

Ofcom Broadcast and On Demand Bulletin

**Issue number 319
19 December 2016**

Contents

Introduction	3
--------------	---

Note to Broadcasters and On Demand Service Providers

Monitoring of training and equality of opportunity in broadcasting	5
--	---

Broadcasting Code Review: Preparing for Ofcom's new responsibilities for regulating the BBC	6
---	---

Broadcast Standards cases

In Breach

Ariana News <i>Ariana International, 20 July 2016, 12:00</i>	7
--	---

CrossTalk <i>RT, 11 July 2016, 12:30</i>	18
--	----

The Incident: Special Investigation <i>NTV Mir Lithuania, 15 April 2016, 19:50</i>	28
--	----

Fox & Friends <i>Fox News Channel, 28 June 2016, 12:00</i>	51
--	----

Resolved

The X Factor <i>ITV, 23 October 2016, 20:00</i>	55
---	----

Broadcast Fairness and Privacy cases

Not Upheld

Complaint by Mr Terry McCarthy <i>Dispatches; Undercover: Inside Britain's Children's Services, Channel 4, 26 May 2016</i>	57
--	----

Tables of cases

Investigations Not in Breach	70
------------------------------	----

Complaints assessed, not investigated	71
---------------------------------------	----

Complaints outside of remit	79
-----------------------------	----

Investigations List	80
---------------------	----

Introduction

Under the Communications Act 2003 (“the Act”), Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives¹. Ofcom also has a duty to secure that every provider of a notifiable On Demand Programme Services (“ODPS”) complies with certain standards requirements as set out in the Act². Ofcom must include these standards in a code, codes or rules. These are listed below.

The Broadcast and On Demand Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes and rules below, as well as licence conditions with which broadcasters regulated by Ofcom are required to comply. We also report on the outcome of ODPS sanctions referrals made by the ASA on the basis of their rules and guidance for advertising content on ODPS. These Codes, rules and guidance documents include:

- a) [Ofcom’s Broadcasting Code](#) (“the Code”) for content broadcast on television and radio services.
- b) the [Code on the Scheduling of Television Advertising](#) (“COSTA”) which contains rules on how much advertising and teleshopping may be scheduled in television programmes, how many breaks are allowed and when they may be taken.
- c) certain sections of the [BCAP Code: the UK Code of Broadcast Advertising](#), which relate to those areas of the BCAP Code for which Ofcom retains regulatory responsibility for on television and radio services. These include:
 - the prohibition on ‘political’ advertising;
 - sponsorship and product placement on television (see Rules 9.13, 9.16 and 9.17 of the Code) and all commercial communications in radio programming (see Rules 10.6 to 10.8 of the Code);
 - ‘participation TV’ advertising. This includes long-form advertising predicated on premium rate telephone services – most notably chat (including ‘adult’ chat), ‘psychic’ readings and dedicated quiz TV (Call TV quiz services). Ofcom is also responsible for regulating gambling, dating and ‘message board’ material where these are broadcast as advertising³.
- d) other licence conditions which broadcasters must comply with, such as requirements to pay fees and submit information which enables Ofcom to carry out its statutory duties. Further information can be found on Ofcom’s website for [television](#) and [radio](#) licences.
- e) Ofcom’s [Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services](#) for editorial content on ODPS. Ofcom considers sanctions in relation to advertising content on ODPS on referral by the Advertising Standards Authority (“ASA”), the co-regulator of ODPS for advertising or may do so as a concurrent regulator.

[Other codes and requirements](#) may also apply to broadcasters, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant licensees must

¹ The relevant legislation is set out in detail in Annex 1 of the Code.

² The relevant legislation can be found at Part 4A of the Act.

³ BCAP and ASA continue to regulate conventional teleshopping content and spot advertising for these types of services where it is permitted. Ofcom remains responsible for statutory sanctions in all advertising cases.

provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code.

It is Ofcom's policy to describe fully the content in television, radio and on demand content. Some of the language and descriptions used in Ofcom's Broadcast and On Demand Bulletin may therefore cause offence.

Note to Broadcasters

Monitoring of training and equality of opportunity in broadcasting

On 1 November 2016 Sharon White, the Chief Executive of Ofcom, announced that in 2017 Ofcom will be launching a new annual monitoring programme on diversity in broadcasting. We intend to gather a wide range of data from broadcasters on equal opportunities. This will enable us to assess a more comprehensive picture of what broadcasters are doing to promote equality and diversity within their organisations.

What information will be requested?

The data will include a range of information including staff make up, the steps broadcasters are taking to improve equal opportunities and diversity, and the level of engagement at all levels of their organisations.

How will the information be used?

We will use the information to produce our first annual Diversity in Broadcasting report which will set out how the industry is doing on equality and diversity overall, steps being taken and the diversity of individual broadcasters, areas where the industry is doing well and what groups lack representation. Our aim is to be as transparent as we can, while also complying with the relevant data protection obligations.

Next steps

Ofcom will officially notify each licensee early in 2017 detailing exactly what information we are requesting, when it is required by and what action each licensee needs to take to comply with the notice.

This notification will initially be sent to television licensees only as Ofcom will be engaging with the radio industry in the new year to discuss equal opportunities and diversity before commencing monitoring in that sector.

Any broadcasters who have questions about our work in this area should contact diversityinbroadcasting@ofcom.org.uk

Note to Broadcasters and On Demand Service Providers

Broadcasting Code Review: Preparing for Ofcom's new responsibilities for regulating the BBC

On 15 December 2016 Ofcom published several consultations in preparation for regulating the BBC in April 2017¹. This followed publication on the same day of the final BBC Royal Charter and Framework Agreement which details how the BBC will operate in the new Charter period from 2017 to 2027². Further details of our consultations are set out below.

Broadcasting Code Review

Ofcom is consulting on proposed amendments to its Broadcasting Code. The revisions are intended to make clear the areas where Ofcom has new responsibility to regulate content standards for BBC licence-fee funded services. This includes extending the Code to cover the BBC's on demand programme services ("ODPS"), such as the BBC iPlayer. We are also proposing to include the existing statutory rules for ODPS, as a new Part 3 of the Broadcasting Code.

We invite representations from interested stakeholders on the matters set out in the consultation by no later than 5pm on **9 February 2017**. Following our review of stakeholder responses, we plan to issue a statement and revised Code in March 2017, which will come into effect on 3 April 2017³.

Other relevant consultations

- Ofcom is already consulting on changes to the rules on due impartiality, due accuracy, elections and referendums. This was published ahead of other consultations so that broadcasters and political parties have time to plan ahead for the various elections taking place in May 2017. The deadline for that particular consultation is **16 January 2017**.
<https://www.ofcom.org.uk/consultations-and-statements/category-2/broadcast-impartiality-accuracy-and-elections-rules-review>
- On 15 December 2016 Ofcom published four separate consultations concerning areas of BBC competition regulation.
<https://www.ofcom.org.uk/consultations-and-statements/ofcom-and-the-bbc>
- In early 2017 Ofcom will also publish a consultation on proposed procedures explaining how we will handle complaints about BBC programmes, and how we will conduct our investigations and sanctions.

¹ <https://www.ofcom.org.uk/consultations-and-statements/ofcom-and-the-bbc>

² <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

³ As part of the transitional arrangements for Ofcom to take on its responsibilities in relation to the BBC, Sections Five (due impartiality) and Six (elections and referendums) of the revised Code, and Ofcom's PPRB Rules, will apply to the BBC from 22 March 2017, the date when the first election period for the May 2017 elections commences.

Broadcast Standards cases

In Breach

Ariana News

Ariana International, 20 July 2016, 12:00

Introduction

Ariana International is a general entertainment channel originating from Afghanistan, and broadcast by satellite in the UK. The licence for Ariana International is held by Ariana Television and Radio Network (“ATRN” or “the Licensee”).

During routine monitoring, Ofcom noted a news item relating to Muhammad Riyad, a 17-year old, who was described as *“said to be an Afghan”*. He had injured five people when he attacked a train, armed with a knife and axe, in Wuerzburg, Germany in July 2016.

Ofcom translated the news item, which was in Pashto. We gave the Licensee an opportunity to comment on the accuracy of the translation. ATRN did not raise any accuracy issues, and we therefore relied on this translation for the purposes of the investigation.

The news presenter introduced this news item as follows:

“It is reported that a 17 year old young man, who it is said to be an Afghan, and who is currently living in southern Germany boarded a train and attacked at least five people and stabbed them all. It is reported that four of the victims were from the same family and that the condition of one of the victims is critical. In a video the young man can be seen talking in Pashto and claiming that he belongs to Daish¹. Daish have now accepted that this young man was one of their followers. German police state that they have not found any evidence establishing a direct link between this young man and Daish”.

Footage was shown of the interior of a railway carriage covered in bloodstains and bloodstained pieces of paper. The news presenter continued:

“In Berlin the Afghan Ambassador Hamid Siddique said that he suspects that this young man is a militant, and calls for the German police to carry out a detailed investigation. He stated that many such people have migrated to Germany claiming to be Afghans”.

¹ Daish or ISIL (Islamic State of Iraq and the Levant) is a proscribed terrorist organisation. The UK Government’s list of proscribed terrorist organisations dated 15 July 2016 states the following in relation to ISIL: “Islamic State of Iraq and the Levant (ISIL) also known as Dawlat al-Iraq al-Islamiyya, Islamic State of Iraq (ISI), Islamic State of Iraq and Syria (ISIS) and Dawlat al Islamiya fi Iraq wa al Sham (DAISh) and the Islamic State in Iraq and Sham - Proscribed June 2014. ISIL is a brutal Sunni Islamist terrorist group active in Iraq and Syria. The group adheres to a global jihadist ideology, following an extreme interpretation of Islam, which is anti-Western and promotes sectarian violence. ISIL aims to establish an Islamic State governed by Sharia law in the region and impose their rule on people using violence and extortion”. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/538297/20160715-Proscription-website-update.pdf

A video was then broadcast which showed Muhammad Riyad talking straight to camera and at times brandishing a knife. The video lasted approximately two minutes and 15 seconds, and Muhammad Riyad said the following:

"In the name of Allah the gracious, the merciful. I am a Mujahid² of Islamic State. I announce this in Germany that inshallah³, Kuffar⁴, those days have now gone, they have long gone, that you can come to our countries and dishonour and kill our women, and children, and there was nobody to call you to account for your actions. These murtaḍ⁵ governments would all remain silent, and there was no Nang⁶ in any Muslim government. Not one of you had, and raised your voice. Those days have gone, because we now have the Islamic State, that has been established in Iraq, Sham⁷, Khorasan⁸, Libya and Yemen. Inshallah Mujahids from Islamic State will reach you everywhere. Inshallah you will be slaughtered in your homes. Inshallah they will enter your homes, enter your land, and on the streets. Inshallah you will not be safe in your homes, your villages, your towns and inshallah, and in every street in every airport inshallah. The Islamic State has enough strength to get you everywhere, even in your parliament [vigorously waving knife at camera]. I am living here amongst you and inshallah I have made a plan to deal with you here in your homes inshallah. I tell you, that I will slaughter you in your homes. I promise you that I will make you forget about France⁹. By Allah's grace and for as long as I have a breath in my body [tapping chest with knife] I make this promise that I will be the last thing that you see in this life. Inshallah I will slaughter you with this knife [waving knife at camera] Inshallah I will destroy you, and tear you to pieces. I want to address the Muslim Ummah¹⁰. How long are you going to remain sleeping? Wake up! The Khilafa¹¹ has been established. Swear the oath of allegiance to Abu Bakr Baghdadi Al Quraish¹². Go to your Vilayats¹³. It has been made easy for you in every nation of the world you

² Mujahid: One who goes on Jihad i.e. holy warrior.

³ Inshallah: God willing.

⁴ Kuffar: Literal translation meaning disbelievers, but often used in a pejorative sense to describe non-Muslims.

⁵ Murtaḍ: A Muslim who renounces his faith.

⁶ Nang: In Afghan culture Nang is the highest form of honour that an Afghan is honour bound to follow.

⁷ Sham: In Islamic Arabic terminology the area encompassing Syria, Lebanon and Palestine is referred to as Sham.

⁸ Khorasan: A historic region which lies mostly in parts of modern-day Afghanistan.

⁹ A week earlier, on 14 July 2016, the attack in Nice had taken place leading to the death of 84 people.

¹⁰ Ummah: Islamic term for the worldwide Muslim community.

¹¹ Khilafa: The Caliphate.

¹² Abu Bakr Baghdadi Quraish: Self-proclaimed Caliph and leader of ISIL.

¹³ Vilayat: An administrative division, usually translated as "province", or occasionally as "governorate" in an Islamic State.

have been promised a Vilayat. Go to these Vilayats and if you cannot reach Iraq or Sham at the very least get this Murtad police, army”.

The news presenter then introduced the next news item.

Ofcom considered the above content clearly raised issues warranting investigation under the following rules of the Code:

- Rule 2.3: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...”.
- Rule 3.1: “Material likely to encourage or to incite the commission of crime or to lead to disorder must not be included in television or radio services”.
- Rule 3.2: “Material which contains hate speech¹⁴ must not be included in television and radio programmes except where it is justified by the context”.

Ofcom therefore asked ATRN how the content complied with these rules.

Response

The Licensee apologised for this “editorial error” that led to what it described as an “unintentional violation” of the Code. It added that it would “never intend to put something inflammatory” on air and said “we wholly condemn the incendiary and divisive views expressed in the particular clip”.

ATRN said that its editorial team in Afghanistan, where both the Afghan-only and international versions of this channel are produced, “chose to play Mr. Riyad’s speech on our domestic [i.e. Afghan-only] channel so that our domestic Afghan audience could clearly see/hear that he was not an Afghan as many international media sources had errantly reported (he is actually of Pakistani descent)”. Therefore, according to the Licensee, the intention was “to clearly communicate to the Afghan people that one of their countrymen was not responsible for the attack and that Pakistani politics likely played a role in the tragedy, a critical clarification given the ongoing tensions in Afghanistan itself at the time”. ATRN also said that it had “believed, in retrospect possibly in bad judgment, that broadcasting the dialect of the speaker would serve to reduce the threat of violence in Afghanistan; would reassure others that radical Islamic ideas were not spreading, especially across the border into Afghanistan from Pakistan”. It added that “Ariana’s purpose was not to support any incendiary call to action but, in fact, the opposite”. It further added that: “The intent was to specifically correct an error in other media coverage about the wrongdoer’s nationality as this incorrect conclusion was being used by other domestic Afghan media entities to advance their particular biased, divisionary positions”.

However, the Licensee said that the content was broadcast on the international version of the channel as well as the Afghan version of the channel. ATRN said it recognised that “such content is not acceptable for an international audience” and therefore such content “will not be aired on our international feed in the future”. It added that “we clearly recognize that [the video] should not have been included on the international [feed] nor presented without some additional context or

¹⁴ The Code defines “hate speech” as: “all forms of expression which spread, incite, promote or justify hatred based on intolerance on the grounds of disability, ethnicity, gender, gender reassignment, nationality, race, religion, or sexual orientation”.

notification/sub-titling below to ensure our viewing audience understood that [ATRN] did not support such views nor was it being shared as an endorsement of such in any fashion”.

The Licensee also said that it “condemns the statements made by the speaker in the video, and inadvertently omitted a segment immediately adjacent to the video disapproving of the statements due to a failure in editorial controls”. It added that it had been “broadcasting for more than eleven years and has a long track record of condemning and placing in context similar radical incendiary statements and calls to take violent action”. It further added that “Although not immediately adjacent to the video, Ariana has broadcast numerous segments disapproving of similar radical statements and similar incidents such as the one involving the speaker”.

In conclusion, ATRN said that as a result of this incident it had “used this incident to remind and augment our production/editorial team working on the ATN international beam that reaches the UK so that they remain editorially vigilant on all content that goes out”. In addition, the Licensee set out details of “additional news editorial guidelines...[and] content oversight controls” it had put in place as a result of this incident:

- the addition of a new Managing Director of Ariana International who has “extensive experience with news production” which meant that, in ATRN’s view, “careful editorial review will now permeate all of [ATRN], including the team responsible for producing and distributing the international” feed. In addition, the Licensee said that it had “re-assigned” or terminated the contracts of “several mid-level team members that were part of the editorial decision chain during this incident”;
- implementation of “additional...organizational ‘checks & balances’ to prevent recurrence of a similar incident happening in the future via the establishment of a bi-annual training program on the sensitivity, role and importance of editorial oversight in news media and content production; and a weekly meeting “to review all broadcast material to ensure that we are maintaining the highest levels of vigilance and global reporting standards”;
- the establishment of a “second editorial ‘check’ step on the international [feed] production team by an Ariana staff member who is not a member of said team” to create and “independent check into our process”; and
- representatives from the Licensee’s “international executive team” will periodically travel to Kabul to emphasise the “need for careful diligence on any material broadcast outbound from Afghanistan” to the UK.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set such standards for broadcast content as appear to it best calculated to secure the standards objectives, including that “generally accepted standards are applied so as to provide adequate protection for members of the public from the inclusion of offensive and harmful material” and “material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television or radio services”. These duties are reflected in Sections Two and Three¹⁵ of the Code.

¹⁵ As a result of changes made to Section Three of the Code, following a public consultation, new Rules 3.2 and 3.3 were introduced on 9 May 2016 to reflect the standards objective

In reaching this Decision, Ofcom has taken account of the audience's and broadcaster's right to freedom of expression set out in Article 10 of the European Convention on Human Rights ("ECHR"). We also had regard to Article 9 of the ECHR, which states that everyone "has the right to freedom of thought, conscience and religion".

We acknowledge that, at times, offence can be caused not just by the actual content of a programme but by the very fact that people with extreme and very controversial views are given airtime. This is especially the case in news and current affairs programming, where broadcasters may wish to give coverage to, or interview, people or organisations with extreme and very challenging views as part of legitimate and comprehensive coverage of on-going news stories. However, the Code does not prohibit particular people from appearing on television and radio services just because their views or actions have the potential to cause offence. To do so would, in our view, be a disproportionate restriction of the broadcaster's right to freedom of expression and the audience's right to receive information and ideas.

Further, broadcasters should be, and are able to, report on terrorist groups that pose potential terror threats internationally and domestically. This is clearly in the public interest. However, if people or organisations are given the chance to articulate their views on television or radio, broadcasters must ensure that they comply with the Code by challenging and placing in context those views as appropriate.

In this case, a news item was broadcast which featured a video produced by an individual, Muhammad Riyad, before he carried out an attack on a train in Germany where he injured five people. In the video, he stated that he was a "*Mujahid* [holy warrior] of *Islamic State*". The news item also made clear that "*Daish* [i.e. ISIL] *have now accepted that this young man* [i.e. Mr Riyad] *was one of their followers*". As noted in footnote 1, ISIL is a proscribed terrorist organisation in the UK, that has sought to establish an Islamic state (a "caliphate") across parts of Iraq and Syria. In addition, it has been widely reported that a number of individuals, such as Muhammad Riyad, have been inspired to carry out acts of violence in the name of ISIL.

In this context, Ofcom considered it was clearly legitimate journalistically for the Licensee, who broadcasts from an Afghani perspective, to wish to broadcast a report about an attack carried out by an individual, widely reported to have been from Afghanistan. We considered there was a strong public and news interest for broadcasters to examine the activities of ISIL. However, when transmitting material of this nature broadcasters must comply with: Rule 2.3 (to apply generally accepted standards, and ensure that any offensive content is justified by the context); Rule 3.1 (prohibition on material likely to incite crime); and Rule 3.2 (hate speech must be justified by the context).

Rule 3.1

Rule 3.1 requires that material likely to encourage or to incite the commission of crime or to lead to disorder must not be included in television or radio services.

In considering the material under Rule 3.1 we are required to assess the *likelihood* of it encouraging or inciting the commission of crime or of leading to some form of

contained within section 319(f) of the Act which is that "generally accepted standards are applied so as to provide adequate protection for members of the public from the inclusion of offensive and harmful material".

disorder. This is fundamentally different from the test that would apply for bringing a criminal prosecution. In particular, the use of the word “likely” in Rule 3.1 means that Ofcom is not required to identify any causal link between the content broadcast and any specific acts of criminal behaviour or disorder.

In assessing the *likely* effect on the audience, the editorial context in which the material is presented to the audience is significant as well as the nature of the material. In particular, we carefully consider the content of any statements and how they were made, and whether the material contained any direct or indirect calls to action. A *direct* call to action could result, for example, from an unambiguous, imperative statement calling viewers or listeners to take some form of potentially criminal or violent action. An *indirect* call to action could result from statements that cumulatively amount to an implicit call to act.

In this case, in the first part of the video Muhammad Riyad described himself as a “*Mujahid* [or holy warrior] *of Islamic State*”. Making clear that he was addressing his comments to the non-Muslim (i.e. “*Kuffar*”) community in Germany, Muhammad Riyad stated his hope that such people “*will be slaughtered in [their] homes*” by ISIL. He also stated his belief that ISIL has “*enough strength to get you [i.e. residents of Germany] everywhere, even in your parliament*”. Muhammad Riyad then signalled the attack he was about to carry out in Germany by stating: “*I am living here amongst you and inshallah I have made a plan to deal with you here in your homes inshallah. I tell you, that I will slaughter you in your homes*” and “*I make this promise that I will be the last thing that you see in this life. Inshallah I will slaughter you with this knife [waving knife at camera] Inshallah I will destroy you, and tear you to pieces*”. In Ofcom’s view, these various statements described in highly positive and graphic terms Muhammad Riyad’s and ISIL’s intentions to carry out acts of extreme violence against the German population.

At the end of the video, Muhammad Riyad then said the following:

“I want to address the Muslim Ummah. How long are you going to remain sleeping? Wake up! The Khilafa¹⁶ has been established. Swear the oath of allegiance to Abu Bakr Baghdadi Al Quraish¹⁷. Go to your Vilayats¹⁸. It has been made easy for you in every nation of the world you have been promised a Vilayat. Go to these Vilayats and if you cannot reach Iraq or Sham at the very least get this Murdad¹⁹ police, army”.

