



Statement on the Outline procedures for sanctions in cases relating to broadcasting

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Section 1

Executive Summary

- 1.1 This Statement sets out Ofcom's decision on revising the current 'Outline procedure for statutory sanctions'. It follows a full public consultation on Ofcom's proposals to amend this procedure. The consultation, "Sanctions in broadcast cases: A consultation on an Outline procedure for sanctions in cases relating to broadcasting," closed on 20 September 2007. The new Outline procedures are entitled "Outline procedures for statutory sanctions in content and content-related cases" and is attached to this Statement at Annex 1.
- 1.2 The new Outline procedures come into effect on the date of this Statement (18 January 2008). They apply with immediate effect as regards all breaches of the relevant Ofcom codes referred to in footnote 2 below and of broadcasting licences recorded on or after 18 January 2008 which warrant consideration of a statutory sanction. They also apply to those breaches recorded prior to the date of this Statement which have not yet been considered for a sanction but which may be so considered. Where a sanctions procedure was begun before 18 January 2008, a broadcaster may request that the new Outline procedures apply going forward.
- 1.3 Some respondents to the consultation commented on Ofcom's proposals and suggested changes to the wording. Some respondents had opposing views on what alteration should be made to the sanctions procedures. This Statement summarises the main issues raised by respondents and Ofcom's response to those issues. Whilst the Statement may not refer directly to each and every point that has been raised by respondents to the consultation, in deciding the final wording of the Outline procedures, Ofcom considered each and every response received in its full form.
- 1.4 A number of changes have been made to Ofcom's proposals on the Outline procedures in the light of the responses. Some were adopted to ensure clarity and, where relevant, consistency, or to ensure legal requirements are met in a more appropriate way.
- 1.5 Below is a summary of the main issues raised by respondents and of Ofcom's response.

The fairness of the Outline procedures

- 1.6 Practical experience of using the current procedures for dealing with sanctions cases has demonstrated that they can be lengthy and sometimes cumbersome. This can inhibit Ofcom in appropriate circumstances from reaching decisions as quickly and efficiently as it might. Many of our proposed changes to the Outline procedures contained in the consultation document were aimed at addressing this issue. Some respondents suggested that Ofcom was consulting on the sanctions procedures over the summer of 2007 as a result of recent high profile cases involving premium rate telephone services where the regulator had imposed significant fines on broadcasters. It was also suggested that, in order to be seen to be acting

effectively in sanctions cases, Ofcom's proposals risked putting in jeopardy the right of broadcasters to a fair hearing.

- 1.7 However, it should be noted that it has always been Ofcom's intention to review its sanctions procedures after they were first adopted in early 2004 after a short consultation. Ofcom made clear on adopting the current Outline procedure that it was being adopted as an interim procedure only and would be subject to review once Ofcom had had some experience of how it worked in practice. Accordingly, informal consultations with broadcasters on the procedure started as long ago as 2006 (see paragraph 2.4 below) and by the time the consultation was issued, the current procedure was already three and a half years old. The proposals in the consultation therefore sought to build on experience of that procedure and enhance and streamline it. In relation to broadcasters' right to a fair trial, the new Outline procedures have been finalised taking full and proper account of these rights. We believe that the new Outline procedures strike a fair and reasonable balance between the rights of broadcasters and the need for Ofcom to be able to impose statutory sanctions quickly and efficiently in accordance with our statutory duties and in the public interest.

Reduction in number of stages to make representations

- 1.8 The new Outline procedures require Ofcom to draft papers setting out in detail the case and any recommendation for sanction. At each stage, the broadcaster is given an opportunity to make submissions. This ensures its views are represented before any decision is made. The consultation proposed a reduction from three to two in the number of draft papers Ofcom would produce and consequently the number of stages a broadcaster is given to make representations¹. These two stages would be: first, when the Executive sends the broadcaster a preliminary draft of the sanctions paper setting out the case for a sanction; and, second, when the paper is revised to add a recommendation by the Executive as to the nature or level of sanction.
- 1.9 There was general agreement among respondents that it was appropriate for Ofcom to reduce the number of stages in the Outline procedures. If a case is exceptional for any reason, it is open to a broadcaster to make submissions to Ofcom that it should be given an additional opportunity to comment. Ofcom will then reach a decision in its discretion on the particular facts of the individual case.

Separation of the finding of a Code breach and sanction notification

- 1.10 Some respondents proposed a demarcation should be made between the finding of a breach and the first draft sanctions paper being sent out. It was argued that unless the breach is finalised before the sanctions paper is sent to broadcasters there may be an impression given that the issue of the sanction is being prejudged by Ofcom.
- 1.11 We have amended the procedures in this area to address these concerns. They now fully reflect the practice that a breach decision is reached separately (and earlier) than the decision that a case is serious enough for consideration of a sanction. The broadcaster will now therefore receive a

¹ Sanctions papers are prepared by Ofcom staff (the Executive) for the Content Sanctions Committee and outline the case for a statutory sanction

finding of breach first and only later receive the draft sanctions paper proposing the consideration of a sanction. In practice this means that broadcasters will know sooner than currently that there has been a breach of the Code.

