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making communications work
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Procedures for handling content standards and licensing investigations and sanctions

Revising the procedures for TV, radio
and video-on-demand services

Statement

Publication date:

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About this document

Ofcom is preparing to take on regulation of the BBC from 3 April 2017. In the process of preparing our BBC procedures (see https://www.ofcom.org.uk/data/assets/pdf_file/0030/99417/procedures-bbc.pdf), we have also reviewed our current procedures for considering and investigating breaches of the Broadcasting Code (“the Code”), Ofcom’s broadcast licences and rules for on demand programme services (“ODPS”). These apply to all other broadcasters and ODPS providers that Ofcom regulates.

Following consultation, this document sets out our responses to stakeholders’ comments and the procedures that Ofcom will normally follow when:

- considering and investigating content standards issues under the Code;
- considering and adjudicating Fairness and Privacy complaints under the Code;
- considering and investigating issues under an Ofcom broadcast licence;
- considering the imposition of sanctions for breaches of broadcast licences;
- considering and investigating issues under the rules for ODPS; and
- considering the imposition of sanctions arising in the context of ODPS.

These new procedures will come into effect alongside our BBC procedures, when Ofcom takes over responsibility for regulating the BBC on 3 April 2017.

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Section 1

Introduction

- 1.1 Ofcom is preparing to take on regulation of the BBC from 3 April 2017. In the process of preparing our BBC procedures (see https://www.ofcom.org.uk/data/assets/pdf_file/0030/99417/procedures-bbc.pdf), we have also reviewed our current procedures for considering and investigating breaches of the Broadcasting Code (“the Code”), Ofcom’s broadcast licences and rules for on demand programme services (“ODPS”). These apply to all other broadcasters and ODPS providers that Ofcom regulates (including commercial BBC companies licensed by Ofcom).
- 1.2 This statement sets out stakeholders’ responses to our consultation and Ofcom’s decisions on the procedures Ofcom will normally follow when investigating breaches of content standards for television and radio; investigating fairness and privacy complaints; investigating breaches of broadcast licences; considering statutory sanctions for breaches of broadcast licences; investigating breaches for ODPS; and considering statutory sanctions in the context of ODPS (“the Procedures”).
- 1.3 Changes to the current procedures have been made with a view to:
 - making relatively minor stylistic changes so that these Procedures are the same as the BBC Procedures (as far as possible, allowing for the fact that the BBC Procedures incorporate a ‘BBC First’ stage);
 - ensuring that all our processes are fair, efficient and timely;
 - ensuring transparency and clarity as to how our processes are run.
- 1.4 These changes will ensure continued high quality decision-making and fairness to those involved in our complaints and investigations handling. The Procedures, which are at Annexes 1 to 6 of this statement, are as follows:
 - Procedures for investigating breaches of content standards for television and radio (“Standards Procedures”);
 - Procedures for the consideration and adjudication of fairness and privacy complaints (“Fairness and Privacy Procedures”);
 - General procedures for investigating breaches of broadcast licences (“General Procedures”);
 - Procedures for the consideration of statutory sanctions in breaches of broadcast licences (“Sanctions Procedures”);
 - Procedures for investigating breaches of rules for on-demand programme services (“ODPS Procedures”);
 - Procedures for the consideration of statutory sanctions arising in the context of on-demand programme services (“ODPS Sanctions Procedures”).

Background and statutory objectives

- 1.5 Ofcom's broadcasting duties include securing the application, in the case of all television and radio services, of standards that provide adequate protection:
- to members of the public from offensive or harmful material in such services: section 3(2)(e) of the Communications Act 2003 ("the 2003 Act"); and
 - to members of the public and all other persons from both unfair treatment in programmes included in such services and unwarranted infringements of privacy resulting from activities carried on for the purposes of such services: section 3(2)(f) of the 2003 Act.
- 1.6 In securing the application of these standards, Ofcom must have regard to the need to secure them in the manner that best guarantees an appropriate level of freedom of expression.
- 1.7 More specifically, Ofcom has a duty under section 319 of the 2003 Act to set standards for the content of television and radio programmes as appear to Ofcom best calculated to secure certain "standards objectives", which are set out in section 319(2). Ofcom is required to establish codes containing these standards. To meet this duty, Ofcom applies the provisions of the Code. Section 325 of the 2003 Act requires Ofcom to establish procedures for the handling and resolution of complaints about the observance of standards set under section 319.
- 1.8 Similarly, Ofcom has a specific duty under section 107 of the Broadcasting Act 1996 ("the 1996 Act") to draw up a code giving guidance as to the principles to be observed and the practices to be followed by broadcasters in connection with the avoidance of unjust or unfair treatment in programmes and unwarranted infringement of privacy in programmes (or in connection with the obtaining of material included in them). To meet that duty, Ofcom applies Sections Seven (Fairness) and Eight (Privacy) of the Code. Section 110 of the 1996 Act requires Ofcom to consider and adjudicate on complaints relating to unjust or unfair treatment in programmes, or to unwarranted infringements of privacy, subject to and in accordance with certain provisions set out in Part V of that Act.
- 1.9 Ofcom's duties also include ensuring a wide range of TV and radio services of high quality and wide appeal. Ofcom has other specific duties relating to broadcast content, for example:¹
- the requirement for certain types of radio station to deliver specific types of music or speech content (sections 106 of the Broadcasting Act 1990 (the "1990 Act") and 314 of the 2003 Act);
 - the requirements relating to independent, original and regional programming on public service television services (Chapter 4 of Part 3 of the 2003 Act);
 - the requirements in television licences relating to European production and European independent production (section 335 of the 2003 Act); and
 - the provision of subtitling, signing and audio description on relevant television services (sections 303 to 307 of the 2003 Act).

¹ This is not an exhaustive list.

- 1.10 Ofcom carries out its duties by granting licences to radio and television broadcasters and including in those licences conditions it thinks appropriate to help it carry out its duties.² These conditions include requirements for broadcasters to offer specific programmes and types of content, to provide information to Ofcom to enable us to perform our regulatory functions³ and to pay fees and to comply with various codes issued by Ofcom.

Overview of consultation proposals

- 1.11 We proposed to update our current procedures, with the key changes falling into three broad areas:
- Procedures for investigating content standards issues and fairness and privacy complaints under the Code and investigating issues under the ODPS rules;
 - Procedures for investigating other “general” breaches of broadcast licences; and
 - Sanctions procedures for broadcast licences and ODPS.

Procedures for investigating content standards issues and fairness and privacy complaints under the Code and investigating issues under the ODPS rules

- 1.12 We proposed to revise and update our procedures for ‘investigating breaches of content standards for television and radio’; ‘the consideration and adjudication of fairness and privacy complaints’; and ‘investigating breaches of rules for on-demand programme services’. Our substantive proposed changes included, in particular:
- Clarifying that Content Board members have an advisory role, in accordance with Content Board’s statutory functions and expertise, and that different Content Board members would advise at the Preliminary View stage and at the final decision stage of our investigations;
 - Clarifying that, in any one investigation, there would be a different Ofcom Executive decision maker at the Preliminary View stage and at the final decision stage, in line with the process that applies in Competition Act investigations and which we proposed for other enforcement cases⁴;
 - Providing that the broadcaster may request an opportunity to make oral representations following the Preliminary View. This reflected our current practice, whereby if a broadcaster requested an oral hearing we would conscientiously consider whether it should be granted in view of the nature of the breach under consideration and the complexity of the issues raised;

² See sections 3 and 4 of the 1990 Act and sections 3 and 4 of the 1996 Act (for television services) and sections 85 to 87 of the 1990 Act and sections 42 and 43 of the 1996 Act (for radio services).

³ For example, information about changes in those controlling broadcasters, annual reports from community radio stations and annual relevant turnover data from specified radio and television licensees.

⁴ See <https://www.ofcom.org.uk/consultations-and-statements/category-2/ofcoms-approach-to-enforcement>

- Changing how we would notify broadcasters of our final decision prior to publication. We proposed to provide broadcasters with a final decision one working day in advance of publication, for information only. This would bring these procedures in line with Ofcom’s other enforcement procedures. We considered one working day sufficient notice for broadcasters and appropriate given the importance that Ofcom’s processes are efficient and transparent.

General procedures

1.13 We proposed to revise and update our procedures for ‘investigating breaches of broadcast licences’⁵. Our substantive proposed changes included, in particular:

- Clarifying that, in any one investigation, there would be a different Ofcom Executive decision maker at the Preliminary View stage and at the final decision stage, in line with the process that applies in Competition Act investigations and which we proposed for other enforcement cases (as noted above);
- Clarifying that Content Board members may have an advisory role in certain cases where Ofcom considers it would be appropriate in order to reach its Preliminary View and final decision, in accordance with Content Board’s statutory functions and expertise. We clarified that, in such cases, different Content Board members would advise at the Preliminary View stage and at the final decision stage;
- Providing for the broadcaster to have the opportunity to make oral representations following the Preliminary View in some cases where, in view of the nature of the breach under consideration and the complexity of the issues raised, Ofcom considered it appropriate. We also proposed to clarify that broadcasters may request an opportunity to make oral representations following the Preliminary View stage. This reflected our current practice, whereby we would consider whether an oral hearing should be granted in view of the nature of the breach under consideration and the complexity of the issues raised;
- Changing how we would notify broadcasters of our final decision prior to publication. We proposed to provide broadcasters with a final decision one working day in advance of publication, for information only. This would bring these procedures in line with Ofcom’s other enforcement procedures. We considered one working day sufficient notice for broadcasters and appropriate given the importance that Ofcom’s processes are efficient and transparent;
- Clarifying that, in most cases, we would normally publish details of Ofcom’s decision to investigate or not to pursue a matter following our initial assessment of the issue and any complaint. However there may be some cases where Ofcom considered it would be inappropriate to publicise the matter at this stage – for example, because the issues raised were particularly sensitive and/or publicity could have a detrimental impact on third parties (although there may be exceptional cases where we would publish in

⁵ Except for (i) those covered by the procedures outlined in paragraph 1.12, above, and (ii) those that relate to possible breaches of competition-related conditions in broadcast licences – for example, conditions imposed under section 316 of the 2003 Act. These are covered by a separate set of procedures: see <https://www.ofcom.org.uk/consultations-and-statements/category-2/ofcoms-approach-to-enforcement>

such circumstances, such as where there was a high level of public interest). We clarified that, in such cases, Ofcom may delay publicising the investigation until after Ofcom had concluded it. We also proposed to clarify that we would normally publish all breach and resolved decisions, and we would not normally publish a “not in breach” decision at the conclusion of an investigation where we had previously not published details of the issues under investigation. This reflected our normal practice, and would provide greater transparency about our approach to publicising our investigations.

Sanctions procedures

1.14 We proposed to revise and update our procedures for ‘the consideration of statutory sanctions for breaches of broadcast licences’; and ‘the consideration of statutory sanctions arising in the context of on demand programme services’. Our substantive proposed changes included, in particular:

- Clarifying the identity and number of the decision-makers depending on the nature of the breach being considered for sanction. In our view, it was not necessary for fairness or any other reason to have more than one decision maker. However, in cases involving a breach of content standards, sanction decisions would continue to be made by two senior Ofcom Executives and a non-executive member of Ofcom’s Content Board. In cases not involving content standards, we proposed that there would be one or two decision makers (depending on the nature of the breach) who were senior Ofcom Executives, and that exceptionally a non-executive member of Ofcom’s Content Board may join them;
- Providing that Ofcom will always offer the broadcaster an opportunity to make oral representations following the Preliminary View. This reflected our current usual practice;
- Changing how we would notify broadcasters of the final sanction decision prior to publication. Where a sanction included a financial penalty, the level of penalty would be included in the decision sent to the broadcaster one working day before publication.

Next steps

1.15 This statement concludes Ofcom’s consultation on the Procedures. Section Two of this document summarises the views of stakeholders on the proposed Procedures, Ofcom’s response to these and final decisions.

1.16 The Procedures come into effect when Ofcom takes over responsibility for regulating the BBC, on the Effective Date contained in the Charter, which is 3 April 2017.

Section 2

Consultation responses and our decisions

- 2.1 Ofcom received seven consultation responses on the proposed procedures for handling content standards and licensing investigations and sanctions. These were from: A+E Networks (“A+E”); BT; Channel 4; ITV & STV (“ITV/STV”); Radiocentre; Sky; and UK Lawyers for Israel (“UKLFI”).
- 2.2 Set out below is a summary of issues raised by stakeholders, and Ofcom’s response to them and final decisions.
- 2.3 The full published responses can be found on Ofcom’s website⁶. The final procedures are available at Annexes 1 to 6.

Stakeholder responses to proposals and Ofcom’s final decisions

‘Broadcaster First’

- 2.4 The most significant difference between Ofcom’s existing procedures which apply to other broadcasters and the procedures proposed by Ofcom for the BBC⁷ is the ‘BBC First’ approach for complaints about content standards. The BBC Agreement requires that, except in the case of Fairness and Privacy complaints,⁸ a complaint should normally in the first instance be resolved by the BBC. If a complainant is not satisfied with the BBC’s final response or considers that the imposition by Ofcom of a sanction may be appropriate, or if the BBC has failed to respond within the timeframe set in its own procedures, the complainant will be able to refer their complaint to Ofcom⁹.

Stakeholder views

- 2.5 A+E, BT and ITV/STV considered Ofcom should introduce a ‘Broadcaster First’ approach for other broadcasters. A+E and ITV/STV also considered an ‘ODPS first’ approach should be adopted, except where the risk of any harm from a breach may be ongoing. ITV/STV considered that the existing procedures “paid lip service” to encouraging complainants to raise complaints with broadcasters first, but suggested that the “new regime” of BBC regulation offered an opportunity to apply an “even-handed approach”. BT and A+E suggested that the ‘BBC First’ model could be extended to other broadcasters who can demonstrate they have effective compliance and complaints handling systems in place. A+E suggested such a framework could reduce the number of complaints Ofcom has to investigate.

Ofcom response

- 2.6 Ofcom’s procedures for broadcasters other than the BBC clearly state that “[i]n the interests of timely resolution, Ofcom considers that complainants should follow the

⁶ <https://www.ofcom.org.uk/consultations-and-statements/category-2/review-procedures-handling-content-standards-and-broadcast-licensing>

⁷ In a parallel consultation, see paragraph 1.1.

⁸ Ofcom is required by statute to consider Fairness and Privacy complaints.

⁹ In accordance with Clause 57(1) of the Agreement.

broadcaster's own complaints procedure before making a complaint to Ofcom".¹⁰ However, Ofcom also accepts complaints made directly to us. The 'BBC First' approach is required by the new BBC Agreement and the BBC must consult on its complaints handling procedures which must meet certain criteria.¹¹ Ofcom recognises there may be other broadcasters potentially able to meet a similar set of criteria. However, the BBC's scale and regulatory framework are different. Ofcom will implement the 'BBC First' approach only for the BBC in April 2017. We will review this position over time.

- 2.7 Ofcom's procedures for investigating breaches of rules for on-demand programme services already state that "Ofcom will not normally consider a complaint unless the complainant has sought to follow the ODPS provider's own complaints procedures first", except where "there may be a risk of ongoing harm arising from some content".

Departure from Ofcom's procedures

- 2.8 Each set of proposed Procedures concerning the consideration and investigation of complaints makes clear that Ofcom may consider it necessary to depart from the published procedures in a material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to consider a complaint or carry out an investigation. We have retained a commitment that, in such cases, we will write to the broadcaster or ODPS provider (and other relevant parties) in advance setting out the nature/extent of Ofcom's departure and our reasons for it. However we proposed removing the statement that we would seek the relevant parties' response.

Stakeholder views

- 2.9 Channel 4 considered that, when Ofcom departs from its published procedures, we should set out our proposed replacement procedure and timescale, as it would be unreasonable for Ofcom to have "unfettered discretion".
- 2.10 Sky considered Ofcom should continue to "[seek] the relevant parties' response" when "setting out the nature/extent of its departure, and the reasons for doing so", as there may be circumstances in which "affected parties have legitimate concerns over Ofcom's proposed departure from its published procedures".

Ofcom response

- 2.11 We recognise that it is important for Ofcom to be transparent about the processes we will follow when carrying out enforcement action, and to act consistently with our published processes, unless there are good reasons to adopt a different approach. It is rare for Ofcom to depart from its published procedures. However, it is essential that we retain flexibility in our procedures to enable fair and efficient enforcement action in each case. When we depart from the approach set out in our published procedures, it is, as cited, for reasons of fairness and/or in order for Ofcom properly to consider a complaint or carry out an investigation, and we will explain to the relevant parties why we are doing so, setting out the nature/extent of Ofcom's departure.

¹⁰ <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures>

¹¹ Clause 56(3) and (4) of the Agreement

- 2.12 Ofcom would always consider concerns raised by relevant parties about the process we intend to follow in circumstances where we depart from our published procedures, but we do not consider this requires that Ofcom routinely seek parties' views in every case prior to deciding whether to depart from our published procedures.

Decision to investigate

- 2.13 Ofcom's Standards, General and ODPS procedures provide that when a complaint is made in accordance with the procedures we will first consider whether, on its face, it raises potentially substantive issues that warrant investigation by Ofcom. We will do so by reference to the gravity and/or extent of the matter at issue. We may also investigate on our own initiative.

Stakeholder views

- 2.14 UKLFI considered that Ofcom should consider any complaint that raises potentially substantive issues under the Code and is submitted within the time limit. It stated that any assessment of the "gravity" of an issue should take into account whether the content relates to subject matter whose coverage is liable to promote racism, including anti-Semitism, and the cumulative effect of accuracy and impartiality deficiencies in different programmes about similar subject matter.
- 2.15 Channel 4 considered that, when we launch an investigation on our own initiative, "the genesis of such a self-generated investigation should be set out for the broadcaster".

Ofcom response

- 2.16 Ofcom carefully assesses all complaints we receive against the Code. Complaints which are considered by Ofcom to raise potentially substantive issues under the Code that warrant investigation are pursued to an investigation. Examples in the procedures of the types of content that may be considered to have the gravity to warrant investigation are not exhaustive. Potential breaches on the grounds of incitement, hate speech, or abusive and derogatory treatment are treated extremely seriously by Ofcom and, depending on the facts of each case, will be expeditiously investigated wherever we consider a substantive Code issue has been raised.
- 2.17 When Ofcom launches an investigation, whether as a result of a complaint or our own monitoring, the broadcaster or ODPS provider is always told under which rule(s) we are considering it and given further detail of the specific issue(s), as required.

Application of appropriate rules

- 2.18 Our ODPS Procedures state that "[i]f a complaint is about a "catch up" ODPS and the material has recently been shown on a television service, it may be more appropriate for Ofcom to consider the complaint under relevant broadcasting procedures as the substantive rules applying to broadcast television services are more extensive".

Stakeholder views

- 2.19 ITV/STV considered that to apply the Code to broadcast output in the event of a complaint about a “catch-up” ODPS would be “wholly misconceived”, as “broadcast and on-demand content are governed by two entirely different sets of regulatory rules...founded in statute.” It therefore considered that, if a complaint falls within the Administrative Rules or Editorial Content Rules (applicable to ODPS), Ofcom should not seek to apply the Code.

Ofcom response

- 2.20 Ofcom disagrees. We consider that we should assess potential breaches of the Code about which we have been alerted – by whatever means – to provide audiences with appropriate protection.

Provision of information by Ofcom

- 2.21 Other than in its Fairness and Privacy Procedures, Ofcom proposed that unless a complainant asks it not to do so, it may disclose a complainant’s identity to the broadcaster or ODPS provider as well as a non-confidential version of the complaint. However it would consider requests from complainants to remain anonymous. We explained the information we would normally provide to a broadcaster or ODPS provider during our initial assessment and when we investigate.

Stakeholder views

- 2.22 Channel 4 suggested that the Standards and ODPS Standards Procedures should state that Ofcom will provide the broadcaster with the detail of the complaint and the complainant at the time of our initial request for “material or evidence”. ITV/STV similarly considered that complainants should normally be identified to the relevant broadcaster(s) – except in the case of whistleblowers – as it saw no rationale for them to remain anonymous and in some circumstances it could be potentially unfair for the broadcaster not to be told their identity.
- 2.23 Radiocentre suggested that broadcasters should be provided with more detailed information on complaints “as early as possible following Ofcom’s initial assessment”, rather than a summary of what Ofcom considered to be the “material parts of the complaint.” It believed this could “avoid additional issues being brought up at a later stage” and “reduce the risk of broadcasters inadvertently repeating any mistakes that compound harm to listeners”.

