

# Ofcom Content Sanctions Committee

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**Consideration of sanction against:**

DM Digital Television Limited (“the Licensee” or “DM Digital Ltd”) in respect of its service DM Digital (“DM Digital” or “the Channel”) TLCS 873;

**For:**

Breaches of Ofcom’s Broadcasting Code (“the Code”) in respect of:

Rule 2.1: “Generally accepted standards must be 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 harmful and/or offensive material”;

Rule 9.4 (previously 9.5): “A sponsor must not influence the content and/or scheduling of a channel or programme in such a way as to impair the responsibility and editorial independence of the broadcaster”;

Rule 9.5 (previously 9.4): “There must be no promotional reference to the sponsor, its name, trademark, image, activities, services or products or to any of its other direct or indirect interests. There must be no promotional generic references. Non-promotional references are permitted only where they are editorially justified and incidental”;

Rule 9.6 (previously 9.5): “Sponsorship must be clearly identified as such by reference to the name and/or logo of the sponsor. For programmes, credits must be broadcast at the beginning and/or end of the programme”; and

Rule 9.7 (previously 9.8): “The relationship between the sponsor and the sponsored channel or programme must be transparent.”

**On:**

8 March 2007

**Decision:**

To impose a financial penalty (payable to HM Paymaster General) of **£15,000**; and, in addition, to require DM Digital Ltd to **broadcast a statement of Ofcom’s findings** on its service DM Digital in a form 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 a statutory sanction on DM Digital Ltd. This is in light of the seriousness of the Licensee's failure to ensure compliance with the Code in its service DM Digital.
- 1.2. This adjudication under the Code relates to the broadcast of an edition of *Health is Wealth* transmitted on DM Digital on 8 March 2007, at 07:45.
- 1.3. DM Digital is a free-to-air general entertainment channel, available via cable and satellite in the UK, Europe, Middle East, Africa and Asia, and broadcasts mainly in Urdu to the UK Asian community. *Health is Wealth* is a weekly magazine programme.
- 1.4. Ofcom received a complaint regarding an edition of *Health is Wealth* transmitted on 8 March 2007, which included an interview with a man introduced as Dr Professor Mohammed Jamil Jilu ("Dr Jamil"), a homeopath. The complaint was that Dr Jamil made potentially dangerous claims regarding the successful use of his homeopathic medicines to treat and cure serious conditions including cancer, diabetes and hepatitis. The complainant was also concerned that the programme appeared to be used as a platform for promoting Dr Jamil's homeopathic practice.
- 1.5. Following an investigation of the programme, breaches of the Code were recorded by Ofcom, namely:
  - (i) that adequate protection was not provided for viewers from harmful/offensive material ie Dr Jamil was allowed to make unchallenged medical claims in the programme that his homeopathic treatments available from his medical clinic in Pakistan could cure cancer and other serious medical conditions such as diabetes and hepatitis (Rule 2.1); and
  - (ii) Dr Jamil was the sponsor of the programme and this was not made clear to viewers as required under the Code. Moreover, the interview allowed Dr Jamil to promote his homeopathic health clinic in breach of the sponsorship rules set out in the Code (Rules 9.4-9.7 inclusive).
- 1.6. Ofcom considered the breaches to be sufficiently serious that the case should be referred to the Committee for consideration of a statutory sanction. The Committee agreed and DM Digital Ltd attended an oral hearing and made written representations to the Committee.
- 1.7. After considering all the evidence and all the representations made to it, the Committee decided that the breaches by the Licensee of the Code were sufficiently serious to attract a financial penalty.
- 1.8. Having regard to the seriousness of the breaches 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; and, in addition, to require DM Digital Ltd to broadcast a statement of Ofcom's findings on its service DM Digital in a form to be determined on two specified occasions.

