

Ofcom Content Sanctions Committee

Consideration of sanction against:

Venus TV Ltd (“the Licensee”) in respect of its service Venus TV (“Venus TV” or “the Channel”) TLCS 535;

For:

Breaches of the Broadcast Committee of Advertising Practice (“BCAP”) Television Advertising Standards Code (“the TV Advertising Code”) concerning the following advertisements:

- Golden Bull Kastoori Capsules,
- Jorge Hane Weight Loss,
- Pandith astrology,
- Pundit Maharaj astrology, and
- Roopamrit;

in light of Condition 8 (4) of the Channel’s licence which requires the Licensee to ensure that Venus TV complies with the TV Advertising Code;

On:

Various dates from November 2006 to August 2007;

Decision:

To impose a financial penalty (payable to HM Paymaster General) of **£35,000**; and, in addition, to require Venus TV Ltd to broadcast a **statement of Ofcom’s findings** on its service Venus TV in a form to be determined by Ofcom on two specified occasions.

1. Summary

- 1.1. For the reasons set out in full in the Sanctions Decision, under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee ("the Committee"), the Committee has decided to impose a statutory sanction on Venus TV Limited. This is in light of the serious and repeated nature of the Licensee's failure to ensure compliance with the TV Advertising Code as required by the Channel's Ofcom licence.
- 1.2. Venus TV is operated by Venus TV Limited. The channel is broadcast on Sky channel 807. It broadcasts general entertainment programmes and is primarily aimed at Asian communities.
- 1.3. On 23 October 2007, the Director General of the Advertising Standards Authority ("ASA") wrote to Ofcom with details of a number of breaches of the TV Advertising Code it had recorded against Venus TV over the period April to October 2007¹.
- 1.4. These included published ASA adjudications concerning the following advertisements on Venus TV:
 - Golden Bull Kastoori Capsules (a herbal remedy), published in April 2007;
 - Jorge Hane Weight Loss, published in May 2007;
 - Pandith astrology, published in October 2007;
 - Pundit Maharaj astrology, published in October 2007; and
 - Roopamrit (a face cream), published in October 2007.
- 1.5. Due to the serious and repeated nature of the breaches, the ASA asked Ofcom on 23 October 2007 to consider taking action against Venus TV under the Communications Act 2003, in line with the procedures stipulated in the Memorandum of Understanding ("MOU") between Ofcom and the ASA. In view of the serious and repeated nature of the breaches of the TV Advertising Code, Ofcom decided the case should be referred to the Committee for consideration of a statutory sanction.
- 1.6. The Committee agreed to consider the case and met on 17 November 2008. Representatives of the Licensee attended the hearing to make oral representations. After considering all the evidence and the Licensee's representations, both oral and written, the Committee decided that the breaches of the TV Advertising Code by Venus TV Ltd were both sufficiently serious and repeated to attract a financial penalty.
- 1.7. Ofcom stresses that all broadcasters who are licensed by Ofcom – however small or specialised their audience, or whichever languages they broadcast in – must ensure they comply fully with the TV Advertising Code and the Broadcasting Code. They must have robust compliance arrangements in

¹ Under the co-regulatory arrangements agreed between Ofcom and the ASA in 2004, Ofcom formally contracted out to the ASA many of its functions concerning the regulation of broadcast advertising

place, backed up by sufficient trained staff. It is wholly unacceptable for any broadcaster to rely for example on inexperienced staff or what is broadcast on other channels as a means of complying its own content. If any similar sanctions cases are referred to the Committee in future, it will consider them very seriously.

- 1.8. In light of the serious and repeated nature of the breaches, and having regard to the Licensee's representations and Ofcom's Penalty Guidelines, the Committee decided it was appropriate and proportionate in the circumstances to impose a financial penalty on Venus TV Limited of **£35,000** (payable to HM Paymaster General); and in addition to require **Venus TV Ltd to broadcast a statement of Ofcom's findings on its service Venus TV** in a form to be determined on two specified occasions.

2. Background

- 2.1. Venus TV is a free-to-air TV channel operated by Venus TV Limited. The channel is broadcast on Sky channel 807. It is licensed by Ofcom as TLCS 535. According to its licence application, the nature of programming includes general entertainment for the Asian community, Bollywood films and music, soaps and dramas in Hindi and Urdu, and local in-house productions. The service is transmitted in English, Urdu, Hindi, Punjabi, Gujarati and Bengali. Advertising takes the form of spot advertising and teleshopping spots and windows.
- 2.2. The regulation of broadcast advertising standards is a function of Ofcom that has been contracted out to the ASA under the Deregulation and Contracting Out Act 1994. In accordance with this contracting out arrangement, the ASA referred Venus TV to Ofcom for consideration of a statutory sanction because the Licensee had repeatedly and seriously breached the TV Advertising Code.

