

# Ofcom Content Sanctions Committee

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<b>Consideration of sanction against</b>	GMTV Ltd (“the Licensee” or “GMTV”) in respect of its service the National Channel 3 service (“Channel 3”).
<b>For</b>	<p>Breaches of Ofcom’s 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>;</p> <p>Relating to the following conduct:</p> <p><b>‘Early selection’</b>: 25 July 2005 to February 2007 <b>‘15/5 method’</b>: 25 July 2005 to August 2006 <b>‘Final five’</b>: 25 July 2005 to August 2006</p> <p>and</p> <p>Breaches of the ITC Programme Code 2002 (“the ITC Code”) of:</p> <p>Rule 8.2(b): Use of Premium Rate Telephone Services in Programmes: <i>“The licensee must retain control of and responsibility for the service arrangements...(including all matters relating to their content).”</i>;</p> <p>Relating to the following conduct:</p> <p><b>‘Early selection’</b>: August 2003 to May 2005 <b>‘15/5 method’</b>: May to 24 July 2005 <b>‘Final five’</b>: May 2005 to 24 July 2005 <b>‘Early selection’</b>: June to 24 July 2005</p> <p>in viewer competitions on GMTV;</p>
<b>between</b>	August 2003 and February 2007.
<b>Decision</b>	To impose a financial penalty (payable to HM Paymaster General) of <b>£2,000,000</b> and, in addition, to require GMTV to <b>broadcast a statement of Ofcom’s findings</b> on its service in a form to be determined by Ofcom on three specified occasions.

## 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 GMTV in light of the serious nature of its failure to ensure compliance with Ofcom's Broadcasting Code and the ITC Programme Code ("the relevant Codes").
- 1.2 This adjudication under the relevant Codes relates to the broadcast of the weekday breakfast service, GMTV, between August 2003 and February 2007.
- 1.3 GMTV is a public service broadcaster transmitting a weekday breakfast service comprised of news, reviews, competitions, and a mix of light entertainment strands. GMTV's competitions gave viewers the opportunity to win a high-value prize - usually a car, a holiday or £10,000 in cash. Entry options were via premium rate telephone calls, text messages (SMS) and the web. Telephone entry cost approximately £1.30, web entry cost £1 and SMS entry cost £1 plus the variable standard network charge.
- 1.4 Since August 2003, GMTV had employed the telecoms operator Opera Telecom ("Opera") to manage the competition entry systems and, in particular, to provide telecommunications services for premium rate services ("PRS").
- 1.5 An Ofcom investigation was launched following viewer complaints and allegations made in an edition of *Panorama* broadcast on BBC1 on 23 April 2007 that, between August 2003 and May 2005, Opera's staff were deliberately picking competition finalists before lines closed.
- 1.6 Ofcom's investigation uncovered four types of misconduct in GMTV competitions held between August 2003 and February 2007. They were:

### **'Early selection': August 2003 to May 2005**

- 1.7 During this period, when GMTV was conducting 'next day reveal' competitions, Opera staff were regularly picking the list of competition finalists up to three hours before lines closed. This meant that substantial numbers of viewers who paid to enter the competitions stood no chance of being entered. GMTV stated that at the time it was unaware of this and admitted it did not have adequate oversight and control of its PRS arrangements. This was in breach of Rule 8.2(b) of the ITC Code.

### **The '15/5 method': May 2005 to August 2006**

- 1.8 During this period, GMTV and Opera staff operated a '15/5 method' to select the twenty finalists for 'same day reveal' competitions. Fifteen finalists were picked between 06:00 and 08:30 and the remaining five were selected at 09:00 after lines closed. Viewers calling between 08:30 and 09:00 therefore had significantly less chance of being selected as a finalist than those who entered before 08:30.
- 1.9 GMTV's lack of adequate oversight and control of PRS arrangements for its competitions transmitted on or before 24 July 2005 was in breach of Rule 8.2(b) of the ITC Code. From 25 July 2005 (when Ofcom's Broadcasting

Code came into force) onwards, the unfairness of the '15/5 method' to those viewers who entered after 08:30, meant the competitions were in breach of Rule 2.11 of the Ofcom Code.

**'Final five': May 2005 to August 2006**

- 1.10 Opera staff also occasionally selected the final five finalists up to three minutes before lines closed at 09:00. Those who paid to enter the competition after the final five were chosen therefore stood no chance of being entered into the competition. GMTV's lack of control over the arrangements for PRS competitions broadcast up to and including 24 July 2005 was in breach of Rule 8.2(b) of the ITC Code. From 25 July 2005, the unfairness of this practice to viewers who entered in the final minutes meant that the competitions were in breach of Rule 2.11 of the Ofcom Code.

**'Early selection': June 2005 to February 2007**

- 1.11 During this period when GMTV was conducting 'same day reveal' competitions, Opera out-of-hours shift workers regularly selected competition finalists before they came off duty at 08:00, an hour before lines closed. Viewers who paid to enter after finalists had already been selected were therefore disenfranchised. Because the broadcaster had not retained control of the arrangements for the conduct of its PRS competitions, it was in breach of Rule 8.2(b) of the ITC Code up to and including 24 July 2005. From 25 July 2005, the unfairness caused to entrants by early selection was in breach of Rule 2.11 of the Ofcom Code.

**Committee's findings**

- 1.12 The effect of this unfair conduct was substantial. GMTV had estimated that between May 2003 and April 2007, 62 million entries were made to its competitions. Of these, it had estimated that 25 million may be eligible for refunds due to the disenfranchisement caused by early selection. GMTV said that it believed this figure was far higher than the number of entries that were actually disenfranchised. However, it was unable to provide accurate figures as it did not want to rely on Opera's evidence. It had also been unable to determine accurate figures or provide estimates of how many entrants were disadvantaged by the '15/5 method' or by the 'final five' practice.
- 1.13 The Committee viewed these breaches as extremely serious, involving as they did longstanding and systematic failures in the conduct of broadcast competitions.
- 1.14 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 whom 'purchased' the right to enter GMTV's competitions in the belief that they would have a fair and equal chance of winning.
- 1.15 The breaches resulted in significant consumer harm involving a very substantial audience, as evidenced by the sizeable revenue made by the Licensee from PRS competitions while the unfair conduct was occurring from August 2003 to February 2007 (£63.6 million).

