

Sanction: Decision by Ofcom

To be imposed on Discovery Communications Europe Limited

For material broadcast on Investigation Discovery on 16, 18 and 20 August 2013 at various times¹

**Ofcom's consideration
of Sanction against:**

Discovery Communications Europe Limited
("Discovery" or "the Licensee") in respect of its service
Investigation Discovery (TLCS-1350)².

For:

Breaches of the March 2013 version of the Ofcom
Broadcasting Code ("the Code")³ in respect of:

Rule 1.3: "Children must also be protected by
appropriate scheduling from material that is unsuitable
for them.

Meaning of "children": Children are people under the
age of 15 years.

Meaning of "appropriate scheduling": Appropriate
scheduling should be judged according to:

- the nature of the content;
- the likely number and age range of children in the audience, taking into account school time, weekends and holidays;
- the start time and finish time of the programme;
- the nature of the channel or station and the particular programme; and
- the likely expectations of the audience for a particular channel or station at a particular time and on a particular day."

¹ See Annex 1 for the material broadcast on Investigation Discovery and found in breach of Ofcom's Broadcasting Code as detailed in Broadcast Bulletin 246, dated 20 January 2014. See <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb246/>

² Discovery currently holds 71 Television Licensable Content Service licences, of which Investigation Discovery is one, in addition to one Digital Television Programme Service licence. Ofcom understands that Discovery carries out the compliance function for Investigation Discovery.

³ See Annex 2 for relevant extracts of the Code and Ofcom's Guidance Notes on the Code. The version of the Code which was in force at the time of the broadcasts took effect 21 March 2013. All references to the Code in this Decision are therefore references to that version of the Code which can be found at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>

Sanction 95(14) Discovery Communications Europe Limited

Rule 1.11: “Violence, its after-effects and descriptions of violence, whether verbal or physical, must be appropriately limited in programmes broadcast before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio) and must be justified by the context.”

Rule 2.3: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context ... Such material may include, but is not limited to, offensive language, violence, sex, sexual violence... [and] violation of human dignity...”

Meaning of “context”: Context includes (but is not limited to):

- the editorial content of the programme, programmes or series;
- the service on which the material is broadcast;
- the time of broadcast;
- what other programmes are scheduled before and after the programme or programmes concerned;
- the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally or programmes of a particular description;
- the likely size and composition of the potential audience and likely expectation of the audience;
- the extent to which the nature of the content can be brought to the attention of the potential audience for example by giving information; and
- the effect of the material on the viewers or listeners who may come across it unawares.”

Sanction 95(14) Discovery Communications Europe Limited

Decision:

To impose a financial penalty (payable to HM Paymaster General) of **£100,000** and;

to direct the Licensee to broadcast a statement of Ofcom's findings on a date and in a form to be determined by Ofcom.

Executive Summary

1. Investigation Discovery is a UK digital satellite television channel that broadcasts documentary programming relating to crime and criminal investigations. The licence is held by Discovery Communications Europe Limited (“Discovery” or “the Licensee”). Discovery currently holds 72 broadcasting licences in respect of 73 services in total. The Licensee carries out its own compliance for all these 73 services, including Investigation Discovery.
2. In Ofcom’s Decision (“the Breach Decision”) published on 20 January 2014 in Broadcast Bulletin 246⁴, Ofcom’s Executive found that material broadcast by the Licensee on the Investigation Discovery service breached Rules 1.3, 1.11 and 2.3 of the Code.
3. That material comprised of eight separate episodes of the series *Deadly Women*, a true-life crime series about female killers. The episodes were broadcast at various times during the morning and afternoon on 16, 18 and 20 August 2013 (“the Broadcasts”).

