

**Sanction: Decision by Ofcom**  
To be imposed on Square 1 Management Limited

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For the broadcast of three pieces of psychic advertising content between 6 May 2012 and 20 June 2012.

**Consideration of sanction against:**

**Square 1 Management Limited (“Square 1” or “the Licensee”)** in respect of its service Big Deal (DTPS-057) broadcast on Freeview Channel 32.

**For:**

Breaches of the UK Code of Broadcast Advertising (“the BCAP Code”) in respect of:

Rule 15.5.2: “Advertisements for personalised and live services that rely on belief in astrology, horoscopes, tarot, and derivative practices are acceptable only on channels that are licensed for the purpose of the promotion of such services and are appropriately labelled: both the advertisement and the product or service itself must state the product or service is for entertainment purposes only.”

Rule 15.5.3: “Advertising permitted under Rule 15.5 may not:

- Make claims for efficacy or accuracy;
- Predict negative experiences or specific events;
- Offer life-changing advice directed at individuals – including advice related to health (including pregnancy) or financial situation;
- Appeal particularly to children;
- Encourage excessive use.”

**On:**

Big Deal, 6 May 2012, 23:21  
Big Deal, 2 June 2012, 23:00 to 23:15  
Big Deal, 20 June 2012, 22:30 to 22:45

**Decision:**

To impose a financial penalty (payable to HM Paymaster General) of **£10,000**.

## Executive Summary

1. The service Big Deal<sup>1</sup> is broadcast on the Digital Terrestrial Platform Freeview on Channel 32 and is owned and operated by Square 1, the Licensee.
2. On 6 May 2012 at 23:21, 2 June at 23:00 to 23:15 and 20 June 2012 at 22:30 to 22:45, Big Deal broadcast a live simulcast of advertising content provided by another Ofcom licensee, Majestic TV Limited (“Majestic TV”) called *Psychic Today* (on Sky Channel 886). This content is classified as advertising and offers psychic readings to callers. It consists of promotions for premium rate telephone services (“PRS”), both voice and text, by which viewers can obtain psychic readings, and it provides a facility for viewers to pay for these by credit card. Callers can select to be connected to a psychic off air, or to the presenter in the studio – in which case the reading is broadcast live, subject to the psychic’s availability.
3. Peripatos Limited (“Peripatos”) (a third party entity) deals with compliance issues in relation to the *Psychic Today* content output on behalf of the Licensee.
4. On 1 September 2010 new Ofcom rules came into force with the effect that channels and content predicated on the promotion of PRS (“participation television” or “PTV”) from then on were treated as advertising and subject to the BCAP Code. At the same time, the revised BCAP Code allowed PRS-based live and personalised psychic services to be broadcast on channels licensed for that purpose (previously the BCAP Code had prohibited such services).
5. In December 2011, Ofcom published guidance<sup>2</sup> to broadcasters in respect of psychic television services predicated on PRS (“the Guidance”). The Guidance states that such services must not contain explicit and implicit claims of efficacy or accuracy. Additionally, it provides that broadcasters should not solely rely on an onscreen message stating the psychic material is for entertainment purposes but that this principle should be reflected in the content as a whole.
6. In the findings published on 18 February 2013 in Broadcast Bulletin 224<sup>3</sup> (“the Findings”), Ofcom found that three pieces of psychic advertising content broadcast on Big Deal on 6 May 2012, 2 June 2012 and 20 June 2012 breached BCAP Rules 15.5.3 and 15.5.2.<sup>4</sup>

### All three pieces of advertising content – breach of BCAP Rule 15.5.3

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<sup>1</sup> The name of this service was changed to to ‘Movie Mix’ on 20 November 2012.

<sup>2</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/psychic-tv-guidance.pdf> (published December 2011).

<sup>3</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb224/obb224.pdf> (published 18 February 2013).

<sup>4</sup> This advertising content was also simultaneously broadcast on three other services: *Psychic Today*, *Sumo TV* and *Fitness TV*. *Psychic Today* is broadcast on the Sky Digital Satellite platform (on Sky Channel 886) and is owned and operated by the licensee Majestic TV Limited. *Sumo TV* broadcasts on the Sky digital satellite platform (on Sky Channel 198), and the licence for this service is held by Sumo TV Limited. *Fitness TV* broadcasts on the Sky digital satellite platform (on Sky Channel 282), and the licence for this service is held by TV Worx Limited. In the Findings Ofcom explained that it intended to consider sanctions only against Square 1 as regards Big Deal and Majestic TV concerning *Psychic Today* content. As regards Majestic TV, see the Sanction Decision available at <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/majestic-tv.pdf>.

7. See <http://www.cap.org.uk/Advertising-Codes/Broadcast-HTML.aspx> for relevant extracts in full of Section 15 of the BCAP Code.
8. Rule 15.5.3 states among other things that: “Advertising permitted under Rule 15.5 may not:
  - Make claims for efficacy or accuracy...”
9. Ofcom decided in the Findings that all three broadcast pieces contained explicit and/or implicit claims of efficacy and accuracy and were therefore in breach of BCAP Rule 15.5.3. In particular:
  - The broadcast on 6 May 2012 on Big Deal included an onscreen graphic which stated that a particular psychic (“Mollie”) could give “*accurate and precise*” readings.
  - The broadcast on 2 June 2012 on Big Deal included a psychic who referred to a previous reading given many years earlier. By referring to that reading she purported to have correctly predicted a number of events that had since occurred. The psychic also referred to evidence to confirm that her predictions had come true.
  - During the broadcast on 20 June 2012 on Big Deal, the host and psychic referred to the psychic’s direct involvement with various police investigations, including the investigation into the abduction and murder of Milly Dowler. To suggest on air through various remarks that UK police forces had employed the psychic in this way was meant to show that the psychic could provide reliable and substantiated readings as demonstrated by her experience of working closely with various UK police forces to help them solve ‘cold cases’.