The introduction of a fast-track sanctions procedure

- 1.12 The consultation proposed the introduction of a “fast-track” procedure for sanctions in some defined circumstances. This would replace part of the normal Outline procedures for statutory sanctions.
- 1.13 There was agreement from some respondents that a fast-track procedure in some cases was appropriate, with one respondent suggesting that Ofcom introduce the fast-track procedure for all sanctions cases. Others were concerned that the proposed circumstances in which the fast-track procedure should apply were too broad.
- 1.14 We have taken into account respondents views and amended accordingly the circumstances when Ofcom would invoke the fast-track procedure.

Deadlines

- 1.15 The consultation proposed that under the new Outline procedures, broadcasters have seven working days to respond to the first draft sanctions paper, and five working days to respond to the second. In the case of the fast-track procedure, the consultation proposed that broadcasters have five working days to make written representations.
- 1.16 Several respondents believed these timescales were inadequate. Ofcom recognises that the imposition of a sanction is a serious matter. Further, cases that are considered for sanction are frequently complex. Ofcom agrees that broadcasters must have an appropriate time to respond. Having taken into account all the responses, Ofcom has amended the deadlines accordingly. The new Outline procedures will require broadcasters to respond within ten working days to both the first and second draft papers. In fast-track cases broadcasters will have ten days to respond to the one and only draft sanctions paper.

The time permitted for comment by broadcasters before the publication of sanctions adjudication

- 1.17 Four respondents raised the concern that in their experience, the time allowed for comment from the broadcaster on factual or typographical errors before publication of the final sanctions adjudication was too short.
- 1.18 We have addressed these concerns and have specifically stated in the new Outline procedures that the length of time given to broadcasters at this stage may in exceptional circumstances be lengthened at Ofcom’s discretion having regard to submissions from a broadcaster.

Section 2

Background

- 2.1 Ofcom has statutory duties, derived from the Communications Act 2003 ('the Act'), 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. These standards are set out in section 319(2) of the Communications Act 2003. It is a requirement of all broadcasters who hold Ofcom licences to adhere to these standards. In the case of the BBC, they are required under the BBC Agreement to observe standards set by Ofcom under section 319 of the Act ie s319(2) (a), (b), (e), (f) and (l) but "only to the extent that they do not concern the accuracy or impartiality of any programme included in the UK Public Broadcasting Services." (Clause 46(2)(b) of the BBC Agreement).
- 2.2 Such procedures must be drafted in light of the Human Rights Act 1998 and other relevant legislation, including:
- the Act;
 - the Broadcasting Acts 1990 and 1996, as amended by the Act; and
 - the Television Without Frontiers Directive 89/552/EEC, as amended by 97/36/EC ('the TWF Directive').
- 2.3 Under the Act, such procedures should also 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 and easy to use and understand.
- 2.4 The current Outline procedure for statutory sanctions in content and content-related 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 procedure worked in practice. Informal consultations with relevant stakeholders took place in 2006. Taking into account those discussions, Ofcom published a consultation, "Sanctions in broadcast cases," on 12 July 2007.
- 2.5 The new Outline procedures take account of the requirements of the TWF Directive and it has also been drafted in light of the Human Rights Act 1998 and the European Convention on Human Rights to ensure the procedures are in keeping with the rules of natural justice and are applied in a way that best guarantees an appropriate level of freedom of expression.

What we consulted on

- 2.6 The proposed new guidelines were broken down into two sections and 35 paragraphs for ease of reference.

- 2.7 In addition Ofcom asked 4 specific questions. These questions related to those areas of the proposed guidelines that Ofcom considered required additional consideration. Comments received in relation to these questions have been summarised in the appropriate paragraphs of the Statement.

For full details on the consultation process please see:

<http://www.ofcom.org.uk/consult/condocs/sibc/>

Who responded

- 2.8 Ofcom received 13 responses in total.
- 2.9 We received responses from The BBC, Channel 4 and Five (Channel 4 and Five provided a joint response), ITV, Sky, STV, UKTV, Global Radio and the Electronic Retailers Association (“ERA UK”).
- 2.10 In addition to these responses Ofcom received responses from two individuals.
- 2.11 Two respondents requested that their response to the consultation remain confidential. For this reason, these responses have not been referred to in this Statement. However, their comments have been taken into account.

Guide to reading this Statement

- 2.12 This Statement sets out in order each of the paragraphs of the Outline procedure as contained in the Consultation Document (“the Consultation Procedure”). Where no responses were received in relation to a particular paragraph, we state that no material responses were received.
- 2.13 Each paragraph is followed by a summary of the responses we received with respect to its content.
- 2.14 Below each summary of responses is Ofcom’s response which includes our reasons for making any changes or deciding not to.
- 2.15 The new Outline procedures which have resulted from this Consultation are at Annex 1.

Section 3

Comments on Ofcom's consultation proposals and Ofcom's response

This section is set out by reference to the Consultation Procedure. We have set out each paragraph that appeared in the Consultation Document under the heading 'Paragraph x of the Consultation Procedure'. In brackets we refer to the corresponding paragraph in the new Outline procedures that have now been adopted. These Outline procedures are at Annex 1. This is so that readers can compare Ofcom's original proposal in the Consultation Procedure with the final text. For each paragraph where there were material comments, we summarise the main points made by respondents. This is followed by Ofcom's response and decision. For completeness sake we have included all paragraphs of the Consultation Procedure. Where no substantive comments were received in relation to a particular paragraph we have stated 'No material responses received'.

