

Ofcom Content Sanctions Committee

Consideration of sanction against

Channel TV Ltd (“Channel TV” or the “Licensee”), in respect of its service the Regional Channel 3 service (“Channel 3”) transmitted across the ITV Network on ITV1.

For

1. Early finalising of the vote for the *People’s Choice Award* in the *British Comedy Awards 2004*, broadcast on 22 December 2004,

Resulting in a breach of the ITC Programme Code 2002 (the “ITC Code”) in force from January 2002 until 24 July 2005 of:

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

2. Early finalising of the vote for the *People’s Choice Award* in the *British Comedy Awards 2005*, broadcast on 14 December 2005,

Resulting in a breach of the Ofcom Broadcasting Code of:

Rule 2.2: “Factual programmes or items or portrayals of factual matters must not materially mislead the audience”

3. Overriding the viewers’ vote for the *People’s Choice Award* and substituting a different winner in the *British Comedy Awards 2005*, broadcast on 14 December 2005

Resulting in a breach of the Code of:

Rule 2.2: “Factual programmes or items or portrayals of factual matters must not materially mislead the audience”

Decision

To impose a financial penalty (payable to HM Paymaster General) of **£80,000**, which comprises £45,000 in respect of the early finalising of the vote in both programmes (“as live breaches”) and £35,000 in respect of overriding of viewers votes in the *BCA 2005* (“the selection breach”). And, in addition, to require Channel TV to **broadcast a statement of Ofcom’s findings** on its service ITV1 in a form to be determined by Ofcom on one specified occasion.

Introduction

- 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 statutory sanctions on Channel TV in light of the serious nature of its failures to ensure compliance with the ITC Programme Code 2002 (the "ITC Code")¹ and the Ofcom Broadcasting Code (the "Code") (together, the "relevant Codes").
- 1.2 This adjudication under the relevant Codes relates to the broadcast of *The British Comedy Awards 2004* ("BCA 2004") and *The British Comedy Awards 2005* ("BCA 2005") across the ITV network on ITV1 on, respectively, 22 December 2004 and 14 December 2005.
- 1.3 Channel 3 (ITV1) is the third national public service channel. It is a free-to-air, commercially funded, national television broadcast channel. At the relevant time, there were fifteen regional Channel 3 licensees, including Channel TV, which is the relevant licensee in this case. The *BCA 2004* and *BCA 2005* were commissioned by ITV Network Limited ("ITV Network") on behalf of all 15 Regional Channel 3 Licensees, from Michael Hurl Television Limited ("MHTV"), an independent production company. Each regional Channel 3 licensee is required under the terms of its Ofcom licence (and previously its ITC licence) to ensure that its regional Channel 3 service complies with the relevant Codes. Channel TV was appointed under a tripartite agreement between it, ITV Network and MHTV as the compliance licensee for the *BCA 2004* and the *BCA 2005*. Its role at the relevant time was to ensure on behalf of all the Regional Channel 3 licensee that these network programmes were compliant with the provisions of the relevant Codes so that they could be broadcast across the ITV network.
- 1.4 The *BCA 2004* and *BCA 2005* have been found in breach of, respectively, Rules 8.2(b) of the ITC Code (which provided that, where PRS was used in programmes, licensees had to retain control and responsibility for PRS service arrangements and PRS line messages (including all matters relating to their content)) and the Code (which provides that factual programmes or items or portrayals of factual matters must not materially mislead the audience) as a result of the following conduct:
 - (i) Early finalising of the vote for the *People's Choice Award* in the *BCA 2004*: The final half hour of the *BCA 2004* programme (broadcast after the ITV News at 22:30) was pre-recorded, although it was broadcast as live and included a number of calls to action to viewers to vote for the *People's Choice Award*. However, in real time, the *People's Choice Award* had already been awarded. Viewers paid to vote using a premium rate service ("PRS") mechanism and continued to do so after the winner of the *People's Choice Award* had been announced. Channel TV admitted that this was in breach of the ITC Code. Ofcom wrote to Channel TV recording this breach on 7 May 2008.
 - (ii) Early finalising of the vote for the *People's Choice Award* in the *BCA 2005*: The final half hour of the *BCA 2005* programme (broadcast after the ITV News at 22:30) was pre-recorded, although it was broadcast as live

¹ The ITC Code was in force from January 2002 until 24 July 2005 when it was replaced by the Ofcom Broadcasting Code.

and included a number of calls to action to viewers to vote for the *People's Choice Award*. However, in real time, the *People's Choice Award* had already been awarded. Viewers paid to vote using a PRS mechanism and continued to do so after the winner of the *People's Choice Award* had been announced in real time. Channel TV admitted that this was in breach of the Code. Ofcom wrote to Channel TV recording this breach on 7 May 2008.

- (iii) Overriding of the vote for the *People's Choice Award* in the *BCA 2005*: Viewers were led to believe that the *People's Choice Award* would be awarded to the nominee with the highest number of viewer votes cast during the programme. At the time when the award was made, *The Catherine Tate Show* had the highest number of votes but the award was made to *Ant & Dec's Saturday Night Takeaway* following a decision to substitute it as the named winner. Channel TV accepted that the *People's Choice Award* had been given to the wrong winner. Ofcom wrote to Channel TV recording this breach on 9 March 2009.

Breaches i) and ii) above are referred to as the “**as live breaches**”.

Breach iii) is referred to as the “**selection breach**”.

