



OFCOM CONSULTATION ON AN OUTLINE PROCEDURE FOR SANCTIONS IN CASES RELATING TO BROADCASTING

RESPONSE OF BRITISH SKY BROADCASTING LIMITED (“SKY”)

1. Introduction

- 1.1. Sky broadly accepts Ofcom’s proposals to amend the procedures for sanctions in cases relating to broadcasting, however, two aspects, the periods proposed for broadcasters to respond to draft sanctions papers, and the occasions when Ofcom might consider using the proposed ‘fast-track’ procedure, raise significant concerns. Each of these is dealt with in turn below.

2. Period for review of Ofcom draft sanctions papers

- 2.1. Not only does Ofcom propose to reduce the number of opportunities that broadcasters have to respond to Ofcom draft sanctions papers from three to two, but also that the ‘normal’ period available to broadcasters to respond be reduced. Under Ofcom’s proposed procedure, responses to the first draft sanctions paper are required within seven working days. In relation to the second paper responses are required within five working days. Under the current procedures the broadcaster is given 10 working days to comment on the first draft paper and seven working days in each subsequent case.
- 2.2. The proposals do not allow broadcasters sufficient time to give due consideration to Ofcom’s draft sanctions papers, and therefore sufficient time to respond and exercise their rights of defence against potentially significant penalties (particularly where fines or revocation of the broadcaster’s licence are under consideration).
- 2.3. A broadcaster’s response to the first draft sanctions paper may cover very different issues to those raised in any initial response to the original complaint. Responding to Ofcom’s case establishing the seriousness of the breach (as is intended by Ofcom’s proposals), is a separate analysis to responding to an initial complaint. Such issues will need to be considered afresh in the light of Ofcom’s draft sanctions paper.
- 2.4. Similarly, Ofcom’s second draft sanctions paper will contain recommendations as to the type and, if appropriate, level of any sanction. This in turn will require consideration of new issues over and above those previously considered by the broadcaster.
- 2.5. Ofcom’s procedures under which statutory sanctions are applied must reflect Ofcom’s duties to act in a reasonable and proportionate manner in respect of its regulatory activities. Its procedures cannot be driven by administrative expediencies, unless separately justified. Beyond acknowledging that broadcasters must be given “*a reasonable opportunity to make representations*”, and claiming that its proposals have

been drafted in the light of the Human Rights Act 1998, Ofcom's consultation document makes no attempt to justify the shortened periods for response.

- 2.6. Broadcasters should be given at least 10 working days to respond to each stage to ensure that they have "*a reasonable opportunity*" to respond to Ofcom's case. If one also considers that it may be necessary for broadcasters to take appropriate external legal advice at this stage, including as to whether there is scope for judicial review of any decision requiring expeditious action following any final decision, a period of 10 days is the minimum necessary to ensure that broadcasters' rights of defence are not significantly prejudiced.

3. 'Fast-Track' Procedure

- 3.1. Ofcom has set out a number of cases where it considers that it may be appropriate to apply a 'fast-track' procedure for the imposition of statutory sanctions. The list of cases is unnecessarily broad and provides no certainty or transparency for broadcasters. In addition, the list of occasions contains a number of cases where the only rationale for the reduced procedure appears to be administrative convenience (e.g. where there has been a failure to provide a recording, and where the broadcaster is failing to comply with licence obligations in a timely manner).
- 3.2. Notwithstanding a broadcaster's agreement to follow the fast track procedure, it should only be used where, in Ofcom's **reasonable** view (supported by adequate evidence), there is a significant risk of material harm, including financial loss, to viewers or listeners or other third parties. Where such circumstances are established then it would be open to Ofcom to use the fast track procedure.
- 3.3. The additional instances listed by Ofcom are unnecessary and would undermine broadcasters' rights of defence which are otherwise protected by the obligation to establish first, the seriousness of the offence and allow the broadcaster to make representations on that issue, before then considering the type and, if appropriate, the level of any sanction.
- 3.4. As with the non-fast track procedure, a period of five working days is not sufficient time to enable broadcasters to respond adequately to Ofcom's sanction papers. This period should be extended to at least 10 working days, and a longer period could be justified in certain circumstances.