References to the Committee are to the Ofcom Content Sanctions Committee. This is a committee of Ofcom with delegated powers to consider and where appropriate impose sanctions against broadcasters (for further details see http://www.ofcom.org.uk/about/csg/ocsc_index/).

Paragraph 1 of Consultation Procedure (corresponds to paragraph 1 of new Outline procedures)

3.1 Paragraph 1 states:

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 codes²) against one of its broadcast licensees, the BBC or S4C ('a broadcaster'). It is effective from [date]

Responses to Consultation

3.2 No material responses were received.

Paragraph 2 of Consultation Procedure (corresponds to paragraph 2 of new Outline procedures)

3.3 Paragraph 2 states:

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:

² 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.

- 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.

'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.

Responses to consultation

- 3.4 In a joint response, Channel 4 and Five pointed out that Ofcom's powers have the potential to be a significant and very real interference with a public service broadcaster's Article 10 right of freedom of expression and the viewer's right to receive information. They said that the power to impose a financial penalty would have a very real and damaging impact on any legitimate broadcasting business. The power to shorten or revoke a licence could potentially undermine the importance of a wide range of television services. As a result it is vital that these powers are exercised fairly. This means that the timely disposal of cases should be balanced with a procedure that is genuinely fair to broadcasters.

Ofcom's response

- 3.5 Ofcom recognises that its powers to impose sanctions are wide. It therefore carries out its functions in this area in a manner that ensures fairness and transparency and in light of the Human Rights Act 1998.

Paragraph 3 of Consultation Procedure (corresponds to paragraph 3 of new Outline procedures)

- 3.6 Paragraph 3 states:

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.

Responses to Consultation

3.7 No material responses were received.

Paragraph 4 of Consultation Procedure (corresponds to paragraph 4 of new Outline procedures)

3.8 Paragraph 4 states:

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

Responses to Consultation

3.9 No material responses were received.

Paragraph 5 of Consultation Procedure (corresponds to paragraph 5 of new Outline procedures)

3.10 Paragraph 5 states:

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.

Responses to Consultation

3.11 No material responses were received.

Paragraph 6 of Consultation Procedure (corresponds to paragraph 6 of new Outline procedures)

3.12 Paragraph 6 states:

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.

Responses to Consultation

3.13 No material responses were received.

Paragraph 7 of Consultation Procedure

3.14 Paragraph 7 states:

The procedure has 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.

Responses to Consultation

- 3.15 No material responses were received. On reflection Ofcom concluded that this paragraph was unnecessary and deleted it from the new Outline procedures. The paragraph numbers in the remainder of the new Outline procedures are amended accordingly.

Paragraph 8 of Consultation Procedure (corresponds to paragraph 7 of new Outline procedures)

- 3.16 Paragraph 8 states:

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.

Responses to consultation

- 3.17 Channel 4 and Five said that in their experience the time set out in the current Outline procedure is often barely sufficient to allow them to respond to the very serious points raised in cases where a sanction is being considered. They pointed out that investigations where a sanction is considered can go back many years and involve personnel no longer connected with the broadcaster. This means that the time required to progress a case can be lengthy.

Ofcom's response

- 3.18 Ofcom recognises that sanctions cases are not only serious but can also be complex. It is also important, however, for Ofcom to conduct its investigation with due pace. We believe that the approach taken in the new Outline procedures is fair and reasonable. It should also be noted that the new Outline procedures state that 'what is a 'reasonable opportunity' depends upon the facts and degree of urgency in each case...' This provides flexibility in the new Outline procedures and this flexibility is often shown by Ofcom in appropriate circumstances. Please also see Ofcom's response regarding paragraphs 15, 18 and 26 below concerning deadlines.

Paragraph 9 of Consultation Procedure (corresponds to paragraph 8 of new Outline procedures)

- 3.19 Paragraph 9 states:

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

Responses to Consultation

3.20 No material responses were received.

Paragraph 10 of Consultation Procedure (corresponds to paragraph 9 of new Outline Procedures)

3.21 Paragraph 10 states:

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

Responses to Consultation

3.22 No material responses were received.

Paragraph 11 of Consultation Procedure (corresponds to paragraph 10 of new Outline procedures)

3.23 Paragraph 11 states:

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

Responses to Consultation

3.24 Channel 4 and Five suggested that the second and third sentences of paragraph 11 of the Consultation Procedure should be amended to read:

“Broadcasters will see all information relied on by the Executive or the Committee. Broadcasters will be provided with copies of all documentation seen by or relied on by the Executive or the Committee subject to the withholding of any documentation that is confidential, market sensitive, legally privileged or that Ofcom is under a legal obligation not to disclose.”

In order to ensure that the broadcaster is aware that certain information has been seen or relied on by the decision-making body even if it is not permitted to review such information, Channel 4 and Five suggested also adding the following sentence:

“Where the Executive or the Committee relies on any withheld documentation or information in making a decision the broadcaster will be made aware of its existence and the reason that it has not been disclosed.”

