

# Ofcom Content Sanctions Committee

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<b>Consideration of sanction against</b>	30 of GCap Media plc's ("GCap") <sup>1</sup> 'One Network' radio stations ("the licensees") <sup>2</sup> .
<b>For</b>	Breaches of the Ofcom Broadcasting Code ("the Code") of:  <b>Rule 2.11:</b> "Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known."  <b>Rule 10.10:</b> "Any use of premium rate numbers must comply with the Code of Practice issued by [PhonepayPlus]."  In respect of the broadcast of a premium rate services ("PRS") listener competition, <i>Secret Sound</i> .
<b>Between</b>	15 January to 8 February 2007 (inclusive)
<b>Decision</b>	To impose a financial penalty of a total of <b>£1,110,000</b> , aggregated across the 30 licensees <sup>3</sup> (payable to HM Paymaster General) and, in addition, to require each of the 30 licensees to <b>broadcast a statement of Ofcom's findings</b> in a form to be determined by Ofcom on two specified occasions.

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<sup>1</sup> On 6 June 2008, Global Radio Group Ltd. ("Global") completed its takeover of GCap Media plc. GCap is now a wholly-owned subsidiary of Global.

<sup>2</sup> For details of the 30 licensees, see paragraph 2.2, below.

<sup>3</sup> This constituted a financial penalty of **£37,000** to be imposed on each of the 30 licensees.

## Summary

- 1.1 For the reasons set out in full in the Decision, under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee ("the Committee"), the Committee decided to impose statutory sanctions on the 30 licensees in light of the serious nature of their failure to ensure compliance with the Code.
- 1.2 This adjudication under the Code relates to the broadcast of a PRS competition by 30 of GCap's 'One Network' radio stations<sup>4</sup> between 15 January 2007 and 8 February 2007. GCap responded to Ofcom's investigation and the sanctions process on behalf of all the relevant licensees.
- 1.3 *Secret Sound* was a four-week PRS listener competition. The competition ran from 09:00 to 15:00 each week day, with one round per hour. A mystery sound was broadcast and listeners were invited to enter each hourly round by either calling or sending a text (or "SMS") message to the stations for an opportunity to guess the sound on air. According to the competition's terms and conditions, at the end of each round, an entrant would be randomly selected from that round's telephone and SMS entries, and their answer would then be broadcast on air. If the answer was incorrect, all other entries from that round would be discarded. Listeners would then be invited to enter the next hourly round of the competition, in which the prize fund would be increased by £100. This would continue until the sound was guessed correctly. There were seven rounds per week day between 15 January and 8 February 2007 (i.e. a total of 133 rounds). During this time, four different sounds were broadcast and correctly guessed.
- 1.4 Ofcom launched an investigation, following a complaint made to PhonepayPlus by a whistleblower. The whistleblower alleged that GCap had deliberately selected entrants with wrong answers to participate in the *Secret Sound* competition on air.
- 1.5 Listeners entering by SMS were instructed to text the words "SECRET SOUND" to the SMS entry number. However, some SMS entrants also texted their guess as to the mystery sound and this information could be seen by the the GCap employee who selected the entrants to go to air. Some of these individuals who had texted the incorrect answer were deliberately chosen to go on air by the GCap employee.
- 1.6 On 19 July 2007, PhonepayPlus recorded a breach of its Code of Practice against GCap for misleading its listeners. GCap was fined £17,500 and given a formal reprimand by PhonepayPlus in respect of this breach. PhonepayPlus then referred the case to Ofcom.
- 1.7 Having investigated the case, Ofcom found that the selection of SMS entrants with incorrect answers to be put to air, in contravention of the competition's terms and conditions, was a deliberate and pre-meditated means of preventing the prize from being won in that round. This led to another round of the competition, in which the prize fund was greater, thereby increasing the competition's 'entertainment value'. However, this practice resulted in those listeners who paid to enter the affected rounds having no chance of winning.

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<sup>4</sup> For details of the 30 licensees, see paragraph 2.2, below.

In addition, more listeners were encouraged to pay to enter in the extra rounds before each prize was awarded. Ofcom found that this practice had been agreed in advance at a programme team meeting by a “Director”<sup>5</sup> with operational responsibility for the content and production of network syndicated programmes. This unfair conduct of the competition was in breach of the Ofcom Broadcasting Code. Further, whilst it was not clear how often the breaches had occurred due the absence of any audit information on entrant selection, by GCap’s admission, the breaches had occurred on several occasions. In the circumstances, Ofcom considered the breaches to be serious, repeated and deliberate and therefore referred the case to Ofcom’s Content Sanctions Committee (“the Committee”).

### **Summary of Committee’s Findings**

- 1.8 The breaches of Rules 2.11 and 10.10 were extremely serious. Competition entrants who were known to have incorrect answers were deliberately selected to go on air, preventing the prize from being won in that round of the competition. This resulted in additional rounds, and therefore a greater number of entries, before each prize was awarded. This was contrary to the competition’s terms and conditions and in contravention of the licensees’ compliance obligations under the Code. Further, this practice had been agreed in advance at a programme team meeting by a “Director”, who had operational responsibility for the content and production of network syndicated programmes.
- 1.9 This deliberate conduct caused material harm in terms of financial loss to entrants who paid to participate in the competitions in good faith, and on the basis that they believed they had a fair and equal chance of winning, when in fact all listeners who entered the competition during the rounds in which a wrong answer was deliberately selected had no chance of winning. Breaches of the Code that result in audiences being misled have always been considered by Ofcom (and its predecessor regulators) to be amongst the most serious breaches that can be committed by a broadcaster. In addition, 30 licensees’ audiences were deceived as to the fair conduct of the competition. As such, the breaches represented a very significant breakdown in the fundamental relationship of trust between 30 local radio stations and their audiences.
- 1.10 On the basis of the evidence available, the pre-meditated practice of deliberately selecting entrants with incorrect answers was used repeatedly and therefore there were repeated breaches of the Code during the conduct of the competition. As such, the breaches were, in Ofcom’s view, indicative of serious and fundamental flaws in the licensees’ compliance with the Code.
- 1.11 The nature of the conduct – deliberately increasing the number of rounds before each prize was awarded and thereby encouraging more listeners to pay to enter than otherwise would have done – was likely to have directly resulted in increased revenue. Further, as the competition’s prize fund increased with each additional hourly round, the pre-meditated prolonging of the competition also resulted in a greater incentive for listeners to enter as the competition continued. On the basis of the evidence available, the conduct did not occur for the purpose of revenue generation, but was put in place

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<sup>5</sup> It should be noted that GCap submitted that despite this role including the term “Director” in its description, it considered the individual to be a “mid-ranking employee”, and not a member of its senior management.

purely for editorial purposes – to increase the ‘entertainment value’ of the competition. Ofcom took the view that that the production team’s actions were calculated and deliberate, and evidenced a complete disregard for those listeners who paid to enter, as well as the audiences overall. This was inexcusable.

- 1.12 GCap allowed a small group of, by its own admission, “relatively junior” employees to conduct a networked PRS competition across 30 of its stations, raising premium rate revenue from 30 audiences, with no apparent management supervision or oversight. Ofcom accepted that no members of senior management had been aware of the unfair conduct at the time it occurred, but this in itself indicated the absence of any sufficient or effective oversight, either of those individuals responsible for deliberately conducting the competition unfairly, or crucially, of compliance overall. As such, Ofcom took the view that GCap had demonstrated a fundamental disregard for the licensees’ compliance obligations under the Code and the terms of their licences.
- 1.13 At the time that GCap became aware of the unfair conduct, its own investigation into the matter did not appear to Ofcom to have been either thorough or extensive. In particular, there was no formal written report produced, and GCap’s Board was only given a verbal report of what had occurred. Ofcom was of the view that this indicated that GCap had not taken the matter seriously enough at the time and that this demonstrated a fundamental lack of care as to the licensees’ compliance obligations.
- 1.14 Some four months after GCap’s Board and senior management became aware of the deliberate and repeated nature of the unfair conduct, it published a statement, issued to the press and on its corporate website (on 9 August 2007). Ofcom was extremely concerned about the manner in which GCap had announced the compliance failures in this corporate statement. For GCap to describe this deliberate and repeated unfair conduct as “an isolated incident” and a “system error” was fundamentally misleading and inaccurate and represented, in Ofcom’s view, an inept attempt at “news management” on GCap’s part. The fact that GCap’s Board had authorised the wording of this statement, and its publication on GCap’s corporate website, was a matter of serious concern to the Committee.
- 1.15 The same statement had included an offer of refunds to any listeners who had entered the *Secret Sound* competition. The decision not to broadcast details of this refund offer on the participating stations, or even to publish these details on the stations’ websites where listeners would have been more likely to see them, but instead to publish the statement only on GCap’s corporate website was, in Ofcom’s view, wholly inadequate, as evidenced by the single refund to a listener of £2.
- 1.16 The nature of GCap’s conduct and co-operation with Ofcom’s investigation was taken into account. In Ofcom’s view, GCap had submitted information to Ofcom and to PhonepayPlus that was ambiguous, both in terms of the nature and the extent of the unfair conduct. Ofcom considered it wholly inadequate that GCap had demonstrated an unwillingness to disclose for several months the specific details and seniority of those responsible for the unfair conduct. This was the first case of its kind in which the behaviour of the licensee (or as in this case, the parent company acting on behalf of the licensees) had effectively hindered Ofcom’s investigation.