## 2. Background

- 2.1. DM Digital is a free to air general entertainment channel, available via cable and satellite in the UK, Europe, Middle East, Africa and Asia, and broadcasts mainly in Urdu. It was launched on 27 July 2005. *Health is Wealth* is a weekly magazine programme.
- 2.2. On 8 March 2007, a guest on *Health is Wealth* was introduced as Dr Professor Mohammed Jamil Jilu ("Dr Jamil"). Dr Jamil was stated to be CEO and Senior Medical Officer of Zaman Hospital, Principal of Zaman Homeopathy Medical College, Sialkot and CEO of Zaman Homeo Herbal Pharma. These entities are all based in Pakistan. During a filmed interview in the programme Dr Jamil claimed that he was at his clinic in Pakistan successfully treating, by means of his homeopathic treatments, various serious medical conditions, in particular cancer, but also diabetes and hepatitis. These claims were, and are, unsupported by appropriate scientific or medical evidence.
- 2.3. During the programme the symptoms and causes of diabetes, hepatitis and cancer were discussed and a number of short testimonials from patients were included. These were introduced as being "people who have been treated and cured by Dr Jamil and are living happily ever since then". Dr Jamil stated during the programme, for example, that "There is a full and successful treatment of cancer in homeopathy"; and regarding hepatitis, "...I believe that if you use our medicine for 1 month your hepatitis will become negative and you will not need to take any other medicine for you life and you will not get hepatitis or any other illness as it will build up your immune system God willing".
- 2.4. Both telephone and postal contact details were provided for Dr Jamil. Several contact numbers appeared on screen throughout the interview, together with a statement "For treatment or advice please contact Dr Jamil Jilu (Gold Medallist) Zaman Hospital". Nearly all the testimonials included recommendations such as "I recommend others to visit Dr Jamil".
- 2.5. The programme was made by Dr Jamil and supplied by him to the Licensee. Material of this sort is described as 'advertiser supplied programming' and is subject to Ofcom's rules on programme sponsorship. These rules require, among other things, that the sponsored nature of the programme is made clear; that the identity of the sponsor is made clear; that a sponsor must not impair a Licensee's editorial independence; and that there must be no promotional reference to the sponsor within the programme.
- 2.6. The programme did not carry sponsor credits (brief announcements placed, at a minimum, at the beginning and end of the programme), so as to make clear that the programme was sponsored and by whom. The programme also contained considerable promotion of Dr Jamil's business interests as a homeopath.
- 2.7. Ofcom received a complaint from a doctor based in the UK regarding *Health is Wealth* transmitted on 8 March 2007. The complainant objected to what he considered to be potentially dangerous medical claims made by Dr Jamil regarding the successful use of homeopathic medicines to treat and cure serious conditions including cancer, diabetes and hepatitis. His concern was

that the programme was broadcast in Urdu and the TV channel would be viewed by people living in the UK of Pakistani origin amongst some of whom, he said, levels of medical awareness are low. He believed that some viewers could easily be exploited and might come to grave harm. He was also concerned that the programme appeared to be used as a platform for promoting Dr Jamil's medical practice.

### **3. 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. The standards objectives are set out in section 319(2) of the Act. In particular, section 319(2)(f) states 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"; and section 319(2)(j) states that "the unsuitable sponsorship of programmes included in television and radio services is prevented". Section 321(1) requires standards set by Ofcom under section 319(2)(j) to include general provision governing standards and practice in the sponsoring of programmes and allows for Ofcom to include provision prohibiting forms and methods of sponsorship generally or in particular circumstances.
- 3.2. In discharging its functions, Ofcom's principal duties are "to further the interests of citizens in relation to communications matters and to further the interests of consumers..." (section 3(1)) and to secure a number of other matters. These include "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).
- 3.3. In performing these duties, Ofcom is also 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 appearing to Ofcom to represent the best regulatory practice" (section 3(3)); 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); and
  - "the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection" (section 3(4)(h) of the Act).

#### **Observance of Code**

- 3.4. Under section 325 of the Act, every programme service licensed by a Broadcasting Act licence includes conditions for securing that the standards set by Ofcom under section 319 are observed. If Ofcom is satisfied that the holder of a licence to provide a television licensable content service has

contravened a condition of the licence, it may impose the following sanctions under sections 236, 237 and 238 of the Act:

- issue a direction not to repeat a programme;
- issue a direction to broadcast a correction or a statement of Ofcom's finding;
- impose a financial penalty; and/or
- revoke the licence.

### **European Television Without Frontiers Directive**

- 3.5. Article 3f of the Audio Visual Services Directive, which replaced the provisions of Article 17 of the European Television Without Frontiers Directive, states that “sponsored television programmes shall meet the following requirements: the content and scheduling of sponsored programmes may in no circumstances be influenced by the sponsor in such a way as to affect the responsibility and editorial independence of the broadcaster in respect of programmes; they must be clearly identified as such by the name and/or logo of the sponsor at the beginning and/or the end of the programmes; and they must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services.”