We considered that the above statement was a direct call to action to members of the Muslim community (i.e. “*the Muslim Ummah*”) to join ISIL, a proscribed terrorist organisation because Muhammad Riyad explicitly called on members of the Muslim community to “*Swear the oath of allegiance to Abu Bakr Baghdadi Al Quraish*”, the leader of ISIL. We also considered that, given what Muhammad Riyad had already said in the video, his final words were an indirect call to the Muslim community to

¹⁶ Khilafa: The Caliphate.

¹⁷ Abu Bakr Baghdadi Quraish: Self-proclaimed Caliph and leader of ISIL

¹⁸ Vilayat: An administrative division, usually translated as “province”, or occasionally as “governorate” in an Islamic State.

¹⁹ Murdad: A Muslim who renounces his faith.

commit violence, up to and including murder, against members of the police and the army in the West.

In considering the likelihood of the inclusion of these statements in the service encouraging or inciting the commission of crime or leading to disorder, we also carefully considered the context within which Muhammad Riyad's words were broadcast.

We noted that this news item appeared on a service, broadcast in Pashto, and would therefore probably have been viewed predominantly by members of the Muslim community in the UK. Muhammad Riyad gave his views directly to camera, speaking in emotive terms, while at times brandishing a knife. In our view, this would have been likely to have had a greater persuasive impact and effect on the audience. The likely effect, in our view, would also have been exacerbated by the fact that the video lasted two and a quarter minutes without interruption, and without any challenge being given to Muhammad's Riyad's views. In judging the likely effect of such content on those watching, Ofcom had regard to concerns about ISIL's use of propaganda to radicalise and recruit citizens of the UK and elsewhere²⁰.

We took into account that the Licensee said that the content featuring Muhammad Riyad had been broadcast unintentionally on its international channel, licensed by Ofcom. We also took into account ATRN's arguments that the video featuring Muhammad Riyad was included in the domestic version of the channel (not regulated by Ofcom) "so that our domestic Afghan audience could clearly see/hear that he was not an Afghan as many international media sources had errantly reported (he is actually of Pakistani descent)". Therefore, according to the Licensee, the intention was "to clearly communicate to the Afghan people that one of their countrymen was not responsible for the attack and that Pakistani politics likely played a role in the tragedy, a critical clarification given the ongoing tensions in Afghanistan itself at the time". It added that it had "inadvertently omitted a segment immediately adjacent to the video disapproving of the statements due to a failure in editorial controls". ATRN also said that it had "believed, in retrospect possibly in bad judgment, that broadcasting the dialect of the speaker would serve to reduce the threat of violence in Afghanistan; would reassure others that radical Islamic ideas were not spreading, especially across the border into Afghanistan from Pakistan". It added that "Ariana's purpose was not to support any incendiary call to action but, in fact, the opposite".

Although, in our view, it was acceptable for ATRN to discuss the nationality of Muhammad Riyad, and to report on the acts of violence he had committed, including his reasons, this did not in our view contextualise (in a way which prevented it from being an incitement to crime or likely to lead to disorder) the broadcast of a two minute and 15 second video which included a direct call to action to members of the Muslim community to join a proscribed terrorist organisation, and an indirect call to commit acts of violence. This was especially the case given that before, during or after the video featuring Muhammad Riyad, there were no statements, for example by the news reader or other contributors, that condemned, lessened the potential impact of, or otherwise put into context the various comments and exhortations being made by Muhammad Riyad. Rather, the prolonged length of the video in this case, and the lack of surrounding content that challenged the contents of the video meant, in our view, that Muhammad Riyad was provided with an unmediated platform to

²⁰ For example, the UK Government has summed up the potential effect of ISIL propaganda as follows: "The threat Da[*i*]sh [i.e. ISIL] poses to the UK and the rest of the world continues to grow as it seeks to expand its terror network, using propaganda to radicalise and recruit citizens of the UK and elsewhere". See <https://www.gov.uk/government/topical-events/daesh>

express highly inflammatory views, which were likely to encourage crime and/or lead to disorder.

We considered that given the content was pre-recorded, given the expressed intentions of Muhammad Riyad in making the content, and given a background of recent multiple terrorist assaults on targets all over the world by people following a radical terrorist agenda against those perceived not to be Muslim, ATRN should, and could, have known in advance the potential effect of what Muhammad Riyad was saying on viewers, and especially impressionable viewers.

In reaching our Decision, we noted: ATRN's statement that it "condemns the statements made by the speaker in the video"; its apology; and its statements that it would "never intend to put something inflammatory" on air and it "did not support such views nor was [the video] being shared as an endorsement of such in any fashion". We also noted that the Licensee had "used this incident to remind and augment our production/editorial team working on the ATN international beam that reaches the UK so that they remain editorially vigilant on all content that goes out". Further, we noted the "additional news editorial guidelines...[and] content oversight controls" it had put in place as a result of this incident.

However, for all the reasons above, our Decision was that this was a breach of Rule 3.1 of the Code.

Rule 3.2

Rule 3.2 requires that material which contains hate speech must not be included in television and radio programmes except where it is justified by the context.

The Code defines "hate speech" as: "all forms of expression which spread, incite, promote or justify hatred based on intolerance on the grounds of disability, ethnicity, gender, gender reassignment, nationality, race, religion, or sexual orientation".

Ofcom first considered whether the content in this case constituted hate speech.

During the video, Muhammad Riyad, who identified himself as *Mujahid* [or holy warrior] *of Islamic State*, made clear he was addressing his comments to the non-Muslim (i.e. "Kuffar") community in Germany, and stated his hope that such people "will be slaughtered in [their] homes" by ISIL. He also stated his belief that ISIL has "enough strength to get you [i.e. residents of Germany] everywhere, even in your parliament". Muhammad Riyad then signalled the attack he was about to carry out in Germany by stating: "I am living here amongst you and inshallah I have made a plan to deal with you here in your homes inshallah. I tell you, that I will slaughter you in your homes" and "I make this promise that I will be the last thing that you see in this life. Inshallah I will slaughter you with this knife [waving knife at camera] Inshallah I will destroy you, and tear you to pieces". In Ofcom's view, these various statements described in highly positive and graphic terms Muhammad Riyad's and ISIL's intentions to carry out acts of extreme violence against German people who did not conform to their definition of Islam.

Ofcom considered the audience would have interpreted Muhammad Riyad's various comments as promoting and justifying hatred and violence towards the persons who did not conform to his definition of Islam. In Ofcom's view, this was a clear example of hate speech, as defined by the Code.

We then went on to consider whether this example of hate speech was justified by the context. Rule 3.2 permits hate speech being included in programming, as long as sufficient context is also provided. There can be circumstances in which there is editorial justification for including challenging or extreme views in keeping with audience expectations, provided there is sufficient context. However, the greater the risk the material may cause harm or offence, the greater the need for more contextual justification. Ofcom must also take proper account of the broadcaster's and the audience's right to freedom of expression and related right to freedom of thought, conscience and religion.

This news item featuring Muhammad Riyad was broadcast on a channel targeted at the Afghan community in the UK. As already mentioned, the Code does not prohibit the broadcast of content featuring people with extreme and very challenging views, for example as part of on-going news stories. In particular, it was not surprising, and within audience expectations for this programme, that a specialist news programme should want to analyse and report on the views and activities of ISIL to some extent. Further, Ofcom considered it was clearly legitimate journalistically for the Licensee, who broadcasts from an Afghani perspective, to wish to broadcast a report about an attack carried out by an individual widely reported to have been from Afghanistan. In this regard, we took into account ATRN's editorial rationale for including the video featuring Muhammad Riyad in this case, namely "to clearly communicate to the Afghan people that one of their countrymen was not responsible for the attack and that Pakistani politics likely played a role in the tragedy".

However, the various statements made by Muhammad Riyad in which he spoke in positive terms about jihad and about both the violent capabilities of ISIL and his own intention to kill non-Muslims and Muslims who renounce their faith amounted, in our view, to spreading, inciting, promoting or justifying hatred based on intolerance of those of a different religion. We were particularly concerned that the Licensee broadcast a prolonged example of hate speech in a news bulletin with no surrounding content that sought to challenge, rebut or otherwise contextualise Muhammad Riyad's highly extreme views.

We took into account: ATRN's statement that it "condemns the statements made by the speaker in the video"; its apology; and its statements that it would "never intend to put something inflammatory" on air and it "did not support such views nor was [the video] being shared as an endorsement of such in any fashion". We also noted that the Licensee said it "used this incident to remind and augment our production/editorial team working on the ATN international beam that reaches the UK so that they remain editorially vigilant on all content that goes out". Further, we noted the "additional news editorial guidelines...[and] content oversight controls" it had put in place as a result of this incident.

However, given the very strong nature of the material in this case, we considered that, under the Code, there would need to be extremely clear and strong context provided to justify the broadcast of the video featuring Muhammad Riyad. Our Decision was that there was clearly insufficient context to justify the inclusion of hate speech in this broadcast, and Rule 3.2 was therefore breached.

Rule 2.3

Rule 2.3 requires broadcasters to ensure that the broadcast of potentially offensive material is justified by the context. Context is assessed by reference to a range of factors including: the editorial content of the programme, the service on which the material was broadcast, the time of broadcast, what other programmes are

scheduled before and after, the degree of harm or offence likely to be caused, likely audience expectations, warnings given to viewers, and the effect on viewers who may come across the material unawares.

The Code places no restrictions on the subjects covered by broadcasters, or the manner in which such subjects are treated, as long as potentially offensive content is justified by the context. In making any assessment of context, Ofcom must also take proper account of the broadcaster's and the audience's right to freedom of expression and related right to freedom of thought, conscience and religion.

Ofcom first considered whether the material in this programme had the potential to cause offence. As already discussed, this content contained highly challenging material which we identified as hate speech. As such we considered that the content clearly had the potential to be extremely offensive.

We therefore went on to consider whether the broadcast of the video was justified by the context. As discussed above, Ofcom acknowledges the Licensee's editorial rationale for including the video featuring Muhammad Riyad in this case, namely "to clearly communicate to the Afghan people that one of their countrymen was not responsible for the attack and that Pakistani politics likely played a role in the tragedy". We also noted the particular public interest there would be in a channel targeting the Afghan community in the UK wishing to broadcast a report about an attack carried out by an individual, widely reported to have been from Afghanistan.

However, we considered the various statements made by Muhammad Riyad, constituting as they did a prolonged example of hate speech which was not rebutted, countered or otherwise contextualised, would have clearly exceeded generally accepted standards.

We took into account: ATRN's statement that it "condemns the statements made by the speaker in the video"; its apology; and its statements that it would "never intend to put something inflammatory" on air and it "did not support such views nor was [the video] being shared as an endorsement of such in any fashion". We also noted that the Licensee said it had "used this incident to remind and augment our production/editorial team working on the ATN international beam that reaches the UK so that they remain editorially vigilant on all content that goes out". Further, we noted the "additional news editorial guidelines...[and] content oversight controls" it had put in place as a result of this incident.

Broadcasters are allowed to include any contributor they wish in their programming, provided they comply with the Code. There are various possible editorial approaches a broadcaster can take to providing sufficient context when featuring someone with extreme and offensive views, to comply with Rule 2.3. The final decision as to what approach to take is one for the broadcaster.

In this case, given the very strong nature of the material, we considered for all the reasons stated above that there was insufficient context to justify the broadcast of this highly offensive material, and our Decision was therefore that Rule 2.3 was also breached.

Conclusion

Breaches of Section Three of the Code, in particular, are very serious because they involve the potential for serious harm.

Ofcom considered all of the breaches in this case to be very serious.

Due to the highly challenging and potentially harmful nature of the content broadcast, we are putting the Licensee on notice that we will consider these very serious breaches for the imposition of a statutory sanction.

Breaches of Rules 2.3, 3.1 and 3.2

In Breach

CrossTalk

RT, 11 July 2016, 12:30

Introduction

RT is a global news and current affairs channel produced in Russia, and funded by the Federal Agency for Press and Mass Communications of the Russian Federation. In the UK, the channel broadcasts on satellite and digital terrestrial platforms. The licence for RT is held by Autonomous Non-profit Organisation TV-Novosti (“TV Novosti” or the “Licensee”).

CrossTalk is a series of 30-minute current affairs debate programmes broadcast three times a week on RT. Ofcom received a complaint from a viewer about “bias against America and the West” in the episode broadcast on 11 July 2016.

Ofcom noted that this programme included a discussion between the programme’s presenter Peter Lavelle (“PL”) and guests Dmitry Babich (“DB”), Mark Sleboda (“MS”) and Rory Suchet (“RS”). The panel discussed the role of the North Atlantic Treaty Organisation (NATO)¹ following the NATO summit in Warsaw on 8 and 9 July 2016. We noted the following statements in particular:

PL: *“...let’s talk about NATO first...what I think was very important, this was a very important summit and Mark [Sleboda] and I have talked about this before and it didn’t get as much news coverage but conflating NATO and the EU as one. This is a significant move. This is the backdoor, the ultimate back door for American hegemony in Europe and this is a finger being thrown at Brexit”.*

MS: *“...NATO is a political organisation. This NATO summit was badly staged, badly signalled, political theatre and this placement of 4,000...troops and four brigades across four countries [referring to the deployment of NATO troops in late June 2016 in the Baltic States and Poland in response to NATO’s perception of an increased threat from Russia] is a political manoeuvre”.*

MS: *“...or it’s part of a good cop/bad cop routine where France traditionally plays the part of good cop trying to lure Russia into dialogue and accepting the status quo, in particular here in Ukraine and, you know, the new confrontational status, while the US and previously the United Kingdom hammered home the bluster and rhetoric”.*

DB: *“My analogy would be a different one from Mark’s. I think that it’s like two robbers coming to a house and one of them says ‘Let’s just break in and intimidate the owner’ and the other one says ‘no, let’s first have*

¹ The intergovernmental military alliance of the USA, Canada and various (largely European) states based on the North Atlantic Treaty, signed on 4 April 1949.

a dialogue with the owner. Let's explain to him that we are not a threat and that he's actually to blame himself because of his dangerous movements inside his own house".

RS: *"You say dangerous movements but one point you need to bear in mind with all this posturing and gesturing and all these comments being made – they did just turn online the missile system in Romania. That is now online and that is not a gesture, that is in effect, right now, that is reason to be concerned".*

DB: *"My analogy would be that they are putting sacks of explosives next to an imaginary fire. The fire right now is imaginary but we'll have Canadians in Latvia, protecting Latvia, we'll have the French people in Estonia, we'll have the Germans in Lithuania and we will have Americans in Poland next to that crazy Polish defence minister who is declared crazy by the EU press".*

PL: *"Even if limited, these assets being deployed – it creates the possibility of a conflict that nobody really wants but no one wants to back down".*

MS: *"It's the precedent. All of these systems, in particular the missile defence, will be built on, developed further. Troops can be added where troops have already politically been placed. There is a growing urge to militarism to turn the Black Sea...into a NATO pond. There is a little bit of fight back from that as perhaps a step back too far, but we've seen very serious near incidents in the Baltics".*

RS: *"We have a minute group of megalomaniac powerbrokers hell bent on sending us into a third world war".*

MS: *"This is not a minute group".*

PL: *"It may be small but they are very influential".*

RS: *"I'll tell you what. Let's take some Russian defensive missiles and put them on the Canadian border or the Mexican border and see how America reacts. They would go mental. They would call that an act of war".*

DB: *"Do you know what they would do? They would buzz, and they did buzz, the Soviet ships coming to Cuba, and they were right because this was so close to the United States. When Russian planes buzz US warships in the Baltic in a bird's flight from St. Petersburg, this is unacceptable. This is aggression from Russia".*

MS: *"...the domestic politics of this is, of course, the legacy of World War II and the Cold War and the precedent of US and German troops being placed on the Russian border. Even if this is not at present a serious military threat, it is a political signal, which is what it is intended as.*

There is of course this suggestion that they could be used as human shields if a conflict broke out, which is a kind of cynical use of troops”.

RS: *“...just days, several days, before the NATO summit we had President Putin, who was in Finland meeting with his Finnish counterpart, and he said to the press, he said in front of the Finnish president, that NATO would gladly fight Russia until the last Finnish soldier”.*

PL: *“You could throw in Ukrainian, you could throw in Poland, you could throw in the whole lot of them”.*

DB: *“That is why I use this analogy – you know, putting sacks of explosives around an imaginary fire. There is a zero possibility of Russia invading Latvia or Estonia or Lithuania. We have no such plans. There are no border incidents”.*

RS: *“But how much longer will Russia not react? That’s a concern. That’s a legitimate concern”.*

DB: *“If you have American troops in Poland, if you have Germans in Lithuania. If, by any chance, Russia touches a Canadian soldier in Latvia there will be several hundred of them...”.*

PL: *“August 1914 all over again”.*

DB: *“You immediately have the other countries getting involved”.*

PL: *“...I’m convinced...this is a way for Washington to seal its hegemonic control of Europe. The problem with this, the problem with this is that the EU, NATO, the closer you get to it...is that one size doesn’t fit all. And this is the tragedy of it all because all of the economic interests inside the European Union don’t reflect everybody else’s, and different countries have different security interests and relationship with Russia. This one size fits all is dangerous”.*

MS: *“The one thing that was a kind of a surprise, because it wasn’t well advertised and was a genuine revelation at this talk shop summit, was this joint EU/NATO declaration. This has long been presented that the EU and NATO, despite being represented by the same countries, [except] essentially a non-important handful, are different hats we can put on and be completely different organisations. This, of course, is a false dichotomy”.*

PL: *“...all of our viewers should understand now, finally, we can explain to our viewers why Montenegro is part of NATO...the police force in New York City, what they spend on the police force in New York City is half the GDP of Montenegro every single year. That’s why Montenegro is in the alliance”.*

MS: *“This conflation of the EU and NATO is very important because as they expand, drawing in new members by hook and by crook...NATO usually precedes the EU or perhaps in some situations with Finland and Sweden...these are in effect the same organisations with the same values representing the same interests and right now those*

interests, it needs to be presented that they are unified and that was the message that failed to be delivered...”.

RS: *“Are the people ever going to wake up to this? The latest YouGov poll coming out of Germany in the wake of this NATO summit saying 64% of those polled in Germany are absolutely strictly opposed to NATO doing this in their garden along the border of Eastern Europe. What’s wrong with the people here. Can the people finally wake up?”*

PL: *“People are never allowed to vote on NATO. That’s never allowed.”*

MS: *“The poll that really scared NATO earlier last year was a pure research poll which showed that majorities in many EU countries including France, Germany and Italy, if a NATO member was involved in a conflict with Russia would not want their country to get involved”.*

The following captions were broadcast during the programme:

“Russia: Military buildup is part of NATO’s ‘anti-Russia hysteria’”.

“Critics: calling Russia aggressive is tactic to get NATO to spend more”.

“Majority of NATO members unwilling to increase their defence spending”.

“NATO Gen. Petr Pavel dismisses idea that Russia wants to invade Europe”.

“NATO Warsaw summit agrees to deploy additional 4K troops to E. Europe”.

Ofcom considered that the programme dealt with matters of political controversy and matters relating to current public policy i.e. the policies and actions of NATO and its member nations, for example in relation to Russia and eastern Europe.

We also considered that the programme raised issues warranting investigation under Rule 5.5 of the Code which states:

“Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service. This may be achieved within a programme or over a series of programmes taken as a whole”.

We therefore asked the Licensee for its comments on how the programme complied with this rule.

Response

In TV Novosti’s initial representations, the Licensee stated its belief that it had preserved due impartiality by including alternative viewpoints in other editorially linked programmes aired soon before or after this broadcast. TV Novosti said for example that *RT Weekly News*, broadcast eight times on 10 July, included “short clips covering statements from many Western leaders”, and pointed viewers to “the availability of further information”. The Licensee stated that *Worlds Apart* broadcast on 14 July included an interview with retired Lieutenant General Mark Hertling, who had served in the US Army in his 37-year military career.

However, in response to Ofcom's Preliminary View (that Rule 5.5 had been breached by statements that were critical and gave a one-sided view of NATO's policies and actions in relation to eastern Europe and Russia), TV Novosti accepted that it had not maintained due impartiality in this programme and apologised.

The Licensee stated that it had carried out an investigation to ascertain how the failure had happened.

The Licensee said that *CrossTalk*'s format, "designed to foster discussion and analysis of current affairs" and to "present opposing views as a base for debate", should have facilitated the preservation of due impartiality. TV Novosti acknowledged that the panellists available for the programme offered "a Russian view" on NATO and the Warsaw summit. It said it had sought a western viewpoint by inviting guests to represent that viewpoint on the programme. The Licensee stated that these individuals declined to participate in the programme, however, and that "refusals of this kind are an increasing problem for RT".

TV Novosti said that it was "aware of the compliance requirement of alternative viewpoints", and that the programme's host Peter Lavelle and the editor had planned to use captions to achieve balance. The Licensee stated that "technical problems" on the day of recording caused pre-prepared "caption comments" to fail to appear on-screen during the recording. TV Novosti said this resulted in disruption during recording, and that the programme required heavy editing afterwards and the comments were then "inadvertently omitted". These comments, according to TV Novosti, included for example remarks concerning "Russia's military build-up on its borders and quotes made by NATO officials regarding Russia". However, TV Novosti stated that some other "basic comments" did appear.

The Licensee said that the omission of balancing comments occurred due to the director failing to save the correct version of the text, and instead using a "backup" set of "basic comments", which was "not noticed either during production or during transmission the following day". TV Novosti added that the director did not check the placement of captions prior to broadcast, and, after a "subsequent incident", is no longer employed by RT.