- 1.17 GCap's attempts on behalf of itself and the licensees to remedy the consequences of the breaches were viewed by Ofcom as entirely inadequate. Further, GCap's conduct during Ofcom's investigation, and in particular, its lack of full disclosure of the facts of the case, was a matter of significant concern. Both factors contributed to the financial penalty being greater than it otherwise would have been.
- 1.18 Since the breaches had occurred, GCap had taken steps to improve its compliance procedures and had also made the decision to no longer use PRS, except for competitions with a charitable motive, or where listeners are paying to receive a non-competition related service. However, GCap had admitted an additional recent incident involving the faking of a winner in a listener competition on one of its stations, Mercia FM. While the incident had been identified promptly by GCap, Ofcom was of the view that the nature of this incident suggested it was still too early to assess whether the improved compliance measures that had been implemented were wholly effective, especially with regards to the compliance training of its staff.
- 1.19 In summary, for GCap employees responsible for the conduct of networked competitions to have deliberately and repeatedly prevented the prize from being won, disenfranchising all those listeners who paid to enter in the affected rounds, and deceiving 30 local radio audiences as to the fair conduct of the competition, was inexcusable. Not only were their actions in breach of the Code and contrary to the competition's terms and conditions, but they represented a gross failure of senior management to have proper regard for the trust of listeners and, ultimately, for the licensees' compliance obligations overall.
- 1.20 This was a particularly serious case where the broadcaster had deliberately deceived its audience, with the result that the revenue from this premium rate competition was likely to have been greater than it otherwise would have been. This, in itself, warranted a significant financial penalty. However, and in addition, some of the actions taken by GCap after a whistleblower had made it aware of its conduct, only served to aggravate the situation. Its own investigation was not as thorough or as extensive as it had claimed. Further, GCap was neither as full or as frank as it should have been either with Ofcom, or with its listeners.
- 1.21 Having considered the relevant facts as outlined above and all the representations made by GCap on behalf of its radio stations, the licensees, the Committee decided to impose a financial penalty which amounted to a total of **£1,110,000**, aggregated across the 30 licensees (payable to HM Paymaster General). This constituted a financial penalty of **£37,000** to be imposed on each of the 30 licensees. The Committee considered this to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed each of the 30 licensees to broadcast a statement of its findings in a form to be determined by Ofcom on two specified occasions.

## Background

- 2.1 GCap owns a total of 55 analogue radio licences and over 90 digital services, including simulcast services. Its 'One Network' of local radio stations comprises 42 stations across the UK.

- 2.2 Starting on 15 January 2007, 30 of GCap's 'One Network' local radio stations ran a networked competition called *Secret Sound*<sup>6</sup>. These radio stations were:

Station	Licensee
2CR FM	Two Counties Radio
97.6 Chiltern FM (Dunstable)	Chiltern Radio Ltd
96.9 Chiltern FM (Bedford)	Chiltern Radio Ltd
Beacon FM (Shropshire)	Beacon Broadcasting Ltd
Beacon FM (Wolverhampton)	Beacon Broadcasting Ltd
Broadland 102	Radio Broadland 102
Wirral's Buzz 97.1	Marcher Radio Group Ltd
Champion FM	Marcher Radio Group Ltd
Coast 96.3	Marcher Radio Group Ltd
Fox FM	First Oxfordshire Radio Company Ltd
Gemini FM (Exeter)	Gemini Radio Ltd
Gemini FM (Torbay)	Gemini Radio Ltd
GWR FM (Bath)	GWR (West) Ltd
GWR FM (Swindon)	Wiltshire Radio Ltd
102.7 Hereward FM	Hereward Radio Ltd
Horizon FM	The Milton Keynes Broadcasting Co Ltd
Lantern FM	Lantern Radio Ltd
Marcher Sound (Wrexham)	Marcher Radio Group Ltd
Mercia FM	GWR Group Plc
Mercury FM (Crawley)	Radio Mercury Ltd
Northants 96	The Northamptonshire Broadcasting Co Ltd
Orchard FM	Orchard FM Limited
Plymouth Sound	Plymouth Sound Ltd
Q103 FM	Cambridge and Newmarket FM Radio Ltd
RAM FM (Derby)	GWR Group Ltd
Severn Sound FM	Cotswold Broadcasting Ltd
SGR Colchester	East Anglian Radio Ltd
SGR FM (Ipswich)	Suffolk Group Radio Ltd
Ten 17	Harlow FM Ltd
Wyvern FM	Radio Wyvern Plc

- 2.3 During the *Secret Sound* competition, a mystery sound was played on air and listeners were invited to enter a PRS competition to identify it. The competition ran from 09:00 to 15:00 each week day, with one round per hour. A mystery sound was broadcast and listeners were invited to enter each hourly round by either calling or sending a text message to the stations for an opportunity to guess the sound on air. The prize for correctly identifying the sound started at £1,000 for the first round (i.e. the first hour that the sound was broadcast) and increased by £100 in each subsequent round if an entrant had given an incorrect answer on air.
- 2.4 Telephone entry cost 35p per call from a landline and SMS cost 25p in addition to the standard network charge per message. According to the competition's terms and conditions, at the end of each round, an entrant would be randomly selected from that round's telephone and SMS entries and

<sup>6</sup> In addition, a non GCap-owned station, Hertfordshire's Mercury 96.6 FM, acquired the competition from GCap and broadcast it during the same period. At the time of publication, this licensee was subject to a separate investigation on which Ofcom had not yet adjudicated.

their answer would then be broadcast on air. Listeners who were selected to give their answer on air at the end of an hourly round were called by a presenter and their conversation was recorded and edited. The completed recording would then be distributed to all the participating stations for broadcast minutes later.

- 2.5 If the answer broadcast on air was incorrect, all other entries from that round would be discarded. Listeners would then be invited to enter the next hourly round of the competition. This would continue until the sound was guessed correctly. There were seven rounds per week day between 15 January and 8 February 2007 (i.e. a total of 133 rounds). During this time, four different sounds were broadcast and correctly guessed.
- 2.6 The selection of entrants to go on air and the compliance of the *Secret Sound* competition was operated on a centralised basis by GCap across all the participating stations.
- 2.7 GCap had invested in an auditable selection system, which could be used to combine all SMS and telephone entries and then randomly select entrants to participate on air in the competition. However, this system was not used by the GCap employee who operated the competition and selected the entrants to go on air. He had, instead, developed his own random selection process. He checked how many SMS entries and how many telephone entries had been received in the previous hour and then entered the total numbers of each into a non-auditable web-based random number generator tool, which was then used to determine whether an SMS or a telephone entry would be selected. The same tool was used to randomly select the entrant who would be put to air in that hour.
- 2.8 Listeners entering by SMS were instructed to text the words "SECRET SOUND" to the SMS entry number, the intention being that entrants selected to participate on air would then be telephoned back and asked to make their guess. However, some SMS entrants also texted their guess as to the mystery sound and this information could be seen by the GCap employee who selected the entrants to go to air.
- 2.9 On several occasions, the GCap employee responsible for selecting the entrants to go to air did not use his own random selection process. Instead, he deliberately selected SMS entrants who had texted a wrong answer with their entry to be put to air. GCap has been unable to determine on precisely how many occasions this occurred due to the absence of audit information. However, GCap accepted that this occurred on several occasions (see paragraph 6.11, below). Further, it later came to light that the practice had been agreed in advance by a "Director"<sup>7</sup>, who had operational responsibility for the content and operation of network syndicated programmes.
- 2.10 There was a total of 297,215 entries to the *Secret Sound* competition during the period 15 January to 8 February 2007. The total revenue received by the relevant service providers was £104,536.61, of which GCap itself received a 41% share, amounting to £42,852. However, the actual cost to competition entrants would have been greater due to costs charged by their own telephone or mobile phone networks in addition to PRS charges and VAT.