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

- 3.6. 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”).
- 3.7. 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).
- 3.8. 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**

- 3.9. Standards set by Ofcom in accordance with section 319 of the Act are set out in Ofcom's Broadcasting Code (“the Code”) which came into force on 25 July 2005<sup>1</sup>.

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<sup>1</sup> The Code can be found at <http://www1.bsc.org.uk/tv/ifi/codes/bcode/>

- 3.10. Accompanying Guidance Notes<sup>2</sup> to each section of the 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 Code.

### **Remedial action and penalties**

- 3.11. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or statement of findings (or both) or not to repeat a programme on contravention of a licence condition.
- 3.12. Section 237 of the Act provides that the holder of a television licensable content service licence (a “TLCS licence”) found by Ofcom to have contravened a condition of its licence may be required by Ofcom to pay a specified financial penalty. The maximum for such a penalty is £250,000 or 5% of the licensee’s qualifying revenue, whichever is greater.
- 3.13. Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence.

### **Relevant provisions of the Ofcom Broadcasting Code**

- 3.14. Rule 2.1: “Generally accepted standards must be 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 harmful and/or offensive material.”
- 3.15. Rule 9.4 (previously 9.5): “A sponsor must not influence the content and/or scheduling of a channel or programme in such a way as to impair the responsibility and editorial independence of the broadcaster.”
- 3.16. Rule 9.5 (previously 9.4): “There must be no promotional reference to the sponsor, its name, trademark, image, activities, services or products or to any of its other direct or indirect interests. There must be no promotional generic references. Non-promotional references are permitted only where they are editorially justified and incidental.”
- 3.17. Rule 9.6 (previously 9.5): “Sponsorship must be clearly identified as such by reference to the name and/or logo of the sponsor. For programmes, credits must be broadcast at the beginning and/or end of the programme.”
- 3.18. Rule 9.7 (previously 9.8): “The relationship between the sponsor and the sponsored channel or programme must be transparent.”

## **4. Ofcom’s investigation**

- 4.1. Following the complaint, Ofcom carried out an investigation of the programme *Health is Wealth* broadcast on DM Digital from approximately 07:45 to 08:00, on 8 March 2007.
- 4.2. Ofcom wrote to DM Digital Ltd outlining its concerns that the medical advice given by Dr Jamil might encourage viewers to avoid seeking, or to dispense with orthodox medical treatment, for the serious medical conditions discussed in the programme. It asked the Licensee to comment on the

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<sup>2</sup> Guidance Notes can be found at <http://www1.bsc.org.uk/tv/ifi/guidance/bguidance/>

inclusion of the material in relation to: Rule 2.1 of the Code (generally accepted standards); and what were then Rules 9.5, 9.6, 9.7 and 9.8 (sponsorship)<sup>3</sup>, regarding the basis for the inclusion of the various telephone numbers on screen during the interview.

- 4.3. With regard to Rule 2.1, the Licensee stated that *Health is Wealth* is an information programme which informs the public of alternative treatments that are available, and which have been successful in treating illnesses. It also stated that the programme did not advise that the public should not also seek medical attention or refuse orthodox treatments<sup>4</sup>.
- 4.4. With regard to Rules 9.4, 9.5, 9.6 and 9.7 (previously Rules 9.5-9.8 inclusive), DM Digital Ltd made a series of further points. The Licensee stated that with reference to Rule 9.4, *Health is Wealth* was not unduly influenced by the sponsor and that the sponsor had "limited say" in the programme's scheduling. On Rule 9.5, it said that the provision in the programme of contact details for Dr Jamil was justified so that viewers could contact someone for further information. On Rules 9.6 and 9.7, it stated that the programme was clearly identified as a sponsored programme because the end credit made no reference to 'DM Digital' and therefore the programme must have been produced by another company. It also said the relationship between the sponsor and the programme was clear as the programme did not provide DM Digital Ltd's own telephone numbers.

