

Sanction: Decision by Ofcom
To be imposed on DM Digital Television Limited

For material broadcast on 9 October 2011¹.

**Consideration of
of sanction against:** DM Digital Television Limited (the “Licensee”) in respect
of its service **DM Digital** (TLCS-873).

For: A breach of Ofcom’s Broadcasting Code (the “Code”)² in
respect of:

Rule 3.1: “Material likely to encourage or incite the
commission of crime or to lead to
disorder must not be included in
television or radio services”.

On: *Rehmatul Lil Alameen* (“the
Programme”), 9 October 2011 at 18:30.

Decision: To impose a financial penalty (payable
to HM Paymaster General) of **£85,000**;

To issue a direction to the Licensee
directing it to broadcast a statement of
Ofcom’s findings in this sanctions case,
on a date and in a form to be determined
by Ofcom; and

To direct the Licensee not to repeat the
Programme.

¹ The material broadcast on DM Digital and found in breach of Ofcom’s Broadcasting Code is detailed in Broadcast Bulletin 205, dated 8 May 2012 (see: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb205/obb205.pdf>).

² The version of the Code, which was in force at the time the broadcast, took effect on 28 February 2011. All references to the Code in this Decision are therefore references to that version of the Code (unless otherwise specified) which can be found at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>

Executive Summary

1. DM Digital is a television channel primarily aimed at an Asian audience in the UK, which features broadcasts in a number of languages including English, Punjabi, Urdu, Sindhi, Kashmiri and Hindi. The service is also received in the Middle East and parts of Asia.
2. In Ofcom's finding ("the Finding"), published on 8 May 2012 in Broadcast Bulletin 205³, the Executive found that material broadcast by the Licensee breached Rules 3.1, 4.1 and 4.2 of the Code.
3. The Finding related to a programme *Rehmatul Lil Alameen* ("the Programme"), which was in Urdu and was approximately one hour in duration, and featured a presenter who introduced an Islamic Pir (a religious scholar) who delivered a live televised lecture about points of Islamic theology with reference to the shooting dead in early 2011 of the Punjab governor Salmaan Taseer by his bodyguard Malik Mumtaz Qadri. Salmaan Taseer had been a vocal critic of Pakistan's blasphemy law⁴. This law punishes derogatory remarks against notable figures in Islam and carries a potential death sentence for anyone who insults or is judged to blaspheme against the Prophet Mohammed.
4. Ofcom considered that the breach of Rule 3.1 in this case was so serious as to warrant the consideration of a statutory sanction.
5. The Finding set out various statements that were in breach of Rule 3.1. Ofcom considered that the material in these statements was likely to encourage or incite the commission of crime or to lead to disorder. This was because, on a reasonable interpretation of the scholar's remarks, Ofcom considered he was personally advocating that all Muslims had a duty to attack or kill apostates or those perceived to have insulted the Prophet.

Summary of Ofcom's Sanction Decision

6. Ofcom considered that this breach was sufficiently serious to warrant the imposition of a sanction on the Licensee in this case.
7. In accordance with Ofcom's Procedures for the consideration of statutory sanctions in breaches of broadcast licences ("the Sanctions Procedures")⁵, and having considered all the evidence and all the representations made to it by the Licensee, Ofcom has decided for the reasons set out in paragraphs 45 to 51 below that it would be appropriate to impose a financial penalty.
8. Having regard to the serious nature of the Code breach, the Licensee's representations and the Ofcom Penalty Guidelines ("the Penalty Guidelines")⁶, Ofcom decided it was

³ See the Finding at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb205/obb205.pdf>

⁴ Section 295-C of Pakistan's Criminal Code.

⁵ Ofcom's Procedures for the consideration of statutory sanctions in breaches of broadcast licences. These procedures came into effect on 1 June 2011 (see: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/june2011/statutory-sanctions.pdf>).

⁶ See: Ofcom's Penalty Guidelines published 13 June 2011 (see: <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>).

appropriate and proportionate in the circumstances to impose a financial penalty of **£85,000** on the Licensee in respect of the breach of Rule 3.1.

9. In addition, Ofcom decided it should issue a direction to the Licensee to broadcast a statement of Ofcom's findings, on a date and in a form to be determined by Ofcom, and not to repeat the programme. For the reasons set out in paragraphs 54 to 62 below, Ofcom considered that it would not be appropriate to shorten, suspend or revoke DM Digital's licence.
10. Ofcom is concerned by the very weak compliance record of the Licensee and expects the Licensee to take immediate and effective steps now to redress this position. In addition to the statutory sanctions imposed, Ofcom puts DM Digital on notice as follows. Ofcom will visit the Licensee at its premises to agree how to improve its understanding of, and compliance with, all applicable legal and regulatory requirements. Ofcom will review the Licensee's compliance arrangements periodically as appropriate and necessary to ensure they are fit for purpose and the Licensee's content will also be monitored for a period of time to ensure it remains compliant with the Code.

Legal Framework

Communications Act 2003

11. In discharging its functions Ofcom's principal duties, set out in section 3(1) of the Communications Act 2003 ("the Act"), are to further the interests of citizens in relation to communications matters and the interests of consumers and to secure a number of other matters. These include the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services (section 3(2)(e)).
12. Ofcom has a specific duty under section 319 of the Act to set such standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives set out in section 319(2). These include the objective that material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television and radio services (section 319(2)(b)).
13. In performing its duties, Ofcom is required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, to have regard to a number of other considerations including:
 - the need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g)); and
 - the desirability of preventing crime and disorder (section 3(4)(j)).

Human Rights Act 1998

14. In addition to section 3(4)(g) of the Act, under section 6 of the Human Rights Act 1998 Ofcom has a duty (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention on Human Rights ("the Convention"). In particular, in the context of this case, Ofcom has taken account of the related rights under Article 9 and Article 10 of the Convention.

15. Article 9 of the Convention provides for the right to freedom of thought, conscience and religion. Article 9 primarily protects the sphere of personal beliefs and religious creeds and acts which are intimately linked to such beliefs or creeds, including acts of worship or devotion, rather than aims of an idealistic nature. This Article makes clear that freedom to “manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of...health...or for the protection of the rights and freedoms of others.” Consequently, the power to interfere with Article 9 rights is limited to manifestations of beliefs or convictions. However, idealistic aims are not protected.
16. Article 10 of the Convention provides for the right to freedom of expression. Applied to broadcasting, this right encompasses the broadcaster’s right to “to impart information and ideas” and also the audience’s right “to receive information and ideas without interference by public authority” (Article 10(1) of the Convention). The exercise of these rights may be subject only to conditions and restrictions which are “prescribed in law and are 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). Article 10 protects not only the substance of ideas or information expressed, but also the form in which they are conveyed. In some circumstances, this may include a polemical or aggressive tone. On the other hand, some types of expression, such as racist literature and expressions of political support for terrorism, have been regarded as deserving of lesser (or no) protection against restrictions.
17. Ofcom must exercise its duties in light of these rights and not interfere with the exercise of these freedoms 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

18. Standards set by Ofcom in accordance with section 319 of the Act are set out in the Code which has been drafted in the light of the Human Rights Act 1998 and the Convention.
19. Accompanying Guidance Notes to each section of the Code are published and from time to time updated on the Ofcom website. The Guidance Notes are intended to assist broadcasters to interpret and apply the Code⁷.
20. The relevant Code rules in this case are set out in full on the first page of this Decision.