The Licensee acknowledged that: "the upshot was that the programme presented a Russian view (or series of views) of NATO's decision to deploy troops and to switch on a ballistic missile system in eastern Europe without mentioning NATO's reasons for doing so"; "assessing the programme against the Broadcasting Code, the programme was dealing with a politically controversial matter"; "the viewpoint favoured one side of the controversy only"; "there was insufficient balancing material, either in terms of alternative viewpoints or context"; "and so 'due' impartiality was not preserved".

TV Novosti agreed with Ofcom's Preliminary View that *RT News* on 10 July and *Worlds Apart* on 14 July did not meet the criteria to preserve due impartiality by being a "series of programmes taken as a whole", as defined in the Code.

For these reasons, the Licensee agreed with Ofcom that it had not maintained due impartiality.

TV Novosti said that "non-compliance was inadvertent" and underlined that the Licensee: was aware of the Code and its responsibility to preserve due impartiality; had "compliance procedures in place"; had "sought commentators" with balancing viewpoints; and, had planned to "fall back on an editorial technique based on

captions” but following the “failure of the caption generator” the director “failed to incorporate the necessary captions”. The Licensee added that as a result of this incident it was reviewing its compliance procedures and training “as a matter of urgency” and “taking steps to minimise” any future mistakes. TV Novosti said that it will not broadcast this programme again and had removed it from the programme’s website.

The Licensee invited Ofcom to treat this matter as resolved and not record a breach of the Code.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that the special impartiality requirements set out in section 320 of the Act are complied with. This objective is reflected in Section Five of the Code.

Broadcasters are required to comply with the rules in Section Five to ensure that the impartiality requirements of the Act are complied with, including that due impartiality is preserved on matters of political or industrial controversy and matters relating to current public policy.

When applying the requirement to preserve due impartiality, Ofcom must take into account Article 10 of the European Convention on Human Rights. This provides for the broadcaster’s and audience’s right to freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without undue interference by public authority. The broadcaster’s right to freedom of expression is not absolute. In carrying out its duties, Ofcom must balance the right to freedom of expression on one hand, against the requirement in the Code to preserve “due impartiality” on matters relating to political or industrial controversy or matters relating to current public policy.

Section Five of the Code acts to limit, to some extent, freedom of expression because its application necessarily requires broadcasters to ensure that neither side of a debate relating to matters of political or industrial controversy and matters relating to current public policy is unduly favoured. Therefore, while any Ofcom licensee has the freedom to discuss any controversial subject or include particular points of view in its programming, broadcasters must always comply with the Code.

Rule 5.5 of the Code requires that: “Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole”.

Application of Section Five

Ofcom first considered whether the requirements of Section Five of the Code should be applied: that is, whether the subject of the debate concerned matters of political or industrial controversy or matters relating to current public policy.

As detailed in the Introduction, the programme included a 12-minute discussion about the role of NATO following the NATO summit that took place in Warsaw on 8 and 9 July 2016 and the movement of NATO troops to Estonia, Latvia, Lithuania and Poland in late June 2016. There were a number of statements and captions that were

clearly critical of the policies and actions of NATO and its member nations. These included:

“...NATO is a political organisation. The NATO summit was badly staged, badly signalled, political theatre and this placement of 4000...troops and four brigades across four countries is a political manoeuvre”.

“We have a minute group of megalomaniac powerbrokers hell bent on sending us into a third world war”.

“...I think that it’s like two robbers coming to a house and one of them says ‘Let’s just break in and intimidate the owner’ and the other one says ‘no, let’s first have a dialogue with the owner. Let’s explain to him that we are not a threat and that he’s actually to blame himself because of his dangerous movements inside his own house”.

“...the domestic politics of this is, of course, the legacy of World War II and the Cold War and the precedent of US and German troops being placed on the Russian border. Even if this is not at present a serious military threat it is a political signal which is what it was intended as. There is of course this suggestion that they could be used as human shields if a conflict broke out which is a kind of cynical use of troops”.

“...I’m convinced...this is a way for Washington to seal its hegemonic control of Europe. The problem with this, the problem with this is that the EU, NATO, the closer you get to it...is that one size doesn’t fit all and this is the tragedy of it all because all of the economic interests inside the European Union don’t reflect everybody else’s and different countries have different security relationships with Russia. This one size fits all is dangerous”.

The captions included:

“Russia: Military buildup is part of NATO’s ‘anti-Russia hysteria”.

“Critics: calling Russia aggressive is tactic to get NATO to spend more”.

“Majority of NATO members unwilling to increase their defence spending”.

In view of this part of the programme being presented as a critical discussion of the policies, motives and actions of NATO and its member nations, we considered the programme dealt with a matter of political controversy. TV Novosti was therefore required to preserve due impartiality to comply with Rule 5.5 of the Code.

Preservation of due impartiality: Rule 5.5

Rule 5.5 makes clear that due impartiality may be achieved “within a programme or over a series of programmes taken as a whole”. We went on to assess whether the Licensee preserved due impartiality – firstly, within the programme, either through sufficiently reflecting alternative viewpoints and/or contextual factors; and secondly, over a series of programmes taken as a whole.

Due impartiality within the programme

Section Five of the Code does not dictate what broadcasters can or cannot include in their programmes. Ofcom underlines that the broadcasting of critical comments about

the policies and actions of any government, multi-national institution or nation state is not, in itself, a breach of the due impartiality rules. Importantly, the Code does not prohibit broadcasters from, for example, criticising one side of a particular issue, such as the policies and actions of NATO and its members towards Russia. Further, Ofcom licensees always have the editorial freedom to challenge any 'orthodox' viewpoint on any controversial issue (including a view perceived to be that of 'the West'), as long as due impartiality is preserved.

It is essential that news and current affairs programmes are able to explore and examine controversial issues, and contributors are able to take robust and highly critical positions. However, depending on the specific circumstances of any particular case, it may be necessary to reflect alternative viewpoints in an appropriate way and/or provide sufficient other context in order to ensure due impartiality is preserved.

In addition, in judging whether due impartiality has been preserved in any particular case, the Code makes clear that the term "due" means adequate or appropriate to the subject matter. Therefore "due impartiality" does not mean an equal division of time has to be given to every view, or that every argument and every facet of the argument has to be represented. Due impartiality may be preserved in a number of ways and it is an editorial decision for the broadcaster as to how it ensures due impartiality is maintained. The definition of "due impartiality" in the Code states: "The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience. Context, as defined in Section Two: Harm and Offence of the Code, is important".

In this case, the programme included a number of statements that were critical and gave a one-sided view of NATO's policies and actions in relation to eastern Europe and Russia. Rule 5.5 therefore required the Licensee to preserve due impartiality on these issues.

We considered that a key relevant alternative viewpoint was one that reflected the opinion of NATO in relation to the matters discussed in the programme and/or a viewpoint challenging the criticisms made about NATO within the programme.

Ofcom noted that the programme included the following caption broadcast at the bottom of the screen on three occasions for a total of approximately 37 seconds:

"NATO Gen. Petr Pavel dismisses the idea that Russia wants to invade Europe".

Although this caption did, to an extent, reflect the viewpoint of a senior NATO figure, we considered it could not be characterised as providing a full response to the criticisms made about NATO in the programme as a whole. In our view, it could only serve a very limited role in helping to preserve due impartiality in this case.

We noted that TV Novosti acknowledged that it had not preserved due impartiality in this programme.

Ofcom took into account that the Licensee said that, being aware of the need to preserve due impartiality, it had invited various guests to appear on the programme and provide an alternative viewpoint, but they had all refused. As Ofcom has made clear on numerous occasions, where an alternative viewpoint is needed to maintain impartiality, inviting contributors to participate who then refuse to do so is not

sufficient to preserve due impartiality. That alternative viewpoint needs to be represented in an appropriate way.

In this case TV Novosti said that, following the refusal of the contributors to take part, it had intended to preserve due impartiality through various captions reflecting the Western/NATO viewpoint but these were omitted due to a combination of technical and human errors. Captions are one of a number of possible editorial techniques that can contribute towards the preservation of due impartiality. Ofcom underlines however that whether captions do in fact maintain due impartiality in any specific programme will depend on all the relevant circumstances, such as the duration and nature of the programme and of the matter of political controversy, and the presence of any other factors in the programme which may contribute to helping to maintain due impartiality. We caution broadcasters against assuming that they can preserve due impartiality where required by solely including captions.

For all these reasons we considered that due impartiality was not maintained within the programme itself.

Due impartiality in a series of programmes taken as a whole

The Code defines “a series of programmes taken as a whole” in the context of Rule 5.5 as follows:

“This means more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience. A series can include, for example, a strand, or two programmes (such as a drama and a debate about a drama) or a ‘cluster’ or ‘season’ of programmes on the same subject”.

In the Licensee’s initial representations, it stated that related broadcasts including relevant alternative viewpoints were shown during and after the NATO summit. It highlighted a 10 July broadcast of *RT Weekly News* that incorporated a “3-minute item... with short clips covering statements from many Western leaders” shown “8 times” on this date, and a 14 July broadcast of *Worlds Apart* that featured an interview between presenter Oksana Boyko, and retired US military Lieutenant General Mark Hertling.

The Code’s definition of a “series of programmes taken as a whole” provides broadcasters with significant flexibility when making editorial decisions about how to maintain due impartiality. In this case however Ofcom did not consider that either of the two RT programmes listed above fulfilled this definition. Ofcom acknowledged that the Licensee broadcast alternative views of the tensions between NATO and Russia following the NATO Warsaw Summit in the 10 July *RT Weekly News* and 14 July *Worlds Apart* programmes. However, Ofcom noted that although both these programmes were broadcast close to the 11 July *Crosstalk* programme, neither was “editorially linked” with the 11 July *Crosstalk* programme. This was because there was no material at all included in the 11 July *Crosstalk* programme which referred to, and so potentially linked it to, any other RT broadcasts.

Consistent with Ofcom’s July 2016 *Going Underground* Decision², we reiterate that programmes broadcast before and after a particular programme that may contain

² See: Ofcom’s Decision on *Going Underground*, issue 308 of Ofcom’s Broadcast and On Demand Bulletin, 4 July 2016
http://www.ofcom.org.uk/_data/assets/pdf_file/0019/46621/issue_308.pdf.

relevant alternative viewpoints are only relevant to compliance with Rule 5.5 if those programmes are editorially linked in a sufficient way. However, this was not the case with the programming identified by the Licensee in this case.

We noted that, in response to Ofcom's Preliminary View in this case (that Rule 5.5 had been breached by statements that were critical and gave a one-sided view of NATO's policies and actions in relation to eastern Europe and Russia), the Licensee agreed that *RT News* broadcast on 10 July, and *Worlds Apart* broadcast on 14 July did not meet the criteria to be regarded as part of a "series of programmes taken as a whole".

Conclusion

The Licensee failed to preserve due impartiality on a matter of political controversy in this episode of *CrossTalk*. Our Decision is that it therefore breached Rule 5.5 of the Code.

We took into account the various points put forward by TV Novosti in mitigation, including that: "non-compliance was inadvertent"; it had "compliance procedures in place"; it had intended to preserve due impartiality through the use of captions but these were not included in the programme as a result of technical and human errors; it was reviewing its compliance procedures and training "as a matter of urgency" and "taking steps to minimise" any future mistakes; and, that TV Novosti said it will not broadcast this programme again and had removed it from the programme's website.

However, Ofcom did not consider that these factors were sufficient to merit resolving this matter. The breach of the Code in this case resulted, by the Licensee's own admission, from a series of mistakes that would have been evident to its staff. Ofcom also noted that TV Novosti did not identify the issue itself before or on broadcast.

Given that Ofcom has recently recorded a number of breaches³ of Section Five in RT programmes, Ofcom is requesting that the Licensee attend a meeting to discuss its compliance in this area.

Breach of Rule 5.5

³ See Ofcom's Decisions on the *The Truthseeker: Genocide of Eastern Ukraine and Ukraine's Refugees* http://www.ofcom.org.uk/_data/assets/pdf_file/0017/50507/issue_288.pdf; and our Decision on *Going Underground* http://www.ofcom.org.uk/_data/assets/pdf_file/0019/46621/issue_308.pdf.

In Breach

The Incident: Special Investigation

NTV Mir Lithuania, 15 April 2016, 19:50

Introduction

NTV Mir Lithuania is a television channel broadcasting to the Russian-speaking community in Lithuania. *The Incident* is a documentary series broadcast in Russian, which deals with a variety of current affairs topics. The licence for NTV Mir Lithuania is held by Baltic Media Alliance Limited (“BMAL” or “the Licensee”).

A complaint alerted Ofcom to this programme, which the complainant considered was partial in terms of its treatment of various policies and actions of the governments of Latvia and Lithuania, such as “the education and training of ethnic minorities in Lithuania, and the status of the Russian national minority in Latvia”.

Ofcom obtained an independent translation of the whole programme from the original Russian to English. We gave the Licensee an opportunity to comment on the accuracy or otherwise of the translation. BMAL raised no objection to the accuracy of the translation, and we therefore relied on this translation for the purposes of the investigation.

Ofcom noted that the programme was about 25 minutes in duration and was presented by a reporter, Roman Igonin. The first segment of the documentary focused on contemporary neo-Nazi movements in the Baltic States, in particular in Latvia and Lithuania, and the alleged links of these groups with the activities of the Waffen-SS¹ in Latvia and Lithuania during World War Two. The second segment of the programme focused on certain current policies and actions of the governments of Latvia and in Lithuania. These were firstly, the alleged unfair discrimination against non-citizens (and in particular Russian speaking individuals) in Latvia, and second, the education and alleged anti-Russian policies of the Lithuanian authorities. In the last few minutes of the documentary, it returned to the subject of the persecution and atrocities carried by the Nazis in the Second World War in Lithuania, and the current activities of far right groups in that country. The documentary included interviews with various individuals (mainly Russian speaking), including: historians; a political analyst; Lithuanian public figures; a survivor of a concentration camp in Latvia, and organisers of and participants in nationalist marches in Latvia and Lithuania (including veterans of the Latvian and Lithuanian volunteer legions of the Waffen-SS).

Throughout the programme, we noted various statements that either directly commented on the various policies and actions of the Latvian and Lithuanian governments referred to above, or were part of the context in which those statements were made in the programme.

Richard Chekutis (described on screen as the “organiser” of a “nationalist march” in Vilnius, the capital of Lithuania):

¹ The Waffen-SS was created in 1933 as the armed wing of the German Nazi Party's SS (“Schutzstaffel” or “Protective Squadron”). This military force was made up of men from Nazi Germany along with volunteers and conscripts from elsewhere, including from occupied lands such as present day Latvia and Lithuania.

"We do not want to see any foreigners here. Our goal is to keep Lithuania pure. Lithuania should be for Lithuanians".

Reporter: *"How did Nazi ideology become an element of domestic policy in the Baltic states?"*

Man speaking: *"For Europe, Russians are the Jews of the 21st century"* [this clip was repeated later in the programme].

Richard Chekutis: *"We don't need all of this Bolshevik scum here at all".*

Reporter: *"Who are the 'Latvian negroes'?"*

Woman in the street: *"Why are they calling us 'negroes'² in Latvia?"*

Reporter: *"How does it feel to be an alien in your own country?"*

Man speaking: *"Hundreds of thousands of people are discriminated against based on their ethnicity".*

Reporter (speaking over footage of the annual march of local nationalists and Waffen-SS veterans in Latvia):

"'Negroes' is the name reserved in the free and democratic Latvia for a special category of residents with limited rights. They are mostly citizens of the former USSR who remained in Latvia after the collapse of the Soviet Union".

Ella Shvetsova (described on screen as a "WW II veteran"):

"I hold a passport of a Latvian non-citizen. Our passports are even different in colour. Why do they call us 'negroes' in Latvia?"

Reporter (speaking over footage of protesters holding a poster reading 'Stop genocide against Russians!'):

"In the early 1990s, Latvia was home to nearly 750,000 non-citizens. Now there are three times less of them. It is hard to survive with 'non-citizens' status in a country that is struggling as it is, which is why non-citizens are leaving the country en masse".

Vladimir Simindey (described on screen as an "historian"):

² In this context 'negroes' referred to non-citizens in Latvia, and was based on a pun: 'negrahzdane' (i.e. non-citizens) shortened to 'negry', meaning negroes. In summary, Ofcom understands that this status was created to deal with the issue of citizens of the former USSR who were residing in Latvia after it became an independent state in 1991. Non-citizens under Latvian law have the right to a non-citizen passport issued by the Latvian government as well as other specific rights (for example to travel freely in the Schengen area), but do not have certain other rights, for example to vote. Approximately two thirds of Latvian non-citizens are ethnic Russians.

“Work restrictions apply [i.e. to ‘non-citizens’ in Latvia]. In other words, a person [i.e. a ‘non-citizen’] cannot hold public office or various positions at commercial companies. There are dozens of differences between the rights and obligations of citizens versus non-citizens”.

Reporter: *“Non-citizen status is an unprecedented phenomenon in the modern world. Hundreds of thousands of the country’s residents are considered second grade people just because they speak Russian”.*

Sergey Mikheyev (described on screen as a “political analyst”):

“The European Union is turning a blind eye to this. They don’t care. Somewhere they are campaigning for the rights of some questionable minorities, while here they fail to see how tens of thousands, hundreds of thousands of people are discriminated against based on their ethnicity”.

Reporter: *“Non-citizens have other passports. They are violet and not red like those of ‘authentic’ Latvians. People who live in Latvia with such passports are deprived of voting rights. They cannot vote in elections or have their own representative in parliament. This despite the fact that they pay taxes on a par with others. Non-citizens can never hold public office, work as lawyers, notaries, or serve in the army or police. They are subject to restrictions when it comes to purchasing real estate and the number of years of employment that can be counted toward a pension. There are close to 80 differences between rights of citizens and non-citizens”.*

Alexander Dyukov (described on screen as an “historian”):

“The glaring and blatant discrimination and the fact that Europe is trying to turn a blind eye to this for almost 25 years now is a sign of big problems”.

Reporter: *“A person can earn citizen status after passing a Latvian language and history exam. Yet learning a foreign language is no simple task, especially so for the elderly. The history exam requires disowning one’s own past altogether”.*

Alexander Dyukov: *“For example, a person has to pass a Latvian history exam, which has specific ideological aspects built into it. In other words, the Salaspils Concentration Camp actually wasn’t a concentration camp but some sort of correctional labour camp”*

Reporter: *“Vilnius. Representatives of Polish and Russian schools are staging a protest to defend the rights of ethnic minorities. In recent years, educational institutions where students are taught in languages other than Lithuanian have existed under the threat of closure”.*

Ella Kanayte (described on screen as an “*historian*”):

“While in 1990 Lithuania had 85 Russian schools with 76,000 students, now the country has 33 Russian schools with a little over 14,000 students”.

Reporter: *“Eliminating education in languages of ethnic minorities is viewed as a key issue of national security and a top-priority task in Lithuania”.*

Karlis Bilans (described on screen as the “*Director, Independent Human Rights Centre*” in Lithuania):

“Mr Grinis, the former head of National Security Department, openly said on live television that Russian schools as such had to be closed because they are channels of enemy ideology and threaten the Lithuanian State”.

Reporter: *“This is footage from a press conference of Lithuanian Parliament member, Mantas Adomemas”.*

Mantas Adomemas: *“This press conference was called due to media reports that students from Russian schools travel to Russia on holiday where they receive military training under a programme for Russian paratroopers”.*

Reporter: *“It turns out that the schoolchildren who went on holiday in Russia were playing a pretend war game. This was mistaken for military training and caused alarm among Lithuanian politicians”.*

Mantas Adomemas: *“What we are actually witnessing is the creation of a network of spies. Young people are recruited under the guise of going on a peaceful sightseeing trip. However, upon arriving at their destination they are supposedly approached by plainclothes foreign intelligence officers who try to identify those Lithuanian schoolchildren who are inclined to cooperate”.*

Reporter: *“After this incident, a search of the school was conducted, which was staged to set an example. The organisers of the trip were accused of collaborating with the Russian Federal Security Service, branded as agents of the Kremlin and terrorists”.*

Mantas Adomemas: *“We are today proposing amendments to the Criminal Code under which participation in reservist trainings or military exercises in the territory of countries that are enemies or potential enemies of Lithuania – Russia, Islamic terrorist organisation, ISIS – would constitute a crime punishable under law”.*

Reporter: *“Lithuanian public figure Yurius Subotinas... campaigned for neighbourly relations with Russia, published online articles and*

shared his favourable views of the experience of the Soviet Union. This also landed him in court”.

Yurius Subotinas (described on screen as the “Chairman of the Union for People’s Unity civic organisation” in Lithuania):

“The Lithuanian Parliament has recently passed a law. Let me quote it, my dear friends: ‘public acknowledgement of international crimes committed by the USSR, i.e. the Soviet Union, and fascist Germany...’. So what do we have here? They are equating the Soviet Union with fascist Germany”.

Reporter: *“Eradicating everything associated with Russia, particularly the Soviet past, is the main goal of Lithuanian domestic policy. A special role in this important national matter has been reserved for descendants of SS legionnaires”.*

Richardus Chekutis (described on screen as the “organiser” of a “nationalist march” in Vilnius, the capital of Lithuania):

“We would totally support a proposal by our authorities to ban such holidays as 9 May [Victory Day is a holiday that commemorates the victory of the Soviet Union over Nazi Germany], 1 May [Labour Day] or 8 March [International Women’s Day]. We don’t need this Bolshevik scum here at all”.

Alexander Dyukov: *“For Europe, the Russians are Jews of the 21st century. In other words, they are the enemy that needs to be fought – an omnipresent enemy that is spreading its scary tentacles, influencing domestic politics and conducting a so-called hybrid war. This is a repetition of what we saw in the 1920-30s. If you look at archival records of Nazi and nationalist propaganda in Eastern European countries targeting the Jews in the period between the two world wars, you will see the same fears and phobias currently associated with the Russians”.*

Reporter: *“War veteran Yulius Deksnis has been wearing his military decorations only at home in recent years. It would be unsafe to walk the streets wearing them. They can fine or arrest you for wearing decorations and a uniform with red stars”.*

Yulius Deksmis (described on screen as a “WW II veteran”):

“There is even a law prohibiting the demonstration of all those Soviet symbols in public places...My fear is lest the neo-Nazism should be revived. Neo-Nazism is a tragedy for all mankind, the Lithuanian people included”.