Summary of Sanction Committee's Findings

- 1.5 The breaches of the ITC Code and the Code by Channel TV in relation to *The British Comedy Awards 2004 and 2005* resulted in the audiences being materially misled and represent a grave breach of the trust between the broadcaster and its audience.
- 1.6 The trust that the audience places in a broadcaster is fundamental to their relationship. This is particularly important in the case of a long-established programme such as *The British Comedy Awards* with extremely high audience expectations and transmitted on the UK's longest established commercially funded public broadcasting channel.
- 1.7 These programmes were compiled by a licensee that specialises in this work and which has very experienced compliance personnel. They should have been aware of the obvious issues raised by a delay in the broadcast, and the implications the delay would have for the on-air calls to action for viewers to vote for an award which had already been given in real time.
- 1.8 The “as live” breaches were serious, reckless and repeated over two years. Viewers were materially misled. Those viewers who voted in the last half hour of each programme, in response to calls to action and not knowing that the winner had already been announced in real time, suffered financial loss. This material misleading of viewers represents a significant breach of the trust between a broadcaster and its viewers. The same failings were repeated by Channel TV both during pre-production and broadcast of the *BCA 2005*.
- 1.9 The Committee was concerned that when the “as live” issue was brought to Channel TV's attention (by a member of the audience shortly after the *BCA 2005*), Channel TV “deferred” to the production team and it did not take any further action as the compliance licensee when it should have done so.

- 1.10 The “as live” breaches were entirely foreseeable. Had Channel TV adequately carried out its compliance function in relation to the programmes, the “as live” breaches should have been avoided.
- 1.11 Ofcom accepts that Channel TV did not itself override the viewers’ vote for the winner of the *People’s Choice Award* in the *BCA 2005*. It was clear that it was done deliberately by a member or members of the production team and that a number of individuals were or were likely to have been contemporaneously aware that the wrong winner had been announced. Ofcom’s Executive undertook an extensive investigation to establish the facts surrounding the substitution of the correct winner in the *People’s Choice Award* at the *BCA 2005*. It received witness evidence that alleged that *The Catherine Tate Show* was correctly identified as the winner, but shortly before the announcement, a member or members of the production team had substituted *Ant & Dec’s Saturday Night Takeaway* as the award winner. However, Ofcom does not have any statutory power to require information or assistance from third parties. Ofcom was disappointed at the lack of cooperation it received from some people involved in the production of the *BCA 2004* and *2005* and as a result it was unable to conclude definitively on the full circumstances surrounding the substitution of the winner of the *People’s Choice Award* at the *BCA 2005*.
- 1.12 Channel TV made representations that there was nothing it could have reasonably done at the time to anticipate, foresee or prevent covert activities leading to the falsifying of the public vote. However, tampering with polls is and has always been entirely foreseeable. Indeed the Committee noted that procedures were in place to verify the jury awards – (which were verified by an independent firm of solicitors) – but there were no processes in place to verify the PRS votes. Whilst accepting that Channel TV was not involved in the substitution, the Committee considers that Channel TV’s representations indicate that it did not and still does not properly appreciate the extent of its responsibilities as a broadcast licensee for ensuring compliance with the relevant Codes. Channel TV has still not acknowledged its own shortcomings in relation to the “selection” breach in the *BCA 2005*. Channel TV should have put processes in place to verify the results of the PRS votes and if it had done so, it would have become aware that the award had been given to the wrong programme.
- 1.13 The Committee was concerned by Channel TV’s oral representations that it had regarded the *People’s Choice Award* as “ancillary” to the programme and the implication that the viewers’ vote did not therefore warrant its full attention.
- 1.14 Channel TV’s compliance procedures were absent and/or insufficient and ineffective in preventing all three breaches from occurring. The Committee considers that Channel TV failed to take rudimentary steps to ensure safeguards were in place to prevent (or at least detect) the substitution and that it failed to exercise proper and reasonable control over the production team. The Committee considers that Channel TV’s approach to the PRS aspects of the programmes contributed to both the “as live” and the “selection” breaches. Senior personnel within Channel TV should have been aware of the obvious risks associated with delay in the broadcast and with the possibility of poll tampering and the need for vote verification.

Sanction

- 1.15 Having considered all the relevant facts and all the written and oral representations made by Channel TV, the Committee decided to impose a financial penalty on Channel TV of **£80,000** (payable to HM Paymaster General) - £45,000 in respect of the “as live” breaches and £35,000 in respect of the “selection” breach - which it considered to be a proportionate and appropriate penalty in all the circumstances.
- 1.16 In addition, the Committee directed Channel TV to broadcast a statement of its findings in relation to this case on its service in a form determined by Ofcom on one specified occasion.

Legal Framework

The Communications Act 2003

- 2.1 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.
- 2.2 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) of the Act).
- 2.3 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) of the Act) 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) of the Act).
- 2.4 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) of the Act); and where relevant, a number of other considerations including:
- The need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g) of the Act).

The Human Rights Act 1998

- 2.5 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”).
- 2.6 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).

- 2.7 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

- 2.8 Standards set by Ofcom in accordance with section 319 of the 2003 Act are set out in Ofcom's Broadcasting Code (the "Code") which came into force on 25 July 2005².
- 2.9 Accompanying Guidance Notes³ to each section of the Ofcom Code are published and, from time to time, updated on the Ofcom website. The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Code.
- 2.10 The relevant provision of the Code is Rule 2.2, which states that:
- "Factual programmes or items or portrayals of factual matters must not materially mislead the audience".

ITC Programme Code 2002

- 2.11 Prior to the publication of the Code, Ofcom was responsible for enforcing the Code of its predecessor, the ITC, as if it were an Ofcom Code⁴.
- 2.12 The relevant provision of the ITC Code is Rule 8.2(b) (Use of Premium Rate Telephone Services in Programmes), which states that:
- "The licensee must retain control of and responsibility for the service arrangements and the premium line messages (including all matters relating to their content)".

Licence Condition

- 2.13 Under section 325 of the Act, every programme service licensed by a Broadcasting Act licence includes conditions for securing that the standards set by Ofcom under section 319 are observed. If Ofcom is satisfied that the holder of a licence has contravened a condition of the licence, it may impose one or more of a number of penalties.