Remedial action and penalties

21. Under section 325 of the Act, a licence for a programme service issued by Ofcom under the Broadcasting Act 1990 or 1996 must include conditions for securing that the standards set under section 319 are observed by the licensee. In the case of a television licensable content service (“TLCS”) licence, Condition 6 of the licence requires the licensee to ensure that the provisions of any Code made under section 319 are complied with. The Licensee holds a TLCS licence.

⁷ See: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/> for relevant extracts of the Broadcasting Code and Ofcom’s Guidance Notes on the Code.

22. Ofcom's powers to take action for the contravention of TLCS licence conditions are set out in sections 236 to 239 of the Act insofar as relevant to the case.
23. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or a statement of Ofcom's findings (or both), or not to repeat a programme which was in contravention of a licence condition.
24. Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence. The maximum penalty which may be imposed under section 237 is whichever is the greater of £250,000 and 5 per cent of the qualifying revenue on each occasion that a breach of the licence has occurred (whether as a result of a breach of the Code or another Licence Condition).
25. Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence where a licensee is in contravention of a condition of a TLCS licence or direction thereunder. Section 238 sets out a general power that applies to all non-incitement cases and is targeted at serious ongoing breaches of the Code by a Licensee. Ofcom is required under section 238 to serve a notice to start revocation proceedings if we are satisfied that there has been a breach of the licence and that the breach, if not remedied, would justify revocation. As the breach in this case relates to incitement section 238 does not apply.
26. Section 239 of the Act sets out a separate and more stringent revocation process in relation specifically to the inclusion in a service of programming that is likely to encourage or incite the commission of crime or lead to disorder (as in this case). Ofcom is required to serve a notice under section 239(2) if we are satisfied that:
 - (a) the holder of the licence has included in the service one or more programmes containing material likely to encourage or to incite the commission of crime or to lead to disorder (i.e. in breach of Rule 3.1);
 - (b) that in doing so, the licensee has contravened conditions contained by virtue of Chapter 4 of Part 3 of the Act in the licence to provide that service; and
 - (c) that the contravention is such as to justify the revocation of the licence.

Under section 239 there is no requirement that the breach must be ongoing for Ofcom to revoke the licence; it can be a one-off breach of Rule 3.1, as it was in this case.

27. The effect of a notice under section 239(2) is to suspend the licence from the time the notice is served i.e. the licensee must stop broadcasting immediately. A notice under section 239(2) must give the licensee an opportunity to make representations and state that Ofcom may revoke the licence after 21 days. If the licensee makes representations to Ofcom and, having considered those representations, Ofcom is satisfied that it is necessary in the public interest to revoke the licence, Ofcom is required under s239(4) to serve a further notice to revoke the licence, stating the date from which the licence is revoked. This must be no less than 28 days after that notice has been served.

Background – The Finding

28. In the Finding⁸, the Executive found that material broadcast by the Licensee breached Rules 3.1, 4.1 and 4.2 of the Code. Further, in the Finding Ofcom stated that the breach of Rule 3.1 in this case was serious and warranted consideration of a statutory sanction.

⁸ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb205/obb205.pdf>

29. The Finding related to a programme *Rehmatul Lil Alameen* (“the Programme”), which was in Urdu and was approximately one hour in duration. This featured a male presenter who introduced an Islamic Pir (a religious scholar) who delivered a live televised lecture about points of Islamic theology with reference to the shooting dead in early 2011 of the Punjab governor Salmaan Taseer by his bodyguard Malik Mumtaz Qadri. Salmaan Taseer had been a vocal critic of Pakistan’s blasphemy law⁹. This law punishes derogatory remarks against notable figures in Islam and carries a potential death sentence for anyone who insults or is judged to have blasphemed against the Prophet Mohammed.
30. In relation to Rule 3.1, the Finding set out various statements made by the Islamic scholar that Ofcom found were likely to encourage or incite the commission of crime or to lead to disorder. Ofcom concluded they were likely to have this effect because, on a reasonable interpretation of the scholar’s remarks, he was personally advocating that all Muslims had a duty to attack or kill apostates or those perceived to have insulted the Prophet.
31. A number of the scholar’s remarks, in Ofcom’s opinion, amounted to direct calls to action. In particular, Ofcom interpreted some of the Islamic scholar’s comments to be a generic call to all Muslims encouraging or inciting them to criminal action or disorder, by unambiguously stating that they had a duty to kill anyone who criticises or insults the Prophet Mohammed and apostates, and by praising Pakistan’s blasphemy law and the killing of the Punjab governor, Salmaan Taseer, by Malik Mumtaz Qadri. Ofcom also noted that such actions were presented as being justified, and even required, as a duty binding on all Muslims according to the tenets of Islamic law and theology.
32. In the Finding Ofcom stated that the breach of Rule 3.1 was particularly serious and warranted the consideration of a statutory sanction.

Ofcom’s Decision to Impose a Statutory Sanction

33. As set out in paragraph 1.10 of the Sanctions Procedures, the imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly¹⁰ or recklessly breached a relevant requirement.
34. In this case, Ofcom issued a preliminary view (“Preliminary View”) that DM Digital had seriously breached the Code and that Ofcom was minded to: impose a statutory sanction in the form of a substantial financial penalty; direct DM Digital to broadcast a statement of Ofcom’s findings in this sanctions case, on a date and in a form to be determined by Ofcom, and; to direct the Licensee not to repeat the programme. Ofcom sent a copy of the Preliminary View to DM Digital on 17 May 2013 at the same time giving DM Digital the opportunity to provide written and oral representations (“the Representations”) on the Preliminary View. DM Digital provided its written representations (“Written Representations”) to Ofcom on 10 June 2013. The Representations are summarised in paragraphs 36 to 44 below.

⁹ Section 295-C of Pakistan’s Criminal Code.

¹⁰ A repeated breach of a relevant requirement, would include for example: a repeat of the breach of the same requirement as had already been recorded; repetition of the same or similar conduct as that which earlier contravened a requirement; or multiple breaches of other requirements.

35. In reaching its final Decision on whether to impose a statutory sanction and if so, what type and level of sanction, Ofcom was not bound by the Preliminary View. Ofcom took account of all the evidence and representations on behalf of DM Digital, including the Representations on the Preliminary View, and has had regard to the Sanctions Procedures and to Ofcom's Penalty Guidelines in reaching its Decision in this sanctions case (see further below).