- 1.16 The lengthy duration of the unfair conduct - the affected competitions being broadcast on a daily (weekday) basis between 2003 and 2007 - illustrated that the breaches were regularly repeated over an extensive period of time.
- 1.17 The Committee was particularly concerned by the Licensee's admission that despite the considerable financial importance of these competitions to GMTV (representing as they did 35-40 per cent of its annual profit), there was no audit of Opera's processes and procedures by GMTV's management or its Board, and there also appeared to have been no assessment of any risks associated with the conduct of these competitions at any point during the extensive period of time in which the competitions took place. Rather, the evidence was that GMTV had focussed heavily on the contribution that the PRS competitions made to its revenues and profitability, whilst paying comparatively little attention to its compliance responsibilities.
- 1.18 GMTV had placed a great deal of trust in Opera. The Committee was strongly of the view that GMTV's handling of the relationship with Opera was both irresponsible and negligent. It did not take adequate account of the possibility that Opera, as a third party, might fail to act in an appropriate manner when taking such substantial sums of money from GMTV's audience.
- 1.19 The Committee noted that GMTV did not intend its competitions to be conducted in a way that was not compliant with the relevant Codes. GMTV co-operated willingly and fully with Ofcom's investigation and had taken extensive steps to remedy the consequences of the breaches. These included:
- the decision by its Managing Director, Paul Corley, to take full responsibility for GMTV's failures and therefore to resign from his post, along with the Head of Competitions, Kate Fleming;
  - offering refunds on a potential 25 million entries, a number which it believed was *"certainly far higher than the number of people who would have actually been disenfranchised"*;
  - setting up a Freephone number for viewers to request a claim form, which could also be downloaded from its website;
  - promoting the refunds every day on GMTV for a five-week period and taking out advertising for the refunds in national and regional newspapers;
  - holding 250 new free prize draws, each with a £10,000 prize, for all entrants on the refund database, at a total cost of £2.5 million; and
  - making a £250,000 donation to the children's charity ChildLine, to take account of the data it had not been able to retrieve.
- 1.20 In addition to the reparations and remedies, GMTV had introduced improved internal codes of conduct and compliance for any future premium rate activities.
- 1.21 The Committee wished to make clear that the financial penalty would have been higher had GMTV not put in place such an extensive programme of reparations and remedies.

- 1.22 Over a period of nearly four years, GMTV made profits running into millions of pounds from its competitions, but had no adequate oversight of this operation. Given the fundamental role that competitions played in its programming and the clear significance of the resulting revenue to its profitability, GMTV's disregard for the need to operate any reasonable compliance procedure, verification, oversight or management of the arrangements for the conduct of these competitions over such a long period of time could not, in the Committee's view, be described as anything other than gross negligence. This resulted in the widespread and systematic deception of millions of viewers who paid to enter the competitions in the belief that they had a fair chance of winning when in fact their chances were diminished or non-existent.
- 1.23 Having considered the relevant facts as outlined above and all the representations made by GMTV, the Committee decided to impose a financial penalty on GMTV of **£2,000,000** (payable to HM Paymaster General) which it considered to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed GMTV to broadcast a statement of its findings on its service in a form determined by Ofcom on three specified occasions.

## Introduction

- 2.1 GMTV is a public service broadcaster with a breakfast service licence, transmitting live programming weekdays between 06:00 and 09:25.
- 2.2 Between 06:00 and 07:00, GMTV transmits *The News Hour*. During the period under investigation *The News Hour* contained a daily (weekday) promotion for GMTV's competitions. The main competition elements were featured in *GMTV Today*, beginning at 07:00, and in *LK Today* or *Entertainment Today*, beginning at 08:40. This programming, between 07:00 and 09:25, included news, reviews, competitions, and a mix of light entertainment strands.
- 2.3 The main competition feature on GMTV gave viewers the opportunity to win a high-value prize - usually a car, a holiday or £10,000 in cash. Entry options were via premium rate telephone calls, text messages (SMS) and the web. Telephone entry cost approximately £1.30, web entry cost £1 and SMS entry cost £1 plus the variable standard network charge.
- 2.4 Since August 2003, GMTV had employed the telecoms operator Opera Telecom ("Opera") to manage the competition entry systems and, in particular, to provide telecommunications services for PRS.
- 2.5 On 23 April 2007, allegations were made in an edition of *Panorama* broadcast on BBC1 that Opera's night-shift staff were deliberately picking the shortlist of competition finalists before lines closed at midnight and that this was fairly common practice between August 2003 and May 2005.
- 2.6 Further allegations were made in the *Mail on Sunday* on 29 April 2007 by two former employees of Opera who said that GMTV had known about the early pre-selection of competition finalists.
- 2.7 As a result of these allegations and a small number of viewer complaints, Ofcom launched an investigation into GMTV's competitions. During the

course of this, the following types of unfair conduct were considered by Ofcom:

#### **'Early selection': August 2003 to May 2005**

2.8 Between August 2003 and May 2005, GMTV's competitions were operated on a 'next day reveal' basis whereby the competition was run daily between 06:00 and 09:25 and lines stayed open until midnight that day. The practice should have meant that the twenty finalists were picked by Opera staff after lines closed at 00:00 and submitted to GMTV in the early hours of the following morning. However, Opera staff were, on a fairly regular basis, picking the list of twenty finalists between 21:00 and 23:00, up to three hours before lines officially closed. This meant that viewers who paid to enter the competitions between 21:00 and 00:00 stood no chance of being entered.

#### **The '15/5 method': May 2005 to August 2006**

2.9 This unfair conduct was in addition and separate to the 'early selection' practice conducted by Opera staff between August 2003 and May 2005, as described in paragraph 2.8 above.

2.10 Between May 2005 and August 2006, GMTV's competitions were changed to operate on a daily basis, whereby the competition was conducted each day between 06:00 and 09:00 with lines closing at 09:00. It was intended that twenty finalists would be picked and put into "the hat" after 09:00, with the winner then revealed live on air before the programme ended at 09:25.

2.11 However, GMTV and Opera staff agreed to operate a '15/5 method' in selecting the twenty finalists for its 'same day reveal' competitions. This involved fifteen finalists being picked between 06:00 and 08:30 and the remaining five being selected at 09:00 after lines closed. According to GMTV, this meant that viewers calling between 06:00 and 08:30 had a 1 in 3,499 chance of being selected as a finalist, whilst those who called between 08:30 and 09:00 had a 1 in 5,077 chance of being selected.