## **5. Ofcom's decision that DM Digital Ltd was in breach of the Code**

- 5.1. Ofcom found that the programme broadcast on 8 March 2007 was in breach of the following Rules of the Code:
  - Rule 2.1 (adequate protection for members of the public);
  - Rule 9.4 (sponsor must not influence content);
  - Rule 9.5 (no promotional reference to sponsor);
  - Rule 9.6 (clear identification of sponsorship by name/logo); and
  - Rule 9.7 (sponsorship relationship must be transparent).
- 5.2. Ofcom considered that the programme allowed Dr Jamil, an alternative health practitioner, to make unsubstantiated and potentially dangerous medical claims regarding the ability of his homeopathic treatments to cure serious illnesses. This could have resulted in viewers with treatable cancers and other significant medical problems to dispense with orthodox medical treatment in favour of Dr Jamil's treatments. Ofcom, therefore, considered that this failure to apply generally accepted standards resulted in inadequate protection being provided to viewers against this material which had a clear potential to cause vulnerable members of the audience very serious (and possibly life-threatening) harm. The programme was, therefore, in breach Rule 2.1 of the Code.
- 5.3. Ofcom considered that Rule 9.4 was contravened because, although it is acceptable for content to be provided by a sponsor, the programme was not suitably edited. Ofcom found that the content of the programme had been

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<sup>3</sup> Now renumbered as Rules 9.4, 9.5, 9.6 and 9.7

<sup>4</sup> However, Ofcom notes that the programme did not contain any disclaimer or any information advising viewers to also seek orthodox medical attention.

entirely determined by the sponsor and the channel's editorial independence had been compromised. Also, no attempt was made within the programme to question Dr Jamil on the medical basis for the claims he made about the effectiveness of his homeopathic medicines.

- 5.4. Rule 9.5 prohibits promotional references to a programme's sponsor, yet Ofcom considered that the references to Dr Jamil and his clinic were clearly promotional. The programme featured positive testimonials which clearly endorsed Dr Jamil's treatments, including statements such as "God has put something special in his hands and I recommend that if you visit him once you will get results". Further, contact details of Dr Jamil's practice were clearly displayed on the screen throughout the programme, which gave the programme a promotional character similar to that of a teleshopping programme. The programme was therefore in breach of Rule 9.5.
- 5.5. With regard to Rule 9.6 of the Code, Ofcom found that the fact that the programme was sponsored was not made clear to viewers. In particular, Rule 9.6 requires that sponsorship must be clearly identified by reference to the name and/or logo of the sponsor at the beginning and/or end of the programme. No such credits were included in this case. The programme was therefore in breach of this Rule.
- 5.6. Ofcom also considered that the relationship between the sponsor and the programme was not made clear. It found that the only indication to suggest the programme was sponsored was the absence of a reference to the channel in the production credits. The programme was therefore in breach of Rule 9.7 of the Code.

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

- 6.1. Ofcom considered that, taking all the circumstances into account, the breaches of Rules 2.1, 9.4, 9.5, 9.6 and 9.7 of the Broadcasting Code were sufficiently serious to warrant the consideration of the imposition of a statutory sanction. This was for the following reasons.
- 6.2. With regard to the breach of Rule 2.1, there was a material risk that broadcasting the unsubstantiated claims of Dr Jamil may have led some viewers to follow his advice – so causing either a delay in treatment or a failure to seek treatment at all. This risk was compounded by the programme presenter not challenging Dr Jamil's claims. The potential for harm was especially serious given Dr Jamil's claims regarding cancer and is underlined by the Cancer Act 1939. Ofcom noted that section 4 of this statute makes it a criminal offence for anyone to publish an "advertisement"<sup>5</sup> offering to treat any person with cancer or prescribe any remedy or to give any advice in connection with the treatment of cancer. This underlines how Parliament intended any public "advertisement" on how to treat cancer to be made only by those specially authorised to do so.
- 6.3. With regard to the breaches of Rules 9.4, 9.5, 9.6 and 9.7, Ofcom believed these were serious because the promotion of Dr Jamil's treatments on the programme encouraged viewers to buy products of no proven medical worth,

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<sup>5</sup> Defined very broadly in the Cancer Act to include "any announcement made orally or by any means of producing or transmitting sounds" (section 4(8)).

and they amounted to significant and comprehensive infractions of the sponsorship rules.