All three pieces of advertising content – breach of BCAP Rule 15.5.2

10. BCAP Rule 15.5.2 states: “Advertisements for personalised and live services that rely on belief in astrology, horoscopes, tarot and derivative practices are acceptable only on channels that are licensed for the purpose of the promotion of such services and are appropriately labelled: both the advertisement and the product or service itself must state the product or service is for entertainment purposes only”.
11. Ofcom decided in the Findings that all three broadcast pieces did not make clear that the advertising content was for entertainment purposes only; they were therefore in breach of BCAP Rule 15.5.2.
12. In each case, Ofcom examined 30 minutes of material<sup>5</sup> broadcast and found that it did not contain any explicit reference (either verbally or in on screen text) to the service being for entertainment purposes only. Nor did the PRS-based psychic content itself reflect the principle that the service must be for entertainment purposes only.
13. In view of the fact that Ofcom had previously found Big Deal in breach of the BCAP Rules and there is a risk of consumer harm in cases such as these, Ofcom considered that the broadcast of this material raised serious compliance issues. Therefore, when Ofcom recorded the breaches in Broadcast Bulletin 224 against Square 1, Ofcom put the Licensee on notice that Ofcom would consider the imposition of a statutory sanction.

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<sup>5</sup> The content found in breach of BCAP Rules 15.5.2 and 15.5.3 in each case occurred within the 30-minute segments examined by Ofcom.

### **Summary of Ofcom's Sanction Decision**

14. Ofcom considered that the breaches as set out in the Findings were sufficiently serious and repeated as to warrant the imposition of a sanction on Square 1.
15. In accordance with Ofcom's Procedures for the consideration of statutory sanctions in breaches of broadcast licences<sup>6</sup> ("the Sanctions Procedures") and having considered all evidence and representations made to it by the Licensee, Ofcom decided, for the reasons set out in paragraphs 58 to 68 below, that it would be appropriate to impose a financial penalty.
16. Having regard to Ofcom's Penalty Guidelines<sup>7</sup>, Ofcom decided that it was appropriate and proportionate in the circumstances to impose a financial penalty of £10,000 (payable to HM Paymaster General).

### **Legal Framework**

#### **General**

17. 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)).
18. Ofcom has a specific duty under section 319 of 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 set out in section 319(2). One of those objectives is that "the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented" (section 319(2)(h)).
19. Ofcom is also under a duty created by section 319(7) of the Act to "take account of such of the international obligations of the United Kingdom as the Secretary of State may notify to them for the purposes of this section." Article 19 of the Audiovisual Media Services Directive<sup>8</sup> requires, among other things, that "television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content."
20. In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, 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)).

#### **Human Rights Act 1998**

21. 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").

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<sup>6</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/june2011/statutory-sanctions.pdf>.

<sup>7</sup> <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>.

<sup>8</sup> Directive 2010/13/EU.

22. 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" (Article 10(1) of the Convention). 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).
23. Ofcom must exercise its duties 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.

### **UK Code of Broadcast Advertising**

24. Standards set by Ofcom in accordance with section 319(2)(h) of the Act relating to advertising are set out in the BCAP Code. The BCAP Code is drawn up and published by the Broadcast Committee of Advertising Practice Limited ("BCAP") pursuant to contracting out arrangements entered into between Ofcom and BCAP<sup>9</sup>.
25. However, Ofcom remains responsible for the regulation of long-form PTV advertising. This class of advertising content includes premium rate telecommunications-based psychic, chat and advice services.
26. As mentioned above, Ofcom has published Guidance to assist licensees who carry PRS-based psychic material to understand the likely interpretation of the BCAP Code that Ofcom will apply. The Guidance includes references for example to the type of material that should not be broadcast during such advertising content.
27. The relevant BCAP Code rules in this case are set out in full on the first page of this Decision.

### **Remedial action and penalties**

28. Under section 325 of the Act, every programme service licensed 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 digital terrestrial television service ("DTPS") licence, Condition 6 of the licence requires the licensee to ensure that the provisions of any Code made under section 319 are complied with. Where Ofcom has identified that a condition of a DTPS licence has been contravened, it may impose sanctions as set out below.
29. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence<sup>10</sup> to broadcast a correction or a statement of findings (or both) in the licensed service, in such form and at such time or times as determined by Ofcom, or not to repeat a programme on contravention of a licence condition.

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<sup>9</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/reg\\_broad\\_ad/statement/mou.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/mou.pdf) (May 2004).

<sup>10</sup> The provisions of the Act set out in this section apply to TLCS licences. There are equivalent provisions for DTPS licences contained in section 23 of the Broadcasting Act 1996.

30. Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence of a maximum of whichever is the greater of £250,000 and five per cent of its qualifying revenue for the licence holder's last accounting period on contravention of a licence condition.
31. 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 licence or a direction thereunder.