ITV stated that broadcasters must be able to see all documents referred to in the making of any decision in relation to sanction.

Ofcom’s response

- 3.25 The new Outline procedures have made the meaning of this paragraph clearer. In light of comments and to ensure transparency, we have also added a final sentence in the paragraph to make it clear that Ofcom will notify broadcasters when relevant material has been withheld and the reasons why. We believe that the wording proposed is now fair and reasonable, reflecting Ofcom’s legal powers and duties not to disclose certain information in appropriate circumstances. However, it should be noted that there will be some documents that the Executive sees that are irrelevant to the issues under investigation. To create an obligation to provide copies to the broadcaster, of all documents that have been ‘seen’, irrespective of whether or not they are relied on and put before the Committee – which is the decision-making body - would be disproportionate and unnecessary.

Paragraph 12 of Consultation Procedure (corresponds to paragraph 11 of new Outline procedures)

- 3.26 Paragraph 12 states:

Consideration of a statutory sanction begins with a manager writing to the broadcaster recording the relevant code or licence breach³. 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.

³ 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/>

Responses to Consultation

3.27 Channel 4 and Five believed that the finding of a breach and the notification that a sanction will be considered by Ofcom must be kept separate. ITV agreed. These broadcasters suggested for example that a broadcaster may wish to dispute the finding before Ofcom considers whether a sanction should be considered. They argued that sometimes the basis of the finding of a breach altered with successive versions of sanctions papers, meaning that the broadcaster faces uncertainty about the case against it. It would in their view be preferable for all issues concerning the breach to be concluded before a draft sanctions paper is first sent out.

Ofcom's response

3.28 Ofcom agrees with the respondents that it would be helpful to clarify - what currently occurs in practice - that the recording of a breach is separate from the decision that a case is serious enough to warrant the consideration of a sanction. The new Outline procedures therefore formally separate the recording of a breach from the sending out of the first draft of any sanctions paper. This would help avoid any inference that Ofcom had in any way made up its mind in advance about whether the breach was sanctionable and would allow the broadcaster to raise with Ofcom any issues about the finding prior to consideration being given to any sanction.

Paragraph 13 of Consultation Procedure (corresponds to paragraph 22 of new Outline procedures)

3.29 Paragraph 13 states:

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 sanction⁴ as appropriate.

Responses to Consultation

3.30 No material responses were received

Paragraph 14 of Consultation Procedure (corresponds to paragraph 23 of new Outline procedures)

3.31 Paragraph 14 states:

⁴ See paragraph 40 of Ofcom's Outline procedures for handling fairness and privacy complaints at <http://www.ofcom.org.uk/tv/ifi/guidance/fairness/>

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

Responses to consultation

- 3.32 UKTV asked for clarification of the criteria for referrals of cases from the ASA to Ofcom. It also said that where a case had been referred to Ofcom, Ofcom should consider the case objectively and should not be led by the ASA's views.

Ofcom's response

- 3.33 The decision as whether a breach of the BCAP Code has occurred is taken by the ASA and therefore not a matter for Ofcom. Ofcom's role is to assess whether the breach – in accordance with the new Outline procedures – should be sanctioned. A decision whether to impose a sanction and, if so, at what level, is solely a matter for Ofcom's Content Sanctions Committee. As with all cases, these decisions are taken independently and objectively. Details of how cases may be referred to Ofcom by the ASA can be found at :

www.ofcom.org.uk/consult/condocs/reg_broad_ad/update/mou/mou.pdf

Paragraph 15 of Consultation Procedure (corresponds to paragraph 13 of new Outline procedures)

- 3.34 Paragraph 15 states:

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.

Responses to consultation

- 3.35 Channel 4 and Five objected to representations being made to a senior manager rather than the person who drafted the earlier version of the sanctions paper. They also argued that seven working days to make representations was not sufficient and that this time should be extended to ten working days. ITV also suggested that the time should be extended to ten working days. Sky commented that the consultation had not provided a justification for the proposed seven working days.

Ofcom's response

- 3.36 At this stage of the new Outline procedures the broadcaster will already have had one opportunity to make representations to the manager in Ofcom who

prepared the first version of the sanctions paper. Having received these representations, the manager then refers the whole case to a more senior manager to review independently. For the representations to be sent back to the manager (rather than the more senior manager) would in Ofcom's view not create any extra fairness but risk adding a layer of unnecessary and extra complexity to the new Outline procedures, slowing down the process. We have therefore not amended the proposed paragraph as suggested. We have however amended the deadline for the representations from seven working days to ten working days.

Paragraph 16 of Consultation Procedure (corresponds to paragraph 14 of new Outline procedures)

3.37 Paragraph 16 states:

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.

Responses to consultation

3.38 Channel 4 and Five wished to understand the basis on which a senior manager would decide not to refer a case to the Committee.

Ofcom's response

3.39 A senior manager would decide not to refer a case when, on the basis of a broadcaster's responses and any other relevant circumstances, the more senior manager concludes the case is no longer appropriate for consideration of a statutory sanction. For example the broadcaster might produce convincing arguments or evidence suggesting that the breach is not as serious as the Executive first considered. We have slightly amended the first sentence to more accurately reflect the role of the senior manager who reviews the case at this stage, by adding the word 'independently' and changing the words 'together with' in the first sentence to 'and taking account of.'