The Breach Decision

4. In the Breach Decision, Ofcom stated that the contraventions of Rules 1.3, 1.11 and 2.3 of the Code were serious and were being considered for statutory sanction.
5. In relation to each breach of the Code, the Breach Decision set out specific examples of broadcast material that was in breach, along with reasoning as to why, in relation to each breach, the material had breached a particular Rule.
6. Rule 1.3: Ofcom found that the content of the material was unsuitable for children and inappropriately scheduled. The Broadcasts contained prolonged and disturbing reconstructions of torture, mutilation and murder, including: attacks on individuals with hammers and knives, electrocutions and whippings; the murder of a six-year old boy through beating by his mother and her boyfriend; a dramatized image and accompanying verbal description of an eyeball rolling across the floor after a victim was attacked; and, the dismemberment of a corpse with a circular saw. Ofcom found that sequences in the Broadcasts were highly likely to have caused distress to any children in the audience. The content was broadcast pre-watershed during the school holidays when there was a significant likelihood that children would be available to view. Ofcom found that pre-broadcast warnings were not sufficient to ensure that the material was appropriately scheduled and concluded that the Broadcasts were in breach of Rule 1.3.
7. Rule 1.11: Ofcom noted that the Broadcasts contained graphic depictions of extreme acts of violence and their after-effects for the entertainment of an adult audience. However, Ofcom found that the cumulative effect of the material would have been likely to have had a significant impact on any children in the audience. Ofcom concluded as a result that the level of on-screen violence in these pre-watershed Broadcasts had not been appropriately limited and was not justified by the context. The material in the Broadcasts was consequently in breach of Rule 1.11.
8. Rule 2.3: Ofcom found that the treatments of murder, torture and associated acts of violence in the Broadcasts had the potential to cause offence and that the degree of offence likely to be caused would have been higher because of the graphic nature of the depictions. Although the content was broadcast on a specialist crime channel, Ofcom found there was insufficient contextual justification for the broadcast of the content, particularly given the time of day at which the broadcasts took place. Ofcom therefore found a breach of Rule 2.3 in relation to each of the Broadcasts.
9. In accordance with Ofcom’s Procedures for the consideration of statutory sanctions in breaches of broadcast licences (“the Sanctions Procedures”)⁵, Ofcom has considered

⁴ See Annex 1: <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb246/>

Sanction 95(14) Discovery Communications Europe Limited

whether these Code breaches were serious, deliberate, repeated or reckless so as to warrant the imposition of a sanction on the Licensee in this case. It has reached the Decision that a sanction is warranted in this case since the breaches were serious and repeated for the following reasons (in summary).

The Sanction Decision

10. First, Ofcom found the breaches of the Code by the Broadcasts were serious principally because of the graphic and extended depictions of extreme violence which they contained and which were transmitted at various times before the watershed in the school holidays. The Broadcasts were unsuitable for children and highly likely to have caused distress to any children in the audience.
11. Second, the breaches were repeated in that this unsuitable content was spread across 8 episodes of the series *Deadly Women*, shown on 16, 18 and 20 August 2013.
12. Last, the pre-watershed broadcasts were made in error and, by the Licensee's own admission, in an "entirely inappropriate time-slot". The errors were blatant and repeated over a period of 5 days. Ofcom considered that the breaches in this case demonstrated that the Licensee failed to ensure that it had robust compliance procedures in place.
13. In arriving at its Decision of the appropriate type and level of sanction, Ofcom also took account of the Licensee's recent compliance record. Prior to the Broadcasts, the Licensee did not have a history of contraventions on the Investigation Discovery service. However, it operates a centralised compliance unit for all 73 of its licensed broadcasting services. Ofcom has found the Licensee in breach of the Code in relation to broadcasts on other licensed services, most recently, in relation to the programme *Embarrassing Bodies* (TLC Poland⁶, 25 July 2013, 14:00). This was found in breach⁷ of Rule 1.3 as the programme, which contained full screen images of an invasive vaginal examination, was unsuitable for children and had not been appropriately scheduled.
14. Ofcom's Decision is that the appropriate sanction should be a financial penalty of **£100,000**. Ofcom also considers that the Licensee should be directed to broadcast a statement of Ofcom's findings, on a date and in a form to be determined by Ofcom.

Legal Framework

Communications Act 2003

15. Ofcom's principal duty, set out in section 3(1) of the Communications Act 2003 ("the Act"), is to further the interests of citizens in relation to communications matters and the interests of consumers in relevant markets. In carrying out its functions, Ofcom is required to secure a number of other matters. These include the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services (section 3(2)(e)). In performing those duties Ofcom must have regard to "the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection" (section 3(4)(h)).

⁵ See Annex 3: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/june2011/statutory-sanctions.pdf>

⁶ The licence for TLC Poland is also held by Discovery, and compliance for TLC Poland is managed by the same centralised Discovery compliance team as for all other Discovery licences.

⁷ See Annex 4: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb247/obb247.pdf>

16. Ofcom has a specific duty under section 319 of the Act to set such standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives set out in section 319(2). These objectives include that: children under the age of eighteen are protected (section 319(2)(a)). This requirement is reflected in Section One of the Code, which contains various specific rules to fulfil this objective, one of which is to ensure that material that is not suitable for children to view is scheduled appropriately. The standards objectives also require that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material (section 319(2)(f)). This requirement is reflected in Section Two of the Code, and in particular Rule 2.3.
17. In performing these duties, Ofcom is required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and, where relevant, to have regard to a number of other considerations including:
 - the need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g)).