### **Background – the Findings**

32. In the Findings, Ofcom decided that three pieces of advertising content broadcast on 6 May 2012, 2 June 2012 and 20 June 2012 by the Licensee on Big Deal breached BCAP Rules 15.5.2 and 15.5.3.
33. In each case Ofcom first considered whether the service had contained claims of efficacy and accuracy (as prohibited by Rule 15.5.3) and then assessed whether it had been “appropriately labelled” to make clear that it was intended for entertainment purposes only (as required by Rule 15.5.2).

#### **BCAP Rule 15.5.3**

##### *6 May 2012 broadcast*

34. The text of onscreen advertising content promoting psychic readings with “Mollie” (to be contacted by means of the PRS number shown on screen at the same time) included the descriptions of her readings as “very accurate” and “precise”. The use of these words to describe this psychic's abilities would, in Ofcom's view, have been widely and reasonably interpreted as a claim of accuracy and efficacy.
35. Further, despite an assurance given to Ofcom on 25 October 2012 in response to Ofcom's preliminary view concerning the breaches of the BCAP Code (the “Standards Preliminary View”) that “[a]ll advertising [for the Psychic Today output<sup>11</sup>] has been reviewed to ensure that there is no repetition” of this compliance issue, Ofcom examined material broadcast on Psychic Today on 31 October 2012 at 13:53 and 7 December 2012 at 16:22 and noted similar problematic content was subsequently broadcast. Ofcom was particularly concerned that Peripatos, the third party carrying out compliance work on the Licensee's behalf did not appear to have carried out a thorough compliance investigation before giving Ofcom the above assurances.

##### *2 June 2012 broadcast*

36. During this broadcast the psychic referred to a previous reading she claimed to have given many years earlier to a friend, i.e. that the friend would meet and become “quite close friends” “for many years” with a very famous pop star, Michael Jackson, stay at his house, write two books about him, and that the friendship would end suddenly for some reason. By referring to that reading the psychic purported to have correctly predicted a number of events that had since occurred, and referred to her friend producing evidence (such as photographs of the friend with Michael Jackson in private locations like his recording studio) to confirm that her predictions had come true. These remarks by the psychic would, in Ofcom's view, have been widely and reasonably interpreted as an implied claim of accuracy and efficacy for her predictions.

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<sup>11</sup> Given that the content broadcast live on the Psychic Today service was simulcast at various times of the day on the Big Deal service, Ofcom considers that Big Deal would have also broadcast the same problematic content.

37. Further, Ofcom had made clear in a previous finding relating to another licensee that references in PTV psychic advertising content to previous readings may constitute an implied claim of accuracy or efficacy for current readings<sup>12</sup>. Ofcom considered that these comments made by the psychic in advertising content clearly implied her predictions were accurate and efficacious.

*20 June 2012 broadcast*

38. Both the host and the psychic (Crystal) referred to Crystal's direct involvement with various police investigations, including the investigation into the abduction and murder of Milly Dowler.
39. In particular Ofcom noted the following various references made by the host: "*You actually use your remote viewing professionally, for, um, the Police*" and "[T]hey [the police] *actually, um, employ you [Crystal] now on several different cases that have gone cold don't they?*" Crystal responded: "*One of the cases that's actually um, signed, sealed and delivered and got the seal on it. Um. Was the um, oh crikey, uh the Milly Dowler case...I was the one that dealt with that one. Yeah.*" The host later added: "*So Crystal works very closely with uh, with several police constabularies, don't you know and what they actually do is when a case has gone cold, when they have no where to look to turn to find out information, they actually consult psychics and they consult Crystal. She has worked on many, many different things; she's remote viewed lots of different cases.*"
40. In Ofcom's view the remarks made by the host and Crystal implied in summary that the psychic had been employed by various UK police forces to assist them to solve 'cold' cases, including the Milly Dowler case. The investigation of all unsolved criminal cases by the police, and especially murder cases, is a very serious matter. The clear implication of these comments was that various UK police forces had employed Crystal to assist them and that the police would only employ Crystal if they believed that the information she might provide as a psychic would be accurate and efficacious. To suggest on air through various remarks that UK police forces had employed Crystal in this way constituted making claims of accuracy and efficacy for the psychic's predictions.
41. Ofcom considered that this material meant to show that the psychic could provide reliable and substantiated readings as demonstrated by her experience of working closely with various UK police forces to help them solve 'cold' cases.

BCAP Rule 15.5.2

42. Ofcom then considered the material broadcast by Big Deal on all three dates against the requirements of Rule 15.5.2. As required by Rule 15.5.2, Ofcom noted that the channel was licensed for the promotion of psychic services. However, Rule 15.5.2 goes on to state that "the advertisement and the product or service itself must state that the product or service is for entertainment purposes only".
43. In each case Ofcom examined a 30 minute segment of the advertising content. In all three instances Ofcom found no explicit reference, either verbally or in onscreen text, to the service being for entertainment purposes only. Further, the content, taken in context, did not suggest that it was for entertainment purposes. Previous published findings regarding Rule 15.5.2 and the Guidance clearly state that, for the avoidance of doubt, it should be noted that the audiovisual output taken as a whole should reflect the

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<sup>12</sup> *Good Morning Psychic*, Psychic Line, 12 April 2012:  
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb212/>.

principle that the service is for entertainment purposes only in addition to the advertisement being appropriately labelled.