Ofcom response

- 2.24 The relevant issue(s) of concern are identified to a broadcaster when we first seek any material from it. Further, if, after assessing a case, Ofcom decides to pursue an investigation, we identify the relevant rule(s) under which we are considering a potential breach. Ofcom provides the specific details of an individual complaint as required.
- 2.25 In applying the Procedures, Ofcom will be considering the objective question of whether the broadcaster or ODPS provider has breached a standards or other requirement. In Ofcom’s view, a fair and effective procedure does not, in most cases, require disclosure to the broadcaster or service provider of a complainant’s identity. Unless a complainant specifically requests anonymity when making a complaint, Ofcom may disclose his or her details to the broadcaster or ODPS provider (and Ofcom informs complainants that it may not be able to deal with a

complaint if it cannot do so). However there may be circumstances in which Ofcom will receive representations on anonymity and we will consider these on a case by case basis.

Representations to Ofcom

Stakeholder views

- 2.26 ITV/STV considered it unreasonable for Ofcom to reach a Preliminary View on a breach of the Code without seeking broadcaster representations, unless the broadcaster had already accepted the breach or there were matters of fact which are not in dispute. It did not consider flashing image incidents to be an example of the latter, as the same programme material can produce different results when using different digital measuring equipment. Channel 4 did not consider Ofcom should proceed to issue a Preliminary View without having afforded the broadcaster an opportunity to make representations. It said that, even when Ofcom considered a breach of the Code to be a matter of objective fact, the broadcaster may disagree and “natural justice requires that representations are allowed before... a Preliminary View is reached”.
- 2.27 A+E noted our proposal to allow broadcasters to request the opportunity to make oral representations after considering Ofcom’s Preliminary View, and suggested in serious or complex cases there should be a presumption in favour of granting such an oral hearing. BT, ITV/STV, Radiocentre and Sky welcomed the proposal, but BT considered the criteria for when Ofcom will permit such representations should be transparent.
- 2.28 UKLFI considered it unfair for Ofcom to provide for broadcasters two or three opportunities to make representations, “as well as additional representations by presenters, producers or independent programme makers, but none in reply by the complainant”. It considered that the complainant should be permitted to see and comment on new points raised by others in their representations. It also considered it unfair that the Sanctions Procedures provide for “further written and possibly secret oral representations by the broadcaster with no opportunity for the complainant to reply to points made or further material provided..., or even see them”.

Ofcom response

- 2.29 We consider that there may be instances, where the facts of the case are clear, or where a broadcaster or ODPS provider has admitted to a breach, and it is not necessary to seek representations before reaching a Preliminary View. The broadcaster or ODPS provider will always be given the opportunity to comment on a Preliminary View before Ofcom reaches its Final Decision, which we consider sufficient in such cases to ensure a fair process. However, we note ITV/STV’s comment concerning flashing image incidents. Ofcom has recently become aware that different equipment can produce different results in marginal flashing image cases and we will therefore remove these, as an example of a ‘matter of objective fact’, from the Procedures.
- 2.30 Ofcom considers it appropriate to consider on a case by case basis requests from broadcasters or ODPS providers to make oral representations in response to a Preliminary View. We do not intend to stipulate specific criteria. This reflects our current practice, whereby if a broadcaster requests an oral hearing we

conscientiously consider whether it should be granted in view of the nature of the breach under consideration and the complexity of the issues raised.

- 2.31 Ofcom notes UKLFI's view. All complaints are important to Ofcom as they help us understand whether broadcasters and ODPS providers may be failing to comply with a requirement in a particular case. Ofcom assesses, and investigates where necessary, a standards or ODPS complaint based on the issues raised. We acknowledge all complaints we receive, but we do not normally correspond any further with individual complainants. Complainants have the opportunity to provide representations when making a complaint. We consider this approach is appropriate in the circumstances, and does not result in any unfairness to complainants.¹² In a standards or ODPS investigation, we are concerned with assessing whether the broadcaster has breached the Code or the ODPS provider has breached the Rules. We are not concerned with adjudicating on the merits of an individual complaint. Therefore, once we have decided to investigate, we provide the broadcaster or ODPS provider (and any relevant third parties who may be directly affected by the outcome of the investigation) with the opportunity to make representations to us, but not normally complainants.
- 2.32 We have a different procedure for handling complaints about fairness and privacy issues, and, as explained in the Fairness and Privacy Procedures set out in Annex 2, complainants also have the opportunity to make representations on Ofcom's Preliminary View before Ofcom issues its final adjudication. This is because the position of a complainant in a fairness and privacy complaint is different from that of a complainant in a standards or ODPS case. In order for Ofcom to entertain a fairness or privacy complaint, the complainant must be able to show that they are a "person affected"¹³ and they will therefore have a direct interest in the outcome of the complaint.

Decision making and the role of Ofcom Content Board and Senior Executives

- 2.33 We proposed to clarify that Content Board members have an advisory role, in accordance with Content Board's statutory functions and expertise, and that different Content Board members will advise at the Preliminary View stage and at the final decision stage. We also proposed to clarify that there will be a different Ofcom Executive decision maker at the Preliminary View stage and at the final decision stage, and that the final decision maker will not have been involved in the investigation or the preparation of the Preliminary View. This is in line with the approach which applies in Competition Act cases and which we have proposed for our other enforcement procedures.¹⁴

Stakeholder views

¹² We note that this issue was considered in the *Traveller Movement v Ofcom* [2015] EWHC 406 (Admin) case and that the Court agreed that it was appropriate for Ofcom not to involve the complainant further in a standards investigation.

¹³ As explained in the fairness and privacy procedures set out in Annex 2, a "person affected" means, in relation to a fairness complaint, someone who was a participant in the programme who was the subject of unfair treatment being complained of or had a direct interest in the subject matter of that treatment, and in relation to a privacy complaint, means someone whose privacy was infringed.

¹⁴ <https://www.ofcom.org.uk/consultations-and-statements/category-2/ofcoms-approach-to-enforcement>

- 2.34 Radiocentre suggested that, in order to facilitate effective communication, it would be useful if “the name and contact details of the Ofcom Executives dealing with the issue were shared with the broadcaster (both at preliminary view stage and final decision stage)”.
- 2.35 A+E welcomed Ofcom’s clarification that advice from Ofcom’s Content Board (“OCB”) members and decisions from senior Board-delegated Ofcom executives will be provided at the Decision stage of an investigation by parties not previously involved in it. However, given both the advisory capacity of OCB members in relation to Preliminary Views and their “extensive broadcasting experience”, as footnoted in the Procedures, A+E queried under what circumstances an Ofcom executive would decide not to act upon their advice.
- 2.36 BT considered it unclear precisely what the different decision makers review at the different stages of the investigation process and encouraged Ofcom to ensure the full response from the broadcaster was always considered, “to ensure fairness and proportionality”.
- 2.37 Channel 4 was concerned that under the revised Procedures, the Preliminary View would be prepared by a different person to the person responsible for taking the final decision who would not have had any previous involvement in the investigation and who would take advice from OCB members who have not seen the relevant material. They said that it was unclear how the ultimate decision maker could reach a fair decision and were concerned that this process runs the risk of “arbitrary decision making ... made on bases that have not been canvassed with the broadcaster”.
- 2.38 ITV/STV agreed with the clarification of OCB and Ofcom Executive members’ roles in the preparation of Preliminary Views and Decisions. Sky welcomed such clarification, but suggested it should remain stated in the Procedures that sanctions decisions will normally be made by the Director of Content Standards, Licensing and Enforcement, as such decisions should always be “taken at an appropriately senior level within Ofcom given the seriousness of the consequences for the broadcaster concerned” and “that this might necessarily entail an additional decision-maker in the process is entirely appropriate in the circumstance”.

Ofcom response

- 2.39 We have decided to implement our proposals. This approach is intended to ensure that the final decision maker, who will not have been involved in the investigation or the preparation of the Preliminary View, will come to a fair and independent decision based on all the relevant material and having had regard to the representations of the broadcaster (and complainants or other third parties as relevant) on the Preliminary View. For the avoidance of doubt, the final decision maker would be provided with all the relevant material, including the Preliminary View and any submissions from the broadcaster (and complainants or other third parties as relevant). The final decision maker would also chair any oral hearing.
- 2.40 The decision on Ofcom’s Preliminary View will typically be taken by the person who is responsible for overseeing the investigation, and has appropriate experience and Board-delegated authority to take the decision within Ofcom. This will generally be a member of the Ofcom Executive at Director level. The final decision will be taken by a senior member of Ofcom’s executive who has not been involved in the investigation at the Preliminary View stage and/or in the

preparation of the Preliminary View, and will be someone with appropriate experience and Board-delegated authority to take the decision within Ofcom. This will be a member of the Ofcom Executive at Director level or above. Ofcom does not consider it necessary or appropriate either to stipulate individual roles in the Procedures or to identify the specific senior Executives involved in an investigation, as we consider the Procedures should be sufficiently flexible to accommodate any relevant future internal changes.

- 2.41 Ofcom values the extensive broadcasting experience of OCB members, which helps to inform their advisory opinions on Preliminary Views and Decisions. OCB members may inspect any material relevant to reaching an informed view and/or providing pertinent advice on a Preliminary View or a Decision. Ofcom considers its proposed approach of drawing on the experience of OCB members will maintain Ofcom's independent, robust and rigorous decision making in such cases, and remains of the view that it will be helpful to provide increased transparency on the role of OCB members in the Procedures.
- 2.42 The Sanctions Procedures state that for content cases "decisions on sanction will be made by two senior members of the Ofcom Executive who have been given appropriate delegated authority by the Ofcom Board (one of whom will be the final decision maker on the breach), together with a Non-Executive member of Ofcom's Content Board". Previously, we stated that the senior members of the Ofcom Executive who take a decision on a statutory sanction in a content related case "will normally be the Director of Content Standards, Licensing and Enforcement and another member of the Ofcom Executive of at least equivalent seniority and with the appropriate delegated authority", but the Procedures also made clear that the former could be replaced by "a Director of equivalent seniority should the Director of Content Standards, Licensing and Enforcement be unavailable for any reason". In adopting our revised approach, Ofcom does not intend to change the level of seniority we consider appropriate to make sanctions decisions, but has sought to ensure the Procedures are sufficiently flexible to accommodate any future changes within Ofcom.

Notice of Decision publication

Stakeholder views

- 2.43 A+E, BT, Channel 4, ITV/STV, and Radiocentre disagreed with shortening the pre-publication notice period to one working day, which they considered insufficient. BT also questioned how such a move allowed Ofcom to be more efficient, "especially as the Broadcast Bulletin is published fortnightly". ITV/STV considered there was no justification for changing Ofcom's current practice and, together with A+E, Sky and Radiocentre, considered the opportunity for broadcasters to correct factual inaccuracies in an Ofcom Decision should be retained.
- 2.44 In relation to our Standards Procedures, Sanctions Procedures and ODPS Procedures, UKLFI considered the provision of an "advance copy of the decision to the broadcaster and not to the Complainant is unfair and ... can be abused by a broadcaster to spin media coverage of a significant ruling, thereby undermining it".

Ofcom response

- 2.45 Ofcom considers one working day sufficient notice of publication for broadcasters and ODPS providers, as it is for stakeholders in other sectors Ofcom regulates.

We consider it desirable that the notice period is consistent with that in our enforcement procedures, and that one working day is appropriate given the importance that Ofcom's processes are efficient and transparent. We have also taken into account that since the introduction of the previous procedures in 2011, the identification of factual inaccuracies during the 48 hour window before publication provided for in those procedures has been extremely rare.

- 2.46 Ofcom notes UKLFI's view. Ofcom consulted on the introduction of the current Standards Procedures in 2011. No respondents objected to the adoption of an "issues based" model for ensuring compliance with relevant requirements and Ofcom therefore decided¹⁵ that it would continue to acknowledge all complaints but would not reply to every individual complaint with a 'tailored' response or normally correspond further with individual complainants. Instead, we would investigate where necessary, prioritising our investigations according to a number of relevant factors (for example, harm to minors, financial detriment and ongoing harm), and publish our decisions in the Broadcast and On-demand Bulletin.
- 2.47 We do not intend to make any changes to the means by which we communicate the outcome of our consideration of content standards and ODPS complaints and investigations. By publishing a record of the complaints we have received in our fortnightly Broadcast and On-demand Bulletin (listing separately those that have raised issues taken forward for investigation), together with the outcomes of our investigations, complainants can track the progress of their complaints. For the reasons set out at paragraph 2.31 above, we consider this approach is appropriate in the circumstances, and does not result in any unfairness to complainants.

Issues specific to Fairness and Privacy investigations

Stakeholder views

- 2.48 Channel 4 and ITV/STV argued that Ofcom does not have the statutory power to consider matters of fairness and privacy in the absence of a complaint from the person affected. The BBC, in its response to Ofcom's separate consultation on procedures for BBC programmes, argued the same.¹⁶
- 2.49 Channel 4 considered that Ofcom's power to investigate issues of harm and offence under Section Two of the Code addresses viewers' perceived harm caused by the treatment of the affected person, and that Ofcom has provided no evidence of a "pressing social need to extend its powers to initiate a fairness/privacy complaint on behalf of an affected person when they have chosen not to pursue this right". It argued that the procedures do not define the 'exceptional circumstances' in which Ofcom might investigate in the absence of a complaint and so provide Ofcom "with a completely unfettered discretion in this area". It said that it was not aware of any cases "where an affected person has declined to make a formal complaint and the regulator has felt the need to initiate an investigation of its own volition." It set out the procedural difficulties that it considered such an investigation would raise.
- 2.50 Channel 4 suggested retaining in the Procedures, "the preliminary view is only provisional and may be subject to change in light of subsequent

¹⁵ https://www.ofcom.org.uk/_data/assets/pdf_file/0022/58153/statement.pdf

¹⁶ https://www.ofcom.org.uk/_data/assets/pdf_file/0030/99417/procedures-bbc.pdf

representations/material provided by the complainant and the broadcaster”, as it is provided to the complainant before the broadcaster sees it.

- 2.51 ITV/STV noted Ofcom’s proposal to direct the broadcaster to broadcast a summary of its Adjudication where there has been a breach of the fairness and/or privacy rules that has “resulted in a complainant’s legitimate interests being seriously damaged and requires publication over and above publication in the Ofcom Broadcast Bulletin”. It considered that not only is further explanation required concerning the meaning of “legitimate interests” and “serious” damage, but also, in any event, the provision is unnecessary and in conflict with Ofcom’s sanctions procedures, under which a direction to broadcast a summary of Ofcom’s findings is among the sanctions available and in which the criteria for its imposition are established.

Ofcom response

- 2.52 Normally, Ofcom requires a complaint from “the person affected” before investigating a fairness and privacy issue. However, where Ofcom considers it necessary in order to fulfil its general duty (under section 3(2)(f) of the 2003 Act) to secure the application of standards that provide adequate protection to members of the public (and all other persons) from unfair treatment in programmes and unwarranted infringements of privacy, we may consider fairness or privacy issues in the absence of a complaint from “the person affected”. As the Procedures state, Ofcom only considers such issues in the absence of a complaint from “the person affected” in exceptional circumstances; Ofcom-initiated fairness and privacy investigations have been rare, given the exceptional nature of the circumstances considered to trigger such an investigation. To date, there have been only six instances in which Ofcom has launched a fairness and privacy investigation in the absence of a complaint from “the person affected”. As noted in the Fairness and Privacy Procedures, in such cases Ofcom sets out in advance the procedures it intends to follow, which would be similar to those procedures but adapted as appropriate to ensure they are fair in the particular circumstances.
- 2.53 Ofcom is content to reinstate in the Procedures, for clarity, the explanation that “this Preliminary View is only provisional and may be subject to change in the light of subsequent representations/material provided by the complainant and the broadcaster”.
- 2.54 The provision that Ofcom may direct a broadcaster to broadcast a summary of its Adjudication if a complaint is upheld or upheld in part reflects section 119 of the 1996 Act. Section 119 declares that the issue of such directions is in addition to directions issued to licensed broadcasters in respect of breaches of relevant requirements which are also licence breaches (see section 119(7B)). In other words this is in addition to directions that Ofcom may impose on broadcasters as a sanction under the Sanctions Procedures (under, for example, sections 40(1) and 109(3) of the 1990 Act, and section 236 of the 2003 Act).
- 2.55 Any decision by Ofcom to issue such a direction will reflect our duties to be proportionate and consistent and to target action only at cases in which, in our view, it is merited. Also, this does not preclude Ofcom seeking a broadcaster’s comments before issuing a direction under the Fairness and Privacy Procedures where we consider doing so appropriate to ensure fairness.

Publication of the outcome of investigations

Stakeholder views

Ofcom's Standards Procedures

- 2.56 ITV/STV urged Ofcom to state in its procedures that it will normally publish in full all Decisions, including 'Not in Breach' decisions, as publicity can arise from Ofcom launching an investigation but there is little or no publicity when those programmes are found to be not to be in breach. ITV/STV considered that this would benefit the public in better understanding Ofcom's deliberations and provide helpful guidance to other broadcasters when considering similar issues in future.
- 2.57 Radiocentre questioned the value in Ofcom publishing details of complaints that are not pursued after initial assessment, "given they have been assessed but effectively considered to be groundless by Ofcom". It also questioned the value in Ofcom publishing the launch of investigations, as it does not assist compliance and has the potential for adverse publicity and speculation.
- 2.58 UKLFI considered Ofcom publishing decisions not to investigate in the Broadcast and On-demand Bulletin was inadequate, adding that outcomes should be communicated to the individual complainants concerned, together with the reason(s) for not investigating.

Ofcom's General Procedures

- 2.59 Channel 4 said it was "unclear in what circumstances it would not be appropriate to publish details of cases under investigation, no longer under investigation or where breaches have been found or not found, or Decisions have been resolved".

Ofcom response

Ofcom's Standards Procedures

- 2.60 Ofcom notes ITV/STV's view that full 'not in breach' decisions should be published in all cases. However, we remain of the view that our current procedures are appropriate in this regard. In the interests of transparency and accountability, we normally publish details of the outcome of all content standards investigations, including details that an investigation has concluded with a 'Not in Breach' decision in the Broadcast and On-demand Bulletin. We also publish full reasoned decisions where we find a breach of the Code. This is because publicising such decisions assists in the carrying out of our functions transparently, can deter non-compliance with regulatory rules, and can help to educate others about what can go wrong. However, normally we only publish a full 'not in breach' decision in circumstances where to do so is likely to be of particular benefit to stakeholders – for example, in cases where it would provide clarification about aspects of the regulatory regime (and how we apply it) that might be helpful for other broadcasters; or if there has been a high level of public interest in the investigation.
- 2.61 We note UKLFI's view, but for the reasons set out at paragraph 2.46 above, we do not intend to make any changes to the means by which we communicate the outcome of our consideration of content standards and ODPS complaints and investigations. We will continue to publish details of the complaints we have assessed but not pursued, as this is the means by which complainants are informed about the outcome of their complaint. We will also continue to publish summary details about the new investigations we have launched to enable any

directly affected third parties to be alerted to our investigation and have the opportunity to provide third party representations.

Ofcom's General Procedures

- 2.62 In our consultation, we proposed to make some changes to the way we publicise cases handled under the General Procedures in order to reflect our current practice and to provide greater transparency about our approach. In the revised General Procedures, we have sought to clarify that:
- In most cases, we would normally publish details in the Broadcast and On Demand Bulletin of Ofcom's decision to investigate or not to pursue a matter following our initial assessment of the issue and any complaint.¹⁷ In these cases, we would also publish the outcome of our final decision on the investigation, whether it is a breach decision, a "resolved" decision or a "not in breach" decision.¹⁸ This is because publicising the investigations we are carrying out, and our final decisions, is an important part of the carrying out of our functions transparently, and can assist in deterring non-compliance with our rules, and help to educate others about what can go wrong.
 - However, there may be some cases where Ofcom considers that it would be inappropriate to publicise the matter when we first decide to investigate (or not to pursue a complaint) because the issues raised are particularly sensitive and/or publicity could have a detrimental impact on third parties¹⁹ – for example, issues relating to the broadcaster's financial situation or a potential change of control. In these cases, where we have not previously published details of the issues under investigation, we may still publicise the outcome of the investigation. In particular, we will normally publish all breach and "resolved" decisions once we have concluded the investigation for the reasons noted above. However, we will not normally publish details of the outcome of a "not in breach decision".²⁰ The reason for not doing so is that we would be concerned that the issues raised were particularly sensitive and/or publicity could have a detrimental impact on third parties, and the benefits of publicity and transparency may not be outweighed by the potential detriment to those concerned in circumstances where we have ultimately not found a breach.
 - There may also be cases which raise sensitive issues and where publicity could have a detrimental impact on third parties, but we still consider, exceptionally, that it is necessary to publicise that we are investigating the case, for example where there is a high level of public interest in the matter complained of.²¹ In those cases, we would also expect to publish the outcome of our final decision, whether it is a breach decision, a "resolved" decision or a "not in breach" decision.²²

Right to appeal and statutory sanctions

Stakeholder views

¹⁷ See paragraph [A3.27].