3. Legal Framework

The Communications Act 2003

- 3.1. Ofcom has a duty under section 319 of the Communications Act 2003 ("the Act") to set standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives. The standards objectives are set out in section 319(2) of the Act. By virtue of section 319(2)(h), one objective is "that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented".

Observance of the TV Advertising Code

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

- 3.3. On contravention of a licence condition, Sections 236-8 of the Act provide Ofcom with the power to impose the following sanctions against a broadcaster:
- issue a direction not to repeat a programme;
 - issue a directions to broadcast a correction or statement of Ofcom's finding;
 - impose a financial penalty (5% of qualifying revenue or up to £250,000 whichever is greater); and/or
 - revoke the licence.

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

- 3.4. This states that the Licensee shall ensure that the provisions of the Ofcom Broadcasting Code and the TV Advertising Code set to secure the objectives in Section 319(2)(a) and (g) to (j) of the Act and relating to standards and practice in advertising and sponsorship of programmes and any prohibitions of advertisements and forms and methods of advertising or sponsorship of programmes are observed in the provision of the Licensed Service.

Remedial action and penalties

- 3.5. Section 237 of the Act provides that the holder of a television licensable content service licence (a "TLCS Licence") found by Ofcom to have contravened a condition of its licence may be required by Ofcom to pay a specified financial penalty. The maximum for such a penalty is the greater of £250,000 and 5% of the Licensee's qualifying revenue.
- 3.6. Section 238 of the Act provides Ofcom with the power to revoke a TLCS Licence.

Legal context of the Memorandum Of Understanding ("MOU")

- 3.7. The legal foundation for the co-regulatory system envisioned by the MOU is the Deregulation and Contracting Out Act 1994 ("DCOA"). Where a Minister or other public authority (like Ofcom) has been given specific functions or duties by legislation, DCOA allows the Minister or public authority to delegate or 'contract out' those functions to another person or organisation. Ofcom has been given the power to contract out its functions under DCOA by Section 1(7) of the Act.
- 3.8. Ofcom's duties and functions in the area of broadcast advertising regulation derive in the main from Sections 319 to 328 of the Act. Under DCOA and various related statutory instruments, Ofcom has contracted out some of its functions, including its functions relating to:
- the setting, reviewing and revising of the codes for broadcast advertising to the Broadcast Committee of Advertising Practice ("BCAP") (from section 319(1)); and
 - the handling and resolving of complaints about the observance of broadcast advertising standards codes to the Advertising Standards Authority (Broadcast) ("ASAB") (from section 325(2)).

Functions to be delegated

- 3.9. Under DCOA, various related statutory instruments, the MOU and other documents, Ofcom agreed that the following broadcast advertising regulation functions should, subject to the appropriate constraints identified in the relevant documents, henceforth be carried out by the ASAB and BCAP:
- (a) Handling and resolution of complaints about advertising content on radio and television;
 - (b) TV Advertising Code setting, monitoring and enforcement;
 - (c) Teleshopping and other non-spot advertising content;...

Further action, including referral to Ofcom

- 3.10. Under the MOU, if, in the opinion of the Director General of ASA(B), a broadcaster:

- fails to comply fully and promptly with a decision of ASA(B),
- fails to co-operate fully and promptly with a reasonable request of BCAP, demonstrates a repeated disregard for decisions of ASA(B) or the reasonable requests of BCAP, or
- commits one or more code breaches of sufficient seriousness to warrant in ASA(B)'s opinion a statutory sanction

the Director General of ASA(B) shall, after ASA(B) has reached any relevant decision(s), refer the matter, together with copies of all relevant evidence and submissions, to Ofcom for Ofcom to consider further action. Ofcom undertakes to consider any such referrals promptly and to impose any such proportionate sanctions as it deems appropriate in the circumstances in support of ASA(B), taking into account any representations from the broadcaster(s) concerned.