#### **DM Digital Ltd's written representations on the decision to refer**

- 6.4. The Licensee made a series of written submissions to Ofcom in relation to the proposed decision to refer the breaches by DM Digital to the Committee. As part of the submissions the Licensee stated that Dr Jamil was a renowned man well-known for his treatments, and that "due to the success of Dr Jamil's treatments, it would be beneficial to [its] audience". It also stated that it took "immediate action" when Ofcom felt there was a problem even though "he [Dr Jamil] runs on other channels". DM Digital Ltd also pointed out that DM Digital is a "small budget channel providing a service to an ethnic community that is not represented" and "an extreme fine would take [it] out of business".
- 6.5. In its final submission to Ofcom, DM Digital Ltd forwarded various certificates and affidavits concerning Dr Jamil. The Licensee argued that these documents showed that Dr Jamil is a recognised homeopathic practitioner in Pakistan and has successfully treated at least three individuals who had suffered from "Hepatitis C, Cancerous diseases and Asthma". The Licensee also put forward various points to argue that the suggested level of financial penalty was "extremely excessive". The Licensee argued that it made no financial gain from this programme and that no one has claimed that he or she has been harmed by this programme. They also stated that if a financial penalty were imposed on DM Digital Ltd it "will severely hamper the business as this is a community channel free to air" with no subscription income.

#### **Decision to refer to the Committee**

- 6.6. Having taken account of all the representations made by DM Digital Ltd, Ofcom concluded that the breaches were sufficiently serious to refer the case to the Committee for a statutory sanction to be considered.
- 6.7. The Committee, having reviewed Ofcom's decision to refer the breaches, accepted that the case was sufficiently serious that it should be considered for sanction. Accordingly, DM Digital Ltd was invited to attend an oral hearing before the Committee.

### **7. Sanctions Hearing**

#### Written representations from DM Digital Ltd

- 7.1. The Committee held a hearing on 7 October 2008. The day before, on 6 October 2008, DM Digital Ltd made additional written submissions to the Committee. The Committee accepted these representations and took them into account in reaching its decision. In summary, the most significant relevant points in these submissions were as follows.
- 7.2. The Licensee formally admitted the breaches of Rules 2.1, 9.4, 9.5, 9.6 and 9.7 and took full responsibility for broadcasting the programme. The programme, *Health is Wealth*, transmitted on 8 March 2008, was made with the intention of being broadcast in Pakistan, where the Licensee believed it met regulatory guidelines. However the programme was broadcast on the Channel in the UK in error, on two occasions. DM Digital Ltd emphasised that it did not make any direct financial gain from broadcasting the

programme and that, once notified of the complaint by Ofcom, immediate action was taken to ensure that the programme was not broadcast again in the UK or in Pakistan.

- 7.3. The Licensee stated that Dr Jamil is a registered homeopath in Pakistan and checks were made by its staff there regarding his credentials prior to the programme being broadcast.
- 7.4. DM Digital Ltd explained that the breaches occurred because the programme was not properly checked by the Compliance Manager employed at the time. It was also not picked up by the Programme Manager before broadcast and was transmitted without the Chairman's knowledge or consent. The Licensee stated that it has now implemented further safeguards to ensure compliance with the Code, including: recruiting a new Compliance Manager; re-training the Programme Manager on compliance with the Code; further training for Editors regarding the use of warnings and the display of contact details in programmes; the appointment of a new Medical Programme Director to provide advice and guidance on the content of programmes with a medical element; and the introduction of new compliance procedures to be overseen by the Chairman of DM Digital Ltd.
- 7.5. With regard to the possible imposition of a fine, the Licensee asked the Committee to consider the following: the Licensee does not receive a subscription income; its programmes are mainly community based, providing advice and support to the Pakistani community in the UK; it operates on a relatively low budget; it recently suffered hardship as a result of the suspension of broadcasting its DM Digital channel in Pakistan during recent political unrest; and it recently lost two of its cameramen who were killed while filming at political rallies. The Licensee stated that a substantial fine could potentially force the business to close, or at the very least, suffer hardship.
- 7.6. Further, the Licensee stated that in 2007 it applied to Ofcom for a licence for an additional channel (DM News Plus). In expectation of this being granted quickly it purchased further equipment and obtained a substantial bank loan to finance the new channel. It asked the Committee to consider that Ofcom had delayed its decision on this licence application for over a year because of the present sanctions case. This, it claimed, had resulted in financial loss to the Licensee and the loss of its position on the BSkyB Electronic Programme Guide.
- 7.7. DM Digital Ltd also asked the Committee to consider the Cancer Act 1939. The Licensee suggested that when considering a sanction the Committee should have regard to the fact that the maximum fine for committing a criminal offence under section 4 of that Act (advertising a treatment for cancer) is £1,000.