¹⁸ See paragraphs [A3.44 and A3.46].

¹⁹ See paragraph [A3.27].

²⁰ See paragraphs [A3.46].

²¹ See paragraph [A3.27].

²² See paragraphs [A3.44 and A3.46].

- 2.63 UKLFI suggested it was wrong in principle, and would result in “inordinate delay”, to treat as “sanctions” directions not to repeat a programme or to include a correction and/or statement of Ofcom’s findings, or, in the case of ODPS, to restrict access or provide additional information. It commented that Ofcom should not just require corrections where the broadcaster has seriously, deliberately, repeatedly or recklessly breached the Code, but whenever the broadcaster has broadcast content that is significantly misleading or lacking due impartiality.
- 2.64 Channel 4 considered there should be an appellate process, adding in relation to sanctions that that “[u]ltimately a broadcaster is met with a decision that they cannot appeal to anyone within Ofcom who has not been involved in the initial decision making process”.
- 2.65 Radiocentre stated that some of its members suggest a formal and/or independent route of appeal should be available to broadcasters, which could help improve accountability and confidence in the regulatory regime.
- 2.66 In relation to the imposition of a financial penalty or in the case of licence revocation or a direction to suspend or restrict the entitlement to provide an ODPS, ITV/STV considered the absence of any form of appeal procedure incompatible with natural justice. ITV/STV asked Ofcom to consider this afresh.

Ofcom response

- 2.67 Ofcom’s powers to consider and impose sanctions, and the forms they may take, are set out in the Broadcasting Act 1990 and the 2003 Act, as detailed in footnotes to the Procedures.
- 2.68 Ofcom has to determine: whether a broadcaster or ODPS provider has breached relevant rules; whether a breach (or breaches) warrant(s) the consideration of statutory sanctions; and, if statutory sanctions are to be imposed, what form they should take. In reaching such decisions, the Procedures ensure broadcasters and ODPS providers have appropriate opportunities to make representations. Ofcom does not consider that fair and effective procedures also require the inclusion of internal review or appeal mechanisms.
- 2.69 The introduction of an external route of appeal would be a matter for legislation. However, broadcasters, ODPS providers and complainants may be able to challenge Ofcom’s decisions by way of judicial review.

The Consultation Process

Stakeholder views

- 2.70 Sky considered Ofcom had not consulted in a clear and transparent manner. It noted that Ofcom did not provide a “mark-up showing its proposed changes to existing procedures” and that some changes Sky considered to be material were not “called out” in the main body of the consultation document. It requested that Ofcom provide “mark-ups for future consultations and/or provides a more detailed summary of the proposed changes”, to assist stakeholders in being able to identify and assess them quickly.

Ofcom response

2.71 Ofcom considers that the substantive changes to the existing procedures were highlighted in the consultation document. However we note Sky's views and will endeavour to provide a mark-up of proposed amendments whenever we consider it will assist stakeholders.

Annex 1

Procedures for investigating breaches of content standards for television and radio

Introduction

- A1.1 This document outlines Ofcom's Procedures for the handling and resolution of complaints (or for the conduct of its own investigations) about broadcasters²³ compliance with the content standards set out under section 319 of the Communications Act 2003 ("the 2003 Act").²⁴ These Procedures are effective from 3 April 2017.²⁵
- A1.2 These Procedures do not apply to BBC UK Public Broadcasting Services and BBC UK Public On Demand Programme Services²⁶. Separate procedures apply to these services: https://www.ofcom.org.uk/data/assets/pdf_file/0030/99417/procedures-bbc.pdf. These procedures do apply to BBC commercial broadcasting companies licensed by Ofcom.
- A1.3 Separate procedures apply to the consideration of Fairness and/or Privacy complaints under Part 5 of the Broadcasting Act 1996²⁷.
- A1.4 If Ofcom considers that it is necessary to depart from these Procedures in any material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to consider a complaint or carry out an investigation, it shall write to the broadcaster concerned (and any other relevant parties) in advance setting out the nature/extent of its departure, and its reasons for doing so.

Statutory framework

- A1.5 Ofcom's duties in relation to broadcasting include securing the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services: section 3(2)(e) of the 2003 Act.
- A1.6 In securing the application of those standards, Ofcom must have regard to the need to do so in the manner that best guarantees an appropriate level of freedom of expression: section 3(4)(g) of the 2003 Act.

²³ References to "broadcasters" in these Procedures are to any broadcaster licensed and/or regulated by Ofcom, with the exception of the BBC UK Public Broadcasting Services to which separate procedures apply.

²⁴ Ofcom is under a duty to establish such procedures under section 325(2) of the 2003 Act.

²⁵ The 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.

²⁶ Such as the BBC iPlayer and iPlayer Kids (both audiovisual and sound programmes).

²⁷ The procedures for the investigation of Fairness and Privacy complaints are available on Ofcom's website at <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures>

- A1.7 Ofcom has a further duty under section 319 of the 2003 Act to set such standards for the content of programmes²⁸ to be included in television and radio services as appear to Ofcom best calculated to secure certain “standards objectives”. Those standards objectives are set out under section 319(2), and Ofcom is required to establish codes containing these standards. For the purposes of that duty, Ofcom applies the provisions of the Ofcom Broadcasting Code (which includes the Cross-Promotion Code) (“the Broadcasting Code”)²⁹ and the Codes referred to in the following paragraph. Section 325 of the 2003 Act requires Ofcom to establish procedures for the handling and resolution of complaints about the observance of standards set under section 319 and broadcasters are required by the terms of their licences to observe those standards in the provision of their services.³⁰
- A1.8 Complaints and investigations about issues raised concerning standards covered by the following Ofcom Codes will be governed by these Procedures: the Broadcasting Code (other than about Fairness and Privacy, or complaints relating to BBC UK Public Services); the Cross-promotion Code, the Code on the Scheduling of Television Advertising (COSTA) and, where appropriate, the UK Code of Broadcast Advertising (the BCAP Code).³¹
- A1.9 Ofcom may launch investigations on its own initiative as well as investigate complaints. The Procedures in a complaint-led investigation and an Ofcom-initiated investigation are the same.

Procedures

Making a complaint

- A1.10 Complaints under these Procedures can be made to Ofcom by any person or body who considers that a broadcaster has failed to comply with the standards under section 319 of the 2003 Act as reflected in the provisions of the Broadcasting Code at <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/> and/or the other Codes referred to in paragraph A1.7 above. Relevant sections of the Broadcasting Code are as follows:
- Protecting the Under-Eighteens (Section One);

²⁸ References to “programmes” in these Procedures include teletext, subtitles, and anything included in television and radio services, other than most forms of advertising (Complaints about advertising and telesshopping are in general investigated by the Advertising Standards Authority (“the ASA”). However, Ofcom is responsible for the regulation of certain advertising requirements, such as political advertising, Participation TV, complaints about Fairness and Privacy in advertisements, and complaints or cases concerning the Code on the Scheduling of Television Advertising (“COSTA”) (see paragraph 1.7) which are investigated by Ofcom under these Procedures or Ofcom’s Procedures for the consideration and adjudication of Fairness and Privacy complaints).

²⁹ <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/> - with the exception of Sections Seven (“Fairness”) and Eight (“Privacy”) which Ofcom applies in relation to Fairness and/or Privacy complaints under separate procedures: see paragraph 1.3 above.

³⁰ Section 325(1) of the 2003 Act requires broadcasters themselves (in addition to Ofcom) to establish their own procedures for the handling and resolution of complaints.

³¹ As noted above, complaints about advertising and telesshopping are in general investigated by the Advertising Standards Authority (“the ASA”). However, Ofcom is responsible for the regulation of certain advertising requirements, such as political advertising, Participation TV, complaints about Fairness and Privacy in advertisements, and complaints or cases concerning COSTA, which are investigated by Ofcom under these Procedures or Ofcom’s Procedures for the consideration and adjudication of Fairness and Privacy complaints.

- Harm and Offence (Section Two)
 - Crime, Disorder, Hatred and Abuse (Section Three)
 - Religion (Section Four)
 - Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions (Section Five)
 - Elections and Referendums (Section Six)
 - Commercial References in Television Programming (Section Nine)
 - Commercial Communications in Radio Programming (Section Ten)
- A1.11 Fairness and/or Privacy complaints under Sections Seven (“Fairness”) and Eight (“Privacy”) of the Broadcasting Code must be made under Ofcom’s “Procedures for the consideration and adjudication of Fairness and Privacy complaints”: go to <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>
- A1.12 In the interests of timely resolution, Ofcom considers that complainants should follow the broadcaster’s own complaints procedure before making a complaint to Ofcom. The contact details of all broadcasters can be found on Ofcom’s website at <http://licensing.ofcom.org.uk/tv-broadcast-licences/current-licensees/> and <http://licensing.ofcom.org.uk/radio-broadcast-licensing/>. If a complainant is not satisfied with the broadcaster’s response to their complaint, the complaint can then be submitted to Ofcom.³² Complaints can also be made directly to Ofcom in the first instance: see paragraphs A1.17 to A1.20 below for details about the time limits on complaints.

Form of complaint and information to be provided

- A1.13 Ofcom requests that complaints are submitted on its complaint form. To access a complaint form, go to Ofcom’s website at <https://www.ofcom.org.uk/tv-radio-and-on-demand/how-to-report-a-complaint>. Alternatively, for any complaint you can contact us at: Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA, or telephone 0300 123 3333 or 020 7981 3040. If you have a text phone you can call 020 7981 3043 – please note that this number only works with special equipment used by people who are deaf or hard of hearing. A Video Relay Service to contact Ofcom in British Sign Language is available on Ofcom’s website.
- A1.14 All complaints should include sufficient detail about the matter complained of. Specifically, complaints should include
- the name / title of the programme complained about;
 - the date and time of the programme;

³² In cases where a complaint is made under a broadcaster’s own complaints procedures, Ofcom will expect the broadcaster to retain the relevant recordings, and any related material, for the periods of days that are required by statute but running from the date on which the broadcaster may reasonably expect the complainant to have received the broadcaster’s final determination. The statutory requirements, derived from section 117 of the 1996 Act, and section 334 of the 2003 Act, are as follows. Recordings of radio programmes must be kept by broadcasters for 42 days after the broadcast. Recordings of television programmes must be kept for 60 days, except in the case of ITV1, Channel 4, Channel 5 and S4C in which case recordings must be kept for 90 days.

- the channel on which it was broadcast;
- the nature of the complaint and (where possible) the particular parts of the programme complained about;
- the complainant's full contact details (including e-mail address where appropriate); and
- whether (and, if so, when) the complainant has submitted a complaint to the relevant broadcaster.

A1.15 The inclusion of these details (or as many of them as possible) is very important. A failure to provide them may mean that Ofcom is not able to investigate the complaint.

A1.16 Unless a complainant asks Ofcom not to do so, Ofcom may disclose the complainant's identity to the broadcaster that is the subject of the complaint as well as sharing a non-confidential version of the complaint submission with it for comment. Ofcom will consider requests from complainants to remain anonymous.³³

Time limits on making a complaint

A1.17 Complainants should submit their complaint to Ofcom within 20 working days of the broadcast of the relevant programme or of the occurrence of the matter complained of. Ordinarily, Ofcom will not accept a complaint which is made after this deadline.

A1.18 Where a complaint is submitted later than 20 working days after broadcast, complainants should explain why the complaint was not submitted earlier. Ofcom will then consider all relevant factors (including the complainant's explanation for the delay in submitting the complaint and the limited time periods during which broadcasters are required to keep recordings)³⁴ in deciding whether or not Ofcom should investigate the complaint despite the delay in its submission.

A1.19 Where a complainant has previously complained directly to the broadcaster, the complainant should wait to see if he/she is satisfied with the broadcaster's response (in accordance with the broadcaster's own complaints procedures) before referring it to Ofcom.³⁵ If not, the complainant should refer his/her complaint to Ofcom (with the broadcaster's response) as soon as possible, and in any event within 20

³³ This does not apply to whistleblowers. Ofcom is a "prescribed person" under Part IVA of the Employment Rights Act 1996 (as inserted by the Public Interest Disclosure Act 1998) to which "qualifying disclosures" can be made about certain matters, including broadcasting and the provision of television and radio services. Ofcom has published guidance (available on our website at: <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines>) on how individuals working in the communications sector may contact us if they have concerns about possible wrongdoing at their own organisation (or their former organisation) and where they have been unable to raise or resolve those concerns internally.

³⁴ Recordings of radio programmes must be kept by broadcasters for 42 days after the broadcast. Recordings of television programmes must be kept for 60 days except in the case of ITV1, Channel 4, Channel 5 and S4C in which case recordings must be kept for 90 days. (But, see footnote 10 above)

³⁵ Broadcasters should be aware that they are required to ensure that Ofcom's functions in relation to content standards complaints are brought to the attention of the public. (These include functions which enable complainants to ask Ofcom to consider complaints where they are dissatisfied with the broadcaster's consideration of the complaint. Ofcom considers that, amongst other things, broadcasters should make clear to complainants the time limits that apply for pursuing complaints with Ofcom).

working days of the final response or determination by the relevant broadcaster under its procedures. If the complainant has not received a response to, or a determination of, his/her complaint from the broadcaster, the complainant should submit it to Ofcom within 20 working days of the time by which he/she could reasonably have expected a response or determination by the broadcaster under its procedures.

- A1.20 Where a complainant submits a complaint simultaneously to the broadcaster and to Ofcom, Ofcom will not normally proceed to consider the complaint until the broadcaster has first had an opportunity to resolve the complaint itself under its procedures. In such a case, the complainant should inform Ofcom when he/she has received the broadcaster's response or determination, and confirm whether he/she wishes to proceed with his/her complaint. (Time will start to run from the date of the broadcaster's response/determination as set out in paragraph A1.19 above).

Ofcom's initial assessment of a complaint

- A1.21 All complaints are important to Ofcom as they help us to understand whether a broadcaster may be failing to comply with the applicable provisions of the Broadcasting Code (or other Code to which these Procedures apply) in a particular case. Ofcom will log and acknowledge every complaint that it receives. However, it will not normally correspond any further with individual complainants. Ofcom will itself carry out a process of initial assessment and investigation in accordance with paragraphs A1.22 to A1.28 below.
- A1.22 Ofcom will first consider whether, on its face, a complaint raises potentially substantive issues under the Broadcasting Code (or other Code to which these Procedures apply) which warrant investigation by Ofcom. It will do so by reference to the gravity and/or extent of the matter complained of, including, for example, whether it involves ongoing harm, harm to minors and/or financial harm.
- A1.23 If Ofcom considers that it should assess the matter further, it may ask the broadcaster for a copy of the relevant programme at this stage, which must be provided within five working days.³⁶ We may also request any other background material or evidence we consider may be relevant to Ofcom's initial assessment of the complaint, however we will not normally request written representations from the broadcaster at this stage.
- A1.24 Based on an initial assessment of the complaint and a review of the relevant broadcast, Ofcom will consider whether there may have been a breach of particular provisions of the Broadcasting Code (or other Code to which these Procedures apply) which Ofcom considers requires a response from the broadcaster. If not, Ofcom will decide not to investigate further and will publish its decision in its Broadcast and On-demand Bulletin, which is published fortnightly on its website: <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>
- A1.25 Ofcom aims to complete an initial assessment of all complaints within 15 working days.

Investigating possible breaches

³⁶ It is a condition of all broadcast licences that a licensee must make and then retain a recording of all its programmes for a fixed period of days from broadcast, and at Ofcom's request must produce recordings "forthwith".

- A1.26 Other than in cases falling within paragraph A4.27 below, where Ofcom considers that a broadcaster may have failed to comply with particular provisions of the Broadcasting Code (or other Code to which these Procedures apply), Ofcom will write to the relevant broadcaster. Ofcom will summarise the material parts of the complaint, set out the particular provisions of the Broadcasting (or other) Code which it considers are relevant and applicable to the instant complaint, and invite the broadcaster to make representations in response (and to provide any relevant material/evidence in support of its representations) within 10 working days. Ofcom will publish details of programmes under investigation on its website at <http://stakeholders.ofcom.org.uk/enforcement/audience-complaints/>
- A1.27 There may be specific cases where the matter(s) in issue, on the facts, mean that Ofcom does not consider it necessary to seek representations from the broadcaster at this stage. This will normally be where the question of whether there is a breach of a relevant Code is a matter of objective fact (for example, relating to the number or length of advertisements). In these cases, Ofcom will not usually seek the broadcaster's representations at this stage (as in paragraph A1.26 above). Instead, Ofcom will write to the broadcaster with its Preliminary View on the substance of the complaint, as set out in paragraph A1.30 below. (There may also be other specific cases where the matter(s) in issue, on the facts, mean this approach is appropriate).
- A1.28 Ofcom aims to complete those cases that it takes forward for investigation within 50 working days.

Representations from third parties

Ofcom recognises that there may be persons/bodies who may be directly affected by the outcome of Ofcom's investigation and determination of a complaint and who may have interests independent of the relevant broadcaster of that programme (e.g. presenters, producers and/or independent programme-makers). Wherever possible, broadcasters should seek to take account of and include the representations of such persons/bodies in their submissions in response to a complaint and confirm to Ofcom that they have done so.

However, such persons/bodies may make representations on their own behalf direct to Ofcom in respect of a complaint which Ofcom proceeds to investigate. In such a case, persons/bodies should seek to make representations to Ofcom as early in an investigation of a complaint as possible, setting out if/to what extent their representations differ from those of the broadcaster. Ofcom will as appropriate take those representations into account and include those persons/bodies in its decision-making process under these Procedures.

Details of Ofcom's live investigations are available in its Broadcasting and On Demand Bulletin at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>

Preparation of Ofcom's Preliminary View

- A1.29 Ofcom will prepare its Preliminary View having taken account of the broadcaster's written representations, where provided. This Preliminary View is only provisional

and may be subject to change in the light of subsequent representations/material provided by the broadcaster³⁷: see paragraphs A1.32 and A1.33, below.

A1.30 All draft Preliminary Views will be provided to a panel of Ofcom's Content Board members³⁸ for their advisory opinion. The decision on Ofcom's Preliminary View will be taken by a senior member of Ofcom's Executive with appropriate Board-delegated authority. Typically, this would be the person who is responsible for overseeing the investigation. The Preliminary View will contain:

- a summary of the complaint;
- a summary of the material parts of the programme/broadcast to which the complaint relates;
- the particular provisions of the Broadcasting Code (or other Code to which these Procedures apply) which Ofcom considers are relevant and applicable to the complaint; and
- Ofcom's preliminary assessment of whether any breaches of those provisions have occurred and the reasons for that assessment.

A1.31 If in any case where Ofcom considers that it is necessary to obtain further information to ensure that it can fairly and properly prepare its Preliminary View, Ofcom may seek such information before preparing that view.

A1.32 When Ofcom has prepared its Preliminary View, Ofcom will provide it to the broadcaster (and any relevant third party) and request written representations within 10 working days.

A1.33 Ofcom considers that it will normally be able to reach a decision fairly and properly following written representations and without oral representations from the broadcaster. However, a broadcaster may, in any particular case, make a written request to make its representations orally to Ofcom in addition to any written representations. Ofcom will agree to such a request if Ofcom considers that an oral hearing is appropriate in view of the nature of the breach under consideration and the complexity of the issues raised³⁹.

The final Decision

A1.34 Once Ofcom has received and considered the broadcaster's representations (and/or any representations from a relevant third party) on its Preliminary View, it will reach its final decision.