Channel TV

- 2.14 Each Regional Channel 3 Licensee (of which Channel TV is one) is required under the terms of its Ofcom licence (and previously its ITC licence) to ensure that the provisions of the relevant Codes are observed in the provision of the Regional Channel 3 Service. By broadcasting the *BCA 2004* and *BCA 2005*, which were not compliant with the relevant Codes, Channel has breached the terms of its licence and, as a result, breaches of the relevant Codes have been recorded against it.

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

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

⁴ See Paragraph 43(1) of Schedule 18 of the Act.

- 2.15 Channel TV was appointed under a tripartite agreement between it, ITV Network and MHTV as the compliance licensee for the *BCA 2004* and the *BCA 2005*, and is responsible for ensuring that the programmes satisfied the requirements of the Codes and applicable Guidelines at the date of transmission. The tripartite agreement is part of the ITV Networking Arrangements, which are statutory arrangements between the Regional Channel 3 Licensees to enable them to provide a nationwide Channel 3 television service. Channel TV's responsibilities as compliance licensee for the *BCA 2004* and the *BCA 2005* must be seen in that context. Its role at the relevant time was to ensure on behalf of all the Regional Channel 3 licensees that these network programmes were compliant with the provisions of the relevant Codes so that they could be broadcast by them across the ITV network.

Remedies

- 2.16 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.
- 2.17 Section 41 of the 1990 Act provides Ofcom with the power to impose a financial penalty on a Channel 3 licence holder of a maximum of 5% of its qualifying revenue. This applies in relation to a failure to comply with a licence condition or direction on or after 29 December 2003..
- 2.18 Under Section 41 of the 1990 Act, Ofcom may also shorten the licence period of a Channel 3 licensee.
- 2.19 Section 42 of the 1990 Act 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.

Regulation of Premium Rate Services ("PRS")

- 2.20 Providers of PRS are separately regulated by PhonepayPlus, the industry-funded regulatory body for all premium rate charged telecommunications services. It regulates in respect of the content, promotion and operation of PRS. In particular, PhonepayPlus' Code of Practice requires: clear and accurate pricing information and honest advertising and service content. PhonepayPlus has the power to impose sanctions for any breach of its Code by the person/body operating PRS.

Summary of Case

- 3.1 The *BCA 2004* and the *BCA 2005* were broadcast across the ITV network on ITV1 on, respectively, 22 December 2004 and 14 December 2005. In accordance with the Networking Arrangements (“NWA”) (which incorporate the Tripartite Agreement), Channel TV complied both programmes. The first part of each programme, which was 90 minutes in duration and broadcast between 21:00 and 22:30, featured live coverage of the annual awards ceremony. The *ITV News and Weather* then interrupted the broadcast at 22:30, while the awards ceremony itself continued in real time. The final part of each programme was pre-recorded, 30 minutes in duration, and broadcast between 23:00 and 23:30. The programmes broadcast at 23:00 were not live, although they were broadcast as such. As explained in more detail below, this delay in transmission for the last half hour of each programme resulted in a significant number of viewers in both years calling and sending text messages to vote for an award which had already been given in real time.
- 3.2 Amongst the awards that were awarded during each year’s ceremony was the *People’s Choice Award*. A shortlist of four nominees for the *People’s Choice Award* was determined by votes made by the readers of four magazines/newspapers (*FHM*, *Heat*, *Zoo* and *The Sun*). Viewers were invited to vote during each programme to determine the winner of the award each year. Viewers were invited to vote by PRS, either by telephone (at a cost of 50p for the *BCA 2004* and 35p for the *BCA 2005*, with the caveat on both occasions that “mobile networks may vary”) or by text message (“SMS”) (at a cost of 50p “plus standard network charge” for the *BCA 2004* and 25p “plus standard network charge” for the *BCA 2005*).
- 3.3 A number of calls to action to vote for the winner of the *People’s Choice Award* were made to viewers during both the first, live part of each programme and the second, pre-recorded part of each programme. However, the result of the *People’s Choice Award* vote had, in fact, been already announced in real time, during the awards ceremonies themselves, before the calls to action were broadcast in the second, pre-recorded part of each programme and before voting lines were closed.
- 3.4 Specifically, in the *BCA 2004*, the result of the *People’s Choice Award* was announced at approximately 22:57 in real time but this was not broadcast until approximately 23:29. The pre-recorded section of the *BCA 2004* contained a call to action (at approximately 22:47 in real time), which was broadcast at approximately 23:20, after the award had been made in real time. The programme’s presenter, Jonathan Ross, stated:
- “And now we have time for one more *People’s Choice* update. I for one am very excited...you’ve just got a few more minutes of button-pushing time to vote for the *People’s Choice Award*.”
- 3.5 In the *BCA 2005*, at approximately 23:03:40 (real time), the result of the *People’s Choice Award* was announced by Robbie Williams. Viewers were not informed of the results until 23:29:42, towards the end of the broadcast of the pre-recorded, second part of the *BCA 2005* programme. In the pre-recorded section of the *BCA 2005*, there was a voting update on the *People’s Choice Award* at approximately 22:36 (real time), which was broadcast at

approximately 23:05, after the award had been made in real time. The programme's presenter, Jonathan Ross, stated:

"News is reaching me from the People's Choice Control Call Centre in Mumbai that voting has been, and I quote, "Frenzied", switchboards have been "lighting up" and the bloke who writes clichés has been "rushed off his feet". So let's see what that means in terms of position. At four, in fourth place with 8% of the votes, Green Wing. In third place with 19% of the votes – it's Friday Night with Jonathan Ross. [Boos from the audience] Yes, yes, I feel your pain. In second place with 35% of the votes is – and it's all between these two we know this now – it's Ant & Dec's Saturday Night Takeaway which means that still in first place with 38% of the votes – how close is that 3 votes between them – in the lead at the moment The Catherine Tate Show Ladies and Gentlemen [Applause] – it's still anyone's award in the People's Choice. Keep phoning, keep texting, wow!"