#### **'Final five': May 2005 to August 2006**

2.12 On occasion when operating the '15/5 method', Opera staff also sent over the final set of five finalists up to three minutes before lines closed at 09:00. This meant that those who paid to enter the competition after the final five were chosen stood no chance of being entered.

#### **'Early selection': June 2005 to February 2007**

2.13 Between June 2005 and February 2007, when GMTV was conducting 'same day reveal' competitions, Opera out-of-hours shift workers also regularly selected competition finalists before they came off duty at 08:00, an hour before lines closed. Opera's GMTV account manager then added a few randomly selected names before sending the names to the programme.

#### **Effect of the unfair conduct**

2.14 GMTV had estimated that, between May 2003 and April 2007, 62 million entries were made to its competitions. Of these, it had estimated that 25 million may be eligible for refunds due to the disenfranchisement caused by early selection. GMTV said that it believed this figure was far higher than the

number of entries that were actually disenfranchised, but it was unable to provide accurate figures as it did not want to rely on Opera's evidence. It had also been unable to determine accurate figures or provide estimates of how many entrants were disadvantaged by the '15/5 method' or by the 'final five' practice.

## **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)); 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)).

### **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.<sup>1</sup>
- 3.9 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.

### **ITC Programme Code**

- 3.10 Prior to the publication of Ofcom's Code, Ofcom was responsible for enforcing the Code of its legacy regulator, the ITC, as if it were an Ofcom Code<sup>3</sup>.

### **Remedies**

- 3.11 Section 40 of the Broadcasting Act 1990 (as amended) ("the 1990 Act") provides that Ofcom has the power to direct a Channel 3 licensee to broadcast a correction or statement of findings or not to repeat a programme in respect of a contravention of a licence condition.
- 3.12 Section 41 of the 1990 Act (as amended) provides Ofcom with the power to impose a financial penalty on a Channel 3 licence holder of up to a maximum of 5% of its qualifying revenue in respect of breaches occurring after the end of 2003. For breaches prior to that, the maximum amount of any financial penalty imposed is 3%, provided no financial penalty has previously been imposed on the licensee (as in this case).
- 3.13 Under Section 41 of the 1990 Act (as amended), Ofcom may also shorten the licence period of a Channel 3 licensee.
- 3.14 Section 42 of the 1990 Act (as amended) provides Ofcom with the power to - revoke a Channel 3 licence if, following due process, Ofcom is satisfied that revocation is necessary in the public interest.

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

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

<sup>3</sup> See Paragraph 43 (1) of Schedule 18 of the Communications Act 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”.

## **Relevant Provisions of the ITC Programme Code**

- 3.16 The ITC Programme Code (2002) (“the ITC Code”) stated:

Rule 8.2(b): Use of Premium Rate Telephone Services in Programmes: “The licensee must retain control of and responsibility for the service arrangements...(including all matters relating to their content)”.

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

- 3.17 Providers of PRS are separately regulated by Icstis, 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, Icstis’ Code of Practice requires: clear and accurate pricing information and honest advertising and service content. Icstis 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 GMTV’s competitions broadcast between 2003 and 2007, as summarised below. During that investigation, GMTV was given the opportunity to make written submissions on the case. In light of the evidence and GMTV’s responses, Ofcom concluded that GMTV’s competitions during the period under investigation were in breach of the relevant Codes, as outlined below.
- 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, GMTV was given opportunities to make written and oral representations. A summary of these is set out below at Paragraphs 7.1 to 8.29.

## **Ofcom’s investigation**

- 4.3 In its investigation, Ofcom asked GMTV, among other issues, to address the following key points and provide certain relevant material. This included:
- Details of the arrangements agreed with Opera for the time at which potential competition winners were to be selected and submitted to GMTV;
  - How GMTV satisfied itself that the selection procedures agreed with Opera complied with the relevant Codes;
  - Whether GMTV had ever asked Opera to finalise the shortlist of potential winners before the closure of telephone lines;

- The details and outcomes of any internal investigations which had been conducted or were underway;
- Why the emails published in the *Mail on Sunday* article referred to 15 finalists and not 20, which was the number of finalists put into “the hat”; and
- The full revenues achieved through the operation of PRS competitions on GMTV since May 2003.

#### **GMTV’s Response to Ofcom’s investigation**

- 4.4 GMTV submitted all the requested material to Ofcom and stated that after initially denying any wrongdoing, Opera had found that there had been serious and “prolonged irregularities” between 2003 and 2007 in the way in which some of its staff had handled PRS competitions on GMTV’s behalf. This had led to a large number of its viewers being disenfranchised.
- 4.5 GMTV confirmed that between August 2003 and May 2005, it was likely that, on a fairly regular basis, the finalists were selected by Opera’s night-shift before lines closed at midnight with the likely selection period having been between 21:00 and 22:00. The finalists were not sent to GMTV until the early hours of the morning, several hours after the lines had closed, and so its staff were not aware that early selection was taking place.
- 4.6 GMTV stated that between June 2005 and February 2007 some employees on Opera’s out-of-hours shift had been selecting the majority of the competition finalists before they came off duty at 08:00. GMTV stated that at no point had it been aware that this was going on and accepted that this practice disenfranchised large numbers of its viewers. It also stated that Opera’s senior management had assured GMTV only days before the *Panorama* broadcast that there was no foundation to the programme’s allegations.
- 4.7 GMTV said that it was very concerned that, whilst its own staff did not know about Opera’s out-of-hours shift practice of picking the majority of names before 08:00, they *did* know about the ‘15/5 method’. Between May 2005 and August 2006, certain GMTV staff had informally agreed the method with Opera to ensure that the shortlist was finalised in time for the winner to be announced before the end of the programme at around 09:20. The GMTV staff had believed that it was fair because it gave every entrant a chance of winning.
- 4.8 GMTV confirmed that its competitions staff accepted that this practice did not comply with the Icstis Code which requires that “All entries have the same chance of winning”. It said that its staff had put too much faith in Opera’s assurances that this method was acceptable and that they had instructed Opera to stop using the ‘15/5 method’ in August 2006 when it was acknowledged internally that it was not a fair system of selecting winners.
- 4.9 It further stated that there was evidence that the ‘final five’ email may have arrived at GMTV a few minutes before 09:00 (08:57 was the earliest computer time it could find). Whilst GMTV re-iterated that this was not at its request, it admitted that its staff should have realised that on occasion Opera was finalising the names before the lines had closed.