Licensee's representations

36. The Licensee accepted that the material broadcast breached Rule 3.1 but argued that any penalty imposed on the Licensee should reflect the following:

- the breach was not deliberate;
- the comments, which took place during a live broadcast, were made by an Islamic Pir known to the broadcaster and who had never expressed such views previously, and therefore his comments on this occasion could not have been foreseen;
- his comments did not include a direct or indirect call to action and therefore this "lessens the breach";
- the comments were not endorsed by the Licensee in anyway;
- the Islamic Pir has not and will never be asked to appear on DM Digital again;
- given the serious nature of his comments, the Licensee had taken "a robust approach" and reported the matter to the police;
- the Licensee said it took action to remedy the breach by broadcasting a programme the next day in which an apology was made and the comments were condemned;
- the comments were contained in one broadcast which will never be repeated by the Licensee;
- the Licensee has now tightened its compliance and dismissed the compliance staff responsible for the programme; and
- that according to the Licensee the imposition of a substantial financial penalty would cause the closure of the channel.

Background to the Code Breaches

37. The Licensee explained in its Written Representations that the Islamic Pir, who had made the comments found to have breached Rule 3.1, had featured on DM Digital on previous occasions "without incident" and he had been broadcasting on DM Digital for at least three years prior to the broadcast of the material. Therefore, the Licensee argued, it could not have "foreseen" that he would express the views, during the live programming, that resulted in the breach. Indeed, according to the Licensee, the individual was widely known in the UK to be a peace loving follower of Sufism and a leading member of that community. As such, he was not an extreme or radical Muslim. Indeed, he had spoken at a number of high profile events previously, including delivering various speeches at the Houses of Parliament.

38. In terms of its compliance procedures, as at 9 October 2011, the Licensee explained that its normal compliance procedure for broadcasts of programmes like *Rehmatul Lil Alameen* was for all scripts to be checked before the start of the broadcast to ensure compliance with the Code. However in this case, the Islamic Pir's comments were not in the script because during the course of the broadcast "he went off on a frolic on his own" and his comments "couldn't have been foreseen"..Therefore the comments could not have been checked or addressed prior to broadcast and the breach could not have been anticipated. Further, in terms of monitoring live material, the Licensee stated it had, at the time of the broadcast, a five second delay in place to ensure any problematic material could be stopped before it was played out. However, on this occasion the

compliance staff responsible for monitoring the live material failed to take any action as the comments were being broadcast. DM Digital said that the staff responsible were dismissed for this compliance failure.

39. The Licensee explained in its Written Representations that following the broadcast of the comments on 9 October 2011, it had taken “a robust approach to the views expressed and reported the matter to the police.” Further, the Licensee explained that it had since been notified by the police that there would be no further action taken with regard to the criminal allegation made. DM Digital stated this demonstrated how seriously it had taken the matter even if it was the case “that one of their staff would in fact be arrested for – and perhaps - charged with a criminal offence.”
40. Further, the Licensee explained during oral representations, that the day after the comments were made the Chief Executive and Chairman of DM Digital, Dr Malik, went on air “straightaway” to “condemn” the comments made by the Islamic Pir and dissociate the service from them. In addition, a week later, an Ahmadi presenter on DM Digital known as Mr Rana conducted a phone-in with members of the Ahmadi community and during that programme also dissociated DM Digital from the comments made by the Islamic Pir. Ofcom noted some disparity between this statement, made during oral representations, and those previously made to Ofcom by the Licensee. No references to these follow-up “retraction” programmes were previously made in either the Licensee’s Written Representations to Ofcom or during the investigation which led to the Finding and no recordings of these programmes were provided to Ofcom. During the investigation leading to the Finding, DM Digital referred only to “a text” being “put across the screen clarifying that DM Digital does not assist in providing or collecting support for this individual or his comments.”
41. Finally, the Licensee said in its Representations that it only recently moved into a modest profit and that the imposition of “a severe financial penalty would have the effect of revocation.” The Licensee provided several written references from various individuals submitted as part of its Written Representations in support of the DM Digital service and set out the important and unique role which it considers DM Digital plays in the community as an “interfaith” service, helping to foster understanding between faiths and supporting Muslim women and young Muslims.
42. DM Digital accepted that the breach of Rule 3.1 in this case was serious and apologised for the broadcast.

Improvements to compliance

43. The Licensee explained that since the breaches were recorded DM Digital had taken steps to “tighten” compliance in the following ways: the staff responsible for these breaches had been dismissed and replaced by a Head of Compliance with legal training and broadcasting experience and further new staff have been taken on and trained by the Chief Executive and Chairman of DM Digital, Dr Malik; multi-lingual staff have been employed within the “control room” so that there is knowledge of the range of languages and dialects broadcast by contributors; and the time delay on live broadcasts has been extended from five seconds to 10 seconds to enable more time for staff to respond to problematic live content. DM Digital argued that the “mistakes” that were made had been acknowledged and, as a result, compliance procedures had now been tightened.
44. The Licensee summarised its current compliance arrangements to underline how, in its opinion, they are now robust. In terms of live programming, Dr Malik, the general manager and the compliance manager review any scripts before broadcast to ensure that no broadcast content is likely to raise issues under the Code. Whilst the live

programme is being broadcast, the compliance manager will watch as the material is played out and take any necessary action to intervene or stop the broadcast if required. In terms of pre-recorded material, the Licensee stated that all material is viewed first by Dr Malik and then by at least three other members of staff, and if the programme raises issues with regard to the Code it will be rejected or edited to ensure it is suitable. Regular monthly meetings take place with compliance staff and presenters where Ofcom's Broadcast Bulletins are reviewed and regular training takes place.

Seriousness of breaches

45. Ofcom considered that the breach of Rule 3.1 was sufficiently serious to warrant the imposition of a statutory sanction for the reasons set out below.
46. Section 319(2)(b) of the Act requires that material likely to encourage or incite the commission of crime or to lead to disorder is not included in television and radio services (section 319(2)(b)). This requirement is reflected in Rule 3.1 of the Code. Any breach of this rule must be regarded as potentially serious because it necessarily involves the broadcast of material judged by Ofcom to be likely to encourage or incite the commission of crime or lead to disorder, and so potentially cause serious harm.
47. Ofcom may impose one or more of a range of sanctions for a breach of Rule 3.1 of the Code. Ofcom's enforcement powers include, as set out above, revocation of the licence under section 239 if we are satisfied that the breach of Rule 3.1 is such as to justify revocation. In considering the seriousness of the breach and whether it was such as to justify revocation of the licence, Ofcom has taken into account the following considerations.
48. Ofcom regards any breach of Rule 3.1 as a very serious matter. Ofcom is given a specific statutory duty to ensure broadcasters do not transmit material that is likely to encourage or incite crime or lead to disorder. Where such material is broadcast in contravention of this requirement, the Act recognises the potential for serious harm to be caused to society and that, where justified by the breach, this should require the regulator to take action to be able to remove a broadcaster's entitlement to hold a licence.
49. Looking at the context within which the statements were broadcast Ofcom considered the breach in this case was particularly serious. This was because the statements were delivered to a predominantly Muslim audience, in a religious programme¹¹, by a religious scholar, a person who holds a position of authority and respect within the Muslim community. The broadcasts were also available to view not just in the UK but in the Middle East and parts of Asia. Taken together, these factors would have given the comments extra weight and enabled the material to be broadcast, potentially, to a wide geographic area and significant numbers of viewers. This, and the fact that, in context, the scholar unambiguously stated that all Muslims had a duty to kill anyone who criticises or insults the Prophet Mohammed and apostates, made this breach all the more serious. This was further compounded by the fact that the Programme made no condemnation of any killing or violent action by individuals in response to a perceived insult to, or perceived blasphemy against, the Prophet Mohammed at the time of the material was broadcast.

