

Ofcom Content Sanctions Committee

Consideration of sanction against	Channel Four Television Corporation (“the Licensee” or “Channel Four”) in respect of its service, Channel 4;
For	<p>The conduct of viewer competitions in the programme <i>Deal or No Deal</i>, as follows:</p> <p>‘Staggered selection’ of competition finalists:</p> <p>Resulting in breaches of the Ofcom Broadcasting Code (“the Code”) of:</p> <p>Rule 2.11: <i>“Competitions should be conducted fairly, prizes should be described accurately, and rules should be clear and appropriately made known”</i>; and</p> <p>Rule 10.10: <i>“Any use of premium rate numbers must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS)”</i> (now re-named as PhonepayPlus¹);</p>
Between	28 August 2006 to 13 May 2007.
Decision	To impose a financial penalty (payable to HM Paymaster General) of £500,000 and, in addition, to require Channel Four to broadcast a statement of Ofcom’s findings on its service Channel 4 in a form to be determined by Ofcom on three specified occasions.

¹ ICSTIS was re-named PhonepayPlus on 15 October 2007.

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 a statutory sanction on Channel Four in light of the serious nature of its failure to ensure compliance with the Ofcom Broadcasting Code ("the Code").
- 1.2 This adjudication under the Code relates to the viewer competitions in the programme *Deal or No Deal*, transmitted on Channel 4 between 28 August 2006 and 13 May 2007 ("the relevant period").
- 1.3 Channel 4 is the fourth national public service channel. *Deal or No Deal* is a daily light entertainment game show transmitted at 16:15 on weekdays and 16:55 on Sundays. On Saturdays, a repeat programme is shown. A premium rate service ("PRS") competition was transmitted during the programme. Viewers were solicited by voice-over before each advertising break to call the PRS number on screen or enter for free via the internet for the opportunity to take part in the daily competition at the end of the programme.
- 1.4 From 28 August 2006 and throughout the relevant period, the telecommunications service provider for the competition was iTouch UK Limited ("iTouch").
- 1.5 Press reports and media interest in the operation and conduct of viewer competitions in spring 2007 prompted some broadcasters who were implicated to conduct investigations into the use of PRS in their programmes and viewer competitions.
- 1.6 Channel Four instructed external specialist media lawyers Wiggin LLP ("Wiggin") to undertake a review of all of its PRS activity, including competitions and voting with a primary focus on the opening and closing of lines, call handling procedures, winner selection and vote counting processes.
- 1.7 The review concluded that a staggered method of selecting finalists ("staggered selection") in the *Deal or No Deal* competition between 28 August 2006 and 13 May 2007 was unfair. It resulted in later entrants having a lower probability of being shortlisted as a potential winner in the competition compared to those who had entered earlier.
- 1.8 Channel Four was notified in March 2007 that the form of staggered selection used in the *Deal or No Deal* competition was unfair. Although it took steps to try to minimise that unfairness in the short term whilst it sought a solution, it knowingly continued to conduct an unfair competition for approximately seven weeks. Channel Four stated that, although the practice of staggered selection was unfair, it had been unclear to it at that time that it was necessarily in breach of the PhonepayPlus Code. This was because although the PhonepayPlus Code required that all entrants have an equal chance, this was not necessarily subject to a strict interpretation in the industry and therefore a 'slight' adverse impact was believed to be acceptable, particularly if steps had been taken to minimise that adverse impact. An initial decision to continue had therefore been taken, which Channel Four regretted and now acknowledged to be wrong. However, Channel Four submitted that this decision had been taken in good faith on the basis of the external advice it had received.

Committee's Findings

- 1.9 The trust that the audience places in a broadcaster is fundamental to their relationship. This is particularly pertinent in the case of a public service broadcaster like Channel Four whose service is available to such a wide audience. This relationship of trust becomes even more important when it involves one of the broadcaster's most popular programmes. Viewers are entitled to believe when entering into a relationship of trust with such an organisation that their trust is not misplaced. Channel Four operated staggered selection between 28 August 2006 and 13 May 2007. As a result viewers who entered at different stages did not have equal opportunities to win. Channel Four did not understand that to be an unfair process until the results of the internal inquiry in March 2007. This was a systematic failure in the conduct of the competition and was a serious breach of trust between a public service broadcaster and its audience.
- 1.10 Ofcom was particularly concerned that, even though Channel Four had believed the staggered selection process to be an acceptable practice, at no point was the audience informed of this particular element of the selection process, either through on-air announcement or in the competition's terms and conditions. Unless otherwise stated, viewers would have assumed that all entrants were treated fairly and that potential winners would be chosen after the lines had closed.
- 1.11 The competition, with its associated interactive relationship with its audience, played an integral role within the programme's format. Ofcom was therefore seriously concerned by the Licensee's admission that it had not undertaken any kind of appropriate audit procedure or instigated any checks or processes at any time to ensure that the competition was being conducted fairly. This was part of a formalised and systematic procedure and Channel Four's failure to understand the inherent unfairness of this system demonstrated a lack of due care that could only be described as negligent.
- 1.12 Whilst Ofcom understood that Channel Four felt that it had been let down by iTouch, it was nevertheless firmly of the view that the conduct of Channel Four's own competitions and the management of its service provider were plainly within the control of the Licensee. Further, Ofcom considered that whilst it was the case that Channel Four had in place contractual arrangements with iTouch which stipulated how the competition should be conducted and that it should be conducted in accordance with the requirements of the PhonepayPlus Code this, in itself, was not sufficient.
- 1.13 The Committee was strongly of the view that Channel Four's failure to take even the most basic independent steps to ensure that its compliance obligations were being fulfilled was negligent. Channel Four appeared to take no account of the possibility that iTouch, as a third party, might fail to act in an appropriate manner while handling such substantial sums of money from Channel Four's audience.
- 1.14 Ofcom was concerned by the scale of the harm caused by the breaches. The breaches resulted in significant consumer harm involving a substantial audience, as evidenced by the sizeable revenue raised by the Licensee from the *Deal or No Deal* competitions while the unfair conduct was occurring (£15

