideration of Fairness and/or Privacy complaints under Part 5 of the Broadcasting Act 1996⁴ at <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>
- 1.2 If Ofcom considers that it is necessary to depart from these Procedures in any material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to consider a complaint(s) or carry out an investigation, it shall write to the broadcaster concerned (and any other relevant parties) in advance setting out the nature/extent of its departure, its reasons for doing so and seeking the relevant parties' response.

Statutory framework

- 1.3 Ofcom has general duties in relation to broadcasting which include securing 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) of the 2003 Act.⁵
- 1.4 Ofcom has a further duty under section 319 of the 2003 Act to set such standards for the content of programmes⁶ to be included in television and radio services as appear to Ofcom best calculated to secure certain "standards objectives". Those standards objectives are set out under section 319(2), and Ofcom is required to establish codes containing these standards. For the purposes of that duty, Ofcom applies the provisions of the Ofcom Broadcasting Code (which includes the Cross-Promotion

¹ References to "broadcasters" in these Procedures are to any broadcaster licensed and/or regulated by Ofcom.

² Ofcom is under a duty to establish such procedures under section 325(2) of the 2003 Act.

³ The Procedures set out in this document, and any related guidance, may be reviewed and amended at any time. Any major revision will be the subject of prior consultation.

⁴ The procedures for the investigation of Fairness and Privacy complaints are available on Ofcom's website at <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>

⁵ By virtue of section 3(4)(g) of the 2003 Act, Ofcom must also have regard to the need to secure that the application of standards in relation to the inclusion of offensive and harmful material is in the manner which best guarantees an appropriate level of freedom of expression.

⁶ References to "programmes" in these Procedures include teletext, subtitles, and anything included in television and radio services, other than most forms of advertising (Complaints about advertising and teleshopping are in general investigated by the Advertising Standards Authority ("the ASA"). However, Ofcom is responsible for the regulation of certain advertising requirements, such as political advertising, Participation TV, complaints about Fairness and Privacy in advertisements, and complaints or cases concerning the Code on the Scheduling of Television Advertising ("COSTA") (see paragraph 1.5) which are investigated by Ofcom under these Procedures or Ofcom's Procedures for the consideration and adjudication of Fairness and Privacy complaints).

Code) (“the Broadcasting Code”)⁷ and the Codes referred to in the following paragraph. Section 325 of the 2003 Act requires Ofcom to establish procedures for the handling and resolution of complaints about the observance of standards set under section 319 and broadcasters are required by the terms of their licences to observe those standards in the provision of their services.⁸

- 1.5 Complaints and investigations about issues raised concerning standards covered by the following Ofcom Codes will be governed by these Procedures: the Broadcasting Code (other than about Fairness and Privacy); the Cross-promotion Code, the Code on the Scheduling of Television Advertising (COSTA) and, where appropriate, the UK Code of Broadcast Advertising (the BCAP Code).⁹
- 1.6 Ofcom may launch investigations on its own initiative as well as investigate complaints. The Procedures in a complaint-led investigation and an Ofcom-initiated investigation are the same.

Procedures

Making a complaint

- 1.7 Complaints under these Procedures can be made to Ofcom by any person or body who considers that a broadcaster has failed to comply with the standards under section 319 of the 2003 Act as reflected in the provisions of the Broadcasting Code at <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/> and/or the other Codes referred to in paragraph 1.5 above. Relevant sections of the Broadcasting Code are as follows:
 - Protecting the Under-Eighteens (Section One);
 - Harm and Offence (Section Two)
 - Crime (Section Three)
 - Religion (Section Four)
 - Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions (Section Five)
 - Elections and Referendums (Section Six)
 - Commercial References in Television Programming (Section Nine)
 - Commercial Communications in Radio Programming (Section Ten)
- 1.8 Fairness and/or Privacy complaints under Sections Seven (“Fairness”) and Eight (“Privacy”) of the Broadcasting Code must be made under Ofcom’s “Procedures for the consideration and adjudication of Fairness and Privacy complaints”: go to <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>

⁷ <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/> - with the exception of Sections Seven (“Fairness”) and Eight (“Privacy”) which Ofcom applies in relation to Fairness and/or Privacy complaints under separate procedures: see paragraph 1.1 above.

