

**Question 1: Do you agree with the new proposed procedure? If not, why not? Please suggest any alternative wording where appropriate:**

1. The BBC supports the principle of simplifying the sanctions procedure as far as is consistent with the requirements of fairness and transparency. However, there are some areas in which we wish to suggest that Ofcom's proposals should be changed or clarified. We will address these in our answers to questions 2 - 4.

**Question 2: In particular do you believe it is appropriate, in normal cases where a sanction is being considered, for broadcasters to have two opportunities to make representations to Ofcom (once on the seriousness of the case and once on the nature and level of any recommended sanction)?:**

2. We agree that the current procedure, which provides for three drafts of a sanctions paper on which the broadcaster can make representations, is unnecessarily drawn-out, and that two opportunities to make written representations would be sufficient so long as other aspects of the process met the appropriate standards of fairness and transparency. Our concern is that, under the current procedure, the provisions regarding oral representations fall somewhat short of those standards.

3. In the one instance in which the BBC has so far been involved, we noted that the Committee's questions ranged beyond the issues raised in the written exchanges. Although the outcome may not have been affected in that instance, raising new issues at what is Ofcom's final stage of consideration is clearly capable of putting the broadcaster at a disadvantage. We therefore suggest either that it is agreed that the Committee's questions be confined to the issues raised in the written exchanges or (if the Committee wishes to preserve flexibility in the matter) that the broadcaster be given the opportunity to respond in writing to any new issues raised in the course of oral representations. The second option could be achieved by introducing a further written stage of the process following oral representations, but this would tend to offset the proposed reduction in the number of stages earlier in the process. It could be achieved without such an offsetting effect if oral representations were to take place between the proposed first and second opportunities to make written representations, allowing the second written representation to encompass any new issues.

4. We also noted that, on the day of our oral representations to the Committee, the Executive were in the room with the Committee and stayed with the Committee when we left. We were told as we were waiting that the Committee were discussing matters with the Executive, and we assume discussion continued after we had left the hearing room. Such discussions in the absence of the broadcaster seem to us to sit uncomfortably with the equality of arms requirements of Article 6 of the European Convention on Human Rights, and with section 94.3 of the Agreement between the BBC and the Secretary of State for Culture, Media and Sport, which prescribes 'a reasonable opportunity to make representations' - particularly any discussion after the hearing, which would appear to provide an opportunity for the broadcaster's representations to be discussed between the Committee and the Executive in a way which could well place the broadcaster at a disadvantage. This aspect of the procedure seems to us to contrast with that of the Editorial Standards Committee of the BBC

Trust in its consideration of appeals, where it bases its decision solely on material on which the complainant and the relevant members of the BBC Executive have had equal opportunity to comment. It also contrasts with the procedures adopted by the FSA in 2005 to address a similar issue (a summary of those procedures is available at <http://www.fsa.gov.uk/pages/Library/Communication/PR/2005/082.shtml>).

**Question 3: Do you agree that it is appropriate for Ofcom to introduce the new proposed fast-track sanctions procedure in the circumstances suggested?:**

5. We agree that there are circumstances where a fast-track procedure as proposed in the consultation would be appropriate. However, we believe the consultation's criteria for deploying the procedure are far too permissive, and that the final two bullet points in particular give them a catch-all character. As it must be presumed that the full procedure as proposed in the consultation represents Ofcom's view of what, in normal circumstances, constitutes a fair opportunity for the broadcaster to make representations, any curtailment of that opportunity could only be viewed as risking unfairness, and could be justified only on the strongest grounds. We therefore suggest that the fast-track procedure be confined to cases where there is a serious and demonstrable ongoing risk of harm to the public, or to individuals or organisations directly affected. Even failure on the part of the broadcaster to comply with Ofcom's directions should not lead to a fast-track procedure unless the ongoing risk of serious harm is present, as recalcitrance which does not issue in harm can be adequately dealt with via the normal procedure.

6. Whatever the circumstances in which the fast-track procedure is applied, we believe an allowance of only five working days for the broadcaster to provide what would appear to be its sole written submission does not amount to reasonable opportunity to make representations. If the normal expectation under the fast-track procedure is that the broadcaster will provide a substantive response in that time, it should be subject to the proviso that Ofcom shall not unreasonably refuse to consider additional material submitted by the broadcaster prior to the hearing (or, in cases where the Sanctions Committee proposes to proceed without a hearing, prior to its final discussion of the matter).

7. Additionally, there appears to be a contradiction between paragraph 24, which says the use of the fast-track procedure shall be 'at Ofcom's discretion', and paragraph 25, which says the procedure shall be used 'Where any of the circumstances referred to in paragraph 24 apply'. As paragraph 25 seems intended simply to identify the stages of the normal procedure which the fast-track procedure will displace, we suggest the apparent contradiction could be removed by rewording it to read 'Where the fast-track procedure is applied, it replaces the procedure set out in paragraphs 12 to 18'.

**Question 4: Do you have any other proposals for making the procedure more effective and/or appropriate?:**

8. We believe the proposals would benefit from a clear statement of the purposes Ofcom intends sanctions to serve, the general considerations which it believes to be aggravating or mitigating in relation to the sanctions process, and the circumstances to

which it regards the difference types of sanction appropriate. This would increase the transparency of the process and, by clarifying to broadcasters the kind of issues they could most helpfully address, would also add to its effectiveness.

**Additional comments:**