million gross revenue was raised during the period 28 August 2006 to 22 March 2007).

- 1.15 Further, Ofcom was particularly concerned that once Channel Four became aware of the unfairness of this selection method, its senior management took the decision to continue conducting the competition while a compliant selection method was devised. The Licensee was therefore conducting a competition which it knew to be unfair, a fact which, in Ofcom's view (notwithstanding the external legal advice), compounded substantially the seriousness of the breaches.
- 1.16 Despite the absolute paramount importance of trust and honesty to Channel Four's relationship with its audience, the Licensee neglected to take due care when conducting the competition to ensure its fairness, and furthermore, allowed it to be conducted over a period of seven weeks once it knew it to be unfair and in doing so misled its audience. It was totally unacceptable for Channel Four to continue this selection method in the knowledge that it was unfair.
- 1.17 It was also a matter of great concern to Ofcom, and considered to be an aggravating factor, that during the period when the Licensee was aware of the unfair conduct and allowed the competition to continue from 23 March to 13 May 2007, it raised a further £2.1 million in revenue.
- 1.18 Ofcom considered the steps Channel Four had taken to remedy the consequences of the breaches in this case. These included:
 - pledging to donate £300,000 to the Great Ormond Street Hospital Children's Charity to reflect the extent of disadvantage caused to PRS telephone entrants, as precise data were not available to enable refunds to be offered. (The Licensee had already made donations to the charity totalling £250,000 in respect of all PRS issues);
 - putting in place an 'inspection' function to audit the performance of third parties in fulfilling contractual obligations; and
 - because of the damage to viewer trust these problems have created, Channel Four had now withdrawn from operating premium rate competitions altogether and from operating votes on a for-profit basis..
- 1.19 Ofcom wished to make it clear that the financial penalty would have been higher had Channel Four not taken such actions to remedy the consequences of the breaches.
- 1.20 In summary, cases where the broadcaster has materially deceived its audience, whether knowingly or not, have always been considered to be amongst the most serious breaches of the Code by the regulator (and its predecessor).
- 1.21 Ofcom took the view that the breaches constituted a substantial breakdown in the fundamental relationship of trust between a public service broadcaster and its viewers. Millions of viewers purchased the right to enter these competitions and invested trust in the Licensee. This case involved the systematic deception of all those viewers who paid to enter in the belief that

they had a fair and equal chance of winning when, in fact, their chances depended on the time they entered. Importantly even after Channel Four was aware following an internal inquiry that there was a risk of non-compliance, it continued the competition for a further seven weeks.

- 1.22 Channel Four failed to have any proper regard for the necessity to operate any effective form of compliance procedures for the operation of the competition; it failed to take adequate measures to understand basic yet crucial elements of the conduct of its own competition (winner selection procedures).
- 1.23 Having considered the relevant facts as outlined above and all the representations made by Channel Four, Ofcom decided to impose a financial penalty on Channel Four of **£500,000** (payable to HM Paymaster General) which it considered to be a proportionate and appropriate penalty in all the circumstances. In addition, Ofcom directed Channel Four to broadcast a statement of its findings on its service in a form determined by Ofcom on three specified occasions.