Paragraph 17 of Consultation Procedure (corresponds to paragraph 15 of new Outline procedures)

3.40 Paragraph 17 states:

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.

Responses to Consultation

3.41 No material responses were received

Paragraph 18 of Consultation Procedure (corresponds to paragraph 16 of new Outline procedures)

3.42 Paragraph 18 states:

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.

Responses to consultation

3.43 Channel 4 and Five suggested that five working days proposed was not sufficient to deal with a draft sanctions paper containing the provisional recommendation on the type, and if appropriate, level of sanction

Ofcom's response

3.44 We have amended the deadline to ten days in light of broadcasters' concerns.

In relation to the choice of sanction, in the second version of the sanctions paper that is sent to the broadcaster there is always an analysis of why a particular sanction has been recommended and if appropriate the level of that sanction so that the broadcaster can comment. For clarification we have added a reference to this in the second sentence of the paragraph.

Paragraph 19 of Consultation Procedure (corresponds to paragraph 17 of new Outline procedures)

3.45 Paragraph 19 states:

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.

Responses to Consultation

3.46 No material responses were received

Paragraph 20 of Consultation Procedure (corresponds to paragraph 18 of new Outline procedures)

3.47 Paragraph 20 states:

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

Responses to consultation

3.48 Channel 4 and Five suggested broadcasters be permitted to make representations on any compelling matters. Channel 4, Five and ITV also suggested that that 10 minutes rather than 5 minutes would be appropriate for the broadcaster's final statement. The BBC said that in its experience, the Committee's questions at this stage range beyond the issues raised in written exchanges, and discussions are held between the Committee and the Executive in the absence of the broadcaster. It believed that these aspects of the procedure disadvantage the broadcaster. It suggested that either the broadcaster be allowed to respond in written form after the oral hearing to matters raised in this way; or to schedule the oral hearing between the first and second written representations.

Ofcom's response

3.49 The structure of the oral hearing is not rigid, but we believe that it is useful to give broadcasters an idea of how the proceedings will normally run. We consider that the paragraph contains sufficient flexibility to ensure that broadcasters are given a fair hearing. We have however agreed to increase the normal limit for the broadcaster's final statement from 5 minutes to 10 minutes. We have also added the words, 'and decide whether it considers the matter should be considered for sanction,' to the first sentence to clarify the role of the Committee at this stage and made some other minor amendments for clarification.

3.50 In relation to the BBC's comments, we believe that the Committee – as part of its investigation - must be allowed room to raise questions not formally brought up in written exchanges. As a consequence of the broadcaster's oral representations, or for other reasons, it is possible that the Committee may

wish to raise issues itself. Given that the Committee is independently considering the matter of whether to impose a sanction and, if so, at what level, it is important that it is able to question the broadcaster on the area of its concern. The aim is to arrive at a fair and reasonable adjudication on the issues before the Committee in as efficient a way as possible consistent with respecting natural justice and having regard to the licensee's human rights. To allow the broadcaster to comment in writing after the oral hearing, or schedule an additional oral hearing, would in Ofcom's view be disproportionate and risk delaying the Committee's decisions. We have not therefore agreed to either of the proposals.

Paragraph 21 of Consultation Procedure (corresponds to paragraph 19 of new Outline procedures)

3.51 Paragraph 21 states:

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.

Responses to Consultation

3.52 No material responses were received

Paragraph 22 of Consultation Procedure (corresponds to paragraph 20 of new Outline procedures)

3.53 Paragraph 22 states:

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/account/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.

Responses to consultation

3.54 Channel 4 and Five said that disclosure of interests should form part of the pre-hearing protocol.

Ofcom's response

3.55 In line with Ofcom's governance procedures, the possibility of any conflict of interest affecting a member of the Content Sanctions Committee will have been considered in advance of the hearing. In the event of such a conflict, the relevant member of the Content Board would either not sit on the Committee or would disclose the potential conflict before the hearing commences and, where appropriate, ask the broadcaster if it has any objections to that person sitting on the Committee. This paragraph has also

been amended to reflect the fact that the Penalty Guidelines are only relevant where a financial penalty is being considered as part of the sanction.

Paragraph 23 of Consultation Procedure (corresponds to paragraph 21 of new Outline procedures)

3.56 Paragraph 23 states:

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.

Responses to consultation

3.57 Channel 4 and Five described the difficulties posed by the short time normally given by Ofcom to a broadcaster to comment on a final decision (usually a few hours). ITV, Channel 4 and Five all suggested that at least 24 hours were required to allow enough time to brief senior executives and prepare for media enquiries.

Ofcom's response

3.58 The purpose of allowing a broadcaster, in advance of publication, to have sight of the sanctions adjudication - which at this stage is final – is to comment on any factual or typographical errors only. It is not to allow requests for substantive changes to the text. If the adjudication is made available some time in advance of publication, we would be concerned about possible breaches of confidentiality. We have however made the paragraph more flexible to allow more time in exceptional cases for broadcasters to receive the adjudication before publication. Nevertheless, this will be at Ofcom's discretion based on submissions from the licensee.