Reporter: *“9 May [Victory Day] has not been considered a holiday in Lithuania for a few years now. The country marks the end of World War II on 8 May – the day when Germany signed the act of unconditional surrender. Lithuania is doing everything it can to erase any associations their victory day might conjure up with the Soviet Union. The nation’s parliament is currently deliberating a law that would prohibit another symbol in Lithuania – the ribbon of Saint George. The authors of this*

initiative – members of a radical rightist party – believe that banning the black-and-orange ribbon in Lithuania is needed to defend the fundamental principles of sovereignty, freedom and democracy. Violators will face administrative sanctions”.

In light of these statements, it was Ofcom’s view that this programme dealt at least in part with matters of political or industrial controversy and matters relating to current public policy i.e. the policies and actions of two Baltic State governments (i.e. Latvia and Lithuania) relating to their treatment of their Russian-speaking minority populations. This fell into three broad areas: firstly, the policies and actions of the Latvian Government relating to alleged unfair discrimination against ‘non-citizens’ (and in particular Russian speaking individuals) in Latvia; second, the policies and actions of the Lithuanian Government relating to alleged unfair discrimination against minorities (and in particular the Russian speaking minority) in the education sector in Lithuania; and, third, alleged unfair anti-Russian policies on the part of the Lithuanian authorities.

We therefore considered this content raised issues warranting investigation Rule 5.5 of the Code:

“Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole”.

Ofcom asked BMAL to provide comments on how the programme complied with the above rule.

Response

Application of Section Five

BMAL argued that Section Five only applied “partially” to the programme. It said that “the programme’s time was principally dedicated to the historical analysis of collaboration of the Baltic population in [the] Holocaust and Nazi Waffen-SS legions during WWII”. The Licensee suggested that the programme “only partially” concerned matters of current political or industrial controversy or matters relating to current public policy. It argued that “the references to the current state of the Baltic countries, as well as critical references to some aspects of their modern policies...acted as a backdrop to the main editorial thrust of the programme, namely the discussion of the historical roots of Baltic nationalism”. It said that these references were of “lesser importance or prominence within the programme”.

The Licensee argued that the programme was an authored documentary analysis “giving a particular interpretation of historical events which, arguably, laid [the] basis of the Baltic nationalism”. It said that it would have been clear to viewers that the views being put forward by the programme makers “may have contained some controversy within Lithuania”. It said that the programme referred to the fact that “some of the Baltic States continue to interpret historical events their own way...or would dispute the account of historical events that is widely known or being advanced within the programme”.

The preservation of due impartiality

BMAL provided an analysis of and background on a number of the statements identified by Ofcom in the Introduction. In summary, the Licensee said that these statements were either representing “statements by actual witnesses to the events, opinions of the persons directly involved in Programme topics (i.e. the matters of current policy or industrial/public disputes)” or were “based on the broader factual context”. BMAL said it was “aware that one of the main conditions for ensuring compliance with Rule 5.5 is inclusion of different opinions in the Programme”. As a result, it stated that the programme contained “clear references to alternative opinions of pro-nationalist and pro-official Lithuanian characters and other opinion makers by both inclusions of direct speech and narration of their opinions”. It said that the programme presented “a variety of declarations by some Lithuanian nationalist opinion-makers, views expressed by anti-nationalist individuals, accounts by immediate witnesses of the events reflected in the Programme and references to the official position on many topics included in the Programme”. For example, BMAL said that the programme referred to the viewpoints of: Richardas Chekutis, one of the leaders of the nationalist movement in Lithuania and official assistant to Lithuanian Parliament deputy Dalia Kuodite; Gediminas Grina, a high-ranking Lithuanian official at the Ministry of Defence (Head of National Security Department at the time of the broadcast); and Mantas Adomemas, member of the Lithuanian Parliament; and Alexander Dyukov (described in the programme as an “*historian*”). The Licensee also provided links to various examples of what it described as “official Lithuanian ‘anti-Russia’ propaganda”. In conclusion, the Licensee said that the “Programme presents a sufficient range of opinions on each of the key topics constituting the Programme”.

The Licensee stated that in determining the application of the due impartiality rules, Ofcom must have regard to the context. BMAL therefore cited various contextual factors³ that it considered helped to preserve due impartiality in this case⁴.

- The editorial content of the programme, programmes or series: BMAL said that this programme was typical of broadcasts in the series of *The Incident: Special Investigation* shown on NTV Mir Lithuania. Its general topics are “anything related to the organised crime and corruption, catastrophes, war and terrorism, unsolved or ambiguous past events referring to countries, leaders and conflicts of nations”. BMAL said the programme’s “themes and audience-related positioning remained unchanged during the past years”.
- The service on which the material is broadcast: The Licensee said NTV Mir Lithuania is a television service broadcast in Russian “for non-native (non-Lithuanian) residents of Lithuania”. The Licensee explained that “[n]ow, there is nearly no Russian-language media left in Lithuania; therefore, NTV Mir Lithuania performs an important role in informing this national minority”.

³ BMAL noted that the definition of “due impartiality” in Section Five specifically states that: “context, as defined in Section Two: Harm and Offence of the Code, is important”.

⁴ In its representations, the Licensee argued that: “Despite the consideration that a fundamental aspect of preserving due impartiality is, normally, a range of viewpoints (and especially of “significant views” with “due weight”) reflected to an appropriate extent in programming, the absence of an alternative viewpoint does not inevitably mean that due impartiality has not been maintained. There is no requirement on broadcasters to provide an alternative viewpoint in all programmes (incl. ‘authored’). All stories must however be presented with impartiality adequate or appropriate to the subject and nature of the programme (i.e. due). Meaning that the ‘context is important’”.

- The time of broadcast: BMAL stated that the programme was broadcast on a Friday at 19:50 and “[d]espite the prime-time positioning”, the programme audience was low because the “NTV Mir Lithuania audience, just like the audiences of other Russian-language channels (PBK, REN TV Lietuva), is evenly distributed throughout the day and mainly presented by economically and politically inactive elderly people of Lithuania”.
- What other programmes are scheduled before and after the programme or programmes concerned: The Licensee said that the schedule of NTV Mir Lithuania “mostly includes movies and TV shows of a criminal and detective type and investigative documentaries” and such programmes were scheduled around the programme in this case.
- Likely expectation of the audience/effect of the material on viewers or listeners who may come across it unawares: BMAL said that “based on our excellent knowledge of the audience profile for NTV Mir Lithuania, we were sure that expectations of our audience fully conform to the eventually controversial content of the Programme”.

BMAL also stressed that alongside all these contextual factors, the importance of freedom of expression should be taken into account.

In summary, the Licensee said that the programme “appropriately reflected...facts from Latvia and Lithuania”. In its opinion the “truth was presented to the extent necessary for a due portrayal of the main topics included in the Programme”, including: the collaboration of Lithuanians in killing Jewish people and other crimes committed during World War Two; anti-Russia/Soviet political trends in the Baltics; “the non-citizen situation in Latvia”; and, the “anti-Russian rhetoric in Lithuania’s education”.

BMAL concluded however by saying that in response to this complaint its “compliance team is making compliance-check criteria adjustments for the content scheduled for NTV Mir Lithuania in order to ensure stricter compliance to the Code and to eliminate any flaws giving cause for biased complaints”.

BMAL’s comments on Ofcom’s Preliminary View

The Licensee made a number of comments in response to Ofcom’s Preliminary View (which was that there was a breach of Rule 5.5).

Overall BMAL continued to defend the programme’s compliance with the Code and invited Ofcom to “dismiss...the complaint about the Programme”. The Licensee said that Ofcom had taken insufficient account of contextual factors and had “neglected notable informational and factual background (well-known to viewers)” which it argued meant that Ofcom “unfairly simplifies the attitude to its evaluation of impartiality in the Programme.” It said it regretted that “the factual inconsistencies...and the very argumentation of the Preliminary View seem to compromise the impartiality of this investigation by Ofcom.”

Latvia: ‘non-citizens’

Regarding this controversial matter, the Licensee said in summary that: the programme set out facts and not opinions on those facts, and therefore no alternative

viewpoints were required; there was evidence that the concerns expressed in the programme about the Latvian government policy of having ‘non-citizens’ were shared by the European Parliament; and, this issue was one “of domestic policy in Latvia” and so not a matter of political controversy in Lithuania, Lithuania (not Latvia) being the territory targeted by NTV Mir Lithuania.

Lithuania: education

The Licensee disputed the way in which Ofcom evaluated the comments of Mr Adomenas and Mr Grinis in the Preliminary View.

Lithuania: anti-Russian policies and actions

The Licensee criticised certain statements in the Preliminary View, arguing for example that: comments in the programme which were critical of policies and actions of the Lithuanian government “could be interpreted reasonably as various individuals expressing their natural concerns about their own and other people’s civil and social security in light of the existence of Nazi tendencies in Lithuania...”; and, Ofcom had failed to take into account that “a number of Lithuanian state officials” had attended “officially sanctioned annual gatherings of Waffen SS veterans” in Lithuania on 16 March 2016.

We have addressed these comments in our Decision below.

Decision

Background

Under the Communications Act 2003 (“the Act”), Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that the special impartiality requirements set out in section 320 of the Act are complied with. This objective is reflected in Section Five of the Code.

Broadcasters are required to comply with the rules in Section Five to ensure that the impartiality requirements of the Act are complied with, including that due impartiality is preserved on matters of political or industrial controversy and matters relating to current public policy.

When applying the requirement to preserve due impartiality, Ofcom must take into account Article 10 of the European Convention on Human Rights. This provides for the broadcaster’s and audience’s right to freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority. However, the broadcaster’s right to freedom of expression is not absolute. In carrying out its duties, Ofcom must balance the right to freedom of expression on one hand against the requirement in the Code to preserve “due impartiality” on matters relating to political or industrial controversy or matters relating to current public policy.

Ofcom recognises that Section Five of the Code, which sets out how due impartiality must be preserved, acts to limit, to some extent, freedom of expression. This is because its application necessarily requires broadcasters to ensure that neither side of a debate relating to matters of political or industrial controversy and matters relating to current public policy is unduly favoured. Therefore, while any Ofcom licensee should have the freedom to discuss any controversial subject or include

particular points of view in its programming, in doing so broadcasters must always comply with the Code. Further, in reaching decisions concerning due impartiality, Ofcom underlines that the broadcasting of highly critical comments concerning the policies and actions of any government or state agency is not, in itself, a breach of due impartiality. Any broadcaster may do this provided it complies with the Code. However, depending on the specific circumstances of any particular case, it may be necessary to reflect alternative viewpoints or provide context in an appropriate way to ensure that Section Five is complied with.

In addition, in judging whether due impartiality has been preserved in any particular case, the Code makes clear that the term “due” means adequate or appropriate to the subject matter. “Due impartiality” does not mean an equal division of time has to be given to every view, or that every argument and every facet of the argument has to be represented. Due impartiality may be preserved in a number of ways and it is an editorial decision for the broadcaster as to how it ensures due impartiality is maintained.

Rule 5.5 of the Code states that:

“Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service... This may be achieved within a programme or over a series of programmes taken as a whole”.

The application of Rule 5.5

We considered first whether the requirements of Section Five of the Code should be applied: that is, whether the programme concerned matters of political or industrial controversy and/or matters relating to current public policy.

Ofcom’s published Guidance to Section Five (“the Guidance”)⁵ makes clear that whether a matter of political or industrial controversy and/or matters relating to current public policy is dealt with in a programme depends on a range of factors. These include the likely expectation of the audience as to the content and all other relevant contextual factors. The Guidance also points out however that “just because a number of individuals and institutions, or the majority of the audience to a service, share the same viewpoint on a contentious issue, does not necessarily mean that a matter is not, for example, a matter of political or industrial controversy”⁶.

In this case, when considering the application of Rule 5.5, Ofcom took careful account of the Licensee’s right to freedom of expression and the audience’s right to receive information. In doing so, we noted that one important theme in the programme was the current position, activity and views of extreme right wing, nationalist movements in the Baltic States (illustrated for example by footage of recent neo-Nazi marches in the capitals of Lithuania and Latvia). We also took into account the Licensee’s representations that “there is nearly no Russian-language media left in Lithuania” and that the Licensee therefore “performs an important role in informing this national minority”.

It is entirely a matter for the Licensee if it wishes, as the provider of a Russian-speaking channel in Lithuania, to make and broadcast a programme which examines

⁵ https://www.ofcom.org.uk/data/assets/pdf_file/0018/24534/section5.pdf

⁶ See paragraphs 1.4 and 1.23.

and explores the activities and views of extreme right wing, nationalist movements in the Baltic States. However, even if the majority of the audience may share the same viewpoint as the Licensee, for the reasons explained below, we considered that parts of the programme examined matters of political or industrial controversy and/or matters relating to current public policy. Therefore, the Licensee was obliged to comply with Rule 5.5 by ensuring that due impartiality was preserved on these matters.

As noted in the Introduction, we considered the programme included a number of highly critical statements about the policies and actions of two Baltic State governments (i.e. Latvia and Lithuania) relating to their treatment of their Russian-speaking minority populations. These critical statements fell into three broad areas:

Latvia: 'non-citizens'

The programme referred to the Government of Latvia regarding alleged unfair discrimination against 'non-citizens', almost all of whom are Russian speaking. For example, the programme included various comments stating that Latvian Government considered and treated its Russian speaking 'non-citizen' residents as "*second grade people*" who, as 'non-citizens': had "*work restrictions*" applied to them; "*are deprived of voting rights*"; and are generally "*subject to restrictions*" that the Latvian citizens are not. This was described by one interviewee as "*glaring and blatant discrimination...that Europe is trying to turn a blind eye to...for almost 25 years now...*". "*The history exam [to obtain the Latvian citizenship] requires disowning one own's past altogether*" and the exam had "*specific ideological aspects built into it*".

BMAL sought to argue that Section Five and the rule of due impartiality did not apply to the statements included in the programme in relation to the issue of 'non-citizens' in Latvia. They gave the following reasons:

- The Licensee said that the issue of 'non-citizens' was an issue of "domestic policy in Latvia", rather than in other countries or internationally, and that Latvia was not "within the broadcasting range of NTV Mir Lithuania". As made clear by the Ofcom Guidance to Section Five⁷, if a service is broadcast outside the United Kingdom, this factor may be taken into account when considering the application of due impartiality, but the requirement for due impartiality still applies to these services. The Guidance also explains that audience expectations are just one of a number of contextual factors that may be relevant when determining whether the obligation of due impartiality applies in a particular case. If an Ofcom licensee broadcasts content about controversial policies and actions of governments and/or their agencies in any jurisdiction in a highly critical manner, it is likely that Section Five will be engaged. This is irrespective of whether these issues are of particular significance amongst a broadcaster's likely audience. In the current case, Ofcom accepted that the issue of the status and treatment of 'non-citizens' was a domestic policy in Latvia. However, as clearly illustrated by the European Parliament report on the broader issue of 'stateless' persons in Europe that the Licensee cited in its representations to Ofcom⁸, the policies and actions of the

⁷ https://www.ofcom.org.uk/_data/assets/pdf_file/0018/24534/section5.pdf (paragraphs 1.4 and 1.5)

⁸ Report of the European Parliament on the Situation of Fundamental Rights in the EU (2013-2014) of 16 July 2015 (see: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2015-0230+0+DOC+XML+V0//EN>)

Latvian government was a controversial issue outside Latvia. We considered therefore that Rule 5.5 would apply in this case, even though the issue of ‘non-citizens’ in Latvia in Ofcom’s view would to some extent be of less significance and be less controversial amongst viewers of the service in the targeted country of Lithuania.

- The Licensee also argued that the statements about the status of ‘non-citizens’ in Latvia that Ofcom had identified as highly critical “could also be interpreted reasonably as various individuals expressing concerns about their own and other people’s rights and social security in light of the existence of ‘stateless status’”. In support of these concerns, the Licensee cited the report by the European Parliament of 16 July 2015⁹, in which the Parliament “condemns the fact that more than 15 million nationals of non-EU countries and 500 000 stateless persons are being discriminated against on account of the refusal to recognise their citizenship”. In accordance with the Licensee’s right to freedom of expression, it was able to broadcast a programme containing criticisms of the Latvian government’s policies and actions concerning ‘non-citizens’. We considered that the European Parliament report provided further evidence that the issue of citizenship, and in particular the status of ‘stateless’ persons in Europe, is a matter of controversy in Europe in general, and in Latvia specifically. In this context, the statements made in the programme about Latvian policies about ‘non-citizens’ were highly critical of the policies and actions of the Latvian government.
- BMAL also argued that the rule on due impartiality on this particular matter did not apply because the policies relating to ‘non-citizens’ and full citizens in Latvia referred to in the programme were well established facts, and viewers would have therefore been aware of them and “could not be misled”. The Licensee added that the programme set out facts and not opinions on those facts, and therefore the rules on due impartiality did not apply, and no alternative viewpoints were required. Ofcom disagreed. The application of the rules on due impartiality does not depend on the inclusion of facts and their accurate statement in a programme. Rather, it depends on whether a programme deals with a matter of political controversy or matter relating to current public policy. In the circumstances of this specific case, because certain statements about the treatment of ‘non-citizens’ within Latvia were factually correct did not mean the rules on due impartiality did not apply, nor that due impartiality was preserved. Ofcom understood that the facts stated in this programme resulted from the implementation of the policies and the actions of the Latvian government on the treatment of ‘non-citizens’ in Latvia, and the programme was highly critical of these policies and actions. Further, Ofcom considered that the programme (through various statements made by the reporter and interviewees) clearly did set out opinions on those facts (for example: the reporter referred to “*Hundreds of thousands of the country’s residents are considered second grade people just because they speak Russia*”; and, one interviewee, the historian Alexander Duykhov, referred to “*the glaring and blatant discrimination*” of the Latvian policies against non-citizens). We considered that those opinions were universally hostile to the policies and actions of the Latvian government concerning ‘non-citizens’. As a result, the rules on due impartiality did apply and alternative viewpoints or appropriate context needed to be provided.

⁹ See footnote 8.

- Finally, BMAL also argued that Mr Dyukov’s statement that the Latvian history exam to gain full citizenship had “*specific ideological aspects built into it*” was about the “interpretation of historical facts and events of the past” rather than a “matter of current political or industrial controversy or matter relating to current public policy” and that therefore the requirement for due impartiality did not apply. We disagreed. In this case, the issues were not a history exam and its contents as such, but that the history exam was part of the process for people to gain full Latvian citizenship in contemporary Latvia, and the allegation that to pass this exam, candidates were required to accept an officially sanctioned interpretation of the history of Latvia. We considered that the statements made by Mr Dyukov (and the reporter who said “*The history exam requires disowning one own’s past altogether*”) were highly critical of the history exam, as part of Latvia’s current policy on obtaining Latvian citizenship, and that therefore, they were relevant to Ofcom’s analysis of the application of the due impartiality rules.

Lithuania: education

We also noted highly critical statements of the policies and actions of the government of Lithuania regarding alleged unfair discrimination against the Russian-speaking minority in education. For example, the programme alleged that the Lithuanian Government threatened the closure of “*educational institutions where students are taught in languages other than Lithuanian*”, and that “*eliminating education in languages of ethnic minorities is viewed as a key issue of national security and a top-priority task in Lithuania*”.

Lithuania: anti-Russian policies and actions

The programme also alleged that Lithuania has a “*domestic policy*” of “*eradicating everything associated with Russia*”. For example, the reporter, who presented the programme, said that “*eradicating everything associated with Russia, particularly the Soviet past, is the main goal for Lithuanian domestic policy*”. The programme also included clips of the Lithuanian nationalist, Richard Chekutis, supporting bans on public holidays in Lithuania related to the former Soviet Union (such as Victory Day), and reporter commentary and a Second World War veteran criticising a law in Lithuania which prohibits the wearing of Soviet military decorations and uniforms in public.

Ofcom also took into account that the Licensee did accept that Section Five of the Code applied at least “partially” to the programme i.e. to the parts containing “references to the current state of the Baltic countries, as well as critical references to some aspects of their modern policies”. BMAL argued however that “the programme’s time was principally dedicated to the historical analysis of collaboration of the Baltic population in Holocaust and Nazi Waffen-SS legions during WWII”. There is no requirement that the due impartiality rules can only apply if the whole of a programme is dealing with particular matters of political or industrial controversy and matters relating to current public policy. Depending on the facts in any particular case, these rules can also apply to any part or parts of a programme that deal with a matter of political controversy or matter relating to current public policy.

In this case, Ofcom concluded that this programme did deal with matters of political controversy and/or matters relating to current public policy, namely the policies and actions of two Baltic State governments (i.e. Latvia and Lithuania) relating to their treatment of their Russian-speaking minority populations, in the three areas outlined above.

Rule 5.5 was therefore applicable to this content within the programme and the Licensee was obliged to take appropriate steps to ensure due impartiality was maintained.

The preservation of due impartiality

Ofcom went on to assess whether the programme preserved due impartiality on these matters. In judging whether due impartiality has been preserved in a programme, the Code makes clear that the term “due” means “adequate or appropriate to the subject and nature of the programme”. Therefore, the Code states that “‘due impartiality’ does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented”. In particular, the Code states that “[t]he approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience.” In addition, the Code makes it clear that ‘context’, as set out in Section Two (Harm and Offence) of the Code, is an important factor in relation to preserving due impartiality. This covers a number of factors including the editorial content of the programme, the service on which the material is broadcast, the likely size and composition of the audience and its expectations.