⁸ Section 325(1) of the 2003 Act requires broadcasters themselves (in addition to Ofcom) to establish their own procedures for the handling and resolution of complaints.

⁹ As noted above, complaints about advertising and teleshopping are in general investigated by the Advertising Standards Authority (“the ASA”). However, Ofcom is responsible for the regulation of certain advertising requirements, such as political advertising, Participation TV, complaints about Fairness and Privacy in advertisements, and complaints or cases concerning COSTA, which are investigated by Ofcom under these Procedures or Ofcom’s Procedures for the consideration and adjudication of Fairness and Privacy complaints.

- 1.9 In the interests of timely resolution, Ofcom considers that complainants should follow the broadcaster's own complaints procedure before making a complaint to Ofcom. The contact details of all broadcasters can be found on Ofcom's website at <http://licensing.ofcom.org.uk/tv-broadcast-licences/current-licensees/> and <http://licensing.ofcom.org.uk/radio-broadcast-licensing/>. If a complainant is not satisfied with the broadcaster's response to their complaint, the complaint can then be submitted to Ofcom.¹⁰ Complaints can also be made directly to Ofcom in the first instance: see paragraphs 1.13 to 1.16 below for details about the time limits on complaints.

Form of complaint and information to be provided

- 1.10 Ofcom requests that complaints are submitted on its complaint form. To access a complaint form, go to Ofcom's website at <http://consumers.ofcom.org.uk/tell-us/tv-and-radio/>. Alternatively, for any complaint you can contact us at: Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA, or telephone 0300 123 3333 or 020 7981 3040. If you have a text phone you can call 020 7981 3043 – please note that this number only works with special equipment used by people who are deaf or hard of hearing.
- 1.11 All complaints should include sufficient detail about the matter complained of. Specifically, complaints should include
- the name / title of the programme complained about;
 - the date and time of the programme;
 - the channel on which it was broadcast;
 - the nature of the complaint and (where possible) the particular parts of the programme complained about;
 - the complainant's full contact details (including e-mail address where appropriate); and
 - whether (and, if so, when) the complainant has submitted a complaint to the relevant broadcaster.

The inclusion of these details (or as many of them as possible) is very important. A failure to provide them may mean that Ofcom is not able to investigate the complaint.

¹⁰ In cases where a complaint is made under a broadcaster's own complaints procedures, Ofcom will expect the broadcaster to retain the relevant recordings, and any related material, for the periods of days that are required by statute but running from the date on which the broadcaster may reasonably expect the complainant to have received the broadcaster's final determination. The statutory requirements, derived from section 117 of the 1996 Act, and section 334 of the 2003 Act, are as follows. Recordings of radio programmes must be kept by broadcasters for 42 days after the broadcast. Recordings of television programmes must be kept for 60 days, except in the case of BBC1, BBC2, ITV1, Channel 4, Channel 5 and S4C in which case recordings must be kept for 90 days.

- 1.12 Unless a complainant specifically requests at the time a complaint is made that his/her name and contact details should remain confidential, Ofcom reserves the right to disclose these to the broadcaster.¹¹