¹¹ Section Four of the Code defines a religious programme as: "a programme which deals with matters of religion as the central subject, or as a significant part, of the programme".

50. Further, and as noted in Ofcom's breach Finding, the potential for these comments to be acted upon is demonstrated by (a) the various examples in recent years of violence against members of the Ahmadiyya community in Pakistan and the various killings that have taken place¹²; and (b) evidence of a number of very serious threats and attacks having been made in Western countries against individuals or entities perceived as insulting or making pejorative remarks about the Prophet Mohammed¹³. Ofcom did not agree with the Licensee's submissions that the comments of the Islamic Pir did not contain a direct or indirect call to action.
51. The fact the material came to be broadcast is of grave concern given the poor compliance history of the Licensee and these factors also increased the seriousness of the breach. In particular:
- the Licensee allowed the material in breach of Rule 3.1 to be broadcast uninterrupted and provided no evidence to Ofcom to show that it had adequate procedures or systems in place at the time for monitoring live content to ensure compliance with the Code or to take appropriate action when required;
 - the Licensee's compliance appears to have been based on the fact that the scholar's previous appearances on DM Digital had previously "given no cause for concern"; and
 - the fact that the senior management ought to be well aware from previous breach findings against the Licensee and financial penalties imposed on it in 2008 and 2010 (see paragraph 77 below) of the Licensee's obligations under the Code and the need for robust and effective compliance procedures.

Imposition of sanctions

52. As mentioned in paragraphs 21 to 27 above, Ofcom's powers to take action are set out in sections 236 to 239 of the Act insofar as relevant to the present case.
53. In view of the factors set out above, Ofcom considers that the breaches are sufficiently serious to warrant further regulatory action. The following paragraphs set out the enforcement action we have considered and the sanctions to be imposed.

Consideration of the imposition of sanctions other than a financial penalty

54. Given the seriousness of this case, Ofcom first considered whether the breach was such as to justify revocation of the licence under section 239 of the Act.

¹² See for example reports of various very serious incidents in April and May 2010:

- http://en.wikipedia.org/wiki/Persecution_of_Ahmadis#2011;
- <http://www.foreignpolicyjournal.com/2010/05/28/80-killed-in-pakistan-ahmadi-carnage/>; and
- <http://ahmadiyyatimes.blogspot.com/2011/06/murders-in-pakistan-should-concern.html>

¹³ See for example:

- the murder of the Dutch film director Theo Van Gogh in 2004 ([http://en.wikipedia.org/wiki/Theo_van_Gogh_\(film_director\)](http://en.wikipedia.org/wiki/Theo_van_Gogh_(film_director)));
- the case of cartoons published in Denmark in 2005 featuring the Prophet (http://en.wikipedia.org/wiki/Jyllands-Posten_Muhammad_cartoons_controversy); and
- the fire bomb attack on a magazine in Paris in November 2011 for publishing a satirical cartoon of the Prophet (<http://globetribune.info/2011/11/02/satirical-magazine-firebombed-in-paris-by-radical-muslims-video/>)

55. This is a matter of judgment for Ofcom. Revocation of a licence is the ultimate enforcement action available to Ofcom. Therefore, in considering whether it was appropriate to serve a notice under section 239(2), which has the effect of suspending the licence (and so depriving a licensee of its right to broadcast until Ofcom reaches a final decision on revocation), Ofcom must take account of all the relevant considerations. These include in this case:

- the words used in the content broadcast and the circumstances in which they were spoken (see paragraphs 28 to 32 above);
- previous licence breaches by DM Digital, and especially any previous occasions when material likely to incite or encourage crime has been broadcast (see paragraph 77 below);
- the explanation and response provided by DM Digital to Ofcom in response to this incident as set out in the Finding (see paragraphs 28 to 32);
- all the submissions put forward by the Licensee both in correspondence with Ofcom and in its Representations (see paragraphs 36 to 44); and
- the likelihood of further breaches.

56. In summary, Ofcom must ensure that, any decision that the breach is such as to merit revocation of the licence, is proportionate. A relevant factor for Ofcom to consider in this regard is whether any sanction short of revocation could ensure that DM Digital would comply with the terms of its licence.

57. Ofcom must also have regard to the balance to be given to competing rights under the ECHR. In particular, the right to freedom of thought, conscience and religion under Article 9 and the right to freedom of expression under Article 10 (see paragraphs 14 to 17 above), against the competing rights and the protections necessary in a democratic society for the protection of citizens, including Ofcom's statutory duty to ensure material likely to encourage crime or disorder is not included in television services.

58. As regards the right to freedom of thought and religion, as noted above, Article 9 primarily protects the sphere of personal beliefs and religious creeds and acts which are intimately linked to such beliefs or creeds. This Article specifically underlines that freedom to "manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety...or for the protection of the rights and freedoms of others." Ofcom notes that the comments of the Islamic scholar found in breach of the Code were concerned with religious convictions but included calls to action for Muslims to react in a violent manner to perceived criticisms or insults against the Prophet Mohammed and apostates, as well as praise for Pakistan's blasphemy law and the killing of the Punjab governor, Salmaan Taseer, by Malik Mumtaz Qadri. As noted above, the manifestation of any religious beliefs and convictions under Article 9 is a qualified right rather than an absolute one. In particular, Ofcom is under an express statutory obligation to ensure that material likely to encourage crime is not broadcast. Accordingly, any such right as may exist in relation to the Islamic scholar's remarks is limited by the requirements of Rule 3.1 of the Code.

59. Concerning Article 10 ECHR, as pointed out above, the rights of the broadcaster to impart information and ideas and of the audience to receive them are also subject to restrictions "prescribed in law...in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime..." Ofcom's statutory obligation is to

set standards to secure that material likely to encourage crime is not broadcast. Article 10 protects not only the substance of ideas or information expressed, but also the form in which they are conveyed. In some circumstances, this may include a polemical or aggressive tone. On the other hand, some types of expression, such as expressions of political support for terrorism, have been regarded by the courts as deserving of lesser (or no) protection against restrictions. On the facts of this case, Ofcom must therefore carefully balance the competing rights of the broadcaster and audience to freedom of expression against the duty to protect the public from material likely to encourage crime or disorder.