- 4.10 GMTV said that there was no evidence of it having requested Opera to finalise the list of potential winners before the competition closing time.
- 4.11 GMTV said that it was identifying as far as possible all of the entrants disenfranchised by Opera's and its own activities throughout the period and offering refunds, donating money to charity and holding re-draws.
- 4.12 GMTV supplied Ofcom with a copy of its contract with Opera and said that this clearly stated that Opera must select finalists only "Once lines close..." and must adhere to Icstis rules. GMTV stated that Opera had continually assured it that all its processes were in accordance with the Icstis Code.
- 4.13 GMTV stated that, in the future, it would implement a computer programme that would allow it to select all competition winners itself, stating that it would never assign this function to a third party again. It also said that it would not conduct 'same day reveal' competitions from now on as this practice placed too much pressure on staff. Instead, it would revert back to 'next day reveals' until the technology was in place to make 'same day reveals' possible again.

### **Ofcom's finding on the breaches**

- 5.1 Ofcom took all GMTV's submissions in its response into account. It noted GMTV's admission of the unfair conduct of viewer competitions between August 2003 and February 2007 and that GMTV had accepted that the conduct was in breach of the relevant Codes. It also noted that GMTV had stated that other than the '15/5 method', it had been unaware at the time of the other forms of unfair conduct undertaken by Opera's staff.

- 5.2 Ofcom considered these matters under the following Code rules from both the ITC Programme Code 2002 and the Ofcom Broadcasting Code 2005, as appropriate:

The ITC Programme Code 2002 (in force until 24 July 2005)

- Rule 8.2(b) **Use of Premium Rate Telephone Services in Programmes** of the ITC Programme Code stated that "The licensee must retain control of and responsibility for the service arrangements...(including all matters relating to their content)".

The Ofcom Broadcasting Code (in force since 25 July 2005)

- Rule 2.11 of the Code states that: "Competitions should be conducted fairly".

- 5.3 Ofcom concluded that there were serious breaches of both Codes in GMTV's viewer competitions broadcast between August 2003 and February 2007. Specifically:

#### **'Early selection': August 2003 to May 2005**

- 5.4 GMTV stated that it was unaware of the early selection of finalists by Opera during this period. This meant that GMTV did not have adequate oversight and control of its premium rate service arrangements in its competitions. This was in breach of Rule 8.2(b) of the ITC Code.

### **The '15/5 method': May 2005 to August 2006**

- 5.5 GMTV stated that its management was not aware at the time that its competitions staff had informally agreed to the adoption of the '15/5 method' in the operation of its 'same day reveal' competitions. This again highlights its lack of control over the arrangements for the conduct of those competitions transmitted on or before 24 July 2005. This was in breach of Rule 8.2(b) of the ITC Code.
- 5.6 The operation of the '15/5 method' was unfair to the viewers who called the competition entry line after 08:30 because they had significantly lower odds of being picked as a finalist than those viewers who called between 06:00 and 08:30. At no point in the programme, or in the terms and conditions of the competition, were entrants made aware that different odds would apply at different times. From 25 July 2005 onwards, the competitions were therefore in breach of Rule 2.11 of the Ofcom Code.

### **'Final five': May 2005 to August 2006**

- 5.7 On occasion when operating the '15/5 method', Opera staff sent over the final set of five finalists up to three minutes before lines closed at 09:00. Although GMTV stated that its staff had not requested that Opera send the finalists' names before lines closed, it admitted that they should have noticed this when it occurred. GMTV's lack of its control over the arrangements for its premium rate competitions broadcast up to and including 24 July 2005 was in breach of Rule 8.2(b) of the ITC Code.
- 5.8 This practice was unfair to viewers who entered in the final minutes after the finalists had been chosen by Opera before lines closed at 09:00 because they would have had no chance of being selected as a finalist. From 25 July 2005, this practice was therefore in breach of Rule 2.11 of the Ofcom Code.

### **'Early selection': June 2005 to February 2007**

- 5.9 Because the Licensee had not retained control of and responsibility for the arrangements for the conduct of its premium rate competitions, it was not able to prevent the disenfranchisement of viewers who paid to enter before lines closed but after the early selection of finalists. Up to and including 24 July 2005, this was in breach of Rule 8.2(b) of the ITC Code.
- 5.10 From 25 July 2005, the unfairness caused to entrants by early selection was in breach of Rule 2.11 of the Ofcom Code.
- 5.11 GMTV accepted and admitted all the breaches Ofcom recorded against it.

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

- 6.1 It was considered that, taking all the circumstances into account, and in particular: the severity, magnitude and scale of the breaches and the resulting substantial 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 the consideration of statutory sanctions in content cases, the case was referred to Ofcom's Content Sanctions Committee ("the Committee").

## GMTV's written representations on the imposition of a sanction

- 7.1 GMTV stated that it accepted the Code breaches and understood the reasons why they were considered to be serious enough to refer the case for consideration of a sanction. It also made the following further representations:
- 7.2 The Licensee stated that Opera had been appointed as its service provider in 2003 following a detailed tender and due diligence process. GMTV also took a reference on Opera from British Telecom into account, as Opera had *"undergone a thorough vetting by BT to become an accredited partner"*. Compliance issues were incorporated into the contract with Opera that was subsequently drawn up. This clearly stated that the shortlist of finalists was only to be compiled once competition lines had closed.
- 7.3 In March 2006, Opera was criticised in the BBC's *Watchdog* programme featuring telecoms companies who sent out unsolicited texts. GMTV stated that it had been unaware of the breaches recorded by Icstis against Opera at that time, but argued that none of these were deemed sufficiently serious by Icstis to warrant any restriction on Opera's services. The broadcaster believed breaches of codes to be *"commonplace within the Icstis-regulated sector"*. GMTV also stated that *"We were satisfied with their [Opera's] explanations at that point and therefore did not see their record of fines as a reason for discontinuing our relationship with them"*.
- 7.4 GMTV submitted that, while its failure to take Opera's record of compliance with the Icstis Code into account may be seen as negligent in view of what had happened more recently, it believed that in the context of the telecoms services industry at the time, it should not be judged as "gross negligence".
- 7.5 The Licensee detailed the regular liaison between: GMTV's competition department and Opera's staff; the head of GMTV's competition department and the Director at Opera in charge of GMTV operations; and GMTV's Legal and Business Affairs Manager and Opera's management.
- 7.6 The Licensee stressed that at all such meetings, GMTV's competition staff were *"regularly reassured that all aspects of Opera's services were functioning properly and in accordance with the contract"*.
- 7.7 However, GMTV admitted that *"in hindsight we should have carried out compliance inspections but there was absolutely no suggestion in our daily and other dealings with Opera that anything was wrong. Like many other broadcasters at the time, we took it for granted that they would adhere to the Icstis Code as we adhered to our Ofcom Codes. Regrettably that confidence was misplaced"*.
- 7.8 The Licensee also argued that during this period, it took "immense care" in its on-screen competition compliance, ensuring that all captions, announcements and filmed items complied with the Ofcom Code.
- 7.9 The '15/5 method' had been introduced by Opera out-of-hours staff in May 2005 when GMTV moved to a regular 09:00 closing time for competition entries. According to GMTV, *"Opera had assured GMTV's Competitions Department that this process was acceptable as part of the random selection process as the last finalists would be sent after lines closed"*. Further, relevant GMTV staff *"had not thought to refer this upwards"*, and stressed that Opera had not pointed out to it that the method did not comply with the Icstis Code.