The Guidance on Section Five states that whether or not due impartiality has been preserved will depend on a range of factors including the programme’s presentation of the argument and the transparency of its agenda. The Guidance also makes it clear that the broadcasting of highly critical comments concerning the policies and actions of any one state or institution is not, in itself, a breach of the Code’s rules on due impartiality. In particular, the Guidance states that it is essential that current affairs programmes are able to explore and examine issues and take a position even if that is highly critical. The Guidance also says that the preservation of due impartiality does not require a broadcaster to include every argument on a particular subject or provide a directly opposing argument to the one presented in a programme¹⁰.

Nevertheless, the Guidance is clear that broadcasters “must maintain an adequate and appropriate level of impartiality in its presentation of matters of political controversy”. In particular, it says that “[d]epending on the specifics of the issue...it may be necessary, in order to fulfil the due impartiality requirements, that alternative viewpoints are broadcast”.

We therefore assessed first whether the Licensee provided sufficient alternative viewpoints on the controversial policies and actions of the Lithuanian and Latvian Governments, relating to their treatment of their Russian-speaking minority populations, in respect of the three issues outlined above.

Latvia: ‘non-citizens’

On this issue of the policies and actions of the Latvian government concerning unfair and unjustified discrimination against ‘non-citizens’, various people were featured giving their opinions. These views were those of: the reporter who presented the programme; a man and a woman on the street in the form of vox pops; Ella Shvetsova (a Second World War veteran); Vladimir Simindey (an historian); Sergey Mikheyev (a political analyst); Alexander Dyukov (an historian); and Nadezhda

¹⁰ See paragraphs 1.32 to 1.34 inclusive.

Nikitina (Salaspils Concentration Camp prisoner)¹¹. The reporter introduced this issue by asking:

“Who are the Latvian ‘negroes’?” before explaining that “‘Negroes’ is the name reserved in the free and democratic Latvia for a special category of residents with limited rights [i.e. ‘non-citizens’]. They are mostly citizens of the former USSR who remained in Latvia after the collapse of the Soviet Union”.

The various comments on this matter: described the status of ‘non-citizens’ in Latvia and the “restrictions”¹² that apply to this category of people, for example in the areas of work and voting; implied that non-Latvian citizens are unfairly and unjustifiably “discriminated against” (for example describing them as “second grade people”; and stated that the treatment of ‘non-citizens’ in Latvia had caused non-citizens to emigrate from Latvia “en masse”. All the viewpoints expressed in this section of the programme were highly critical of the policies and actions of the Latvian government on this matter.

Ofcom noted the Licensee’s argument that the programme included “clear references to alternative opinions of pro-nationalist and pro-official characters and other opinion-makers”. However, none of these opinions reflected the alternative or official viewpoint of the Latvian government on its policy and actions concerning ‘non-citizens’. For example, the programme did not contain any comments explaining why the status of ‘non-citizen’ exists and defending the policies and actions of successive Latvian governments in this area. Ofcom noted comments by the reporter in the programme and by the historian Alexander Dyukov that ‘non-citizens’ could gain full citizenship by passing a Latvian language and history exam. But these comments were highly critical of this exam. The reporter stated that “*The history exam requires disowning one own’s past altogether*” and a historian, Alexander Dyukov explained that the exam had “*specific ideological aspects built into it*”. We considered that viewers would have understood from these statements that in effect people taking the exam had to accept an official or approved Latvian interpretation of that country’s history in order to pass it.

For due impartiality to be preserved about these matters in Latvia, alternative viewpoints (for example viewpoints that defended or explained the policies of the Latvian government in relation to the differences in treatment between ‘non-citizens’ and full citizens in Latvia) needed to be included in the programme. The critical statements made about those policies and actions within the programme were not adequately challenged and/or sufficient other context provided to preserve due impartiality.

Lithuania: education

On the issue of the Lithuanian Government having a policy of, and taking actions amounting to, unfair and unjustified discrimination against ethnic minority schools in Lithuania (and Russian schools in particular) various people were featured giving their opinions. These views were those of: the reporter; Ella Kanayte (an historian); Karlis Bilans (Director of the Independent Human Rights Centre, Lithuania); Mr Gediminas Grinis (former head of National Security Department in Lithuania); and

¹¹ See Introduction.

¹² For example, the reporter stated that “*There are close to 80 differences between rights of citizens and non-citizens*” in Latvia.

Mantas Adomemas (Lithuanian Parliament Member). The reporter introduced this issue by saying:

“Vilnius. Representatives of Polish and Russian schools are staging a protest to defend the rights of ethnic minorities. In recent years, educational institutions where students are taught in languages other than Lithuanian have existed under the threat of closure”.

This was followed by Ella Kanayte, an historian, who quoted figures illustrating the significant reduction in the number of Russian schools in Lithuania, before the reporter stated that *“eliminating education in languages of ethnic minorities is viewed as a key issue of national security and a top-priority task in Lithuania”*. These viewpoints expressed in this section of the programme were therefore critical of the policies and actions of the Lithuanian Government on these matters.

Ofcom again noted the Licensee’s argument that the programme included “clear references” to “alternative opinions”. BMAL said for example that “a representative official position regarding Russian-language schools is provided in the Programme as the genuine opinion of Mantas Adomenas, member of the Lithuanian Parliament”. BMAL also said the broadcast accurately referred to the words of Gediminas Grina (or Grinis, as he was referred to in the programme), who was described in the programme as the former Head of National Security Department in Lithuania.

We therefore considered how the programme referred to the viewpoints of Mr Adomenas and Mr Grina. We noted the broadcast did feature footage of Mr Adomemas alleging that *“students from Russian schools travel to Russia on holiday where they receive military training under a programme for Russian paratroopers”*. He added that:

“What we are actually witnessing is the creation of a network of spies. Young people are recruited under the guise of going on a peaceful sightseeing trip. However, upon arriving at their destination they are supposedly approached by plainclothes foreign intelligence officers who try to identify those Lithuanian schoolchildren who are inclined to cooperate”.

Mr Adomemas then said that as a result he was proposing amendments to the Lithuanian Criminal Code to criminalise participation in military exercises in the territories of countries that *“are enemies or potential enemies of Lithuania”*, which he said included Russia.

However, we also noted that the reporter commented that Mr Adomenas and other Lithuanian politicians were incorrect in their allegations about Russian-speaking school children from Lithuania visiting Russia, by stating:

“It turns out that the schoolchildren who went on holiday in Russia were playing a pretend war game. This was mistaken for military training and caused alarm among Lithuanian politicians”.

“After this incident, a search of the school was conducted, which was staged to set an example. The organisers of the trip were accused of collaborating with the Russian Federal Security Service, branded as agents of the Kremlin and terrorists.”

We also noted that Mr Grinis was referred to by Mr Bilans as having said live on television that *“Russian schools as such had to be closed because they are channels of enemy ideology and threaten the Lithuanian state”*.

We considered that Mr Adomenas' remarks reflected his opinion as an elected representative (i.e. a Member of the Lithuanian Parliament), given at a press conference at that Parliament, on media reports about the incident involving the Russian school and its significance. The programme explained that as a result of the incident, Mr Adomenas *“was proposing amendments to the Lithuanian Criminal Code to criminalise participation in military exercises in the territories of countries that are enemies or potential enemies of Lithuania”*. We did not consider that Mr Adomenas speaking at a press conference at the Lithuanian Parliament was sufficient evidence to indicate that his remarks represented the official stance of the Lithuanian Government on its policy and actions of alleged unfair and unjustified discrimination against ethnic minority schools in Lithuania. Instead, in our view, the audience would have understood his remarks as representing the position of a member of the Lithuanian Parliament on this controversial issue.

The Licensee stated that *“Mr Grinis was the head of Lithuania’s State Security Department at the moment of the scandal in question, which involved the participation of Lithuanian school children at summer camps in Russia.”* It also provided two news stories dating from December 2015 as evidence of the accuracy with which his comments were quoted by Mr Bilans¹³. In one of these stories (of 18 December 2015) Mr Grinis was clearly referred to as *“the former chief of Lithuania’s State Security Department”*. It therefore appeared to be the case that Mr Grinis had expressed his views on the summer camps when he was no longer Head of the National Security Department. On this basis, in Ofcom’s opinion, Mr Grinis’ comments, which were quoted by Mr Bilans (rather than being the original footage of Mr Grinis making these remarks), could not have reasonably reflected the current viewpoint of the Lithuanian Government on its policy and actions of alleged unfair and unjustified discrimination against ethnic minority schools in Lithuania.

The Licensee also argued that Mr Grinis’ and Mr Adomenas’ statements were widely discussed in Lithuania media, which treated them specifically as *“opinions of official representatives of the Lithuanian Government”*. However, the Licensee did not provide Ofcom with sufficiently clear evidence that these views were widely treated in this way, nor that these views were in fact the official position of the Lithuanian Government.

In any event, we considered that the inclusion of Mr Adomenas’ and Mr Grinis’ remarks in the programme was consistent with the overall narrative of this segment of the programme i.e. criticising the Lithuanian Government for having a policy of, and taking actions amounting to, unfair and unjustified discrimination against ethnic minority schools in Lithuania (and Russian schools in particular).

BMAL argued that due impartiality on this particular matter also was maintained by the context¹⁴, pointing to the accuracy to which the words of Mr Grinis were

¹³ See the two news stories dated 9 December and 18 December 2015 which the Licensee referred to in its representations to Ofcom:
http://www.lrt.lt/en/news_in_english/29/122970/lithuanian_russian_school_teachers_say_their_schools_are_not_vehicles_for_moscow_propaganda
and <http://www.15min.lt/naujiena/aktualu/lietuva/buves-vsd-vadovas-gediminas-grina-siulo-uzdaryti-tautiniu-mazumu-mokyklas-56-552929>

“accurately” referred¹⁵. As already pointed out however the preservation of due impartiality does not centrally depend on the accuracy of statements presented in a programme. Rather, it depends on a matter of political controversy or matter relating to current public policy being presented in a duly impartial way. In the circumstances of this specific case, this did not happen, although certain statements of Mr Grinis may have been reported with reasonable accuracy. This was because: alternative viewpoints were not included that, for example, defended or explained the policies and actions of the Lithuanian Government (in relation to its alleged unfair and unjustified discrimination against ethnic minority schools in Lithuania); the critical statements made about those policies within the programme were not adequately challenged; and/or sufficient other context was not provided.

Lithuania: anti-Russian policies and actions

On the issue of anti-Russian policies and actions of the Lithuanian Government, various individuals stated their opinions. These were: the reporter; a student, Kristoferis Voiska; Yurius Subotinas (of the Union for People’s Unity civic organisation; Richardus Chekutis, one of the leaders of the nationalist movement in Lithuania; Alexander Dyukov (an historian); and Yulius Deksnis (World War Two veteran). We noted that in this segment of the programme, Yurius Subotinas criticised a recent Lithuanian law for referring to:

“...public acknowledgement of international crimes committed by the USSR, i.e. the Soviet Union, and fascist Germany...”. So what do we have here? They are equating the Soviet Union with fascist Germany”.

We also noted that the reporter summarised the theme of this section of the broadcast by saying: *“Eradicating everything associated with Russia, particularly the Soviet past, is the main goal of Lithuanian domestic policy”*. The reporter and the World War Two veteran then criticised a Lithuanian law which makes it an offence to wear military *“decorations and a uniform with red stars”* or other *“Soviet symbols”* in public places, and the reporter referred to a proposal put forward by *“a radical rightist party”* in Lithuania to add the ribbon of Saint George¹⁶ to this list of prohibited Soviet symbols, saying that: *“The nation’s parliament is currently deliberating a law that would prohibit another symbol in Lithuania – the ribbon of Saint George”*.

Although not directly commenting on the Lithuanian Government’s policies and actions on these matters, the criticism of the government was bolstered in Ofcom’s opinion by:

- the reporter suggesting that Lithuania had somehow created a *“special role in this important national matter”* (i.e. *“Eradicating everything associated with Russia, particularly the Soviet past, is the main goal of Lithuanian domestic policy”*) for *“descendants of SS legionnaires”* [i.e. Lithuanians who had served in the Waffen-SS];

¹⁴ We have commented on the other points raised by the Licensee concerning contextual factors under Other Matters below.

¹⁵ See introduction.

¹⁶ The Licensee explained in its representations that the ribbon of Saint-George is a symbol of military glory and valour in Russia.

- the Lithuanian nationalist Richardus Chekutis saying he and his colleagues would support a ban on Soviet-inspired public holidays in Lithuania like 9 May Victory Day;
- the historian Alexander Dyukov stating that: *“For Europe, the Russians are Jews of the 21st century. In other words, they are the enemy that needs to be fought – an omnipresent enemy that is spreading its scary tentacles, influencing domestic politics and conducting a so-called hybrid war”*; and,
- Second World War Two veteran Yulius Deksnis suggesting an implicit link between Lithuanian anti-Russian policies with the revival of neo-Nazism: *“My fear is lest the neo-Nazism should be revived. Neo-Nazism is a tragedy for all mankind, the Lithuanian people included”*.

The Licensee argued that all the viewpoints included in the programme could reasonably be interpreted as various people expressing concerns about their own and other people’s civil and social security in light of the existence of Nazi tendencies in Lithuania and various banning legislative acts. We did not dispute that these viewpoints were personal opinions on the different policies and actions of the Lithuanian Government. We also underline that the Licensee was free to broadcast a programme containing criticisms of the Lithuanian government’s policies and actions perceived as being anti-Russian. However, in doing so, BMAL needed to comply with the Code, including the due impartiality requirements. In this case, all the viewpoints on these issues expressed in this section of the programme, as set out above, were either explicitly or implicitly critical of the policies and actions of the Lithuanian Government.

Ofcom again had regard to the Licensee’s argument that on this issue the programme included references to alternative opinions of “pro-nationalist and pro-official characters and other opinion-makers”. However, in Ofcom’s opinion, the programme did not include any statement or comment which could be reasonably said to reflect the alternative or official viewpoint of the Lithuanian Government on its various alleged anti-Russian policies and actions discussed in this part of the programme. For example, we could not find any reference in the broadcast to a viewpoint which explained why the Lithuanian legislation exists which bans the public display of Soviet (and Nazi) symbols¹⁷ and defending the policies and actions of successive Lithuanian governments in this area. The Licensee also argued that the programme’s intention was not to comment on the causes of the controversial ‘anti-Russian’ Lithuanian legislation, but simply to acknowledge that it existed. However, as set out above, we considered that all the viewpoints expressed in the programme by the different participants were highly critical of the policies and actions of the Lithuanian Government. Therefore, in Ofcom’s opinion, to maintain due impartiality on this issue it was necessary for sufficient context to be provided which, for example, might have explained the viewpoint of the Lithuanian government on this legislation, or defended the policies and actions of successive Lithuanian governments in this area.

¹⁷ Ofcom understands that the ban was introduced in June 2008: <http://news.bbc.co.uk/1/hi/world/europe/7459976.stm>. See Section 188-18 in the Code of Administrative Violations of the Republic of Lithuania.

BMAL also argued that due impartiality on this matter was maintained by the context¹⁸. It pointed principally to evidence that the statement that “[e]radicating everything associated with Russia, particularly the Soviet past, is the main goal of Lithuanian domestic policy” was “amply” substantiated. This evidence included several examples of what the Licensee described as “official Lithuanian ‘anti-Russia’ propaganda”. In Ofcom’s view, the “official Lithuanian ‘anti-Russia’ propaganda” BMAL referred to (i.e. certain anti-Russian policies and actions of the Lithuanian authorities) might be interpreted as “propaganda” from the viewpoint of Russia. But these official policies and actions of the Lithuanian were all referred to in a negative way, in support of the criticisms of the anti-Russian policies and actions of the Lithuanian government made in the programme. None was referred to, in Ofcom’s view, to provide the official viewpoint of the Lithuanian Government on its alleged anti-Russian policies and actions.

BMAL also cited evidence that the references in the programme to the Lithuanian legislation banning Soviet symbols were accurate. Ofcom acknowledged that this law exists and that factual references in the programme to the Lithuanian legislation banning Soviet symbols appeared duly accurate. This law, and actions flowing from it, reflect Lithuanian government policy. This policy, and these actions, however clearly remain politically controversial, as reflected in the strong criticism of the legislation (and proposals to extend it) in this programme. Due impartiality therefore needed to be maintained when discussing these matters in the programme. In the circumstances of this specific case, this did not happen, although certain statements may have been reported the factual position with reasonable accuracy. This was because alternative viewpoints were not included that, for example, defended or explained the policies and of the Lithuanian Government (such policies and actions which were argued by the programme to be anti-Russian); the critical statements made about those policies within the programme were not adequately challenged; and/or nor was sufficient other context was not provided.

In summary, we therefore considered that during the programme, alternative viewpoints were not reflected, nor sufficient context provided, concerning the policies and actions of two Baltic State governments (i.e. Latvia and Lithuania) relating to their treatment of their Russian-speaking minority populations, as indicated in the three areas outlined above.

Other statements and the overall approach of the programme

In reaching a Decision on whether the Licensee preserved due impartiality when treating the matters of political controversy and/or matters relating to current public policy detailed above, Ofcom also took into account the approach, tone and content of the programme as a whole, as summarised in the Introduction. Clearly the potential size, influence and attitudes of neo-Nazi or extreme right wing groups in contemporary Latvia or Lithuania, and their historical origins, are legitimate subjects for broadcasters to explore. Clearly also such groups do exist in the Baltic States. The programme featured the views of some of their followers, for example Richard Chekutis stated that: “*We do not want to see any foreigners here. Our goal is to keep Lithuania pure. Lithuania should be for Lithuanians*”. In our view, however, a repeated theme of the programme was to imply that the thinking and ideology of such groups (presented as typically being unfairly hostile and discriminatory towards Russia and Russian speakers) had been adopted by the governments and/or official authorities of the Baltic states, and in particular Latvia and Lithuania. This approach

¹⁸ We have commented on the other points raised by the Licensee concerning contextual factors under Other Matters below.

was summarised by the reporter asking *“How did Nazi ideology become an element of domestic policy in the Baltic states?”*, followed immediately by a clip of the historian Alexander Dyukov saying *“For Europe, Russians are the Jews of the 21st century”*.

The Licensee asked Ofcom to take into account that “a number of Latvian state officials” participate in annual marches that take place on 16 March each year in Latvia (in Riga’s main square and in Lestene) alongside, it was alleged, Waffen SS veterans of Latvian nationality and their supporters. BMAL said this was a “factual context that is universally known (to the service audience)”. Ofcom’s understanding is that there is evidence that some Latvian state officials attend these ceremonies (including some right-wing, nationalist politicians). However, even if a number of Latvian state officials do participate in these marches each year, we did not consider that their attendance could be reasonably interpreted to mean as a matter of fact that the Latvian or Lithuanian government had adopted *“Nazi ideology”* as *“an element of domestic policy”*.

These themes and approach were underscored by emotive footage from the Second World War, featuring in particular atrocities committed by the Nazis (assisted in some cases by Lithuanians and Latvians) against Jewish people during World War Two. The programme also highlighted possible links between Lithuanian and Latvian annual nationalist marches and the activities of Lithuanians and Latvians who were involved with the Waffen-SS. At one point for example the reporter remarked that:

“Eradicating everything associated with Russia, particularly the Soviet past, is the main goal of Lithuanian domestic policy. A special role in this important national matter has been reserved for descendants of SS legionnaires”.

In Ofcom’s opinion, for the reasons given above, the programme did not maintain due impartiality in its treatment of the policies and actions of two Baltic State governments (i.e. Latvia and Lithuania) relating to their treatment of their Russian-speaking minority populations, as indicated in the three areas outlined above. Furthermore, when analysed in light of the programme as a whole, we considered that the overall approach, tone and content of the programme were factors which further underpinned our Decision that BMAL did not preserve due impartiality.

Other matters

We also had regard to various other arguments put forward by the Licensees that due impartiality was in fact preserved if all relevant contextual factors and the subject and nature of the programme were taken into account.

Firstly, BMAL said the programme was “authored”. Ofcom recognised that broadcasters may wish to produce “authored” or “personal view” programmes in which a presenter or reporter will cover a matter of political or industrial controversy and matter of current public policy from a particular, and sometimes highly partial, perspective¹⁹. However, as Rule 5.9²⁰ of the Code makes clear, when broadcasting

¹⁹ Section Five of the Code defines “personal view” or “authored” programmes as follows: “Personal view’ programmes are programmes presenting a particular view or perspective. Personal view programmes can range from the outright expression of highly partial views, for example by a person who is a member of a lobby group and is campaigning on the subject, to the considered ‘authored’ opinion of a journalist, commentator or academic, with professional expertise or a specialism in an area which enables her or him to express opinions which are not necessarily mainstream”.

personal view and authored programmes alternative viewpoints must be adequately represented either in the programme, or in a series of programmes taken as a whole. There is a history of broadcasters producing such programmes that do comply with the due impartiality rules of the Code. In addition, BMAL did not provide any evidence of alternative views on this issue in a series of programmes taken as a whole (i.e. more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience).

Second, we noted that BMAL referred to various other contextual factors (see Response section above), which, in its view, “had contributed to preserving due impartiality”. In Ofcom’s opinion however with a number of these factors the Licensee referred to them without explaining how they may have contributed to preserving due impartiality – for example the time of broadcast, which programmes were scheduled before or afterwards, or that the editorial content of this programme was typical of broadcasts in the series of *The Incident: Special Investigation*. BMAL also referred to the programmes broadcast on NTV Mir Lithuania being watched by a small number of viewers. We acknowledged that these factors may have influenced to some extent audience expectations of this programme and this service broadcast in Russian and targeted at viewers in Lithuania. In our view, however, all these contextual factors together did not remove the need for the Licensee to preserve due impartiality in this case, nor ensure that due impartiality was preserved. In addition, the fact that trailers²¹ to the programme in this case “contained all the major topics” covered in the programme did not mitigate the fact that in the whole programme as broadcast, BMAL did not adequately reflect alternative viewpoints on the relevant matters of political controversy and current public policy being discussed.