A1.35 All draft decisions will be provided to a panel of Ofcom's Content Board members (who have not been involved in the investigation) for their advisory opinion before a final decision is taken. The final decision will be taken by a senior member of Ofcom's executive with appropriate Board-delegated authority, who will not have been involved in the investigation and/or the preparation of the Preliminary View.

³⁷ including any relevant third party (see "Representations from third parties" text box below).

³⁸ The Content Board is a committee of the main Ofcom Board established by the Communications Act 2003. It includes members with extensive broadcasting experience. See <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/content-board>

³⁹ The final decision maker would chair any oral hearing

Publication of Decision

- A1.36 Before publishing the Decision, Ofcom will provide the broadcaster, for information only with an embargoed copy of the Decision one working day before publication.
- A1.37 The Decision will be published in Ofcom's Broadcast and On-demand Bulletin on its website at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>

Non Disclosure

- A1.38 It is an essential part of the integrity of Ofcom's processes and its ability to regulate fairly that all parties concerned abide by Ofcom's published rules and procedures, including those relating to non disclosure below.

Non Disclosure

Parties to a complaint (complainants, broadcasters, Ofcom and any directly affected third parties) may, unless otherwise indicated, make public the fact that a complaint has been made or that Ofcom is investigating a case. They may also use any information which is already in the public domain.

However, parties should not disclose any correspondence, documents or other material concerning the complaint during the course of the investigation⁴⁰.

Failure to follow these requirements may result in Ofcom ceasing to consider the party's representations.

This does not limit what Ofcom can publish in its decision at the end of the investigation⁴¹.

Time limits

- A1.39 Complainants and broadcasters should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or properly to carry out an investigation) to amend or adapt the time limits set out in the Procedures in a particular case. Any complainant or broadcaster seeking an extension to a time limit should explain in writing to Ofcom why it believes it is appropriate.

Sanctions

- A1.40 Where Ofcom decides there has been a breach (or breaches) of the standards in section 319 of the 2003 Act (as reflected in the relevant provisions in the Broadcasting Code or other relevant Code), Ofcom may consider that it justifies consideration of a statutory sanction against the broadcaster. If so, Ofcom will make that clear in its Decision (under paragraphs A1.34 and A1.35 above) and the

⁴⁰ Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Information provided to Ofcom as part of a complaint may need to be disclosed by Ofcom in order to meet such obligations.

⁴¹ Ofcom may (in investigating and publishing its decision) withhold material it believes to be 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.

“Procedures for the consideration of statutory sanctions in breaches of broadcast licences” will apply.⁴² These are available on Ofcom’s website at [insert link].

Directions

A1.41 Ofcom has the power under the Broadcasting Acts⁴³ to issue a direction pursuant to a broadcaster’s licence.

A1.42 Ofcom may issue such a direction in any case it considers appropriate. This may include, for example, cases in which, in Ofcom’s view:

- the broadcaster has committed a serious breach of a relevant Code, but in which Ofcom does not think that the breach justifies consideration of a sanction against the broadcaster under Ofcom’s Sanctions Procedures referred to in paragraph A1.38 above;
- a broadcaster has failed to comply in a timely manner with any relevant requirement; and/or
- there are other reasons which make the taking of a specific step by a broadcaster appropriate.

A Notice of Direction will normally be published in Ofcom’s Broadcast and On-demand Bulletin.

A1.43 Failure by a broadcaster to comply with a direction issued by Ofcom pursuant to its licence can lead to the consideration of statutory sanctions against the broadcaster (for example, the imposition of a financial penalty, or the revocation of a licence). In such cases, the Sanctions Procedure referred to in the previous paragraph would apply.

⁴² The ASA may, under the terms of its Memorandum of Understanding with Ofcom, request Ofcom to consider a statutory sanction in an advertising case. In such cases, the ASA will normally have published a breach of its code.

⁴³ See, for example, sections 4(2) and 87(2) of the Broadcasting Act 1990.

Annex 2

Procedures for the consideration and adjudication of Fairness and Privacy complaints

Introduction

- A2.1 This document outlines the Procedures for Ofcom's consideration and adjudication of Fairness and Privacy complaints in relation to programmes⁴⁴ broadcast on television and radio and broadcasters' compliance with Ofcom's "fairness code" under section 107 of the Broadcasting Act 1996 (as amended)⁴⁶ ("the 1996 Act") see the "statutory framework" below. These Procedures are effective from 3 April 2017.⁴⁷
- A2.2 These Procedures do not apply to BBC UK Public Broadcasting Services and BBC UK Public On Demand Programme Services⁴⁸. Separate procedures apply to these services: https://www.ofcom.org.uk/data/assets/pdf_file/0030/99417/procedures-bbc.pdf. These procedures do apply to BBC commercial broadcasting companies licensed by Ofcom.
- A2.3 If Ofcom considers that it is necessary to depart from these Procedures in any material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to consider a complaint or carry out an investigation, it shall write to the parties concerned in advance setting out the nature/extent of its departure, and the reasons for doing so. (Separate procedures apply for investigating breaches of content standards for television and radio. These are available on the Ofcom website⁴⁹).

Statutory framework

- A2.4 Ofcom has a duty under section 3(2)(f) of the Communications Act 2003 ("the 2003 Act") to (among other things) secure the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public (and all other persons) from both unfair treatment in programmes included in such services and unwarranted infringements of privacy resulting from activities carried on for the purposes of such services. In securing the application of those standards, Ofcom must have regard to the need to do so in the manner that best guarantees an appropriate level of freedom of expression: section 3(4)(g) of the 2003 Act.

⁴⁴ References to "programmes" in these Procedures include advertisements, teletext, subtitles, and any item included in television and radio services.

⁴⁵ References to "broadcasters" in these Procedures are to any broadcaster licensed and/or regulated by Ofcom, with the exception of the BBC UK Public Broadcast Services.

⁴⁶ The Broadcasting Act 1996 was amended by the Communications Act 2003.

⁴⁷ The 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.

⁴⁸ Such as the BBC iPlayer and iPlayer Kids (both audiovisual and sound programmes).

⁴⁹ <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures>

- A2.5 Ofcom has a specific duty under section 107 of the 1996 Act to draw up a code giving guidance as to the principles to be observed and the practices to be followed by broadcasters in connection with the avoidance of unjust or unfair treatment⁵⁰ in programmes and unwarranted infringement of privacy in programmes (or in connection with the obtaining of material included in them). For the purposes of that duty, Ofcom applies the provisions in Sections Seven (“Fairness”) and Eight (“Privacy”) of the Ofcom Broadcasting Code (“the Broadcasting Code”)⁵¹, and broadcasters are required by the terms of their licence conditions to observe the provisions of the Broadcasting Code in the provision of their services and in relation to programmes included in their services.
- A2.6 Under section 110 of the 1996 Act (and subject to the other provisions of Part 5 of the 1996 Act), Ofcom also has a specific duty to consider and adjudicate on complaints which relate to unjust or unfair treatment in programmes or to unwarranted infringements of privacy in programmes (or in connection with the obtaining of material included in them). (These are collectively referred to below as “Fairness and/or Privacy complaints”). Sections 111 to 130 of the 1996 Act provide for certain statutory criteria which must be satisfied before Ofcom is entitled to proceed to consider Fairness and/or Privacy complaints, in addition to certain procedures to be followed by Ofcom, complainants and broadcasters.
- A2.7 However, in exceptional circumstances, where Ofcom considers it necessary in order to fulfil its duty under section 3(2)(f) of the 2003 Act to secure the application of standards that provide adequate protection to members of the public (and all other persons) from unfair treatment in programmes and unwarranted infringements of privacy, Ofcom may consider fairness or privacy issues in the absence of a complaint from “the person affected” (see paragraph 1.8 and the Entertainment Decision text box below). In those exceptional circumstances, Ofcom would set out in advance the procedures that it intends to follow⁵². The procedures would be similar to these but adapted as appropriate to ensure that they are fair in the particular circumstances.

Procedures

Making a complaint: who may make a complaint

- A2.8 Fairness and/or Privacy complaints may be made by an individual or by a body of persons (whether incorporated or not). However, Ofcom is normally under a duty not to entertain such a complaint unless it is made by “the person affected” or by a person authorised by him/her to make the complaint on their behalf: for further details on who can make a complaint, see the Entertainment Decisions text box below.
- A2.9 Ofcom encourages complainants with Fairness and/or Privacy concerns to follow the broadcaster’s own complaints procedures before making a complaint to Ofcom. The contact details of all radio and television broadcasters can be found on Ofcom’s website at <http://licensing.ofcom.org.uk/tv-broadcast-licences/current-licensees/> and <http://licensing.ofcom.org.uk/radio-broadcast-licensing/>. If a complainant is not satisfied with the broadcaster’s response to their complaint, the complaint can be

⁵⁰ Unjust or unfair treatment is defined by section 130 of the 1996 Act as including treatment which is unjust or unfair because of the way in which material included in a programme has been selected or arranged.

⁵¹ <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>

⁵² As Ofcom does, for example, in relation to complaints made to the Election Committee.

submitted to Ofcom. However, complaints can also be made directly to Ofcom in the first instance: see paragraphs A2.13 to A2.17 for the time limits on making a complaint.

Form of complaint & information to be provided

A2.10 Fairness and/or Privacy complaints must be submitted to Ofcom in writing. Ofcom will normally only consider such complaints if they are submitted through the completion of Ofcom's Fairness and Privacy Complaint form. (To access this complaint form, go to Ofcom's website at <https://www.ofcom.org.uk/tv-radio-and-on-demand/how-to-report-a-complaint> or contact: Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA, Tel No. 0300 123 3333 or 020 7981 3040).

A2.11 All complaints should include:

- the name/title of the programme complained about;
- the date and time of the programme;
- the channel on which it was broadcast;
- the standing of the complainant, (i.e. whether the complainant is "the person affected" or authorised by "the person affected" to make the complaint for them: see the Entertainment Decision text box below);
- the nature of the complaint and (where possible) the particular parts of the programme complained about;
- the complainant's full contact details (including email address where appropriate);
- whether (and, if so, when) the complainant has submitted a complaint to the relevant broadcaster (and details of it); and
- any supporting material/evidence which the complainant considers relevant to the substance of the complaint and/or their standing to make it.

A2.12 It is very important that the complainant provides as many of these details as possible when making a complaint. Failure to provide these details may prevent Ofcom from identifying the programme within a reasonable time and otherwise delay or prevent Ofcom being able to consider the complaint.

Time limits on making a complaint

A2.13 Ofcom may refuse to entertain a Fairness and/or Privacy complaint if it appears not to have been made with a reasonable time after the last occasion when the relevant programme was broadcast: section 111(5) of the 1996 Act. Accordingly, complainants should submit their complaint to Ofcom within 20 working days after broadcast of the relevant programme. Ordinarily, Ofcom will not accept a complaint which is submitted after this deadline.

A2.14 Where a complaint is submitted later than 20 working days after broadcast, complainants should explain why the complaint was not submitted earlier. Ofcom will then weigh up all relevant factors (including the complainant's explanation for

the delay in submitting the complaint) and decide whether or not it is appropriate for it to consider the complaint despite the delay in its submission.

- A2.15 Where a complainant has previously complained directly to the broadcaster, the complainant should wait to see if he/she is satisfied with the broadcaster's response (in accordance with the broadcaster's own complaints procedures) before referring it to Ofcom.⁵³ If not, the complainant should refer his/her complaint to Ofcom (with the broadcaster's response) as soon as possible, and in any event within 20 working days of the final response or determination by the relevant broadcaster under its procedures. If the complainant has not received a response to or determination of his/her complaint from the broadcaster, the complainant should submit it to Ofcom within 20 working days of the time by which he/she could reasonably have expected a response or determination by the broadcaster under its procedures.
- A2.16 Where a complainant submits a complaint simultaneously to the broadcaster and to Ofcom, Ofcom will not normally proceed to consider the complaint until the broadcaster has first had an opportunity to resolve the complaint itself under its procedures. In such a case, the complainant should inform Ofcom when he/she has received the broadcaster's response or determination, and confirm whether he/she wishes proceed with his/her complaint. (Time will start to run from the date of the broadcaster's response/determination as set out in paragraph A2.14 above).
- A2.17 In cases where a complaint is made under a broadcaster's own complaints procedures, Ofcom will expect the broadcaster to retain the relevant recordings, and any related material, for the periods of days that are required by statute⁵⁴ but running from the date on which the broadcaster may reasonably expect the complainant to have received the broadcaster's final determination.

Assessing whether to entertain a complaint

- A2.18 On receiving a complaint Ofcom will forward a copy of the complaint to the broadcaster and ask it to provide a recording of the programme within five working days.⁵⁵ At this stage, we will not normally request the broadcaster to provide written representations on the substance of the complaint.
- A2.19 If Ofcom considers that it requires further information from the complainant at this stage (for example, about their standing to make a complaint on their own or some other person's behalf, or about the substance of their complaint), it will write to the complainant requesting such information and will also provide it to the broadcaster.

⁵³ Broadcasters should be aware that they are required to ensure that Ofcom's functions in relation to Fairness and/or Privacy complaints are brought to the attention of the public. (These include functions which enable complainants to ask Ofcom to consider complaints where they are dissatisfied with the broadcaster's consideration of the complaint. Ofcom considers that, amongst other things, broadcasters should make clear to complainants the time limits that apply for pursuing complaints with Ofcom).

⁵⁴ The statutory requirements, derived from section 117 of the 1996 Act, and section 334 of the 2003 Act, are as follows. Recordings of radio programmes must be kept by broadcasters for 42 days after the broadcast. Recordings of television programmes must be kept for 60 days except in the case of ITV1, Channel 4, Channel 5 and S4C in which case recordings must be kept for 90 days.

⁵⁵ It is a condition of all broadcast licences that a licensee must make and then retain a recording of all its programmes for a fixed period of days from broadcast (see time periods in footnote immediately above and paragraph 1.17 above). If Ofcom requests it, the broadcaster must provide Ofcom with a copy of the recording to which a Fairness and Privacy complaint relates.

- A2.20 Ofcom will then decide whether or not to entertain the complaint. This decision is called the Entertainment Decision.
- A2.21 Ofcom aims to assess and decide whether to entertain a complaint within 25 working days of receipt of the complaint and any further information requested from the complainant (as set out in paragraph A2.19).

Entertainment Decisions

As explained above, Fairness and/or Privacy complaints are complaints about unjust or unfair treatment in programmes, or about unwarranted infringements of privacy in programmes (or in connection with the obtaining of material included in them).

These complaints may be made by an individual or by a body of persons (whether incorporated or not). However, Ofcom shall not entertain such a complaint unless it is made by “the person affected” or by a person authorised by “the person affected” to make the complaint for him/her: section 111(1) of the 1996 Act.⁵⁶

“The Person Affected” is a statutory term defined by section 130 of 1996 Act.

In relation to a Fairness complaint, i.e. a complaint of unjust or unfair treatment in a programme, “the person affected” means:

- a participant in the programme in question who was the subject of that treatment (“Participant” means a person who appeared, or whose voice was heard, in the programme); or
- a person who, whether such a participant or not, had a direct interest in the subject-matter of that treatment.

In relation to a Privacy complaint, i.e. a complaint of unwarranted infringement of privacy in a programme(s), or in connection with the obtaining of material included in a programme(s), “the person affected” means a person whose privacy was infringed.

The 1996 Act then sets out a number of other statutory criteria that must be satisfied before Ofcom may entertain or proceed to consider a Fairness and/or Privacy complaint. In particular, Ofcom is under a duty not to entertain a complaint where it appears to Ofcom that:

- the matter complained of is the subject of proceedings in a court of law in the UK; or

⁵⁶ This is subject to exceptions. Where “the person affected” is an individual who has died, a Fairness and/or Privacy complaint may be made by his personal representative or by a member of the family of the person affected, or by some other person or body closely connected with him (whether as his employer, or as a body of which he was at his death a member, or in any other way). Equally, where “the person affected” is an individual who is for any reason both unable to make a complaint him/herself and unable to authorise another person to do so for him/her, a fairness complaint may be made by a member of the family of “the person affected”, or by some other person or body closely connected with him (whether as his employer, or as a body of which he is a member, or in any other way): see section 111(2)&(3). (This will be appropriate if “the person affected” is unable to give his/her authority, because, for example, he/she is under the age of 16).

- the matter complained of is a matter in respect of which the complainant or the person affected has a remedy by way of proceedings in a court of law in the UK, and that in the particular circumstances it is not appropriate for Ofcom to consider a complaint about it; or
- the complaint is frivolous; or
- for any other reason it is inappropriate for Ofcom to entertain or proceed with consideration of the complaint.

(If any of the above matters become apparent to Ofcom in the course of a considering a complaint, it may cease to proceed with consideration of the complaint).

A2.22 The complainant and the broadcaster will be provided with a copy of Ofcom’s Entertainment Decision indicating whether (and to what extent) Ofcom will be proceeding with consideration of the complaint⁵⁷: see paragraph A2.24 below.

A2.23 Not all complaints (or all parts of complaints) received will fall into Ofcom’s Fairness and Privacy remit. If Ofcom considers that the complaint raises other (non Fairness and Privacy-related) matters which are within Ofcom’s wider remit, the complaint will be passed to an appropriate section of Ofcom for assessment. (For example, if a complaint is made in relation to general content standards under section 319 of the 2003 Act, then Ofcom’s “Procedures for investigating breaches of content standards for television and radio” will apply. These are available on Ofcom’s website at: <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures>).

Representations

A2.24 If a complaint is entertained by Ofcom, then at the same time that it provides the Entertainment Decision to the relevant broadcaster (under paragraph A1.22 above), Ofcom will also ask the broadcaster to provide a statement in response to the complaint within 20 working days. In doing so, Ofcom will set out the provisions of the Broadcasting Code which it considers are relevant and applicable to its subsequent consideration of the complaint, and seek representations from the broadcaster on that basis. Ofcom may also request a transcript of the relevant programme to be provided by the broadcaster, together with any other relevant material or documentation.

A2.25 On receipt of the broadcaster’s statement/representations, Ofcom will provide a copy of it to the complainant.

Preparation of Ofcom’s Preliminary View

A2.26 Ofcom will then prepare its Preliminary View on the substance of the complaint having taken account of the broadcaster’s statement/representations where provided. This Preliminary View is only provisional and may be subject to change in

⁵⁷ Details of all programmes being investigated (i.e. if a Fairness and/or Privacy complaint has been entertained), will be published on Ofcom’s website at <http://stakeholders.ofcom.org.uk/enforcement/audience-complaints/>

the light of subsequent representations/material provided by the complainant and the broadcaster⁵⁸: see paragraphs A2.28 and A2.29, below.

A2.27 All draft Preliminary Views will be provided to a panel of Ofcom's Content Board members⁵⁹ for their advisory opinion. The decision on Ofcom's Preliminary View will be taken by a senior member of Ofcom's Executive with appropriate Board delegated authority. Typically, this would be the person who is responsible for overseeing the investigation. The Preliminary View will contain:

- a summary of the entertained complaint (or the particular parts of the complaint which have been entertained) as set out in the relevant Entertainment Decision;
- a summary of the material parts of the programme(s) to which the complaint relates;
- the particular provisions of the Broadcasting Code which Ofcom considers are relevant and applicable to the entertained complaint;
- a summary of the broadcaster's statement of representations in response; and
- Ofcom's preliminary assessment of whether any breaches of those provisions have occurred and the reasons for that assessment.

A2.28 Ofcom will then provide the Preliminary View to the complainant and request representations within 10 working days. After receiving any representations from the complainant Ofcom will provide both the Preliminary View and those representations to the broadcaster, requesting its representations within 10 working days. In some circumstances, Ofcom may decide that it is appropriate, fair and necessary to hold a hearing before reaching a decision⁶⁰ (see "Hearings" box below). Where it does so, Ofcom will prepare its Preliminary View after it has held the hearing.

A2.29 Once Ofcom has received and considered the broadcaster's and complainant's representations (or any representations from relevant third parties (see relevant text below) on its Preliminary View, it will then make its final Adjudication. If Ofcom considers that it is necessary to obtain further information from either party⁶¹ to ensure that it can fairly and properly adjudicate on the complaint (for example, if there is a significant dispute of fact between the complainant and the broadcaster), Ofcom may seek such further information.

A2.30 Ofcom aims to complete the consideration and adjudication of Fairness and Privacy complaints within 90 working days of the complaint being entertained.

Hearings

⁵⁸ including any relevant third party (see "Representations from third parties" text box below).