- 7.10 The Licensee stated that in August 2006, its Legal and Business Affairs Manager “discovered” that Opera and GMTV’s competition staff had been informally operating the ‘15/5 method’. According to GMTV, on discovering this, he immediately contacted Opera and “*ordered them to stop doing it and to revert to choosing all finalists after the closing time of 9.00am because he was concerned that this might result in differential odds arising*”.
- 7.11 The Licensee submitted that on discovery of the ‘15/5 method’ in August 2006, it instructed Opera to stop using the method; and on discovery of Opera staff’s early selection of finalists before the closure of competition lines in April 2007, it immediately took its competitions off air, sacked Opera and apologised on air to viewers.
- 7.12 GMTV’s gross revenue from viewer competitions for the period August 2003 to April 2007 was £63.6 million. Total profit from viewer competitions in this period was £49.2 million.
- 7.13 GMTV believed that of all the broadcasters so far involved in these matters, it had been the “*most open, has taken full responsibility and has gone to considerable lengths to recompense viewers in the most comprehensive way*”. GMTV stated its planned reparations and remedies on 25 July 2007, which included:
- the resignation of its Managing Director, Paul Corley;
  - offering refunds on up to 25 million entries which it stated was “*certainly far higher than the number of people who would have actually been disenfranchised*” because it had taken a “safety first policy” in compiling its refund database;
  - setting up a Freephone number for viewers to request a claim form and this could also be downloaded from its website. Those claiming a refund would have to provide proof of ownership of their telephone number;
  - promoting the refunds every day on GMTV for a five-week period and taking out advertising for the refunds in national and regional newspapers;
  - holding 250 new free prize draws, each with a £10,000 prize, for all entrants on the refund database, at a total cost of £2.5 million; and
  - making a £250,000 donation to the children’s charity ChildLine, to take account of the very small amount of data it had not been able to retrieve.
- 7.14 In addition to these reparations and remedies, GMTV stated that it had introduced improved internal codes of conduct and compliance for any future premium rate activities. These included:
- the decision not to hold premium rate prize competitions featuring a same day reveal;
  - insistence on all finalists being selected by GMTV staff on its own premises, rather than by any service provider;
  - the appointment of a dedicated compliance officer with specific responsibility for compliance on premium rate services; and
  - regular compliance inspections of any nominated service providers.

- 7.15 The Licensee argued that if the purpose of a financial sanction was to punish it for its contraventions, then regard to the *“punishment which GMTV has already suffered and will continue to suffer as a direct consequence of this unfortunate matter”* was necessary in assessing the level of sanction.
- 7.16 The Licensee stated that as a result of the suspension of the competitions, it had lost more than £1 million a month in revenue. It had also set aside a £4 million provision for its reparations and remedies. Finally, it cited the cost of the significant damage to its reputation caused by this issue.
- 7.17 GMTV submitted that despite losing a major revenue source that helped to fund its public service news, current affairs and children’s programmes through the recent advertising downturn, it had not made any cuts to its programme services.
- 7.18 GMTV stated that in comparison to the Five *Brainteaser* case (available at [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/channel5.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/channel5.pdf)), there had been no “fakery” involved in this case. While the failure of GMTV staff to identify the unfairness resulting from the ‘15/5 method’ was a “misjudgement by our programme makers”, the Licensee believed this to be of a “lesser magnitude” than the issues raised in the *Brainteaser* case.
- 7.19 GMTV also argued that in contrast to Five’s reliance on Endemol - an unregulated third party - in the *Brainteaser* case, GMTV had relied on a service provider that was regulated by Icstis and believed that *“we should have been able to place more reliance on Opera adhering to the Icstis Code”*.
- 7.20 Further, the Licensee referred to investigations on premium rate activities and service providers involving other broadcasters as evidence that GMTV had not been alone in *“putting our trust in companies in another regulated sector and assuming that their regulatory rules and structures would deliver standards of compliance equivalent to those that operate in broadcasting”*.
- 7.21 GMTV asked Ofcom to take Icstis’ investigation of Opera for the same unfair conduct into account in its consideration of GMTV’s case. With reference to paragraph 5 of Ofcom’s Penalty Guidelines, requiring Ofcom to have regard to *“Whether a penalty in respect of the same conduct has already been imposed by Ofcom or another body”*, GMTV believed the point of reference for these purposes was the conduct and not the party in question.
- 7.22 GMTV described the “standards and conditions prevailing at the time” of the breaches, referring to what had been an “ambiguity” in broadcasters’ understanding of PRS compliance. In light of this, GMTV believed that to refer to its acts and omissions as “grossly negligent” was “unduly harsh”.
- 7.23 GMTV submitted that one of the key points in Ofcom’s Penalty Guidelines is the need to ensure that the threat of penalties should act as sufficient incentive to comply. The Licensee argued that in light of the actions already taken, the significant financial losses and costs it had incurred and the adverse publicity, it did not require the discipline of a substantial financial penalty as a further incentive to comply with its regulatory obligations.