#### Oral representations by DM Digital Ltd

- 7.8. The Licensee also made oral representations to the Committee on 7 October 2008, before the Committee decided whether the breaches warranted the position of a statutory sanction and, if so, of what type(s) and at what level(s). DM Digital Ltd was represented by Dr Liaqat Malik (Chairman, DM Digital Ltd), Mateen Khan (Marketing Director, DM Digital Ltd) and Dr Sabbir Rahju (Medical Programming Director, DM Digital Ltd).

- 7.9. In the oral submissions the Licensee restated many of the points made in its written submission of 6 October 2008. It also emphasised that: the breaches of the Code were made in error, and were in no way deliberate; and, that it had always accepted the breaches, but due to a misunderstanding by its former Compliance Manager, this was not stated to Ofcom earlier. The Licensee confirmed that everyone working for DM Digital Ltd was committed to compliance with the Code, including its committee of five senior individuals who will oversee the compliance of its programmes.
- 7.10. In response to questions from the Committee, the Licensee provided approximate figures for its annual costs and wage bill to support its claim that it has a relatively small budget. It informed the Committee that it currently retains five or six full time employees, and additional freelance staff, resulting in approximately 20 members of staff in total overall.
- 7.11. The Licensee apologised again for the breaches of the Code and re-emphasised that the programme was broadcast on 8 March 2007 in error and no financial gain was made. It also restated that it has now implemented stronger procedures to ensure its programmes comply with the Code.

## **8. Decision by the Committee**

- 8.1 In reaching its decision, the Committee considered carefully all the written and oral submissions made by DM Digital Ltd. The Committee decided, for the reasons set out below, to impose a financial penalty of £15,000; and, in addition, to require DM Digital Ltd to broadcast a statement of Ofcom's findings on its service DM Digital in a form to be determined by Ofcom on two specified occasions.
- 8.2 In deciding on the level of financial penalty the Committee had regard to Ofcom's Penalty Guidelines<sup>6</sup>.

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

- 8.3 Having viewed this material, and taken account of all the evidence and the representations of the Licensee, the Committee considered that the breaches of Rules 2.1, 9.4, 9.5, 9.6 and 9.7 of the Code were particularly serious. This was for the following reasons.
- 8.4 First, the case involves significant potential harm to some viewers. A homeopath, who was not medically qualified, was permitted to give medical advice on air to an audience in the UK about how to treat extremely serious conditions such as cancer, hepatitis and diabetes. The Committee was concerned that this kind of advice would resonate with any members of the audience who may be suffering from these diseases and so would be vulnerable. In the Committee's view there was a material risk that broadcasting the sort of unsubstantiated claims made by Dr Jamil may lead some viewers to buy his advertised products without taking proper medical

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<sup>6</sup> 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.

advice – so causing either a delay in treatment or a failure to seek treatment at all. The seriousness of the breach of Rule 2.1 was compounded by the fact that the programme’s presenter did not challenge Dr Jamil’s claims at any stage.