44. Ofcom set out in the Findings that the contraventions of BCAP Rules 15.5.2 and 15.5.3 in these cases by Square 1 were particularly serious and repeated, and that they therefore warranted consideration of a statutory sanction.

#### **Ofcom's decision to impose a statutory sanction**

45. As set out above, Ofcom's powers to impose a sanction are contained in sections 236 to 238 of the Act insofar as relevant to the present case.
46. In this case, Ofcom issued a preliminary view (the "Sanctions Preliminary View") that Ofcom was minded to impose a statutory sanction in the form of a financial penalty. Ofcom sent the Sanctions Preliminary View to the Licensee on 4 April 2013, giving the Licensee an opportunity to provide written and oral representations in response. The Licensee provided written representations to Ofcom on 25 April 2013 (the "Representations") which are summarised below. The Licensee declined the opportunity to provide oral representations.
47. 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 Sanctions Preliminary View. Ofcom took account of all the evidence and the Licensee's Representations in response to the Sanctions Preliminary View in reaching its Decision, and also had regard to the Sanctions Procedures and Ofcom's Penalty Guidelines. Ofcom also considered that it was appropriate to note the written and oral representations made by Majestic TV, the content provider, concerning the breaches of the BCAP Code and the proposed sanctions, as detailed in the Sanctions Decision against Majestic TV<sup>13</sup>.

#### **Licensee's Representations**

48. Square 1 stated briefly that "it would be fair and reasonable that Ofcom should give all due recognition to the fact that the content was produced by a third party and that it has now been removed from scheduling and is no longer being aired on Big Deal".

#### **Imposition of sanctions**

49. Ofcom's powers to impose a sanction are set out in sections 236 to 238 of the Act insofar as relevant to the present case.
50. In view of the factors set out in paragraphs 58 to 68 below, Ofcom considered that the breaches were sufficiently serious to warrant the imposition of a statutory sanction. The following paragraphs set out the enforcement action we have considered and the sanctions to be imposed in this case.

#### **Consideration of the imposition of sanctions other than a financial penalty**

51. Ofcom has the power to direct the holder of a TLCS licence<sup>14</sup> to broadcast a correction or a statement of Ofcom's findings (or both) in the licensed service, in such form and at

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<sup>13</sup> Available at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/majestic-tv.pdf> which includes a summary of Majestic TV's written and oral representations in response to Ofcom's sanctions preliminary view sent to Majestic TV, and Ofcom's views on Majestic's representations.

<sup>14</sup> This also applies to DTSPS licences – see footnote 10 above.

such time or times as determined by Ofcom, or not to repeat a programme (or advertisement) which was in contravention of a licence condition.

52. In this particular case, it is Ofcom's view that a direction not to repeat the advertising content would not be an appropriate sanction in the circumstances. This is because the advertising content was broadcast live, and the psychic readings were personal and specific to the relevant callers; the Licensee was simulcasting the service; and the service recently changed its name and editorial content and no longer broadcasts Psychic Today advertising content.
53. Similarly, Ofcom does not believe that a direction to broadcast a statement of Ofcom's findings is appropriate. In particular, this is because the service recently changed its name and editorial content and no longer broadcasts Psychic Today advertising content. Consequently, in broadcasting a statement, the contravention by the Licensee of the BCAP Code (and the relevant licence condition) would not be appropriately remedied in that a range of viewers of PRS-based advertising content would be informed that a breach has taken place.
54. However, Ofcom does consider that, for the reasons set out in paragraph 58 and following below, the breaches were sufficiently serious and repeated to warrant the imposition of a financial penalty. In Ofcom's view, this would act as an effective deterrent to discourage the Licensee, if relevant, and other licensees, from breaching the BCAP Code in a similar manner in the future.
55. In light of the above, and taking into account the broadcaster's right to freedom of expression and the information currently available, Ofcom does not consider that it would be necessary or proportionate to revoke the Licence as an appropriate statutory sanction in respect of the current breaches under consideration.

### **Imposition of a financial penalty**

56. Under section 237 of the Act, the maximum level of financial penalty that can be imposed on the holder of a TLCS licence in respect of each breach of a licence<sup>15</sup> is a maximum of £250,000 or five per cent (5%) of the Licensee's qualifying revenue relating to its last complete accounting period, falling within the period for which the licence has been in force ("the relevant period"), whichever is greater.
57. Ofcom's 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 Guidelines.

### **Seriousness and repeated nature of breaches**

58. 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

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<sup>15</sup> This also applies to DTSPS licences – see footnote 10 above.

sanction if it considers that a broadcaster has seriously, deliberately, repeatedly<sup>16</sup>, or recklessly breached a relevant requirement.