Time limits on making a complaint

- 1.13 Complainants should submit their complaint to Ofcom within 20 working days of the broadcast of the relevant programme or of the occurrence of the matter complained of. Ordinarily, Ofcom will not accept a complaint which is made after this deadline.
- 1.14 Where a complaint is submitted later than 20 working days after broadcast, complainants should explain why the complaint was not submitted earlier. Ofcom will then consider all relevant factors (including the complainant's explanation for the delay in submitting the complaint and the limited time periods during which broadcasters are required to keep recordings)¹² in deciding whether or not Ofcom should investigate the complaint despite the delay in its submission.
- 1.15 Where a complainant has previously complained directly to the broadcaster, the complainant should wait to see if he/she is satisfied with the broadcaster's response (in accordance with the broadcaster's own complaints procedures) before referring it to Ofcom.¹³ If not, the complainant should refer his/her complaint to Ofcom (with the broadcaster's response) as soon as possible, and in any event within 20 working days of the final response or determination by the relevant broadcaster under its procedures. If the complainant has not received a response to, or a determination of, his/her complaint from the broadcaster, the complainant should submit it to Ofcom within 20 working days of the time by which he/she could reasonably have expected a response or determination by the broadcaster under its procedures.
- 1.16 Where a complainant submits a complaint simultaneously to the broadcaster and to Ofcom, Ofcom will not normally proceed to consider the complaint until the broadcaster has first had an opportunity to resolve the complaint itself under its procedures. In such a case, the complainant should inform Ofcom when he/she has received the broadcaster's response or determination, and confirm whether he/she wishes to proceed with his/her complaint. (Time will start to run from the date of the broadcaster's response/determination as set out in paragraph 1.15 above).

Initial assessment and investigation

- 1.17 All complaints are important to Ofcom as they help it to understand whether a broadcaster may be failing to comply with the applicable provisions of the Broadcasting Code (or other Code to which these Procedures apply) in a particular

¹¹ Ofcom is a 'prescribed person' under the Public Interest Disclosure Act 1998 and has published guidance at <http://www.ofcom.org.uk/about/policies-and-guidelines/procedure-for-making-a-disclosure-to-ofcom-under-the-public-interest-disclosure-act-pida/> on how to make a disclosure to Ofcom under the provisions of this Act.

¹² Recordings of radio programmes must be kept by broadcasters for 42 days after the broadcast. Recordings of television programmes must be kept for 60 days except in the case of BBC1, BBC2, ITV1, Channel 4, Channel 5 and S4C in which case recordings must be kept for 90 days. (But, see footnote 10 above)

¹³ Broadcasters should be aware that they are required to ensure that Ofcom's functions in relation to content standards complaints are brought to the attention of the public. (These include functions which enable complainants to ask Ofcom to consider complaints where they are dissatisfied with the broadcaster's consideration of the complaint. Ofcom considers that, amongst other things, broadcasters should make clear to complainants the time limits that apply for pursuing complaints with Ofcom).

case. Ofcom will log and acknowledge every complaint that it receives. However, it will not normally correspond any further with individual complainants. Ofcom will itself carry out a process of initial assessment and investigation in accordance with paragraphs 1.18 to 1.24 below.

- 1.18 Ofcom will first consider whether, on its face, a complaint(s) raises potentially substantive issues under the Broadcasting Code (or other Code to which these Procedures apply) which warrant investigation by Ofcom. It will do so by reference to the gravity and/or extent of the matter complained of, including, for example, whether it involves ongoing harm, harm to minors and/or financial harm.
- 1.19 If Ofcom considers that it should assess the matter further, it may ask the broadcaster for a copy of the relevant programme at this stage, which must be provided within five working days.¹⁴ At this stage it is not appropriate for the broadcaster to provide written representations.
- 1.20 Based on an initial assessment of the complaint(s) and a review of the relevant broadcast, Ofcom will consider whether there may have been a breach of particular provisions of the Broadcasting Code (or other Code to which these Procedures apply) which Ofcom considers requires a response from the broadcaster. If not, Ofcom will decide not to investigate further and will publish its decision in its Broadcast Bulletin, which is published fortnightly on its website:
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>
- 1.21 Ofcom aims to complete an initial assessment of all complaints within 15 working days.
- 1.22 Other than in cases falling within paragraph 1.23 below, where Ofcom considers that a broadcaster may have failed to comply with particular provisions of the Broadcasting Code (or other Code to which these Procedures apply), Ofcom will write to the relevant broadcaster. Ofcom will summarise the material parts of the complaint(s), set out the particular provisions of the Broadcasting (or other) Code which it considers are relevant and applicable to the instant complaint(s), and invite the broadcaster to make representations in response (and to provide any relevant material/evidence in support of its representations) within 10 working days. Ofcom will publish details of programmes under investigation on its website at
<http://stakeholders.ofcom.org.uk/enforcement/audience-complaints/>
- 1.23 There may be specific cases where the matter(s) in issue, on the facts, mean that Ofcom does not consider it necessary to seek representations from the broadcaster at this stage. This will normally be where the question of whether there is a breach of a relevant Code is a matter of objective fact (for example, relating to the number or length of advertisements, or to the intensity and frequency of flashing images in a programme). In these cases, Ofcom will not usually seek the broadcaster's representations at this stage (as in paragraph 1.22 above). Instead, Ofcom will write to the broadcaster with its preliminary view on the substance of the complaint(s), as set out in paragraph 1.25 below. (There may also be other specific cases where the matter(s) in issue, on the facts, mean this approach is appropriate).
- 1.24 Ofcom aims to complete those cases that it takes forward for investigation within 50 working days.