60. Ofcom notes that in this case, the Islamic Pir's comments were not merely polemical or aggressive; he made calls for, and supported acts of, violence. There was no attempt made by the broadcaster, at the time of the broadcast, to stop this material from being played out and nor was any attempt made during the programme to place the remarks in a context to make them potentially less harmful.¹⁴ The broadcasting of these remarks during a live broadcast, which was broadcast to a wide geographical area, therefore in Ofcom's view deserves a lower level of protection under Article 10 than for example the inclusion in a programme of comments about a controversial political issue within the context of a debate presenting differing views on that issue.
61. On the other hand, we note first that the remarks of the scholar were not broadcast deliberately by DM Digital. Second, they were contained in one programme, not several over a sustained period of time. Third, the comments were broadcast on a channel providing a variety of programming to a range of religious and ethnic communities. Ofcom therefore acknowledges that if this licence were revoked a number of viewers (and their right to receive the service) would be adversely affected by them being deprived of this service. Fourth, the broadcaster acknowledged its error and the potential seriousness of the comments by independently reporting this incident to the police and told Ofcom it had condemned the comments on air the following day and at the same time made clear that DM Digital disassociated itself from them; and, the broadcaster said it would not repeat this programme. On balance and based on the facts before Ofcom of this particular case at this time, we therefore consider that the rights of the broadcaster and audience to freedom of expression (i.e. freedom to impart and to receive information) may be disproportionately affected by a decision that the breach justified revocation of the licence under section 239, in circumstances where other sanctions may be sufficient to act as a deterrent against future breaches. Ofcom's consideration of those other sanctions is set out in paragraph 63 onwards below.
62. On balance, after taking into account all the relevant factors, it is Ofcom's decision that, although the contravention of the Code in this case is serious, it would not be proportionate to decide that the breach of Rule 3.1 by DM Digital is such as to justify revocation of the Licence under section 239.

Imposition of sanctions other than a financial penalty

63. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or a statement of Ofcom's findings (or both), if Ofcom is satisfied that the contravention can be appropriately remedied by such a direction. This may include a direction not to repeat the programme.

¹⁴ During its oral representations to Ofcom, the broadcaster said that the day after the broadcast, on 10 October 2011, a programme was transmitted in which the DM Digital service distanced itself from the Islamic Pir's comments. Ofcom noted however that DM Digital had not previously referred to this programme before making its Representations to Ofcom and nor did it provide a copy of this programme to the regulator.

64. Ofcom considers that on its own, a direction to broadcast a statement of Ofcom's findings in this case would not be a sufficient statutory sanction, given the seriousness of the breach in this case. In Ofcom's view, such a statement by itself would not act as an effective disincentive to discourage the Licensee from repeating similar breaches of the Code or other licensees from contravening the Code in a similar manner.
65. Ofcom considers that directing the Licensee to broadcast a statement of Ofcom's findings (as provided by Ofcom and at times stipulated by Ofcom) is an appropriate way to remedy the breaches. For a broadcaster to transmit material likely to encourage crime or lead to disorder is clearly wrong and potentially harmful. It is therefore appropriate for the broadcaster to transmit a statement of findings as a way publicly to: correct that wrong and potential harm; to bring the breaches, and Ofcom's concern and robust action in response to the breaches, to the attention of DM Digital's viewers; and, demonstrate that the complaint to Ofcom which drew Ofcom's attention to the issue of DM Digital broadcasting material encouraging crime has been fully and properly addressed.
66. Ofcom notes that the Licensee has already said it will not repeat the Programme. Nonetheless Ofcom considers that a direction not to repeat the Programme is necessary to ensure the Licensee puts robust procedures in place so that the broadcast is not repeated in error, and to help underline how unacceptable a programme with content of this type is on an Ofcom licensed service. It is Ofcom's view that, on its own, a direction not to repeat the Programme found in breach is not a sufficient statutory sanction, given the seriousness of the breaches in this case.
67. However, Ofcom considers that a direction to broadcast a statement of Ofcom's findings in combination with a direction not to repeat the Programme and a financial penalty should, together, act as an effective deterrent to discourage the Licensee from repeating the breach or other licensees from contravening the Code in a similar manner.

Imposition of a financial penalty

68. Under section 237 of the Act, the maximum level of financial penalty that can be imposed on the holder of a TLCS licence is £250,000 or five per cent of the licensee's qualifying revenue relating to its last complete accounting period falling within the period for which its licence has been in force, whichever is greater.
69. Qualifying revenue is calculated by adding together revenue gained from advertising, sponsorship and subscription. It does not include revenue gained from interactive services, such as premium rate phone calls.
70. The Penalty Guidelines state that: "Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement." In reaching its decision, Ofcom has taken full account of the need to ensure that any penalty acts as a deterrent and has also taken account of the specific factors set out at paragraph 4 of the Penalty Guidelines¹⁵.

¹⁵ See the Penalty Guidelines at: <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

Factors taken into account in determining the amount of a penalty

71. In considering the appropriate and proportionate amount of a financial penalty for the breach, Ofcom took account of relevant factors in accordance with the Penalty Guidelines, as set out below:

72. Deterrence

The Penalty Guidelines make clear that the “central objective of imposing a penalty is deterrence” and that “the amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement”.¹⁶ Ofcom regards any breach of Rule 3.1 as a very serious matter. Further, and for the reasons explained in paragraphs 45 to 51, Ofcom considered the breach in this case was particularly serious. Ofcom therefore considered that any financial penalty had to be substantial to reflect Ofcom’s very serious concerns and to ensure that the Licensee fully understands these concerns and the very serious nature of the Code breach recorded against it. Ofcom also considered that such a penalty was necessary to ensure the Licensee acts with immediate effect to make necessary improvements to its compliance processes to ensure compliance with the Code in future.

A substantial penalty would also act as a powerful and clear deterrent to other broadcasters and send a very clear message underlining the need to understand and respect the requirement at all times not to broadcast material likely to encourage or incite the commission of crime or to lead to disorder.

73. The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants

As the Finding made clear, Ofcom is conscious of various examples of violence against, and killings of, members of the Ahmadiyya community in Pakistan in recent years and very serious threats and attacks made in Western countries against individuals or entities perceived as insulting or making pejorative remarks about the Prophet Mohammed.

Ofcom has taken these factors into account in considering the potential for harm to be caused by the contravention and the extent of any potential harm. Ofcom also took into account the audience reach of the channel, which is received throughout the UK and around the world (in particular, in the Middle East and parts of Asia). Ofcom concluded that the broadcast material, which included the unambiguous calls to action of the Islamic Pir, was likely to encourage or incite the commission of crime or to lead to disorder. We consider that as a result of this broadcast, there was a risk of harm to members of the public who for example might choose to criticise or insult the Prophet Mohammed, or who follow certain traditions of religious belief, such as the Ahmadiyya community.

74. The duration of the contravention

Ofcom noted in the Finding that the recorded breach of Rule 3.1 was in relation to material broadcast on 9 October 2011. The material has not been broadcast further.