59. Ofcom considers that the breaches of BCAP Code Rules 15.5.2 and 15.5.3 in this case were sufficiently serious and repeated to warrant the imposition of a statutory sanction, for the following reasons.
60. First, in Ofcom's view, the breaches by Square 1 raise significant issues of consumer protection. These issues are prevalent in this case because they concern the protection of potentially vulnerable viewers who might believe that paying for a PRS contact with a psychic via this service will provide them with accurate information about the future or influence them in making life-changing decisions. The BCAP rules seek to ensure that these practices are not presented, whether expressly or by implication, as in any way dependable or based on any reliable evidence. As Ofcom found that the material in each case featured an implied claim of efficacy and accuracy in breach of Rule 15.5.3, and there was a failure to label the advertising content as being for entertainment purposes only in breach of Rule 15.5.2, this means that potentially vulnerable viewers were not protected in these instances and potentially exposed to the risk of financial harm (i.e. the cost of the PRS calls).
61. In this context, it is relevant to note that it is appropriate and reasonable to construe the Rule and Guidance to include both express and implied claims for efficacy and accuracy, for the following principal reasons:
- The overarching principle of the regulation of advertising is that advertisements should not mislead or cause harm, especially to the vulnerable (see Section 1 of the BCAP Code). It seems clear that viewers, in particular vulnerable viewers, can be misled merely by implication, taking account of the context in which a claim is made.<sup>17</sup> This is also supported by Section 3 of the BCAP Code which, in requiring that advertisements must not mislead consumers, states among other things that:

“3.2 Advertisements must not mislead consumers by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.

Material information is information that consumers need in context to make informed decisions about whether or how to buy a product or service. Whether the omission or presentation of material information is likely to mislead consumers depends on the context, the medium and, if the medium of the advertisement is constrained by time or space, the measures that the advertiser takes to make that information available to consumers by other means”.
  - Broadcasters must ensure that advertisements they transmit comply with both the spirit and the letter of the Code (see Section 1 of the BCAP Code); as noted above, the spirit of the Code is to avoid misleading or causing harm to viewers, and thus the rules of the Code should be read purposefully to have regard to this principle. Such reading is also consistent with the requirement in Rule 15.5.2 that the advertisement must state that the product or service is for entertainment purposes only.

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<sup>16</sup> A repeated breach of a relevant requirement includes, for example: a repeat of the breach of the same requirement as has already been recorded; repetition of the same or similar conduct as that which earlier contravened a requirement; or multiple breaches of other similar requirements.

<sup>17</sup> For example, the purpose of making a claim may be to establish credentials to increase the likelihood of consumers calling the service; which goes beyond merely informing the public as a matter of interest.

62. By way of background to the issue of the protection of vulnerable viewers, Ofcom notes that while its 2007 research conducted by Essential Research Limited<sup>18</sup> found that regular female viewers of psychic TV felt “trustworthy” and supportive of such content, there were other respondents who found the product “visibly harmful, especially as it was considered to be a product that would largely be used by those in need of professional support”. The report also stated that:

*“Some respondents hinted that their judgement, or that of other callers, may sometimes be impaired at the time of participation [in the psychic service]. Reasons for this perceived vulnerability included insomnia and heavy alcohol consumption before or during viewing. However, when talking to Psychic TV viewers, it became clear that they were particularly concerned about the emotional vulnerability of callers to TV ‘psychics’. The ‘psychic’ is believed to provide guidance or reassurance when callers are depressed or dealing with difficult personal events. While most regular viewers of Psychic TV could happily watch for long periods without feeling compelled to call in, the decision to call in was normally triggered by a specific incident or feeling of depression, hence callers were often in an emotionally fragile state of mind. Some respondents recognised that they have been or could be emotionally vulnerable when calling in”.*

63. Further, according to this research there is a notable risk of potential addiction to or dependency on such services<sup>19</sup>. Ofcom is also aware of evidence of the potential for considerable financial harm suffered by consumers of PRS-based psychic services, as highlighted by the 2007 Essential research<sup>20</sup>.
64. While it is the case that the Essential research is somewhat outdated, Ofcom does not rely on the research to make its Decision in this case but refers to it merely as background. Despite the potential limitations, Ofcom nevertheless believes that it is reasonable to infer from the research that there are some viewers who are vulnerable and who need to be protected.
65. The breaches in this case also evidence repeated non-compliance issues by the Licensee over three separate broadcasts between 6 May 2012 and 20 June 2012. The seriousness of these breaches is compounded by the fact that between 20 April 2011 and 29 February 2012 Ofcom published findings in this area which highlighted its concerns and gave the sector and the Licensee guidance about its interpretation of the rules concerning this type of advertising content. In particular:
- two relevant findings were published in Broadcast Bulletin 180 on 20 April 2011 (*Psychic Interactive*, Psychic TV, 25 January 2011, 10:30-11:15)<sup>21</sup> and Broadcast Bulletin 184 on 20 June 2011 (*Psychic TV*, Big Deal, 11 March 2011, 21:30-22:00)<sup>22</sup>. In both cases Ofcom found that the material featured a number of customer testimonials which clearly amounted to claims of accuracy and efficacy prohibited in such content. Those claims were further emphasised by the presenter’s reference to and comments on the testimonials. Ofcom noted that the

<sup>18</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/participationtv/annexes/report1.pdf> (published 24 July 2007), page 22.

<sup>19</sup> Paragraph 6.4.1:

<http://stakeholders.ofcom.org.uk/binaries/consultations/participationtv/annexes/report1.pdf>.

<sup>20</sup> Paragraph 6.4 ‘Possibility of addiction and dependency’.

<http://stakeholders.ofcom.org.uk/binaries/consultations/participationtv/annexes/report1.pdf>

<sup>21</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb180/obb180.pdf> (20 April 2011).

<sup>22</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb184/obb184.pdf> (20 June 2011).

