

Ofcom Content Sanctions Committee

Consideration of sanction against:

Channel S World Limited, Channel S Plus Limited and Channel S Global Limited (“the Licensees”) in respect of their respective services Channel S NTV, ATN and Channel S (“the Channels”).

For:

A breach of the Broadcast Committee of Advertising Practice (“BCAP”) Television Advertising Standards Code (“the TV Advertising Code”) in respect of:

Section 4:

“No advertisement:

- (a) may be inserted by or on behalf of any body whose objects are wholly or mainly of a political nature;*
- (b) may be directed towards any political end.”*

On:

Various times between 18 and 22 April 2008.

Decision:

To impose a financial penalty (payable to HM Paymaster General) of **£15,000** on Channel S World Limited, **£13,000** on Channel S Plus Limited and **£12,000** on Channel S Global Limited making a total of £40,000; and, in addition, to require Channel S World Limited, Channel S Plus Limited and Channel S Global Limited to **broadcast a statement of Ofcom’s findings on each of their respective services Channel S NTV, ATN and Channel S**, in a form and at a time or times to be determined by Ofcom on two specified occasions.

1. Summary

- 1.1. For the reasons set out in section 8, under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee ("the Committee"), the Committee has decided to impose statutory sanctions on each of Channel S World Limited, Channel S Plus Limited and Channel S Global Limited. This decision has been reached in light of the seriousness of the Licensees' failure to ensure compliance with the ban on political advertising set out in section 4 of the TV Advertising Code on their respective services, Channel S NTV, ATN and Channel S.
- 1.2. The Channels operated by the Licensees provide free-to-air general entertainment and information services aimed at the Bangladeshi community in the UK and Europe.
- 1.3. This sanctions decision under the TV Advertising Code relates to the broadcast of a political advertisement ("the Advertisement") during the election period¹ leading up to the Mayor of London and London Assembly elections held on 1 May 2008. The Advertisement showed images of Brian Paddick, the Liberal Democratic Party candidate for London, and Jalal Rajonuddin, a Liberal Democratic Party candidate for the London Assembly. During the footage, a voiceover stated, in Bangla: "*Vote Brian Paddick for Mayoral candidate, and Jalal for GLA candidate...*" The Advertisement was broadcast a total of 44 times on the Channels between 18 and 22 April 2008.
- 1.4. Ofcom received two complaints about the Advertisement. On 22 April 2008, upon notification that the Advertisement was being broadcast, Ofcom immediately contacted the Licensees. On the same day, the Licensees informed Ofcom that the Advertisement had been taken off the air. On 28 April 2008, Ofcom formally directed the Licensees to cease transmission of the Advertisement.
- 1.5. Having viewed the Advertisement, Ofcom found on 28 April 2008 that its broadcast on the Channels repeatedly breached the TV Advertising Code. In particular, the broadcast of this Advertisement breached Sections 4(a) and 4(b) of the TV Advertising Code, which prohibits political advertising. This states that no advertisement may be inserted by or on behalf of any body whose objects are wholly or mainly of a political nature or may be directed towards any political end. Ofcom considered that this content was advertising, even though it was not paid for. The Advertisement was transmitted by, or on behalf of, the Liberal Democrat Party – one of the UK's main political parties. It is beyond question that the Liberal Democrats objects are wholly of a political nature. No advertisement may be inserted on, or on behalf of, the Liberal Democrat Party. Further, the advertisement was directed towards a political end because it directly encouraged voters to vote for the Liberal Democrat candidate for London, Brian Paddick, and a Liberal Democrat candidate for the Greater London Assembly, Jalal Rajonuddin. Among other things, the Advertisement sought to influence the outcome of an election.
- 1.6. Ofcom considered this contravention of the Code particularly serious in circumstances where the Advertisement not only actively promoted the

¹ The election period for these elections began on 18 March 2008 – London 2008 Media Handbook, The Electoral Commission, page 6

candidates of a political party standing in the elections and urged viewers to vote for them but was repeated on many occasions. Ofcom therefore decided that the case should be referred to the Committee for consideration of statutory sanctions. The Committee agreed, and the Licensees, having made further written representations, also attended an oral hearing before the Committee on 18 November 2008.