Human Rights Act 1998

18. Under section 6 of the Human Rights Act 1998 there is a duty on Ofcom (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention on Human Rights (“the Convention”).
19. Article 10 of the Convention provides for the right to freedom of expression. Applied to broadcasting, this right encompasses the broadcaster’s freedom to impart and the audience’s freedom to receive information and ideas without interference by public authority and regardless of frontiers (Article 10(1) of the Convention). The exercise of these freedoms may be subject only to conditions and restrictions which are “prescribed in law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary” (Article 10(2) of the Convention).
20. Ofcom must exercise its duties in light of this right and not interfere with the exercise of these freedoms in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

Ofcom Broadcasting Code

21. Standards set by Ofcom in accordance with sections 319 of the Act are set out in the Code.
22. Accompanying Guidance Notes to each section of the Code are published and from time to time updated on the Ofcom website. The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Code⁸.
23. The relevant Code rules in this case are set out in full at the beginning of this Decision.

⁸ See Annex 2 for relevant extracts of the Broadcasting Code and Ofcom’s Guidance Notes on the Code

Remedial action and penalties

24. Under section 325 of the Act, a licence for a programme service issued by Ofcom under the Broadcasting Act 1990 or 1996 must include conditions for securing that the standards set under section 319 are observed by the licensee. In the case of a television licensable content service (“TLCS”) licence, Condition 6 of the licence requires the licensee to ensure that the provisions of any Code made under section 319 are complied with. The Licensee holds a TLCS licence.
25. Where Ofcom has identified that a condition of a TLCS licence has been contravened, its powers to take action are set out in sections 236 to 238 of the Act insofar as relevant to the case.
26. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or a statement of Ofcom’s findings (or both), or not to repeat a programme which was in contravention of a licence condition.
27. Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence. The maximum penalty which may be imposed in respect of each contravention of a licence condition is whichever is the greater of £250,000 and 5 per cent of the qualifying revenue from the licensed service for the licensee’s last complete accounting period falling within the period for which its licence has been in force.
28. Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence where a licensee is in contravention of a condition of a TLCS licence or direction thereunder.

Background – The Breach Decision

29. In the Breach Decision, the Executive found that material broadcast by the Licensee on Investigation Discovery breached Rules 1.3, 1.11 and 2.3 of the Code. The Breach Decision set out the reasons for each of these breach findings.
30. The Breach Decision noted that the Broadcasts were shown at various times pre-watershed. Each episode of *Deadly Women* had a scheduled duration of 60 minutes and featured the crimes of three different murderers, described through dramatic reconstructions and interviews with investigators and experts in criminal behaviour.
31. Ofcom was concerned by the graphic depictions and descriptions of violence, torture and murder included in the Broadcasts. The Breach Decision described a number of these in detail. We set out two extracts drawn from the Breach Decision by way of illustration.
32. The programme broadcast on 16 August 2013 at 07:50 included a segment featuring the crimes of Elizabeth Brownrigg, an 18th century murderer who tortured young orphans in her care. The reconstructions included extended sequences of teenage girls being flogged. A whip was shown being used more than 40 times within 10 minutes. The perpetrators were shown smiling and laughing while close up images of one of the girls showed her crying and screaming in agony.
33. The programme broadcast on 18 August at 07:00 included a segment describing the murder of Jeff Wright by his wife, Susan, in the USA in 2003. In a dramatic reconstruction, the couple were depicted engaging in a sex game with Jeff tied to the bed. A shot of Susan holding a candle was shown, before a helpless Jeff was shown screaming and shouting: “What are you doing that for!?” As Susan put the candle down on the bedside table a voiceover explained: “Candle wax had been melted and dripped on Jeffrey’s scrotum.” Susan then revealed a knife which she waved in front of her husband’s face before she moved down his body. Images were shown of Susan raising the knife and striking out towards his groin and it was later confirmed by an interviewee

that she inflicted “mutilation and cuts to the genitals”. Susan was then depicted in the reconstruction stabbing her husband multiple times. Although the blade penetrating Jeff’s flesh was not shown, viewers did see the knife being brought down onto Jeff’s bloodied chest. Susan’s attack was interrupted by her young son knocking on the bedroom door and Jeff’s blood-covered face was shown as he struggled to breathe. Having put her son back to bed, Susan returned to the bedroom and continued her attack.