Introduction

- 2.1 Channel 4 is the fourth national public service channel. *Deal or No Deal* is a daily light entertainment game show transmitted at 16:15 on weekdays and 16:55 on Sundays. On Saturdays a repeat programme is shown. The programme is not broadcast continuously throughout the year; the last series ended on 13 July 2007 and a new series commenced broadcasting in August 2007. The *Deal or No Deal* viewer competition ceased on 29 September 2007. One element of the show contained a viewer competition which was transmitted during the pre-recorded programme. Viewers entered via a premium rate service (“PRS”) telephone line. Calls were solicited by voice-over before each advertising break to call the PRS number on screen or enter for free via the internet for the opportunity to take part in the daily competition towards the end of the programme. From the outset, entrants were told whether their entry was successful or unsuccessful. Ten per cent of PRS entries and ten per cent of web entries would receive the “successful” response and go forward for the opportunity to be randomly selected as the day’s winner.
- 2.2 Once a viewer was chosen at random, they would win a prize revealed in one of three sealed boxes numbered 1, 2 and 3. Three members of the studio audience would stand behind each of the boxes. Each box contained a hidden amount of money, usually £1,000, £3,000 or £10,000 (but occasionally larger amounts, such as £75,000). At the end of the programme, the presenter, Noel Edmonds, asked a member of the studio audience to select a number between 1 and 3. When that number had been chosen, the corresponding box was opened. A caption was then placed across the screen to indicate the person who had won the cash amount revealed.
- 2.3 Press reports and media interest in the operation and conduct of viewers’ competitions in spring 2007 prompted some broadcasters who were implicated to instruct firms of lawyers and/or accountants to undertake a thorough investigation of PRS in their programmes.
- 2.4 Channel Four instructed external specialist media lawyers Wiggin LLP (“Wiggin”) to undertake a review of all its PRS activity, including competitions and voting. In particular, the review focused on the opening and closing of lines, call handling procedures, integration of modes of entry, winner selection and vote counting processes.
- 2.5 The internal review highlighted that a staggered method of selecting potential winners for the *Deal or No Deal* competition which was in operation between 28 August 2006 and 13 May 2007 was unfair.
- 2.6 The staggered selection process for finalists operated as follows:
 - three potential free web entry finalists and three potential PRS telephone finalists were selected at ten minute intervals throughout the duration of the programme until lines closed. Entrants who were not selected were placed into a continuously expanding pool of entrants until 18 potential finalists had been selected;

- after the competition closed, one further potential web finalist and one further potential telephone finalist were selected at random to make a total of 20 shortlisted finalists;
 - the two lists of ten web finalists and ten telephone finalists were reduced (*pro rata* to the overall number of entries from each medium) to a combined shortlist of ten finalists, from which the ultimate winner of the competition would be chosen at random by computer.
- 2.7 This selection process created unfair odds which meant that viewers entering the competitions were not given a fair and equal opportunity to win. Because of the selection process, those viewers who rang later in the programme stood a statistically lesser chance of being selected to the final shortlist. This was unfair.
- 2.8 As a result of the inquiry, Channel Four knew in March 2007 that the form of staggered selection (as described above) in use in the *Deal or No Deal* competition was unfair. However, it continued to conduct a staggered selection process though it sought to minimise the unfairness. This resulted in Channel Four conducting a competition which it knew to be at risk of non-compliance for a period of seven weeks.
- 2.9 Between 28 August 2006 and 13 May 2007 - the time which the programme has been on air and operating a staggered selection process - Channel Four raised considerable revenue by calls that were improperly managed (estimated at approximately 934,000 calls), disadvantaging a significant number of entrants. Additionally, between 23 March 2007 and 13 May 2007 when the Licensee knew that the staggered selection process was unfair, but continued with it (albeit having attempted to limit its inherent unfairness), 56,000 entries were estimated to have been disadvantaged by staggered selection. The Licensee confirmed that accurate data were not available to enable it to offer refunds. It calculated that a donation of £300,000 to charity would reflect the financial detriment caused.

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. They 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)).
- 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)) 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)).
- 3.4 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 representing 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)).

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 Ofcom Code”) which came into force on 25 July 2005.²
- 3.9 Accompanying Guidance Notes³ 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.

² The Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

³ Guidance Notes can be found at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/>

Licence Condition

- 3.11 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 has contravened a condition of the licence, it may impose one or more of a number of penalties.

Remedies

- 3.12 Section 40 of the Broadcasting Act 1990 (as amended) (“the 1990 Act”) provides that Ofcom has the power to direct Channel 4 to broadcast a correction or statement of findings or not to repeat a programme in respect of a contravention of a licence condition.
- 3.13 Section 41 of the 1990 Act provides Ofcom with the power to impose a financial penalty on the licence holder of Channel 4 of a maximum of 5% of its qualifying revenue. This applies in relation to a failure to comply with a licence condition or direction on or after 29 December 2003.

Relevant Provisions of the Ofcom Broadcasting Code

- 3.15 Rule 2.11 of the Code states that “Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known”.
- 3.16 Rule 10.10 of the Code states that “Any use of premium rate numbers must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of Telephone Information Services (PhonepayPlus)”.

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 by the person/body operating PRS.

Background

- 4.1 Ofcom carried out an investigation of the *Deal or No Deal* competition broadcast between 28 August 2006 and 13 May 2007, as summarised above and explained more fully below. During that investigation, Channel Four was given the opportunity to make written submissions on the case. In light of the evidence and Channel Four’s responses, Ofcom concluded that the *Deal or No Deal* competition during the period under investigation was in breach of the Code.
- 4.2 In addition, Ofcom found the breaches to be sufficiently serious to warrant the referral of the case for the consideration of the Content Sanctions Committee (“the Committee”). Throughout the consideration of the imposition of a

statutory sanction, Channel Four was given opportunities to make written and oral representations. A summary of these is set out below.