- 8.5 The potential for harm as a result of the breach of Rule 2.1 was particularly serious given Dr Jamil’s claims in relation to the treatment of cancer. The seriousness of the breach is underlined by the Cancer Act 1939. Section 4 of this statute makes it a criminal offence for anyone to publish an “advertisement”<sup>7</sup> offering to treat any person with cancer or prescribe any remedy or to give any advice in connection with the treatment of cancer. The Committee did not express any view of whether Dr Jamil or DM Digital Ltd should be investigated in relation to a criminal offence. However, the existence of this crime on the statute book highlights that Parliament considered the public “advertisement” of any advice on how to treat cancer to be in a special category which should be very tightly regulated in the public interest and only be made by those specially authorised to do so.
- 8.6 The Committee also noted that the Licensee has pointed out that there is no evidence of any harm to any individual as a result of this programme. However, this in the Committee’s opinion does not undermine the seriousness of the breaches. Rule 2.1 is designed to provide “adequate protection for members of the public”. For adequate protection to be given, Ofcom is able to and should consider potential harm to viewers as well as actual harm. Viewers needed to be protected from claims of the sort made by Dr Jamil because there is no properly tested scientific or medical evidence that the products he sells are effective. Also, the illnesses he claimed to treat (cancer and hepatitis for example) are so serious that any risk that members of the public might delay seeking proper medical advice for treatment of such conditions, or substitute untested homeopathic treatments to cure them instead of following approved medical advice, should have been avoided by the broadcaster.
- 8.7 Second, the breaches of Rules 9.4, 9.5, 9.6 and 9.7 are serious because they demonstrated DM Digital Ltd’s failure to understand and comply with its fundamental responsibilities under the Code in respect of sponsorship. This failure meant in particular that:
- the programme consisted entirely of promotional content for Dr Jamil’s practice, so giving his products and services an even greater degree of prominence, and thus increasing the potential for harm; in effect the programme became an extended advertisement for his products and services;
  - the programme sponsor, Dr Jamil, was permitted to influence the content of the programme in such a way as to impair the editorial independence of the broadcaster; and
  - the programme was not clearly signalled to viewers as having been sponsored by Dr Jamil.

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<sup>7</sup> Defined very broadly to include “any announcement made orally or by any means of producing or transmitting sounds”.

## Precedent

- 8.8 The Committee noted the representations made by the Licensee (see below) that, because the present case was significantly different to the decision of the Committee in *ARY Digital*<sup>8</sup>, it was: (a) not appropriate to impose a sanction at all on DM Digital Ltd in respect of the Channel; or (b) if a financial penalty were imposed, it should be appreciably lower than the one in *ARY Digital*. *ARY Digital* (published on 1 November 2007) concerned an alternative health practitioner, who was not medically qualified but permitted to promote her products on air and claim that they could cure cancer and other serious illnesses. The Committee decided in that case to impose a fine of £15,000 and made a direction that the Licensee should broadcast a statement of Ofcom's findings.
- 8.9 The Licensee argued, that DM Digital is “completely different” to previous cases for various reasons. First, that Dr Jamil is regulated by and is a member of a professional body, ie the Government of Pakistan's National Council for Homeopathy, and that Dr Jamil had affidavits of support from his patients. The Licensee also argued that DM Digital is a “community channel free to air” whose income is “severely limited”, whereas *ARY Digital* was part of an expanding network of channels available in Pakistan, the Middle East and Europe.
- 8.10 As regards the comparison with *ARY Digital*, the Committee decided that the present case merited the imposition of a sanction as had the earlier one. Both cases concerned serious breaches of the Code because channels had allowed alternative health practitioners who were not medically qualified to promote their products and services on air and claim that they could treat very serious conditions such as cancer. This was unacceptable in both cases.
- 8.11 The Committee did not believe that, based on the available evidence, the facts of the current case were so different from those in *ARY Digital* that it would be inappropriate to impose a fine on DM Digital Ltd. In reaching its decision the Committee had regard to the nature of the Channel and to the limited evidence that was provided of DM Digital Ltd's financial position. The Committee gave careful consideration to the broadcaster's representations regarding the size of the channel and its financial position, weighing this up against the seriousness of the breaches and the substantial potential for harm to viewers.
- 8.12 The Committee decided that the imposition of a financial penalty in the current case was appropriate and consistent with previous practice at Ofcom.

## Deterrent

- 8.13 In the Committee's view any financial penalty should be sufficient to act as an effective incentive to ensure future compliance. The financial penalty should therefore be sufficiently significant to act as a deterrent against a repeat of these or similar breaches (given the severity, magnitude and scale of the current breaches and the resulting substantial, potential harm) by DM Digital Ltd. It should also act as an incentive to other broadcasters not to

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<sup>8</sup> [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/ary\\_digital.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/ary_digital.pdf)

allow the promotion of scientifically unproven treatments of cancer and other serious medical conditions in programmes.