34. In relation to Rule 1.3, Ofcom first considered whether the material was suitable for children and found that it was not. The Broadcasts contained numerous dramatic reconstructions, featuring extended violent sequences, including scenes of torture - mutilation, knife attacks, electrocution, poisoning, beatings with blunt instruments, flogging, kicking and punching, as well as dismemberment; in nearly all cases, the outcome of the violence was death. The graphic nature of the various reconstructions was further exacerbated by the content of the commentary and statements made by interviewees – these comments were frequently detailed and protracted.
35. Ofcom was particularly concerned by the strength and graphic detail of a number of reconstructions, including: those depicting the crimes of Elizabeth Brownrigg; a prolonged, four minute episode of torture featuring a hammer attack, a knife, a frying pan, electrocution and injection with battery acid; a dramatized image and accompanying verbal description of an eyeball rolling across the floor following an attack; and a dismemberment with an electric saw. Ofcom found that two sequences involving young children were highly likely to have caused distress to any children in the audience and that a number of episodes were likely to have greatly troubled young viewers in particular.
36. Ofcom went on to consider whether the material was appropriately scheduled and found that it was not. The graphic levels of violence and the extended duration of the reconstructions meant the series were entirely unsuitable for broadcast during the daytime. Further, while the Breach Decision acknowledged that a channel such as Investigation Discovery may attract a limited child audience, it noted that the Broadcasts occurred during the school holidays when there was a significant likelihood that children – some unaccompanied by an adult – would be available to view.
37. Accordingly, the Breach Decision recorded that the Broadcasts were clearly in breach of Rule 1.3.
38. With regard to Rule 1.11, Ofcom said that graphic depictions of violence, including on more than one occasion extended depictions of torture and suffering, had significant potential to shock any children in the audience. Ofcom noted that the Broadcasts did not contain images of weapons, such as knives, entering flesh, and limited images of weapons making contact with victims. However, Ofcom considered that the cumulative effect of, for example, the images of weapons being wielded by attackers, the sound effects accompanying use of these weapons, the sound effects of the weapons’ impact on victims, the graphic depictions of blood and wounds on the victims, and the on-going cries of pain from the victims, would have been likely to have had a significant impact on any children in the audience. Therefore we concluded that the level of violence on-screen had not been appropriately limited.
39. Ofcom then went to determine if the violence within the Broadcasts was justified by the context. Although Discovery contended that the programmes addressed issues such as abusive relationships and violence against children, Ofcom did not consider that the focus of the material was on these complex issues. Instead, Ofcom said the programmes featured highly stylised dramatic reconstructions of brutal crimes, with a focus on acts of violence for the entertainment of an adult audience. Violent scenes were prolonged and stylised with menacing music and exaggerated sound effects, for example of a knife being thrust into a human body. Images of dead bodies were shown

repeatedly, both in moving and still shots. The commentary, both in the voice over and from the interviewees, included descriptions of the pain experienced by the victims and the techniques used by their attackers to inflict it. Consequently we considered the violence featured in the Broadcasts, which were shown before the watershed, could not be justified by the context. Ofcom therefore found the Broadcasts breached Rule 1.11.

40. With regard to Rule 2.3, Ofcom first considered whether the material in the Broadcasts was potentially offensive. Ofcom found that these treatments of murder, torture, and associated acts of violence had the potential to cause offence and that the degree of offence likely to be caused would have been higher because of the graphic nature of the depictions, going beyond audience expectations for a daytime broadcast. Further, Ofcom found that the graphic treatment of a real-life case featuring extreme violence towards a small child had the potential to be highly offensive to those watching at the time it was shown.
41. Ofcom then considered whether the offence was justified by context. Ofcom took into account that the Broadcasts were shown on a specialist crime channel. However, Ofcom concluded that the content would have likely gone beyond audience expectations for a broadcast on an Ofcom licensed service during the daytime, irrespective of the fact the channel was aimed at an adult audience. Ofcom found that the context was insufficient to justify the broadcast of the offensive content, and that the Licensee had not applied generally accepted standards, in breach of Rule 2.3.
42. In the Breach Decision, Ofcom noted that broadcasters must be adequately resourced to ensure that all their programming complies with the Code and that they have sufficient resources and appropriate arrangements to monitor as necessary output as it is broadcast in order to be in a position to spot errors and take remedial action. Ofcom observed in the Breach Decision that in this case the Licensee was seemingly unaware that it had broadcast wholly unsuitable material before the watershed until alerted by Ofcom.
43. Ofcom stated that the contraventions of Rules 1.3, 1.11 and 2.3 of the Code were serious and were being considered for statutory sanction.

Ofcom's Decision to Impose a Statutory Sanction

44. As set out in paragraph 1.10 of the Sanctions Procedures, the imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly or recklessly breached a relevant requirement.
45. Ofcom considered that for the reasons set out below the breaches of Rule 1.3, 1.11 and 2.3 were serious and repeated and therefore warranted the imposition of a statutory sanction.
46. In this case, Ofcom issued a preliminary view ("Preliminary View") that Ofcom was minded to impose a statutory sanction in the form of a financial penalty. In addition, Ofcom proposed that the Licensee should be directed to broadcast a statement of Ofcom's findings, on a date and in a form to be determined by Ofcom. Ofcom sent a copy of the Preliminary View to the Licensee on 7 May 2014 at the same time giving the Licensee the opportunity to provide written and oral representations on the Preliminary View. The Licensee responded by letter dated 29 May 2014 in which it provided written representations (summarised in paragraphs 48 to 54) ("the Representations"). The Licensee declined the opportunity to provide oral representations stating that it believed "the written information contained within this response is detailed and comprehensive enough to address the points raised in your preliminary view of sanction".