4. ASA's investigations and decisions that Venus TV breached the TV Advertising Code

Summary of cases referred to Ofcom by the ASA for consideration of a sanction

Golden Bull Kastoori Capsules (ASA adjudication published 11 April 2007²)

- 4.1. The ASA published an adjudication against Venus TV, relating to an advertisement for Golden Bull Kastoori Capsules. The advertisement described the product as a natural remedy that may help "if you are worried about yourself and your family's health, or feeling depressed and weak because you don't have children".
- 4.2. The advertisement, transmitted on 7 November 2006 and at other times, was found in breach of the following TV Advertising Code rules:
- Rule 5.1 (no advertisement may mislead);

² http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_42437.htm

- Rule 8.2.6 (no advertisement may give the impression that a medical consultation or surgical operation is not necessary for conditions for which qualified medical advice should be sought);
- Rule 8.2.9 (words, phrases or illustrations that claim or imply the cure of any ailment, illness, disease or addiction are unacceptable);
- Rule 8.3.1 (health claims must be supported by sound scientific evidence and advertising must not give a misleading impression of the health benefits); and
- Rule 8.3.5 (advertisements must not suggest that it is necessary or therapeutic for the average person to augment their diet or that dietary supplements can enhance normal good physical or mental condition).

4.3. The ASA also said that the advertisement must not be broadcast again in its current form.

Jorge Hane Weight Loss Programme (ASA adjudication published 30 May 2007³)

4.4. In April 2007, the ASA wrote to Venus TV regarding an advertisement it had aired for the Jorge Hane Weight Loss Programme. According to the advertisement, taking a capsule half an hour before each meal resulted in weight loss, whatever type of food was eaten. The ASA asked Venus TV for information on how the advertisement complied with the TV Advertising Code and to substantiate the claims made.

4.5. Although in response Venus TV submitted some documentary evidence, the ASA judged that the Licensee had not supported the claims made in the advertisement and published an adjudication on 30 May 2007. The advertisement was found in breach of the following TV Advertising Code rules:

- Rule 5.1 (no advertisement may mislead);
- Rule 5.2.1 (licensees must obtain adequate objective evidence to support all claims);
- Rule 8.1.2 (a) (the following are not acceptable in advertisements for products or treatments: (a) presentations of doctors and surgeons, which give the impression of professional advice or recommendations; (b) statements giving the impression of professional advice or recommendation by people who are presented, whether directly or by implication, as being qualified to give such advice or recommendation; (c) references to approval, recommendation of, or preference for, any relevant product or its ingredients or their use by the professions referred to in (a) above).
- Rule 8.4.2 (licensees must obtain suitably qualified independent medical advice on the safety and efficacy of products or services);
- Rule 8.4.3 (advertisements must not promise or predict specific weight loss. Advertisements which refer to specific amounts of weight that have been lost by individuals must also state the period over which that loss was achieved); and
- Rule 8.4.5 (advertisements for products and services must not be directed at the obese or use testimonials or case histories referring to subjects who

³ http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_42609.htm

were or appeared to be obese before using the product or service advertised).

- 4.6. The ASA said that the advertisement must not be broadcast again in its present form and the product should not be advertised without adequate substantiation for the claims made for it.

Pandith astrology (ASA adjudication published 3 October 2007⁴)

- 4.7. The ASA wrote to Venus TV in August 2007 on the subject of both the Pandith astrology advertisements and the Pundit Maharaj advertisements (see below). The Pandith astrology advertisement was for a “world famous astrologer”. It asked Venus TV to explain how the Pandith astrology advertisement complied with the TV Advertising Code, and also asked for evidence that, as claimed, the Pandith provided 99% accurate results. Venus TV replied that the Pandith astrology advertisement had been removed and had been aired due to a “mix up”.
- 4.8. The ASA published an adjudication on Pandith astrology advertisement on 3 October 2007. The ASA found that the advertisement, transmitted on 8 August 2007 and at other times, breached the following TV Advertising Code rules:
- Rule 3.1 (i) (advertisements for products or services coming within the recognised character of, or specifically concerned with the occult are not acceptable);
 - Rule 3.1 (j) (advertisements for products or services coming within the recognised character of, or specifically concerned with commercial services offering individual advice on personal or consumer problems are not acceptable);
 - Rule 5.1 (no advertisement may mislead);
 - Rule 5.2.1 (licensees must obtain adequate objective evidence to support all claims); and
 - Rule 10.3 (with very limited exceptions, advertisements for products or services concerned with the occult or psychic practices are not acceptable).
- 4.9. The ASA said that the advertisement must not be shown again.