⁵⁹ The Content Board is a committee of the main Ofcom Board established by the Communications Act 2003. It includes members with extensive broadcasting experience. See <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/content-board>

⁶⁰ The final decision maker would chair any oral hearing

⁶¹ or a relevant third party.

Fairness and/or Privacy complaints made to Ofcom shall be considered either at a hearing, or if Ofcom thinks fit, without a hearing. Ofcom will normally hold an oral hearing if it considers that a one is necessary to ensure that it can fairly and properly adjudicate on the complaint. For example, if there is a significant dispute of fact between the complainant and the broadcaster. Ofcom will normally give at least 15 working days' notice of the hearing date to the parties. Hearings may take place in England, Northern Ireland, Scotland, or Wales, as appropriate.

Hearings are held in private and each of the following persons shall be given an opportunity to attend and to make oral representations:

- (a) the complainant;
- (b) the relevant broadcaster;
- (c) the programme-maker responsible for the making of the programme complained about (if different from the relevant broadcaster); and
- (d) any other person who Ofcom considers might be able to assist at the hearing.

Each of the parties may bring to the hearing any other person (normally up to a maximum of three other people). Their names, connection to the case and a description of the role they intend to play at the hearing, should be given to Ofcom at least five working days before the hearing. Ofcom must also be informed if any person to attend a hearing is under the age of 16.

The procedure at the hearing will be at the discretion of Ofcom. Ofcom will write to the parties in advance of any hearing to set out what the procedure will be.⁶²

Late submission of material/representations

- A2.31 Parties should only submit representations and relevant material/evidence to Ofcom when requested to do so at the appropriate stages of these Procedures. Ofcom will not normally accept submission of any additional representations or material once it has proceeded to draft its final Adjudication (see paragraph A2.32 below).
- A2.32 Whether such material is admitted will be at Ofcom's discretion. If unsolicited material is admitted it will be provided to the other party who will then be given an opportunity to comment on it.

Representations from third parties

Ofcom recognises that there may be persons/bodies who may be directly affected by the outcome of Ofcom's consideration and adjudication of a complaint and who may have interests independent of the relevant broadcaster of that programme (for example, presenters, producers and/or independent programme-makers). Wherever possible, broadcasters should seek to take account of and include the representations of such

⁶² Together with details of who from Ofcom, including any Non-Executive members of Ofcom's Content Board, will attend.

persons/bodies in their submissions in response to a complaint and confirm to Ofcom that they have done so.

However, such persons/bodies may make representations on their own behalf direct to Ofcom in respect of a complaint which Ofcom proceeds to investigate. In such a case, persons should seek to make representations to Ofcom as early in an investigation of a complaint as possible, setting out if/to what extent their representations differ from those of the broadcaster. Ofcom will as appropriate take those representations into account and include those persons/bodies in its decision-making process under these Procedures.

Details of all programmes being investigated (i.e. if a Fairness and/or Privacy complaint has been entertained) are published on Ofcom's website at:

<http://stakeholders.ofcom.org.uk/enforcement/audience-complaints/>

The final Adjudication and publication

- A2.33 Once Ofcom has gathered and considered the relevant evidence and (written/oral) representations submitted by the parties, Ofcom will conclude its consideration of a complaint by preparing a final Adjudication setting out whether the complaint is upheld, not upheld, or upheld in part. All draft Adjudications will be provided to a panel of Ofcom's Content Board members (who have not been involved in the preparation of the Preliminary View) for their advisory opinion before a final Adjudication is taken. The decision on the final Adjudication will be taken by a senior member of Ofcom's executive with appropriate Board-delegated authority who will have overseen the preparation of the draft Adjudication and who will not have been involved in the investigation and/or preparation of the Entertainment Decision and/or the Preliminary View.
- A2.34 Before publishing its final Adjudication, Ofcom will provide the broadcaster and complainant, for information only with an embargoed draft copy of the final Adjudication one working day before publication.
- A2.35 Adjudications will be published in Ofcom's Broadcast and On-demand Bulletin on its website at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>
- A2.36 If a complaint is upheld or partly upheld, Ofcom may direct the broadcaster to broadcast a summary of its Adjudication. Ofcom will normally make such a direction where there has been a breach of the Fairness and/or Privacy sections of the Ofcom Broadcasting Code which has resulted in a complainant's legitimate interests being seriously damaged and requires publication over and above publication in the Ofcom Broadcast and On-demand Bulletin.⁶³ Any decision to direct will reflect Ofcom's duties to be proportionate, consistent and targeted only at cases on which, in Ofcom's view, action is merited.

Non Disclosure

- A2.37 It is an essential part of the integrity of Ofcom's processes and its ability to adjudicate fairly that all parties concerned abide by Ofcom's published rules and procedures, including those relating to non disclosure below.

⁶³ But Ofcom may also make such a direction in other cases in which it considers publication over and above publication in the Ofcom Broadcast and On-demand Bulletin is appropriate.

Non Disclosure

Parties to a complaint (complainants, the broadcaster, Ofcom and any relevant third party) may, unless otherwise indicated, make public the fact that a complaint has been made or that Ofcom is investigating a case. They may also use information which is already in the public domain.

However, parties should not disclose any correspondence, documents or other material concerning the complaint during the course of the investigation.⁶⁴ Prior to Ofcom's final decision, the identity of a complainant may only be disclosed by the BBC or a third party to those with a direct interest in the matter complained of.

Failure to follow this requirement may result in Ofcom ceasing to consider the party's representations.

This does not limit what Ofcom can publish in its decision at the end of the investigation.⁶⁵

Time limits

- A2.38 Complainants and broadcasters should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or properly to consider a complaint) to amend or adapt the time limits set out in these Procedures in a particular case. Any complainant or broadcaster seeking an extension of a time limit should explain in writing to Ofcom why it believes it is appropriate. Ofcom will then decide if an extension is appropriate and inform the other party/parties accordingly.

Sanctions

- A2.39 In the light of its adjudication of a Fairness and/or Privacy complaint, Ofcom may consider that it justifies consideration of a statutory sanction against the broadcaster. If so, then Ofcom will make that clear in its Adjudication and the "Procedures for the consideration of statutory sanctions in breaches of broadcast licences" will then apply. These are available on Ofcom's website at: <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures>.

⁶⁴ Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Information provided to Ofcom as part of a complaint may need to be disclosed by Ofcom in order to meet such obligations.

⁶⁵ Ofcom may (in investigating and publishing its Adjudication) withhold material it believes to be 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.

Annex 3

General procedures for investigating breaches of broadcast licences

Introduction

- A3.1 This document outlines Ofcom’s General procedures for investigating possible breaches by broadcasters⁶⁶ (“the General Procedures”) which are not covered by any of the specific procedures set out below in paragraph A3.11.
- A3.2 The General Procedures set out in this document are those Ofcom will usually follow in order to investigate whether a breach of a “relevant requirement” (as set out at paragraph A3.13 below) has occurred, before any action may be taken under the *Procedures for the consideration of statutory sanctions in breaches of broadcast licences* (“the Sanctions Procedures”).⁶⁷
- A3.3 These Procedures do not apply to BBC UK Public Broadcasting Services and BBC UK Public On Demand Programme Services⁶⁸. Separate procedures apply to these services: https://www.ofcom.org.uk/_data/assets/pdf_file/0030/99417/procedures-bbc.pdf. These procedures do apply to BBC commercial broadcasting companies licensed by Ofcom.
- A3.4 The General Procedures set out in this document are effective from 3 April 2017.
- A3.5 If Ofcom considers that it is necessary to depart from these General Procedures in any material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to consider a complaint or carry out an investigation, it will write to the broadcaster concerned (and any other relevant parties) in advance, setting out the nature/extent of its departure, and its reasons for doing so.

Statutory framework

- A3.6 The main statutes governing broadcasting are the Broadcasting Act 1990 (“the 1990 Act”), the Broadcasting Act 1996 (“the 1996 Act”) and the Communications Act 2003 (“the 2003 Act”). These statutes impose general duties on Ofcom in relation to broadcasting, and include the duty to secure the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests (section 3(2)(c) of the 2003 Act).
- A3.7 Ofcom also has more specific duties in relation to, for example:⁶⁹

⁶⁶ References to “broadcasters” in these General Procedures are to any radio or television broadcaster licensed and/or regulated by Ofcom.

⁶⁷ https://www.ofcom.org.uk/_data/assets/pdf_file/0030/71967/procedures_for_consideration.pdf

⁶⁸ Such as the BBC iPlayer and iPlayer Kids (both audiovisual and sound programmes).

⁶⁹ This is not an exhaustive list of Ofcom’s specific duties that give rise to relevant requirements to which these General Procedures apply.

- the requirement for certain types of radio station to deliver specific types of music or speech content (sections 106 of the 1990 Act and 314 of the 2003 Act);
- the requirements relating to independent, original and regional programming on public service television services (Chapter 4 of Part 3 of the 2003 Act);
- the requirements in television licences relating to European production and European independent production (section 335 of the 2003 Act);
- the provision of subtitling, signing and audio description on relevant television services (sections 303 to 307 of the 2003 Act); and
- applying rules restricting those who may hold broadcasting licences (sections 5 and 88 of the 1990 Act and sections 5 and 44 of the 1996 Act).

A3.8 Ofcom carries out its duties by granting licences to certain radio and television broadcasters and including in those licences conditions it thinks are appropriate to help it carry out its duties.⁷⁰ These conditions include requirements upon licensees to offer specific programmes and types of content, to provide information to Ofcom to enable us to perform our regulatory functions⁷¹ and to pay fees and to comply with various codes issued by Ofcom. Examples of relevant codes are listed in paragraph A3.13.

The Welsh Authority

A3.9 The Welsh Authority (which operates its television service under the name S4C) does not require a licence from Ofcom but is nonetheless subject to certain requirements.⁷²

A3.10 Relevant requirements that the Welsh Authority are subject to include those under the Code on Television Access Services,⁷³ requirements on independent programme quotas⁷⁴ and retaining and producing recordings when required by Ofcom to do so.⁷⁵

When do these General Procedures apply?

A3.11 Ofcom has produced specific procedures which apply to investigations of potential breaches of certain categories of regulatory requirement. These specific procedures are listed in the table below. A breach of the types shown in the table below would

⁷⁰ See sections 3 and 4 of the 1990 Act and sections 3 and 4 of the 1996 Act (for television services) and sections 85 to 87 of the 1990 Act and sections 42 and 43 of the 1996 Act (for radio services).

⁷¹ For example, information about changes in those controlling broadcasters, annual reports from community radio stations and annual relevant turnover data from specified radio and television licensees.

⁷² Relevant provisions governing the Welsh Authority are sections 203 and 338 of, and Schedule 12 to, the 2003 Act, as well as provisions such as those in Part IV of the 1996 Act.

⁷³ Applicable to the Welsh Authority under sections 203 and 338 of, and Schedule 12 to, the 2003 Act.

⁷⁴ Applicable to the Welsh Authority under sections 203 and 338 of, and paragraph 7 of Part 2 of Schedule 12 to, the 2003 Act.

⁷⁵ Applicable to the Welsh Authority under sections 203 and 338 of, and paragraph 20 of Schedule 12 to, the 2003 Act.

generally be investigated under the corresponding specific procedure and would not be covered by these General Procedures.

Category of regulatory requirement	Specific procedure
Content standards objectives set out under section 319 of the 2003 Act and applied in the Ofcom Broadcasting Code and other codes. ⁷⁶	Procedures for investigating breaches of content standards for television and radio. ⁷⁷
Fairness and/or privacy requirements set out under Part 5 of the 1996 Act and applied in the Ofcom Broadcasting Code.	Procedures for the consideration and adjudication of Fairness & Privacy complaints. ⁷⁸
Licence conditions and relevant codes to ensure fair and effective competition in the provision of broadcast services. ⁷⁹	Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences; ⁸⁰ Advice for complainants: submitting a complaint to Ofcom. ⁸¹

A3.12 These General Procedures apply to investigations of breaches of all other categories of regulatory requirement which are not included in the list above. These requirements are referred to in this document as “relevant requirements”.

A3.13 The relevant requirements include, for example, requirements placed upon broadcasters to:

- broadcast certain types of content (e.g. radio formats and delivery of news and regional programming quotas);
- comply with television licence obligations to fulfil certain production and programming quotas set out in accordance with UK and European legislation;

⁷⁶ “Other codes” includes the *Cross-Promotion Code* and the *Code on the Scheduling of Television Advertising*. These codes and the Broadcasting Code can be found on Ofcom’s website at <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code>. It also includes the UK Code of Broadcast Advertising, which can be found at <https://www.cap.org.uk/Advertising-Codes/Broadcast.aspx>.

⁷⁷ [See Annex 1]

⁷⁸ [See Annex 2]

⁷⁹ The Code on Electronic Programme Guides (“EPG”) sets out practices to be followed by EPG providers to (i) give appropriate prominence for public service channels, (ii) provide features and information needed to enable EPGs to be used by people with disabilities affecting their sight or hearing or both and (iii) secure fair and effective competition (https://www.ofcom.org.uk/_data/assets/pdf_file/0031/19399/epgcode.pdf). Generally, Ofcom will apply the *Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences* for breaches of (iii), and these General Procedures for breaches of (i) and (ii).

⁸⁰ [See Annex 3]

⁸¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0029/96806/Draft-advice-for-complainants.pdf

- provide Ofcom with information it has requested;
- pay fees; and
- comply with various codes, such as:
 - the Code on Television Access Services (i.e. subtitling, sign language and audio description);⁸²
 - the Code on Sports and Other Listed and Designated Events⁸³
 - the Code on Electronic Programme Guides (in respect of issues relating to prominence of public service channels and access services);⁸⁴ and
 - technical codes for television⁸⁵ and radio.⁸⁶

General Procedures

A3.14 Ofcom may launch investigations on its own initiative as well as investigate complaints made by others. The General Procedures in a complaint-led investigation and an Ofcom-initiated investigation are the same.

Making a complaint

A3.15 Complaints under these General Procedures can be made to Ofcom by any person or body who considers that a broadcaster has failed to comply with a relevant requirement.

A3.16 Unless a complainant asks Ofcom not to do so, Ofcom may disclose the complainant's identity to the broadcaster that is the subject of the complaint as well as sharing a non-confidential version of the complaint submission with it for comment. Ofcom will consider requests from complainants to remain anonymous. However, it may not be feasible to open or conduct an investigation without revealing the identity of the complainant. This does not apply to whistleblowers.⁸⁷

⁸² <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/tv-access-services/code-tv-access-services-2015>.

⁸³ https://www.ofcom.org.uk/_data/assets/pdf_file/0029/35948/ofcom_code_on_sport.pdf.

⁸⁴ https://www.ofcom.org.uk/_data/assets/pdf_file/0031/19399/epgcode.pdf. See also footnote [79] above.

⁸⁵ For example, the Television Technical Performance Code

(https://www.ofcom.org.uk/_data/assets/pdf_file/0023/58910/tv_tech_platform_code.pdf).

⁸⁶ For example, the Site Engineering Code for Analogue Radio Broadcast Transmission Systems (https://www.ofcom.org.uk/_data/assets/pdf_file/0017/37133/code2013.pdf), the Digital Technical Code (https://www.ofcom.org.uk/_data/assets/pdf_file/0023/47831/digi_tech_code.pdf) and the Technical policy guidance for DAB multiplex licensees (https://www.ofcom.org.uk/_data/assets/pdf_file/0017/51650/policy_guidance.pdf).

⁸⁷ Ofcom is a "prescribed person" under Part IVA of the Employment Rights Act 1996 (as inserted by the Public Interest Disclosure Act 1998) to which "qualifying disclosures" can be made about certain matters, including broadcasting and the provision of television and radio services. Ofcom has published guidance (available on our website at: <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines>) on how individuals working in the communications sector may contact us if they have concerns about possible wrongdoing at their own organisation (or their former organisation) and where they have been unable to raise or resolve those concerns internally.

Complaints relating to broadcast content

A3.17 Complaints relating to broadcast content which fall under these General Procedures should be made as soon as possible after the relevant broadcast or occurrence due to the time limits for broadcasters retaining recordings of their output.⁸⁸

A3.18 Complaints considered under these General Procedures are dealt with by Ofcom according to the type of broadcasting service. Please send your complaint to the appropriate email address:

- Complaints about a television channel: tv.licensing@ofcom.org.uk.
- Complaints about a community radio station: community.radio@ofcom.org.uk.
- Complaints about a commercial radio station: commercial.radio@ofcom.org.uk.
- Complaints about a temporary radio station (also known as a Restricted Service Licence or RSL): rsenquiries@ofcom.org.uk.

A3.19 Alternatively, you can contact us at: Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA, or telephone 0300 123 3333 or 020 7981 3040.

Complaints relating to access services (subtitling, sign language and audio description)

A3.20 In the case of complaints about the provision of subtitling, sign language and audio description, complainants can, if they wish, seek to resolve the matter directly with the broadcaster before making a complaint to Ofcom⁸⁹. We understand that this has previously produced speedy and effective resolution of complaints and that receiving complaints and feedback from consumers assists broadcasters in improving the quality of the access services they provide. If you are not satisfied with the response you receive from the broadcaster then please complete our [complaint form](#).⁹⁰

A3.21 People with sensory impairments who find it easier to do so may call our text phone on 020 7981 3043 (please note that this number only works with special equipment used by people who are deaf or hard of hearing). People with visual impairments wishing to complain about audio description may wish to use our dedicated email address: adcomplaints@ofcom.org.uk. A Video Relay Service to contact Ofcom in British Sign Language is available on Ofcom's website.

A3.22 Alternatively, you can contact us at: Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA, or telephone 0300 123 3333 or 020 7981 3040.

⁸⁸ Recordings of radio programmes must be kept by broadcasters for 42 days after the broadcast. Recordings of television programmes must be kept by cable and satellite broadcasters for 60 days, and by ITV, STV, UTV, Channel 4, Channel 5, S4C and digital terrestrial television channels for 90 days.

⁸⁹ The contact details of all television broadcasters can be found on Ofcom's website at <https://www.ofcom.org.uk/manage-your-licence/tv-broadcast-licences/current-licensees>.

⁹⁰ <https://ofcomforms.secure.force.com/formentry/SitesFormCSLEStandardsComplaints>.

Information to be included in a complaint

A3.23 All complaints should include sufficient detail about the matter complained of to enable Ofcom to investigate fully. All complaints should, therefore, include: details about what is alleged to have been done, or not done, by which broadcaster, when, where and how. The complainant's full contact details (including email address where appropriate) should also be included. The inclusion of these details (or as many of them as possible) is very important. A failure to provide them may mean that Ofcom is not able to investigate the complaint.

Initial assessment

A3.24 Ofcom may investigate a broadcaster's compliance with a relevant requirement following receipt of a complaint or on its own-initiative (for example, where information comes to Ofcom's attention during routine monitoring). When deciding whether to open an investigation, Ofcom will first consider whether, on its face, there are potentially substantive issues in relation to a relevant requirement which warrant investigation by Ofcom. It will do so by reference to the gravity and/or extent of the matter at issue.

A3.25 If Ofcom considers that it should assess the matter further, it may at this stage provide the broadcaster with a non-confidential version of the complaint (if applicable) and ask the broadcaster for information to assist our consideration of the matter(s), and/or – in cases relating to the output of a broadcast service – recordings of the relevant output/programme(s), which must normally be provided within five working days.⁹¹

A3.26 Based on an initial assessment of the issue and any complaint and a review of any relevant broadcast output, Ofcom will consider whether there may have been a breach of a relevant requirement(s). Ofcom aims to complete an initial assessment usually within 15 working days.

A3.27 Where, following the initial assessment, Ofcom decides not to investigate further, Ofcom will normally notify the complainant of its decision. If Ofcom has contacted the broadcaster for information or recordings to assist in the assessment of the issue or complaint, Ofcom will notify the broadcaster of its decision not to pursue the matter. Ofcom will also normally publish details of its decision not to investigate in a table in its Broadcast and On-demand Bulletin⁹². However, there may be some cases where Ofcom considers it would be inappropriate to publicise the matter, for example because the issues raised are particularly sensitive and/or publicity could have a detrimental impact on third parties (although there may be exceptional cases where we do publish in such circumstances, such as where there is a high level of public interest in the matter complained of).