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

Licensee's Representations

48. In its Representations, the Licensee accepted that it had breached the Code and apologised "unreservedly". The Licensee also accepted that the broadcast of clearly post watershed material during the day was a "significant" breach.
49. The Licensee's Representations noted Ofcom's Penalty Guidelines which state that: "the central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance". The Licensee said that in this case there is no need for Ofcom to impose a financial penalty to ensure compliance as its previously good compliance record and the actions it has taken since this breach (see paragraphs 74 and 75) demonstrated a "clear commitment" to on-going compliance.
50. Discovery acknowledged that the number of complaints is not in itself an indication of the potential harm that can result from a breach of the Code and that Ofcom has a statutory duty to ensure broadcast standards are maintained irrespective of the number of complaints that are received. However, the Licensee said that it did believe that "the number of children in the likely audience and other contextual factors are important when considering the *degree* of actual harm that may have been caused, whether a sanction should be imposed and, if so, at what level".
51. In respect of the duration of the contravention, Discovery said that as soon as it was alerted to the complaint and the potential contravention of the Code, it withdrew the programmes from air and reviewed all relevant material "with the result that all programmes were re-certified as post-watershed". Discovery said that it had "ensured that the duration [of the breach] was minimised as much as possible and any children in the potential audience would be provided adequate protection".
52. Discovery highlighted to Ofcom that before the breach being considered in this case, Investigation Discovery had had no breaches recorded it. The Licensee also raised concerns that breaches recorded against Discovery in 2007 and 2008 had been taken into account as "these breaches occurred many years ago and should therefore not be relevant to the case under consideration".
53. The Licensee's representations stated that neither Ofcom nor its predecessor, the Independent Television Commission, had imposed a statutory sanction against Discovery. The Licensee also noted that it "has never been given a warning by Ofcom or ever put on notice that: 'any further breaches of the Code would lead to the consideration of a statutory sanction'. The Licensee said that in these circumstances, it believed "that moving straight to a fine and at the level proposed, in this case would be unfair and totally disproportionate" and that "full consideration of Discovery's good record of compliance be taken into account when deciding on any sanction".
54. In its Representations, the Licensee also stated why, in light of various precedents, it considered that the proposed fine was disproportionately high. Discovery noted that fines of £100,000 or more have only been imposed by Ofcom in four instances since 2009. The Licensee said that it believed that these cases were "far more serious than the breaches found in *Deadly Women*" and therefore asked Ofcom to "reconsider its

proposal and take an approach in line with its statutory principles which is, proportionate, consistent and targeted only at cases in which action is needed”.

Serious and repeated nature of breaches

55. As set out in paragraph 1.10 of the Sanctions Procedures, the imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly or recklessly breached a relevant requirement.
56. Ofcom considered that for the reasons set out below the breaches of Rule 1.3, 1.11 and 2.3 were serious and repeated and therefore warranted the imposition of a statutory sanction.
57. First, and principally, the breaches were serious because of the graphic and extended depictions of extreme acts of violence in the Broadcasts, which were transmitted at various times before the watershed over a five day period during the summer school holidays when children were available to view. These Broadcasts were unsuitable for children and, moreover, were likely to have caused distress to any children in the audience and to have greatly troubled younger viewers in particular. Second, they also had the potential to be highly offensive to the audience more generally at that time of day. Third, there was no justification for the level of violence shown. Fourth, the Licensee failed to have any regard to its responsibilities towards a potential child audience and the need to limit the violence appropriately at the time the Broadcasts were shown.
58. Ofcom also considered the breaches were serious as the blatant nature of the breaches (in which material clearly inappropriate for broadcast during the day was shown in the daytime during school holidays) indicated a failure by the Licensee to ensure that it had robust compliance procedures in place. Furthermore, the Licensee’s failure to spot this series of on-going breaches demonstrated either the absence or the failure of a system that would have alerted senior members of staff to the issue as it was occurring and prevented the later broadcasts of this potentially harmful and offensive content.
59. Further, these breaches of the Code were repeated because the material was not contained in a single or isolated programme, but broadcast in a number of programmes shown on three separate days over a five day period. The breaches of the same three Rules of the Code (1.3, 1.11 and 2.3) occurred in each of these eight separate programmes.
60. In view of the factors set out above, Ofcom considers that the breaches of the Code are both serious and repeated. As such they warrant a statutory sanction. The following paragraphs set out the enforcement action we have considered and Ofcom’s Decision of the appropriate sanctions to be imposed.