¹⁶ See Paragraph 3 of the Penalty Guidelines at: <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

75. Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention

We have no evidence to suggest that the Licensee made any financial gain from this breach of the Code.

76. Any steps taken for remedying the consequences of the contravention

Ofcom noted that the Licensee had independently reported to the police the comments made by the Islamic Pir in the Programme soon after it was broadcast.

The Licensee said during its oral representations, but not in any other representations made to Ofcom, that an apology was broadcast by the Chief Executive and Chairman of DM Digital (Dr Malik) the day after the Programme was broadcast to dissociate DM Digital from the comments.

In addition, Ofcom noted that since the broadcast of the Programme, the Licensee had sought to improve compliance by implementing the following measures:

- banning the Islamic Pir from broadcasting or being featured on the DM Digital service in the future;
- introducing a 10 second time delay to all live broadcasts to help ensure there is time to take appropriate action to stop potentially harmful material from being broadcast;
- dismissing the compliance staff in post on 9 October 2011 and replacing them with a better trained and more experienced compliance team; and
- introducing a set of procedures for the compliance of live material and pre-recorded material and ensuring that all staff is briefed on compliance matters on a regular basis.

77. Whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties)

There is a considerable history of contraventions by the holder of the licence for the DM Digital between 2008 and 2012; two of these breaches were so serious that they led to Ofcom imposing a statutory sanction. See below. The breaches concerned principally the Code but also related for example to other Ofcom codes, the BCAP Code, and conditions in the broadcaster's Ofcom licence.

Breaches where Ofcom imposed a statutory sanction:

Sanction against DM Digital Television Limited, DM Digital, 28 October 2008¹⁷: Sanction of £15,000 and a direction to broadcast a statement of Ofcom's findings for breaches of Rule 2.1, Rule 9.4, Rule 9.5, Rule 9.6, Rule 9.7 of the July 2005 version of the Code¹⁸. This case concerned a programme featuring Dr Professor Mohammed Jamil Jilu ("Dr

¹⁷ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/dmdigital.pdf> (published 28 October 2008).

¹⁸ See the relevant extracts of the July 2005 version of the Code at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/Broadcast-Code-2005.pdf>

Jamil”), a homeopath, who made potentially dangerous claims regarding the successful use of his homeopathic medicines to treat and cure serious conditions including cancer, diabetes and hepatitis. The programme was also used as a platform for promoting Dr Jamil’s homeopathic practice.

Sanction against DM Digital Television Limited, DM Digital, 20 July 2010¹⁹: Sanction of £17,500 and a direction to broadcast a statement of Ofcom’s findings for breaches of the CAP (Broadcast) TV Advertising Standards Code (“the BCAP Code”)²⁰. This case concerned the broadcast of an advertisement offering advice to individuals based on faith-based practices for personal problems which was likely to exploit vulnerable viewers. The advertisement caused financial harm of £1,150 to one viewer and potential harm to viewers in general.

Other breaches recorded by Ofcom also under consideration for sanction:

Breaches recorded on 8 May 2012 in Broadcast Bulletin 205:

- Breach of Code Rules 5.4 (programmes...must exclude all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy) and 5.5 (due impartiality) – POAF Conference, DM Digital, 25 November and 4 December 2011

Breaches recorded by Ofcom which were not considered for sanction:

Breaches recorded on 10 March 2008 in Broadcast Bulletin 104²¹:

-Breach of Code Rules: 1.14 (the most offensive language must not be broadcast before the watershed) and 1.16 (pre-watershed use of offensive language) – Yasmin, DM Digital, 15 October 2007.

Breaches recorded on 10 November 2008 in Broadcast Bulletin 121²²:

-Breach of Code Rule: 10.10 (Any use of premium rate numbers must comply with the Code of Practice issued by PhonepayPlus formerly) – Premium rate services promoted in programme content, DM Digital, various dates in 2007.

-Breach of Code Rules:10.2 (advertising and programming must be kept separate); 10.4 (undue prominence); 10.5 (product placement is prohibited); and breach of Rules on the Amount and Distribution of Advertising (“RADA”)²³: 1.2 (only 12 minutes of advertising per hour) – Good Morning Manchester, DM Digital, 11 and 12 February 2008.

¹⁹ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/dmdigitaltd.pdf> (published 20 July 2010).

²⁰ See relevant extracts of the BCAP Code at: <http://www.cap.org.uk/Advertising-Codes/Broadcast/BCAP-Code.aspx>

²¹ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb104/bb104.pdf>

²² See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb121/issue121.pdf>

²³ See: <http://stakeholders.ofcom.org.uk/consultations/rada/summary/> for relevant extracts of RADA.

Breaches recorded on 23 November 2009 in Broadcast Bulletin 146²⁴:

-Breach of Code Rule: 10.2 (advertising and programming must be kept separate); and
Breach of Ofcom's Code on the scheduling of television advertising ("COSTA")²⁵ Rule: 4
(only 12 minutes of advertising per hour) – Scrolled advertisement for Manchester
College of Higher Education and Media Technology, DM Digital, 19&20 August 2009.

Breach recorded on 7 December 2009 in Broadcast Bulletin 147²⁶:

-Breach of TLCS Licence Condition 11 (Retention and production of recordings) – Baba
Ji Online, DM Digital, 13 May 2009.

Breach recorded on 21 December 2009 in Broadcast Bulletin 148²⁷:

-Breach of Code Rule: 2.13 (flashing images) – Flashing images on programme content,
DM Digital, 22 September 2009.

Breach recorded on 8 February 2010 in Broadcast Bulletin 151²⁸:

-Breach of TLCS Licence Condition 12 (Provision of Information – revenue return).

Breach recorded on 10 May 2010 in Broadcast Bulletin 157²⁹:

-Breach of TLCS Licence Condition 11 (Retention and production of recordings) – Chai
Sitaroon Ki, DM Digital, 18 February 2010.

Breach recorded on 19 July 2010 in Broadcast Bulletin 162³⁰:

-Breach of Code Rule: 2.8 (astrology and life-changing advice) – Chai Sitaroon Ki, DM
Digital, 18 February 2010.

Breach recorded on 11 October 2010 in Broadcast Bulletin 167³¹:

-Breach of Code Rule: 5.5 (due impartiality) – Assan Na Kashmir, DM Digital, 20 July
2010.

Breaches recorded on 8 November 2010 in Broadcast Bulletin 169³²:

²⁴ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb146/Issue146.pdf>

²⁵ See: <http://stakeholders.ofcom.org.uk/binaries/consultations/rada08/statement/costa.pdf> for relevant extracts of COSTA

²⁶ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb147/Issue147.pdf>

²⁷ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb148/Issue148.pdf>

²⁸ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb151/Issue151.pdf>

²⁹ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb157/Issue157.pdf>

³⁰ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb162/issue162.pdf>

³¹ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb167/issue167.pdf>

³² See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb169/issue169.pdf>

- Breach of Code Rule: 9.13 (sponsorship messages must not contain advertisements); and
- Breach of TLCS Licence Condition 11 (Retention and production of recordings) – Islamabad Grill sponsorship of Zaika he Zaika, DM Digital, 10 July 2010.