## Sanction 87(13) Square 1 Management Limited

Big Deal service was licensed for the promotion of psychic services and the advertising content was labelled on air as being for entertainment purposes. However, in view of the fact that the material featured repeated claims of efficacy and accuracy in breach of Rule 15.5.3, Ofcom decided that these claims contradicted the purpose of the mandatory labelling of this material as being merely entertainment. Therefore Ofcom also found the advertising content in breach of Rule 15.5.2;

- on 12 July 2011 Ofcom sent a letter to all licensees who broadcast PRS-based psychic content which set out Ofcom's likely interpretation of the relevant BCAP Code rules. The issues explored in that letter arose from the two findings referred to above;
- on 3 August 2011 Ofcom met with Peripatos representing the Licensee to discuss Ofcom's interpretation of the relevant BCAP Code rules and the proposed Ofcom Guidance which was subsequently published on 20 December 2011<sup>23</sup>. At that meeting Ofcom made clear, as set out in the PTV statement published on 3 June 2010<sup>24</sup>, that this genre of advertising is acceptable only as entertainment and this must be stated in the advertising content;
- on 4 August 2011 Ofcom contacted Peripatos to advise it that the onscreen text on Psychic Today should be amended to reflect the fact that the content was now classified as advertising and not programming;
- on 20 December 2011 Ofcom published its Guidance. The Guidance is clear and unambiguous with regard to making claims for efficacy and accuracy in, and appropriate labelling of, psychic reading PTV advertising content; and
- on 29 February 2012 Ofcom responded to a query Peripatos raised regarding spot advertisements for psychic services on other television channels.

66. In view of the above, in particular the first bullet point, Ofcom believes that the likely interpretation by Ofcom of the BCAP Rules and the meaning of the Guidance was clear, and Square 1<sup>25</sup> should have been in no doubt as to the requirements of Rules 15.5.2 and 15.5.3 at the time the material was broadcast. Ofcom was therefore particularly concerned that Square 1 again broadcast between 6 May 2012 and 20 June 2012 psychic advertising content that breached Rules 15.5.2 and 15.5.3 of the BCAP Code.

67. However, Ofcom also noted that while it is the Licensee who is responsible for ensuring that its output complies with relevant rules, the relative seriousness of the breaches concerning Square 1 was decreased by the fact that the Licensee (compared to Majestic TV which not only broadcast the output but also conceived and produced it) only simulcast the material. Ofcom also noted the fact that Square 1 no longer includes psychic advertising content in the Big Deal service.

### Conclusion

68. In assessing the seriousness of the breaches Ofcom had regard to the fact that the material was a live simulcast of content conceived and produced by a third party. Ofcom also took account of the Licensee's Representations as well as the Sanction

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<sup>23</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/psychic-tv-guidance.pdf..>

<sup>24</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/participationtv3/statement/statement.pdf>

(paragraph 3.15).

<sup>25</sup> As well as Majestic TV.

Decision against Majestic TV<sup>26</sup>. Ofcom's view continues to be that bearing in mind the purpose of the regulation of psychic TV and its classification as advertising with more stringent rules to protect viewers, the breaches between 6 May 2012 and 20 June 2012 were sufficiently serious and repeated that they should be considered for a statutory sanction. It is relevant to note however that in this Decision Ofcom reduced the financial penalty imposed on Square 1 as proposed in the Sanctions Preliminary View following the Licensee's Representations and considering the sanctions imposed on the producer of the content, Majestic TV<sup>27</sup>, to ensure that the sanction imposed on Square 1 was proportionate.

**Factors taken into account in determining the amount of a penalty**

69. In considering the appropriate amount of a financial penalty for the breaches, Ofcom has taken account of relevant factors in accordance with Ofcom's Penalty Guidelines, as set out below.

Deterrence

70. In Ofcom's view a financial penalty is necessary to ensure not only that the Licensee fully understands the serious nature of the BCAP Code breaches recorded against it, but implements all necessary steps to ensure compliance with the BCAP Code in future, if relevant. Ofcom also considers in particular that the financial penalty is necessary to emphasise to other licensees underlining the need to adhere to the BCAP Code.

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

71. The purpose of Rules 15.5.2 and 15.5.3 is to help protect those viewers who are potentially vulnerable and who might believe that paying for a PRS contact with a psychic will provide them with accurate information about the future or influence them in making life-changing decisions.
72. Ofcom found that the broadcast of the advertising content on the three dates raised serious compliance issues; however we were particularly concerned by the advertising content broadcast on 2 and 20 June 2012.
- As regards the 2 June broadcast, Ofcom was concerned that the psychic made claims about the accuracy of psychic readings she allegedly made to an acquaintance of hers involving a world famous pop celebrity (Michael Jackson). In Ofcom's view, the psychic referred to Michael Jackson as a form of promotional "name dropping" to enhance her image and to show the credibility and accuracy of her readings.
  - As regards the 20 June broadcast, in our view the implication that the psychic (Crystal) could provide reliable and substantiated readings as demonstrated by her experience of working "very closely with ....several police constabularies" and that she was "the one that dealt with the [Milly Dowler case]" was clearly problematic. The investigation of all unsolved criminal case by the police and especially murder cases is a very serious matter. Ofcom considered the comments by Crystal and the host implied that various UK police forces had employed Crystal to assist them and that the police would employ Crystal if they believed that the information she might provide as a psychic would be accurate and efficacious.

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<sup>26</sup> See footnote 13.