¹⁴ It is a condition of all broadcast licences that a licensee must make and then retain a recording of all its programmes for a fixed period of days from broadcast, and at Ofcom's request must produce recordings "forthwith".

Representations from third parties

Ofcom recognises that there may be persons/bodies who may be directly affected by the outcome of Ofcom's investigation and determination of a complaint(s) and who may have interests independent of the relevant broadcaster of that programme (e.g. presenters, producers and/or independent programme-makers). Wherever possible, broadcasters should seek to take account of and include the representations of such persons/bodies in their submissions in response to a complaint and confirm to Ofcom that they have done so.

However, such persons/bodies may make representations on their own behalf direct to Ofcom in respect of a complaint which Ofcom proceeds to investigate. In such a case, persons/bodies should seek to make representations to Ofcom as early in an investigation of a complaint as possible, setting out if/to what extent their representations differ from those of the broadcaster. Ofcom will as appropriate take those representations into account and include those persons/bodies in its decision-making process under these Procedures.

Preparation of Ofcom's preliminary view

1.25 On receipt of the broadcaster's representations,¹⁵ Ofcom will then prepare its preliminary view on the substance of the complaint(s). This preliminary view is only provisional and may be subject to change in the light of subsequent representations / material provided by the broadcaster (and any relevant third party): see paragraphs 1.27 and 1.28 below. Members of Ofcom's Content Board will be provided with all preliminary views before they are provided to the broadcaster.¹⁶ The preliminary view will contain:

- a summary of the complaint(s);
- a summary of the material parts of the programme/broadcast to which the complaint(s) relates;
- the particular provisions of the Broadcasting Code (or other Code to which these Procedures apply) which Ofcom considers are relevant and applicable to the complaint(s); and
- Ofcom's preliminary assessment of whether any breaches of those provisions have occurred and the reasons for that assessment.

1.26 If in any case where Ofcom considers that it is necessary to obtain further information to ensure that it can fairly and properly prepare its preliminary view, Ofcom may seek such information before preparing that view.

¹⁵ In cases where paragraph 1.22, not 1.23, above applies.

¹⁶ The Content Board is a committee of the main Ofcom Board established by the Communications Act 2003. It includes members with extensive broadcasting experience. See <http://www.ofcom.org.uk/about/how-ofcom-is-run/content-board/functions-and-role/>

- 1.27 When Ofcom has prepared its preliminary view, Ofcom will provide it to the broadcaster (and any relevant third party) and request representations within 10 working days.
- 1.28 Once Ofcom has received and considered the broadcaster's representations (and/or any representations from a relevant third party) on its preliminary view, it will reach its final decision and inform the broadcaster.¹⁷

Publication of Decision

- 1.29 Before publishing the Decision, Ofcom will provide the broadcaster with a strictly embargoed copy of the Decision for the purposes of correcting factual inaccuracies only. The broadcaster will be given 48 hours in which to respond with such corrections, following which Ofcom will publish the Decision.
- 1.30 The Decision will be published in Ofcom's Broadcast Bulletin on its website at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>

Non Disclosure

- 1.31 Subject to any relevant obligations, it is an essential part of the integrity of Ofcom's processes that all parties concerned abide by all Ofcom's published rules and procedures. These require, for example, that parties to a complaint should not disclose any correspondence, documents and other material concerning the complaint¹⁸ during the course of the investigation (see text box below). This requirement of non disclosure does not limit what Ofcom can publish in its decision at the end of the investigation.

