

Question	Your response
Question 1: Do you agree with the proposed amendments to Rule 5.3 of the Ofcom Broadcasting Code? Please give reasons for your answer.	Confidential? – ¥ / N
Question 2: Do you consider that Rule 5.3 of the Ofcom Broadcasting Code, if amended as proposed, will provide sufficient protection for audiences? Please give reasons for your answer.	Confidential? – ¥ / N
Question 3: Do you agree with the assessment of the potential impacts of the proposed amendments to Rule 5.3 of the Ofcom Broadcasting Code (as set out in Annex 2)? Please give reasons for your answer.	Confidential? – ¥ / N
Question 4: Do you agree with the proposed amendments to the Guidance on Rule 5.3?	Confidential? – ¥ / N
Question 5: Do you have any other comments to make on the proposals, including in relation the scope of the proposed changes?	Confidential? – ¥ / N

Please tell us how you came across about this consultation:

- ☐ Email from Ofcom
- ☐ Saw it on social media
- ☐ Found it on Ofcom's website
- ☐ Found it on another website
- ☐ Heard about it on TV or radio
- ☐ Read about it in a newspaper or magazine
- ☐ Heard about it at an event
- ☐ Somebody told me or shared it with me
- ☐ Other (please specify)

Consultation on proposed amendment to Rule 5.3 of the Ofcom Broadcasting Code

Response of ITV plc

ITV welcomes the opportunity to comment on Ofcom's proposals to amend Rule 5.3 of the Code. We have shared our response to the Consultation with our fellow Channel Three licensee STV, and they support the comments we make below.

Our response to the Consultation questions is as follows:

Question 1: Do you agree with the proposed amendments to Rule 5.3 of the Ofcom Broadcasting Code? Please give reasons for your answer.

We have sympathy with what Ofcom is trying to achieve with its proposed amendments. We accept the need to maintain the trust in broadcast news and the expectation the audience has that it will be presented with due impartiality. We agree that it's important that politicians should not present news.

However, we do have concerns around the clarity of the new rule and particularly the precision of the underlying definitions which will become much more stark (and potentially problematic) when the proposed regime extends across all programming. We believe that these issues should be resolved before the changes are implemented.

This is not an issue at present because we consider that Rule 5.1 and its contextual analysis currently gives broadcasters and Ofcom flexibility to cater for the existing wide range of programme formats and any formats to be developed in the future outside of those programmes that are clearly news programmes in their entirety. Of course, compliance with that rule is backed by Ofcom's regulatory power to find broadcasters in breach of the Code, and to impose sanctions for serious, repeated or deliberate breaches.

The proposed amendment to Rule 5.3 and its potential consequences

The proposed amendment to Rule 5.3, coupled with two key current definitions in Ofcom's Code, could lead to regulatory uncertainty and a lack of clarity regarding the remit of both Rules 5.1 and 5.3. There are two definitional issues:

1. The definition of news. This definition is quite close to being a "know it when you see it" test which probably works to define an entire news programme, but works a lot less well in helping licensees establish what Ofcom might consider to be news within a different genre of programming. We give a few illustrative examples below of the concerns we have.

2. The definition of a politician is very broad which again may be less of an issue when determining who can be a newscaster but is likely to be more problematic when applied to any genre of programming. The concept of an activist, for instance, is clearly a broad and quite vague one.

The definition of news

We are concerned that it will be unclear to broadcasters and viewers whether and when a non-news programme is likely to be considered to be delivering 'news'.

In the Consultation Paper, Ofcom suggests that what it wants to safeguard is news that "would immediately be recognisable as news to most viewers or listeners". Ofcom's existing Guidance addresses the distinction of news programmes from current affairs programmes, and sets out (as the Consultation Paper does) a list of factors that would assist in making the distinction. However the Guidance does not explain whether these factors are cumulative, or whether each factor in itself could lead to a piece of content being considered as 'news'. Furthermore the Guidance does not define or give guidance on what is 'news' itself (for the reasons given in the Guidance).

We accept that where a programme or programme segment features a cumulation of the factors that might identify it as news, it is likely to be "immediately recognisable" as news and that as such, it should not be presented by a politician.

However we are concerned that the extended scope of Rule 5.3 and the existing Guidance on Section 5 of the Code could lead to breaches in non-news programmes that are not intended be news programmes/segments or to deliver news, and do not feature many or all of the factors identifying the content as news, but which are later found by Ofcom to have done so following a complaint.

The following are examples which we believe illustrate the potentially very wide reach of the proposed Rule 5.3:

- A politician being used as a regular guest on a 'news review' item in a daily magazine programme. ITV has done and does do this, takes steps to ensure that alternative views are included from the presenters and other guests and we cannot recall any complaints from viewers regarding due impartiality. Under the proposed Rule 5.3, the regular guest could possibly be deemed by Ofcom to be a news presenter, newsreader or news reporter, thereby resulting in a breach given there would be no exceptional justification.
- An "activist" presenting a current affairs programme on assisted dying, who explains during their presentation a development happening in the news (for example a parliamentary debate due to take place on the day of broadcast). That could fall within the definitions of news, news presenting, news reading or news reporting

under the proposed Rule 5.3. Under the current Rule 5.3 it would not, and would instead be subject to the contextual analysis under Rule 5.1 (correctly in our view).