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<sup>7</sup> See footnote 5, above.

- 2.11 On 19 July 2007, PhonepayPlus recorded a breach of its Code of Practice against GCap for misleading its listeners. GCap was fined £17,500 and given a formal reprimand by PhonepayPlus in respect of this breach. PhonepayPlus then referred the case to Ofcom.
- 2.12 Following the PhonepayPlus adjudication, GCap issued a statement to the press and on its corporate website on 9 August 2007, offering compensation to those who had entered the *Secret Sound* competition. It also announced in this statement that it would, in future, operate PRS on a not-for-profit basis.

## **Legal Framework**

### **The Communications Act 2003**

- 3.1 Ofcom has a duty under section 319 of the Communications Act 2003 (the “Act”) to set standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives.
- 3.2 The standards objectives are set out in section 319(2) of the Act. These include:
- That generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material (section 319(2)(f) of the Act).
- 3.3 In discharging its functions, Ofcom’s principal duties are to further the interests of citizens in relation to communications matters and the interests of consumers (section 3(1) of the Act) and to secure a number of other matters including:
- 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 Act).
- 3.4 In performing these duties, Ofcom is required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3) of the Act); and where relevant, a number of other considerations including:
- The need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g) of the Act).

### **The Human Rights Act 1998**

- 3.5 Under section 6 of the Human Rights Act 1998, there is a duty on Ofcom (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention of Human Rights (the “Convention”).

- 3.6 Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster's right to "impart information and ideas" and also the audience's "right to receive information and ideas without interference by public authority." Such rights may only be restricted if the restrictions are "prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary" (Article 10(2) of the Convention).
- 3.7 Ofcom must exercise its duty in light of these rights and not interfere with the exercise of these rights in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

### **Ofcom Broadcasting Code**

- 3.8 Standards set by Ofcom in accordance with section 319 of the 2003 Act are set out in Ofcom's Broadcasting Code ("the Code") which came into force on 25 July 2005<sup>8</sup>.
- 3.9 Accompanying Guidance Notes<sup>9</sup> to each section of the Ofcom Code are published and from time to time updated, on the Ofcom website. The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Ofcom Code.
- 3.10 The relevant Code Rules are:

Rule 2.11, which states that:

"Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known".

Rule 10.10, which states that:

"Any use of premium rate must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS)."<sup>10</sup>

### **Licence Condition**

- 3.11 Under section 325 of the Act, a condition is included in broadcasters' licences requiring the broadcaster to secure observance of the standards set by Ofcom under section 319. If Ofcom is satisfied that the holder of a licence has contravened a condition of the licence, it may impose one or more of a number of penalties.

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<sup>8</sup> The Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode>

<sup>9</sup> Guidance Notes can be found at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance>

<sup>10</sup> ICSTIS was re-named PhonepayPlus on 15 October 2007.

## Remedies

- 3.12 Section 109(3) of the Broadcasting Act 1990 (as amended) (the “1990 Act”) provides Ofcom with the power to direct a sound broadcasting services licensee to broadcast a correction or statement of findings (or both) in respect of a contravention of a licence condition.
- 3.13 Sections 110(1)(a) and 110(3) of the 1990 Act provide Ofcom with the power to impose a financial penalty on a sound broadcasting services licensee of up to £250,000.
- 3.14 Under section 110(1)(b) of the 1990 Act, Ofcom may also shorten the licence period of a sound broadcasting services licensee by up to two years.
- 3.15 Section 110(1)(c) of the 1990 Act provides Ofcom with the power to suspend a sound broadcasting services licence by up to six months.
- 3.16 Under section 111 of the 1990 Act, Ofcom may revoke a sound broadcasting services licence if, following due process, it is satisfied that revocation is necessary in the public interest.

## Regulation of Premium Rate Services (“PRS”)

- 3.17 Providers of PRS are separately regulated by PhonepayPlus, the industry-funded regulatory body for all premium rate charged telecommunications services. It regulates in respect of the content, promotion and operation of PRS. In particular, PhonepayPlus’ Code of Practice requires: clear and accurate pricing information and honest advertising and service content. PhonepayPlus has the power to impose sanctions for any breach of its Code of Practice by the person/ body operating PRS.

## Investigation

### Summary

- 4.1 Ofcom carried out an investigation into the *Secret Sound* competition broadcast between 15 January and 8 February 2007. During that investigation, GCap, who was responding on behalf of the 30 licensees, was given the opportunity to make written submissions on the case. In light of the evidence and GCap’s responses, Ofcom concluded that the conduct of the *Secret Sound* competition was in breach of the Code, as outlined above and explained further below.
- 4.2 In addition, Ofcom found the breaches to be sufficiently serious to warrant the referral of the case for consideration by its Contents Sanctions Committee (“the Committee”). Throughout the consideration of the imposition of a statutory sanction, GCap was given opportunities to make written and (at the Committee’s hearing) oral representations, which are summarised below. GCap agreed to the ‘fast-track’ procedure for considering the imposition of sanctions, as set out in paragraphs 24 to 29 of Ofcom’s outline procedures for statutory sanctions in content and content-related cases<sup>11</sup>.

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<sup>11</sup> Ofcom’s outline procedures for statutory sanctions in content and content-related cases are available at: <http://www.ofcom.org.uk/radio/ifi/iffguidance/sanctions/>

## Details of the investigation

- 4.3 Following the broadcast of the *Secret Sound* competition, PhonepayPlus received a complaint from a whistleblower who made a number of allegations about the conduct of the competition including an allegation that entrants who had submitted an incorrect answer by SMS had been selected to go on air. GCap admitted that this conduct had occurred “on occasion”.
- 4.4 On the basis of information provided by PhonepayPlus to Ofcom, Ofcom wrote to GCap requesting its comments in relation to the allegations.
- 4.5 GCap responded and referred to its initial correspondence with PhonepayPlus. It said that the auditable random selection system had not been used because it “had recently employed a new member of staff who took over the entrant procedures and there was a gap in the training process. This staff member was not aware that the system was able to compile both the [telephone] and SMS entries as sufficient training had not been given.” GCap explained the alternative selection process that was used (set out at paragraph 2.7, above).
- 4.6 Additionally, GCap said that during its investigation it had “discovered that, on occasion, an entrant was chosen to go to air who had given an incorrect answer in their SMS entry without putting them through the [selection] system we eventually used.” GCap said that it was unable to provide details concerning how often this had occurred because it had not been using its auditable system for selecting entrants at the time.
- 4.7 GCap said that as soon as it became aware of what it termed the “error”, senior management was informed and key staff members were immediately briefed to “reinforce the procedures”. It stated that it had implemented the following measures to seek to avoid recurrence:
- a fully updated manual had been produced for future networked competitions, scrutinised by the Group Programme Director and the company lawyer;
  - all programme controllers would be taken through the manual;
  - daily spot checks would be made by the Promotions Controller during future networked competitions;
  - additional training would be given on the (auditable) Intext system used for selecting entrants; and
  - GCap’s legal team were updating an internal document detailing best practice on the way to run competitions.
- 4.8 In relation to Rule 10.10 of the Code, GCap said that it had provided the correct pricing information and the operation of the premium rate service did not incorporate any prohibited practices. GCap said that it had acted quickly and in a robust manner to improve its procedures and that it believed the measures it had taken had fully addressed the problems it had encountered.

- 4.9 On the basis of the information GCap had submitted to Ofcom at that time about the circumstances of the conduct and the measures it had taken to prevent any recurrence, Ofcom considered the matter to be resolved.
- 4.10 On 19 July 2007, PhonepayPlus upheld the part of the complaint relating to the selection of SMS entrants who had submitted incorrect answers to go to air as a breach of provision 5.4.1a of its Code of Practice. This states that: “services and promotional material must not...mislead, or be likely to mislead in any way.” PhonepayPlus imposed a fine of £17,500 on GCap and issued it with a formal reprimand.
- 4.11 On 8 August 2007, the case was officially referred by PhonepayPlus to Ofcom for consideration of potential breaches of the Code. It was now apparent to Ofcom that entrants with incorrect answers had been selected deliberately to prolong the duration of the competition, and that this had occurred on a number of occasions. Further, Ofcom received new information relating to the alleged involvement of GCap’s management in this deliberate selection.
- 4.12 On 9 August 2007, GCap issued a statement to the press and on its corporate website. The statement referred to the breach as “an isolated incident” and explained that “as soon as the system error was discovered, management took swift and decisive action to tighten up GCap’s procedures”. The statement also included an offer to refund listeners who had entered the competition:
- “Our relationship with our listeners is of paramount importance to us and any listeners who took part in the *Secret Sound* competition in January 2007 can claim a full refund by visiting [www.gcapmedia.com](http://www.gcapmedia.com) and following the claim guidelines.”
- 4.13 As a result of the new information Ofcom had received, and in accordance with Ofcom’s complaints handling procedures, Ofcom wrote to GCap on 17 August 2007 requesting its formal response.
- 4.14 On 31 August 2007, GCap responded, repeating what it had said in its earlier correspondence with Ofcom and with PhonepayPlus, adding that it had now fully implemented the measures it had decided to adopt. GCap accepted that the practices under investigation were “less than exemplary”.
- 4.15 Having considered GCap’s response, Ofcom remained concerned both by the deliberate nature of the selection of entrants with incorrect answers, and the alleged involvement of GCap’s management in the practice, and wrote to GCap asking “at what stage and at what level within the organisation the decision was made to knowingly take wrong entrants to air.” Ofcom also requested comments on the whistleblower’s specific allegations that:
- the decision to knowingly select entrants with the wrong answer was a “blatant attempt to generate as much revenue as possible on the part of GCap and that the decision to do this was taken at a senior level, at least as senior as the [Director with operational responsibility for network syndicated programmes]”; and
  - that the practice continued throughout the duration of the competition.
- 4.16 GCap responded and stated that:

“No single individual took a unilateral decision about the conduct of the competition at any stage but there were group discussions/ meetings about the competition’s progress at various stages. At one such meeting an erroneous decision was made to take entrants to air who were known to have supplied an incorrect answer. However, we do not believe it appropriate to focus on whether an individual was or was not present at a particular meeting. Whilst we are not proud of the fact that entrants who we knew had provided incorrect answers were taken to air, we dealt with the issue immediately and effectively.”

- 4.17 GCap also strongly denied that the motivation behind the decision was to maximise revenue, submitting that the competition was led by programming, “the principal purpose of which was to drive audience growth.”
- 4.18 GCap reiterated that it had no knowledge of how frequently or infrequently the practice had occurred, only that when it was brought to the attention of senior management, it was immediately discontinued. GCap asked Ofcom to bear in mind that it had already been fined by PhonepayPlus and had offered reimbursement through a press release and in its statement published on its corporate website.

### **Ofcom’s Finding on the Breaches**

- 5.1 Ofcom took GCap’s submissions on behalf of the 30 licensees into account when reaching its conclusions on the question of Code breaches. Ofcom noted GCap’s admission that the practice of selecting SMS entrants to go to air who had submitted an incorrect answer was “less than exemplary”. Ofcom also noted that PhonepayPlus had recorded a breach of provision 5.4.1a of its Code of Practice against GCap.
- 5.2 The practice of deliberately selecting entrants with incorrect answers to prevent the prize from being won and increase the number of rounds before each prize was awarded was contrary to the competition’s terms and conditions which stated that entrants would be randomly selected. This conduct caused material harm, in terms of financial loss, to listeners who paid to participate in the competition on the basis that they had a fair and equal chance of winning, when in fact, all listeners who entered the competition during the rounds where a wrong answer was deliberately selected had no chance of winning. The competition was therefore conducted unfairly, in breach of Rule 2.11 of the Code. Further, by misleading the licensees’ audiences, GCap breached the PhonepayPlus Code of Practice, and the competition was therefore in breach of Rule 10.10 of the Ofcom Code.
- 5.3 Ofcom concluded that serious, repeated and deliberate breaches of Rules 2.11 and 10.10 of the Code had occurred during the broadcast of the competition. In addition to recording these breaches, Ofcom informed GCap that on the basis of the evidence in the case to date, it considered the breaches sufficiently serious, repeated and deliberate to warrant the consideration of a statutory sanction. Ofcom also reiterated that it required from GCap the provision of further information on the seniority of those employees responsible for the unfair conduct.

## **GCap's written representations on the imposition of a sanction**

- 6.1 GCap stressed that it took the matter and its regulatory obligations extremely seriously and emphasised its commitment to providing Ofcom with the most complete and accurate explanation of the relevant facts possible in its ongoing investigation. It underlined that it had consistently admitted that it had engaged in unfair conduct, that the conduct had been “wholly unacceptable” and in breach of Rules 2.11 and 10.10 of the Code. It further accepted that there were “deficiencies in the compliance systems and processes in place at the time which should have prevented the conduct from occurring.”
- 6.2 GCap submitted that there were a number of key factors it wished Ofcom to take into account, including: the absence of any evidence to support allegations regarding the involvement and/or awareness of members of GCap's senior management in the unfair conduct (which it completely rejected); the absence of any evidence to support allegations regarding the motivation behind the unfair conduct as being primarily for financial gain; and the complete rejection by GCap of any suggestion that it had not been full, frank and consistent in the factual accounts provided to Ofcom and PhonepayPlus to date.
- 6.3 GCap accepted that it was effectively the sole entity engaging in the unfair conduct and, on this basis, it accepted responsibility for the breaches committed by the 30 participating ‘One Network’ radio stations. It also confirmed that as the ultimate holding company for all the individual licensees, it was able to assure Ofcom that the individual licence-holders had agreed to this arrangement.
- 6.4 GCap submitted that the history of Ofcom's investigation did not lead it to understand the seriousness with which Ofcom now viewed the matter. It said that due to the passage of time that had elapsed since the events in question had taken place (over a year), the “recollections of certain members of staff of events [were] no longer fresh or entirely consistent with each other” and “it [had] become difficult to gather evidence in response to the new issues raised by Ofcom.”
- 6.5 GCap submitted that any decision to take entrants to air who had texted in an incorrect answer had not been taken at a senior level within GCap. It considered that all of the employees involved had held “relatively junior” positions within GCap. GCap considered that only those individuals that had responsibilities in respect of financial, budgetary, operational or policy matters at group level could properly be categorised as “senior” or as being part of senior management.
- 6.6 GCap said that the *Secret Sound* competition had been conducted by a programme team based in its Bristol offices that was responsible for network-syndicated content. This team comprised four “relatively junior employees”. The most junior member of the team had been responsible for the selection of entrants to be taken to air in the competition and for giving their contact details to the presenter of the competition. These four employees reported to a “mid-ranking employee”, an employee whose job title included the term “Director”, and who had “operational responsibility for the content and production of network syndicated programmes” for stations across the One Network, including the development and presentation of competitions.

However, GCap said that the use of “Director” in this job title might have conveyed “a misleading impression as to the nature and seniority of [the] role.” GCap said that the employee had no responsibility for deciding which programming, including which competitions, would be taken to air, nor any responsibility for financial or budgetary matters relating to group policy or procedures. Responsibility for these matters rested with the Senior Programme Director (to whom the Director in question reported) and, in turn, to those members of senior management to whom the Senior Programme Director reported.

- 6.7 GCap said that the *Secret Sound* competition had been discussed at four “product meetings” held by the Bristol production team, which were attended by all members of the programme team (save for the most junior member). GCap said that at one of these meetings, the Director in question had made a comment “to the effect that it would be good if the prize offered in a particular round of the competition was not won too early”. It submitted that the context was the need to generate listener interest in the competition. Following this comment, a member of the programme team had informed the junior member of the programme team (who was responsible for entrant selection) that the competition should be prolonged. GCap submitted that this junior member had understood that: “when he was told words to the effect that the competition should be prolonged, this meant that whenever the volume of SMS entries with correct answers got to a volume considered to give rise to a risk that the prize for a particular round could be won, he was to suspend his own web-based method for randomly selecting an entrant to be taken to air and instead select an entrant who had sent an SMS with an incorrect answer.”
- 6.8 GCap said that it had thoroughly investigated the allegation that individuals within senior management had been involved or had known of the conduct. It said that this allegation had been “robustly and categorically denied” by those holding positions senior to the Director in question and that it had found “absolutely no evidence” that any other employee in a position senior to him/her had been aware that entrants to the competition were not being selected in a completely random manner.
- 6.9 GCap said that the objective that had been set for the Bristol production team had been to develop entertaining radio content that increased audience numbers across the ‘One Network’. Competitions had been seen primarily as a means to generate listener interest and therefore drive audience growth.
- 6.10 It said that PRS had been used in relation to SMS entries because it provided a single number that could be texted by all listeners of participating stations across the network. It had been used for telephone entries because it offered better management of high call volumes. It had also been used because ‘shortcode’ SMS and non-geographic voice systems each involved costs in their set-up and handling. PRS was therefore used to cover the costs of running the competition, as well as the prize fund. GCap submitted that the cost of entry to *Secret Sound* (35p per call and 25p per SMS, plus standard network charges) were “modest”. It said that there had been four available tariffs, 25p being the lowest and said that had revenue generation been a “key driver” for its PRS activities, it would have adopted higher tariffs than it did. Finally, it said that the performance and remuneration of the production team had not been measured by the revenue any competition generated.