Another argument put forward by BMAL was that NTV Mir Lithuania is targeted at the Russian-speaking community within Lithuania. It added that NTV Mir Lithuania performed an “important role” in this respect because “there is nearly no Russian-language media left in Lithuania”. BMAL said it “strives to broadcast programmes with topics that would be embraced by the target audience”. Ofcom acknowledged that NTV Mir Lithuania, as a channel serving the Russian-speaking community in Lithuania, will want to produce current affairs programming from a Russian viewpoint. However, in doing so, it must comply with the Code. Just because the majority of the audience to a service shares the same viewpoint as the provider of the service on a contentious issue, or is likely to possess background knowledge to help assess that issue, does not mean that a particular matter is no longer a matter of political

²⁰ Rule 5.9 states: “Presenters and reporters (with the exception of news presenters and reporters in news programmes), presenters of “personal view” or “authored” programmes or items, and chairs of discussion programmes may express their own views on matters of political or industrial controversy or matters relating to current public policy. However, alternative viewpoints must be adequately represented either in the programme, or in a series of programmes taken as a whole. Additionally, presenters must not use the advantage of regular appearances to promote their views in a way that compromises the requirement for due impartiality. Presenter phone-ins must encourage and must not exclude alternative views”.

²¹ According to the Licensee: “The probability that a viewer may have come across the Programme unawares was minimised by announcements of the Programme during the day by means of showing trailers”. BMAL said that the trailers “contained the major topics of the Programme as well as mentioned the names of the participants in the discussion” and were “sufficient to enable people to make an informed choice about whether to watch the Programme, especially taking into account personalities of the guests”.

controversy. Nor does this lessen the requirement on that service to reflect alternative viewpoints as appropriate.

Another contextual factor raised by BMAL was the importance of freedom of expression, which includes the audience's right to receive information and ideas. In reaching our Decision in this case we had very careful regard to the broadcaster's right to freedom of expression and the audience's right to receive information and ideas. But, as mentioned above, when considering the application of Section Five, the right to freedom of expression is not absolute since the application of the due impartiality rules (derived directly from statute) necessarily requires broadcasters to ensure that neither side of a debate relating to matters of political or industrial controversy and matters relating to current public policy is unduly favoured.

In conclusion, we considered that viewers would have expected programmes on the channel and in the *Incident: Special Investigation* series to address controversial issues, and to do so from the perspective of NTV Mir Lithuania. Ofcom took careful account of all the relevant various contextual factors and factual background to assess if they were sufficient to preserve due impartiality. Notwithstanding the nature of the channel and the audience's expectations, we considered that these contextual factors were not sufficient. Furthermore, in the absence of sufficient alternative viewpoints and/or challenge to the critical views expressed on policies and actions of the Latvian and Lithuanian governments, there was insufficient material to ensure that due impartiality was preserved in the programme.

For all the reasons set out above, Ofcom's Decision was that the programme breached Rule 5.5 of the Code.

We note that this case follows three previous breaches²² of the due impartiality rules involving NTV Mir Lithuania. We are therefore requesting the Licensee to attend a meeting to explain its compliance processes in this area.

Breach of Rule 5.5

²² Ofcom has recorded the following breaches of Section Five of the Code:

Professia Reporter, Breach of Rule 5.5, published in issue 282 of Ofcom's Broadcast Bulletin on 29 June 2015

(https://www.ofcom.org.uk/_data/assets/pdf_file/0021/50349/issue_282.pdf)

Today, Breach of Rule 5.1, published in issue 284 of Ofcom's Broadcast Bulletin on 27 July 2015 (https://www.ofcom.org.uk/_data/assets/pdf_file/0018/50436/issue_284.pdf);

Anatomy of the Day, Breach of Rule 5.1, published in issue 300 of Ofcom's Broadcast and On Demand Bulletin on 4 July 2016

(https://www.ofcom.org.uk/_data/assets/pdf_file/0012/51402/issue_300.pdf)

In Breach

Fox & Friends

Fox News Channel, 28 June 2016, 12:00

Introduction

Fox News is a news channel originating in the USA, broadcast on the digital satellite platform and licensed by Ofcom in the UK. The licence for this channel is held by Fox News Network Limited Liability Company (“FNN” or the “Licensee”).

Fox & Friends is a weekday news and general discussion programme broadcast from New York. It airs between 06:00 and 09:00 (EST) and simultaneously in the UK between 11:00 and 14:00 (GMT). A complainant alerted Ofcom to a four minute segment called *It’s Your Money* within the programme broadcast on 28 June 2016.

It’s Your Money comprised a sequence of discussions between the programme’s two presenters and a representative of the website Mega Morning Deals. Each discussion focused on a particular product offered exclusively to *Fox & Friends* viewers at a discounted price. Viewers were directed to the programme’s website to take advantage of the special offers. For example:

Representative: *“Ok, the Golf Buddy; this is for the golf fanatic. This is basically a wristband, you get on the course and it has this special green view technology. It tells you exactly the distance from any angle or approach to the greens, so you know which to choose; 38,000 courses programmed into this baby. It’s got GPS; it’s typically pretty pricey \$300 – but today: \$119. So –”*

First Presenter: *“Wow”*

Second Presenter: *“That’s awesome”.*

Representative: *“just click on the Mega Morning Deals icon on the Fox & Friends website”*

First Presenter: *“Yeah, Foxandfriends.com”*

Representative: *“Shop till you drop”.*

The segment also featured several on-screen graphics detailing pricing and product information. When each Mega Morning Deals discount was featured, a full graphics screen was shown displaying the original price, the discounted price and the reduction in terms of percentage in large font. For example:

“MEGA MORNING DEALS: Sausalito Night Sheet and Duvet Sets, Retail Price: \$60-\$95, Deal Price: \$21, Savings: Up to 78% OFF”

Additionally, an on-screen banner displayed information about the products and special offers featured in this item:

“Smooth savings: Blender system makes perfect smoothies and soup”

“Stellar savings: Amazing deals on the season’s best products”.

Ofcom considered the material raised issues warranting investigation under Rule 9.2 of the Code, which states:

“Broadcasters must ensure that editorial content is distinct from advertising.”

We therefore asked the Licensee for its comments on how the material complied with this rule.

Response

FNN explained that an element of *Fox & Friends* is to provide viewers with helpful consumer information and that viewers would appreciate and welcome a report about discounts that were available to them.

The Licensee said that “*Fox & Friends* typically covers an array of topics in a casual presentation...that are relevant to viewers as they prepare for their day”. It said that the hosts introduced Megan Meany as a spokesperson for the website Mega Morning Deals and that “with summer underway, viewers could treat themselves with seasonal products such as travel items, workout gear, and household goods.” The Licensee added that Megan Meany presented discounts on products available to viewers “should they wish to purchase such items directly from the website” and that the banner across the bottom of the screen “touted that viewers could avail themselves of the discounts for such products”. The Licensee continued that “Megan Meany’s appearance in the Programme was not connected to any financial arrangement for which Fox News or the hosts of the Programme were beneficiaries. Neither Fox News nor the hosts received any compensation as a result of the Programme”.

FNN submitted that in assessing whether the content was compliant with Ofcom’s rules, due regard must be given to the freedom of expression rights enshrined in Article 10 of the European Convention on Human Rights (“ECHR”). It said that “broadcasters have a right to transmit, and their audience a right to receive, information and ideas” and suggested that conveying the availability of the discounts corresponded with these rights.

FNN acknowledged that the right to freedom of expression can be subject to certain limitations and it recognised Ofcom’s obligations under the Communications Act 2003 (“the Act”) for setting standards for broadcast content. However, FNN said that “it remains an important principle that expression rights should be restricted only where it is necessary and proportionate to do so”.

The Licensee noted the principles that underpin Section Nine of the Code, including that a distinction must be maintained between editorial content and advertising. In FNN’s view, the programme did not violate the principles. It continued that *It’s Your Money* was “clearly distinguished as a featured segment distinct from advertising by the absence of the use of lead-in and lead-out bumps and teases that broadcasters use to alert viewers when a commercial interstitial is appearing”. It argued that these devices “make use of a combination of unique graphics and music to indicate to viewers’ distinctions between editorial and non-editorial content”. FNN further argued

that the manner in which the programme segment was presented was not promotional because its focus was the offer of the discounts to *Fox & Friends* viewers rather than the availability of the products themselves. The Licensee added that the programme segment was not advertising and “accordingly, no distinctions as called for in Rule 9.2 were necessary”.

Decision

Under the Act, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure a number of standards objectives, one of which is “that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with”. These objectives include ensuring compliance with the Audiovisual Media Services (“AVMS”) Directive.

The AVMS Directive places limits on the amount of advertising that broadcasters are permitted to transmit. It also contains a number of provisions designed to help maintain a distinction between advertising and editorial content, including a requirement that television advertising is kept visually and/or audibly distinct from programming.

The requirements of the AVMS Directive and the Act are reflected in Ofcom’s broadcasting codes, including the Code on the Scheduling of Television Advertising (COSTA) and the Broadcasting Code (“the Code”). While COSTA applies to advertising, the Code applies to the content of programming. Rule 9.2 of the Code requires programming to be distinct from advertising. Guidance on this rule states that its purpose “... is to prevent editorial content being distorted for advertising purposes, so ensuring that editorial control is reserved to the Licensee and that programming is understood by viewers as not being subject to the control of advertisers”. The rule helps to ensure that viewers are easily able to differentiate between editorial material and advertising, and prevents broadcasters using editorial airtime for advertising purposes.

Ofcom recognises a broadcaster’s right to transmit, and their audience’s right to receive, information and ideas: these rights are reflected in Ofcom’s broadcasting codes. The codes do not prevent broadcasters promoting, or offering for sale, goods and services that may be of interest to viewers. However, in line with the requirements of the AVMS Directive, the amount of airtime that can be used for such advertising purposes is limited. One of the purposes of Rule 9.2 is to prevent broadcasters exceeding these limits by using programmes for advertising purposes.

In this case, Ofcom noted that the Licensee treated and presented the content as editorial programming. The segment was positioned within the *Fox and Friends* programme and featured its regular presenters in conversation in the programme’s studio with the guest.

Although the content was scheduled and presented as programming, Ofcom considered that it served the function of advertising, i.e. the promotion of the supply of products in return for payment by viewers.

In reaching this view, we noted the positive references to attributes of the five featured products – for example:

“Right, this thing is super powerful, it’s like a 1000 watts, you can put in dry ingredients or wet ones, it purees, it chops everything up, it keeps all the nutrients

in, you can put raw veggies and stuff...It comes with a meal plan and it's really a whole personal fitness system. It's got even a fitness DVD that goes with it".

We also noted the information about the discounted prices – for example:

"This internationally acclaimed personal trainer came up with the system – it comes with a DVD, it's great for sculpting and toning and it's the new thing", "[pointing at portable charging sticks] they've got these really cool designs, there's one for fourth of July, there's a rainbow one, love that they're fashionable",

"[in reaction to the discounts] Wow, what a saving";

an on-screen banner reading "Stellar Savings: Amazing deals on the season's best products";

"today it doesn't cost \$44, it costs £18"; and

simultaneously, on-screen graphics taking up the full size of the screen that read "Mega Morning Deals: FXP Hula Hoop Workout, Retail Price: \$44.95, Deal Price: \$18, Savings: 60% OFF".

Finally, we took account of the instructions on how viewers could purchase the products:

"just click on the Mega Morning Deals icon on the Fox and Friends website...yeah foxandfriends.com...shop 'til you drop!"

Ofcom noted the Licensee's view that the focus of the segment was the discounts available to *Fox & Friends* viewers, rather than the products to which the discounts applied. In Ofcom's view, this did not change the fact that the overall character of the content was clearly akin to advertising.

Ofcom was concerned by FNN's suggestion that using devices such as "lead-in and lead-out bumps and teases" is sufficient to ensure distinction between advertising and editorial content. Although such devices can be useful signals to alert viewers to a transition between a programme and an advertising break, their absence does not negate the need for broadcasters to ensure that content presented and scheduled as programming does not function as advertising.

In this case, *It's Your Money* was presented (and classed by FNN) as programming but contained several elements that were akin to advertising. For this reason, we considered that FNN did not ensure sufficient distinction between editorial and advertising content. Therefore, the material breached Rule 9.2.

Breach of Rule 9.2

Resolved

The X Factor

ITV, 23 October 2016, 20:00

Introduction

The X Factor is a popular musical talent show broadcast weekly from late summer until Christmas. Four judges and viewers vote to decide which act wins the prize of a recording contract. The programme is complied by the ITV compliance department ("ITV") on behalf of the ITV Network.

During this live episode of *The X Factor*, the results of the week's viewers' vote were revealed, determining which contestants would progress to the next stage of the competition and which would have to perform again in the elimination round.

Six complainants alerted Ofcom to the broadcast of offensive language when presenter Dermot O'Leary read out the results. After discovering that her fellow contestant Samantha Lavery was successful, Gifty Louise said "*I fucking told you*".

About five minutes later, after the vote results were announced, Dermot O'Leary broadcast an apology: "*Now you may have just heard some inappropriate language. If you did we apologise. As you can imagine, emotions are running high*".

Ofcom considered the material raised issues warranting investigation under Rule 1.14 of the Code, which states:

"The most offensive language must not be broadcast before the watershed..."

We therefore sought comments from ITV as to how the material complied with this rule.

Response

ITV said it regretted any offence caused to viewers by this unexpected comment. It said it understands the requirements of Rule 1.14 and therefore takes suitable precautions to avoid the broadcast of the most offensive language in live pre-watershed programmes. For example, before broadcast it said that the production team briefs all participants to avoid using offensive language during the live shows. ITV explained that a member of the compliance team also attends the studio to advise the production team for all live broadcasts of *The X Factor*, and views the programme during broadcast from a production room adjacent to the director's gallery.

ITV said that unfortunately the contestant Gifty Louise failed to follow the pre-broadcast briefing due to the "excitement in the moment". Her comment was heard by the production team. The production team then notified Dermot O'Leary who broadcast his apology.

ITV said that it also removed the offensive language from its catch-up service and asked the programme's executive producer to repeat the briefing about offensive language to all remaining participants.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that “persons under the age of eighteen are protected”. This objective is reflected in Section One of the Code.

Rule 1.14 of the Code states unequivocally that “the most offensive language must not be broadcast before the watershed...”.

Ofcom’s recent 2016 research on offensive language¹ notes that the word “fuck” and variations of this word are considered by audiences to be amongst the most offensive language. This pre-watershed programme contained the word “ *fucking* ”, clearly breaching Rule 1.14.

However, Ofcom took into consideration the live and emotionally charged nature of the programme and that ITV had compliance procedures in place to minimise the risk of offensive language being broadcast. Ofcom also noted the prompt action taken by ITV following the incident to mitigate any offence caused and reduce the likelihood of a recurrence.

In light of these factors, Ofcom considered the matter resolved.

Resolved

¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0022/91624/OfcomOffensiveLanguage.pdf

Broadcast Fairness and Privacy cases

Not Upheld

Complaint by Mr Terry McCarthy

Dispatches; Undercover: Inside Britain's Children's Services, Channel 4, 26 May 2016

Summary

Ofcom has not upheld Mr Terry McCarthy's complaint of unjust or unfair treatment in the programme and of unwarranted infringement of privacy.

The programme featured a social worker who secretly filmed at Birmingham Children and Families Services Department ("BCFS"), to discover whether the department's three-year plan to improve children's services in Birmingham was being implemented successfully after the first year and a half. It included secretly filmed footage of the complainant, Mr McCarthy, who worked as a manager at BCFS.

Ofcom considered that:

- The broadcaster took reasonable care to satisfy itself that material facts were not presented, disregarded or omitted in a way that resulted in unfairness to Mr McCarthy.
- Mr McCarthy had a legitimate expectation of privacy in relation to the secret filming of him and the subsequent broadcast of this footage without his consent. However, his expectation of privacy was outweighed by the broadcaster's right to freedom of expression and the public interest in the particular circumstances of the case. Therefore, his privacy was not unwarrantably infringed either in connection with the obtaining of the footage or its subsequent broadcast.

Programme summary

On 26 May 2016, Channel 4 broadcast an edition of its documentary series *Dispatches*, entitled *Undercover: Inside Britain's Children's Services* which reported on BCFS (then operated by Birmingham City Council, "BCC") and that investigations had found that mistakes made by BCFS (amongst other agencies) had been contributory factors in the deaths of a number of children who had been referred to the department. The programme said that BCFS had been "*consistently criticised*" by Ofsted and that in 2013 it was described as "*a national disgrace*" by Ofsted's Chief Inspector. It also said that "*last summer*" (i.e. in 2015) Ms Brigid Jones, the councillor in charge of children's services at BCC, "*claimed that the Council was successfully implementing its recovery plan*". This was followed by footage of Ms Jones setting out the improvements that she said had been made one year into what she described as "*a three-year improvement journey here in Birmingham Children's Services*".

The programme said that six months on from Ms Jones' statement, and half-way through the department's three-year plan to improve children's services in Birmingham, it "*wanted to test how accurate these claims of a turnaround were*". It then explained that it had sent an experienced social worker, "*Vicky*", to work undercover in the department and to record footage inside BCFS using a hidden

camera. The programme showed footage recorded by Vicky and set out various issues and problems which it said had been found within BCFS, for instance:

- problems with the allocation of serious cases (notably that cases which should have been allocated as “Section 47” cases – i.e. where a child was at risk of suffering significant harm and therefore an urgent assessment was needed – were being given lower priority status);
- that there was a lack of management support and supervision for social workers in the department (a factor which it said was key in ensuring the work was carried out appropriately); and,
- that there were severe staffing problems, including high staff turnover and high use of agency staff, which resulted in a lack of stability and consistency in decision making, and low staff morale.

The complainant, Mr McCarthy, who was described as Vicky’s “*Head of Department*”, appeared in three sections of the secretly filmed footage shown in the programme. Mr McCarthy was not named in the programme and his face was obscured in this footage, but his voice was heard undisguised.

First section

Mr McCarthy was shown in a team meeting with other social workers discussing the allocation of serious “Section 47” cases and, in particular, a case involving a pregnant woman who was being threatened by her partner. Mr McCarthy said:

“A person saying, with his seven or eight-month pregnant partner, ‘I’m going to kick the baby out of you’ is kind of, for me, a Section 47. What’s happening is it’s getting in a pickle. What that will do is get clearer about what we mean by suffering significant harm and what do we mean by child in need”.

The programme’s reporter then said “*and then, even he [i.e. Mr McCarthy] admits he doesn’t understand how certain decisions have been made*” before Mr McCarthy was shown saying:

“I think there’s a lot of arbitrary decisions being made, and, I’ll be honest, with you, I, for the life of me, can’t work out on what basis they’ve been made. I’ve seen loads and I really think: I just do not understand why this is considered a Section 47 [and] I just can’t, for the life of me, understand why it’s been considered a Child in Need [i.e. a less urgent type of case allocation] rather than a Section 47. I can’t work out the rationale. I suspect there is no rationale”.

A brief clip of Mr McCarthy making the first part of this comment about arbitrary decision making was also included in the pre-title sequence at the very start of the programme. This clip was preceded by voice-over commentary saying: “*We hear senior staff admitting they don’t understand how some serious cases have been handled*”.

Second section

The programme later discussed the lack of support and supervision which some social workers felt they received from their managers. The programme’s reporter stated that Vicky’s “*Head of Department*” (i.e. Mr McCarthy) was leaving to lead the

Multi-Agency Safeguarding Hub (“MASH”), the unit responsible for allocating new cases. This was accompanied by secretly filmed footage of a team meeting in which some social workers in Mr McCarthy’s team expressed their concerns about the frequent changes in management. Mr McCarthy was heard acknowledging their concerns that the new head of their department “*will tell you something different*”.

Third section

Mr McCarthy appeared in this section as the Head of MASH along with another manager. The secret filming took place during an emergency meeting to discuss the problem that some social workers in the unit were forced to sit apart from the police officers with whom they were supposed to liaise on casework because they had not been given sufficient security clearance to access certain police databases. This resulted in the social workers having to telephone their police colleagues, rather than talk to them face to face, to discuss child protection cases that they were working on together even though they were physically located near each other on the same floor. Vicky said that this situation had arisen from the “*chaos*” that followed the re-organisation of BCFS and the set-up of MASH.

No further footage of Mr McCarthy was shown in the programme. However, he was later referred to as “*an interim head of service*” in the programme’s representation of BCC’s response to the claims made about BCFS.

The programme concluded with the reporter saying:

“Two days ago, Birmingham Council made a dramatic announcement. Following our investigation, it would bring forward plans to remove Children’s Services from Council control and place it into a voluntary trust. The move is too late to save the likes of Fenton Hogan and Keegan Downer [two of the children whose deaths were featured in the programme] but the hope is that this radical shake-up will finally secure a safer future for the city’s vulnerable children”.

Summary of the complaint and the broadcaster’s response

Unjust or unfair treatment

- a) Mr McCarthy complained that he was treated unjustly or unfairly in the programme as broadcast because it gave the impression, falsely, that he had overall managerial responsibility for BCFS and was therefore responsible for the “chaos and mismanagement” alleged in the programme. He said that the programme left viewers with the impression that the department’s difficulties were as a result of his performance as a manager.

Mr McCarthy said that the programme did not put the “chaos and mismanagement” alleged in the programme into context. In particular, he said that the programme inaccurately referred to him as a “Head of Department” when, in fact, he was only one of three Heads of Services managing the office shown in the programme. He said that overall managerial responsibility for the BCFS was held by four Assistant Directors, underneath which were a total of nine Heads of Services, who were supported by 30 to 40 team managers. Mr McCarthy said that only one other manager was shown in the programme. He also said that the programme did not make it clear that he was not directly connected to any of the serious concerns (including child deaths) highlighted in the programme and that his position in BCFS was held in an interim capacity.

By way of background, Mr McCarthy said that the programme had a particularly damaging impact on his reputation and credibility because there were a very limited number of people working at the same level as him in England and Wales.

