

OFCOM CONSULTATION ON PROCEDURES FOR HANDLING CONTENT STANDARDS AND LICENSING INVESTIGATIONS AND SANCTIONS

INTRODUCTION

1. Radiocentre is the industry body for commercial radio. We work on behalf of over 40 stakeholders who represent 90% of commercial radio in terms of listening and revenue. Our member companies understand the need for a transparent and effective compliance framework for broadcasters and have extensive experience of working with Ofcom's procedures for handling complaints and investigations.
2. Overall the revised procedures outlined in this consultation seem sensible. However, as noted below, we do not believe that it is necessary or helpful to reduce advance notice that broadcasters get of Ofcom's decision (from 48 hours to 24 hours) or remove the opportunity to comment on accuracy. In addition we believe that there could be further improvements in the way information on complaints is shared with broadcasters initially and a reconsideration of whether it is necessary to publish the details of all complaints, even at the preliminary stage.

KEY CHANGES PROPOSED

3. The changes outlined in the consultation document cover several detailed aspects of Ofcom's investigations and sanctions procedures. Our response to these proposals is outlined below, along with some additional observations on the way these procedures work in practice based on feedback from commercial radio operators.
 - **Broadcaster representations**
4. A crucial element of the current procedures is the ability for broadcasters to be able to respond to a complaint or investigation, providing a right of reply on any allegation so that it can be explained from their perspective and any factual inaccuracies can be addressed.
5. In order to assist with this process we believe that broadcasters should be provided with more detailed information on complaints as early as possible following Ofcom's initial assessment, rather than simply a summary of what it considers to be the material parts of the complaint. Ideally this should extend to all elements of a complaint being disclosed to a broadcaster (with the complainants details redacted if necessary), so that the nature of the complaint is understood clearly and to avoid additional issues being brought up at a later stage. This transparency would not only help to ensure a full understanding of the issues but also reduce the risk of broadcasters inadvertently repeating any mistakes that could compound harm to listeners.
6. On the specific proposal in the consultation document, we welcome the move to provide broadcasters with the opportunity to make oral representations to Ofcom following the preliminary view stage of an investigation into content standards or fairness and privacy issues. This is likely to be especially useful in complex cases and should be open for broadcasters to request where they feel it would be useful in clarifying or explaining particular issues.
 - **Communication and notification**
7. Once a complaint has been received by Ofcom it is important for broadcasters to be kept informed of the progress of any investigation and have the ability to feed into the process. In order to facilitate this communication effectively 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).

8. We also note that Ofcom is proposing new procedures for notifying broadcasters of its final decision following an investigation. At present Ofcom will provide the broadcaster with 48 hours to consider a strictly embargoed copy of the decision for the purpose of correcting factual inaccuracies. The new procedures will give Ofcom the right to provide their final decision only 24 hours (one working day) prior to publication and appears to no longer give broadcasters the opportunity to comment on factual inaccuracies.
 9. This change presents a potential risk for broadcasters, particularly if they have made additional representations to Ofcom based on the preliminary view. In this situation, Ofcom could make lengthy and detailed comments that the broadcaster will not have had sight of, and could potentially contain inaccuracies. Therefore we believe it is fair and proportionate to continue to allow broadcasters at least 48 hours to view Ofcom's final decisions, with an opportunity to make changes if necessary.
- **Publication of cases**
10. Ofcom is proposing to clarify the circumstances in which it will publicise cases relating to content standards or fairness and privacy. These are not changes as such given they reflect Ofcom's normal practice when publicising its investigations.
 11. In particular Ofcom states that it will normally publish details of a decision to investigate or not, but that in some cases it might be inappropriate to do so if the issues raised are particularly sensitive and/ or publicity could have a detrimental impact on third parties. In such cases there may be a delay in publishing an in breach or resolved decision, with no publication at all where a broadcaster is not in breach.
 12. While this clarification is helpful up to a point it also raises some broader questions about Ofcom's approach to publishing complaints, its investigations and decisions. In previous submissions¹ on these matters we have questioned the value of publishing details of complaints that are not pursued past the preliminary stage, given they have been assessed but effectively considered to be groundless by Ofcom.
 13. We would also question the value of publishing information about cases being investigated before the outcome of the complaint has been determined. This does nothing to assist with compliance with licence conditions and could actually have serious unintended consequences for broadcasters who may have done nothing wrong, due to the potential for adverse publicity and speculation.
- **Right of appeal**
14. Some Radiocentre members have also suggested that there should be a formal and/ or independent route of appeal available to broadcasters. This would be particularly useful if there were aspects of a decision they believed should be reconsidered or were not examined and if they felt that additional material factors were not taken into account fully as part of the original investigation. Clear criteria would need to be established in order to ensure that the basis of any appeal is reasonable and structures would need to be put in place to consider the arguments. However the introduction of such a process could help improve accountability and confidence in the regime among broadcasters.

¹ http://www.radiocentre.org/files/rc_response_to_ofcom_licence_breaches_final.pdf

NEW PROCEDURES FOR THE BBC

15. In parallel with this consultation Ofcom is also considering new procedures for regulating the BBC, including the way it will handle complaints, investigations and sanctions relating to BBC programmes². Radiocentre will not be responding separately to this consultation, which is largely concerned with implementing the procedures outlined in the BBC Charter and Agreement, but would make some brief observations on the proposals that have been outlined.
16. The particular procedures for dealing with the BBC in this area are largely consistent with those for commercial broadcasters, with the most notable exception being the more extensive 'BBC first' approach to complaints. However, given that this means Ofcom will not be assessing every complaint, we seek reassurance that the regulator will be in a position to judge whether the BBC has repeatedly breached the Broadcasting Code, as would make a broadcaster potentially eligible for a sanction. The consultation document makes clear that the BBC will provide a report of complaints, but it is not clear at present if the information provided will be audited by Ofcom in a manner that will enable it to assess the BBC's overall compliance record (or even the number of complaints received).
17. In addition, at an overall level we appreciate the desire to ensure that these new procedures for the BBC are broadly consistent with the arrangements for regulating other broadcasters as far as possible. However there will also be areas where commercial broadcasters and the BBC are quite rightly dealt with in a different way, due to its unique funding model and obligation under the Charter and Agreement to provide services that are distinct from the commercial sector.

6 March 2017

² <https://www.ofcom.org.uk/consultations-and-statements/category-2/bbc-content-standards-investigations-and-sanctions>