- 1.7. After considering all of the evidence before it, the Committee decided that the breach by the Licensees of section 4 of the TV Advertising Code was sufficiently serious to attract a sanction, including a financial penalty.
- 1.8. The Licensees did not dispute the fact that they had breached the TV Advertising Code by the broadcast of the Advertisement. They argued however that because the Advertisement was compiled for the three Licensees by one compliance committee, the Committee should treat it as one contravention rather than on the basis of separate breaches by all three Licensees. The Licensees also pointed to: new safeguards put in place to prevent a similar breach happening again (for example, the broadcast of individual advertisements now rests with the Licensees' senior executives and not with duty managers as before); the fact that the impact of the breach they said would not have been great given the Channels' small audience share; the high turnover of staff working at the Channels, which had meant that observance of existing compliance procedures had been reduced to a certain extent. Moreover, many staff spoke Bengali as a first language and so did not easily understand all of the detail of Ofcom's English-language Codes.
- 1.9. The Committee however considered that the breach of Section 4 of the TV Advertising Code was very serious because: a specific statutory ban exists to prohibit political advertising because of the serious potential effect that such advertising can have on the democratic process; the potential effect of the political advertising in this case was significant - the Advertisement gave unfair promotion to Liberal Democratic Party candidates for the 2008 London mayoral and London Assembly elections by being shown during the election period; the case is not a marginal one - the Advertisement involved a flagrant breach of the TV Advertising Code and was broadcast on a total of 44 occasions over a five day period; and, the compliance procedures in place at the time of the breach were woefully inadequate.
- 1.10. Having regard to the seriousness of the breach and to Ofcom's Penalty Guidelines, the Committee decided it was appropriate and proportionate in the circumstances to impose a financial penalty (payable to HM Paymaster General) of **£15,000** on Channel S World Limited, **£13,000** on Channel S Plus Limited, and **£12,000** on Channel S Global Limited, making a total of £40,000. In addition, the Committee decided that it was appropriate to require the Licensees to **broadcast a statement of Ofcom's findings on each of their respective services, Channel S NTV, ATN and Channel S** in a form and at a time or times to be determined by Ofcom on two specified occasions.

2. Background

- 2.1. Channel S, ATN and Channel S NTV provide free-to-air general entertainment and information services aimed at the Bangladeshi community in the UK and Europe.
- 2.2. Channel S Global Limited holds the Ofcom licence for Channel S (TLCS589), Channel S Plus Limited holds the licence for the channel ATN (TLCS1029) and Channel S World Limited holds the licence for Channel S NTV (TLCS1030)². Mr Mahee Ferdhaus is the sole shareholder of each of the Licensees. A compliance committee made up of representatives from the Licensees is responsible for the compliance of each Licensee. Mr Harish Joshi, the Licensees' compliance consultant, is the "spokesperson" and point of contact for this compliance committee.
- 2.3. On 22 April 2008, Ofcom was informed that a political advertisement ("the Advertisement") was being broadcast on the Channels. Ofcom also received a complaint about the Advertisement on 23 April 2008.
- 2.4. The Advertisement showed images of Brian Paddick, the Liberal Democratic Party candidate for London, and Jalal Rajonuddin, a Liberal Democratic Party candidate for the London Assembly. During the footage, a voiceover stated, in Bangla:

"Vote Brian Paddick for mayoral candidate, and Jalal for GLA candidate – one time anti-racist activist; former deputy leader of Tower Hamlets Council; and well known East London political leader. Vote for Jalal by placing a cross on box number 10 on the yellow ballot paper. For more information, contact..."
- 2.5. The words, in Bangla, "Vote for GLA candidate Jalal Rajonuddin" were displayed across the screen together with an address.
- 2.6. The election period began on 18 March 2008 and voting took place on 1 May 2008.

3. Legal Framework

The Communications Act 2003 ("The Act")

- 3.1 Ofcom has a duty under section 319 of 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. The standards objectives are set out in section 319(2) of the Act. Section 319(2)(g) is to ensure that "advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services".

² Channel S NTV is using licence TLCS1030 which is licensed to Channel S World Limited. The channel changed its name from "NTV" to "Channel S World" in June 2007. It is currently operating under the name "Channel S NTV" on the Sky EPG.

Section 321(2) provides that:

“For the purposes of section 319(2)(g) an advertisement contravenes the prohibition on political advertising if it is -

- (a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;
- (b) an advertisement which is directed towards a political end....”