- 3.6 There was then a call to action at approximately 22:50 (real time), which was broadcast at approximately 23:19, again after the award had been made in real time. Jonathan Ross stated:

"So we're now coming up to your last chance to take part in the People's Choice Award. Here come those numbers..."

- 3.7 Ofcom's analysis of the raw interactive voice response ("IVR") and SMS telephony data from the *BCA 2005* confirmed that both the voting update and the call to action which were broadcast after the award had been made in real time, resulted in a significant number of viewers calling and sending text messages to vote.
- 3.8 In the *BCA 2005*, the *People's Choice Award* was presented by Robbie Williams to Anthony McPartlin and Declan Donnelly for *Ant & Dec's Saturday Night Takeaway*. However, at the time when the award was made, the raw IVR and SMS telephony data indicated that *The Catherine Tate Show* had more viewer votes than *Ant & Dec's Saturday Night Takeaway*.

Ofcom's investigation

- 4.1 Following concerns raised about the use of premium rate interactive services ("PRS") on ITV channels, ITV plc ("ITV") announced on 5 March 2007 that it had appointed Deloitte & Touche LLP ("Deloitte") to conduct a complete review of all PRS in ITV programmes.
- 4.2 During the Deloitte review, Channel TV drew ITV Network's attention to the "as live" issue that had occurred in the *BCA 2005*. In the course of Deloitte's investigations it became clear that the "as live" issue had also occurred in the *BCA 2004*. When examining the raw call data supplied by the telephony provider, Eckoh UK Limited (then known as Eckoh Technologies UK Limited ("Eckoh"), for submission to Deloitte in 2007, Channel TV uncovered the "selection" issue and Channel TV immediately informed both ITV Network and Deloitte of this issue by email on 1 August 2007. ITV subsequently referred the *BCA 2005* to Olswang (a law firm) for investigation and a number of reports regarding the *BCA 2005* were then made in the press in September 2007. ITV indicated to Ofcom that it would provide Ofcom with a summary of Olswang's findings once Olswang's investigation was complete.

- 4.3 Ofcom launched an investigation in January 2008, it having become apparent that Ofcom could not expect to receive details of Olswang's findings for some time as it had been informed that Olswang's investigation was ongoing.
- 4.4 On 20 March 2008, ITV provided Ofcom with a copy of Olswang's findings in relation to *The British Comedy Awards*. Channel TV explained to Ofcom that it was having difficulty in getting information from third parties, including Olswang, which declined to give Channel TV access to whatever evidence it had uncovered. However, Channel TV confirmed that both the *BCA 2004* and the *BCA 2005* had breached the relevant Codes in that, within the final half hour of both, viewers were still encouraged to vote for the *People's Choice Award*, even though, in "real time", the award had already been made. Channel TV also said that the *People's Choice Award* for the *BCA 2005* might have been awarded to the act which had not received the highest number of viewer votes when the result had been decided. Channel TV said that it was not yet absolutely clear whether this was the case, but it did appear likely.
- 4.5 On 7 May 2008, Ofcom wrote to Channel TV and recorded breaches of Rule 8.2(b) of the ITC Code (in relation to the *BCA 2004*) and Rule 2.2 of the Code (in relation to the *BCA 2005*) in respect of the early finalising of the vote in both programmes. Ofcom stated that it would await further information from Channel TV in relation to the overriding of viewers' votes in the *BCA 2005* because, at that stage, Channel TV had not yet ascertained definitively that viewers' votes had been overridden.
- 4.6 In June and July 2008, PhonepayPlus, the PRS regulator, launched preliminary investigations into Eckoh and Mobile Interactive Group Limited ("MIG") in relation to the *BCA 2005*, and Broadsystem Limited ("Broadsystem") in relation to the *BCA 2004*. Ultimately, PhonepayPlus' preliminary investigations into Broadsystem and MIG were not pursued due to lack of evidence available. PhonepayPlus has proceeded to conduct a formal investigation into Eckoh in relation to the *BCA 2005*, culminating in Eckoh attending a PhonepayPlus Tribunal on 22 January 2009. The Tribunal took the decision to adjourn pending the outcome of Ofcom's investigation. As a result of PhonepayPlus' investigation into Eckoh, PhonepayPlus received the IVR data for the *BCA 2005*, which it passed to Ofcom. This data, when aggregated with the SMS data for the *BCA 2005* (which MIG had passed to Channel TV, and which Channel TV had passed to Ofcom) showed that, at the time (in real time) when the results of the *People's Choice Award* were announced, *The Catherine Tate Show* had had more votes than *Ant & Dec's Saturday Night Takeaway*. Therefore, the wrong winner had been announced.
- 4.7 In addition to investigating Channel TV and liaising with PhonepayPlus:
- (i) Ofcom received a submission from Michael Hurl Television Limited ("MHTV"), the independent production company which produced the *BCA 2004* and the *BCA 2005*.
 - (ii) Ofcom wrote directly to all fifteen Regional Channel 3 licensees (including Channel TV) formally requesting information under the terms of their licences, and to ITV plc requesting information.
 - (iii) Ofcom wrote to a number of individuals to invite them to meet Ofcom to give their versions of events in relation to the *BCA 2004* and/or the

BCA 2005. Three individuals took up this invitation and five declined. Of those individuals who declined to meet Ofcom, two answered written questions and a third provided comments in connection with the investigation.