Breaches recorded by the Advertising Standards Authority not leading to sanction:

Breaches published on 15 February 2012³³:

Breaches of BCAP³⁴ Rules: 1.2 (social responsibility); 3.1 (misleading advertising); 3.12 (exaggeration); and 11.3 (medicines, medical devices, treatments and health) – Advertisement for Islamic ‘Taweez’ lockets.

78. Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention

In Ofcom’s view, the Licensee failed to take appropriate steps to prevent the contravention. In particular, Ofcom noted that:

- The Licensee argued in mitigation that the contravention in this case was wholly “unforeseen” because (i) they could not have predicted that the Islamic Pir, known to the service and having never expounded such views previously, would have gone “off on a frolic of his own”; and (ii) his words were not scripted and therefore the customary compliance checks of the script before broadcast would not have made known his comments in advance. However, Ofcom is of the view that if DM Digital had in place robust compliance procedures and a competent and experienced compliance team in the first place, immediate action could have been taken to intervene to prevent the comments from being broadcast by halting the material being broadcast, or immediately broadcasting an apology or comments to mitigate the harm they might cause. In this case the Licensee provided no evidence to Ofcom to show that it had adequate procedures or systems in place for monitoring the live content at the time of this breach to ensure compliance with the Code, other than to indicate a five second delay mechanism which was not used in this case. In all the circumstances it was clear to Ofcom that timely and appropriate steps had not been taken by the Licensee to prevent the contravention;
- Further, Ofcom noted that the Licensee had advised the regulator following the two previous sanctions decisions against it recorded by Ofcom that it was taking action to remedy its compliance. In Ofcom’s view the Licensee’s failure to adequately address shortcomings in its compliance processes over time played a significant part in the circumstances which gave rise to the contravention; and
- The decision to include the religious scholar in the Programme was based on the fact that, according to the Licensee: the scholar had broadcast for “three years” on DM Digital and had not previously demonstrated such views. This individual was therefore, in effect, given his own platform on the Licensee’s television service to present his own views without any adequate procedure in place to

³³ http://www.asa.org.uk/ASA-action/Adjudications/2012/2/DM-Digital-Television-Ltd/SHP_ADJ_167626.aspx

³⁴ See: <http://www.cap.org.uk/Advertising-Codes/Broadcast/BCAP-Code.aspx> for relevant extracts of the BCAP Code.

monitor or intervene as necessary during his live broadcasts to prevent the broadcast of potentially harmful material from being transmitted. This, in our view, also indicated that the Licensee had failed to take appropriate steps to prevent the contravention in this case.

79. The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur

Ofcom acknowledges in this case that the breach was not intentional. However, Ofcom was of the view that the breach arose through negligence on the part of senior management. As detailed in paragraph 78 above, the breach in this case occurred through negligence because the Licensee had failed to ensure that presenters or contributors delivering live output were properly trained and briefed and that output was monitored by properly trained staff. With such monitoring of the live output by trained staff the contravention could have been avoided in this case.

The Licensee's apparently casual approach to compliance is of great concern to Ofcom, particularly in view of the previous compliance history of DM Digital. Ofcom considers that the lack of effective compliance procedures, including appropriate systems for monitoring live output to enable swift action to be taken, was seriously negligent. The senior management was well aware from previous breach findings recorded against the Licensee, and two statutory sanctions that Ofcom had previously imposed on it, of its obligations under the Code and the need for robust compliance procedures.

Whilst noting the Licensee's representations regarding the various steps it has taken to improve compliance since it became aware of Ofcom's investigation, Ofcom still has concerns that the Chairman of DM Digital, who as Chief Executive was also in charge of overall compliance and training at all times in the period running up to and at the time of the breach, continues to be undertaking this role now. This is because the Licensee has demonstrated a very weak compliance record overall throughout the extensive period that he has had overall responsibility for compliance (see paragraph 78 above), and not taken numerous opportunities to improve its compliance arrangements sufficiently.

80. Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it.

Timely steps were not taken to end the contravention which consisted of repeated breaches of Rule 3.1 from the very first minutes of the one hour programme. Despite the 5 second delay that the Licensee said it had in place, no steps were taken to cut short the live broadcast and it was evident that the Licensee did not become aware of the contravention until after the programme had been broadcast in full. It was not until the following day that, according to the Licensee, it condemned the statements on air and disassociated itself from them. The Licensee also told Ofcom that it would not repeat the programme and that it had reported the incident to the police. None of these steps, however, can be considered as timely steps to end the contravention itself.

81. The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body.

The Licensee explained its current financial situation and the difficulties posed by the current economic climate which it said were threatening the future of the service. The Licensee provided copies of its recent accounts to support these representations and urged Ofcom not to impose a substantial financial penalty, saying it would lead to the

closure of the service. The Licensee also explained that it was a small operation, employing 25 staff, including part-time staff and freelancers. Taking account of the Licensee's representations about its size and financial situation Ofcom considered whether the level of penalty was proportionate in all the circumstances.

Ofcom recognised that the penalty must be proportionate taking into account the Licensee's rights under Articles 9 and 10 of the Convention. If any financial penalty was to be so high that its effect would be to close a service down, then it might be a disproportionate interference with the Licensee's and the audience's right to freedom of expression in particular and exceed the purposes of imposing a penalty. Ofcom therefore took this point into account and carefully weighed it in reaching its decision on the proportionality of the financial penalty.

As noted above, the "central objective of imposing a penalty is deterrence". The breach recorded in this case was extremely serious and arose from what, in Ofcom's view, was serious negligence of the senior management of the broadcaster. Ofcom regards any breach of Rule 3.1, as demonstrated in this case, as a very serious matter. Ofcom is given a specific statutory duty to ensure broadcasters do not transmit material that is likely to encourage or incite crime or lead to disorder. Where such material is broadcast in contravention of this requirement, the Act recognises the potential for serious harm to be caused and that, where justified by the breach, this should require the regulator to take action to be able to remove a broadcaster's entitlement to hold a licence. Ofcom considered this to be a genuinely unprecedented case on account of the nature and the seriousness of the breach as discussed in paragraphs 45 to 51.

For the reasons set out above (see paragraphs 54 to 62) Ofcom did not consider that revocation was appropriate in this case. However, as explained in paragraph 72, Ofcom considered that any penalty had to be substantial to reflect the very serious concerns which Ofcom has set out in this Decision, and act as a powerful and clear deterrent to other broadcasters. Ofcom carefully assessed all the evidence provided by the Licensee about its size and current financial situation, including the Licensee's accounts, the Licensee's Representations and the Licensee's responses at the hearing to Ofcom's questions about sources of funding which had not been apparent before the hearing. Having weighed all these factors with the utmost care, Ofcom considered that a penalty of £85,000 would be proportionate taking into account all the relevant circumstances as set out and discussed in this Decision.