Investigating possible breaches

A3.28 Where, following Ofcom's initial assessment, Ofcom decides to open an investigation into a broadcaster's compliance with a particular relevant requirement, Ofcom will generally inform the broadcaster and any complainant by sending them each a case opening letter explaining the scope of Ofcom's investigation (i.e. the

⁹¹ It is a condition of all broadcast licences that a licensee must make and then retain a recording of all its programmes for a fixed period of days from broadcast.

⁹² <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/broadcast-bulletins>

particular relevant requirement(s) which Ofcom considers are relevant and applicable to the complaint(s) or matters concerned).

- A3.29 Shortly after sending the case opening letter(s), Ofcom will normally publish details of issues under investigation in a table in its Broadcast and On-demand Bulletin. However, there may be some cases where Ofcom considers that it would be inappropriate to publicise the matter at this stage, for example because the issues raised are particularly sensitive and/or publicity could have a detrimental impact on third parties (although there may be exceptional cases where we do publish in such circumstances, such as where there is a high level of public interest in the matter complained of). In such cases, Ofcom may delay publicising the investigation until after Ofcom has completed its consideration of the broadcaster's compliance with a relevant requirement, or may decide not to publicise such cases at all (see further at paragraphs A3.44 and A3.46 below).
- A3.30 Other than in cases falling within paragraph A3.31 below, when Ofcom sends the broadcaster the case opening letter, Ofcom will invite the broadcaster to make representations in response (and to provide any relevant material/evidence in support) within 10 working days.
- A3.31 If in any case Ofcom considers that it is necessary to obtain further information to ensure that it can fairly and properly prepare its Preliminary View, Ofcom may seek such information before preparing that View.
- A3.32 There may be specific cases where the matter(s) in issue, on the facts, mean that Ofcom does not consider it necessary to seek representations or any further information from the broadcaster at this stage. This will normally be where the question of whether there is a breach of a relevant requirement is a matter of objective fact (for example, relating to whether a broadcaster has paid licence fees). There may also be other specific cases where the matter(s) in issue, on the facts, mean this approach is appropriate. In these cases, Ofcom will not usually seek the broadcaster's representations at this stage. Instead, Ofcom will write to the broadcaster with its Preliminary View on the substance of the matter(s).
- A3.33 Ofcom aims to complete those cases that it takes forward for investigation usually within 50 working days.

Representations from third parties

Ofcom recognises that there may be persons/bodies who may be directly affected by the outcome of Ofcom's investigation and determination of a complaint(s) and who may have interests independent of the relevant broadcaster. Wherever possible, broadcasters should seek to take account of and include the representations of such persons/bodies in their submissions in response to a complaint and confirm to Ofcom that they have done so.

However, such persons/bodies may make representations on their own behalf direct to Ofcom in respect of a complaint which Ofcom proceeds to investigate. In such a case, persons/bodies should seek to make representations to Ofcom as early in an investigation of a complaint as possible, setting out if/to what extent their representations differ from those of the broadcaster. Ofcom will as appropriate take those representations into account and include those persons/bodies in its decision-making process under these General Procedures.

Preparation of Ofcom's Preliminary View

- A3.34 Ofcom will prepare its Preliminary View on the substance of the possible breach of the relevant requirement(s). This Preliminary View is only provisional and may be subject to change in the light of subsequent representations/material provided by the broadcaster⁹³: see paragraphs A3.38 and A3.40, below.
- A3.35 Where Ofcom considers in a particular case that it would be appropriate in order to reach its Preliminary View, Ofcom will provide a draft Preliminary View to a panel of Ofcom's Content Board members⁹⁴ for their advisory opinion. The decision to issue a Preliminary View will be taken by a senior member of Ofcom's Executive with appropriate Board-delegated authority. Typically, this would be the person who is responsible for overseeing the investigation.
- A3.36 The Preliminary View will contain:
- a summary of the matter and, if relevant, any complaint;
 - a summary, if relevant, of the material parts of any broadcast output to which the matter and/or any complaint relates;
 - the particular relevant requirements which Ofcom considers are relevant and applicable to the matter/complaint; and
 - Ofcom's preliminary assessment of whether any breaches of those requirements have occurred and the reasons for that assessment.
- A3.37 When Ofcom has prepared its Preliminary View, Ofcom will provide it to the broadcaster (and any relevant third party).
- A3.38 The broadcaster (and any relevant third party) will have the opportunity to make written representations on Ofcom's Preliminary View. The period for written representations will normally be 10 working days.
- A3.39 Ofcom considers that it will normally be able to reach its final Decision fairly and properly following written representations and without oral representations from the broadcaster. However, there may be some cases where, in view of the nature of the breach under consideration and the complexity of the issues raised, Ofcom considers it appropriate to give the broadcaster the opportunity to make its representations orally to Ofcom, following the submission of any written representations to Ofcom. Ofcom will inform the broadcaster if it considers that it is appropriate to offer the broadcaster the opportunity to make oral representations in a particular case⁹⁵.
- A3.40 In any event, a broadcaster may, in any particular case, make a written request to make its representations orally to Ofcom in addition to any written representations. Ofcom will agree to such a request if Ofcom considers that an oral hearing is appropriate in view of the nature of the breach under consideration and the complexity of the issues raised.

⁹³ including any relevant third party (see "Representations from third parties" text box below).

⁹⁴ The Content Board is a committee of the main Ofcom Board established by the Communications Act 2003. It includes members with extensive broadcasting experience. See <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/content-board>

⁹⁵ The final decision maker would chair any oral hearing

The final Decision

- A3.41 Once Ofcom has received and considered the broadcaster's representations on its Preliminary View (if any) and/or any representations from a relevant third party, it will reach its final decision (i.e. whether or not to record a breach of a licence or other relevant requirements) ("the Decision").
- A3.42 Where a panel of Content Board members has reviewed in the draft Preliminary View in a particular case, generally the draft decision in that case would be provided to a panel of Ofcom's Content Board members (who have not been involved in the investigation) for their advisory opinion before a final decision is taken.
- A3.43 The final decision will be taken by a senior member of Ofcom's executive with appropriate Board-delegated authority, who will not have been involved in the investigation and/or the preparation of the Preliminary View.

Publication of Decision

- A3.44 Where Ofcom has found that a broadcaster has breached a relevant requirement(s), Ofcom will publish its Decision in Ofcom's Broadcast and On-demand Bulletin⁹⁶ and/or in the relevant broadcast licensing section of the website. Ofcom will normally publish all breach and resolved Decisions, even where Ofcom has not previously publicised details of the matters under investigation in accordance with paragraph A3.29 above.
- A3.45 Ofcom will provide the broadcaster for information only with an embargoed copy of the Decision one working day before publication.
- A3.46 Ofcom will also normally publish information in its Broadcast and On-demand Bulletin about Decisions in which it has found that the broadcaster has **not** breached a relevant requirement. However, where Ofcom has not published details of an issue under investigation in accordance with paragraph A3.32 Ofcom would not normally publish a "not in breach" decision at the conclusion of the investigation.

Non Disclosure

- A3.47 It is an essential part of the integrity of Ofcom's processes and its ability to regulate fairly that all parties concerned abide by Ofcom's published rules and procedures, including those relating to non-disclosure below.

Non Disclosure

Parties (complainants, broadcasters, Ofcom and any directly affected third parties) may, unless otherwise indicated, make public the fact that a complaint has been made or that Ofcom is investigating a case. They may also use any information which is already in the public domain.

However, parties should not disclose any correspondence, documents or other material concerning the complaint during the course of the investigation⁹⁷.

⁹⁶ <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/broadcast-bulletins>.

⁹⁷ Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations

Failure to follow these requirements may result in Ofcom ceasing to consider the party's representations.

This does not limit what Ofcom can publish in its Decision at the end of the investigation⁹⁸.

Time limits

A3.48 Complainants and broadcasters should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or properly to carry out an investigation) to amend or adapt the time limits set out in the Procedures in a particular case. Any complainant or broadcaster seeking an extension to a time limit should explain in writing to Ofcom why it believes it is appropriate.

Sanctions

A3.49 Where Ofcom decides that there has been a breach (or breaches) of a relevant requirement, Ofcom may consider that it justifies consideration of a statutory sanction against the broadcaster. If so, Ofcom will make that clear in its Decision "Procedures for the consideration of statutory sanctions in breaches of broadcast licences" will apply. These are available on Ofcom's website at [link].

Directions

A3.50 Ofcom has the power under the Broadcasting Acts⁹⁹ to issue a direction pursuant to a broadcaster's licence.

A3.51 Ofcom may issue such a direction in any case it considers appropriate. This may include, for example, cases in which, in Ofcom's view:

- the broadcaster has committed a serious breach of a relevant Code, but in which Ofcom does not think that the breach justifies consideration of a sanction against the broadcaster under Ofcom's Sanctions Procedures referred to in paragraph A3.38 above;
- a broadcaster has failed to comply in a timely manner with any relevant requirement; and/or
- there are other reasons which make the taking of a specific step by a broadcaster appropriate.

A3.52 A Notice of Direction will normally be published in Ofcom's Broadcast and On-demand Bulletin.

A3.53 Failure by a broadcaster to comply with a direction issued by Ofcom pursuant to its licence can lead to the consideration of statutory sanctions against the broadcaster (for example, the imposition of a financial penalty, or the revocation of a licence). In

2004). Information provided to Ofcom as part of a complaint may need to be disclosed by Ofcom in order to meet such obligations.

⁹⁸ Ofcom may (in investigating and publishing its decision) withhold material it believes to be 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.

⁹⁹ See, for example, sections 4(2) and 87(2) of the Broadcasting Act 1990.

such cases, the Sanctions Procedure referred to in the previous paragraph would apply.

Annex 4

Procedures for the consideration of statutory sanctions in breaches of broadcast licences

Introduction

- A4.1 This document outlines the Procedures that Ofcom will normally follow when considering the determination of a sanction against broadcasters¹⁰⁰ for breaches of any requirement of their licence (with the exception of breaches of competition-related conditions in Broadcasting Act licences)¹⁰¹; or in the case of S4C¹⁰², who do not hold a licence, any relevant enforceable requirement (see paragraph A4.11 below). In this document all these requirements are referred to as “a relevant requirement.” These Procedures are effective from 3 April 2017.
- A4.2 These procedures do not apply to BBC UK Public Broadcasting Services and BBC UK Public On Demand Programme Services¹⁰³. Separate sanctions procedures apply to these services:
https://www.ofcom.org.uk/data/assets/pdf_file/0030/99417/procedures-bbc.pdf
These procedures do apply to BBC commercial broadcasting companies licensed by Ofcom.
- A4.3 If Ofcom considers that it is necessary to depart from these Procedures in any material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to determine a sanction, it shall write to the broadcaster concerned in advance setting out the nature and extent of its departure, and its reasons for doing so.

Statutory framework

- A4.4 Ofcom’s duties in relation to broadcasting include securing the application, in the case of all television and radio services, of standards that provide adequate protection:
- to members of the public from offensive or harmful material in such services: section 3(2)(e) of the Communications Act 2003 (“the 2003 Act”); and

¹⁰⁰ As the context requires, subsequent references in these Procedures to “broadcasters” include any broadcaster licensed and/or regulated by Ofcom, with the exception of the BBC UK Public Broadcasting Services to which separate procedures apply.

¹⁰¹ Investigations into breaches of competition-related conditions in Broadcasting Act licences, such as conditions imposed under section 316 of the Communications Act 2003 for the purposes of securing fair and effective competition, are handled in accordance with Ofcom’s *Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences*, which also set out the process that Ofcom will generally follow in considering the imposition of a statutory sanction against broadcasters for breaches of competition-related requirements of their licence.

¹⁰² The Welsh Authority operates its television service under the name “S4C”.

¹⁰³ Such as the BBC iPlayer and iPlayer Kids (both audiovisual and sound programmes).

- to members of the public and all other persons from both unfair treatment in programmes included in such services and unwarranted infringements of privacy resulting from activities carried on for the purposes of such services: section 3(2)(f) of the 2003 Act.
- A4.5 By virtue of section 3(4)(g) of the 2003 Act, Ofcom must have regard to the need to secure that the application of those standards is in the manner that best guarantees an appropriate level of freedom of expression.
- A4.6 Ofcom’s general duties also include securing the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests: section 3(2)(c) of the 2003 Act.
- A4.7 More specifically, Ofcom has a duty under section 319 of the 2003 Act to set such standards for the content of programmes to be included in television and radio services as appear to Ofcom best calculated to secure certain “standards objectives”. Those standards objectives are set out in section 319(2), and Ofcom is required to establish codes containing these standards. To meet that duty, Ofcom applies the provisions of the Ofcom Broadcasting Code (“the Broadcasting Code”)¹⁰⁴, the Cross-Promotion Code¹⁰⁵, the Code on the Prevention of Undue Discrimination Between Advertisers¹⁰⁶, the Code on the Scheduling of Television Advertising (COSTA)¹⁰⁷ and, where appropriate, the UK Code of Broadcast Advertising (the BCAP Code) at <http://www.cap.org.uk/The-Codes/BCAP-Code.aspx>¹⁰⁸.
- A4.8 Similarly, Ofcom has a specific duty under section 107 of the Broadcasting Act 1996 (as amended)¹⁰⁹ (“the 1996 Act”) to draw up a code giving guidance as to the principles to be observed and the practices to be followed by broadcasters in connection with the avoidance of unjust or unfair treatment¹¹⁰ in programmes and unwarranted infringement of privacy in programmes (or in connection with the obtaining of material included in them). To meet that duty, Ofcom applies Sections Seven (“Fairness”) and Eight (“Privacy”) of the Broadcasting Code.
- A4.9 Ofcom also has more specific duties¹¹¹ in relation to, for example, the provision of subtitling, signing and audio description¹¹². Likewise, in relation to securing that the character of a licensed broadcast radio service, as proposed by the licence holder

¹⁰⁴ See <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>.

¹⁰⁵ See <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/cross-promotion/>.

¹⁰⁶ See <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/undue-discrimination/>.

¹⁰⁷ See <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/tacode.pdf>.

¹⁰⁸ In addition, section 325 of the 2003 Act requires Ofcom to establish procedures for the handling and resolution of complaints about the observance of standards set under section 319. It also requires broadcasters themselves (in addition to Ofcom) to establish their own procedures for the handling and resolution of such complaints.

¹⁰⁹ The Broadcasting Act 1996 was amended by the 2003 Act.

¹¹⁰ Unjust or unfair treatment is defined by section 130 of the 1996 Act as including treatment which is unjust or unfair because of the way in which material included in a programme has been selected or arranged.

¹¹¹ The following are examples, not an exhaustive list of Ofcom’s specific duties.

¹¹² Derived from sections 303 – 307 of the 2003 Act.

when making its application, is maintained during the period for which the licence is in force¹¹³.

A4.10 As well as by the application of the Codes referred to above, Ofcom carries out its duties by:

- granting broadcast licences under the Broadcasting Act 1990 (“the 1990 Act”) and the 1996 Act; and
- by including in those licences conditions required by statute or which it thinks are appropriate to help it carry out those duties.

These conditions include those requiring broadcasters to observe the provisions of the Codes described above in the provision of their services and in relation to programmes included in their services. They also include, for example, conditions imposing requirements on broadcasters: to provide information to Ofcom, to offer specific programmes and types of content and to comply with various other codes issued by Ofcom.

A4.11 Sections 203 and 338 of, and Schedule 12 (paragraph 12 in particular) to, the 2003 Act provide that the Welsh Authority (i.e. S4C) must comply with relevant Codes. In the case of the Welsh Authority (S4C), which does not hold an Ofcom licence, these Codes are “relevant enforceable requirements”.

A4.12 In the event of a breach of a condition of a licence issued under the 1990 or 1996 Acts (including non-compliance with a relevant Code), Ofcom has the power to impose statutory sanctions (“a sanction”) on the relevant broadcaster under provisions contained in those Acts (or the 2003 Act in some cases)¹¹⁴. Ofcom’s powers to impose sanctions for breach of a relevant enforceable requirement on S4C are contained in section 341 of, and Schedule 12 to, the 2003 Act.

A4.13 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, repeatedly¹¹⁵ or recklessly breached a relevant requirement.

A4.14 The sanctions available to Ofcom include a decision to¹¹⁶:

- issue a direction¹¹⁷ not to repeat a programme or advertisement;

¹¹³ Section 106(1) of the 1990 Act.

¹¹⁴ The specific provision which empowers Ofcom to impose sanctions for a breach of licence conditions will depend upon the type of licence held (see paragraph 1.14 and accompanying footnotes for examples).

¹¹⁵ A repeated breach of a relevant requirement, would include, for example: a repeat of the breach of the same requirement as has already been recorded; repetition of the same or similar conduct as that which earlier contravened a requirement; or multiple breaches of other requirements.

¹¹⁶ These do not include the sanctions which Ofcom can impose on the BBC UK Public Services under the Charter and Agreement.

¹¹⁷ Under, for example, section 40(1) of the 1990 Act, and section 236(6) of the 2003 Act.

- 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 determine¹¹⁸;
- impose a financial penalty¹¹⁹;
- shorten¹²⁰ or suspend a licence¹²¹ (only applicable in certain cases); and/or¹²²
- revoke a licence (not applicable to S4C or Channel 4)¹²³.

Financial penalty

In most cases the maximum financial penalty for commercial television or radio licensees is £250,000 or 5% of the broadcaster’s ‘Qualifying Revenue’, whichever is the greater.

For licensed Public Service Broadcasters the maximum financial penalty payable is 5% of ‘Qualifying Revenue’.

For S4C, the maximum financial penalty payable is £250,000.

Decision-making under these Procedures

- A4.15 In sanctions cases under these Procedures involving a breach of a relevant requirement relating to the content of a programme¹²⁴, decisions on sanction will be made by two senior members of the Ofcom Executive who have been given appropriate delegated authority by the Ofcom Board (one of whom will be the final decision maker on the breach), together with a Non-Executive member of Ofcom’s Content Board.
- A4.16 In all other sanctions cases under these Procedures involving the breach of a relevant requirement¹²⁵, decisions on sanction will be made by one or two (depending on the nature of the breach) senior members of the Ofcom Executive with appropriate Board-delegated authority (one of whom will be the final decision maker on the breach). Exceptionally in such cases, where Ofcom considers that it is necessary for reasons of fairness and/or in order for Ofcom properly to determine a

¹¹⁸ Under, for example, sections 40(1) and 109(3) of the 1990 Act, section 236(2) of the 2003 Act, and paragraph 15 of Schedule 12 to the 2003 Act in S4C’s case.

¹¹⁹ Under, for example, sections 41(1) and 110(1) of the 1990 Act, and section 341(2) of the 2003 Act in S4C’s case.

¹²⁰ Under, for example, sections 41(1) and 110(1) of the 1990 Act.

¹²¹ Under, for example, 110(1) of the 1990 Act.

¹²² In some cases Ofcom may impose more than one sanction.

¹²³ Under, for example, sections 42 and 111 of the 1990 Act and 238 of the 2003 Act.

¹²⁴ Investigations in these cases are dealt with in accordance with Ofcom’s *Procedures for investigating breaches of content standards for television and radio* in respect of compliance with the content standards set out under section 319 of the Communications Act 2003 and in accordance with Ofcom’s *Procedures for the consideration and adjudication of Fairness & Privacy complaints* [See Annex 2] in respect of compliance with Ofcom’s “fairness code” under section 107 of the Broadcasting Act 1996

¹²⁵ Investigations in these cases are dealt with in accordance with Ofcom’s *General procedures for investigating breaches of broadcast licences*

sanction, a Non-Executive member of Ofcom's Content Board will make a sanctions decision together with the Ofcom Executive Officers.

- A4.17 A decision maker in a sanctions case will not have been involved in the investigation of the breach of the relevant requirement, up to and including the preparation of the Preliminary View on the breach.
- A4.18 As noted in paragraph A4.1 above, these Procedures do not apply to the determination of a sanction against broadcasters for breaches of competition-related requirements of their licence: in those cases, Ofcom will consider the imposition of a statutory sanction in accordance with the process set out in our Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences¹²⁶.
- A4.19 In all cases, when Ofcom writes to the broadcaster in accordance with paragraph A4.22 below, it will identify the decision maker(s).