- (iv) Ofcom carried out its own analysis of the IVR and SMS data for the *BCA 2005*.
 - (v) Ofcom met ITV, Olswang and Deloitte to discuss Olswang's and Deloitte's investigations into the *BCA 2005*.
- 4.8 Ofcom's Executive undertook an extensive investigation to establish the facts surrounding the substitution of the correct winner in the *People's Choice Award* at the *BCA 2005*.
- 4.9 Ofcom investigated a number of allegations surrounding the substitution of the correct winner. One theory put forward to Ofcom was that Robbie Williams, who presented the *People's Choice Award*, accepted, via his agent, the invitation to appear at the *BCA 2005* on condition that he would be able to present an award to Anthony McPartlin and Declan Donnelly. The only award which at that point had the potential to be awarded to the pair was the *People's Choice Award* (as the jury awards had already been decided and they had not won any of them). However, the Ofcom Executive was unable to conclude definitively whether this alleged booking condition was the reason that the wrong programme was announced as the winner.
- 4.10 Another theory put forward was that the results of the *People's Choice Award* for the *BCA 2005*, may have been changed by a member or members of the production team, or the telephony provider, on the instruction of, or as a result of comments made by, an employee or employees of ITV Network or ITV. Again, the Ofcom Executive was unable to conclude definitively whether or not the substitution took place as a result of ITV Network's or ITV's actions.
- 4.11 During its investigation, the Ofcom Executive received witness evidence that alleged that *The Catherine Tate Show* was correctly identified as the winner, but shortly before the announcement, a member or members of the production team had substituted *Ant & Dec's Saturday Night Takeaway* as the award winner. However, Ofcom does not have any statutory power to require information or assistance from third parties. Ofcom was disappointed at the lack of cooperation it received from some people involved in the production of the *BCA 2004* and *2005* and as a result it was unable to conclude definitively on the full circumstances surrounding the substitution of the winner of the *People's Choice Award* at the *BCA 2005*.
- 4.12 In any event, notwithstanding that the evidence surrounding the circumstances of the substitution was not conclusive, it was clear that it was done deliberately by a member or members of the production team and that a number of individuals were or were likely to have been contemporaneously aware that the wrong winner had been announced. The fact that Channel TV was not involved in the substitution did not negate Channel TV's responsibility to ensure that the programme complied with the Code. The Executive's view was that Channel TV should have had safeguards in place to prevent the substitution occurring and that Channel TV failed to exercise proper and reasonable control over the production team. On 6 March 2009, Ofcom wrote to Channel TV and recorded a further breach of Rule 2.2 of the Code in

respect of the overriding of the vote for the *People's Choice Award* in the *BCA 2005*.

- 4.13 Channel TV made representations that there was nothing it could have reasonably done at the time to anticipate, foresee or prevent covert activities leading to the falsifying of the public vote. Whilst accepting that Channel TV did not participate in the substitution, the Ofcom Executive considered that Channel TV should have put processes in place to verify the results of the PRS votes and if it had done so, it would have become aware that the award had been given to the wrong programme.
- 4.14 The Ofcom Executive considered, after taking all the circumstances of the case including Channel TV's written representations into account, that the three breaches were sufficiently serious to warrant referral to the Sanctions Committee for consideration of a statutory sanction. Therefore, in accordance with Ofcom's outline procedures for statutory sanctions in content and content-related cases, the case was referred to the Sanctions Committee.

Sanctions Committee's Hearing

- 5.1 Ofcom's Content Sanctions Committee ("the Committee") held a hearing on 8 September 2009 at which Channel TV 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, of what type and at what level.
- 5.2 The Committee was addressed by Rowan O'Sullivan (Chief Executive of Channel TV) and Mick Desmond (Chairman of Channel TV). Channel TV's legal representatives (David Gore and Stephen Hornsby from Davenport Lyons solicitors) were also present.
- 5.3 Channel TV explained in its view that the compliance licensee does not and cannot act as a police force. It is not its role to control production issues. It is there to provide advice, guidance and instruction where necessary to ensure as far as it is reasonable to expect, all programmes commissioned by ITV Network are made and broadcast consistently with all relevant codes and laws. This requires making judgments about people's experience, skill and probity and that these judgments are made on the basis of what was known or anticipated at the time.
- 5.4 Channel TV accepted responsibility for the "as live" breaches which it accepted were serious and reckless, but not deliberate, or repeated more than once. Channel TV unreservedly apologised and deeply regretted their failure to appreciate the implications of the "as live" element of the programmes.
- 5.5 However, Channel TV was aggrieved that it was being held culpable for the "selection" breach. It believed it was being judged in light of contemporary expectations about PRS rather than in the context of the time when the programmes were broadcast. Had it decided to consider the PRS element of the show in advance, the aspect it would have most plausibly focussed upon was the contingency planning should there be a technical fault that would compromise the satisfactory running of the voting. One risk it would not have considered was that anyone might deliberately falsify the vote. In its view, nothing it might have done on the night would have prevented the breach

from occurring. Channel TV did not see why it should be rebuked and penalised for the deliberate substitution of the winner by a third party, which it termed arguably criminal behaviour. Channel TV did not believe that it was reasonably foreseeable in 2005 that someone would seek to change the result of the award. It believed that there had been a concerted and premeditated plan to do just that.

- 5.6 Channel TV said that none of these breaches could occur again due to changes in its own procedures and Ofcom's licence variation⁵. Channel TV said that it had an excellent compliance record and that any penalty for the "as live" breaches should be fair and proportionate. However, in relation to the "selection" breach, which Channel TV had brought to the attention of Ofcom in the first place, Channel TV felt aggrieved that third parties who had deliberately changed the winner had "escaped scot-free" while Channel TV took "the rap". Channel TV submitted that any fine for the "selection" breach should reflect the fact that this was an event outside of its control.

The Committee's Decision

- 6.1 In reaching its decision, the Committee considered carefully all the material before it, including the written and oral submissions made by Channel TV. The Committee decided, for the reasons set out below, to impose a financial penalty on Channel TV and to issue a direction requiring Channel to broadcast a statement of Ofcom's findings in relation to this case in a form to be determined by Ofcom on one occasion to be 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 Guidelines⁶.