- 4.3 On 19 July 2007, PhonepayPlus (formerly ICSTIS) imposed a formal reprimand and a fine of £30,000 on iTouch (the service provider to Channel Four for the *Deal or No Deal* competition from 28 August 2006) in respect of *Deal or No Deal* for the duration that staggered selection had been in place (between 28 August 2006 and 13 May 2007). PhonepayPlus ruled that the competition misled viewers in that “...each entrant did not have the same chance of winning, to a significant degree”.

Ofcom’s Investigation

- 4.4 In its investigation, Ofcom asked Channel 4 about a number of issues including:
- how it assessed the procedures for operating the viewer competition format and the extent of its liaison with the service provider;
 - what reviews, oversight and management was in place to monitor the services provided by the service provider;
 - the details of the number of entrants for each episode including the full details of the winners from each entry mode;
 - details of the revenue generated for the duration of the *Deal or No Deal* competition; and
 - the number of entrants who were disadvantaged by the use of staggered selection between 28 August 2006 and 13 May 2007.

Channel Four’s Response to Ofcom’s Investigation

- 4.5 Channel Four stated that lawyers from its compliance department advised at the outset on the legality of the *Deal or No Deal* viewer competition format.
- 4.6 Channel Four had contracted service provider iTouch to provide a variety of services for a number of years prior to it being appointed as the service provider for the *Deal or No Deal* viewer competition in August 2006.
- 4.7 From the outset, staff in Channel Four's New Media department liaised closely with the service provider regarding the *Deal or No Deal* viewer competition. Prior to appointing iTouch, Channel Four met with the service provider to discuss their proposals for the service and network and account management. Once it had been appointed, iTouch devised the *Deal or No Deal* winner selection procedure. Channel Four relied on the advice and expertise of iTouch regarding the compliance of the procedure with the PhonepayPlus Code. iTouch did not indicate that it had any concerns that the winner selection procedure adopted might breach the PhonepayPlus Code of Practice.
- 4.8 Responding to media investigations into competitions in Channel Four's *Richard and Judy* programme in the *Mail on Sunday* on 18 February 2007, Channel Four commissioned Wiggin to conduct a review into all of its PRS

activity. In March 2007, the report concluded that on a strict interpretation the form of staggered selection in use in the *Deal or No Deal* competition between 28 August 2006 and 13 March 2007 was unfair. Channel Four voluntarily notified PhonepayPlus of this matter on 26 March 2007.

- 4.9 Channel Four stated that it was not aware that the practice of staggered selection used in the *Deal or No Deal* competition was unfair until March 2007, when the investigation it had commissioned concluded. After this time, it worked with the service provider and Wiggin to develop a new selection procedure to ensure that no potential winners were selected until after the competition had closed. However, in the interim, between 23 March 2007 and 13 May 2007 it continued to transmit the competition, albeit attempting to minimise the unfairness until the new selection procedure could be implemented on 14 May 2007.
- 4.10 Channel Four said that it agreed that the unfairness to viewers caused by this particular form of staggered selection process could not be justified. However, it said that it hoped that the comprehensive review of all its PRS services, its voluntary notification of this staggered selection issue to PhonepayPlus, and the measures it had since put in place demonstrated how seriously it took its responsibilities to viewers, as well as its sincere regret for the harm which had been caused to viewers and its desire to ensure that this did not happen again.
- 4.11 Channel Four submitted that the fact it continued to operate the competition after the issue regarding the staggered selection process came to its attention in March 2007 needed to be considered in context. The staggered selection process was delayed, in accordance with external legal advice, so that it started later in the programme to minimise the unfairness so far as possible. From 27 to 29 March 2007, the staggered selection process commenced approximately 15 minutes into the programme. From 1 April 2007 to 13 May 2007, it commenced approximately 20 minutes into the programme (and approximately 15 minutes before the competition closed).
- 4.12 Channel Four fully accepted that it should have recognised the inherent unfairness of using this particular form of staggered selection prior to the competition closing and sincerely regretted its failure in this respect. It stated that it took its responsibilities as a public service broadcaster very seriously and recognised the need to rebuild trust in this area. As a consequence it had instructed Wiggin to monitor, on an on-going basis, the activity of service providers in relation to existing PRS competitions and votes.

Ofcom's Finding on the breaches

- 5.1 Ofcom took all of Channel Four's submissions in its response into account when carrying out its investigation and reaching its conclusions on the question of Code breaches. It noted Channel Four's admission of the unfair conduct in the *Deal or No Deal* competition between 28 August 2006 and 13 May 2007 and that Channel Four had accepted that the conduct was in breach of the Code. It also noted that Channel Four had stated that it had been unaware at the time of the inherent unfairness in using staggered selection.
- 5.2 Ofcom considered these matters under the following Code rules:

- Rule 2.11 of the Code states that: “competitions should be conducted fairly”; and
 - Rule 10.10 of the Code states that: “Any use of premium rate numbers must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of Telephone Information Services (PhonepayPlus)”.
- 5.3 Ofcom concluded that there were serious breaches of the Code in the conduct of Channel Four’s *Deal or No Deal* viewer competition broadcast between 28 August 2006 and 13 May 2007, specifically:
- 5.4 The staggered selection process created unfair odds because viewers who called to enter earlier in the programme were in a smaller selection pool than those who called later in the programme, because the selection pool expanded during the duration of the programme. This meant that a significant number of viewers who called to enter the competitions between 28 August 2006 and 13 May 2007 were disadvantaged. This was in breach of Rule 2.11 of the Code.
- 5.5 This practice of staggered selection was also in breach of the PhonepayPlus Code and therefore breached Rule 10.10 of the Code.
- 5.6 These breaches were considered to be serious as the Licensee appeared to have considered that its obligations and responsibilities regarding compliance with the Code could be satisfied by contracting them out to a third party, in this case, iTouch. The Licensee had done so without putting any procedures in place to monitor those activities.
- 5.7 Ofcom considered that it was not sufficient for a Licensee with clear compliance obligations and duties under the Code to put itself in a position where it was not aware of a matter that related intrinsically to the overall fairness of a competition on one of its programmes.
- 5.8 The seriousness of the breaches was compounded by the fact that whilst Channel Four was made aware that staggered selection was unfair in March 2007 by Wiggin, it allowed the competition to continue until 13 May 2007 (albeit in a way that sought to lessen the unfairness), until a fair solution was devised and implemented, instead of removing the competition until such time as it could be conducted fairly and in compliance with the Code.

Referral to the Content Sanctions Committee

- 6.1 It was considered that, taking all the circumstances into account, and in particular: the severity, scale and repeated nature of the breaches and the resulting harm caused to significant numbers of participants and to the audience overall, the breaches were sufficiently serious to warrant the consideration of the imposition of a statutory sanction.
- 6.2 Therefore, in accordance with Ofcom’s Outline Procedure for Consideration of Statutory Sanctions in Content Cases, the case was referred to the Committee.

Channel Four's written representations on the imposition of a sanction

- 7.1 Channel Four stated that it did not contest the Executive's decision to refer this matter to the Committee and recognised that the circumstances of the case warranted a statutory sanction. It admitted and sincerely regretted that the unfair practice which was in breach of the Code was in use in its competitions between 28 August 2006 and 13 May 2007. It said that it was not aware that the practice of staggered selection used in the *Deal or No Deal* competition was unfair until 23 March 2007 when the investigation it had commissioned from Wiggins confirmed the unfairness. It then voluntarily notified the PRS regulator PhonepayPlus of the breach of its Code.
- 7.2 Channel Four continued that it had made a policy decision that it would no longer profit from PRS and was no longer running any PRS competitions, including the *Deal or No Deal* viewer competition which it ceased to conduct on 29 September 2007.
- 7.3 Channel Four said that its reliance on the advice and expertise of iTouch regarding the compliance of the PRS service with the relevant regulatory codes was a requirement of the contractual arrangement between them. It continued that iTouch devised the winner selection procedure and that it did not indicate that it had any concerns that the procedure adopted might breach the relevant codes. Channel Four stated that there were formalised compliance procedures in place, and regular liaison between itself and its service provider regarding the operation of the *Deal or No Deal* competition. It accepted however, that it should have recognised the inherent unfairness in using this particular form of staggered selection.
- 7.4 It accepted that it was a misjudgment on its part to have placed such reliance on a reputable and experienced service provider with which it had already worked for a number of years on similar services. The Licensee also stated that with the benefit of hindsight, continuing with an interim staggered selection procedure whilst a compliant procedure was being developed was an inadequate measure, and it sincerely regretted the continuing harm suffered by viewers as a result. However, it continued that the decision to continue was not one which was taken lightly or recklessly.
- 7.5 With regard to the disadvantage caused to entrants it said that on the basis of the total calls received during the period in question, the disadvantage suffered by viewers has been estimated as equivalent to 934,000 "successful" telephone entries. It said this represented the aggregation of all individuals' lower chances of selection. In comparison to the 15 million calls received across this time period, this represented 6.2 per cent of all telephone entries ("successful" and "unsuccessful") across the period. These 934,000 telephone entries represented 1.3 per cent of the total number of overall entries across both entry methods of the web and telephone.
- 7.6 With regard to the period 23 March 2007 and 13 May 2007, the statistical probability was different because it had sought to minimise the unfairness until a solution could be found. Therefore, of the total calls received during this period, "successful" telephone entries at a disadvantage compared to those who entered at the start of each competition was estimated to equate to 56,000 entries. In comparison to the 2.1 million calls received during this

period, this represented 2.7 per cent of all telephone entries (“successful” or “unsuccessful”) across the period.