## **Sanctions Hearing**

- 8.1 Ofcom’s Content Sanctions Committee (“the Committee”) held an oral hearing on 10 September 2007 at which GMTV 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 Paul Corley, GMTV's Managing Director, with evidence supplied by Clive Jones, Non-Executive Chairman of GMTV, Rhian Walker, GMTV's Finance Director and Paul Herbert from Goodman Derrick, GMTV's Company Solicitor.
- 8.3 GMTV re-iterated that it accepted full responsibility for the breaches. It said that it had made this clear from the beginning of the investigation and had never sought to argue that it had not been liable for these breaches.
- 8.4 It stated that as soon as it had become aware of the extent of the problems, its Managing Director, Paul Corley, went on air and apologised personally to GMTV's viewers. Since then all its energies had been devoted to putting in place a comprehensive set of remedies aimed at restoring its viewers' trust. It said these remedies were more comprehensive by far than those of any other broadcaster.
- 8.5 GMTV said that it had co-operated fully with Ofcom's investigation and been prompt in its responses. However, GMTV made submissions as to the appropriateness and proportionality of the proposed financial penalty.
- 8.6 With regard to viewer compensation, GMTV said that it had created a refund database of 25 million entries, to the value of £35 million. However, it said that the figure of 25 million entries was far more than it believed were actually disenfranchised. It stated that the number of refunds offered was extended as far as possible because it did not want to rely on the accounts of Opera staff to determine when finalist selection had been made. At this point, GMTV expected to spend around £5.5 million compensating viewers in various ways, but it stated that this figure might increase, depending on the level of refund applications it received. It said that its refunds and draws had been extensively promoted on television and in the press since their introduction on 25 July 2007.
- 8.7 It said that its on-screen announcements were seen by nearly 9 million adults over the period, representing 60 per cent of its regular audience and that it also took out advertisements in national and major regional newspapers. It said that the recent figures showed that its paid-for newspaper campaign had reached 20.8 million adults which equated to 43 per cent of the UK population. It said that it took the "safety first" decision to widen the net because it wanted to make sure, as far as possible, that no-one was left out.
- 8.8 GMTV said that on 30 August 2007, under the supervision of Deloitte, it held 250 prize draws for every single entry on the refund database and that each of the winners would receive £10,000. It was now in the process of contacting those winners and distributing their prizes and said that this was a complex operation that would take some weeks to conclude. The draws were broadcast on GMTV on 31 August 2007. It pointed out that the winners of the prize draws could also apply for refunds under its refund scheme.
- 8.9 It said that it had carefully constructed the draws to ensure that they were a fair approximation of the average odds of the original draws which gave entrants the chance that they may have missed originally to win a substantial prize in a fair draw. It had also made a £250,000 donation to ChildLine to cover the small amount of data from 2003 and 2004 that it could not retrieve.

- 8.10 GMTV said that it fully appreciated Ofcom's paramount concern to protect viewers against exploitation and harm and that this objective had informed its remedies and new compliance measures. In short, the remedies had been designed to try to achieve full compensation for every affected viewer.
- 8.11 With regard to the imposition of a financial sanction against GMTV, it stated that it could assure Ofcom categorically that it did not need a substantial fine to ensure that it would comply with the Code in the future. A fine of £10,000 would not even be necessary to ensure that. It continued that the public humiliation that it had endured together with its own distress at the discovery of these breaches meant that it would not re-introduce competitions until it was absolutely certain that these could be operated compliantly.
- 8.12 GMTV said that it was sadly apparent that it was one of several broadcasters to be caught out and said that it was essential that any judgement against it was not influenced by the somewhat frenzied atmosphere that currently existed, but had regard to the circumstances prevailing over the period in question. It firmly believed that if its conduct was considered in this light, a fine of no more than half a million pounds was entirely appropriate.
- 8.13 Acknowledging that telecoms service providers are regulated by Icstis, it said that Opera came to it with credentials and references and that it received a full reference on Opera from British Telecom. In August 2003, Opera was therefore engaged by GMTV under a comprehensive contract that included a firm requirement to comply fully with Icstis Codes which described clearly the process for selecting finalists after lines closed. Sadly, it said, its trust in Opera had been misplaced although it was by no means sure that, even had it carried out regular compliance inspections, the problems at Opera would have come to light as they were caused by informal arrangements between a small number of Opera night shift employees who were simply trying to make life easier for their colleagues on the day shift.
- 8.14 The Committee questioned whether Opera's record of compliance with Icstis – which had recorded over 20 Code breaches, some of which were “serious” or “very serious” – raised concerns with senior management. GMTV responded that at the time it employed Opera, it was satisfied that its compliance record was not a barrier and that it was reassured that the way in which Icstis investigated and recorded breaches against telecoms companies differed, with a more regular system of smaller fines and breaches being recorded against telecoms companies for the third party content they provide.
- 8.15 The Committee questioned why GMTV had relied so heavily on a telecoms company which had more than 20 breaches recorded against it by Icstis but provided a substantial portion of its annual profits. GMTV responded that it was hard to explain why it had not taken more notice of Opera's compliance record, but that it was not alone in the industry in not having done so.
- 8.16 In mitigation, GMTV stated that that there was no personal financial gain for GMTV or for Opera arising from any of these breaches and that the vast majority of the problems were caused by a third party - Opera.
- 8.17 It said that the ‘15/5 method’ which its competition staff agreed was wrong but that the staff had acted in good faith and were misled by Opera who assured them that the arrangement was acceptable. GMTV acknowledged that it was guilty of “gross naivety” and that, in hindsight, it accepted it was “negligent”,

but in the context of the relationships at that time between broadcasters and the premium rate sector, it argued that it was not grossly negligent.

- 8.18 With regard to the implementation and subsequent cessation of the '15/5 method', GMTV said that it had never been escalated beyond its Head of Legal and Business Affairs and that no member of GMTV's Senior Management had been aware of it. It said this was highly relevant in explaining its apparent lack of action at the time.
- 8.19 GMTV confirmed that the breaches were undetected until their exposure by *Panorama*, but that some weeks before *Panorama* was transmitted, it had asked Deloitte to review Opera's procedures following the recent *Richard and Judy* exposé. In the week before *Panorama* went to air, Deloitte reported back to GMTV that Opera's system of finalist selection was compliant. This was because Deloitte was asked by GMTV only to review procedures as they stood at that moment. The procedures were compliant at that time. Deloitte had not been required to audit the conduct of Opera and its practices and procedures over the preceding years.
- 8.20 GMTV continued that over the last five years, there had been a huge expansion in the use of PRS across all channels and that PRS income made up some of the shortfall in advertising revenue during a prolonged advertising downturn. Referring to the telecoms industry as a complex area, GMTV said that like other broadcasters, it employed specialist service providers for the technical telecoms aggregation necessary to service its competitions, in the same way that the industry employed web-hosting companies to host websites and red button companies to service red button interactivity.
- 8.21 GMTV said that its staff had daily contact with Opera and it had reassured them that everything was compliant. Its senior management had regular meetings with Opera's senior management and at no point was it alerted to any problems, even though the contract specifically asked Opera to do so.
- 8.22 The Committee queried the structure of GMTV's competitions department and how staff who were trained in compliance did not apply the same compliance mentality to the telecoms issues relating to its competitions. GMTV said that its competitions team was small and housed in a separate building to the rest of GMTV's operations. The Head of Legal and Business Affairs, who reported directly to GMTV's Managing Director, had not referred problems he had uncovered with competitions upwards, nor conducted any investigations.
- 8.23 GMTV estimated that for the period in question, the revenue and profit derived from competitions accounted for approximately 15-20 per cent of its revenue and between 35-40 per cent of its gross profits. GMTV explained that its Finance Director had represented competitions and telecoms issues at Board level, but accepted that the competitions department's structure and external location was not satisfactory given that it was a substantial source of GMTV's gross profits.
- 8.24 GMTV confirmed to Ofcom that its relationship with Opera had not been addressed on a regular basis at Board meetings. Such discussions would generally have taken place around the time of the commissioning and tender process relating to a PRS operator.
- 8.25 GMTV said that throughout the period of investigation, all winners were selected by GMTV staff in the studio or competition offices from the shortlist