### **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: there was no evidence that the Licensee had directly gained financially from the programme; although the degree of harm potentially caused was great, there was no evidence of harm to any individual as a result of the broadcast; and, the Licensee was a relatively small although profitable broadcaster. In addition the Committee considered it relevant to note the likely audience expectation of television audiences in relation to programmes dealing with significant medical conditions. In the Committee's view, audiences expect such programmes to deal with medical issues with an appropriate degree of objectivity and accuracy – especially in this case where, according to the Licensee, the programme was usually presented by a qualified doctor. Such objectivity and accuracy was not demonstrated in this case.

8.15 The Committee had regard to, but did not consider relevant, the Licensee's submissions that the maximum fine under the Cancer Act is £1,000. Ofcom must fulfil its statutory duties to enforce standards on licensed services. It does not enforce the Cancer Act. Under the Communications Act, the maximum for such a penalty is £250,000 or 5% of the licensee's qualifying revenue, whichever is greater. In determining an appropriate financial penalty within this framework, the Committee does not consider it appropriate to be restricted by any tariff fixed in relation to criminal legislation. Rather, it is incumbent on the Committee to take account of what is fair, reasonable, and proportionate in all the circumstances of the case and to ensure the approach it takes in setting the level of any penalty imposed is consistent with previous Ofcom practice and in accordance with the principles set out in Ofcom's Penalty Guidelines.

### **Factors increasing the level of penalty**

8.16 The Committee then reviewed factors which aggravate or tend to increase the level of the financial penalty.

8.17 The Committee took account of the facts that:

- DM Digital Ltd had admitted that the programme was broadcast twice and was not even viewed before broadcast;
- senior management of the Licensee ought to have been aware of the weak compliance arrangements at the Channel which permitted the current and serious breaches to occur;
- the Licensee continued to dispute, and did not formally admit, the breaches of the Code referred to the Committee in this case until immediately before the hearing – demonstrating, in the Committee's view, the Licensee's failure to understand its fundamental responsibilities under the Code and have effective compliance procedures in place; and

- the Licensee has a relatively weak compliance history, with a number of breaches of the Code recorded against DM Digital Ltd. This underlines that the Licensee does not appear to understand to some considerable extent its responsibilities under the Code.

### **Mitigating Factors**

- 8.18 The Committee then considered whether there were any factors which in its view might limit or decrease the level of financial penalty.
- 8.19 The Committee noted all the submissions as to mitigation made by the Licensee. In particular the Committee took account of the following:
- the Channel is a free-to-air community channel with limited income catering for the British Asian community living in the UK;
  - the Licensee's argument that a substantial financial penalty may result in the Channel ceasing to broadcast;
  - the strengthening of compliance procedures, including the recruitment of a new compliance manager, and more and better training for staff at all levels; and
  - there is no evidence that the broadcaster made any direct financial gain from broadcasting the programme.

### **Conclusion**

- 8.20 A case where the broadcaster has created a material risk to the health and safety of its audience must always be considered a significant breach of the Code. Here, by broadcasting the unsubstantiated claims of Dr Jamil, there was a risk to vulnerable viewers suffering from the serious illnesses discussed in the programme, such as cancer or hepatitis.
- 8.21 Although the Committee noted that in mitigation DM Digital Ltd stated that there was no evidence of financial gain by the Channel, it is also a serious matter when a broadcaster breaches its duties under the Code as regards sponsorship. These rules are vital to ensure products and services are not advertised to viewers during programmes, to maintain a broadcaster's editorial independence and to ensure that the legal obligation to ensure the separation of programmes (i.e. editorial content) and advertising is fulfilled.
- 8.22 As set out above, the steps taken by the Licensee to improve compliance were taken into account in the Committee's decision. The Committee however expects DM Digital Ltd to follow through and implement fully its new compliance procedures and arrangements.
- 8.23 Having considered the relevant facts as outlined above and all the representations made by DM Digital Ltd, including in particular those relating to the size of the channel and its financial position, the Committee decided to impose a financial penalty on the Licensee of £15,000 (payable to HM Paymaster General). The Committee considered this to be a proportionate and appropriate penalty in all the circumstances, especially given the seriousness of the breaches and the substantial potential for harm to viewers. In addition, the Committee requires DM Digital Ltd to broadcast a

statement of Ofcom's findings on its service DM Digital in a form to be determined by Ofcom on two specified occasions.

**Content Sanctions Committee**

Philip Graf  
Anthony Lilley  
Adam Singer

28 October 2008