Procedures

Consideration of sanctions

- A4.20 The consideration of a sanction follows a decision by Ofcom that a broadcaster has breached a relevant requirement¹²⁷. A case will normally be considered for the imposition of a sanction when Ofcom considers that a broadcaster has seriously, deliberately, repeatedly, or recklessly breached a relevant requirement.
- A4.21 Ofcom aims to conclude the consideration of the imposition of a sanction within 60 working days from the date Ofcom records the breach(es) of the relevant requirement(s). However, the circumstances of individual cases can vary considerably and completion may in some cases take longer.
- A4.22 If Ofcom considers that a sanction may be appropriate, it will write to the broadcaster with the following information as appropriate:
- details of the breach(es);
 - comments on any issue raised by the broadcaster that is material to the case;
 - details of any relevant cases on which Ofcom has already adjudicated;
 - details of the broadcaster's recent compliance history;
 - details of Ofcom's Preliminary View that a sanction may be appropriate;
 - details of Ofcom's Preliminary View on the type and level of any sanction considered to be appropriate and proportionate;

¹²⁶ [link to be inserted when final procedures published]

¹²⁷ The Advertising Standards Authority ("the ASA") may, under the terms of its Memorandum of Understanding with Ofcom, request Ofcom to consider a statutory sanction in an advertising case. In such cases, the ASA will normally have published a breach of its code.

- a summary of the material on which it has relied in reaching its preliminary view; and
- the relevant documentation¹²⁸ that Ofcom has taken into account will also be provided.

A4.23 Where, at this stage, Ofcom's Preliminary View is that the appropriate sanction should include a financial penalty, then it will, as appropriate, consider the penalty in accordance with the Penalty Guidelines published by Ofcom at <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.

Written representations

A4.24 The broadcaster will have the opportunity to make written representations on Ofcom's Preliminary View that a sanction may be appropriate and on the type and level of any sanction being considered. The period for written representations will normally be 15 working days, unless otherwise specified. In some circumstances, Ofcom may, if it considers appropriate, seek further information or representations from the broadcaster.

Oral representations

A4.25 In addition, Ofcom will offer the broadcaster the opportunity to attend an oral hearing to make oral representations on the matters referred to in Ofcom's Preliminary View. Ofcom will normally give the broadcaster at least 15 working days' notice of the date for making those representations. The hearing will be in private and may take place in England, Northern Ireland, Scotland, or Wales, as appropriate. The hearing will be transcribed and the transcript will be provided to the broadcaster. The broadcaster may bring legal advisers to the oral hearing to assist in presenting its oral representations, although Ofcom may ask that the broadcaster limits the number of persons attending the oral hearing on its behalf to a reasonable number.

A4.26 The procedure for making oral representations will be at the discretion of Ofcom. Ofcom will write to the broadcaster in advance of the date for hearing the representations, to set out what the procedure will be.

Disposal

A4.27 After consideration of written and/or oral representations from the broadcaster, Ofcom may decide that no sanction is appropriate in a particular case. Where this occurs, the broadcaster will receive a notification to this effect.

Sanctions decision

A4.28 If, after considering all the evidence and representations from the broadcaster, Ofcom believes that a sanction is appropriate, it shall consider which of the available sanctions is appropriate and will reach a decision to this effect. Where Ofcom decides that the appropriate sanction should include a financial penalty, then

¹²⁸ Ofcom may withhold material it believes to be 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.

it will, as appropriate, have regard to the Ofcom Penalty Guidelines published at <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.

Revocation of licence

- A4.29 In cases where the broadcaster is an Ofcom licence holder and Ofcom considers that the sanction to be imposed should be revocation of the licence, it will follow the statutory provisions governing the revocation of that licence¹²⁹. In the majority of cases, this will require Ofcom to serve a notice indicating that the licence will be revoked if the steps specified in the notice are not taken. 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 licence¹³⁰. The notice revoking the licence takes effect when it is served on the licence holder.
- A4.30 Where there is no statutory procedure prescribed for the revocation of a licence, for example where a person is no longer considered to be “fit and proper” to hold a licence, Ofcom will follow a comparable procedure in which the licensee will be given an opportunity to make representations on Ofcom’s proposal to revoke the licence. Depending upon the urgency of the situation, the period for representations may be very short, possibly a matter of hours.

Publication of Sanction Decision

- A4.31 The Sanction Decision, with a statement of reasons, will be sent to the broadcaster, for information only, one working day before its publication.
- A4.32 Ofcom will then proceed to publish its decision on its website. A summary of the Sanction Decision will normally be published in Ofcom’s Broadcast and On-demand Bulletin at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>.

Non Disclosure

- A4.33 It is essential to the integrity of Ofcom’s processes and its ability to regulate fairly that all parties abide by Ofcom’s published rules and procedures, including those relating to non disclosure below¹³¹.

Non Disclosure

Ofcom expects broadcasters to keep all information, correspondence and documents relating to sanctions cases strictly confidential, unless already in the public domain. In particular, Ofcom expects broadcasters to keep strictly confidential any information provided to them by Ofcom as part of the sanctions process, including any provisional indication/decision on the type and level of any sanction that may be imposed¹³².

¹²⁹ See, for example, sections 42 and 111 of the 1990 Act and sections 238 and 239 of the 2003 Act.

¹³⁰ The precise procedure we will follow will depend on the relevant statutory provisions. For example, the provisions may require a licence holder to be given a second opportunity to make representations before a notice of revocation is served.

¹³¹ Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Information provided to Ofcom may need to be disclosed by Ofcom in order to meet such obligations.

¹³² Ofcom may withhold material it believes to be 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.

This does not limit what Ofcom can publish in its decision at the end of the investigation.

Time limits

- A4.34 Broadcasters should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or properly to make decisions relating to sanctions) to amend or adapt the time limits in a particular case. Any broadcaster requiring an extension to a time limit should explain in writing to Ofcom why it believes the relevant time limit should be extended.

Annex 5

Procedures for investigating breaches of rules for on-demand programme services

Introduction

- A5.1 This document outlines Ofcom’s Procedures for the handling and resolution of complaints (or for the conduct of its own investigations) about potential breaches of rules applying to on-demand programme services (“ODPS”) by ODPS providers¹³³. These Procedures are effective from 3 April 2017.
- A5.2 These Procedures do not apply to BBC UK Public On Demand Programme Services (“BBC ODPS”)¹³⁴. Separate procedures apply to BBC ODPS (which also apply to BBC UK Public Broadcasting services): https://www.ofcom.org.uk/data/assets/pdf_file/0030/99417/procedures-bbc.pdf These Procedures do apply to notified on demand programme services operating under the BBC’s commercial arm.
- A5.3 If Ofcom considers that it is necessary to depart from these Procedures in any material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to consider a complaint(s) or carry out an investigation, it will make clear to the ODPS provider concerned (and any other relevant parties) the nature/extent of its departure and its reasons for doing so.
- A5.4 It is noted that the nature of ODPS (in comparison with linear broadcast) means that material will often remain available for viewing on demand, meaning a risk any harm from a breach may be ongoing. An example of where it may be appropriate to depart from these Procedures (and particularly to expedite the process) is where a potential breach involves incitement or the protection of minors, and the material remains available.

Statutory framework

- A5.5 Part 4A of the Communications Act 2003 (the “Act”) makes provision for the regulation of ODPS. Section 368C of the Act imposes various duties on the “appropriate regulatory authority” which, in the absence of another body being designated under section 368B in relation to programme content, is Ofcom. These include a duty to take steps to secure that every provider of an ODPS complies with requirements in section 368D. These requirements include:
- (a) complying with rules (in sections 368E to 368H of the Act) for harmful material, advertising, sponsorship, and product placement;
 - (b) supplying specified information about the ODPS provider to users;
 - (c) retaining copies of programmes for at least 42 days after they cease to be available for viewing;

¹³³ References to “ODPS providers” in these Procedures are to providers of any on-demand programme service meeting the criteria in section 368A (1) of the 2003 Act.

¹³⁴ Such as the BBC iPlayer and iPlayer Kids (both audiovisual and sound programmes).

- (d) cooperating fully with the regulator, including by complying with information requests issued under section 368O; and
 - (e) paying any regulatory fees that may be imposed under section 368NA.
- A5.6 Under section 368BA of the Act, ODPS providers are also required to notify Ofcom in advance of providing an ODPS, making significant changes to an ODPS, or ceasing to provide an ODPS. The notification must include all such information as Ofcom may require.
- A5.7 Ofcom has published Rules and Guidance¹³⁵ which set out the statutory requirements applying to ODPS (apart from those for advertising content) and provide non-binding guidance.
- A5.8 These Procedures cover potential breaches of any rules applying to ODPS providers except rules for advertising. The Advertising Standards Authority (“ASA”)¹³⁶ has been designated by Ofcom under section 368B as the “appropriate regulatory authority” for the regulation of advertising content on ODPS. Any complaints about advertising content on an ODPS should be sent to the ASA¹³⁷.
- A5.9 Ofcom may launch investigations on its own initiative as well as in response to complaints received. The Procedures in a complaint-led investigation and an Ofcom-initiated investigation are the same.

Procedures

Making a complaint

- A5.10 Complaints under these Procedures can be made to Ofcom by any person or body who considers that an ODPS provider has failed to comply with the relevant requirements as set out in the Rules. In particular, and as set out in Ofcom’s Rules and Guidance, these include:
- A5.11 Administrative Rules
- Notification of an intention to provide an ODPS (Rule 1).
 - Notification of an intention to make significant changes to a notified service (Rule 2).
 - Notification of intention to cease providing a notified service (Rule 3).
 - Payment of any required fee (Rule 4)
 - Retention of programmes for at least 42 days (Rule 5).
 - Provision of information (Rule 6).
 - Cooperation (Rule 7).
 - Compliance with enforcement notifications (Rule 8).

¹³⁵ Available at: http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Rules_and_Guidance.pdf

¹³⁶ www.asa.org.uk

¹³⁷ <https://www.asa.org.uk/Consumers/How-to-complain.aspx>

- Supply of information to service users (Rule 9).

A5.12 Editorial Content Rules

- Harmful Material: Material Likely to Incite Hatred (Rule 10).
- Harmful Material: Protection of Under Eighteens (Rule 11).
- Sponsorship (Rule 12).
- Product Placement (Rule 13).
- Harmful Material: Prohibited Material (Rule 14).

A5.13 Ofcom will not normally consider a complaint unless the complainant has sought to follow the ODPS provider's own complaints procedure first (see exception regarding ongoing harm at paragraph 1.14).

A5.14 The contact details of all notified ODPS providers can be found on Ofcom's website at http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/List_of_Regulated_Video_On_Demand_Services.pdf. If a complainant is dissatisfied with the ODPS provider's response to their complaint, or the ODPS provider is not on the list of notified providers, the complaint can then be submitted to Ofcom.

A5.15 In cases where a complaint is made under an ODPS provider's own complaints procedures, Ofcom will expect the ODPS provider to retain the relevant programme, and any related material, for the 42-day period required by statute (section 368D (3) (ab) of the Act), running from the date on which the ODPS provider may reasonably expect the complainant to have received the ODPS provider's final response.

A5.16 Because ODPS content is continually available and there may be a risk of ongoing harm arising from some content, it may be appropriate for a complainant to contact Ofcom immediately if they believe harmful material is involved under Rules 10, 11 or 14. In cases raising a risk of ongoing harm, Ofcom may open an investigation before the conclusion of the ODPS provider's own process. Ofcom will take into account the potential harm alleged and any immediate steps taken by the ODPS provider, such as suspending access to particular material or preventing it from being accessed by under-18s, while the complaint is being considered. Ofcom may also depart from these Procedures to the extent necessary to expedite cases (whilst remaining fair to the ODPS provider) in these circumstances (see paragraph A5.3).

A5.17 Separate, but similar, procedures apply to broadcast material. If a complaint is about a "catch-up" ODPS and the material has recently been shown on a television service, it may be more appropriate for Ofcom to consider the complaint under relevant broadcasting procedures as the substantive rules applying to broadcast television services are more extensive.

Form of complaint and information to be provided

A5.18 Ofcom requests that complaints are submitted on its complaint form. To access a complaint form, go to Ofcom's website at <http://stakeholders.ofcom.org.uk/broadcasting/on-demand/complain>. Alternatively, for any complaint you can contact us by telephone on: 0300 123 3333 or 020 7981 3040. If you have a text phone you can call 020 7981 3043 – please note that this number only works with special equipment used by people who are deaf or hard of hearing. A Video Relay Service to contact Ofcom in British Sign Language is also

available on Ofcom's website. Alternatively, you can contact us by post at the following address:

Ofcom
ODPS Complaints
5th Floor
Riverside House
2a Southwark Bridge Road
London
SE1 9HA

- A5.19 All complaints should include sufficient detail about the matter complained of. Specifically, complaints should include:
- the name / title of the content complained about;
 - the date when it was accessed;
 - the ODPS on which it appeared;
 - a link to where on the ODPS service it appeared;
 - the nature of the complaint and (where possible and relevant) the particular parts of any programme complained about;
 - the complainant's full contact details (including any e-mail address); and
 - whether (and, if so, when) the complainant has submitted a complaint to the ODPS provider.
- A5.20 Provision of these details (or as many of them as possible) is very important. A failure to provide them may mean that Ofcom is not able to investigate the complaint.
- A5.21 Unless a complainant asks Ofcom not to do so, Ofcom may disclose the complainant's identity to the ODPS provider that is the subject of the complaint as well as sharing a non-confidential version of the complaint submission with it for comment. Ofcom will consider requests from complainants to remain anonymous.

Making a complaint promptly

- A5.22 ODPS providers are required, under Rule 5 which reflects section 368D(3) (ab) of the Act, to retain copies of programmes for 42 days after the programme ceases to be available. With that in mind, complainants should act promptly on becoming aware of material made available on an ODPS which they consider may breach the rules for ODPS. Generally, and particularly in circumstances where the relevant material is no longer available on an ODPS, Ofcom will not accept a complaint unless it has been pursued promptly.
- A5.23 Where a complaint is submitted regarding material which is no longer available on the ODPS, complainants should confirm when they became aware of the content and explain the reasons for any delay in progressing the complaint. Ofcom will then consider all relevant factors (including the complainant's explanation for the delay and the limited time period during which ODPS providers are required to keep recordings) in deciding whether or not Ofcom should investigate the complaint.

- A5.24 Where a complainant has previously complained directly to the ODPS provider, the complainant should wait to see if he/she is satisfied with the ODPS provider's response before referring it to Ofcom. If not, the complainant should refer his/her complaint to Ofcom (with the ODPS provider's response) as soon as possible, and in any event within 20 working days of the final response to the complainant from the relevant ODPS provider.
- A5.25 If the complainant has not received an acknowledgement of his/her complaint from the ODPS provider within 10 working days of submission and a substantive response within 20 working days, the complainant should promptly submit the complaint to Ofcom, providing copies of the correspondence with the ODPS provider.
- A5.26 Where a complainant submits a complaint at the same time to the ODPS provider and to Ofcom, Ofcom will not normally proceed to consider the complaint until the ODPS provider has first had an opportunity to resolve the complaint itself under its procedures. However, it may do so where it considers it appropriate taking into account whether the material remains available and the risk and seriousness of any potential ongoing harm. In such a case, the complainant should inform Ofcom when he/she has received the ODPS provider's final response, and confirm whether he/she wishes to proceed with his/her complaint.

Initial assessment of complaints

- A5.27 All complaints are important to Ofcom as they help it to understand whether an ODPS provider may be failing to comply with the rules for ODPS. Ofcom will log and acknowledge every complaint that it receives. However, it will not normally correspond any further with individual complainants. Ofcom will carry out a process of initial assessment and, where relevant following initial assessment, further investigation as set out below.
- A5.28 Ofcom will first consider whether, on its face, a complaint raises potentially substantive issues under the rules for ODPS which warrant investigation by Ofcom. It will take into account the gravity and/or extent of the matter complained of, including, for example, whether it involves ongoing harm and/or harm to minors.
- A5.29 If Ofcom considers that it should assess the matter further, it may ask the ODPS provider for a copy of the relevant programme or material at this stage, which we would generally require to be provided within five working days.¹³⁸ We may also request any other background material we consider may be relevant to Ofcom's initial assessment of the complaint, however we will not normally request written representations from the ODPS provider at this stage.
- A5.30 Based on an initial assessment of the complaint and a review of the relevant material, Ofcom will consider whether there may have been a breach of the rules for ODPS which Ofcom considers requires a response from the ODPS provider. If not, Ofcom will decide not to investigate further and will normally publish its decision in a table in its Broadcast and On-demand Bulletin¹³⁹ if the matter relates to compliance

¹³⁸ This would be pursuant to a request under section 368O of the Act, and the period allowed is in line with the position under Broadcasting Act Licences.

¹³⁹ The Broadcast and On-demand Bulletin is published fortnightly on Ofcom's website: <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>

with a “public facing” rule. “Public facing” rules relate to editorial content or the provider’s dealings with the public. We will not normally publish the decision if the matter relates to compliance with a rule that is not “public facing”, but there may be exceptional cases where we do publish (such as where there is a high level of public awareness of, and interest in, the matter complained of).

A5.31 Ofcom aims to complete an initial assessment of complaints within 15 working days.

Investigating possible breaches

A5.32 Other than in cases falling within paragraph A5.33 below, where Ofcom considers that an ODPS provider may have failed to comply with a relevant requirement, Ofcom will write to the ODPS provider. Ofcom will summarise the material parts of the complaint(s), set out the particular Rules which it considers are relevant, and invite the ODPS provider to make representations in response (and to provide any relevant material/evidence in support of its representations) within 10 working days. Ofcom will normally publish details of issues under investigation in a table in its Broadcast and On-demand Bulletin if the matter relates to compliance with a “public facing” rule (for more information on “public facing” rules see paragraph A5.30 above).

A5.33 There may be cases in which Ofcom does not consider it necessary to seek representations from the ODPS provider at this stage. This will normally be where the question of whether there is a breach of a relevant rule is a matter of objective fact (for example where R18 is made available to under-18s without restriction). In these cases, Ofcom will not usually seek the ODPS provider’s representations at this stage (as in paragraph A5.30 above). Instead, Ofcom will write to the ODPS provider with its Preliminary View on the substance of the complaint(s), as set out in paragraph A5.36 below. There may also be other cases where the matter(s) concerned, on the facts, mean this approach is appropriate.

A5.34 Ofcom aims to complete those cases that it takes forward for investigation within 50 working days.

Representations from third parties

Ofcom recognises that there may be persons/bodies who may be directly affected by the outcome of Ofcom’s investigation and decision on a complaint(s) and who may have interests independent of the relevant ODPS provider (e.g. presenters, producers and/or independent programme-makers). Wherever possible, ODPS providers should seek to take account of and include the representations of such persons/bodies in their submissions in response to a complaint and confirm to Ofcom that they have done so.

However, such persons/bodies may make representations on their own behalf direct to Ofcom in cases it is investigating. In such a case, persons/bodies should seek to make representations to Ofcom as early in an investigation as possible, setting out if/to what extent their representations differ from those of the ODPS provider. Ofcom will as appropriate take those representations into account and include those persons/bodies in its decision-making process under these Procedures.

Preparation of Ofcom’s Preliminary View

A5.35 Ofcom will prepare its Preliminary View having taken account of the ODPS provider’s representations, where provided. This preliminary view is only provisional

and may be subject to change in the light of subsequent representations/material provided by the ODPS provider.

- A5.36 All draft Preliminary Views will be provided to a panel of Ofcom's Content Board members¹⁴⁰ for their advisory opinion. The decision on Ofcom's Preliminary View will be taken by a senior member of Ofcom's Executive with appropriate Board-delegated authority. Typically, this would be the person who is responsible for overseeing the investigation. The Preliminary View will contain:
- a summary of the complaint(s);
 - a summary of the material parts of the programme/service to which the complaint(s) relates;
 - the relevant requirements as set out in the Rules; and
 - Ofcom's preliminary assessment of whether any breaches of those requirements have occurred and the reasons for that assessment.
- A5.37 If Ofcom considers that it is necessary to obtain further information to ensure that it can fairly and properly prepare its Preliminary View, Ofcom may seek such information before preparing that view.
- A5.38 When Ofcom has prepared its Preliminary View, Ofcom will provide it to the ODPS provider (and any relevant third party) and request representations within 10 working days.
- A5.39 Ofcom considers that it will normally be able to reach a decision fairly and properly following written representations and without oral representations from the ODPS provider. However, an ODPS provider may, in any particular case, make a written request to make its representations orally to Ofcom in addition to any written representations. Ofcom will agree to such a request if Ofcom considers that an oral hearing is appropriate in view of the nature of the breach under consideration and the complexity of the issues raised.