The Act goes on to explain the meaning of political nature and political ends. The Section 321(3) of the Act states:

“(3) For the purposes of this section objects of a political nature and political ends include each of the following—

(a) influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;...

(f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;

(g) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends.”

3.2 By virtue of sections 321 and 325 of the Act, a condition is included in broadcasters’ licences requiring them to secure compliance with the TV Advertising Code in connection with the provision of their services and the advertising or sponsorship included in their services.

3.3 On contravention of a licence condition, sections 236 to 238 of the Act provide Ofcom with the power:

- to direct the licensee not to repeat a programme;
- to direct the licensee to broadcast a correction or statement of Ofcom’s finding;
- to impose a financial penalty (5 percent of qualifying revenue or up to £250,000 whichever is greater); and/or
- to revoke the licence.

TLCS Licence Condition 8(4) (Television Licensable Content Service)

3.4 This Condition states that the Licensee shall ensure that the provisions of the standards code, in this case the TV Advertising Code, set to secure the objectives in section 319(2)(a) and (g) to (j) of the Act and relating to standards and practice in advertising and sponsorship of programmes and any prohibitions of advertisements and forms and methods of advertising or sponsorship of programmes, are observed in the provision of the licensed service.

Legal context of the Memorandum Of Understanding (“MOU”)

3.5 The legal foundation for the co-regulatory system envisioned by the MOU is the Deregulation and Contracting Out Act 1994 (“DCOA”). Where a Minister or other public authority (like Ofcom) has been given specific functions or

duties by legislation, DCOA allows the Minister or public authority to delegate or 'contract out' those functions to another person or organisation. Ofcom has been given the power to contract out its functions under DCOA by section 1(7) of the Act.

- 3.6 Ofcom's duties and functions in the area of broadcast advertising regulation derive in the main from sections 319 to 328 of the Act. Under DCOA and various related statutory instruments, Ofcom has contracted out some of its functions, including its functions relating to:
- the setting, reviewing and revising of standards codes for broadcast advertising to BCAP (from section 319(1)); and
 - the handling and resolving of complaints about the observance of broadcast advertising standards codes (from s325(2))
- to the Advertising Standards Authority (Broadcast).

Functions to be delegated

- 3.7 Under the MOU, certain advertising regulation functions are delegated to the ASA(B) and BCAP, subject to certain constraints. However, under the MOU political advertising regulation has been specifically reserved to Ofcom, notwithstanding that it involves the control of advertising content.

BCAP's Television Advertising Standards Code

- 3.8 Section 4 states that "No advertisement...
(a) may be inserted by or on behalf of any body whose objects are wholly or mainly of a political nature;
(b) may be directed towards any political end."

Remedial action and penalties

- 3.9 Section 236 of the Act provides Ofcom with the power to direct the holder of a television licensable content service licence ("TLCS licence") to broadcast a correction or statement of findings (or both) or not to repeat a programme on contravention of a licence condition.
- 3.10 Section 237 of the Act provides Ofcom with the power to require a TLCS licence-holder to pay a specified financial penalty, if Ofcom finds that the licence-holder has contravened a condition of its licence. The maximum amount for such a penalty is £250,000 or 5 percent of the licensee's qualifying revenue, whichever is greater.
- 3.11 Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence.

4. Ofcom's investigation

- 4.1. Following notification of the broadcast of the Advertisement and receipt of the complaint, Ofcom carried out an investigation. On the day that it became aware of the Advertisement, 22 April 2008, Ofcom telephoned the Licensees' compliance consultant, Mr Joshi, to inform him of its concerns about the broadcasting of the Advertisement. Mr Joshi emailed Ofcom on the same day

informing them that the transmission of the Advertisement had been stopped. Ofcom asked how the Advertisement came to be broadcast and how it complied with the relevant provisions in the Act and Section 4 of the TV Advertising Code.

- 4.2. On 23 April 2008, Mr Joshi responded by explaining that the Channels had been approached by the Liberal Democratic Party to broadcast the Advertisement. The Advertisement did not go through the Licensees' compliance team for approval before broadcast because the approach was made over a weekend and a decision to allow it to be broadcast was taken by a junior member of the Licensees' marketing department, who Mr Joshi said had been told by the Liberal Democratic Party that it was satisfactory to broadcast. Ofcom had not received any evidence whether this was the case.
- 4.3. Mr Joshi also explained that no payment was made to the Licensees by the Liberal Democratic Party for the Advertisement to be broadcast. They considered that the Advertisements transmissions "counted as a service to the community". The Channels ceased transmission of the Advertisement as soon as they became aware of Ofcom's concerns.
- 4.4. The Licensees acknowledged that the Advertisement was broadcast a total of 44 times on the three Channels (Channel S, 11 times; ATN, 13 times; and Channel S NTV, 20 times) between 18 to 22 April 2008, and provided Ofcom with transmission logs highlighting the specific occasions on which the Advertisement was broadcast confirming the same.