<sup>27</sup> Ibid.

73. Even if the statements made in both cases were factually correct, an argument put forward by Majestic TV<sup>28</sup>, of which Ofcom has no evidence, Ofcom's view is that such statements would not comply with the requirements of the BCAP Code, specifically the prohibition on any claims of efficacy or accuracy, for the reasons set out in paragraph 61 above.
74. Ofcom welcomed Majestic's TV explanation that it has procedures in place with regard to callers who are potentially unaware of the increasing costs incurred by repeated calls to the premium rate number and the training undertaken by customer service representatives and psychics to identify those callers who are potentially vulnerable or require assistance from another organisation which can offer professional help.
75. While in these cases, Ofcom does not have any direct evidence of harm, in Ofcom's opinion, aside from the potential personal consequences (see paragraph 60 above), there is the potential for harm that might result from the broadcast of this advertising content. There may be financial detriment that viewers may incur as a result of making PRS contact with the service on the basis of the implied and explicit claims that were made, portraying the psychic readings as being accurate and efficacious, while not making clear that the service is merely for entertainment.

The duration of the contravention

76. Ofcom noted that the recorded breaches were in relation to three pieces broadcast on 6 May 2012, 2 June 2012 and 20 June 2012 and lasted several minutes each.

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

77. We have no evidence to show whether or not the Licensee made any financial gain from these breaches of the BCAP Code.

Any steps taken for remedying the consequences of the contravention

78. As highlighted in the Findings regarding the broadcast of 6 May 2012, Ofcom was concerned that despite assurances from Peripatos that it had reviewed its output to ensure there was no repetition of onscreen references to psychics being "accurate", we subsequently noted two examples of such content being broadcast (see paragraph 82 below). Ofcom is concerned that neither the Licensee, nor its compliance officer in discussion with Majestic TV had apparently conducted a thorough investigation before making such assurances.
79. Ofcom noted the Licensee's submission that it has since removed all Psychic Today advertising content from its schedule. Square 1 did not outline any other measures taken in response to the breaches of the BCAP Code.

Whether the regulated body in breach has a history of contraventions

80. On 11 March 2011 Ofcom recorded one breach regarding advertising content broadcast on Big Deal<sup>29</sup>. That content breached Rules 15.5.2 and 15.5.3 of the BCAP Code. Ofcom found that the material included claims for efficacy and accuracy and did not comply with the mandatory labelling requirement for PRS-based psychic advertising content. See *Big Deal*, 11 March 2011, 21:30 to 22:00.

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<sup>28</sup> See footnote 13.

<sup>29</sup> Big Deal, 11 March 2011, 21:30 to 22:00:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb184/obb184.pdf>.

Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contraventions

81. The Licensee's submissions in response to Ofcom's Standards Preliminary View regarding the broadcast on 6 May 2012 stated that: "*All advertising has been reviewed to ensure that there is no repetition and continuing compliance training will re-emphasise the need to avoid the use of this word or language to the same effect*" (i.e. the use of "accurate" and "precise").
82. The Licensee also stated that a "specialist" who had responsibility for compliance and training at Psychic Today had purportedly "*reviewed and corrected descriptions for every on screen psychic following the 'Mollie the Psychic' accuracy incident*", i.e. the broadcast of 6 May 2012. However, Ofcom noted two further examples of similar problematic content on 31 October 2012 and 7 December 2012 as set out in the Findings. Majestic TV said that this was a "result of human error".
83. Ofcom noted the training and compliance measures Majestic TV (the service provider) had in place prior to the contraventions (as explained during Majestic TV's oral Representations<sup>30</sup>), as well as Majestic TV's submissions that in its view there were some uncertainties and misunderstandings about the meaning of the relevant BCAP Code rules and the Guidance. Ofcom however considered that it should have been clear, both to Majestic TV and the Licensee, from a combination of the relevant BCAP Code rules, previous published findings and the Guidance that:
- PRS-based psychic advertising content must be appropriately licensed and labelled as entertainment;
  - explicit references (for example in onscreen text) to a psychic's ability to give accurate readings are prohibited; and
  - references to previous readings or experiences may constitute a claim of implied accuracy and efficacy and are therefore unlikely to be acceptable.
84. This suggests that the Licensee, who was responsible for the output on Big Deal, did not take the necessary and appropriate steps to prevent the contraventions.

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

85. Ofcom published a finding in Broadcast Bulletin 180<sup>31</sup> against Square 1 regarding material on Big Deal that breached Rules 15.5.2 and 15.5.3. In that finding Ofcom formally put Big Deal on notice: "that should compliance issues of this type arise in future, [Ofcom] will be likely to consider the imposition of statutory sanctions". This finding was in turn referenced in the Guidance. The Guidance explicitly states that: "Such [psychic reading advertising] material must not include claims for efficacy or accuracy – this covers both explicit and implicit claims...PTV advertising content [must] be presented only as entertainment. To be clear, it is not sufficient to rely on onscreen text to fulfil this requirement of Rule 15.5.3. The advertising as a whole must reflect this principle."
86. According to Ofcom's records, an individual at Square 1 is responsible for compliance issues concerning the Big Deal service generally. However, as the Psychic Today material was a live simulcast of the content produced by and broadcast on Psychic

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<sup>30</sup> See footnote 13.

<sup>31</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb184/obb184.pdf> (20 June 2011).