Pundit Maharaj (ASA adjudication published 3 October 2007⁵)

- 4.10. The ASA wrote to Venus TV in August 2007 also on the subject of the Pundit Maharaj astrology advertisements. The Pundit Maharaj advertisement featured a “graphic of a palm and a circling wheel of zodiac signs.” The ASA asked Venus TV to explain how the Pundit Maharaj advertisement complied with the TV Advertising Code.
- 4.11. In response Venus TV said the advertisement had been removed. Venus TV also said that it had requested a Broadcast Advertising Clearance Centre (“BACC”)⁶ clearance certificate from the advertiser for the Pundit Maharaj

⁴ http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_43284.htm

⁵ http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_43283.htm

⁶ Now known as Clearcast

advertisement and that the advertiser had told Venus TV that the advertisement had been approved by the BACC.

- 4.12. The ASA published an adjudication on the Pundit Maharaj advertisement on 3 October 2007. The ASA found that the advertisement breached Rule 3.2 of the TV Advertising Code (no advertisement may indirectly publicise an unacceptable product or service).
- 4.13. The ASA said that the advertisement must not be shown again.

Roopamrit (ASA adjudication published 31 October 2007⁷)

- 4.14. Venus TV also broadcast an advertisement for Roopamrit. This product is a face cream that, according to the advertisement, removes dark complexions, detoxifies skin, destroys acne and pimples, removes dark circles and reduces wrinkles.
- 4.15. The background to this adjudication was that the ASA had recommended in April 2007 that Venus TV keep up to date with ASA adjudications. In July 2007, the ASA found that another broadcaster had breached the TV Advertising Code by showing this advertisement. Despite and after this published adjudication, the Roopamrit advertisement was broadcast by Venus TV. In August 2007, ASA therefore requested substantiations for the claims made in the advertisement. In response, Venus TV said that: the advertisement had been removed; and it had relied on assurances from the advertiser. The ASA replied that: Venus TV should check evidence concerning advertisements before broadcast and broadcasters should not rely on an advertiser's assurance.
- 4.16. The ASA published an adjudication relating to Roopamrit on 31 October 2007. The ASA found that the advertisement breached the following TV Advertising Code rules:
 - Rule 5.1 (no advertisement may mislead);
 - Rule 5.2.1 (licensees must obtain adequate objective evidence to support all claims);
 - Rule 5.2.2 (descriptions, claims and illustrations must not imply attributes, capabilities or performance beyond those that can be achieved in normal use);
 - Rule 5.4.4 (testimonials or endorsements used in advertising must be genuine and be supported by documentary evidence. Fictitious testimonials must not be presented as genuine);
 - Rule 8.1.2 (a) (the following are not acceptable in advertisements for products or treatments: (a) presentations of doctors, which give the impression of professional advice or recommendations; (b) statements giving the impression of professional advice or recommendation by people who are presented, whether directly or by implication, as being qualified to give such advice or recommendation; (c) references to approval, recommendation of, or preference for, any relevant product or its ingredients or their use by the professions referred to in (a) above); and

⁷ http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_43444.htm

- Rule 8.2.3 (no medicinal claims may be made for products that do not hold a marketing authorisation under the Medicines Act 1968).
- 4.17. The ASA also said that the advertisement must not be shown again in its present form and the product should not be advertised without adequate substantiation for the claims made for it. It also stated that the ASA was concerned by Venus TV's poor compliance record and continued breaches, and that it had referred Venus TV to Ofcom for consideration of a statutory sanction.

Compliance background to the breaches of the TV Advertising Code referred to the Committee

- 4.18. In addition to the published ASA adjudications above, various other TV Advertising Code issues arose with Venus TV between April and September 2007. These concerned three advertisements shown by Venus TV. None of these issues were adjudicated on by the ASA nor upheld as contraventions of the TV Advertising Code. Nonetheless they were of concern to the ASA, and taken into account by the ASA as part of the Licensee's overall compliance record, in deciding to refer this case to Ofcom.

Referral to Ofcom

- 4.19. In October 2007, the Director General of the ASA wrote to the Director of Standards at Ofcom about Venus TV. The ASA said that it was concerned by the breaches of the TV Advertising Code that had occurred on Venus TV and asked Ofcom to consider taking action against Venus TV under the Communications Act 2003, in line with the procedures stipulated in the MOU.

5. Referral to Content Sanctions Committee

- 5.1. Ofcom considered that, taking all the circumstances into account, the numerous breaches by the Licensee of the TV Advertising Code were sufficiently serious, and also repeated, to warrant consideration of the imposition of a statutory sanction. This was for the following reasons.