Level of Sanction

Imposition of sanctions other than a financial penalty

61. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or a statement of Ofcom’s findings (or both), or not to repeat a programme which was in contravention of a licence condition.
62. It is Ofcom’s view that a direction not to repeat the programmes found in breach would not be an appropriate or sufficient sanction in all the circumstances. This is because the Licensee, as set out in the Breach Decision, has already removed the Broadcasts from its daytime schedule.

63. Ofcom considers that, on its own, a direction to broadcast a statement of Ofcom's findings is not a sufficient statutory sanction, given the serious and repeated nature of the breaches in this case. Ofcom therefore considers that a direction to broadcast a statement of Ofcom's findings in combination with a financial penalty would act as a more effective deterrent to discourage the Licensee from contravening the Code in a similar manner.
64. In light of the above, and taking into account the broadcaster's right to freedom of expression and the information currently available, Ofcom's Decision is that it would not be proportionate to recommend revocation of the licence as an appropriate statutory sanction in respect of the current breaches under consideration.

Imposition of a financial penalty

65. Under section 237 of the Act, the maximum level of financial penalty that can be imposed on the holder of a TLCS licence in respect of each breach of a TLCS licence is £250,000 or five per cent of the licensee's qualifying revenue relating to its last complete accounting period falling within the period for which its licence has been in force, whichever is greater.
66. Qualifying revenue is calculated by adding together revenue gained from advertising, sponsorship and subscription.
67. The Penalty Guidelines state that: "Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement." In reaching its Decision on sanction in this case, Ofcom has taken full account of the need to ensure that any penalty acts as a deterrent and has also taken account of the specific factors set out at paragraph 4 of the Penalty Guidelines⁹.

Factors taken into account in determining the amount of a penalty

68. In considering the appropriate amount of a financial penalty for the Code breaches in this case, Ofcom took account of relevant factors set out in the Penalty Guidelines as set out below:

Deterrence

69. Ofcom believes that a financial penalty is necessary to reflect the serious and repeated nature of the Code breaches recorded against the Licensee, and to act as an effective incentive to comply with the Code, both for the Licensee and other licensees.

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

70. Ofcom has no evidence of actual harm to child or adult viewers caused by these contraventions of Section One and Two as recorded in the Breach Decision. Nonetheless, given that these very violent Broadcasts took place in the daytime during the school holidays, when children would have been available to view the scope for potential harm was considerable. As recorded in the Breach Decision, these Broadcasts contained numerous depictions of highly graphic violent content that was likely to have caused serious distress to any children in the audience and to have greatly troubled

⁹ See Annex 5: <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

younger viewers in particular, and caused grave concern to parents or carers of any children watching.

71. We have no evidence in this case of any increased costs being incurred by consumers or others.

The duration of the contravention

72. The Breach Decision related to material included in eight 60-minute broadcasts, transmitted on three separate days across a five day period.

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

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

Any steps taken for remedying the consequences of the contravention

74. Ofcom noted in the Breach Decision that the Licensee had stated in its representations that it had:

- reviewed the Broadcasts and then immediately removed them from the daytime schedule;
- removed a large number of series from the channel's daytime schedule to be reviewed for compliance; and
- begun a programme of tailored compliance training for crime programmes.

75. Ofcom also took into account various other new measures taken by the Licensee to improve compliance and referred to in its Representations. These included:

- setting up a dedicated Investigation Discovery programming/re-versioning unit headed up by the newly created role of senior Investigation Discovery UK producer;
- adopting a new process to review programming through introducing new checks to ensure any programming requiring further review is referred routinely to senior staff;
- ensuring all programmes requiring further checks are discussed at weekly compliance meetings; and
- putting a new emphasis in compliance training on content likely to raise protection of minors issues.

76. Ofcom also noted that the Licensee had expressed its deep regret with regard to the Broadcasts.

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

77. As pointed out by the Licensee in its Representations, the Licensee does not have a history of contraventions on the Investigation Discovery service.¹⁰ However, it does operate a centralised compliance unit for all 73 of its licensed broadcasting services and the licences for all these services are held by the same entity, Discovery. In these circumstances, when assessing a sanction against one service, Ofcom considers it appropriate to take into account the compliance record of all the services.

¹⁰ The only other breach finding that Ofcom has made in respect of the service related to a programme broadcast after the Broadcasts which are the subject of this Decision – see paragraph 83 for further details.