- 7.7 In response to Ofcom’s request for the declining odds attributable to each selection group it said that it was not possible to provide accurate odds which applied to all the competitions during the period of non-compliance. It was difficult to determine reliably the chances of selection for each “successful” entrant at different time intervals in the programme. However, it continued that it was evident that the chances of selection for a “successful” entrant at the start of the competition were materially different to that of a “successful” entrant drawn from the final pool just after lines closed.
- 7.8 Revenue figures were supplied by Channel Four for the period 28 August 2006 to 13 May 2007 (the period during which the unfair conduct occurred). From 28 August 2006 to 22 March 2007, the gross revenue raised by the Licensee from *Deal or No Deal* was approximately £15 million. For the period 23 March to 13 May 2007, (when the Licensee was aware of the unfair conduct and allowed the competition to continue), the gross revenue it raised was approximately £2.1 million.
- 7.9 Channel Four stated that since early March 2007, it had engaged Wiggin and other third party specialists to monitor all its PRS services on an ongoing basis. It also said that:
- As soon as the unfairness of the form of staggered selection used was highlighted by Wiggin, Channel Four voluntarily brought the issue to the attention of PhonepayPlus immediately;
 - Channel Four, on its own initiative, took action to devise and implement a fully compliant selection process which it did by 14 May 2007, before any communication from either PhonepayPlus or Ofcom regarding the *Deal or No Deal* competition; and
 - Channel Four admitted the unfair conduct and acknowledged and accepted the Code breaches.

Sanctions Hearing

- 8.1 Ofcom’s Content Sanctions Committee (“the Committee”) held an oral hearing on 14 December 2007 at which Channel Four was given the opportunity to make oral representations before the Committee decided whether the breaches warranted the imposition of a statutory sanction, and if so, at what level.
- 8.2 The Committee was addressed by Kevin Lygo, Channel Four’s Director of Television and Content, and Anne Bulford, Group Finance Director of Channel Four, with evidence supplied by Neil Pepin, Channel Four’s Deputy Head of Legal and Compliance. A representative from Wiggin LLP was also in attendance.
- 8.3 Channel Four accepted that the *Deal or No Deal* competition was in breach of the Code between 28 August 2006 and 13 May 2007 and stated that it deeply regretted the harm to viewers and the loss of trust which resulted.

- 8.4 Channel Four had considered it best to appoint a specialist service provider with the experience to handle the technological aspects of viewer competitions and considered that it should have been able to rely on the expertise of telecoms service providers. It had taken comfort in the fact that such a provider would be regulated separately by PhonepayPlus and that it had provisions in its contract with iTouch to notify Channel Four as soon as it became aware that any services may breach the PhonepayPlus Code and to remedy the same. Regrettably, iTouch did not appreciate the concerns relating to staggered selection.
- 8.5 Channel Four stated that it had wrongly viewed the mechanics of the way in which competitions operated as the primary responsibility of iTouch in complying with the PhonepayPlus Code.
- 8.6 Channel Four considered it to be of the utmost priority to resolve the issues in a prompt and appropriate manner, and it believed it had done so. It had reviewed its PRS activities and once in receipt of the findings, it notified PhonepayPlus. It had also made a significant donation to charity.
- 8.7 The Licensee stated that, with the benefit of hindsight, its decision to eliminate wholly the unfairness in the selection format had been too slow. Channel Four stated that it had notified the PRS regulator, PhonepayPlus explaining that it had used a staggered selection process. Channel Four stated that in “the absence of any response or guidance from PhonepayPlus”, it took the decision to continue using a process of staggered selection having taken steps to minimise the adverse impact before ceasing the process altogether. It accepted with hindsight that its judgement at the time was wrong, albeit made in good faith, and that it should have taken the competition off air immediately it became aware it was unfair.
- 8.8 Channel Four continued that at the time, although the practice was unfair, it had not been clear that it was in breach of the PhonepayPlus Code and therefore potentially in breach of the Ofcom Code. This was because although the PhonepayPlus Code required that all entrants have an equal chance, this was not necessarily subject to a strict interpretation in the industry and therefore, as referred to in the external legal advice, a ‘slight’ adverse impact was believed to be acceptable, particularly if steps had been taken to minimise that adverse impact. An initial decision had therefore been taken – which Channel Four regretted and now acknowledged to be wrong – to continue with staggered selection. Moreover, from a programming perspective, given the enormous viewer interaction with the programme, there would have been resistance to removing a competition that worked so well and which viewers enjoyed. Nevertheless, Channel Four admitted that it had been wrong to continue to conduct the competition between 23 March 2007 and 13 May 2007 whilst a compliant solution was sought. However, this decision had been taken in good faith by its senior management, on the basis of the external advice it had received.
- 8.9 Channel Four considered that any sanction to be imposed by Ofcom should be proportionate and not based on gross revenue raised by the *Deal or No Deal* competition but on its profits. The Licensee stated that it should be taken into account that not all revenue raised by the *Deal or No Deal* competition had been raised unfairly because all entrants had been considered (this was not a matter where any individuals were excluded from consideration) and not

all of them had been disadvantaged by the staggered selection process in operation.