Seriousness

- 5.2. The breaches by Venus TV were serious because they raised significant issues of consumer protection. These issues were particularly serious in this case because they concerned the health and wellbeing of viewers. For example some advertisements promoted products which claimed to offer remedies for various medical conditions but no evidence was presented to support the claims made. In some cases the appearance of doctors in the "infomercials" gave the impression of professional medical support for the remedies promoted.

Repeated

- 5.3. The Licensee breached the TV Advertising Code on five separate occasions between April and October 2007.

Compliance Background

5.4. Ofcom also took account of the compliance background described above at paragraph 4.18.

Venus TV written representations on the recommendation to refer the breaches to the Content Sanctions Committee

5.5. The Licensee made a series of written representations to Ofcom on the proposed decision to refer the breaches to the Committee. In summary, the Licensee argued that the case did not warrant a sanction because:

- it had never intended deliberately or recklessly to breach the terms of its licence conditions and that the repeated compliance failures were the result of inaccurate advice received from two different compliance staff employed during the period when the breaches took place;
- it had now secured the services of an experienced compliance officer who had proposed a series of workshops and relevant training for staff to ensure awareness of the relevant Codes;
- it had employed, as its compliance manager between March 2006 and February 2007, an individual “who continually reassured the Venus TV executive that the services he oversaw were fully compliant...”. The Licensee also suggested that the channel had been “deliberately lied to, probably for commercial gains” by that former compliance manager; and
- there had been compliance issues in the past through Venus TV broadcasting in four different languages which had been corrected through all instructions and directions now being in English.

Decision to refer to the Committee

5.6. Having taken account of all the representations made by Venus TV, Ofcom concluded that the breaches of the TV Advertising Code were repeated and sufficiently serious to refer the case to the Committee for the consideration of a statutory sanction. The Committee, having reviewed Ofcom’s decision to refer the breaches, accepted that the case was sufficiently serious that it should be considered for sanction. Accordingly, Venus TV was invited to attend an oral hearing before the Committee.

6. Sanctions Hearing

6.1. The Committee held a hearing on 17 November 2008. At this meeting Venus TV Ltd was given the opportunity to make oral representations to the Committee before the Committee decided whether the breaches warranted the imposition of a statutory sanction, and if so, at what level. Before the meeting, the Licensee sent to the Committee on 14 November 2008 a final set of submissions in writing. The oral submissions of Venus TV Ltd were based on, and supplemented, this document.

6.2. At the hearing Venus TV Ltd was represented by Tahir Ali (Chairman and CEO Venus TV Ltd), Rukhsana Ali (Company Secretary of the Licensee), Robert Tyler (Compliance Advisor) and Alex Cassel (Barrister).

- 6.3. In oral submissions the Licensee said that an individual had performed the Licensee's compliance function from the time the Channel started up until spring 2007. The Golden Bull, Jorge Hane, Vibra Tone and Roopamrit commercials had been cleared by this person. After this individual had left the company there had been, the Licensee conceded, a gap in the compliance process. During this period, the Licensee had accepted the Pandith Maharaj commercial on the basis that a different channel had considered it acceptable. The Licensee agreed that this method of compliance was not acceptable.
- 6.4. The Licensee admitted all the breaches of the TV Advertising Code. Further, the Licensee recognised that multiple breaches of the Code reflected an "historic systemic failure" of its compliance procedures and systems. The Licensee however denied acting recklessly, saying that compliance advice was being urgently sought at the time of the ASA's referral.
- 6.5. Venus TV Ltd accepted in oral submissions that the breaches were serious and repeated, despite adverse ASA adjudications and previous warnings. The Licensee accepted that both the imposition of a financial penalty and a Direction that the Licensee broadcast a statement of Ofcom's findings were inevitable.
- 6.6. However, in accepting these matters, the Licensee pointed to the financial penalties applied in two previous sanctions cases (concerning *ARY Digital* and *DM Digital* in which fines of £15,000 were imposed in each case). Venus TV Ltd said these lower fines were imposed in spite of the fact that the material in those two cases dealt with more serious medical conditions, such as cancer, leprosy and hepatitis, than those referred to in any of the advertising transmitted by the Licensee. Further, referring to the *ARY Digital* case, the Licensee said that the use of programming (as opposed to advertising) to make these claims also appeared to give editorial endorsement to the treatments featured. Concerning *DM Digital*, the Licensee pointed to the Committee's noting in that case that claims to cure cancer must belong in a special category, there being criminal penalties for advertisements claiming to offer cancer cures.
- 6.7. The Licensee submitted that these cases, and the fact that one broadcaster had been reported as having breached other Broadcasting Code rules in the past and the other referred to as having a poor compliance history, should be regarded as more serious than the breaches recorded against Venus TV Ltd. In response to questioning by the Committee (see further paragraph 6.10 below), the Licensee suggested that the two astrology adverts in relation to which breaches against Venus TV had been recorded by the ASA should be recognised as belonging to a different, and less serious, category to the three breaches relating to health claims.
- 6.8. In respect of deterrence, the Licensee said that a financial penalty was not necessary to achieve this purpose because it was already implementing rigorous compliance procedures and this was not a suitable case for 'setting an example'. In addition it submitted that the training and other measures already undertaken tended to decrease the level of penalty.
- 6.9. The Licensee submitted that if the Committee was minded to impose a penalty, anything more than £15,000 would be disproportionate. The