5. Ofcom's decision that the Licensees were in breach of the TV Advertising Code

- 5.1. First, Ofcom considered that this content was advertising and therefore the material had to comply with the TV Advertising Code. The TV Advertising Code states that:

"(g) For the purposes of the Code, 'licensees' means Ofcom licensees and the terms 'advertisement' and 'advertising' mean any publicity by advertisers in breaks during or between programmes. This is irrespective of whether payment is made. The rules also apply to 'teleshopping' channels, windows and spots."

Further, Section 2.1 Ofcom's of Rules on the Amount and Distribution of Advertising ("RADA")³ states:

"For the purposes of calculating advertising time the following are deemed to be advertising items:

(a) all items of publicity broadcast on behalf of someone other than the licensee in breaks in or between programmes, apart from public service announcements, charity appeals broadcast free of charge, announcements

³ RADA was replaced by the Code on the Scheduling of Television Advertising ("COSTA") http://www.ofcom.org.uk/tv/ifi/codes/code_adv/tacode.pdf on 1 September 2008.

required by the Ofcom and information to viewers broadcast in accordance with an Ofcom requirement;...”

- This material was not a public service announcement. Public service announcements are impartial announcements providing information or advice to citizens.
- This was not a charity appeal.
- This was not an announcement by or on behalf of Ofcom.

Given the requirements of RADA and the TV Advertising Code and the information provided by the Licensees, it is clear that this was an advertisement.

- 5.2. Having viewed the Advertisement, Ofcom found on 28 April 2008, that its broadcast repeatedly breached the TV Advertising Code. In particular, the broadcast of this Advertisement breached Sections 4(a) and 4(b) of the TV Advertising Code (see paragraph 3.8)
- 5.3. The Advertisement was transmitted by, or on behalf of, the Liberal Democratic Party – one of the UK’s main political parties (with seats in the House of Commons, Scottish Parliament, Welsh Assembly, the London Assembly, and local government). It is beyond question that the Liberal Democrats objects are wholly of a political nature. No advertisement may be inserted on, or on behalf of the Liberal Democrat Party.
- 5.4. Further, taking into account Section 231(3)(a), (f), and (g), the Advertisement was directed towards a political end. It directly encouraged voters to vote for the Liberal Democrat candidate for London, Brian Paddick, and the Liberal Democrat candidate for the Greater London Assembly, Jalal Rajonuddin. Among other things, the Advertisement sought to influence the outcome of an election.
- 5.5. On 28 April 2008, under Condition 17(1) of its Licence, Ofcom directed each Licensee to cease, with immediate effect, transmission of the Advertisement. Ofcom informed the Licensees that it considered the broadcast of a political advertisement at the time of an election to be an extremely serious breach of the TV Advertising Code, and particularly serious in circumstances where the content not only actively promoted the candidates of a political party standing in the elections but also urged viewers to vote for them.
- 5.6. Ofcom also found that such a repeated breach was especially serious during the time of an election, and raised some fundamental questions about the adequacy of compliance procedures of the Channels. Further, Ofcom did not consider this to be a marginal breach of the rules, where fine editorial judgement was needed. This was a blatant breach of the prohibition on political advertising.

6. Referral to the Content Sanctions Committee

- 6.1. On 1 July 2008 Ofcom formally recorded a breach of Section 4 of the TV Advertising Code. It considered that, taking all of the circumstances into account, the contraventions were sufficiently serious to warrant the consideration of the imposition of a statutory sanction. This was because:
- there was such a blatant breach of the TV Advertising Code;
 - there was a very serious breach;
 - the breach took place during the election period;
 - the Advertisement was broadcast repeatedly over several days; and
 - the Licensees' compliance procedures were inadequate, given that the Advertisement was allowed to be shown at all.