Relevant precedents set by previous cases

82. In accordance with Ofcom's Penalty Guidelines, published on 13 June 2011, Ofcom will have regard to any relevant precedents set by previous cases in determining a penalty but may depart from them depending on the facts and context of each case.
83. In this instance, there is one direct precedent in terms of a financial sanction for a contravention of Rule 3.1. The sanction against the Community Radio Licensee, Radio Asian Fever Community Interest Company was the first occasion Ofcom considered a breach of Rule 3.1 for a sanction.

23 November 2012, Radio Asian Fever Community Interest Company³⁵ - Sanction of £4,000 and a direction to broadcast a statement of Ofcom's findings for breaches of

³⁵ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/radio-asian-fever.pdf> (published 23 November 2012).

Rules 2.3, 2.4, 3.1 and 4.1. This case concerned two editions of the *Sister Ruby Ramadan Special 2011*, broadcast on 17 August 2011 at noon and 18 August 2011 at 11.00. The material was broadcast in Urdu. In the first programme the presenter was highly critical of homosexuality in the context of discussing aspects of the Qur'an. Ofcom concluded that this material was likely to encourage violent behaviour towards homosexual people and was therefore in breach of Rule 3.1. As it could also reasonably be considered as material likely to encourage others to copy such violent and dangerous behaviour, it was also considered a breach of Rule 2.4³⁶. Ofcom also concluded that this material was offensive and the broadcaster had failed to apply generally accepted standards which is a breach of Rule 2.3 and that as a religious programme it had failed to exercise the proper degree of responsibility and this was a breach of Rule 4.1. The second programme contained various offensive remarks critical of marriages between Muslims and those of other faiths, which were found in breach of Rules 2.3 and 4.1.

Ofcom notes significant differences between the Radio Asian Fever sanctions case and the present one. For example, Radio Asian Fever was a community radio station broadcasting only to a restricted part of the city of Leeds, had only a very small potential audience, and the broadcast comments in that case (although judged by Ofcom to breach Rule 3.1 and to be serious and clearly completely unacceptable) were very brief and did not contain such unambiguous calls to action as in the current case against DM Digital.

84. In addition there was the following fairly recent sanction case relating to breaches of Rule 2.4, which is a rule that also deals with the issue of incitement in programming (see below):

85. **8 May 2012, Dama (Liverpool) Limited (Aden Live)**³⁷ – Sanction of £10,000 and a direction to broadcast a statement of Ofcom's findings, for breaches of Rule 2.4, 5.4, 5.11 and 5.12. This case concerned various programmes broadcast on Aden Live, a service broadcasts predominantly to a South Yemeni audience. Ofcom concluded that, in relation to Rule 2.4, given that many of Aden Live's audience would have been likely to be: in support of the secession of South Yemen from the Republic of Yemen; and/or in support of the Southern Movement and oppose the Government of Yemen, material broadcast by Aden Live could reasonably be considered as material likely to encourage others to copy violent or dangerous behaviour.

86. Ofcom is satisfied that the level of penalty proposed in this case and combination of sanctions is appropriate taking due account of the factors outlined in the Penalty Guidelines and the seriousness of the breach. As set out in paragraphs 54 to 62 above, Ofcom has considered carefully whether the breach justifies revocation of the licence under section 239 of the Act. On balance, and for the reasons given in those paragraphs, Ofcom considers in this case that the breach is not such as to justify revocation of the licence.

Cooperation

87. In accordance with the Penalty Guidelines, Ofcom may increase the penalty where a licensee has failed to cooperate with Ofcom's investigation.

³⁶ Rule 2.4 states: "Programmes must not include material (whether in individual programmes or in programmes taken together) which, taking into account the context, condones or glamorises violent, dangerous or seriously antisocial behaviour and is likely to encourage others to copy such behaviour".

³⁷ http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/Aden_Live_sanctions_decisio1.pdf (published 8 May 2012).

88. In Ofcom's view, the Licensee has, in general, been cooperative. For example, it has: provided full representations in response to Ofcom's formal requests for comments under the Code relating to the Programme; it informed Ofcom that it had referred the matter to the police; and it has expressed a willingness to take steps to remedy its failure to apply Section Three. Ofcom does not therefore consider it appropriate to increase the penalty on account of a failure to cooperate in this case.

Conclusion

89. Any financial penalty Ofcom imposes on the Licensee must be appropriate and proportionate to the contravention in respect of which it is imposed. Ofcom's central objective in setting a penalty is deterrence both for the Licensee and other broadcasters. An appropriate penalty would be one that secures this objective (doing so in a proportionate way).

90. As regards the weighting of the factors considered above, it is Ofcom's view that the following factors are of particular importance in the circumstances of this case, and in consideration of the level of the penalty:

Factors which serve to increase the penalty

- (a) the degree of potential harm, in particular taking account of the nature of the breach, which included the unambiguous calls to action of the Islamic Pir during a live broadcast, which were likely to encourage or incite the commission of crime or to lead to disorder and the audience reach of the channel (see paragraph 73);
- (b) the considerable previous history of code contraventions by the Licensee, including the imposition by Ofcom of two statutory sanctions (see paragraph 77);
- (c) the Licensee's failure to adequately address shortcomings in its compliance processes over time which played a significant part in the circumstances giving rise to the breach (see paragraph 78);
- (d) the fact that the breach arose through negligence on the part of senior management because of their failure to ensure that presenters or contributors delivering live output were properly trained and briefed and that live output was monitored by properly trained staff who could take action to withdraw material if necessary (see paragraph 79); and
- (e) the failure of the Licensee to take timely and effective steps to end the contravention, which consisted of repeated breaches of Rule 3.1 from the very first minutes of the one hour programme (see paragraph 80).

Factors which serve to reduce the penalty

- (a) the contravention occurred in a single programme that was not repeated (see paragraph 74);
- (b) the steps taken by the Licensee to remedy the consequences of the breach, including independently reporting the comments to the police soon after the broadcast and broadcasting an apology the day after the programme (see paragraph 76); and
- (c) the Licensee has cooperated with Ofcom during the sanctions process (see paragraph 88).

91. Having regard to all the factors referred to in this Decision and all the Representations from the Licensee, Ofcom's decision was that an appropriate and proportionate sanction would be a financial penalty of **£85,000**.

92. In addition, Ofcom considers that the Licensee should broadcast a statement of Ofcom's findings in this case, on a date and in a form to be determined by Ofcom; and that the Licensee should be directed not to repeat the programme.

93. Ofcom is concerned by the very weak compliance record of the Licensee and expects the Licensee to take immediate and effective steps now to redress this position. In addition to the statutory sanctions imposed above, Ofcom puts DM Digital on notice as follows. Ofcom will visit the Licensee at its premises to agree how to improve its understanding of, and compliance with, all applicable legal and regulatory requirements. Ofcom will review the Licensee's compliance arrangements periodically as appropriate and necessary to ensure they are fit for purpose and the Licensee's content will also be monitored for a period to ensure it remains compliant with the Code.

5 July 2013