Licensee said that a more significant financial penalty could threaten the future of the channel.

- 6.10. In response to questions from the Committee, the Licensee confirmed that its compliance arrangements had been inadequate and that its staff found themselves on a steep learning curve. In particular, the Licensee accepted that for a period around the beginning of April 2007 there had been a lacuna in compliance arrangements but submitted that after that period, the only breach that occurred involving health claims related to the Roopamrit Face Cream advert, which it said was probably the least serious of all the health adverts. The Licensee said that the subsequent breaches resulting from the astrology adverts should probably belong to a different category as regards seriousness.
- 6.11. In considering the level of a potential sanction, the Committee sought comments from the Licensee about sets of financial accounts that had been tabled. The Licensee confirmed that a substantial cost incurred in 2007/8 for purchasing play-out software would not be payable again for some time and that Venus TV's financial position was expected to improve.

7. Decision by the Committee

- 7.1. In reaching its decision, the Committee considered carefully all the written and oral submissions made Venus TV Ltd. The Committee decided, for the reasons set out below, to impose a financial penalty of £35,000; and in addition, to require Venus TV Ltd to broadcast a statement of Ofcom's findings on its service Venus TV in a form to be determined by Ofcom on two specified occasions.
- 7.2. In deciding on the level of financial penalty the Committee had regard to Ofcom's Penalty Guidelines⁸.

The seriousness of the breaches

- 7.3. Having viewed this material, and taken account of all the evidence and the representations of the Licensee, the Committee considered that the breaches of the TV Advertising Code were particularly serious. This was for the following reasons.
- 7.4. First, the case involved significant consumer protection issues, particularly in relation to the advertisements relating to the health of viewers – that is the three infomercials purporting to offer remedies to various medical conditions which were not supported by sufficient evidence. The infomercial for Golden Bull Kashtoori Capsules claimed to help viewers with conditions such as impotency, infertility and depression, the Jorge Hane Weight Loss Programme advertisement claimed to offer a permanent and natural weight loss product and Roopamrit claimed to lighten skin and offer an effective

⁸ 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.

remedy for acne and pimples. The failure to supply sufficient evidence meant the claims materially misled consumers.

- 7.5. In addition the Committee was concerned that these kinds of infomercial would resonate with viewers who were experiencing any of the medical conditions to which they related and so would be vulnerable to the claims being made. In the Committee's view there was a material risk that broadcasting such unsubstantiated claims could lead viewers to buy the products without consulting a suitably qualified medical practitioner – so causing a delay in treatment or a failure to seek out treatment at all.
- 7.6. Further, the appearance of doctors in the Jorge Hane Weight Loss Programme and the Roopamrit infomercial gave viewers the impression of professional medical support and recommendation for the remedies thereby further misleading viewers of the veracity of the claims made about these products.
- 7.7. Second, the breaches were serious because they demonstrated systemic and repeated failure by the broadcaster to ensure compliance. The ASA adjudications recorded breaches by several of the infomercials against the same TV Advertising Code rules, in particular Rule 5.1 (no advertisement may mislead); Rule 5.2.1 (licensees must obtain adequate objective evidence to support all claims); and Rule 8.1.2 (presentations of doctors, which give the impression of professional advice or recommendations are not acceptable in advertisements for products or treatments). There was clear evidence that management of the Licensee before, and at the time of, these breaches did not sufficiently appreciate the crucial importance of having robust compliance procedures in place and ensuring these are implemented at all times by sufficient, properly trained and qualified staff. In this regard, the Committee rejected the view that the astrology adverts belong to a different category. They may have concerned breaches of different rules but should be treated no differently in terms the failure of management responsibility for compliance that they indicated.
- 7.8. The seriousness of the contraventions of the TV Advertising Code was increased, in the opinion of the Committee, to some extent by the length of a number of the advertisements. Some were not brief "spot" advertisements but longer teleshopping items which lasted for several minutes. In the Committee's view this increased the impact and the extent to which viewers were likely to have been influenced by this advertising.
- 7.9. The Committee also took account of the overall compliance record of the Licensee regarding the TV Advertising Code. In particular the Committee had regard to the various background compliance issues which the ASA had brought to its attention as regards three other advertisements broadcast on Venus TV between April and September 2007 (see paragraph 4.18). Within this same time period the ASA gave Venus TV Ltd various specific warnings and guidance about its repeated poor compliance.