Today, Ofcom understands that the individual at Peripatos was responsible for compliance with regard to this PRS-based psychic content on Big Deal. As such, Peripatos responded on 25 October 2012 on behalf of Square 1 to Ofcom's enquiries regarding the relevant broadcasts on Big Deal. As an experienced compliance officer with years of experience relating to the Psychic Today channel and as the representative of both Majestic TV and Square 1 which submitted a detailed response to Ofcom's consultation on the proposed regulation of this sector in 2009<sup>32</sup> – in particular the rules that would regulate such advertising content – we believe that the individual should have been well aware of the requirements of the BCAP Code in relation to PRS-based psychic TV content.

87. All Ofcom correspondence regarding compliance of psychic TV content on Big Deal was sent to both the compliance officer at Square 1 and to Peripatos. We therefore consider that the management of Square 1 ought to have known that contraventions were likely to occur, and to the extent it (or on its behalf, Peripatos) did not take action to prevent the contraventions the management acted recklessly.

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

88. Ofcom considers that, as the person in charge of Peripatos is the PRS-based psychic advertising content compliance contact for Square 1, the Licensee ought to have been aware that the conduct in question amounted to a breach of the BCAP Code. However Ofcom has not been provided with evidence that the Licensee put in place any measures to prevent further breaches occurring once it was aware of them, although Ofcom has been informed that the Licensee has now stopped simulcasting Psychic Today content on its service.

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

89. Ofcom considered that a penalty of £10,000 would be proportionate taking into account all the relevant circumstances. These circumstances include: the need to achieve an appropriate level of deterrence, the serious and repeated nature of the BCAP Code breaches in this case, the fact that this is the first sanction imposed by Ofcom on Square 1 and the fact that the Licensee simulcast this material and did not conceive or produce it. Ofcom also considered it relevant to consider the sanctions imposed on the content provider, Majestic TV<sup>33</sup> to ensure that the sanction imposed on Square 1 was proportionate.

**Precedents**

90. In accordance with the Penalty Guidelines, Ofcom has also had regard to relevant sanction precedents set by previous cases.

Previous sanction decisions

91. There are no direct precedents for the present case. Those cases summarised below are relevant to the extent they concern financial penalties applied to advertising content found in breach of television advertising rules in Section 15 of the BCAP Code (Faith, Religion and Equivalent Systems if Belief). The rules breached by DM Digital and Venus TV were however different to those in the case of Square 1.

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<sup>32</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/participationtv3/responses/MajesticTV.pdf>.

<sup>33</sup> See footnote 13.

92. **20 July 2010, DM Digital**<sup>34</sup> – Sanction of £17,500 and a direction to broadcast a statement of Ofcom’s findings for breaches of the BCAP Code. 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.
93. **4 December 2008, Venus TV**<sup>35</sup> – Sanction of £35,000 and a direction to broadcast a statement of Ofcom’s findings for breaches of the BCAP Code. This case involved the broadcast of five advertisements for various products and services, such as capsules, an astrology service, and a face cream. These advertisements raised issues of harm to viewers. For example, some of the advertisements promoted products which claimed to offer remedies for various medical conditions but no evidence was presented to support the claims made.
94. Ofcom is satisfied that the financial penalty proposed in this case is consistent with these cases, taking due account of the factors outlined in the Penalty Guidelines.

### Cooperation

95. In accordance with the Penalty Guidelines, Ofcom may increase the penalty where a licensee has failed to cooperate with Ofcom’s investigation.
96. Ofcom’s investigation into the three broadcasts took a longer amount of time than is usually the case for Standards investigations, partly because Ofcom did not know and had not been told<sup>36</sup> that Majestic TV was simulcasting its *Psychic Today* content on other channels, including Big Deal. Further Square 1 had not informed Ofcom that it was broadcasting a live simulcast of PRS-based psychic content at various times of the day. During the course of the investigations Ofcom repeatedly asked on a number of occasions for clarification regarding the nature of the simulcasts; however Peripatos did not respond to Ofcom’s enquires in a timely manner but only did so once in receipt of the Standards Preliminary View. It then became clear that the investigation involved four different licensees, and it was necessary to establish the facts in each case (while the issues were similar, the factual background was not). Ofcom took account of Majestic TV’s representations that the delay in responding to Ofcom’s queries was due to the number of staff that had to be consulted, and there was no intention in any respect to delay or mislead Ofcom. Ofcom therefore considered that both Majestic TV and the Licensee (through Peripatos) had reasonably cooperated in the investigation, and it was therefore not appropriate for Ofcom to increase the penalty.

### **Conclusion**

97. Ofcom concluded that the BCAP Code breaches by the Licensee were serious and repeated for the reasons set out earlier in this Decision.
98. Having regard to all the factors referred to above and the Representations from the Licensee, Ofcom’s Decision was that an appropriate and proportionate sanction was a financial penalty of £10,000 (payable by the Licensee to HM Paymaster General).

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<sup>34</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/dmdigitaltd.pdf>.

<sup>35</sup> <http://www.ofcom.org.uk/files/2010/07/venustv.pdf>.

<sup>36</sup> As required by Ofcom’s licensing guidance: <http://licensing.ofcom.org.uk/binaries/tv/service-provider.pdf> published on 21 May 2012.

**Sanction 87(13) Square 1 Management Limited**

**21 June 2013**