The Licensees' written representations on the decision to refer

- 6.2. The Licensees made written submissions to Ofcom in relation to the proposed decision to refer the breach to the Committee. They did not dispute the fact that they had breached the TV Advertising Code by the broadcast of the Advertisement.
- 6.3. The Licensees argued that while Ofcom had recommended an aggregate figure for the fines, it had proposed that individual fines be imposed on each of the Licensees. The Licensees, however, argued that if responsibility for the breach in relation to each Licensee rested with the same compliance committee, and the recommended sanction was made due to that committee's failure to ensure that the Licensees complied with Section 4 of the TV Advertising Code, it would seem only right that the fine imposed should be on a "concurrent basis" (i.e. on the basis of one breach of the TV Advertising Code, rather than on the basis of separate breaches by all three Licensees). The Licensees therefore suggested that the fine should be one third of the amount recommended.
- 6.4. The Licensees also pointed to what it believed to be mitigating circumstances, which had not previously been raised and considered. They said that they had put safeguards in place to prevent a similar breach happening again. They also said that while they appreciated that one possible reason for imposing a financial penalty is to deter licensees from breaching Ofcom regulations again, the admitted failure on this occasion arose from a failure within the checking process of the compliance committee, which had been corrected. They argued that because they were small commercial operations with relatively low turnover and a limited audience, the harm caused by the Advertisement was limited due to the restricted coverage and the short period of time during which it was broadcast. Finally, they argued that they had taken the matter very seriously as evidenced by their actions, including their immediate cessation of the broadcast of the Advertisement upon notification by Ofcom.

Decision to refer to the Committee

- 6.5. Having taken account of all of the circumstances and of the representations made by the Licensees, Ofcom concluded that the breach was sufficiently

serious to refer the case to the Committee for consideration of a statutory sanction.

- 6.6. The Committee, having reviewed Ofcom's decision to refer the breach, accepted that the case was sufficiently serious that it should be considered for sanction. Accordingly, the Licensees were invited to attend an oral hearing before the Committee.

7. Sanctions Hearing

Written representations from the Licensees

- 7.1 The Committee held an oral hearing with the Licensees' representatives on 18 November 2008. On 17 November 2008, the Licensees made additional but unsolicited written submissions through the solicitors Harris Cartier. The Committee accepted these representations and took them into account in reaching its decision. In summary, these submissions are as follows.
- 7.2 The Licensees reiterated that they did not dispute the breach of the TV Advertising Code recorded by Ofcom. They emphasised that they had taken the issues raised by Ofcom very seriously and had dealt with them immediately.
- 7.3 The Licensees, through its solicitors, rejected the suggestion, which they alleged had been made by Ofcom in correspondence, that they had been dilatory in dealing with certain issues arising from the breach. They explained that any delay was attributable to a lack of availability of personnel at Harris Cartier, rather than to the Licensees themselves.
- 7.4 In the afternoon on 17 November 2008, the Licensees provided details of new procedures for commercial advertising compliance, which had been introduced after the breach of the TV Advertising Code that led to this case.

Oral representations by the Licensees

- 7.5 The Licensees also made oral representations to the Committee on 18 November 2008, before the Committee came to its decision. They were represented by Francisco de Sancha, Consultant, and Harish Joshi, Compliance Consultant and director of the Licensee companies.
- 7.6 The Licensees restated many of the points that they had made in written submissions to Ofcom (see above) during the sanctions process. They fully accepted that the breach had occurred and reiterated that they had not received any financial payment for the broadcast of the Advertisement.
- 7.7 The Licensees also said that it was likely that the impact of the breach would not have been great given the Channels' small audience share. While they acknowledged that this did not diminish the offence, it was they submitted, a mitigating factor. In addition, the Licensees pointed out that over the past year there had been a high turnover of staff working at the Channels, which had meant that observance of existing compliance procedures had been reduced to a certain extent. Moreover, many staff spoke Bengali as a first language and so did not easily understand all of the detail of Ofcom's English-language Codes.