The repeated nature of the breaches

- 7.10. The Committee took note of the fact that the Licensee repeatedly breached the TV Advertising Code. The ASA investigated and published five adjudications against Venus TV Ltd between April and October 2007 for broadcasting infomercials, which in a number of these cases, breached the

same TV Advertising Code rules relating: to misleading claims; to failure to supply adequate objective evidence to support claims made; and to the presentation of doctors thereby giving the impression of medical advice.

Precedent

- 7.11. The Committee noted that this was the first time that Ofcom has considered a sanction following a referral from the ASA for any comparable case. It took account of the representations made by the Licensee that, notwithstanding the greater number of breaches of the TV Advertising Code recorded against the Licensee, this case should be treated as being less serious than both the *ARY Digital*⁹ sanctions adjudication (published on 1 November 2007) and the more recent adjudication in relation to *DM Digital*¹⁰ (published on 28 October 2008), in each of which a fine of £15,000 had been imposed as well as a direction to broadcast a statement of Ofcom's findings (once in the case of *ARY Digital* and twice in relation to *DM Digital*). Given that both of these previous cases had involved breaches of the Ofcom Broadcasting Code in relation to claims concerning more serious medical conditions, such as cancer, leprosy and hepatitis, the Licensee considered that the level of sanction that had been recommended by the Executive was disproportionate. (The Licensee had previously suggested in its earlier written submissions that no penalty was appropriate in this case - this position was subsequently changed in the Licensee's final submissions, in which it noted that "the imposition of a financial penalty is inevitable").
- 7.12. In recognition of the points made by the Licensee in relation to both of these previous cases, the Committee acknowledged that the infractions of the Broadcasting Code by both *ARY Digital* and *DM Digital* had concerned more serious medical conditions and that in both of those cases the broadcasters had allowed unsubstantiated claims to be made on air about such life-threatening diseases as cancer, leprosy or hepatitis. The Committee also accepted that in the present case not all of the breaches concerned health claims, and that none of the three breaches that did relate to health claims concerned claims relating to such serious conditions as cancer, leprosy and hepatitis. Finally, the Committee noted that, to a limited extent, some of the claims made in the advertisements on Venus TV had been qualified (two examples were given at the hearing in relation to the adverts for Golden Bull Kastoori Capsules: "a natural remedy like Golden Bull Kastoori Capsules may help you", and "we make no medical claim").
- 7.13. Notwithstanding the above factors, the Committee noted that three of the present breaches had concerned unsubstantiated and potentially misleading claims about health and medical products. These claims had the potential to cause substantial harm as a result of consumers not seeking the appropriate medical advice for conditions which can be treated by qualified medical practitioners. The two astrology adverts that did not concern health claims nevertheless breached important rules in the TV Advertising Code.
- 7.14. The Committee noted the Licensee's submissions on the *ARY Digital* and *DM Digital* cases. However, in the current case five separate advertisements – each a serious breach of the TV Advertising Code - had been referred to

⁹ http://www.ofcom.org.uk/tv/obb/ocsc_adjud/ary_digital.pdf

¹⁰ http://www.ofcom.org.uk/tv/obb/ocsc_adjud/dmdigital.pdf

the Committee for consideration of sanction. These breaches were recorded between April and September 2007. Although each of these five breaches concerned material that may not have had the potential to cause life-threatening harm to viewers as was the case in relation to the contraventions in the *ARY Digital* and *DM Digital* cases (in terms of what the claims related to), it was the Committee's view that the number and repeated nature of the breaches in the present case were particularly significant and distinguishing factors.