supplied by Opera. Each winner selection was witnessed and signed off by two GMTV staff members. In hindsight, GMTV accepted that this had not been enough. Certain employees at Opera, including its account manager for GMTV, had been selecting names early to make their jobs easier, and then sending them later in the day to GMTV, as though they had complied with the relevant regulations. No-one benefited financially and even the senior management at Opera was not aware that this was going on. GMTV remained ignorant of these practices until the broadcast of *Panorama*. It was now apparent that Opera's employees had not been as committed to compliance as GMTV had been. It was equally apparent that many of these companies had margins so thin that corners were cut.

- 8.26 GMTV stated that the television industry had always put compliance at the top of its priorities. In the search for new sources of revenue, it had been unwittingly drawn into working with a specialist industry in which compliance was apparently lower down the priority list. It said that it had simply not occurred to broadcasters that what appeared to be relatively simple rules were not being adhered to by the regulated companies running their telephony systems.
- 8.27 GMTV stated that it welcomed Ofcom's proposed introduction of a new licence condition regarding the broadcaster's role as the primary point of accountability and compliance for PRS. In determining whether it was guilty of negligence or gross negligence, it asked Ofcom to take account of the conditions at the time. It would not argue with a finding that its breaches should be described as negligent. However, it vehemently objected to the characterisation of its conduct as gross negligence. It said this was unfair and unrealistic and was based on "20/20" hindsight vision.
- 8.28 GMTV had announced a new compliance code at the time it had launched its remedies. This included: appointing a compliance officer with specific responsibility for competitions, GMTV employees selecting all competition finalists and winners in its offices and regular inspections of service providers.
- 8.29 It said it had already been punished by the huge weight of press condemnation attached to this case. Unlike some others, it said it had already and very publicly taken real responsibility for its errors. It considered that a very high level of fine would be a serious disincentive to other broadcasters to fund the kind of comprehensive remedies it had instituted. GMTV considered that it should be given substantial credit for all that it had done and that its staff had endured since April 2007 and that a fine of no more than £500,000 seemed to it to be reasonable, appropriate and proportionate.

## **Sanctions Decision**

- 9.1 In reaching its decision, the Committee considered carefully all the written and oral submissions provided by GMTV. The Committee decided, for the reasons set out below, to impose a financial penalty on GMTV and issue a direction requiring GMTV 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 Guidelines<sup>4</sup>.

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<sup>4</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.

## **The seriousness of the breaches**

- 9.2 Having considered all the evidence and GMTV's representations, the Committee found that the breaches in this case were extremely serious for the following reasons.
- 9.3 The breaches involved longstanding and systematic failures in the conduct of GMTV's broadcast competitions 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 More specifically the Committee was concerned by the scale of the harm caused by the breaches, their duration and the repeated nature of the breaches.
- 9.5 The breaches resulted in significant consumer harm involving a very substantial audience, as evidenced by the sizeable revenue made by the Licensee from PRS competitions while the unfair conduct was occurring between August 2003 and February 2007 (£63.6 million). This was also demonstrated by the very substantial number of viewers who made calls because they believed they could still enter competitions even though finalists had already been selected, and the un-quantifiable number of viewers who were disadvantaged as a result of the '15/5 method'.
- 9.6 The Committee was concerned to note that the duration of the unfair conduct - the affected competitions being broadcast on a daily (weekday) basis between 2003 and 2007 - illustrated that the breaches were regularly repeated over an extensive period of time.
- 9.7 The Committee was particularly concerned by the Licensee's admission that, despite the considerable financial importance of these competitions to GMTV (representing as they did 35-40 per cent of its annual profit), there was no audit of Opera's processes and procedures by GMTV's management or its Board, and there also appeared to have been no assessment of any risks associated with the conduct of these competitions at any point during the extensive period of time in which the competitions took place. Rather, the evidence was that GMTV had focussed heavily on the contribution that the PRS competitions made to its revenues and profitability, whilst paying comparatively little attention to its compliance responsibilities.
- 9.8 Over a period of nearly four years, GMTV had made profits running into millions of pounds from its competitions, but despite the importance of this revenue to its profitability, it had no adequate oversight of this operation. This resulted in a substantial number of viewers being seriously misled into paying to enter competitions which they did not have a fair and equal chance of winning. This, in the Committee's view, was such a serious and fundamental failing as to represent evidence of gross negligence on the part of GMTV.
- 9.9 The Committee noted that GMTV did not seek to argue that it was not ultimately liable. GMTV stated that it had been "grossly naive" and "negligent" in placing its trust in a third party without having any procedures in place to ensure that the conduct of competitions (which were a central part of its programming) was compliant with the relevant Codes.

9.10 The Committee believed that in this case the conduct of its competitions and the management of Opera were plainly within the control of GMTV and noted that GMTV had accepted full responsibility for the unfair conduct. Further, the Committee considered that whilst it was the case that GMTV had relied on a separately regulated service provider, GMTV's trust in Opera was evidently misplaced and misjudged in this case given the number and seriousness of the breaches by Opera of the Icstis Code between 2003 and 2006. The Committee was strongly of the view that GMTV's handling of its relationship with Opera was both irresponsible and negligent. It did not take adequate account of the possibility that Opera, as a third party, might fail to act in an appropriate manner when taking such substantial sums of money from GMTV's audience.