Paragraph 24 of Consultation Procedure (corresponds to paragraph 24 of new Outline procedures)

3.59 Paragraph 24 states:

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

Responses to consultation

- 3.60 Some respondents (Global Radio and ERA UK) agreed with the proposal to introduce a fast-track procedure. Another respondent believed that the fast-track procedure should be introduced for all sanctions cases. Other respondents however had serious concerns about the circumstances in which it was proposed Ofcom could use the procedure.
- 3.61 Channel 4 and Five made the point that as it was likely that the fast-track procedure would be used in the most serious cases, the importance of allowing the broadcaster as full an opportunity as possible to respond would seem to militate against a fast-track approach. They pointed out that as Ofcom has the power to direct broadcasters to cease certain activities, this could be followed up by the fast-track procedure if the direction is ignored.
- 3.62 Respondents also commented on the wording of the individual circumstances proposed by Ofcom for use of the fast-track procedure. As regards "material harm" for example several broadcasters said the risk of "material harm" should be "ongoing".
- 3.63 However the main concern was reflected in the responses of the BBC, Channel 4 and Five, ITV and Sky. They believed that the circumstances in which it was proposed to use the procedure were too widely drawn. UKTV and Sky believed that the fast-track procedure should be used where there was a "significant" risk of consumer harm; Channel 4 and Five said it should only be used in the most urgent cases and should never be used because of outside pressure on Ofcom to make a decision. In particular respondents were concerned with the final two bullet points of paragraph 24 of the Consultation Procedure. Channel Four and Five said that the final bullet point in particular (public interest) could fit almost any situation and would seem to indicate that Ofcom would use the fast-track procedure whenever it believed it appropriate.

Ofcom's response

- 3.64 Ofcom has taken account of broadcasters concerns and considers it unnecessary to invoke the fast-track procedure in 'any other circumstances' where Ofcom felt there was a need for 'urgency'. We consider the new Outline procedures cover the necessary circumstances in which we may consider it appropriate to use the fast-track procedure. We also removed the sixth bullet point, which related to non-compliance by associates of broadcasters. In light of the responses, we have tightened the grounds for invoking the fast-track procedure. However, we have retained Ofcom's right to invoke the fast-track procedure when we consider it to be in the 'public interest'. We consider this to be important as there may be unforeseen circumstances where Ofcom considers it necessary to fast-track a case which is in the public interest. However, mindful of Ofcom's duty to be transparent, we have added words to ensure that in these circumstances we will provide the broadcast with the reasons why we consider fast-tracking the case is in the public interest.

Paragraph 25 of Consultation Procedure (corresponds to paragraph 25 of new Outline procedures)

- 3.65 Paragraph 25 states:

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.

Responses to Consultation

- 3.66 No material responses were received.

Paragraph 26 of Consultation Procedure (corresponds to paragraph 26 of new Outline procedures)

- 3.67 Paragraph 26 states:

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.

Responses to consultation

- 3.68 Several respondents believed that the time proposed in the Consultation Procedure allowed for broadcasters to respond (five days) was too short to respond adequately. STV and Sky believed that the time should be extended from five to ten working days. Sky also said that a longer period may be justified in certain circumstances. Channel 4 and Five responded that it was unfair to allow less time for broadcasters to prepare responses for serious cases, and that at least twelve working days should be permitted.

Ofcom's response

- 3.69 We re-worded this paragraph to make the description of the new fast-track procedure clearer. We have extended the deadline for making final representations and commenting on the draft sanctions to ten working days. We have amended the paragraph accordingly. In view of the special nature of the fast-track procedure, Ofcom accepts that – by prior mutual agreement - there may be occasions when material may be supplied by the broadcaster closer to a Committee hearing than normal.

Paragraph 27 of Consultation Procedure (corresponds to paragraph 27 of new Outline procedures)

- 3.70 Paragraph 27 states:

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.

Responses to Consultation

- 3.71 No material responses were received.

Paragraph 28 of Consultation Procedure (corresponds to paragraph 28 of new Outline procedures)

- 3.72 Paragraph 28 states:

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.

Responses to Consultation

- 3.73 No material responses were received.

Paragraph 29 of Consultation Procedure (corresponds to paragraph 29 of new Outline procedures)

- 3.74 Paragraph 29 states:

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

Responses to Consultation

3.75 No material responses were received.

Paragraph 30 of Consultation Procedure (corresponds to paragraph 30 of new Outline procedures)

3.76 Paragraph 30 states:

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.

Responses to Consultation

3.77 No material responses were received.

Paragraph 31 of Consultation Procedure (corresponds to paragraph 31 of new Outline Procedures)

3.78 Paragraph 31 states:

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.

Responses to Consultation

3.79 No material responses were received.

Paragraph 32 of Consultation Procedure (corresponds to paragraph 32 of new Outline procedures)

3.80 Paragraph 32 states:

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.

Responses to Consultation

3.81 No material responses were received.

Paragraph 33 of Consultation Procedure (corresponds to paragraph 33 of new Outline procedures)

3.82 Paragraph 33 states:

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.

Responses to Consultation

3.83 No material responses were received.

Paragraph 34 of Consultation Procedure

Paragraph 34 states:

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.