Non Disclosure

Parties (complainants, broadcasters, Ofcom and any directly affected third parties) may, unless otherwise indicated, make public the fact that a complaint has been made or that Ofcom is investigating a case. They may also use any information which is already in the public domain.

However, all parties are subject to the requirement of non disclosure in relation to all other material submitted and communications/correspondence entered into in relation to that complaint or case.¹⁹ Moreover, once a complaint has been made or Ofcom has started investigating a case, no party should take any steps which could – whether intentionally or not – compromise, or risk compromising, a fair decision on the matter by Ofcom or otherwise constitute, in Ofcom's opinion, an abuse of process.

Failure to follow these requirements may result in Ofcom ceasing to consider the party's representations.

¹⁷ Members of Ofcom's Content Board will be provided with all Decisions before they are provided to the broadcaster.

¹⁸ Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Such obligations do not allow the use of exemptions by Ofcom in an arbitrary fashion. Information provided to Ofcom as part of a complaint may need to be disclosed by Ofcom in order to meet such obligations and nothing in these Procedures can prevent Ofcom from doing so.

¹⁹ Ofcom may withhold material it believes to be confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the broadcaster will be notified that relevant material has been withheld and the reasons why.

Time limits

1.32 Complainants and broadcasters should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or properly to carry out an investigation) to amend or adapt the time limits set out in the Procedures in a particular case. Any complainant or broadcaster seeking an extension to a time limit should explain in writing to Ofcom why it believes it is appropriate.

Sanctions

1.33 Where Ofcom determines a complaint(s) or an investigation by deciding that there has been a breach (or breaches) of the standards in section 319 of the 2003 Act (as reflected in the relevant provisions in the Broadcasting Code or other relevant Code), Ofcom may consider that it justifies consideration of a statutory sanction against the broadcaster. If so, Ofcom will make that clear in its Decision (under paragraphs 1.29 and 1.30 above) and the “Procedures for the consideration of statutory sanctions in breaches of broadcast licences” will apply.²⁰ These are available on Ofcom’s website at <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/procedures-statutory-sanctions/>

Directions

1.34 Ofcom has the power under the Broadcasting Acts²¹ to issue a direction pursuant to a broadcaster’s licence. This does not apply to the BBC or S4C and is limited to persons holding licences issued under those Acts.

1.35 Ofcom may issue such a direction in any case it considers appropriate. This may include, for example, cases in which, in Ofcom’s view:

- the broadcaster has committed a serious breach of a relevant Code, but in which Ofcom does not think that the breach justifies consideration of a sanction against the broadcaster under Ofcom’s Sanctions Procedures referred to in paragraph 1.33 above;
- a broadcaster has failed to comply in a timely manner with any relevant requirement; and/or
- there are other reasons which make the taking of a specific step by a broadcaster appropriate.

A Notice of Direction will normally be published in Ofcom’s Broadcast Bulletin.

1.36 Failure by a broadcaster to comply with a direction issued by Ofcom pursuant to its licence can lead to the consideration of statutory sanctions against the broadcaster (for example, the imposition of a financial penalty, or the revocation of a licence). In such cases, the Sanctions Procedure referred to in the previous paragraph would apply.

²⁰ The ASA may, under the terms of its Memorandum of Understanding with Ofcom, request Ofcom to consider a statutory sanction in an advertising case. In such cases, the ASA will normally have published a breach of its code.

²¹ See, for example, sections 4(2) and 87(2) of the Broadcasting Act 1990.