The seriousness of the breaches

- 6.2 Having considered all the evidence and Channel TV's written and oral representations, the Committee found that the breaches in this case were extremely serious and, in the case of the "as live" breaches, repeated, for the reasons set out at paragraphs 6.3 to 6.11 below.

As live breaches

- 6.3 The "as live" breaches were serious, reckless and repeated over two years. Viewers were materially misled. Those viewers who voted in the last half hour of each programme, in response to calls to action and not knowing that the winner had already been announced in real time, suffered financial loss. This material misleading of viewers represents a significant breach of the trust between a broadcaster and its viewers.
- 6.4 Channel TV failed to ensure adequate compliance oversight of the *BCA 2004* and the *BCA 2005*. In the *BCA 2004*, Channel TV failed to retain control of and responsibility for the premium rate telephone services, in breach of the then current ITC Code. Channel TV has admitted, the "as live" breach, which

⁵Guidance and details of the licence variation can be found at http://www.ofcom.org.uk/tv/ifi/guidance/guidance_verification_obj.pdf

⁶ Ofcom's Penalty Guidelines are available at <http://www.ofcom.org.uk/about/account/pg/>. Section 392 of the Act 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.

occurred in the *BCA 2004* and again in the *BCA 2005*, was “entirely unintentional but nonetheless stupid”. Despite the obvious nature of the “as live” breach, Channel TV failed to anticipate it in advance of the broadcast of the *BCA 2004*, nor did it identify it during or after the broadcast.

- 6.5 The same failings were repeated by Channel TV both during pre-production and broadcast of the *BCA 2005*. The running order for the show, which Channel TV saw and should have reviewed, clearly shows the break for the ITV News at 22.30 and two reminders for the *People’s Choice Award* scheduled for 23.05 and 23.13, during the recorded section of the programme. It would have been obvious from this document that, in the absence of any amendment to the programme, the “as live” breaches would occur. Channel TV gave no regard to the consequences of the delayed transmission of the final half hour of the programme.
- 6.6 The “as live” breaches were entirely foreseeable. Had Channel TV adequately carried out its compliance function in relation to the programmes, the “as live” breaches should have been avoided.
- 6.7 Moreover, when Channel TV was alerted to the “as live” breach shortly after the *BCA 2005*, it failed to follow this up. Instead Channel TV “deferred” (in its own words) to the independent producer. The Committee was concerned that Channel TV did not appear to accept its responsibility as compliance licensee, nor to fully understand the implications of the breach of trust with the viewers.

Selection breach

- 6.8 In the *BCA 2005*, the material misleading of viewers was not confined to the last half hour of the broadcast programme. The result of the vote for the *People’s Choice Award* was deliberately overridden. The audience as a whole was doubly misled, both as to the results of the vote and that their votes as cast would determine the eventual winner of the *People’s Choice Award*.
- 6.9 Channel TV has said that there was nothing it could have reasonably done at the time to anticipate, foresee or prevent covert activities leading to the falsifying of a public vote. However, tampering with polls is and has always been entirely foreseeable. The Committee noted that procedures were in place to verify the jury awards – (which were verified by an independent firm of solicitors) – but there were no processes in place to verify the PRS vote.
- 6.10 The Committee was concerned that Channel TV did not attend any production meetings although entitled to do so, and that it clearly had not carried out any risk assessment of the PRS element of the programmes.
- 6.11 Ofcom licensees have always been required to ensure compliance with the requirements set out in the Code (and the ITC Code before it). It is not unreasonable to expect Channel TV to have had sufficient safeguards in place to ensure that the audience was not materially misled. In addition, Channel TV has extensive experience of complying programmes that involve interactive viewer votes and the use of PRS. Safeguards which could have been implemented with ease include Channel TV (being the company responsible for ensuring that the programme complied with the Code) or an independent third party verifying the result of the vote. Whilst there is no suggestion that Channel TV was contemporaneously aware of the substitution, the Committee believe that its failure to take rudimentary steps to

ensure safeguards were in place facilitated the ease with which the deception occurred. Channel TV did not become aware of the deception of viewers in the *BCA 2005* until, having volunteered to ITV that the programme should be included in ITV's PRS review (which was carried out between March and October 2007) because of the "as live" issue, Channel TV then proceeded to examine the telephony data.

- 6.12 The Committee was concerned by Channel TV's oral representations that it had regarded the *People's Choice Award* as "ancillary" to the programme and the implied meaning that the vote did not therefore warrant its full attention. In its oral representations, Channel TV said that the "*People's Choice Award* is not exactly the Booker Prize, or the BAFTAs or the Oscars; not that it means that it should be readily overridden by anyone".
- 6.13 During Ofcom's investigation, a number of allegations were made about who made the substitution and for what reasons. On the evidence available, the Committee is unable to conclude on these issues. However Channel TV was responsible for compliance of the programme and it should have had safeguards in place to prevent the substitution from occurring.

Common to both types of breaches

- 6.14 Ofcom and its predecessor regulators have always considered cases where a broadcaster materially misleads its audience to be amongst the most serious breaches of the relevant Codes. In this case, viewers were seriously materially misled and the breaches of the relevant Codes involved serious inadequacies or failures in Channel TV's compliance procedures. The breaches also involved fundamental breaches of trust with the audience.

Precedent

- 6.15 In considering the appropriate level of financial penalty for both types of breaches, the Committee took account of its previous decisions in cases relating to the conduct of viewer interactive PRS voting, as well as the specific written and oral representations made by Channel TV. The Committee was satisfied that its decision as to the appropriate and proportionate level of financial penalty to be imposed in this case reflected the particularly serious nature of the breaches in all the circumstances of this case.