Responses to Consultation

3.84 No material responses were received. We have incorporated this paragraph into paragraph 32 of the new Outline procedures.

Paragraph 35 of Consultation Procedure (corresponds to paragraph 34 of new Outline procedures)

3.85 Paragraph 35 states:

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.

Responses to consultation

- 3.86 Global Radio commented that Ofcom should not postpone every licence application by default, but should instead reserve the right to do so.

Ofcom's response

- 3.87 We have accepted this point and amended the first sentence accordingly.

Annex 1

Outline procedures for statutory sanctions in content and content-related cases

Outline procedures for statutory sanctions in content and content-related cases

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Introduction

1. This document outlines the procedures that Ofcom will normally follow when considering the imposition of a statutory sanction ('sanction') on a broadcaster for breaches of any content or content related requirements (including breaches of Ofcom's codes) by a broadcast licensee, the BBC or S4C ('a broadcaster'). They are effective from 18 January 2008.

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). Ofcom may impose a range of sanctions either together or separately, as it deems appropriate. These include a decision to:

- 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 in certain cases); or
- revoke a licence (not applicable to the BBC, S4C or Channel 4). The procedures for revocation are set out in paragraphs 32 and 33 below.

‘financial penalty’

In most cases involving holders of a commercial television or radio licence, the maximum fine is normally £250,000 or 5% of the relevant broadcaster’s ‘Qualifying Revenue’ whichever is the greater. However, for licensed Public Service Broadcasters the maximum is 5% of their ‘Qualifying Revenue’. For the BBC or S4C, the maximum financial penalty payable 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 procedures and is set out in paragraphs 30 and 31 below. Failure to comply with such a direction is itself likely to lead to consideration of a sanction.

4. Ofcom’s powers to impose a sanction in broadcasting cases apply to the content of all broadcast services (both editorial and advertising).

1. Statutory Sanctions

A. General principles

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, repeatedly¹, or recklessly breached the terms of its licence conditions (in the case of Ofcom licensees) or any relevant enforceable requirement (in the case of the BBC and S4C). This includes any breach of any relevant Ofcom codes from time to time in force².

6. The Outline 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.

7. 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

¹ A repeated breach of a licence condition, enforceable requirement or Ofcom code would include, for example: a repeat of the breach of the same condition, term or requirement as has already been recorded; repetition of the same or similar conduct as that which earlier contravened a licence condition, enforceable requirement or Ofcom code; or a breach of another different licence condition, term or requirement to that previously contravened.

² 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, the Broadcast Committee of Advertising Practice (BCAP) Codes and the Electronic Programme Guide (EPG) Code. This outline procedure does not apply to competition cases.

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 (see paragraph 18). For instance, broadcasters will be invited to give oral representations where the Executive recommends that a financial penalty or the shortening or revocation of a licence should be considered.

8. The imposition of sanctions in content and content-related cases has been delegated from the Board to the 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

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

10. Under the Outline procedures, broadcasters will be provided at each stage of the process with the draft sanctions paper prepared by the Executive (this paper summarises the case) to allow broadcasters to make representations at each stage before the paper is presented to the Committee. Broadcasters will be provided with copies of the documentation which will be attached to the sanctions paper that is put before the Committee, subject to the withholding of any material that Ofcom believes is 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.

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. Outline procedures

The consideration of a sanction

11. Consideration of a statutory sanction begins with a manager writing to the broadcaster³ in accordance with Ofcom's Guidelines for the handling of standards complaints ('the Guidelines')⁴. The broadcaster will be notified that a breach has been found. A finding will be enclosed with this notification. The manager will inform the broadcaster that a statutory sanction is being considered and that a draft sanctions paper may follow.

Confidentiality

Confidentiality is necessary for the proper performance of Ofcom's functions with respect to cases where a sanction is being considered. All information,

³ Ofcom will already have received representations from the broadcaster on whether a breach of the relevant code has occurred.

⁴ Available at <http://www.ofcom.org.uk/tv/ifi/guidance/standards/>

correspondence and documents relating to Ofcom sanctions procedures are strictly confidential, unless already in the public domain

First draft of sanctions paper – seriousness of case

12. Once the breach has been recorded, the manager will send a draft sanctions paper containing details of the code or licence breach and setting out the reasons why it is currently considered that a statutory sanction may be appropriate. This draft sanctions paper should contain a summary of the 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 grounds on which the case is being referred for consideration of a sanction.

First draft of sanctions paper – broadcaster representations

13. 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. The broadcaster will be asked to make these representations to a more senior manager. These representations should normally be submitted within ten working days of the broadcaster receiving the draft sanctions paper.

14. Taking account of any representations from the broadcaster, the more senior manager will then independently review the case,. 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.

Disposal of cases of insufficient seriousness

15. 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 of breach will then normally be published in the Ofcom Broadcast Bulletin.

Second draft of sanctions paper – type and level of sanction

16. 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 revised 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 also normally sets out a provisional recommendation of the type (and, if appropriate), level of sanction and includes an analysis of the reasons for that provisional recommendation. The broadcaster will be advised to make any final written representations, which should normally be submitted within ten working days of the broadcaster receiving the draft sanctions paper.

17. 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, which will also contain all the relevant material the Executive has relied on as outlined in paragraph 12, including the final recommendation, is then submitted to the Committee. A copy is also sent to the broadcaster.