- 7.8 The Licensees did, however, emphasise that new compliance procedures and stricter rules are now in place. In particular, the Licensees' employees have been advised not to take risks in relation to the broadcast of commercials. The decision to sign off the broadcast of individual advertisements now rests with the Licensees' senior executives and not with duty managers as before. New training manuals have been distributed and training sessions have been organised since May 2008. The intention is to have wider staff attendance and more training sessions going forward.
- 7.9 For the reasons described above, the Licensees asked that the Committee consider the fine as resulting from just one breach (thereby lowering the overall figure). They restated their argument that because the breach of the TV Advertising Code originated from one source (that is, the Licensees' central compliance committee) the breach should be regarded as a single breach by the Licensees instead of as breaches by each of the three Licensees.
- 7.10 In response to questions from the Committee, the Licensees provided more detail about the circumstances surrounding the broadcast of the Advertisement. They alleged that a representative of the Liberal Democratic Party had approached them directly and this representative had said that the Advertisement had been approved. Ofcom has no evidence whether this is the case. The Licensees also stated that it was broadcast on other channels⁴. The Licensees said that, as a result, although compliance procedures had been in place they were undermined by what the Liberal Democratic Party representative had told them.
- 7.11 In response to questions from the Committee, the Licensees said that they were aware of the ban on political advertising.

8. Decision by the Committee

- 8.1 In reaching its decision, the Committee carefully considered all of the written and oral submissions made by the Licensees. For the reasons set out below, the Committee decided to impose a financial penalty on each of the Licensees separately totalling £40,000. In addition, the Committee decided to require the Licensees to broadcast a statement of Ofcom's findings on each Channel (Channel S, ATN and Channel S NTV) in a form and at a time or times to be determined by Ofcom on two specified occasions.
- 8.2 In deciding on the level of financial penalty the Committee had regard to the seriousness of the breach and to Ofcom's Penalty Guidelines⁵.

⁴ Despite investigation Ofcom has seen no evidence that this material was transmitted on other licensed services.

⁵ Ofcom's Penalty Guidelines are available at <http://www.ofcom.org.uk/about/accoun/pg/>. Section 392 of the Communications Act 2003 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.

The seriousness of the breaches

- 8.3 Having viewed the Advertisement and taken account of all of the evidence the Committee considered that the breach of Section 4 of the TV Advertising Code was particularly serious. This was for the following reasons.
- 8.4 First, a specific statutory ban exists to prohibit political advertising because of the serious potential effect that such advertising can have on the democratic process. Ofcom has retained control over the regulation of political advertising, despite responsibility for the regulation of most broadcast advertising being contracted out to BCAP precisely because of its sensitivity and significance. Thus, a contravention of the ban on political advertising is always a serious matter.
- 8.5 Second, the potential effect of the political advertising in this case was significant. The Advertisement gave unfair promotion to Liberal Democratic Party candidates for the 2008 London al and London Assembly elections by being shown during the election period, when it was most likely to affect the voting intentions of the electorate.
- 8.6 Third, the case is not a marginal one. The Advertisement was clearly political and involved a flagrant breach of the TV Advertising Code. It was broadcast on a total of 44 occasions across the Channels operated by the Licensees and over a five day period. In Ofcom's experience, no broadcaster has ever transmitted an advertisement that was so political in nature and so obviously directed at a political end. This Advertisement clearly and specifically promoted named candidates during an election period.
- 8.7 Fourth, the compliance procedures in place at the time of the breach were, in the Committee's view, woefully inadequate. The prohibition on political advertising is unequivocal. The Committee noted that, in their submissions to Ofcom, the Licensees said that the Advertisement was cleared for broadcast by a junior member of staff because the request to the Licensees by the Liberal Democratic Party to broadcast the Advertisement had come at a weekend.

Deliberate and reckless breach of TV Advertising Code

- 8.8 In the Committee's view, a deliberate decision was made to allow the Advertisement to be broadcast in the first instance, and the Licensees were reckless to allow it to continue to be broadcast afterwards a total of 44 times over five days during the election period. The Licensees were also reckless and failed to exercise reasonable care in the management of their compliance procedures. The Licensees admitted that authorisation for the broadcast of the Advertisement was given by a junior member of the Licensees' marketing team without it being referred to the compliance committee. Further, the Licensees did not realise that the Advertisement was being broadcast on the three Channels until alerted by Ofcom some five days after its first broadcast. The Committee also noted that the Licensees did not submit the material to Clearcast⁶ beforehand for clearance. The ban on political advertising is specific, clear and absolute, and the items shown were obviously political

⁶ Clearcast, formally known as the Broadcast Advertising Clearance Centre ("the BACC"), is the company responsible for the pre-transmission examination and clearance of television advertisements for broadcast. To help ensure compliance with their licensing obligations, many broadcasters clear advertisements to be transmitted on UK terrestrial and satellite channels with Clearcast in advance of transmission.

advertising. To allow such advertising to be broadcast at all, and certainly on 44 occasions over five days, demonstrates that the Licensees' compliance procedures were woefully inadequate.