Incentive

- 6.16 The Committee took into account in setting the level of financial penalty the fact that Channel TV has implemented a new compliance policy which it believes will provide a detailed and effective mechanism to safeguard against any repetition of these issues. However, the Committee also noted that the purpose of the imposition of a financial penalty was to deter both the party involved and third parties from committing future breaches. In this case, the Committee considered that a significant financial penalty would represent an appropriate incentive to ensure compliance in the future.

Other specific criteria

- 6.17 The Committee considered that the following specific criteria, as set out in Ofcom's Penalty Guidelines, were relevant to adjust the starting figure of any financial penalty:

- Any gain (financial or otherwise) made by the regulated body in breach
 - The Committee notes that Channel TV received no revenue from the PRS viewer votes in the *BCA 2004* and the *BCA 2005* and that it received a relatively modest fee for complying each programme.
- The degree of harm caused, or increased costs incurred by consumers or other market participants
 - The Committee notes that the harm to viewers and consumers caused by the breaches of the relevant Codes was significant. Breaches involving financial detriment to viewers and/or misleading the audience have always been regarded by Ofcom as amongst the most serious breaches that can be committed by a broadcaster.
 - It is not possible to ascertain the financial detriment to viewers who voted for the *People's Choice Award* in the *BCA 2004* after the time (in real time) when the winner was announced because the telephony data is not available. However, it is reasonable to assume that a significant number of viewers would have voted during the last half hour of the broadcast programme, to their financial detriment.
 - Viewers were seriously and materially misled in the *BCA 2005*. No viewers' votes were taken into account because of the programme makers' decision to override the vote and substitute *Ant & Dec's Saturday Night Takeaway* as the "winner" of the *People's Choice Award*. The audience as a whole was also deceived as to the "winner". The financial detriment to viewers who voted for the *People's Choice Award* in the *BCA 2005* was at least £34,782⁷, although the actual figure is likely to have been higher because some calls would have been made from mobiles (typically at a higher rate than calls made from BT landlines), and because a "standard network charge" would have been applied in respect of each SMS vote.
- Size and turnover of the regulated body
 - The Committee notes that Channel TV is a company with modest qualifying revenue.
- The extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the regulated body
 - The Committee does not consider that the early finalising of the vote for the *People's Choice Award* in the *BCA 2004* and the *BCA 2005* was caused by a third party, or any relevant circumstances beyond the control of Channel TV. Whilst a number of other individuals or organisations (for example, ITV Network, the Producer and/or the Executive Producer) arguably could or should have identified the fact that the inclusion of invitations to vote in the final half hour of the programme would lead to a breach of the relevant Code that does not detract from the fact that this a matter well within Channel TV's control as compliance licensee.

⁷ On the basis that, because the vote was not conducted properly, all 114,987 votes were affected.

- The Committee accepts that it was a member or member of the production team that overrode the results of the vote for the *People's Choice Award* in the *BCA 2005* and that Channel TV was not contemporaneously aware of the substitution. However, the Committee considers that Channel TV failed to take rudimentary steps to ensure safeguards were in place to prevent (or at least detect) the substitution and that it failed to exercise proper and reasonable control over the production team. It does not, therefore, consider that the circumstances surrounding the "selection" breach were beyond the control of Channel TV.
- Whether a penalty in respect of the same conduct has already been imposed by Ofcom or another body
 - The Committee notes that no penalty in respect of the same conduct has been imposed already by Ofcom or another body
- Audience expectations
 - The Committee notes that the *BCA 2004* and the *BCA 2005* were broadcast in peak time slots across the ITV Network on ITV1, the longest established commercially funded public service channel in Great Britain., This is a long established programme and the *People's Choice Award* was similarly well known. Audience expectations in relation to the programmes would have been high. Nearly 6 million viewers watched the part of the *BCA 2004* that was broadcast before the news. Approximately 4.4 million viewers watched the final half hour of the *BCA 2004*. Over 5.6 million viewers watched the part of the *BCA 2005* that was broadcast before the news. Nearly 2.8 million viewers watched the final half hour of the *BCA 2005*. Furthermore, in relation to the *BCA 2005*, in particular, the Committee notes that statements made by the programme's presenter made it very clear that viewers' votes should have determined the winner of the *People's Choice Award*. In addition, his statement that there were only "3 votes" between *Ant & Dec's Saturday Night Takeaway* and *The Catherine Tate Show* broadcast at 23.05 after the award had been presented in real time was clearly intended to encourage people to vote in the belief that every vote could be critical and would count in determining the winner.
- Scheduling
 - In relation to the early finalising of the vote for the *People's Choice Award* in the *BCA 2004* and the *BCA 2005*, the Committee does not consider that the scheduling of the programmes and the *ITV News* programmes that were interposed warrants any special consideration. If the programmes had made clear that voting lines had closed before the *ITV News* and if the final half hours of the *BCA* programmes had not contained invitations to viewers to vote, the "as live" breaches of the relevant Codes would not have occurred.

Level of Penalty

- 6.18 Taking all these factors into account (and in light of the serious nature 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

- 6.19 The Committee then considered whether any of the factors set out in the Penalty Guidelines (or any other relevant factors) aggravated or tended to increase the level of any financial penalty it might impose.

As live breaches

- The “result” of the viewers’ votes for the *People’s Choice Award* was finalised early in both the *BCA 2004* and the *BCA 2005*. The Chairman of Channel TV told the Committee that the *BCA* had always been “one of the most thoroughly and rigorously complied programmes under Channel’s aegis”. Yet Channel TV failed to anticipate and prevent breaches of the relevant Codes on two consecutive occasions. The Committee considers that the contraventions were repeated.
- The Committee is strongly of the view that Channel TV ought to have known that the “as live” breaches would occur and that, accordingly, it ought to have taken appropriate measures to prevent them.
- The Committee was concerned that when the “as live” issue was brought to Channel TV’s attention (by a member of the audience the day after the *BCA 2005*), Channel TV “deferred” to the production team and it did not take any further action as the compliance licensee as it should have done.