- 6.11 GCap said that it had no knowledge of the frequency with which the unfair conduct had occurred because the junior member of staff responsible for selection of entrants to go to air had not used the auditable random selection system that was in place. However, it said that it did not consider that it was correct to state that all entrants chosen to go to air, other than the four winners, had provided incorrect SMS answers. GCap understood that the junior member of staff would cease using the random generator for approximately two to three days during each “sound”. This occurred at the point when it was clear (usually on the third day of each “sound”) that there was a sufficiently high volume of entrants who were texting in correct answers that individuals within the production team would become concerned that the jackpot was likely to “go off early”. GCap submitted that after ceasing to use the random generator for two to three days, the junior employee would then revert to random methods of entrant selection so that the jackpot could be won. GCap said that, therefore, to the best of its understanding, the unfair conduct “did not occur at all stages and without interruption throughout the duration of the competition.”
- 6.12 GCap acknowledged Ofcom’s concerns about its compliance procedures at the time of the competition. It accepted that those measures in place had either broken down or had been insufficient to prevent the conduct from occurring. It described the conduct as occurring as a result of “the combination of the failure of a very junior assistant producer to use the auditable system and a decision taken by a small group of relatively junior employees.” However, it submitted that there had not been an absence of action on its part at the time to address its compliance obligations and considered that it was not appropriate to describe what had occurred as indicative of fundamental flaws in its compliance procedures.
- 6.13 GCap outlined the compliance procedures that had been in place at the time of the unfair conduct, as follows:
- it had invested in the auditable random selection system, which had been custom-built to GCap’s specifications. When used by a properly trained operator, this system ensured that entrants for PRS competitions were selected in accordance with the terms and conditions of the competition and Ofcom’s regulations;
  - its in-house legal team had “comprehensively” reviewed the competition’s terms and conditions in November 2006, including highlighting the need for random selection and fair treatment of all competition entrants;
  - manuals had been prepared for all networked competitions which included details of relevant on-air disclaimers, terms and conditions and regulatory obligations. These were provided to all employees on any networked competition; and
  - guidance notes on Ofcom regulatory obligations were circulated to Programme Directors and Programme Controllers with instructions to pass these on to team members.
- 6.14 GCap said that it did not consider that the competition should have been more closely supervised by senior individuals. It submitted that “such a level of close and constant supervision by senior management would not have been practical in the circumstances.” It also submitted that its senior

management were not acting unreasonably in relying on programme makers who were “with one notable exception, reasonably experienced and for whose use the [auditable] purpose-built random selection tool had been acquired.”

6.15 GCap accepted that the issues that had arisen on *Secret Sound* had identified the need for it to review and strengthen its compliance processes. It outlined a number of improvements that it had made to its internal processes, including:

- The production by its legal team of competition and promotions guidelines circulated to all Programme Controllers, Programme Directors and Heads of Sales with a firm requirement to instruct relevant members of their teams to become familiar with the information;
- The hosting of three conference calls and five training workshops by an in-house lawyer, the Group Programme Director and Head of Commercial Programming to explain the new guidelines to all national and regional sales and promotions teams, all programming staff and the national commercial team;
- The production of an updated manual for future networked competitions, reviewed in detail by the Group Programme Director and an in-house lawyer;
- Additional training conducted by the provider of the auditable selection tool to the junior members of the Bristol production team responsible for selecting entrants to go to air;
- Individual sessions held by the Group Programme Director with all Programme Directors, specifically to address compliance issues;
- The attendance of GCap’s in-house lawyers at local stations to explain to employees its regulatory obligations and to answer any questions;
- A requirement that when entrants are selected, there are at all times two members of the production team in the studio to ensure that proper processes are followed;
- The carrying out of daily spot checks by the Promotions Controller during future networked competitions; and
- The review of GCap’s general terms and conditions for competitions by external lawyers and GCap’s in-house legal team.

6.16 GCap also reiterated that in future it would only use PRS on a not-for-profit basis, restricted to situations where money was being raised for charity or where listeners were calling or sending an SMS for services such as weather updates or sports scores. It said that its decision not to use PRS for “normal competitions” was a further safeguard on its part to ensure that no similar breaches occurred.

6.17 GCap referred to the statement it had issued on 9 August 2007, together with an offer to refund charges incurred by all entrants and directions as to how a refund could be obtained. It said that this statement had been covered by “a number of media sources, including the East Anglian Daily Times..., the

Colchester Evening Gazette,...Media Guardian online, Broadcast Now online and Radiotoday online...” GCap submitted that “in retrospect...it could have done more to publicise the offer, including broadcasting the statement and offer of a refund on the 30 stations that had carried the *Secret Sound* competition.”

- 6.18 GCap’s offer to refund in full the amount of any costs incurred by competition entrants remained open between 9 August 2007 and 31 December 2007. This offer was taken up by one listener who was issued with a refund of £2. GCap stated that its Chairman and then CEO had decided on 6 August 2007 that it would not be appropriate for GCap to retain its profits from the competition (£25,867). It would be donating them to the Nordoff-Robbins Music Therapy charitable foundation within seven days.
- 6.19 GCap accepted that “it could have given a fuller response to Ofcom” in relation to Ofcom’s request summarised at paragraph 4.15 above. However, it rejected any suggestion that it had misled either Ofcom or PhonepayPlus or provided inconsistent or conflicting accounts of the relevant facts.
- 6.20 GCap said that having carefully reviewed its records and spoken to those involved in the original investigation to the extent that they were still employed by GCap, it was unable to pinpoint the precise time it had become aware that the decision to select entrants who had texted an incorrect answer had come about as a result of a discussion at a meeting. However, it believed it had become aware of this fact at or about the time of preparing its initial response to PhonepayPlus (13 April 2007). GCap said that this information was not provided to PhonepayPlus as it had not been requested by the regulator and GCap understood its questions to be “more technical in nature.” However, GCap submitted that when the information was requested by Ofcom in September 2007, it was provided by GCap. GCap admitted that its response to this request could have contained a greater level of detail about those present at the relevant meetings. It described its decision not to provide more detail as motivated by “the desire to protect the confidentiality of the relatively junior employees involved”. It stated that it had never intended to obstruct Ofcom’s investigation and, to the extent that it had caused any delay or difficulties, it apologised.
- 6.21 GCap said that whilst it was not able to provide an “absolute guarantee” that similar practices had not occurred in other competitions (in particular, having regard to the time that had passed since it had conducted many of those competitions and staff turnover in the interim), it believed that *Secret Sound* was an isolated case.

### **Referral to the Content Sanctions Committee**

- 7.1 It was considered that, taking all the circumstances into account, and in particular, the fundamental lapses in the planning and management and compliance oversight of the *Secret Sound* competition and the deliberate and pre-meditated nature of the unfair conduct of the competition, the breaches were sufficiently serious and repeated to warrant the consideration of the imposition of a statutory sanction.
- 7.2 Therefore, in accordance with Ofcom’s outline procedures for consideration of statutory sanctions in content and content-related cases, the case was referred to the Committee.

## GCap's further written submission

- 8.1 GCap subsequently sent a further unsolicited written submission to Ofcom. In this submission, GCap responded to Ofcom's view that GCap had provided inconsistent explanations to Ofcom and PhonepayPlus, particularly with reference to GCap's initial explanation of the role of a junior member of staff in the unfair conduct (see paragraphs 4.5 and 4.6, above) and its later admission that the conduct resulted from a deliberate decision taken at a programme team meeting.
- 8.2 In particular, GCap stated that it considered it had been entirely consistent in its explanations as to the process by which the decision to take entrants who had texted an incorrect answer to air was taken. GCap said that it had not stated or sought to imply that the unfair conduct was the result solely of the actions of the junior member of the production team responsible for selecting entrants to go to air. GCap said that in October 2007, it had admitted in a letter to Ofcom that, at a meeting, "an erroneous decision was made to take entrants to air who were known to have supplied an incorrect answer." Subsequently, in April 2008, it had given the fullest account it was able to give of how this decision was taken and by whom. It recognised that the description of events given in its April 2008 response was a fuller explanation but submitted that it was not inconsistent with the summary statement in its October 2007 letter to Ofcom.
- 8.3 GCap also wholly refuted any allegation that it had not disclosed information to Ofcom and PhonepayPlus in a full and frank manner. It accepted that it could have provided fuller details at an earlier stage, but stated that it was clear that GCap had not sought to mislead Ofcom or PhonepayPlus. GCap submitted that it had responded to the questions put to it in a straightforward way and, in the context of the enquiries made of it, GCap said it had not understood that any additional information had been sought or expected by Ofcom and PhonepayPlus.