9.11 It was the view of the Committee that due to the severity, magnitude, and scale and repeated nature of the breaches and the resulting substantial harm caused to significant numbers of participants and to GMTV's audience overall, this was the most serious case of this type that Ofcom has had to consider to date 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 decisions and the specific representations GMTV 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, but reflected the particular scale, severity and repeated nature of the breaches in the circumstances of this particular case.

### **Incentive**

9.13 Whilst the Committee took into account in setting the level of penalty, the fact that GMTV had taken extensive steps to rectify the breaches and improve its compliance procedures, it also noted 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.

### **Other factors**

9.14 GMTV made representations that in setting the level of any financial penalty, the Committee should take account of the fact that Opera might be subject to a financial penalty imposed by Icstis. It did this by reference to the statement in Ofcom's Penalty Guidelines that it may be relevant when setting a penalty, to adjust the figure if a penalty in respect of the same conduct had been imposed by Ofcom or another body. The Committee did not accept that it should take into account any potential penalty that might be imposed on Opera by Icstis. In the Committee's view, it would only be relevant to take account of a penalty already imposed by Ofcom or another body, if that penalty had been imposed on GMTV for the same conduct.

9.15 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**

- 9.16 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.
- 9.17 Though there were regular meetings between GMTV and Opera, these appeared to focus almost exclusively on the financial aspects of their relationship and opportunities for increasing revenue from competitions. At no point did GMTV appear to have raised the issue of compliance with the relevant Codes. This appeared to the Committee to highlight that GMTV failed to have any regard for proper compliance with the relevant Codes when conducting its competitions.
- 9.18 The Committee believed that GMTV's inadequate checks on Opera meant that it was negligent in failing to make itself aware of Opera's record of non-compliance with the Icstis Code. Moreover, GMTV remained unaware of this until March 2006 when the BBC's *Watchdog* programme highlighted the concerns of consumers regarding text messaging services managed by Opera. In the Committee's view, this omission was substantially compounded by GMTV's failure to review Opera's management of GMTV's competitions at any point over such a lengthy period of time, resulting in its failure to detect the repeated breaches over nearly four years. Even when GMTV was made aware of Opera's record of failing to comply with the Icstis Code, it relied solely on Opera's own explanation for the many breaches. The Committee did not consider that GMTV's conduct in this respect could be described as anything but grossly negligent.
- 9.19 Further, the Committee noted that, in relation to the '15/5 method', GMTV had admitted that its staff were complicit in the use of this unfair practice - albeit failing to understand its implications. This was part of a formalised and systematic procedure and GMTV's failure to understand the inherent unfairness of the use of this system was negligent. The Committee was particularly concerned that even when the Head of Legal and Business Affairs became aware that this unfair practice had been in place for some time, no efforts were made to refer the issue more widely and importantly no more senior members of the management team were made aware. This failure demonstrated gross negligence on the part of GMTV.
- 9.20 Similarly, in the Committee's view, the fact that as part of the operation of the 'final five' practice, finalists' names were routinely being sent to GMTV before lines closed and its staff were apparently not aware of this and/or failed to realise the implications of this practice raised significant concerns about GMTV's oversight or understanding of the operation of its own competitions.

## **Mitigating Factors**

- 9.21 The Committee then considered whether there were any factors which in its view might limit or decrease the appropriate level of the financial penalty.
- 9.22 The Committee noted that GMTV did not intend for its competitions to be conducted in a way that was not compliant with the relevant Codes.
- 9.23 The Committee noted that GMTV had co-operated willingly and fully with Ofcom's investigation of the case from the very beginning of the process;

admitting all the breaches and volunteering information relevant to the investigation.

9.24 The Committee considered that the steps GMTV had taken to remedy the consequences of the breaches in this case were extensive. These included:

- the decision by its Managing Director, Paul Corley, to take full responsibility for GMTV's failures and therefore to resign from his post, along with the Head of Competitions, Kate Fleming;
- offering refunds on a potential 25 million entries, a number which it believed was "*certainly far higher than the number of people who would have actually been disenfranchised*";
- setting up a Freephone number for viewers to request a claim form, which could also be downloaded from its website. Those claiming a refund would have to provide proof of ownership of their telephone number;
- promoting the refunds every day on GMTV for a five-week period and taking out advertising for the refunds in national and regional newspapers;
- holding 250 new free prize draws, each with a £10,000 prize, for all entrants on the refund database, at a total cost of £2.5 million; and
- making a £250,000 donation to the children's charity ChildLine, to take account of the data it had not been able to retrieve.

9.25 In addition to the reparations and remedies, GMTV had introduced improved internal codes of conduct and compliance for any future premium rate activities. These included:

- the decision not to hold premium rate prize competitions featuring a same day reveal;
- insistence on all finalists being selected by GMTV staff on its own premises, rather than by any service provider;
- the appointment of a dedicated compliance officer with specific responsibility for compliance on premium rate services; and
- regular compliance inspections of any nominated service providers.

9.26 The Committee wished to make clear that the financial penalty would have been higher had GMTV not put in place such an extensive programme of reparations and remedies, as set out above.

## **Conclusion**

9.27 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).

9.28 The Committee accepted that GMTV had no intention to mislead its audience for the sole purpose of financial gain. However, the Committee nonetheless 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 whom 'purchased' the right to enter GMTV's competitions. This case involved the widespread and systematic deception of all those

viewers who paid to enter in the belief that they had a fair chance of winning when in fact their chances of winning were diminished or non-existent.

9.29 Despite the fundamental role that competitions played in GMTV's programming and the clear significance of the resulting revenue to its profitability, the Licensee's disregard for the need to operate any reasonable compliance procedure, verification, oversight or management of the arrangements for the conduct of these competitions over such a long period of time could not, in the Committee's view, be described as anything other than gross negligence as to GMTV's compliance with the relevant Codes. However, as set out above, the extensive steps taken by GMTV to rectify the breaches were taken into account in the Committee's decision.

9.30 Having considered the relevant facts as outlined above and all the representations made by GMTV, the Committee decided to impose a financial penalty on GMTV of **£2,000,000** (payable to HM Paymaster General) which it considered to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed GMTV to broadcast a statement of its findings on its service in a form determined by Ofcom on three specified occasions.

#### **Content Sanctions Committee**

Philip Graf

Millie Banerjee

Philip Rutnam

Joyce Taylor

Kath Worrall

26 September 2007