In response, Channel 4 said that the programme provided a fair and accurate reflection of Mr McCarthy's role as the manager of the team in which Vicky was employed. It argued that it was warranted to have used material obtained through misrepresentation or deception without Mr McCarthy's consent because it was in the public interest to do so. Channel 4 said that the allegations that child protection procedures and practices at, and the services being offered to vulnerable children by, BCFS continued to be inadequate, were incontrovertibly of immense public interest. It also said that these concerns about the performance of BCFS mirrored wider concerns about children's services across the nation and thereby impacted upon a broad proportion of the population. Channel 4 also referred to the justification it gave for secret filming which is set out in the summary of its response to head b) of the complaint below.

The broadcaster also argued that the material in the programme concerning Mr McCarthy was a fair and accurate reflection of his behaviour and statements and those of his colleagues. It said that there was "nothing to suggest – either in his complaint or in the programme as broadcast – that any of the comments made by him and broadcast in the programme were made other than of his own free will, [reflected] anything other than his genuinely and strongly held opinions... [or] were improperly solicited or taken out of context".

Channel 4 said that, in contrast to Mr McCarthy's claim, the programme did not imply that he had overall managerial responsibility for the BCFS, or New Aston House (the building in which part of the BCFS was housed). Channel 4 said that at the time of the undercover investigation, Mr McCarthy was a Head of Service at BCFS and that it understood that he held this role for an Assessment and Short Term Intervention ("ASTI") team attached to the northwest and central area, in which Vicky was employed. The broadcaster said that Mr McCarthy was referred to as Vicky's head of department thereby indicating that he supervised her immediate team. It argued that, given this, it was accurate and not misleading to describe the complainant as a head of department. It also said that in the pre-titles to the programme, the complainant was referred to as "*senior staff*" and that no reasonable viewer and certainly no fellow professionals, would have understood this term to suggest "overall managerial responsibility" in the way that Mr McCarthy contended. Channel 4 also said that, later, at the meeting when Vicky and colleagues learned that Mr McCarthy was moving on to run the MASH, he was clearly referred to by his colleagues as a "*head of service*". It said that "this and the very fact that the complainant moved to [the] MASH undermines any suggestion that he held the position of overall responsibility for BCFS or New Aston House, particularly among colleagues and fellow professionals".

Channel 4 said that it was manifestly not the case that the programme did not put the alleged chaos and mismanagement in context. It said that the issue of overall responsibility for the mismanagement of the BCFS was presented in the context of the shortcomings of politicians over a number of years and, specifically, of Ms Brigid Jones, as the local councillor in charge of Children's Services. It also said that "in exposing the BCFS's state of chaos and mismanagement, the programme clearly identified serious structural problems with the running of the BCFS dating back many years – at least as early as 2013 – and did not attribute those failings to individual employees".

The broadcaster added that, notwithstanding the above, the comments made by staff that were included in the programme, showed continuing low morale, elevated levels of stress, high caseloads, delays in dealing with cases; and, problems caused by: poor staff retention, frequent management changes and lack of supervision and management oversight of cases. It also said that despite “the senior nature” of the complainant’s role, “even he was unable to understand key referral processes within the BCFS, or the rationale for certain decisions – a process which he [was] a part of, albeit not [as] the ultimate decision-maker”. Channel 4 argued that given the importance of these decisions in terms of safeguarding children, this information was clearly a matter of genuine public interest.

Channel 4 said that the programme never stated or implied that Mr McCarthy was in any way directly involved in the cases involving child deaths. It also said that the programme made it clear that the complainant’s position was held in an interim capacity when it included the following comment (which was made by BCC as part of its response to the claims being made about BCFS): “... *the process of establishing the assessment teams, especially at that office involved a number of agency staff including an interim head of service*”.

The broadcaster noted the manner in which BCC’s response to several claims made about BCFS was represented in the programme (these claims related to whether serious cases were allocated appropriately, the alleged lack of support and supervision of social workers and the impact on the work of BCFS of successive structural changes and management practices) and observed that the complainant was shown acknowledging specific problems in relation to two of these three concerns. It also said that the programme made it clear that Mr McCarthy was not the ultimate or sole decision-maker, but also fairly and accurately revealed shortcomings in his managerial performance as acknowledged by BCC in these responses.

The broadcaster also said that, given that Mr McCarthy was not named and his face was heavily blurred, it was highly unlikely that people outside BCFS to whom he was not already known professionally or personally would have identified him from the programme, and those who did already know him would be fully aware of both his role and level of responsibility within the organisation and his reputation.

Unwarranted infringement of privacy

- b) Mr McCarthy complained that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme because he was filmed secretly by a social worker who was working undercover for the programme.

Channel 4 accepted that Mr McCarthy did not give consent to be filmed but said that there was nothing in the material that was recorded which was private in nature or in respect of which Mr McCarthy could reasonably have had a legitimate expectation of privacy. However, it also said that, even if the complainant had a legitimate expectation of privacy in relation to the secret filming of him in his workplace, his expectation of privacy was diminished by the fact that the conversations recorded related solely to his role as a senior manager within a publicly-funded organisation that was publicly accountable, and in which the staff, particularly senior staff, were also publically accountable.

The broadcaster said that the surreptitious filming was sanctioned at a senior level and was warranted because it was in the public interest, there were reasonable grounds to suspect that further material evidence could be obtained and it was necessary to the credibility and authenticity of the programme.

Channel 4 said that it had already set out in response to head a) of the complaint, the reason it was in the public interest to make and broadcast this programme. It said that the programme makers' preliminary research had identified widespread criticism of BCFS by Ofsted inspectors and other agencies. It also said that the programme makers had found evidence that, despite claims of recent service improvements (made by public officials and local politicians) the service provided by BCFS continued to be inadequate. The broadcaster argued that this evidence provided reasonable grounds to suspect that further material evidence could be obtained through covert filming. It also said that covert filming was the only way to obtain an accurate picture of the current position within the BCFS and the everyday experience of staff and managers; and, to substantiate the serious allegations of mismanagement, lack of experienced staff and problems with staff retention, excessive caseloads, and inappropriate classification of cases. Channel 4 said that it was highly unlikely that BCFS would have permitted a film crew to film openly without wishing to monitor and control the access given to the crew and therefore it was necessary to the credibility and authenticity of the programme to film and record surreptitiously. It also said that all the secret filming was carried out in accordance with clear criteria and strict guidance which included filming only where there was a *prima facie* public interest in doing so. Accordingly, staff and managers were only filmed in the performance of their responsibilities at BCFS and on its premises, and no filming of clients took place.

- c) Mr McCarthy also complained that his privacy was unwarrantably infringed in the programme as broadcast because it included secretly filmed footage of him without his consent. Mr McCarthy said that, although his face was obscured, he was identifiable in the programme because of his: physical build; "fairly distinctive Northern Irish accent"; and, level of seniority within the profession.

Channel 4 accepted that Mr McCarthy did not give consent for footage of him that was filmed surreptitiously to be included in the programme as broadcast, but argued that there was nothing in this footage which was of an inherently private nature to Mr McCarthy or, in respect of which he could reasonably have had a legitimate expectation of privacy. It said that this footage pertained to Mr McCarthy in his role in a senior position with managerial responsibilities within a public administration and the comments he was shown making were made openly to colleagues in the performance of that public function. It also said that his words, as broadcast, included nothing of a sensitive or private nature in respect to him as an individual and that the footage in the programme did not have the requisite qualities of privacy to engage Mr McCarthy's privacy rights under Article 8 of the European Convention of Human Rights ("ECHR"). It added that the fact that Mr McCarthy did not consent "cannot convert entirely non-private matters into private ones".

Channel 4 said that in any case, the inclusion of the secretly filmed footage of Mr McCarthy in the programme was warranted and in the public interest.

With regard to the first section of footage, Channel 4 said that a key concern among staff in Vicky's department was how serious cases were allocated. It observed that, as the reporter said in the programme, if a serious case was

allocated incorrectly a child could be left at risk of serious harm and official enquiries into the deaths of vulnerable children had often focused on mistakes made by social services in allocating cases. Channel 4 said that the fact that Mr McCarthy, who was at the time a senior member of the management team within Vicky's department, was unable to understand the key referral process within BCFS and/or the rationale for certain decisions was unarguably a matter of significant public interest and concern; and, added that this was "irrespective of whether it was evidence of a failing on the part of MASH and/or evidence of his own shortcomings".

With regard to the second section, Channel 4 said that the fact that Mr McCarthy, whose seniority in Vicky's department it again noted, was aware of the inconsistencies and instability caused by the frequent management changes within BCFS, added credibility to the concerns about these matters expressed by staff, and was plainly a matter of public interest.

With regard to the third section, the broadcaster said that the situation described by Mr McCarthy evidenced a lack of pre-planning by management that, at the time, put yet more strain on the system and caused staff stress. It said that the credibility of these concerns was reinforced by the fact that senior management, including Mr McCarthy, freely acknowledged the resulting operational difficulties. Channel 4 said that Mr McCarthy's statements in this footage reflected the continued inadequacies of BCFS, despite the implementation of BCC's recovery plan and argued that this material, which it said showed the additional pressures on staff caused by the cumulative effect of these operational and institutional shortcomings, was clearly a matter of significant public interest.

Channel 4 said that the broadcast of each of these sections of secretly filmed footage served a clear and important public interest in that they shed crucial light on failings within BCFS and the day-to-day impact of these failings on staff and on the health and safety risks to the children BCFS was mandated to protect. It noted that Ofcom's Broadcasting Code ("the Code") included protecting public health or safety, exposing misleading claims made by individuals or organisations and disclosing incompetence that affects the public among the examples it gives of ways in which a broadcast may serve the public interest and argued that the programme "fulfilled all three of these criteria".

It also argued that the broadcast of the secretly filmed conduct and comments from staff, including that of Mr McCarthy, was essential to establish the credibility and authenticity of the programme. In particular, it said that "as they were obtained without the complainant realising he was being filmed, the views expressed had greater credibility because they were spontaneous and genuinely held ones rather than carefully tempered views which might be so watered down for fear of potential repercussions as to be worthless".

With regard to the identification of Mr McCarthy, Channel 4 said that the decision not to name the complainant was taken not as a result of any representations made by him or on his behalf. It said that identifying his position was necessary for the legitimacy, accuracy and context of the statements being made and thereby further served the public interest. However, the programme was not seeking to "name and shame" the complainant or to expose him to potential criticism by members of the public who may have felt aggrieved by the failings within BCFS. The programme makers therefore took the editorial decision that the story could be reported in a fair and accurate way without the need for the complainant to be named or his face left unobscured. Channel 4 said that it was

anticipated he may be identifiable to people who already knew him or who worked in children's services, but the steps taken to obscure his face and remove his name considerably minimized the possibility of wider identification by the public at large and were, in all the circumstances, proportionate.

Channel 4 concluded that its right to obtain and impart the information complained of was entirely warranted by the very high public interest value of the matters revealed and that this outweighed any intrusion into the complainant's privacy.

Ofcom's Preliminary View

Ofcom prepared a Preliminary View that Mr McCarthy's complaint should not be upheld. Both parties were given the opportunity to make representations on the Preliminary View, however, neither chose to do so.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its Decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript, both parties' written submissions and correspondence between the programme makers and BCC.

Unjust or unfair treatment

- a) Ofcom first considered Mr McCarthy's complaint that he was treated unjustly or unfairly in the programme as broadcast because it gave the impression, falsely, that he had overall managerial responsibility for BCFS and was therefore responsible for the "chaos and mismanagement" alleged in the programme.

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of the Code.

In assessing whether Mr McCarthy had been treated unjustly or unfairly, we had particular regard to Practice 7.9 of the Code which states that, before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to the individual or organisation.

We considered what information relating to Mr McCarthy and/or his role was included in the programme. With regard to his complaint that he was inaccurately

referred to as a “*Head of Department*”, we noted that although Mr McCarthy was described in this way on a number of occasions, the programme also repeatedly made clear that he was either managing Vicky’s department or running the MASH – both of which were teams within BCFS. In addition, during the footage of the meeting in which Mr McCarthy informed Vicky and her colleagues that he was leaving their team and going to run the MASH, Mr McCarthy’s role within Vicky’s team was twice referred to by members of that team as that of a “*head of service*”. We also observed that when representing the BCC’s response to the claims made about BCFS, the programme included the BCC’s acknowledgment that “*the process of establishing the assessment teams, especially at that office [i.e. the office in which Mr McCarthy was shown working] involved a number of agency staff including an interim head of service. A permanent head of service has since taken up post and those teams are much more settled and stable now*”. In our opinion, these comments would have reinforced viewers’ understanding that Mr McCarthy had held a head of service post when he managed Vicky’s team and made them aware that he had held this post in an interim capacity only.

We observed that Mr McCarthy was one of only two managers shown in the programme. However, we also observed that viewers were told that the relevant footage had been filmed in secret by Vicky – initially while she was working undercover in a team which was managed by the complainant and later when he had started to run the MASH. The programme also explained that the second manager, who was included in the final section of footage showing Mr McCarthy, held a very senior role in BCFS (he was described as “*the city’s chief social worker*”). In our view, this reinforced the impression, given by the rest of the programme that, although Mr McCarthy was a manager, he did not hold overall managerial responsibility for BCFS. In addition, we noted that the programme made no specific claims of wrongdoing on the part of Mr McCarthy and, in particular, it made no connection between him and the deaths of children whose cases had been referred to BCFS in the past. Moreover, all of the relevant footage was shown in the context of the programme’s unambiguous purpose of ascertaining whether the BCC’s claim that, following a history of failures at BCFS, it had gone a long way to dealing with the structural problems in the department, was valid.

We also observed that Mr McCarthy was not named in the programme and his face was obscured by blurring. We accepted that Mr McCarthy was identifiable from the programme (by virtue of the inclusion of his undisguised voice and the description of his roles at BCFS). However, we considered that it was unlikely that anyone outside BCFS to whom he was not already known would have identified him from this material.

In light of all the observations set out above, Ofcom took the view that the way in which Mr McCarthy’s role was presented would not have materially and adversely affected viewers’ opinions of him in a manner that resulted in unfairness.

Taking account of all of these factors, we concluded that the programme makers took reasonable care to satisfy themselves that material facts in relation to Mr McCarthy’s role at BCFS were not presented, disregarded or omitted in a way that resulted in unfairness to him.

Therefore, Ofcom concluded that there was no unfairness to Mr McCarthy in this respect.

Unwarranted infringement of privacy

In Ofcom's view, the individual's right to privacy has to be balanced against the competing right of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

- b) Ofcom considered Mr McCarthy's complaint that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme because he was filmed secretly by a social worker who was working undercover for the programme.

In assessing this part of the complaint, Ofcom had regard to Practices 8.5 and 8.13. Practice 8.5 states that any infringement of privacy in the making of a programme should be with the person's and/or organisation's consent or be otherwise warranted. Practice 8.13 says that surreptitious filming should only be used where it is warranted. Normally, it will only be warranted if: there is *prima facie* evidence of a story in the public interest; there are reasonable grounds to suspect that further material evidence could be obtained; and, it is necessary to the credibility and authenticity of the programme. Ofcom also had regard to Practice 8.9 which provides that the means of obtaining material must be proportionate in all the circumstances and in particular to the subject matter of the programme.

Before assessing the extent to which Mr McCarthy had a legitimate expectation of privacy in connection with the obtaining of the material included in the programme, Ofcom considered whether the surreptitious filming was, in itself, warranted.

In its statement, Channel 4 said that there was an immense public interest in the matters which the programme investigated. It said that, prior to the filming, the programme makers had found not only widespread criticism of BCFS, but also evidence that, notwithstanding recent claims to the contrary by BCC, the service provided by BCFS continued to be inadequate. It also said that covert filming was the only way to obtain an accurate picture of the situation in BCFS; and, to substantiate the serious allegations which had been made about it.

Ofcom accepted that the information gathered by the programme makers before the surreptitious filming took place amounted to *prima facie* evidence of a story in the public interest. We also considered that the claims that the service provided by BCFS continued to be inadequate (especially in the context of the BCC's opposing position) meant that there were reasonable grounds to suspect that further material evidence could be obtained through filming in this manner. In addition, we considered that the programme was unlikely to have been able to capture footage of staff within BCFS (including Mr McCarthy) giving their honest and candid opinions of the situation within BCFS, and the serious shortcomings which they perceived therein, without using this technique. In addition, we noted that in its submission, Channel 4 indicated that the surreptitious filming was used to capture only situations which were directly relevant to the matters being

investigated and restricted this filming to members of BCFS staff while they were at work in BCFS offices.

For these reasons, in our view, the use of surreptitious filming was warranted and the means of obtaining the material had been proportionate.

Ofcom then considered the extent to which Mr McCarthy had a legitimate expectation of privacy in the particular circumstances in which the relevant material was obtained (i.e. surreptitiously with the use of a hidden camera). As stated in the Code, “legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question”.

From the footage shown in the programme and the information provided by the broadcaster, we observed that Mr McCarthy was filmed while at work, notably during meetings he held with colleagues to discuss various matters pertaining to their roles as social workers at BCFS.

We recognised that Mr McCarthy was not filmed discussing anything personal or private about himself. However, we noted that he appeared to have been filmed either in private meetings or in areas where only staff from BCFS were in attendance and which the general public were unable to access. We also considered that, given the nature of his work (which necessarily involved the discussion of sensitive information regarding the safety of vulnerable children) and the location in which he was filmed (i.e. meeting rooms and offices inside BCFS) it was reasonable for Mr McCarthy to have understood that the comments he was filmed making attracted an expectation of privacy. This was particularly the case, given that he was filmed surreptitiously and was likely to have felt that he could speak openly and freely. In light of the above, Ofcom considered that Mr McCarthy had a legitimate expectation of privacy with regard to the obtaining of the material.

As set out in its submission on this complaint, Channel 4 confirmed that it had not obtained consent from either Mr McCarthy or his employer. In light of these observations, we concluded that Mr McCarthy had not consented to the filming and went on to consider whether the infringement of Mr McCarthy’s legitimate expectation of privacy in the obtaining of this material was warranted. In doing so, we assessed the broadcaster’s competing right to freedom of expression and the audience’s right to receive information and ideas without unnecessary interference.

The Code states that “warranted” has a particular meaning. It means that, where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why, in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest could include revealing or detecting crime, protecting public health and safety, exposing misleading claims by individuals or organisations or disclosing incompetence that affects the public.

Ofcom considered that there was genuine public interest in the programme’s investigation into the claims made about BCFS, particularly given the impact that decisions made by social workers in the department had on the lives of vulnerable children. We also noted the wider concern about how children’s services were being managed nationwide and the fact that BCFS was, as Channel 4 stated, “a publicly-funded organisation that was publicly accountable”.

In these circumstances, it was our view, that there was justification for gathering more evidence to test the claims that had been made about BCFS through surreptitious filming.

Therefore, on balance, and given all the factors set out above, Ofcom considered the broadcaster's right to freedom of expression and the public interest in obtaining the footage of Mr McCarthy, in these particular circumstances, outweighed his legitimate expectation of privacy.

- c) Ofcom then considered Mr McCarthy's complaint that his privacy was unwarrantably infringed in the programme because it included secretly filmed footage of him without his consent.

In assessing this part of the complaint, Ofcom had regard to Practices 8.6 and 8.14. Practice 8.6 states that, if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted. Practice 8.14 states that material gained by surreptitious filming and recording should only be broadcast when it is warranted.

As discussed at head b) immediately above, Ofcom considered that the use of surreptitious filming was warranted in the circumstances.

Ofcom next considered the extent to which Mr McCarthy had a legitimate expectation of privacy in the broadcast of the material in the programme.

Ofcom took account of the circumstances in which Mr McCarthy was filmed as well as the material that was broadcast. We observed that Mr McCarthy was unaware that he was being filmed while discussing matters pertaining to his work as a social worker with colleagues while he was at work. We also took account of our earlier conclusion (at head a) above) that although Mr McCarthy was identifiable from the programme, the steps the programme makers had taken (i.e. not naming him and obscuring his face) meant that it was unlikely that he would have been identified by anyone to whom he was not already known. We recognised that Mr McCarthy was not shown discussing anything personal or private about himself. However, we took the view that the conversations which Mr McCarthy was shown having, i.e. conversations concerning sensitive matters which were conducted for the purpose of his work in an environment to which only his colleagues had access, and in which all parties felt they could speak freely and openly, could reasonably be regarded as being confidential and therefore could attract an expectation of privacy. Taking these factors into account, Ofcom considered that Mr McCarthy had a legitimate expectation of privacy in relation to broadcast of the footage.

Channel 4 accepted that Mr McCarthy had not consented to the inclusion of the footage of him in the programme so we went on to consider whether broadcasting this footage was warranted.

We carefully balanced Mr McCarthy's right to privacy in relation to the broadcast of the footage obtained through surreptitious filming and weighed this against the broadcaster's right to freedom of expression and the audience's right to receive information in the public interest. We considered that there was a genuine public interest in including this material in the programme. In particular, it was our opinion, that Mr McCarthy's comments gave direct and candid testimony about the situation within BCFS and thereby served to enable viewers to draw their own

conclusions about the serious claims which the programme had made about systemic and on-going problems with the service provided by BCFS and the impact that such problems could have on vulnerable children and staff working in the department.

Therefore, taking all the factors set out above into account, Ofcom considered that the broadcaster's right to freedom of expression, and the public interest in broadcasting the material in order to allow viewers to assess the validity of the claims made in the programme, outweighed Mr McCarthy's legitimate expectation of privacy in relation to the broadcast of the footage.

Ofcom has not upheld Mr McCarthy's complaint of unjust and unfair treatment in the programme and unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast.

Investigations Not in Breach

Here are alphabetical lists of investigations that Ofcom has completed between 28 November and 11 December 2016 and decided that the broadcaster or service provider did not breach Ofcom's codes, rules, licence conditions or other regulatory requirements.