## Sanctions Hearing

- 9.1 Ofcom's Content Sanctions Committee ("the Committee") held a hearing on 2 June 2008 at which GCap was given the opportunity to make oral representations on behalf of the 30 licensees, before the Committee decided whether the breaches warranted the imposition of a statutory sanction and, if so, of what type and at what level.
- 9.2 The Committee was addressed by Fru Hazlitt, GCap's Chief Executive Officer, Richard Manning, GCap's Group Legal Director and Company Secretary and Bea Tormey, GCap's Legal Advisor, Freshfields. Daniel Owen, Director of Regulatory and Public Affairs, Global Radio Group Ltd<sup>12</sup>, was also in attendance.
- 9.3 GCap stated that it considered the unfair conduct of *Secret Sound* to have been "totally unacceptable" and it was committed to ensuring that it was not repeated. It also assured the Committee that it took its compliance obligations very seriously and considered that the conduct in question was particularly

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<sup>12</sup> At the time of the Sanctions Hearing, GCap was in the process of a takeover by Global Radio Group Ltd.

regrettable, firstly because of its generally good record of compliance and secondly, because it believed that trust and integrity should be at the heart of its relationship with its listeners.

- 9.4 GCap stated that it had compliance measures in place at the time of the conduct, although these had proved to be inadequate. In particular, it detailed the significant investment it had made in the auditable random selection system at a time when few, if any, other radio groups had invested in such systems, and before there was what it described as “a general awareness” about the fair conduct of competitions.
- 9.5 GCap stated that it had, at the time, considered that its compliance procedures were well understood by its staff. Describing the circulation of the competition manual and guidance notes it had in place at the time of the unfair conduct, it admitted that it had believed this to be sufficient in terms of supervisory compliance. It described the unfair conduct as a serious error of judgement on the part of those involved, but also admitted that GCap’s senior management had not supervised sufficiently well on the matter. With reference to the compliance oversight at the time, it stated that it was unable to give a cast iron guarantee that the unfair conduct would have come to light had it not been for the whistleblower’s complaint.
- 9.6 On the issue of the nature and extent of GCap’s actions following the whistleblower’s allegation of the unfair conduct in *Secret Sound*, GCap explained that it had undertaken an internal investigation of the matter at the time of preparing its April 2007 response to PhonepayPlus. This had involved two of its in-house lawyers conducting telephone interviews with the staff concerned. It was as a result of this investigation that GCap became aware that the unfair conduct had resulted from a decision taken at a programme team meeting to select entrants with incorrect answers as a means of deliberately prolonging the competition. However, it went on to admit that due to staff changes in its legal department, it had experienced difficulty in understanding the extent and outcome of the investigation conducted at that time. GCap subsequently admitted that no formal written report of the investigation had been produced, although a verbal report had been given to GCap’s Board at that time, explaining the seriousness of the issue.
- 9.7 GCap said that it wished to dispel any suggestion that it had been inconsistent or less than frank in its responses to Ofcom and PhonepayPlus. It submitted that it had not deliberately provided any inconsistent or misleading information to Ofcom. In particular, GCap submitted that it had not described the seniority of the individuals involved in the conduct in an inconsistent way as no-one with senior management responsibility was involved. While some of those involved may have been experienced, they were still relatively junior within the organisation of GCap. In addition, GCap stated that it had not given an inconsistent account of who was involved, and had never suggested nor intended to imply that the conduct occurred solely as a result of the actions of the inexperienced junior member of staff.
- 9.8 GCap submitted that in response to PhonepayPlus’ request for information about the selection system and procedure used to handle entrants, GCap had additionally disclosed voluntarily the issue of SMS entrants with incorrect answers being selected to go to air. It stated that, at the time, it believed therefore that it had made its “core admission”. However it went on to admit to the Committee that, with the benefit of hindsight, it now understood it should

have provided both PhonepayPlus and Ofcom with a full report at the time. GCap also subsequently accepted, contrary to its written representations, that the responses it did provide, particularly the response to PhonepayPlus of 13 April 2007 (on which it later relied in two of its responses to Ofcom), “could [have] be[en] read a number of ways”. Nevertheless, it had no doubt that the issue had been treated with the utmost of seriousness within GCap, having been discussed at a Board meeting, and various steps having been taken as an immediate response to the issue.

- 9.9 Referring to its unwillingness to disclose to Ofcom the level of seniority of those involved in the unfair conduct for several months after it had uncovered this information in its internal investigation, GCap reiterated that this resulted from what it described as a “misguided desire” to protect employees who were fairly junior within the organisation. However, GCap went on to accept that having been asked for the information by Ofcom, it should have been provided, and the fact that it did not provide it at that time was unacceptable.
- 9.10 With reference to the description of the unfair conduct in the statement GCap had issued to the press and on its corporate website on 9 August 2007, and the extent and take-up of its listener refund offer, GCap submitted that with hindsight it now accepted that it “should have done more”. By way of explanation, GCap admitted that at the time it was concentrating on improving its internal processes, and that due to the absence of full audit information on how frequently the unfair conduct had occurred, there was a potential difficulty in verifying which listeners had been affected.
- 9.11 GCap submitted that it had put in place significant remedial measures since the conduct had occurred, as outlined in its earlier written representations. Specifically, it drew attention to the following:
- all members of staff involved in competitions, sponsorship or promotions must be familiar with GCap’s new competition guidelines which reinforce the requirements of the Code and PhonepayPlus’ Code of Practice;
  - training workshops and conference calls have taken place to explain and reinforce the new guidelines;
  - GCap had taken the decision to cease using its original random selection system in December 2007, and now uses an auditable Flytext selection system for all its networked competitions which means that entries can only be received by text message;
  - two employees must be present for entrant selection in all competitions to ensure that the correct procedures are followed;
  - the Bristol programming team was in the process of being re-located to London where it would be subject to closer management supervision and scrutiny; and
  - GCap no longer uses PRS, except for competitions with a charitable motive, or where listeners are paying to receive a non-competition related service.
- 9.12 GCap drew the Committee’s attention to a recent incident that had occurred on 1 May 2008, involving a networked listener competition broadcast on a

number of GCap-owned stations. Due to a technical problem with its new Flytext selection system, the programming team was not able to select a competition entrant. Staff at one of the participating stations, Mercia FM, had instead faked a winner on air<sup>13</sup>. GCap submitted that the staff involved immediately referred the incident upwards, and the Flytext system in place also identified the issue to senior management. It presented this incident as an indication that its new compliance systems and improved training and procedures were robust and effective. The staff involved in that case had been dismissed as a result of the incident. GCap submitted that it believed its staff were now “under no illusions” as to its compliance obligations.

9.13 GCap reiterated that it accepted full responsibility for the conduct of *Secret Sound* on behalf of the 30 licensees, and that it also accepted that, in the circumstances, a sanction was warranted. However it requested that in reaching its decision, the Committee take into consideration that: the duration of the conduct was limited to four weeks; not all rounds of the competition were affected and the number of affected participants was therefore likely to be relatively low; there was no knowledge or involvement of senior management; revenue from the competition was relatively small; the conduct was not driven by revenue considerations; GCap had already been fined by PhonepayPlus; GCap had already donated its profits to charity, had offered reparations to listeners; and finally, had implemented improved compliance measures.

9.14 In conclusion, GCap stressed that it did not wish to convey the impression that it was seeking to deny or minimise the magnitude of the infringements, which it accepted were serious and inexcusable and believed had brought discredit not only to those involved but to the whole organisation. It stated that its trusted relationship with its listeners was its “most valuable asset” and that it was in no doubt that these breaches should not have occurred.

## **Sanctions Decision**

10.1 In reaching its decision, the Committee considered carefully all the written and oral submissions made by GCap on behalf of the 30 licensees. The Committee decided, for the reasons set out below, to impose a financial penalty and to issue a direction requiring each of the 30 licensees to broadcast a statement of Ofcom’s findings in relation to the case in a form to be determined by Ofcom on two specified occasions. In deciding on an appropriate and proportionate level of financial penalty in this case, the Committee had regard to Ofcom’s Penalty Guidelines<sup>14</sup>.

### **The seriousness of the breaches**

10.2 Having considered all the evidence and GCap’s representations on behalf of the licensees, the Committee found that the breaches in this case were serious, repeated and deliberate, as set out at paragraphs 10.3 to 10.9, below.

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<sup>13</sup> At the time of publication, this incident was the subject of a separate investigation on which Ofcom had not yet adjudicated.