Selection breach

- The Committee considers that Channel TV’s representations to Ofcom indicate that it did not and does not properly appreciate the extent of its responsibilities as a broadcast licensee for ensuring compliance with the relevant Codes. Channel TV’s assessment of the risks associated with the *People’s Choice Award* and the use of PRS was inadequate and the level of supervision it implemented was insufficient. Notwithstanding this, Channel TV has still not acknowledged its own shortcomings in the discharge of its responsibilities in relation to the “selection” breach.
- The Committee was concerned that Channel TV had treated the PRS element of the *British Comedy Awards* as only being “ancillary” to the programme, and it failed to properly understand its responsibilities under the relevant Codes to ensure compliance. The Committee noted that in written submissions, Channel TV had stated “at no stage did anyone consider that the *People’s Choice Award* merited special attention – it was considered editorially unimportant, even an irrelevance, and was simply regarded as a mechanistic process”.

Common to both types of breach

- Channel TV's compliance procedures were absent and/or insufficient and ineffective in preventing all three breaches from occurring. Whilst it is clear that Channel TV circulated a note on compliance issues to relevant individuals prior to the broadcast of each programme, it does not appear that this compliance note addressed or made any reference to the importance of it retaining control of and responsibility for PRS arrangements or the importance of ensuring the audience was not materially misled.
- Channel TV does not appear to have ensured that the telephony provider in either programme was aware of who Channel TV was and what its role was as the Regional Channel 3 Licensee that had responsibility for ensuring compliance of the programme pursuant to the NWA. Channel TV was obliged under the ITC Code to retain control of and responsibility for PRS arrangements in the *BCA 2004*. Under the Code in the *BCA 2005*, it was obliged to ensure that any use of PRS complied with the (then) ICSTIS Code.
- Channel TV did not attend any of the production meetings and appeared to rely on the contractual arrangements under the Tripartite Agreement without fully understanding its responsibilities for the PRS elements as the compliance licensee.
- The Committee considers that Channel TV's approach to the PRS aspects of the programmes contributed to both the "as live" and the "selection" breaches. Senior personnel within Channel TV should have been aware of the obvious risks associated with delay in the broadcast; and with the possibility of poll tampering and the need for vote verification. Code compliance is a broadcasting function, not a production function, and it is the broadcast licensee that is ultimately responsible for ensure that programmes it broadcasts comply with the Code. For the purpose of discharging its responsibility, the licensee must anticipate risks and exercise effective supervision.

Factors tending to decrease the level of penalty

6.20 The Committee then considered whether any of the factors set out in the Penalty Guidelines (or any other relevant factors) in its view might limit or decrease the level of any financial penalty it might impose.

As live breaches

- Channel TV has accepted and apologised for the "as live" breaches. It said that it deeply regretted the failure to appreciate the implications of the "as live" element of the show and that it is a further embarrassment that the error was repeated in 2005 for which they also apologised. Channel TV also stated that it remains "dismayed and apologetic that a significant number of viewers wasted time and money voting pointlessly for the *People's Choice Award* in 2004 and 2005". It has also accepted the imposition of a financial penalty in respect of the "as live" breaches, so long as it is "fair and proportionate".

- After the broadcast of the *BCA 2005* and the identification of the “as live” issue, Channel TV took steps to ensure that the “as live” contravention would not recur in future *BCA* programmes.

Selection breach

- When examining the raw telephony data for the *BCA 2005* in 2007, Channel TV brought the “selection issue” to the attention of the ITV Network and Deloitte.

Common to both types of breach

- Channel TV has devised and implemented a policy which (per Channel TV’s representations) is consistent with the new Ofcom licence variation and provides a detailed and effective mechanism to safeguard against any repetition of issues similar to those that occurred in the *BCA 2004* and the *BCA 2005* in the future, regardless of the number of viewers affected or the amounts of money involved.
- Channel TV received no revenue from the PRS viewer votes in the *BCA 2004* and *BCA 2005* and it received a relatively modest fee for complying each programme.
- Channel TV has dealt transparently with Ofcom throughout the investigation.

Conclusion

- 6.21 Cases where a broadcaster materially misleads its audience, whether knowingly or not, have always been considered to be amongst the most serious breaches of the relevant Codes by Ofcom (and its predecessor regulators). The trust that the audience places in a broadcaster is fundamental to their relationship. This is particularly important in the case of a very long-established programme such as *The British Comedy Awards* with extremely high audience expectations which was broadcast on the UK’s most popular commercially funded public broadcasting channel.
- 6.22 Channel TV should have been aware of the obvious issues raised by a delay in the broadcast and the implications the delay would have for the on-air calls to action for viewers to vote for an award which had already been given in real time.
- 6.23 Whilst Channel TV was not involved in the substitution of the winner of the *People’s Choice Award* in 2005 and it is clear that another third party or other third parties involved in the production of the programme was/were responsible for overriding the viewers’ votes, Channel TV had not conducted any assessment of any of the risks associated with the conduct of the PRS viewer interactive voting. In the Committee’s view, Channel TV should have put procedures in place so that it could have verified the results of the vote.
- 6.24 Having considered the relevant facts as outlined above and all the representations made by Channel TV, the Committee decided to impose a financial penalty on Channel TV of **£80,000** (payable to HM Paymaster

General) which comprises £45,000 in respect of the “as live” breaches and £35,000 in respect of the selection breach. The Committee considered this to be a proportionate and appropriate penalty in all the circumstances.

- 6.25 In addition, the Committee directed Channel TV to broadcast a statement of its findings in relation to this case on ITV1 in a form to be determined by Ofcom on one specified occasion.

Content Sanctions Committee

Philip Graf
Joyce Taylor
Kath Worrall

2 October 2009