78. Ofcom has made the following breach findings in relation to these other Discovery services during the period January 2008 to 20 January 2014 (when the Breach Decision was published). All of these breaches related to broadcasting offensive language before the watershed. These findings were published in Broadcast Bulletins 100, 102, 130, 142 and 214 respectively:
- In its decision **UK's Toughest Jobs** (Discovery +1, 20 October 2007 16:00: Broadcast Bulletin 100)¹¹ Ofcom noted the use of the words “fuck” and “fucking” before the watershed and consequently the programme was in breach of Rule 1.14.
 - In its decision **Chop Shop: London Garage** (Discovery Channel, 18 November 2007 16:00: Broadcast Bulletin 102)¹² Ofcom found that the Licensee had broadcast the word “fuck” before the watershed in an episode of the series *Chop Shop: London Garage*. The broadcast was found in breach of Rule 1.14. Ofcom noted that a very similar breach had been recently recorded against Discovery.
 - In its decision **Chop Shop** (Discovery Channel, 12 October 2008 12:00, 13 October 2008 09:00, 27 December 2008 17:00, 31 December 16:00: Broadcast Bulletin 130)¹³ Ofcom found that the Licensee had repeatedly broadcast the word “fuck” before the watershed in episodes of the series *Chop Shop*. The broadcasts were found in breach of Rule 1.14. These breaches were the latest in a series of multiple similar breaches and Discovery was required to attend a meeting with Ofcom to discuss its compliance arrangements.
 - In its decision **Wife Swap** (Discovery Real Time, 28 May 2011, 14:00: Broadcast Bulletin 188)¹⁴ Ofcom noted the use of the word “fucking” before the watershed and consequently the broadcast was in breach of Rule 1.14.
 - In its decision **HMS Ark Royal** (Discovery, 1 August 2012, 13:00: Broadcast Bulletin 214)¹⁵ Ofcom noted the use of the word “fuck” in this programme broadcast before the watershed. The programme was therefore found in breach of Rule 1.14.
79. Subsequent to the publication of the decision finding *Deadly Women* in breach of the Code, Ofcom recorded a further breach against Discovery Communications Europe in Broadcast Bulletin 247 on 3 February 2014 for a broadcast made on another licensed service just before the Broadcasts:
- In its decision **Embarrassing Bodies** (TLC Poland, 25 July 2013, 14:00: Broadcast Bulletin 247)¹⁶ Ofcom noted that the programme featured full screen and close-up images of a vaginal examination during which a speculum was inserted and removed. The programme, which contained material unsuitable for children, was not appropriately scheduled and was therefore in breach of Rule 1.3.

¹¹ See Annex 6: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb100/issue100.pdf>

¹² See Annex 7: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb102/issue102.pdf>

¹³ See Annex 8: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb130/issue130.pdf>

¹⁴ See Annex 9: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb188/obb188.pdf>

¹⁵ See Annex 10: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb214/obb214.pdf>

¹⁶ See Annex 4: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb247/obb247.pdf>

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

80. Discovery only became aware of the potentially serious issue raised by the Broadcasts on being alerted to it by Ofcom on 29 August 2013.
81. On 18 September 2013, the Licensee told Ofcom that following a review, the series (*Deadly Women*) had been removed from the Investigation Discovery's daytime schedule.
82. On 24 October 2013, the Licensee informed Ofcom that it had removed a large number of series from the Investigation Discovery daytime schedule. As set out in paragraph 75 above, the Licensee has also set out the further steps it has taken to improve its compliance processes.
83. Ofcom notes, however, that the Licensee did not take sufficiently timely steps to prevent a subsequent and similar breach of the Code. On 24 September 2013, the Licensee broadcast **Scored: Crimes of Passion** at 17:00 on Investigation Discovery. On 3 February 2014, Ofcom found that the content, which contained various scenes of sexual and violent behaviour, was unsuitable for children and had not been appropriately scheduled. A breach of Rule 1.3 was recorded.¹⁷

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

84. In accordance with section 237(4) of the Act, Ofcom obtained financial data setting out the Licensee's Qualifying Revenue for the last accounting period (2012) to decide upon a proportionate penalty. Ofcom considered that a penalty of **£100,000** would be proportionate taking into account all the relevant circumstances, including the need to achieve an appropriate level of deterrence and the serious and repeated nature of the Code breaches in this case; whilst noting this is the first statutory sanction imposed by Ofcom on Discovery.

Precedent

85. In accordance with the Penalty Guidelines, Ofcom has also had regard to relevant precedents set by previous cases.
86. In this instance, there are no directly relevant precedent cases in terms of sanctions that deal with the same range of Code rule breaches across Sections One and Two within one sanctions case. The following sanctions cases included some similar breaches of some of the same Code rules. They can however be distinguished from the present case in that either they included cumulative breaches of the same single Code rule involving programmes in the same series broadcast on the same day (the decision in respect of E Entertainment) or they included several breaches resulting from a single broadcast (the decision in respect of Scuzz TV). In contrast, in the present case there were breaches of the same three Code rules which occurred in each of the eight separate programmes shown over a five day period.