<sup>14</sup> Ofcom’s Penalty Guidelines are available at <http://www.ofcom.org.uk/about/account/pg/>. Section 392 of the Act requires Ofcom to prepare and publish a statement containing guidelines it proposes to follow in determining the amount of any penalties imposed by Ofcom, which Ofcom must have regard to in setting any penalty.

- 10.3 The Committee considered that the breaches of Rules 2.11 and 10.10 were extremely serious. Competition entrants who were known to have incorrect answers were deliberately selected to go on air, preventing the prize from being won in that round of the competition. This resulted in additional rounds, and therefore a greater number of entries, before each prize was awarded. This was contrary to the competition's terms and conditions and in contravention of the licensees' compliance obligations under the Code. Further, this practice was pre-meditated, having been agreed in advance at a production meeting by a "Director" who had operational responsibility for the content and production of network syndicated programmes.
- 10.4 This deliberate conduct caused material harm in terms of financial loss to entrants who paid to participate in the competitions in good faith, and on the basis that they believed they had a fair and equal chance of winning, when in fact all listeners who entered the competition during the rounds in which a wrong answer was deliberately selected had no chance of winning. Breaches of the Code that result in audiences being misled have always been considered by Ofcom (and its predecessor regulators) to be amongst the most serious breaches that can be committed by a broadcaster. In addition, GCap deceived 30 audiences overall, as to the fair conduct of the competition. As such, the breaches represented a very significant breakdown in the fundamental relationship of trust between 30 local radio stations and their audiences.
- 10.5 In addition, the Committee noted that due to GCap's failure to train, manage and oversee its staff sufficiently, a relatively inexperienced junior member of staff had taken the decision to suspend use of the auditable random entrant selection system. Consequently, when the junior member of staff implemented the agreed practice of deliberately prolonging the competition by selecting entrants with incorrect answers, no audit information was recorded. It was therefore not possible to demonstrate accurately how frequently the unfair conduct had occurred, which was, in itself, a matter of serious concern. However, notwithstanding the fact that GCap submitted that the conduct did not occur "at all stages and without interruption throughout the duration of the competition", the Committee was of the view that, on the basis of the evidence available, the practice of deliberately selecting entrants with incorrect answers was used repeatedly and therefore there were repeated breaches of the Code during the conduct of the competition. As such, the breaches were, in the Committee's view, indicative of serious and fundamental flaws in the licensees' compliance with the Code.
- 10.6 The Committee noted that this was the first case it had had to consider to date involving the unfair conduct of a competition in which the nature of the conduct – deliberately increasing the number of rounds before each prize was awarded and thereby encouraging more listeners to pay to enter than otherwise would have done – was likely to have directly resulted in increased revenue. Further, the Committee considered that, as the competition's prize fund increased with each additional hourly round, the pre-meditated prolonging of the competition also resulted in a greater incentive for listeners to enter as the competition continued. While the Committee was satisfied that there was no evidence that the unfair conduct had occurred specifically for the purpose of revenue generation, it was nevertheless of the view that by deliberately prolonging the competition, and thereby encouraging more

listeners to pay to enter, there had been increased consumer harm as a direct result of the conduct.

- 10.7 It was clear to the Committee that, as compared to those cases in which unfair conduct of competitions had occurred (to some extent) spontaneously, as a result of an unforeseen technical failure, this case involved entirely pre-meditated unfair conduct that was put in place purely for editorial purposes – to increase the ‘entertainment value’ of the competition. The Committee took the view that that the production team’s actions were calculated and deliberate, and evidenced a complete disregard for those listeners who paid to enter, as well as the audiences overall. This was inexcusable.
- 10.8 While the Committee accepted that none of GCap’s senior management was aware of the unfair conduct at the time it occurred, this in itself indicated to the Committee that there had been an absence of any sufficient or effective oversight, either of those individuals responsible for deliberately conducting the competition unfairly, or crucially, of compliance overall. GCap allowed a small group of, by its own admission, “relatively junior” employees to conduct a networked PRS competition across 30 of its stations, raising premium rate revenue from 30 audiences, with no apparent management supervision or oversight. Beyond the acquisition of the random selection system, the circulation of a competition manual and guidance notes, there appeared to have been no sufficient compliance training, as evidenced by the fact that the auditable selection system was not, in fact, used.
- 10.9 Further, the Committee noted that there was no liaison between the production team and GCap’s compliance department, nor any compliance procedures in place to assess and monitor the conduct of the competition during its planning or operation. The Committee considered that, had it not been for the whistleblower’s complaint, it was highly unlikely the breaches would have come to light. As such, it took the view that GCap had demonstrated a fundamental disregard for the licensees’ compliance obligations under the Code and the terms of their licences.
- 10.10 It was the view of the Committee that due to the severity, deliberate and repeated nature of the breaches, the resulting financial harm caused to those listeners who paid to enter those rounds in which they had no chance of winning and the fundamental breach of 30 audiences’ trust, this was a very serious case. The Committee therefore considered that the imposition of a significant financial penalty was warranted.

## **Precedent**

- 10.11 In considering an appropriate and proportionate level of financial penalty, the Committee took account of its previous decisions in those cases in which audiences paid to enter competitions that had been conducted unfairly. This case was the first case to be considered by the Committee involving a radio listener competition. In addition, this was also the first case involving unfair conduct which by its nature was likely to have directly resulted in increased revenue. The Committee also took account of the specific representations made by GCap on behalf of the 30 licensees. The Committee was satisfied that its decision as to the appropriate and proportionate level of financial penalty to be imposed in this case was consistent with the most relevant precedent cases, and reflected the particular circumstances of this case.

## **Incentive**

10.12 In setting the level of financial penalty, the Committee took into account that GCap had taken steps to improve compliance procedures and oversight. However, the Committee was also of the view that GCap's conduct subsequent to the breaches was a matter of significant concern, in particular given the licensees' obligations to disclose information to Ofcom (as detailed in paragraph 10.27, below). The Committee also noted that the purpose of the imposition of a financial penalty was to deter both the party involved and third parties from future breaches. In this case, the Committee considered that a significant financial penalty would represent an appropriate incentive to ensure compliance in the future.

## **Other specific criteria**

10.13 The Committee considered that the following specific criteria, as set out in Ofcom's Penalty Guidelines, were relevant to adjust the starting figure of any financial penalty:

10.14 The Committee noted that the competition had raised a total revenue of £104,536.61, of which GCap had received a 41 per cent share overall, amounting to £42,852. The Committee took into account that the particular type of unfair conduct in this case – prolonging the duration of the competition, with the increasing prize fund also giving a greater incentive to listeners to enter – was likely to have directly resulted in a greater number of listeners paying to enter the competition than otherwise would have done. However, it also noted that the revenue raised by the competition, and therefore the consumer harm as a result of the unfair conduct, was relatively limited, when compared to relevant precedent cases. Notwithstanding this, the Committee considered that the breaches caused significant harm to the fundamental relationship of trust between the 30 participating radio stations and their audiences.

10.15 It was the view of the Committee that this was not a case in which the breaches were caused or contributed to by any third party, nor were there any similar relevant circumstances which should be taken into account in this case.

10.16 The Committee noted that the competition had been conducted over a relatively short time period – on week days over four weeks. Although the breaches were repeated, the Committee noted that due to GCap's inability to provide audit information or any other relevant evidence on this issue, it was not possible to determine precisely on how many occasions the unfair conduct occurred.

10.17 The Committee took into account that a financial penalty of £17,500 had already been imposed on GCap by PhonepayPlus on 19 July 2007 in respect of the same conduct of the competition, as operated on a telephone and an SMS premium rate service.

10.18 The Committee noted that the combined audience reach of the participating stations was approximately 3,000,000 listeners<sup>15</sup>. It was of the view that the scheduling of the competition (from 09:00 to 15:00 on weekdays) represented

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<sup>15</sup> As indicated by RAJAR figures.

a significant proportion of the stations' daytime programming. Taking into account audiences' high expectations of trust with their local radio stations, the Committee considered that the unfair conduct of the competition represented a significant breach of the trust of those 30 audiences.

### **Level of Penalty**

10.19 Taking all these factors into account, the Committee considered that the 'starting figure' of any financial penalty should be significant. In considering the level of penalty, the Committee took into account that the maximum financial penalty that could be imposed on each of the licensees was £250,000.

### **Factors tending to increase the level of penalty**

10.20 The Committee then considered whether any of the factors set out in the Penalty Guidelines (or any other relevant factors) aggravated or tended to increase the level of any financial penalty it might impose.

10.21 As referred to in paragraph 10.16, above, the Committee noted that the breaches in this case occurred repeatedly during the prolonged duration of the four-week competition, although it was not possible to determine precisely how many hourly rounds of the competition were affected.