- A politician presenting a current affairs programme who reports on a breaking news story that has no relation to their political convictions or views and who does so in an objective and factual way. An example of this could include a politician announcing the death of a monarch as a news flash in a non-news programme they are presenting. Under the proposed Rule 5.3 the broadcaster would automatically be in breach of the Rule absent any exceptional justification, whereas there would currently be a more contextual analysis of the programme under Rule 5.1.
- An interview with an activist or MP during live racing coverage regarding a protest against changes to farmers' inheritance tax rules that is taking place at the racecourse that day. If the activist/MP starts reporting to camera what is happening at the course, that could be deemed to be news reporting in a case where it was never intended to be news.

The proposed Rule 5.3 could therefore extend the 'highest requirements' for due impartiality from news programmes to all genres of programmes, even if they are not intended to be news programmes, only a brief part of them involves the delivery of "news" and even then many or all of the distinguishing factors for news might not be present and/or the inclusion of news was unintended and the result of an incident in a live programme. If Ofcom is determined to move away from a Rule 5.1 approach in such cases, then it must ensure clarity on how it will interpret the definition of news and activist in a broader application of Rule 5.3.

The definition of a politician

We consider that the scope of the Rule is made wider, and the lack of clarity and certainty greater, by the existing Ofcom definition of 'politician', which is likely to include *"an elected representative e.g. an MP or councillor, a candidate, an applicant to be a candidate or a prospective candidate (that is a candidate for election who knows they have been chosen to represent a party at an election), an employee of a political party or an activist"*.

We also believe that the proposed amendment could have an impact on other Rules in Section 5. It could extend the prohibition on presenters giving their personal views on a matter of controversy or policy in a programme, under Rule 5.9. Currently this prohibition is restricted to "news presenters and reporters in news programmes". It does not cover presenters of other programmes, including current affairs programmes. However, if a politician presenting another type of programme was to be deemed to be reading or reporting the news and gave their view on the issue, we believe this could make them a 'news presenter' for the purposes of Rule 5.9 and entail an automatic breach of that Rule. As above, we believe this would be an approach that is too rigid, and that a more contextual analysis is required under Rule 5.1. We also believe it adds to the lack of certainty and clarity surrounding the proposed Rule 5.3.

Article 10 of the ECHR

For the above reasons, although we agree that the proposed amendment is ‘prescribed by law’, we are concerned that without the additional definitional clarity we have requested in this submission the change that Ofcom is making might not be a necessary and proportionate restriction on freedom of expression and the public’s right to receive information.

Question 2: Do you consider that Rule 5.3 of the Ofcom Broadcasting Code, if amended as proposed, will provide sufficient protection for audiences? Please give reasons for your answer.

Yes, but only subject to tighter definitions to deal with scenarios such as those we outline above.

Question 3: Do you agree with the assessment of the potential impacts of the proposed amendments to Rule 5.3 of the Ofcom Broadcasting Code (as set out in Annex 2)? Please give reasons for your answer.

No – not with reliance on the current definitions and lack of clarity on the approach to cumulating definitional components of news. Without that it could be argued that Rules 5.1 and 5.3 serve to adequately and proportionately protect viewers from harm, and are as a matter of fact enforced by Ofcom and sanctions imposed for serious, repeated or deliberate breaches of the Rules. We do not feel that the impact assessments in the Consultation Paper have recognised this.

Question 4: Do you agree with the proposed amendments to the Guidance on Rule 5.3?

Please see above regarding our concerns relating to the proposed amendment to Rule 5.3. The same points relate to the proposed amendments to the Guidance.

In addition we have the following comments on the Guidance as currently drafted:

- Para 1.4/definition of ‘politician’ – we have concerns about how wide this definition is, especially in light of the proposed Rule 5.3 amendment.
- Para 1.7 – “presentation” of news by a politician “in whatever programme context it appears” – we accept that the ‘context’ language would be a natural consequence of the amendment to Rule 5.3, but “presentation” is a wide concept and could conceivably apply beyond people reading the news, being a news interviewer or reporting on news. It could easily extend to a guest on a regular news review programme item, or even an interviewee, as per our examples above.

- Para 1.10 – this seems to suggest that beyond news programmes, Ofcom believes Rule 5.3 only applies where a politician ‘presents’ or ‘hosts’ a programme. However the scope of Rule 5.3 as drafted seems to extend to interviewers and reporters as well. We feel that it is unclear.

Question 5: Do you have any other comments to make on the proposals, including in relation the scope of the proposed changes?

No.