Investigations conducted under the Procedures for investigating breaches of content standards for television and radio

Programme	Broadcaster	Transmission date	Categories
The Fall	BBC 2	28/10/2016	Harm
Emmerdale	ITV	20/10/2016	Violence
The Chase	ITV	02/11/2016	Generally accepted standards
D-Live 1984 Shaheedi Smagam	Sikh Channel	07/06/2016	Crime

For more information about how Ofcom conducts investigations about content standards on television and radio programmes, go to:
https://www.ofcom.org.uk/data/assets/pdf_file/0020/55109/breaches-content-standards.pdf

Investigations conducted under the General Procedures for investigating breaches of broadcast licences

Licensee	Licensed service	Categories
ARY Network Limited	ARY News	Provision of information

For more information about how Ofcom conducts investigations about broadcast licences, go to: https://www.ofcom.org.uk/data/assets/pdf_file/0019/31942/general-procedures.pdf

Complaints assessed, not investigated

Here are alphabetical lists of complaints that, after careful assessment, Ofcom has decided not to pursue between 28 November and 11 December 2016 because they did not raise issues warranting investigation.

Complaints assessed under the Procedures for investigating breaches of content standards for television and radio

For more information about how Ofcom assesses complaints about content standards on television and radio programmes, go to:

https://www.ofcom.org.uk/_data/assets/pdf_file/0020/55109/breaches-content-standards.pdf

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
UK Hotlist of 2016	4 Music	04/12/2016	Sexual material	1
Can't Pay? We'll Take It Away!	5*	29/11/2016	Generally accepted standards	1
Dance Moms	5*	25/11/2016	Under 18s - coverage of sexual and other offences	1
Majlis e Aza	Ahlebeit TV	13/11/2016	Religious/Beliefs discrimination/offence	1
Live Gurdwara Singh Sabha Derby	Akaal Channel	16/10/2016	Crime and disorder	3
Gold Christmas (trailer)	Alibi	22/11/2016	Generally accepted standards	1
The Sunday Forum	At The Races	13/11/2016	Race discrimination/offence	1
BBC London News	BBC 1	24/11/2016	Scheduling	1
BBC News at Ten	BBC 1	20/11/2016	Generally accepted standards	1
EastEnders	BBC 1	21/11/2016	Generally accepted standards	1
EastEnders	BBC 1	01/12/2016	Scheduling	3
EastEnders	BBC 1	02/12/2016	Generally accepted standards	1
EastEnders	BBC 1	02/12/2016	Under 18s in programmes	4
EastEnders	BBC 1	02/12/2016	Under 18s in programmes	1
Have I Got News For You	BBC 1	25/11/2016	Disability discrimination/offence	1
Have I Got News For You	BBC 1	25/11/2016	Generally accepted standards	1
Have I Got News For You	BBC 1	25/11/2016	Generally accepted standards	1
Have I Got News For You	BBC 1	25/11/2016	Offensive language	1
Holby City	BBC 1	06/12/2016	Disability discrimination/offence	1
Michael McIntyre's Big Show	BBC 1	26/11/2016	Product placement	1
Michael McIntyre's Big Show	BBC 1	26/11/2016	Sexual material	1

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
Oneness Christmas trailer	BBC 1	04/12/2016	Sexual material	6
Oneness Christmas trailer	BBC 1	05/12/2016	Sexual material	1
Oneness Christmas trailer	BBC 1	05/12/2016	Sexual material	1
Ordinary Lies	BBC 1	15/11/2016	Generally accepted standards	1
Strictly Come Dancing	BBC 1	19/11/2016	Sexual orientation discrimination/offence	2
Strictly Come Dancing	BBC 1	26/11/2016	Voting	1
The Missing	BBC 1	30/11/2016	Offensive language	1
The One Show	BBC 1	29/11/2016	Crime and disorder	1
Walliams and Friends	BBC 1	02/12/2016	Gender discrimination/offence	1
Walliams and Friends	BBC 1	02/12/2016	Generally accepted standards	1
Walliams and Friends	BBC 1	02/12/2016	Sexual material	1
Watchdog	BBC 1	30/11/2016	Generally accepted standards	1
Autumn Watch	BBC 2	24/10/2016	Sexual material	1
Black and British	BBC 2	28/11/2016	Race discrimination/offence	1
Deep Impact	BBC 2	27/11/2016	Offensive language	1
MasterChef: The Professionals	BBC 2	22/11/2016	Generally accepted standards	1
Rugby Union: Wales v South Africa	BBC 2	26/11/2016	Race discrimination/offence	1
Victoria Derbyshire	BBC 2	05/12/2016	Generally accepted standards	2
BBC News	BBC News Channel	28/11/2016	Generally accepted standards	1
BBC News	BBC News Channel	01/12/2016	Race discrimination/offence	1
The Radio 1 Breakfast Show with Nick Grimshaw	BBC Radio 1	24/11/2016	Sexual material	1
The Chris Evans Breakfast Show	BBC Radio 2	17/11/2016	Sexual orientation discrimination/offence	1
I'm Sorry I Haven't A Clue	BBC Radio 4	04/12/2016	Disability discrimination/offence	1
The Truth About Anna	BBC Radio 4	22/11/2016	Offensive language	1
Today	BBC Radio 4	15/11/2016	Generally accepted standards	5
Today	BBC Radio 4	02/12/2016	Race discrimination/offence	1
The Sports Hour	BBC Radio Cambridgeshire	21/11/2016	Generally accepted standards	1
Sunny and Shay	BBC Radio London	03/12/2016	Religious/Beliefs discrimination/offence	1
Off the Ball	BBC Radio Scotland	12/11/2016	Generally accepted standards	1

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
Capital Breakfast with Rob Ellis	Capital FM (Manchester)	29/11/2016	Generally accepted standards	1
Channel 4 News	Channel 4	10/11/2016	Due impartiality/bias	2
Channel 4 news	Channel 4	16/11/2016	Due impartiality/bias	1
Channel 4 News	Channel 4	28/11/2016	Crime and disorder	1
Countdown	Channel 4	21/11/2016	Fairness	1
Four in a Bed	Channel 4	14/11/2016	Generally accepted standards	1
Grayson Perry: Born Risky (trailer)	Channel 4	22/11/2016	Scheduling	1
Hollyoaks	Channel 4	01/12/2016	Offensive language	1
Hollyoaks	Channel 4	01/12/2016	Violence	1
Life On the Psych Ward	Channel 4	29/11/2016	Disability discrimination/offence	2
Lyle's Golden Syrup's sponsorship of Weekend Mornings on 4	Channel 4	12/11/2016	Sponsorship credits	1
Michael Moore in Trumpland	Channel 4	29/10/2016	Due impartiality/bias	1
School of Rock	Channel 4	04/12/2016	Offensive language	1
The Last Leg	Channel 4	25/10/2016	Offensive language	3
The Lie Detective	Channel 4	28/11/2016	Materially misleading	1
The Secret Life of Five Year Olds (trailer)	Channel 4	26/11/2016	Religious/Beliefs discrimination/offence	1
Grayson Perry: Born Risky (trailer)	Channel 4+1	22/11/2016	Scheduling	1
Ben Fogle: New Lives in the Wild	Channel 5	29/11/2016	Animal welfare	1
Can't Pay? We'll Take It Away!	Channel 5	23/11/2016	Generally accepted standards	1
Gangland Turf Wars	Channel 5	28/11/2016	Generally accepted standards	2
Programming	Channel 5	various	Generally accepted standards	1
The Nightmare Neighbour Next Door	Channel 5	27/10/2016	Materially misleading	1
The Wright Stuff	Channel 5	16/11/2016	Materially misleading	1
The Wright Stuff	Channel 5	01/12/2016	Generally accepted standards	6
Tour de Celeb	Channel 5	05/12/2016	Offensive language	4
Ben Fogle: New Lives in the Wild	Channel 5+1	29/11/2016	Animal welfare	1
Tour de Celeb (trailer)	Comedy Central	30/11/2016	Generally accepted standards	1
Blackish	E4	16/11/2016	Generally accepted standards	1
Blackish	E4	07/12/2016	Race discrimination/offence	1
James Dunden	Heart Cornwall	22/11/2016	Disability discrimination/offence	1

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
Heart Breakfast with Jagger and Woody	Heart Radio (South Wales)	24/11/2016	Animal welfare	1
Laaj	Hum TV	19/11/2016	Violence	1
Aunt Bessie's sponsorship of I'm a Celebrity...Get Me Out of Here!	ITV	18/11/2016	Sponsorship credits	1
Aunt Bessie's sponsorship of I'm a Celebrity...Get Me Out of Here!	ITV	20/11/2016	Sponsorship credits	1
Coronation Street	ITV	05/07/2016	Sexual orientation discrimination/offence	1
Emmerdale	ITV	24/11/2016	Religious/Beliefs discrimination/offence	3
Emmerdale	ITV	25/11/2016	Violence	1
Emmerdale	ITV	30/11/2016	Sexual material	2
Emmerdale	ITV	02/12/2016	Dangerous behaviour	1
Good Morning Britain	ITV	15/11/1966	Under 18s in programmes	1
Good Morning Britain	ITV	06/11/2016	Generally accepted standards	2
Good Morning Britain	ITV	09/11/2016	Due impartiality/bias	3
Good Morning Britain	ITV	15/11/2016	Due impartiality/bias	1
Good Morning Britain	ITV	30/11/2016	Gender discrimination/offence	1
Good Morning Britain	ITV	30/11/2016	Generally accepted standards	5
Good Morning Britain	ITV	06/12/2016	Generally accepted standards	1
Good Morning Britain	ITV	07/12/2016	Generally accepted standards	1
Good Morning Britain	ITV	07/12/2016	Generally accepted standards	1
Good Morning Britain	ITV	07/12/2016	Generally accepted standards	1
I'm a Celebrity...Get Me Out of Here!	ITV	16/11/2016	Animal welfare	2
I'm a Celebrity...Get Me Out of Here!	ITV	16/11/2016	Generally accepted standards	1
I'm a Celebrity...Get Me Out of Here!	ITV	18/11/2016	Animal welfare	12
I'm a Celebrity...Get Me Out of Here!	ITV	18/11/2016	Generally accepted standards	1
I'm a Celebrity...Get Me Out of Here!	ITV	19/11/2016	Animal welfare	1
I'm a Celebrity...Get Me Out of Here!	ITV	19/11/2016	Animal welfare	1
I'm a Celebrity...Get Me Out of Here!	ITV	19/11/2016	Generally accepted standards	1
I'm a Celebrity...Get Me Out of Here!	ITV	19/11/2016	Generally accepted standards	1
I'm a Celebrity...Get Me Out of Here!	ITV	20/11/2016	Animal welfare	1

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
I'm a Celebrity...Get Me Out of Here!	ITV	20/11/2016	Animal welfare	1
I'm a Celebrity...Get Me Out of Here!	ITV	20/11/2016	Generally accepted standards	4
I'm a Celebrity...Get Me Out of Here!	ITV	22/11/2016	Animal welfare	1
I'm a Celebrity...Get Me Out of Here!	ITV	23/11/2016	Generally accepted standards	1
I'm a Celebrity...Get Me Out of Here!	ITV	24/11/2016	Animal welfare	1
I'm a Celebrity...Get Me Out of Here!	ITV	24/11/2016	Generally accepted standards	7
I'm a Celebrity...Get Me Out of Here!	ITV	26/11/2016	Animal welfare	9
I'm a Celebrity...Get Me Out of Here!	ITV	26/11/2016	Generally accepted standards	7
I'm a Celebrity...Get Me Out of Here!	ITV	27/11/2016	Animal welfare	41
I'm a Celebrity...Get Me Out of Here!	ITV	27/11/2016	Generally accepted standards	1
I'm a Celebrity...Get Me Out of Here!	ITV	28/11/2016	Drugs, smoking, solvents or alcohol	1
I'm a Celebrity...Get Me Out of Here!	ITV	29/11/2016	Gender discrimination/offence	1
I'm a Celebrity...Get Me Out of Here!	ITV	30/11/2016	Animal welfare	5
I'm a Celebrity...Get Me Out of Here!	ITV	30/11/2016	Generally accepted standards	1
I'm a Celebrity...Get Me Out of Here!	ITV	01/12/2016	Animal welfare	26
In Plain Sight (trailer)	ITV	27/11/2016	Scheduling	1
ITV News	ITV	15/11/2016	Due impartiality/bias	1
ITV News	ITV	21/11/2016	Promotion of products/services	1
ITV News	ITV	24/11/2016	Due accuracy	1
ITV News	ITV	28/11/2016	Generally accepted standards	1
ITV News	ITV	29/11/2016	Generally accepted standards	1
ITV News	ITV	04/12/2016	Due accuracy	1
ITV News	ITV	04/12/2016	Due impartiality/bias	1
Loose Women	ITV	24/11/2016	Sexual orientation discrimination/offence	1
Loose Women	ITV	24/11/2016	Sexual orientation discrimination/offence	1
Loose Women	ITV	28/11/2016	Sexual material	1
Loose Women	ITV	30/11/2016	Generally accepted standards	1
McCain's sponsorship of Emmerdale	ITV	various	Sponsorship credits	1
On Assignment	ITV	22/11/2016	Materially misleading	1
Programming	ITV	02/12/2016	Competitions	1

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
River Monsters	ITV	06/12/2016	Violence	1
Talk Talk's sponsorship of The X Factor	ITV	03/12/2016	Disability discrimination/offence	1
Tenable	ITV	23/11/2016	Promotion of products/services	1
The Chase Celebrity Special	ITV	11/09/2016	Other	1
The Jeremy Kyle Show	ITV	25/11/2016	Generally accepted standards	1
The Martin Lewis Money Show	ITV	28/11/2016	Race discrimination/offence	1
The X Factor	ITV	19/11/2016	Promotion of products/services	1
The X Factor	ITV	20/11/2016	Voting	11
The X Factor	ITV	26/11/2016	Drugs, smoking, solvents or alcohol	1
The X Factor	ITV	26/11/2016	Generally accepted standards	1
The X Factor	ITV	26/11/2016	Other	1
The X Factor	ITV	26/11/2016	Race discrimination/offence	1
The X Factor	ITV	27/11/2016	Other	1
The X Factor	ITV	27/11/2016	Voting	1
The X Factor	ITV	02/12/2016	Generally accepted standards	1
This Morning	ITV	22/11/2016	Generally accepted standards	1
This Morning	ITV	29/11/2016	Generally accepted standards	6
ITV News London	ITV London	30/11/2016	Crime and disorder	1
I'm a Celebrity...Get Me Out of Here!	ITV+1	25/11/2015	Generally accepted standards	1
Gala Bingo's sponsorship of the Ellen Degeneres Show	ITV2	22/11/2016	Sponsorship credits	1
The Xtra Factor	ITV2	04/12/2016	Generally accepted standards	1
Today's Big 10	Kiss	13/11/2016	Drugs, smoking, solvents or alcohol	1
News	LBC 97.3 FM	23/11/2016	Due accuracy	1
Nick Ferrari	LBC 97.3 FM	24/06/2016	Generally accepted standards	1
Dance Moms	Lifetime	29/11/2016	Under 18s in programmes	1
Tour de Celeb (trailer)	My5	22/11/2016	Generally accepted standards	1
Place of Meeting (Mesto vstreci)	NTV Mir Baltic	31/08/2016	Due impartiality/bias	1
Captain Flinn and the Pirate Dinosaurs	Pop	29/11/2016	Offensive language	1
Morning Show	Raaj Radio	13/11/2016	Crime and disorder	1

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
Breaking the News	Radio BBC Scotland	25/11/2016	Race discrimination/offence	1
Leanne and Dave	Radio City 96.7	12/11/2016	Gender discrimination/offence	1
Alan Partridge's Scissored Isle	Sky Atlantic	24/10/2016	Dangerous behaviour	1
Paper Review	Sky News	30/11/2016	Generally accepted standards	11
Sky News	Sky News	17/11/2016	Due impartiality/bias	1
Sky News	Sky News	29/11/2016	Product placement	1
Sky News	Sky News	29/11/2016	Scheduling	1
Sky News	Sky News	30/11/2016	Generally accepted standards	1
Sky News	Sky News	01/12/2016	Religious/Beliefs discrimination/offence	2
Sky News Sunrise	Sky News	17/11/2016	Due impartiality/bias	1
Sky News with Colin Brazier	Sky News	01/12/2016	Other	1
Sky Papers	Sky News	19/11/2016	Generally accepted standards	1
Sunrise	Sky News	17/11/2016	Due impartiality/bias	1
UNICEF advertisement	Sky News	20/11/2016	Political advertising	1
International Rugby Union – England vs South Africa	Sky Sports 1	12/11/2016	Generally accepted standards	1
Live EFL Cup Football	Sky Sports 1	29/11/2016	Offensive language	1
Soccer AM	Sky Sports 1	26/11/2016	Race discrimination/offence	1
Killers Behind Bars	Spike	22/11/2016	Materially misleading	1
England v Scotland (trailer)	STV	03/11/2016	Crime and disorder	3
Arnold Schwarzenegger season (trailer)	Syfy Channel	14/11/2016	Violence	1
Max Rushden	Talksport	13/11/2016	Religious/Beliefs discrimination/offence	1
News	Talksport	04/12/2016	Other	1
Masterchef USA	W HD	18/11/2016	Animal welfare	1
Fight Club: A History of Violence	Yesterday	20/11/2016	Race discrimination/offence	1

Complaints assessed under the General Procedures for investigating breaches of broadcast licences

For more information about how Ofcom assesses complaints about broadcast licences, go to: https://www.ofcom.org.uk/data/assets/pdf_file/0019/31942/general-procedures.pdf

Licensee	Licensed service	Categories
Made in Birmingham Ltd	Made in Birmingham	Programming Commitments

Complaints assessed under the Procedures for investigating breaches of rules for On Demand programme services

Programme	Service name	Service provider	Categories	Number of complaints
The Grand Tour	Amazon Prime	Amazon Instant Video	Hatred and abuse	2
Stacey on the Frontline: Girls, Guns and Isis	BBC3 Online	BBC	Protection of under 18s	1

For more information about how Ofcom assesses complaints about on demand services, go to:

https://www.ofcom.org.uk/data/assets/pdf_file/0033/74499/procedures-investigating-breaches.pdf

Complaints outside of remit

Here are alphabetical lists of complaints received by Ofcom that fell outside of our remit. This is because Ofcom is not responsible for regulating the issue complained about. For example, the complaints were about the content of television, radio or on demand adverts, accuracy in BBC programmes or an on demand service does not fall within the scope of regulation.

For more information about what Ofcom's rules cover, go to:

<http://consumers.ofcom.org.uk/complain/tv-and-radio-complaints/what-does-ofcom-cover/>

Complaints about television or radio programmes

For more information about how Ofcom assesses complaints about television and radio programmes, go to:

https://www.ofcom.org.uk/data/assets/pdf_file/0020/55109/breaches-content-standards.pdf

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
BBC News	BBC	11/11/2016	Due accuracy	1
BBC News	BBC	various	Due impartiality/bias	1
BBC News	BBC 1	10/11/2016	Due accuracy	1
Breakfast	BBC 1	02/12/2016	Due impartiality/bias	1
Have I Got News For You	BBC 1	02/12/2016	Due impartiality/bias	1
The Today Programme	BBC Radio 4	06/12/2016	Due impartiality/bias	1
BBC News	BBC services	06/12/2016	Due impartiality/bias	1
The Last Leg	Channel 4	02/12/2016	Outside of remit	1
Advertisement	ITV	25/11/2016	Advertising content	1
Advertisement	ITV	27/11/2016	Advertising content	1
Advertisement	ITV	02/12/2016	Advertising content	1
Advertisement	ITV	05/12/2016	Advertising content	1
Emmerdale	ITV	05/12/2016	Outside of remit	1
Advertisement	Quest	04/12/2016	Advertising content	1
Advertisement	Sky Sports 1	02/12/2016	Advertising content	1
Advertisement	Yesterday	03/12/2016	Advertising content	1

Investigations List

If Ofcom considers that a broadcaster or service provider may have breached its codes, rules, licence condition or other regulatory requirements, it will start an investigation.

It is important to note that an investigation by Ofcom does not necessarily mean the broadcaster or service provider has done anything wrong. Not all investigations result in breaches of the codes, rules, licence conditions or other regulatory requirements being recorded.

Here are alphabetical lists of new investigations launched between 28 November and 11 December 2016

Investigations launched under the Procedures for investigating breaches of content standards for television and radio

Programme	Broadcaster	Transmission date
JVS Show	BBC Three Counties Radio	21 November 2016
The Motown Hour	Coast and County Radio (Scarborough)	10 November 2016
Advertisements	LFCTV	various
Programming	MATV	28 September 2016
The Town That Banned Christmas	Sony Movie Channel	4 November 2016

For more information about how Ofcom assesses complaints and conducts investigations about content standards on television and radio programmes, go to: https://www.ofcom.org.uk/_data/assets/pdf_file/0020/55109/breaches-content-standards.pdf

Investigations launched under the Procedures for the consideration and adjudication of Fairness and Privacy complaints

Programme	Broadcaster	Transmission date
Brush Up On...British Schools	BBC 4	4 October 2016
Hunted	Channel 4	22 and 29 September 2016
Nightmare Neighbour Next Door	Channel 5	13 October 2016
Can't Pay? We'll Take It Away!	Channel 5	7 September 2016
Can't Pay? We'll Take It Away!	Channel 5	13 September 2016

Programme	Broadcaster	Transmission date
Can't Pay? We'll Take It Away!	Channel 5	19 October 2016
RT News	RT	28 September 2016
Say Yes to the Dress	TLC	16 September 2016

For more information about how Ofcom considers and adjudicates upon Fairness and Privacy complaints about television and radio programmes, go to:

https://www.ofcom.org.uk/_data/assets/pdf_file/0031/57388/fairness-privacy-complaints.pdf