¹⁷ See Annex 11: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb247/obb247.pdf>

- **19 August 2012 at 20:40 CSC Media Group Limited (“CSC Media”) in respect of its Service Scuzz TV¹⁸** – Sanction of £10,000 for a serious breach of Rules 1.3, 1.10, 1.14, 1.16, 1.21 and 2.3. This sanction concerned the broadcast of the music video for *Undead* by the band Hollywood Undead. The video, which had duration of three minutes and 30 seconds, contained repeated use of the most offensive language, a significant quantity of close-up images of naked or near naked breasts and buttocks, images of semi-naked female performers dancing provocatively while simulating sex acts and what appeared to be illegal drug paraphernalia and illegal drug consumption. This breach occurred in spite of the fact that the Pre-Watershed Guidance, which contained specific advice on the content of music videos broadcast before the watershed, was published on 30 September 2011, in advance of the date on which the video was broadcast, and the fact that Ofcom had drawn the licensee’s attention to the Pre-Watershed Guidance, following another breach finding in December 2011 in relation to the broadcast by the Licensee of inappropriate material before the watershed (in this case on the licensee’s service Flava) in breach of the Code.
- **27 December 2011 at 10:00 to 13:00 and 16:00 to 21:00 E Entertainment UK Limited (“E Entertainment”) in respect of its service E! Entertainment (“E!”)¹⁹** – Sanction of £40,000 for serious and repeated breaches of Rule 1.3 (Children must also be protected by appropriate scheduling from material that is unsuitable for them) during the broadcast of episodes of the reality television series *Girls of the Playboy Mansion*. Ofcom found that material of a highly sexualised nature had been shown repeatedly throughout the day on a Bank Holiday during the Christmas holidays. Ofcom found that the numerous shots of naked breasts, genitals and buttocks, although blurred, considered together with the sexualised editorial content, and the repeatedly bleeped and masked offensive words, demonstrated that this material was not suitable for children and had not, given the times at which it was repeatedly broadcast, been suitably scheduled. Ofcom noted that just before this contravention of the Code, the licensee been found in breach of Section One of the Code on two previous occasions. Following the second of these two previous breaches, Ofcom had put the licensee on notice that it was concerned about the licensee’s compliance procedures and would proceed to consider further regulatory action should any similar incident occur.

87. As set out in paragraphs 3 and 4 of the Penalty Guidelines, each sanction decision depends on the individual circumstances of each case and Ofcom considers each case on its facts. As we explained in paragraph 86 above, there are a number of differences between the current case, the two precedents referred to above, but we note in particular the serious and repeated nature of the breaches in the present case (see paragraphs 55 to 60).
88. In addition, as set out in paragraph 54 above, the Licensee submitted that it was being treated inconsistently compared to other licensees. It referred to various sanction decisions which should, in its view, be taken into account when considering the seriousness of the current case even though as the Licensee acknowledged, those

¹⁸ See Annex 12: <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/scuzz.pdf>

¹⁹ See Annex 13: http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/E_Entertainment_UK_Ltd.pdf

Sanction 95(14) Discovery Communications Europe Limited

cases did not involve similar content to that currently under consideration.²⁰ Ofcom considers that given that these cases involved very different content as acknowledged by the Licensee, they are not directly relevant to the present case, which should be instead considered on its own facts.

Cooperation

89. In accordance with the Penalty Guidelines, Ofcom may increase the penalty where a licensee has failed to cooperate with Ofcom's investigation.
90. In Ofcom's view, the Licensee has been cooperative. For example, it has: provided full representations in response to Ofcom's formal requests for information relating to the material broadcast and the service in general; and it has expressed a willingness to take, and has taken, some steps to remedy its failures to comply with Sections One and Two of the Code. Ofcom does not therefore consider it appropriate to increase the penalty on account of a failure to cooperate in this case.

Level of financial penalty

91. Having regard to all the factors referred to above and all the representations to date from the Licensee, Ofcom's Decision is that an appropriate and proportionate sanction would be a financial penalty of **£100,000**. In addition, Ofcom considers that the Licensee should broadcast a statement of Ofcom's findings in this case, on a date and in a form to be determined by Ofcom.

16 July 2014

²⁰ The sanction decisions referred to by the Licensee were in respect of: Noor TV, Sangat TV, Northern Birds, Essex Babes, Sportxxx Girls, Livexxx Babes, DM Digital, Satellite Entertainment Ltd, Press TV Ltd, Bang Media and BBC (Ross/Brand material).