Precedent

- 8.9 The Committee considered whether there were any relevant precedents which they should take into account. They considered one precedent which, although not directly comparable to this case, involved presenters of programmes broadcast during an election period who were themselves candidates in the election. This was the case of the Islam Channel Limited in respect of its service Islam Channel⁷, which decision was published on 31 July 2007. The Licensees did not make any representations on this precedent case.
- 8.10 Islam Channel Limited was fined a total of £30,000 for breaches of the due impartiality rules in the Code. In that decision, Ofcom considered the breaches of the Code to be serious, and that the Licensee had shown a reckless disregard for important rules of the Code with respect to ensuring that the special impartiality requirements in the Communications Act 2003 and other legislation, relating to broadcasting on elections and referendums, are applied at the time of elections and referendums (see principle in Section Six of the Code).
- 8.11 In considering the precedent value of the Islam Channel case when considering the Channel S case, the Committee noted that the *Islam Channel* case had been decided on different facts. Nonetheless, there were a number of significant similarities: the programmes on the Islam Channel involved breaches of the Code which took place during the election period for London local elections; had the potential to cause considerable harm to the democratic process by conferring an unfair electoral advantage on a particular candidate; and, as in the current case, the breaches were repeated and resulted from considerable inadequacy in existing compliance procedures. On balance however the Committee considered that the breaches in the current case were in some ways more serious than in *Islam Channel*: for example, the political advertising in this case in support of particular candidates was blatant, calling on viewers to vote for named individuals, and the Advertisement was played a total of 44 times.
- 8.12 The Committee found that the imposition of a substantial financial penalty in the current case – which had a number of similarities with *Islam Channel* – was consistent with previous Ofcom practice.

Deterrent

- 8.13 The Committee considered the Licensees' submission that the current case had already acted as an incentive for the Licensees to comply with the TV Advertising Code in that new compliance procedures had already been put in place. The Committee noted these changes and took the view that they would assist to some extent in improving compliance in the future. The Committee, however, balanced this factor against other very significant ones: in particular the seriousness of the breaches, the fact that the Advertisement had been repeated 44 times over a period of five days, the woeful compliance

⁷ http://www.ofcom.org.uk/tv/obb/ocsc_adjud/islamchannel.pdf

procedures in place at the time of the contraventions, and concerns about how effective the new compliance procedures would be in practice in the future. The Committee considered these latter factors very important and therefore concluded that a substantial financial penalty was appropriate in this case. Further, the financial penalty needed to be sufficiently significant to act as a deterrent against a repeat of this or a similar breach (given the severity, magnitude and scale of the current breach and the resulting substantial, potential harm to the electoral process) by the Licensees. The financial penalty should also be significant enough to act as an incentive to all other broadcasters not to air advertisements of this nature in the future.

Other specific criteria

- 8.14 The Committee then considered whether there were any specific criteria it should take into account in deciding on a suitable level of financial penalty. It noted that:
- the Licensees derived no financial benefit from the broadcasts of the Advertisement;
 - the breaches had the potential to cause considerable harm to the democratic process by conferring an unfair electoral advantage on particular candidates;
 - the Licensees were relatively small but profitable broadcasters;
 - although the Licensees said they relied to some extent on representations from a third party about the acceptability of the Advertisement, they were wholly incorrect to do so, and broadcast of the Advertisement resulted from a deliberate decision of the Licensees' staff; and
 - the audience had a clear expectation that the Licensees would respect the democratic process by following the rules in the TV Advertising Code prohibiting political advertising.
- 8.15 Therefore, the Committee considered that a financial penalty was proportionate and appropriate in this case, and that in light of all of the circumstances outlined above, the fine should be substantial.
- 8.16 In deciding the appropriate level of fine, the Committee had regard to the fact that the Licensees had common ownership and a common compliance structure, with one shared compliance committee (see paragraph 2.2 above). As a result, it considered that the general and specific criteria outlined above – as regards, for example, seriousness, recklessness and precedent – applied to a very great extent equally to all three Licensees. The Committee found that a substantial element of the financial penalty to be imposed on each Licensee should therefore be the same in each case.
- 8.17 The Committee took into account the Licensees' argument that because their compliance was centralised in one committee, Ofcom should treat this matter as one breach by the compliance committee (or, in effect, one Licensee) rather than separate breaches by the three individual Licensees. The Committee did not accept this argument. Under the regulatory framework of the Broadcasting and Communications Acts, each Licensee is responsible for the output on its own channel and Ofcom licences are issued on this basis with specific obligations for compliance imposed on each Licensee. Similarly, the legislation provides for any sanctions to be imposed on and by reference to the individual Licensee.