The final Decision

- A5.40 Once Ofcom has received and considered the ODPS provider's representations (and/or any representations from a relevant third party) on its Preliminary View, it will reach its final decision.
- A5.41 All draft decisions will be provided to a panel of Ofcom's Content Board members (who have not been involved in the investigation) for their advisory opinion before a final decision is taken. The final decision will be taken by a senior member of Ofcom's executive with appropriate Board-delegated authority, who will not have been involved in the investigation and/or the preparation of the Preliminary View.

¹⁴⁰ The Content Board is a committee of the main Ofcom Board established by the Communications Act 2003. It includes members with extensive broadcasting experience. See <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/content-board>

Publication of Decision

- A5.42 Before publishing the Decision, Ofcom will provide the ODPS provider, for information only with an embargoed copy of the Decision one working day before publication.
- A5.43 The Decision will be published in Ofcom's Broadcast and On-demand Bulletin on its website at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>
- A5.44 Ofcom will also normally publish information in its Broadcast and On-demand Bulletin about Decisions in which it has found that the ODPS provider has **not** breached a "public facing" rule (for more information about "public facing" rules, see paragraph A5.30 above).

Non-Disclosure

- A5.45 It is an essential part of the integrity of Ofcom's processes and its ability to regulate fairly that all parties concerned abide by Ofcom's published rules and procedures, including those relating to non-disclosure below.

Non-Disclosure

Parties (complainants, ODPS providers, Ofcom and any directly affected third parties) may, unless otherwise indicated, make public the fact that a complaint has been made or that Ofcom is investigating a case. They may also use any information which is already in the public domain.

However, parties should not disclose any correspondence, documents or other material concerning the complaint during the course of the investigation.¹⁴¹

Failure to follow this requirement may result in Ofcom ceasing to consider the party's representations.

This does not limit what Ofcom can publish in its decision at the end of the investigation.¹⁴²

Time limits

- A5.46 Complainants and ODPS providers should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or properly to carry out an investigation) to amend or adapt the time limits set out in the Procedures in a particular case. Any complainant or ODPS provider seeking an extension to a time limit should explain in writing to Ofcom why it believes it is appropriate.

¹⁴¹ Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Information provided to Ofcom as part of a complaint may need to be disclosed by Ofcom in order to meet such obligations.

¹⁴² Ofcom may (in investigating and publishing its decision) withhold material it believes to be confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the ODPS provider will be notified that relevant material has been withheld and the reasons why.

Sanctions

A5.47 Where Ofcom records a breach or breaches of the Rules, it may consider that the breach justifies consideration of the imposition of a statutory sanction on the ODPS provider. If so, Ofcom will make that clear in its Decision (under paragraphs A5.40 and A5.41 above) and the “Procedures for the consideration of statutory sanctions arising in the context of On-Demand Programme Services” will apply.¹⁴³ These are available on Ofcom’s website at http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Revised_sanctions_procedures.pdf

Complaints raising questions of scope

A5.48 In cases involving services which have not been notified to Ofcom as ODPS, there will be a preliminary issue before considering the substance of the complaint of whether the service in fact constitutes an ODPS as defined in section 368A (1) of the Act (i.e. a question of whether the service falls into the “scope” of regulation). If it does not, the rules for ODPS do not apply to it and no breach of them can have occurred.

A5.49 Where scope appears to be an issue Ofcom will, at the initial assessment stage, consider whether on its face the service appears it may meet the test in section 368A (1) and in particular whether it appears likely that the principal purpose is the provision of programmes comparable in form and content to programmes normally included in television programme services¹⁴⁴. If it does not, Ofcom would not generally assess the matter further.

A5.50 If it does appear likely to meet the test, and there also appears to be a substantive issue if the service were to be found in scope, Ofcom would generally consider the scope and substantive issues in parallel, following the process set out above. This is in order to assist the prompt resolution of issues, especially where there is a risk of ongoing harm arising from the content in question. Given such investigations are likely to be more complex, the indicative investigation times indicated above may be longer in such cases. If no issue appears likely to arise from the content but there is a scope issue, Ofcom would consider the question of scope, and whether the requirement to notify an ODPS had been breached.

A5.51 There may be circumstances in which it is appropriate to separate the scope and substantive issues, and consider them in sequence. In such circumstances, Ofcom will inform the ODPS provider of its proposal to do so.

A5.52 In cases raising issues of scope, the service provider may consider it is not an ODPS provider. It is noted that the power to require provision of information under section 368O of the Act applies to all those who appear to Ofcom to be ODPS providers (whether or not a detailed assessment leads to that conclusion). Such service providers should also observe the rules applying to ODPS providers

¹⁴³ The ASA may, under the terms of its Memorandum of Understanding with Ofcom, request Ofcom to consider a statutory sanction in an advertising case. In such cases, the ASA will normally have published a breach of the advertising rules.

¹⁴⁴ This is the test under section 368A(1)(a) of the Act. A service would need to meet other criteria in section 368A (1), but those are more likely to require further information from the service provider to enable assessment.

(including retention of recordings and cooperation) as if they were such a provider pending determination on scope.

A5.53 If and to the extent that cases raise issues of scope, decisions reached under these procedures will be made by two (or more) members of the Ofcom Executive who have been given the appropriate delegated authority by the Ofcom Board.

Directions

A5.54 Ofcom has the power under the Act¹⁴⁵ to issue a direction suspending or restricting an ODPS. Ofcom may issue a direction in any case where it considers it to be appropriate, noting that the statute sets out tests and procedures that apply. In particular, Ofcom would only issue a direction where it is satisfied that an ODPS provider has contravened a relevant obligation and that either:

- attempts to secure compliance through imposition of a financial penalty and/or enforcement notification has failed, and a direction would be appropriate and proportionate in light of the seriousness of the contravention (section 368L); or
- the contravention relates to the inclusion of material likely to encourage or incite crime, or lead to disorder (whether or not there had been a previous financial penalty or enforcement notification) and the contravention is such as to justify a direction.

A5.55 A Notice of Direction will normally be published in Ofcom's Broadcast and On-demand Bulletin.

A5.56 Failure by an ODPS provider to comply with a direction issued by Ofcom can lead to the consideration of the imposition of a statutory sanction on the ODPS provider (for example, the imposition of a financial penalty). In such cases, the Sanctions Procedures referred to in paragraph A5.47 would apply.

Expedited processes

A5.57 As noted in paragraph A5.4 above, material on an ODPS will often remain available for viewing on demand for a long period, meaning there may be an ongoing risk of harm. Examples include cases where material remains available which potentially involves incitement to hatred based on sex, religion or nationality, or the protection of minors.

A5.58 In such circumstances, Ofcom will make clear to the ODPS provider that it is expediting the process described above. This may include bypassing the ODPS provider's own complaints process, allowing substantially less time to provide material and other information, and allowing substantially less time to provide any representations. Ofcom will make clear to the ODPS provider the time limits for responses in such cases which will be fair in the circumstances of the case.

¹⁴⁵ See sections 368K and 368L of the Act, which relate to contraventions and to inciting crime or disorder respectively.

Procedures for the consideration of statutory sanctions arising in the context of on-demand programme services

Overview and general information

- A6.1 This document outlines the procedures that Ofcom will normally follow when considering the determination of a sanction against the provider of an on demand programme service (“ODPS”)¹⁴⁶ for contravention of one (or more) of the requirements imposed on them under Part 4A of the Communications Act 2003¹⁴⁷ (the “Act”). In this document these requirements are referred to as “relevant requirements”.
- A6.2 These procedures were first introduced on 18 February 2015.¹⁴⁸ Minor amendments were introduced which had effect from 1 January 2016 to reflect the ending of the co-regulatory regime under which the Authority for Television on Demand (“ATVOD”) was designated to carry out certain functions in relation to regulation of ODPS content (except advertising which is a co-regulatory responsibility of the Advertising Standards Authority (“ASA”)). The designation did not include the function of considering statutory sanctions, but clearly its ending has an impact on how sanctions cases come to Ofcom for consideration. These Procedures are effective from 3 April 2017
- A6.3 If Ofcom considers that it would be fairer and more appropriate to follow a different procedure in any particular case, we will explain our reasons for departing from these procedures. It is noted that the statutory rules applying to ODPS include, for example, rules prohibiting material likely to incite hatred, and material which might seriously impair the physical, mental or moral development of under eighteens. The urgency of addressing potential ongoing harm where material remains available on-demand on an ODPS is one example of a reason why it might be appropriate to depart from these procedures.
- A6.4 Ofcom’s powers include the power to determine whether or not an ODPS provider is contravening, or has contravened, any of the relevant requirements of the Act and to issue enforcement notifications¹⁴⁹ where it has reasonable grounds for believing

¹⁴⁶ An “on-demand programme service” is defined in section 368A of the Act, and an ODPS provider has the associated meaning. Separate sanctions procedures apply to BBC UK Public On-Demand Programme Services: https://www.ofcom.org.uk/data/assets/pdf_file/0030/99417/procedures-bbc.pdf.

¹⁴⁷ As amended by The Audiovisual Media Services Regulations 2009 (SI 2009/2979) and the Audiovisual Media Services Regulations 2010 (SI 2010/ 419).

¹⁴⁸ The 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.

¹⁴⁹ Under sections 368BB(1)(a) and 368I(1)(a).

that an ODPS provider has contravened certain of its statutory obligations.¹⁵⁰ Ofcom may enforce compliance with an enforcement notice by issuing civil proceedings.¹⁵¹

A6.5 The Act places a statutory duty on ODPS providers to comply with the relevant requirements. These requirements include that ODPS providers must:

- give advance notification (to Ofcom) of the provision of their service or their intention to provide the service;¹⁵²
- supply specified information to users of the service;¹⁵³
- pay any required fees (to Ofcom);¹⁵⁴
- keep a copy of every programme contained in the service;¹⁵⁵
- ensure that the service does not contain material which is likely to incite hatred on the grounds of race, sex, religion or nationality;¹⁵⁶
- ensure that the service does not contain any “prohibited material”;¹⁵⁷
- protect those under 18 years of age from being exposed to “specially restricted material”;¹⁵⁸
- ensure that restrictions on advertising, sponsorship and product placement are observed;¹⁵⁹ and
- provide Ofcom (or the ASA for advertising content) with such information as it may require for carrying out investigations.¹⁶⁰

A6.6 In the event of a contravention of the Act by an ODPS provider (including non-compliance with any enforcement notification issued by Ofcom), Ofcom has the power to impose on that provider statutory sanctions as contained in sections 368I – 368L of Part 4A of the Act. The imposition of a sanction against an ODPS provider is a serious matter. Ofcom may, following due process, impose a sanction if it considers that an ODPS provider has seriously, deliberately, repeatedly¹⁶¹ or recklessly breached a relevant requirement.

A6.7 The statutory sanctions available to Ofcom include:

- the imposition of a financial penalty; and
- the issuing of a direction to suspend or restrict the entitlement to provide the ODPS.

Financial penalty

¹⁵⁰ This includes the obligations under section 368BA, 368D, 368G, 368H and 368O of the Act.

¹⁵¹ Under sections 368BB(6) and 368I(8) of the Act.

¹⁵² Section 368BA (n.b. re-notification is not required for services notified with ATVOD as at 31 December 2015).

¹⁵³ Section 368D.

¹⁵⁴ Section 368NA.

¹⁵⁵ Section 368D(3)(zb).

¹⁵⁶ Section 368E(1).

¹⁵⁷ Section 368E(2) and Section 368E(3).

¹⁵⁸ Section 368E(4) and Section 368(5).

¹⁵⁹ Sections 368F – 368H.

¹⁶⁰ Sections 368O.

¹⁶¹ A repeated contravention of a relevant requirement would include, for example; a repeat of the contravention of the same requirement as has already been recorded; repetition of the same or similar conduct as that which earlier contravened a requirement; or multiple contraventions of other requirements.

The maximum fine for a contravention of the Act is £250,000 or an amount up to 5% of the ODPS provider's "applicable qualifying revenue",¹⁶² whichever is the greater.

Decision-making under these Procedures

- A6.8 In sanctions cases under these Procedures, decisions on sanction will be made by two senior members of the Ofcom Executive who have been given appropriate delegated authority by the Ofcom Board (one of whom will be the final decision maker on the breach), together with a Non-Executive member of Ofcom's Content Board.
- A6.9 A decision maker in a sanctions case will not have been involved in the investigation of the breach of the relevant requirement, up to and including the preparation of the Preliminary View on the breach.
- A6.10 In all cases, when Ofcom writes to the ODPS provider in accordance with paragraph A6.12 below, it will identify the decision maker(s).

Procedures

Consideration of sanctions

- A6.11 The consideration of a sanction follows a decision by Ofcom that an ODPS provider has contravened a relevant requirement. As indicated above, a case will normally be considered for the imposition of a statutory sanction when Ofcom considers that an ODPS provider has seriously, deliberately, repeatedly, or recklessly contravened a relevant requirement.
- A6.12 If Ofcom considers that a sanction may be appropriate, it will write to the ODPS provider with the following information as appropriate:
- details of the contravention(s);
 - comments on any issue raised by the ODPS provider that is material to the case;
 - details of any relevant cases on which Ofcom has already adjudicated;
 - details of the ODPS provider's recent compliance history;
 - details of Ofcom's Preliminary View on the type and level of any sanction considered to be appropriate and proportionate; and

¹⁶² For the purposes of imposing a sanction, "qualifying revenue" for an accounting period consists of the aggregate of all the amounts received, or to be received, by the provider (or any "connected person" as defined by the Broadcasting Act 1990) of the service to which the contravention relates for the inclusion in that service of advertisements, product placement and sponsorship and in respect of charges made in that period for the provision of that service (section 368J(4)). The "applicable qualifying revenue" in relation to a provider means either the qualifying revenue for the provider's last complete accounting period falling within the period during which the provider has been providing the service to which the contravention relates **OR**, in relation to a person whose first complete accounting period has not ended when the penalty is imposed, the amount of that the appropriate regulatory authority estimates to be the qualifying revenue for that period (section 368J(3)).

- a summary of the material on which Ofcom has relied in reaching its Preliminary View.

The relevant documentation that Ofcom has taken into account will also be provided.

- A6.13 Where, at this stage, Ofcom considers that the appropriate sanction should include a financial penalty then it will, as appropriate, consider the penalty in accordance with the Penalty Guidelines published by Ofcom at <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.
- A6.14 Where the sanction under consideration involves the suspension or restriction of the service, Ofcom will set out:
- its reasons for taking this view;
 - (in appropriate cases) its reasons for being satisfied that an attempt to secure compliance with the relevant requirements by issuing an enforcement
 - notification or imposing a financial penalty has failed;
 - (in appropriate cases) details of steps that the ODPS provider must take in order to remedy the relevant contravention and any conditions that Ofcom
 - might include in any potential direction to suspend or restrict the service;
 - the period the ODPS provider has for taking any specified steps and making representations; and
 - the effects of the relevant sanction(s).
- A6.15 Ofcom will then invite the ODPS provider to make representations on its Preliminary View of the type and level of any sanction being proposed. Depending on the type and level of any sanction, this may be by written and/or oral representations as Ofcom may consider appropriate.

Written representations

- A6.16 The ODPS provider will have the opportunity to make written representations on Ofcom's Preliminary View that a sanction may be appropriate and on the type and level of any sanction being considered. The period for written representations will normally be 15 working days, unless otherwise specified. In some circumstances, Ofcom may, if it considers appropriate, seek further information or representations from the ODPS provider.

Oral representations

- A6.17 In addition, Ofcom will offer the ODPS provider the opportunity to attend an oral hearing to make oral representations on the matters referred to in Ofcom's Preliminary View. Ofcom will normally give the ODPS provider at least 15 working days' notice of the date for making those representations. The hearing will be in private and may take place in England, Northern Ireland, Scotland, or Wales, as

appropriate. The hearing will be transcribed and the transcript will be provided to the ODPS provider. The ODPS provider may bring legal advisers to the oral hearing to assist in presenting its oral representations, although Ofcom may ask that the ODPS provider limits the number of persons attending the oral hearing on its behalf to a reasonable number.

- A6.18 The procedure for making oral representations will be at the discretion of Ofcom. Ofcom will write to the ODPS provider in advance of the date for hearing the representations, to set out what the procedure will be.

Disposal

- A6.19 After consideration of written and/or oral representations from the ODPS provider, Ofcom may decide that no sanction is appropriate in a particular case. Where this occurs, the ODPS provider will receive a notification to this effect.

Sanctions Decision

- A6.20 If, after considering all the evidence and representations from the ODPS provider, Ofcom believes that a sanction is appropriate, it shall consider which of the available sanctions is appropriate and will reach a decision to this effect.

Suspension or restriction of entitlement to provide an ODPS

- A6.21 Where, having considered the ODPS provider's representations on Ofcom's Preliminary View, Ofcom decides to serve on the provider a notice under section 368L of the Act,¹⁶³ the suspension or restriction of the service under that notice will take effect immediately from the date the notice is served.¹⁶⁴ The ODPS provider will then have 21 days to make (further) representations to Ofcom about whether Ofcom should issue a direction confirming the suspension or restriction of the service.¹⁶⁵
- A6.22 If, at the end of the period specified by Ofcom for making representations,¹⁶⁶ and having considered any such representations made by the ODPS provider, Ofcom is satisfied that:
- (in appropriate cases) the specified steps set out in any notice under section 368K have not been taken; and
 - (in all cases) it is necessary in the public interest to give a direction, Ofcom will issue a direction either suspending or restricting the ODPS provider's entitlement to provide an ODPS.

¹⁶³ In relation to a failure to comply with any requirement of sections 368E – 368H that is due to the inclusion in the service of material likely to encourage or to incite the commission of crime or lead to disorder.

¹⁶⁴ Section 368L(4)

¹⁶⁵ In accordance with sections 368L(2)(e) and (5) of the Act.

¹⁶⁶ Either under paragraphs 1.13 – 1.15 above, in cases where Ofcom is considering a suspension or restriction of a service under section 368K of the Act, or under paragraph 1.18 where Ofcom has served a notice under section 368L.

A6.23 ODPS providers should note that Ofcom will regard any failure by an ODPS provider to comply with an enforcement notification requiring the payment of any fee imposed under section 368NA of the Act as a serious breach of a relevant requirement¹⁶⁷. Ofcom is likely, subject to an ODPS provider's representations, to consider that the appropriate sanction would be issuing a direction suspending or restricting the ODPS provider's entitlement to provide a service.

Publication of a Sanctions Decision

A6.24 The Sanctions Decision will normally be sent to the ODPS provider, for information only, one working day before publication.

A6.25 Ofcom will then proceed to publish its decision on its website. A summary of the Sanction Decision will normally be published in Ofcom's Broadcast and On-demand Bulletin at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>.

Non-Disclosure

A6.26 It is essential to the integrity of Ofcom's processes and its ability to regulate fairly that all parties abide by Ofcom's published rules and procedures, including those relating to non-disclosure below¹⁶⁸.

Non-Disclosure

Ofcom expects ODPS providers to keep all information, correspondence and documents relating to sanctions cases strictly confidential, unless already in the public domain. In particular, Ofcom expects ODPS providers to keep strictly confidential any information provided to it by Ofcom as part of the sanctions process, including any provisional indication/decision on the type and level of any sanction that may be imposed¹⁶⁹.

This does not limit what Ofcom can publish in its decision at the end of the investigation.

Time limits

A6.27 ODPS providers should keep to the time limits specified in these procedures. The time limits may be extended or shortened, in appropriate circumstances, at Ofcom's discretion. Any ODPS provider seeking an extension to a time limit should explain in writing to Ofcom why it believes the relevant time limit should be extended.

Failure to follow procedures

A6.28 Any failure by an ODPS provider to follow these procedures may result in Ofcom taking additional regulatory action.

¹⁶⁷ Note that section 368NA allows but does not require fees to be imposed.

¹⁶⁸ Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Information provided to Ofcom may need to be disclosed by Ofcom in order to meet such obligations.

¹⁶⁹ Ofcom may withhold material it believes to be confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the ODPS provider will be notified that relevant material has been withheld and the reasons why.

Failure to comply with a suspension, restriction

- A6.29 ODPS providers should be aware of the importance of complying with a sanction that is imposed in accordance with these procedures. For instance, a person may be guilty of an offence and liable to a fine if an ODPS Provider continues to operate an ODPS in contravention of a suspension or restriction imposed under sections 368K, or 368L.¹⁷⁰

¹⁷⁰ See section 368N of the Act.