The Committee and oral hearings

18. The Chair of the Committee will then consider the final sanctions paper and decide whether he considers the matter should be considered for a sanction. If so, and the Chair of the Committee believes it appropriate, the broadcaster will be invited to a meeting to give oral representations (see paragraph 7). The broadcaster may bring legal representation to this meeting. However, the total representation on behalf of the broadcaster should normally not exceed five 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 breaches which have occurred and explains the range of potential sanctions which may be imposed in the particular case;
- 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; and
- the broadcaster then concludes with a brief final statement, normally limited to 10 minutes following which the broadcaster and its representatives leave the meeting.

Committee's decision

19. The Committee may decide either that a sanction is not appropriate, or that a sanction is appropriate and if so, what type of sanction should be imposed and at what level. The decision of the Committee is final and published.

20. If, after considering all the evidence including any relevant points raised in any oral representations, the Committee believes that the sanction to be imposed should include a financial sanction, then it will, as appropriate, consider the penalty in accordance with the Penalty Guidelines published by Ofcom (see <http://www.ofcom.org.uk/about/accoun/pg/>). If the Committee believes that the sanction should include revocation of the licence, then the procedure for revocation described in paragraphs 32 and 33 will apply.

Publication of decision

21. The Committee's final decision will be communicated to the broadcaster in writing, setting out the reasons ('the sanctions adjudication'). The broadcaster will normally be provided with the sanctions adjudication only on the day of, and shortly before, publication to allow time for the broadcaster to comment on any factual or typographical errors in that adjudication. In exceptional circumstances the length of time given to the broadcaster to comment may be lengthened at Ofcom's discretion based on submissions made by the broadcaster.

Sanctions in fairness and privacy cases and advertising cases

22. 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 sanction⁵ as appropriate. Paragraphs 12 to 21 then apply.

23. The Advertising Standards Authority ('the ASA') may, under the terms of its Memorandum of Understanding with Ofcom, request Ofcom to consider a statutory

⁵ See paragraph 40 of Ofcom's Outline procedures for handling fairness and privacy complaints at <http://www.ofcom.org.uk/tv/ifi/guidance/fairness/>

sanction in an advertising case. In such cases, the ASA will normally have published a breach of its code. In these circumstances, the consideration of a statutory sanction commences with the manager sending a broadcaster a draft sanctions paper.⁶ Paragraphs 12 to 21 then apply.

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 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 ongoing 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 as required with the terms of a direction issued by Ofcom pursuant to the terms of the broadcaster's licence (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 take steps as required to comply with its licence obligations despite notification from Ofcom of its non-compliance; or
- where Ofcom is satisfied it is in the public interest to do so. (Where Ofcom considers that it is in the public interest to adopt the fast-track procedure, its reasons for doing so, will be provided to the broadcaster(s) concerned.)

'associate'

'associate' has the same meaning in these Outline procedures 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 below may replace the procedure set out in paragraphs 12 to 16.

26. In such cases, the manager, who has recorded a breach, in accordance with the Guidelines, will notify the broadcaster that Ofcom is invoking the fast-track procedure and that the case has been passed immediately to the more senior manager for assessment. If the more senior manager agrees that it is appropriate to invoke the fast-track procedure, he or she will write to the broadcaster enclosing a draft sanctions paper. Unlike the normal Outline procedures for statutory sanctions described in paragraphs 12 to 16, 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 are material to the decision as to whether to impose a sanction (and if so at what level). The broadcaster may be requested to provide further information. The broadcaster will be requested to make any final written representations on the draft sanctions paper and the provisional recommendation to Ofcom, normally within ten working days of the date of receiving the draft sanctions paper.

⁶ For more information on the criteria for referral from the Advertising Standards Authority to Ofcom, please see the Memorandum of Understanding available at http://www.ofcom.org.uk/consult/condocs/reg_broad_ad/update/mou/

27. If, in the light of any representations provided by the broadcaster, 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 of breach will then normally be published in the Ofcom Broadcast Bulletin.

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 and provided with a copy.

29. The consideration of a sanction will then continue as normal, that is, as set out in paragraphs 18 to 21.

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. This procedure is separate from the statutory sanctions procedures outlined above. However the sanctions procedures may run parallel to the issuing of a direction under the licence if appropriate. Further, compliance with the direction does not mean that sanctions will not be considered.

31. A direction under a broadcasting licence can be issued by an executive member of Ofcom's Content Board. 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. The holder of the licence will be given a reasonable opportunity of making representations about the matters set out in the notice. What is reasonable will depend on the circumstances and urgency of the case but could be no more than 24 hours.

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.

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

34. If Ofcom is considering imposing a sanction against a broadcaster, and until the Committee has reached a decision on the matter, and the matter is fully resolved (eg by payment of any financial penalty) Ofcom reserves the right to postpone the consideration of any applications for new licences by the licensee (or where appropriate, an associate of the licensee). Ofcom also reserves the right to postpone

consideration of any other matters that could affect the nature or status of the licensee and the licensed service and/or the nature or status of an associate and/or its licensed service. (including, but not limited to, requests for consent to transfer and changes to the name and nature of a licensed service).