8.18 Where however the same or similar breaches have been committed by individual licensees who are under common ownership and compliance is handled centrally, Ofcom will normally choose to hear the cases together and take those factors into account when considering whether any sanction(s) should be imposed. The gravity of the breaches, and any appropriate sanctions, must however be considered by reference to the individual Licensees and on the facts of the particular case.

Factors increasing the level of penalty

8.19 The Committee then reviewed factors which aggravate or tend to increase the level of the financial penalty, both generally and as regards the individual Licensees.

8.20 The Committee took into account that:

- the breach was repeated a total of 44 times over a period of five days;
- each of the Licensees broadcast the Advertisement a different numbers of times: Channel S NTV broadcast it 20 times, ATN broadcast it 13 times and Channel S broadcast it 11 times. This difference appeared of some significance to the Committee and a reason why the financial penalty imposed on Channel S World Limited (Channel S NTV) should be correspondingly higher than for Channel S Plus Limited (ATN) and Channel S Global Limited (Channel S);
- senior management should clearly have known that with such inadequate compliance procedures, a serious contravention of the Code or TV Advertising Code could or would occur;
- no steps appear to have been taken before the breach occurred to identify and mitigate the particular risk of a breach of the rules on political advertising (for example, translating the relevant parts of the Code or TV Advertising Code into Bangla for staff); and
- this breach of the TV Advertising Code demonstrated an ineffectiveness and repeated failure of internal mechanisms or procedures intended to prevent breaches occurring.

Mitigating Factors

8.21 The Committee then considered whether there were any factors which in its view might limit or decrease the level of financial penalty, both generally and as regards the individual Licensees.

8.22 The Committee noted all the submissions as to mitigation made by the Licensees. In particular, the Committee took account of the following:

- the Licensees acted immediately and cease broadcast of the Advertisements once it was aware of the compliance issues;
- the Licensees have taken the breach seriously and admitted it promptly;
- no profit was derived by the Licensees as a result of the breach;
- the Licensees have indicated that they have put in place additional safeguards to improve compliance. However, the Committee still has some concerns about just how effective and robust the Licensees'

- compliance procedures are, and how clearly they understand their responsibilities under the Code and TV Advertising Code; and
- the potential harm caused by showing the Advertisement was limited to some extent because of the restricted coverage of the Channels (although the Committee stresses that any breach of the ban on political advertising is a very serious matter because of its ability to distort the democratic process).

Conclusion

8.23 A case where Licensees have clearly and recklessly breached a specific statutory ban prohibiting political advertising must always be considered a significant breach of the TV Advertising Code. Here, notwithstanding the limited audience share of the Channels, by broadcasting the Advertisement repeatedly over 5 days and during an election period, there was a real risk that the democratic process could have been prejudiced, making the breach even more significant.

8.24 As noted above, the Committee took into account the additional safeguards introduced by the Licensees to improve compliance. However, Ofcom still has concerns about how effective and robust compliance arrangements are at the Channels, and urges the Licensees to keep this issue under review. If further breaches of the Code or the TV Advertising Code by these Licensees are referred to the Committee in future, it will treat them very seriously.

8.25 Having considered the relevant facts as outlined above and all of the evidence, the Committee has decided to impose financial penalties on the Licensees as follows:

- **£15,000** on Channel S World Limited;
- **£13,000** on Channel S Plus Limited; and
- **£12,000** on Channel S Global Limited.

The total of these fines is £40,000. The fines are all payable to HM Paymaster General. In addition, the Committee requires the Licensees to **broadcast a statement of Ofcom's findings in a form and at a time or times to be determined by Ofcom twice on each of their respective services, Channel S NTV, ATN and Channel S.**

Content Sanctions Committee

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10 December 2008