

**Response by ITV to Ofcom's Consultation on an outline procedure for sanctions in cases relating to broadcasting**

ITV has not been involved in drafting but has seen the joint response of Channel 4 and Five to this consultation, and broadly endorses the concerns raised in that response and the suggestions made therein.

ITV will therefore not rehearse again in detail the legal framework and arguments underlying that response, but will simply summarise its own position on each of the consultation questions raised.

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

We accept in principle that the present procedure should be streamlined so that the broadcaster would have in future two opportunities to comment in writing to Ofcom on draft sanctions papers prior to any oral hearing : once on the recommendation of a statutory sanction, and once on the nature and level of any such recommended sanction. However, we share with Channel 4 and Five concerns that the draft revised sanctions procedures are unfair in the following respects:

**Time limits**

We believe insufficient time has been allotted for the broadcaster to review and respond to each of the draft papers. These are often complex matters requiring a great deal of analysis, internal discussion and on occasion further inquiry and legal advice. The desirability of timely and efficient handling of breaches must be balanced against fairness to broadcasters threatened with sanction. In circumstances where a commercial broadcaster could be faced with a financial penalty of thousands or even millions of pounds, or lose its licence altogether,

the proposed timetable cannot be considered reasonable, or meeting the principles under the HRA and Article 6 referred to in Paragraph 7 of the Consultation.

Given the potential seriousness to a broadcaster of a sanction being imposed, particularly where a significant financial sanction is being proposed, the broadcaster must have an adequate opportunity to consider the case against it and sufficient time to consult internally and prepare a full response. We therefore suggest that each response in non-fast track cases should be allowed a minimum of 10 working days and that paragraphs 15 and 18 should be amended accordingly.

### **Notification of Breach and Sanction**

We consider it very important that in future the finding of a breach, and the notification to the broadcaster that a sanction is being considered, should be separate steps. This is in the interests of fairness, to ensure that the broadcaster can if necessary consider whether to pursue any available review procedures on the question of breach, prior to separate consideration of a sanctions recommendation.

### **Disclosure of documents**

It is important that the broadcaster understands the case being made against it, and sees all documents referred to in the making of any decision in relation to sanction, save for the unusual circumstances suggested in the consultation. We therefore agree with Channel 4 and Five that if documents are not disclosed, at least the existence of the documents and the reason for their non-disclosure should, as a matter of natural justice, be made known to the broadcaster. We also confirm our agreement to the suggested amendment in this respect to paragraph 11:

*“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. 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.”*

### **The hearing**

We suggest, given the gravity of the outcome of the hearing, that 10 minutes is an appropriate time limitation for the summing up of the broadcaster’s position.

### **Time allowed for review and comment on final draft adjudication**

As a matter of fairness broadcasters should be given sufficient time (at least 24 hours at a minimum) to comment on any factual or typographical errors, and to prepare for the inevitable press interest upon publication of the adjudication where a sanction is imposed. We suggest this is stated explicitly as an amendment to Paragraph 23 and the reference to “time of publication will be at its sole discretion” be deleted accordingly.

**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?)**

We accept this in principle. We emphasise that it is important that the decision to recommend a sanction and the decision as to the nature and level of that sanction are two distinct decisions which require separate and different responses from the broadcaster.

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

Given the inherently adverse impact that this would have on a broadcaster's ability to prepare its case, we believe that a fast track procedure would not be justified or fair in other than the most exceptional circumstances, such as where there is demonstrable risk of ongoing material harm to viewers or a failure by a broadcaster to comply with a direction pursuant to the terms of its broadcast licence.

We therefore believe the criteria as drafted are far too wide and arbitrary and could have the undesirable result (for both broadcasters and for the regulator) that Ofcom's decision to elect for the fast track procedure might be perceived to be a response to external pressure (generated by press or political interest in a case) rather than genuine concern for material harm to viewers.

Even where an expedited procedure is considered justified, the amount of time given to the broadcaster to prepare its response, particularly on the question of the nature and level of sanction should not be materially different to that in a 'normal' case.

We therefore suggest that the final three bullet points in the list of criteria in Paragraph 24 be deleted and that the first bullet point be amended to state "...risk of *ongoing* material harm...".

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

Please see above.

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