- 8.10 In addition it noted that when callers entered the competition, ninety per cent of those callers would have received a message saying that they had been unsuccessful. The remaining ten per cent of callers would have gone into the pool in which staggered selection applied. Therefore it argued that up to ten percent of callers would have actually been adversely affected by staggered selection.
- 8.11 Channel Four submitted that it was not possible to implement a refund procedure because the data was not available to ascertain accurately who had been disadvantaged and by how much. It confirmed that it intended to make a donation to charity of £300,000, which it considered reflected the extent of disadvantage caused to PRS telephone entrants. Channel Four also acknowledged that whilst web entrants had not been financially disadvantaged, they were nonetheless also disadvantaged by the method of staggered selection that was in operation.
- 8.12 Channel Four said that it did not immediately notify Ofcom of the issue because it knew that PhonepayPlus was leading on the initial investigation into *Deal or No Deal* and that, when requested, it gave full and complete disclosure to Ofcom.
- 8.13 Channel Four stated that it had taken this matter extremely seriously. It said that it had been open about the judgements that had been made and had done everything to try to repair this situation and restore viewer trust. It had not taken disciplinary action but had considered whether there was scope for it to do so. However, it said there was no evidence of dishonesty or intention to mislead. It said that the breaches had occurred because of an inappropriate reliance on iTouch and poor judgement on its own part. It said that it hoped that its complete withdrawal from operating PRS viewer competitions demonstrated how seriously this matter was viewed by Channel Four.

Sanctions Decision

- 9.1 In reaching its decision, the Committee considered carefully all the written and oral submissions provided by Channel Four. The Committee decided, for the reasons set out below, to impose a financial penalty on Channel Four and to issue a direction requiring Channel Four to broadcast a statement of Ofcom's finding on three occasions determined by Ofcom. In deciding on an appropriate and proportionate level of financial penalty in this case, the Committee had regard to Ofcom's Penalty Guidelines⁴.

The seriousness of the breaches

- 9.2 Having considered all the evidence and Channel Four's representations, the Committee found that the breaches in this case were extremely serious for the following reasons.

⁴ 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.

- 9.3 The breaches involved systematic failures in the conduct of this competition and constituted a serious breakdown in trust between a public service broadcaster and its audience. Materially misleading an audience has always been considered to be amongst the most serious breaches that can be committed by a broadcaster under the Codes.
- 9.4 The trust that the audience places in a broadcaster is fundamental to their relationship. This is particularly pertinent in the case of a public service broadcaster like Channel Four whose service is available to such a wide audience. This relationship of trust becomes even more important when it involves one of the broadcaster's popular programmes. Viewers are entitled to believe when entering into a relationship of trust with such an organisation that their trust is not misplaced.
- 9.5 Channel Four operated staggered selection between 28 August 2006 and 13 May 2007. It resulted in later entrants having a lower probability of being shortlisted as a potential winner in the competition compared to those who had entered earlier. Channel Four did not understand this to be an unfair process until the results of the internal inquiry in March 2007. This was a systematic failure in the conduct of the competition and was a serious breach of trust between a public service broadcaster and its audience.
- 9.6 Further, the Committee was particularly concerned that once Channel Four became aware of the unfairness of this selection method (and notwithstanding legal advice it had received), its senior management took the decision to continue conducting the competition while a compliant selection method was devised, knowing that the unfairness had not been eliminated. The Licensee was therefore conducting a competition which it knew to be unfair, a fact which, in the Committee's view, compounded substantially the seriousness of the breaches.
- 9.7 The Committee was concerned by the scale of the harm caused by the breaches, as well as their duration and repeated nature. The breaches resulted in significant consumer harm involving a substantial audience, as evidenced by the sizeable revenue raised by the Licensee from the *Deal or No Deal* competitions while the unfair conduct was occurring (£15 million gross revenue was raised during the period 28 August 2006 to 22 March 2007). It was also a matter of great concern to the Committee that during the period from 23 March to 13 May 2007, when the Licensee was aware of the unfair conduct and allowed the competition to continue, it raised a further £2.1 million in revenue.
- 9.8 The competition, with its associated interactive relationship with its audience, played an integral role within the programme format. The Committee was therefore seriously concerned by the Licensee's admission that it had not undertaken any kind of appropriate audit procedure or instigated any checks or processes at any time to ensure that the competition was being conducted fairly and entrants were not being unfairly treated.
- 9.9 Whilst the Committee understood that Channel Four felt that it had been let down by iTouch, it was nevertheless firmly of the view that the conduct of Channel Four's own competitions and the management of its service provider were plainly within the control of the Licensee. Further, the Committee considered that whilst it was the case that Channel Four had in place

contractual arrangements with iTouch which stipulated how the competition should be conducted and that it should be conducted in accordance with the requirements of the PhonepayPlus Code this, in itself, was not sufficient.

- 9.10 Channel Four's trust in iTouch was evidently misplaced and misjudged in this case. The Committee was strongly of the view that Channel Four's handling of its relationship with iTouch and its failure to take even the most basic independent steps to ensure that the Licensee was fulfilling its compliance obligations was negligent.
- 9.11 It was the view of the Committee that due to the severity, scale and repeated nature of the breaches and the resulting substantial harm caused to significant numbers of participants and to Channel Four's audience overall, this was a particularly serious case and therefore warranted the imposition of a significant financial penalty.

Precedent

- 9.12 In considering the appropriate level of financial penalty, the Committee took account of its previous sanctions decisions and the specific representations Channel Four had made regarding the relevance of those decisions in this case. 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 previous cases, and reflected the specific scale, severity and repeated nature of the breaches in the circumstances of this particular case.