10.22 The Committee noted that GCap had submitted as a point of mitigation that none of its senior management was aware of the conduct. The Committee was strongly of the view that senior management should have been aware of the breaches that had occurred. The Committee considered that GCap's management, risk assessment, supervision and compliance procedures had been entirely inadequate, and consequently resulted in the unfair conduct of this networked competition. As such, the Committee took the view that the breaches reflected a gross failure by senior management.

10.23 The Committee considered that the absence of any sufficient internal compliance procedures, management or oversight directly resulted in the programme team being able to put their plan into action to deliberately conduct the competition unfairly for the purpose of increasing its 'entertainment value'. The actions of those responsible were undertaken without any consideration for the compliance of the competition with the Code, or, for that matter, with the competition's terms and conditions. The Committee took the view that it was unacceptable for GCap, as a major radio group, responsible for the centralised compliance of this networked competition, to have had such wholly inadequate procedures in place that the breaches were neither prevented from occurring, nor identified once they had occurred. As such, the Committee considered that the breaches represented a gross failure of compliance with the relevant obligations under the Code.

10.24 It was a matter of significant concern to the Committee that, contrary to GCap's written representations, its investigation into the matter did not appear to have been either thorough or extensive. In particular, the Committee was very concerned to learn that there was no formal written report produced, and GCap's Board was only given a verbal report of what had occurred. The Committee was of the view that this indicated that GCap had not taken the matter seriously enough at the time. In the Committee's opinion, the steps GCap had taken to investigate the unfair conduct were inadequate and could

not, therefore, be treated as a factor tending to mitigate the consequences of the breaches and the level of penalty.

- 10.25 The Committee also took account of the fact that, since April 2007, the GCap Board and other members of senior management, including the Group Legal Director and Company Secretary, had been fully aware that the unfair conduct had occurred on several occasions, and was the result of a deliberate and pre-meditated decision by the programme team to prolong the competition as a means of increasing its 'entertainment value'. Further, the Committee noted that it had taken GCap a period of some four months to publish its statement, issued to the press and on its corporate website on 9 August 2007. The Committee was also extremely concerned about the manner in which GCap had announced the compliance failures in this corporate statement. For GCap to describe this deliberate and repeated unfair conduct as "an isolated incident" and a "system error" was fundamentally misleading, inaccurate and represented, in the Committee's view, an inept attempt at "news management" on GCap's part. The fact that GCap's Board had authorised the wording of this statement, and its publication on GCap's corporate website, was a matter of serious concern to the Committee.
- 10.26 The Committee also took into account that the same statement had included an offer of refunds to any listeners who had entered the *Secret Sound* competition. The decision not to broadcast details of this refund offer on the participating stations, or even to publish these details on the stations' websites where listeners would have been more likely to see them, but instead to publish the statement only on GCap's corporate website was, in the Committee's view, wholly inadequate, as evidenced by the single refund to a listener of £2. The Committee took the view that if, as GCap submitted, it considered its relationship with its listeners to be its "most valuable asset", this had in no way been demonstrated by its attempt to inform those listeners who may have been affected by the unfair conduct and alert them to its offer to remedy the material harm caused.
- 10.27 The Committee considered the nature of GCap's conduct and co-operation with Ofcom's investigation and whether this should be considered as a factor tending to decrease the level of the penalty. In the Committee's view, GCap had submitted information to both Ofcom and to PhonepayPlus that was ambiguous, both in terms of its description of the nature and the extent of the unfair conduct. The Committee considered it wholly inadequate that GCap had demonstrated an unwillingness to disclose for several months the specific details and seniority of those responsible for the unfair conduct. Further, the Committee noted that GCap had now admitted that it should have provided more information to Ofcom during the investigation. It was a matter of serious concern to the Committee that this was the first case of its kind in which the behaviour of the licensee (or as in this case, the parent company acting on behalf of the licensees) had effectively hindered Ofcom's investigation. The Committee considered that GCap did not co-operate with Ofcom's investigation in a manner that it would expect from its licensees. In light of this, the Committee was firmly of the view that this conduct should be considered as a factor tending to increase, rather than decrease, the level of penalty.

## **Factors tending to decrease the level of penalty**

- 10.28 The Committee then considered whether any factors set out in the Penalty Guidelines (or any other relevant factors) in its view might limit or decrease the level of any financial penalty it might impose.
- 10.29 The Committee took into account that, since the breaches had occurred, GCap had taken steps to improve compliance procedures. It had also made the decision to no longer use PRS, except for competitions with a charitable motive, or where listeners are paying to receive a non-competition related service. However, the Committee noted that GCap had admitted an additional recent incident involving the faking of a winner in a listener competition on one of its stations, Mercia FM. GCap submitted that its identification of this incident (both through staff reporting it to more senior staff and by its new selection system's processes) demonstrated that its new compliance procedures were robust and effective. The Committee considered that the incident had been identified promptly. Nevertheless, it was the Committee's view that the nature of this incident suggested it was still too early to assess whether the improved compliance measures that had been implemented were wholly effective, especially with regards the compliance training of its staff.
- 10.30 The Committee also noted that GCap had donated the profits it made from the competition to charity. However, in light of what the Committee considered to be the misleading and wholly unsatisfactory contents of GCap's published statement, and the limited scale of its publication (see paragraphs 10.25 and 10.26, above), the Committee was firmly of the view that GCap's attempts to remedy the consequences of the breaches should not decrease the level of the penalty to be imposed. To the contrary, the Committee considered that such behaviour should be treated as a factor tending to increase the level of the penalty.

## **Conclusion**

- 10.31 Cases where a broadcaster has misled its audience, whether knowingly or not, have always been considered to be amongst the most serious breaches of the Code by Ofcom (and its predecessor regulators).
- 10.32 The Committee was of the view that the breaches of Rules 2.11 and 10.10 in this case represented a very serious breakdown in the fundamental relationship of trust between 30 local radio stations and their audiences. Those members of the audience who listened to the *Secret Sound* competition, and in particular, those who paid to enter it, did so in good faith, on the basis that the competition was being conducted fairly and in accordance with its terms and conditions. In fact, the competition was deliberately and repeatedly prolonged and this resulted directly in financial detriment to those who entered the rounds in which the unfair conduct occurred, and was also likely to have resulted in increased revenue. Whilst the Committee noted that the unfair conduct had been for the purpose of increasing the 'entertainment value' of the competition, and not to generate revenue, it was nonetheless of the view that this was wholly unacceptable.
- 10.33 GCap failed to put in place any effective or sufficient compliance procedures, risk assessment, management or supervision of its staff to ensure the licensees' fair conduct of the competition. This was despite the size and resources of GCap, as a large radio group, and the fact that the competition

was networked across 30 licensees' stations. As such, the unfair conduct represented a gross failure of senior management.

- 10.34 While the Committee noted that GCap had taken steps to improve compliance procedures going forward, GCap's attempts at remedying the consequences of the breaches were viewed by the Committee as entirely inadequate. Further, GCap's conduct during Ofcom's investigation, and in particular, its lack of full and frank disclosure of the facts of the case, was a matter of significant concern.
- 10.35 In summary, for GCap employees responsible for the conduct of networked competitions to have deliberately and repeatedly prevented the prize from being won, disenfranchising all those listeners who paid to enter in the affected rounds, and deceiving 30 audiences as to the fair conduct of the competition, was inexcusable. Not only were their actions in breach of the Code and contrary to the competition's terms and conditions, but they represented a gross failure of senior management to have proper regard for listeners' trust and, ultimately, for the licensees' compliance obligations overall.
- 10.36 This was a particularly serious case where the broadcaster had deliberately deceived 30 audiences, with the result that the revenue from this premium rate competition was likely to have been greater than it otherwise would have been. This, in itself, warranted a significant financial penalty. However, and in addition, some of the actions taken by GCap after a whistleblower had made it aware of its conduct, only served to aggravate the situation. Its own investigation was not as thorough or as extensive as it had claimed. Further, GCap was neither as full or as frank as it should have been either with Ofcom, or with its listeners.
- 10.37 Having considered the relevant facts as outlined above and all the representations made by GCap on behalf of the licensees, the Committee decided to impose a financial penalty which amounted to a total of **£1,110,000** aggregated across the 30 licensees (payable to HM Paymaster General). This constituted a financial penalty of **£37,000** to be imposed on each of the 30 licensees. The Committee considered this to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed each of the 30 licensees to broadcast a statement of its findings in a form to be determined by Ofcom on two specified occasions.

### **Content Sanctions Committee**

Philip Graf  
Adam Singer  
Kath Worrall

26 June 2008