- 7.15. In view of all of the above considerations in relation to the comparison between this case and the *ARY Digital* and *DM Digital* cases, the Committee decided that the imposition of a financial penalty was appropriate and consistent with previous practice at Ofcom.

Deterrent

- 7.16. In the Committee's view any financial penalty should be sufficient to act as an effective incentive to ensure future compliance. The financial penalty should therefore be sufficiently significant to act as a deterrent against repetition of these or similar breaches by Venus TV Ltd. (given the severity, serious and repeated nature of the current breaches and the resulting and substantial potential harm). It should also be an incentive to all other broadcasters not to air advertisements which breach the TV Advertising Code – and, in particular, misleading infomercials offering medical remedies unsubstantiated by evidence, and which can mislead the consumer into not seeking the appropriate medical advice for conditions which can be treated by qualified medical practitioners

Other specific criteria

- 7.17. The Committee then considered whether there were any specific criteria it should take into account in deciding on a suitable level of financial penalty. It noted that: there was no or very limited financial gain to the Licensee from broadcasting the advertisements; although the potential degree of harm was great, there was no evidence of any harm to any individual as a result of the broadcasts; it was a relatively small channel with a limited size and turnover; and that the breaches of the TV Advertising Code occurred over a relatively lengthy period of time, that is between April and September 2007. The Committee also considered that viewers of all channels had a reasonable expectation not to see any advertisements which were misleading, especially relating to medical and health products.

Factors increasing the level of penalty

- 7.18. The Committee then reviewed factors which aggravate or tend to increase the level of the financial penalty.
- 7.19. The Committee took account of the facts that:
- the Licensee repeatedly breached the TV Advertising Code on five separate occasions. It also repeatedly failed to keep up to date with ASA adjudications and the guidance provided by the ASA, which resulted in infomercials being broadcast which had previously been found in breach and removed from other services;

- Venus TV Ltd's senior management ought to have been aware of its responsibilities to ensure full compliance with the TV Advertising Code; and
- there was clear evidence of an absence of effective compliance arrangements at Venus TV and repeated failures to avoid infractions of the TV Advertising Code.

Mitigating Factors

7.20. The Committee then considered whether there were any factors which in its view might limit or decrease the level of financial penalty.

7.21. The Committee took account of the following:

- the Licensee admitted all the breaches of the TV Advertising Code and cooperated with Ofcom's sanctions procedure;
- once advised by the ASA that there were compliance problems with particular advertisements, the Licensee stopped broadcasting all the material immediately;
- the Channel is a relatively small service which produces 12 hours a day of British programming for the British Asian community;
- the Licensee's argument that a very substantial financial penalty may result in the Channel ceasing to broadcast; and
- the Licensee had strengthened its compliance procedures, by for example acquiring the services of a compliance consultant and introducing a series of workshops for staff to ensure awareness of the relevant Code and Licence obligations.

Conclusion

7.22. Where Licensees broadcast advertisements which may risk the health and safety of, and mislead, its viewers, there is a significant contravention of the TV Advertising Code. In this case there was a considerable risk to vulnerable viewers that responding to these infomercials could have resulted in a delay in seeking out appropriate treatment for conditions such as impotency, infertility and depression.

7.23. The steps taken so far by the Licensee to improve compliance were taken into consideration in the Committee's decision. The Committee however expects Venus TV Ltd fully to implement its new compliance procedures and arrangements, and take great care in the future to ensure all licensed services under its control comply fully with the TV Advertising Code.

7.24. The Committee stresses that all broadcasters who are licensed by Ofcom – however small or specialised their audience, or whichever languages they broadcast in – must ensure they comply fully with the TV Advertising Code and the Broadcasting Code. They must have robust compliance arrangements in place, backed up by sufficient trained staff. It is wholly unacceptable for any broadcaster to rely for example on inexperienced staff or what is broadcast on other channels as a means of complying its own content. If any similar sanctions cases are referred to the Committee in future, it will consider them very seriously.

7.25. Having considered the relevant facts as outlined above and all the representations made Venus TV Ltd, the Committee decided to: impose a financial penalty on the Licensee of **£35,000** (payable to HM Paymaster General); and, in addition, to require **Venus TV Ltd to broadcast a statement of Ofcom's findings on its service Venus TV** in a form to be determined by Ofcom on two specified occasions. The Committee considered this a proportionate and appropriate penalty in all the circumstances, especially given the seriousness, and repeated nature, of the breaches and the potential for harm to viewers.

Content Sanctions Committee

Philip Graf
Sue Balsom
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4 December 2008