Incentive

- 9.13 The Committee took into account in setting the level of penalty, the fact that Channel Four had taken steps to rectify the breaches (including its decision that it would no longer profit from PRS in its programmes and was no longer running any PRS competitions). It also took into account the fact that Channel Four continued to conduct the competition despite knowing it to be in breach of the Code. The Committee was conscious that the purpose of the imposition of a penalty was to provide a deterrent both to the party involved and to third parties. In this case it considered that a significant financial penalty would represent an appropriate incentive to ensure compliance in the future.

Level of Penalty

- 9.14 Taking all these factors into account (and in light of the scale and severity of the breaches), the Committee considered that the 'starting figure' for any financial penalty should be significant.

Factors tending to increase the level of penalty

- 9.15 The Committee then considered whether there were any factors which aggravated or tended to increase the appropriate level of any financial penalty it might impose.
- 9.16 This was part of a formalised and systematic procedure and Channel Four's failure to understand the inherent unfairness of this system demonstrated a lack of due care that could only be described as negligent.

- 9.17 The Committee was particularly concerned that, even though Channel Four initially believed the staggered selection process to be fair, at no point was the audience informed of this particular element of the selection process, either through on-air announcement or in the competition's terms and conditions. Unless stated otherwise, viewers would assume that all entrants were treated fairly and that potential winners would be chosen after the lines had closed.
- 9.18 It was of great concern to the Committee that once Channel Four became aware of the unfairness of this selection method, its senior management took the decision to continue conducting the competition in the knowledge that it was unfair, while a compliant selection method was devised. The Committee considered that it was wholly unacceptable for Channel Four (being aware that its competition was not being conducted fairly) to allow it to continue for seven weeks, albeit having taken steps to minimise the unfairness. This appeared to contradict Channel Four's submissions that the absolute paramount importance of trust and honesty in its relationship was with its audience.
- 9.19 The Committee considered that any fine should reflect these aggravating factors.

Mitigating Factors

- 9.20 The Committee then considered whether there were any factors which in its view might limit or decrease the appropriate level of the financial penalty.
- 9.21 The Licensee had procedures in place to ensure that it chose a suitable service provider to run the competition and exercised care in the selection of that service provider.
- 9.22 Additionally, as soon as it became aware of the concerns surrounding PRS competitions, Channel Four engaged the assistance of external specialist media lawyers, Wiggin, to ensure a thorough internal inquiry. It also instigated a review by Wiggin of all its other PRS activity, and put in place 'live' monitoring of all its PRS activity by Wiggin and other specialists on an ongoing basis.
- 9.23 The Committee considered that the steps Channel Four had taken to remedy the consequences of the breaches in this case. These included:
- pledging to donate £300,000 to the Great Ormond Street Hospital Children's Charity to reflect the extent of disadvantage caused to PRS telephone entrants, as precise data were not available to enable refunds to be offered. (The Licensee had already made donations to the charity totalling £250,000 in respect of all PRS issues);
 - putting in place an 'inspection' function to audit in future the performance of third parties in fulfilling contractual obligations; and
 - because of the damage to viewer trust these problems have created, Channel Four had now withdrawn from operating premium rate competitions altogether and from operating votes on a for-profit basis.

- 9.24 The Committee considered that any fine should reflect these mitigating factors and wished to make it clear that the financial penalty would have been higher had Channel Four not taken such action.

Conclusion

- 9.25 Cases where the broadcaster has materially misled its audience, whether knowingly or not, have always been considered to be amongst the most serious breaches of the Code by the regulator (and its predecessor).
- 9.26 The Committee accepted that, at least at the outset, Channel Four had no intention to mislead its audience. However, for the duration that the competition was on air, Channel Four had failed to communicate to its audience a fundamental element of the competition (winner selection) and, more importantly, when it became aware of the inherent unfairness in this selection process, it again failed to communicate this to viewers. Instead, Channel Four chose to continue operating a competition it knew to be unfair (despite taking steps to minimise the adverse impact).
- 9.27 The Committee took the view that the breaches constituted a substantial breakdown in the fundamental relationship of trust between a public service broadcaster and its viewers. Millions of viewers purchased the right to enter these competitions and invested trust in the Licensee. This trust was ultimately misplaced. This case involved the widespread and systematic deception of all those viewers who paid to enter in the belief that they had a fair and equal chance of winning, when in fact their chances of winning depended on the time they entered.
- 9.28 Channel Four failed to take adequate measures to understand basic yet crucial elements of the conduct of its own competition (winner selection procedures). Channel Four ultimately failed to place appropriate emphasis on the fair treatment of its viewers. Further, for a period of seven weeks, it appeared that its desire to continue to run a competition overrode the value it placed on its relationship with its audience.
- 9.29 Having considered the relevant facts as outlined above and all the representations made by Channel Four, the Committee decided to impose a financial penalty on Channel Four of **£500,000** (payable to HM Paymaster General) which it considered to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed Channel Four to broadcast a statement of its findings on its service in a form determined by Ofcom on three specified occasions.

Content Sanctions Committee

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20 December 2007