

# **Ofcom Broadcast Bulletin**

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## 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 objectives<sup>1</sup>. Ofcom must include these standards in a code or codes. These are listed below. 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 Act<sup>2</sup>.

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes 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 ATVOD and the ASA on the basis of their rules and guidance for ODPS. These Codes, rules and guidance documents include:

- a) [Ofcom’s Broadcasting Code](#) (“the Code”).
- b) the [Code on the Scheduling of Television Advertising](#) (“COSTA”) which contains rules on how much advertising and teleshopping may be scheduled in 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. 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 advertising<sup>3</sup>.
- 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) rules and guidance for both [editorial content and advertising content on ODPS](#). Ofcom considers sanctions in relation to ODPS on referral by the Authority for Television On-Demand (“ATVOD”) or the Advertising Standards Authority (“ASA”), co-regulators of ODPS for editorial content and advertising respectively, or may do so as a concurrent regulator.

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

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<sup>1</sup> The relevant legislation is set out in detail in Annex 1 of the Code.

<sup>2</sup> The relevant legislation can be found at Part 4A of the Act.

<sup>3</sup> 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.

licensees must 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 Bulletin may therefore cause offence.**

## Notice of Sanction

### Psychic Today

*Psychic Today*, 6 May 2012, 23:21; 2 June 2012, 23:15; and 20 June 2012 22:30

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#### Introduction

The Psychic Today service consists of advertising content offering psychic readings to callers. This free to air channel is broadcast 24 hours a day on the Sky digital satellite platform (on Sky Channel 886). It consists of promotions for premium rate telephone services (“PRS”), both voice and text, by which viewers can obtain psychic readings, and provides a facility for viewers to pay for these by credit card. Callers can select to be connected to a psychic off air, or to the presenter in the studio – in which case the reading is broadcast live, subject to the psychic’s availability. The channel Psychic Today gives different names to segments of its psychic reading advertising content broadcast at various times, and the name of the programming broadcast in the cases to which this sanction relates was also *Psychic Today*.

The licence for the Psychic Today service is held by Majestic TV Limited.

#### Summary of Decision

In the findings published on 18 February 2013 in issue 224 of Ofcom’s Broadcast Bulletin<sup>1</sup>, Ofcom found that three pieces of psychic advertising content broadcast on Psychic Today contained explicit and/or implicit claims of efficacy and accuracy in particular:

- The broadcast on 6 May 2012 on Psychic Today included an onscreen graphic which stated that a particular psychic (“Mollie”) could give “*accurate and precise*” readings.
- The broadcast on 2 June 2012 on Psychic Today included a psychic who referred to a previous reading given many years earlier. By referring to that reading she purported to have correctly predicted a number of events that had since occurred. The psychic also referred to evidence to confirm that her predictions had come true.
- During the broadcast on 20 June 2012 on Psychic Today, the host and psychic referred to the psychic’s direct involvement with various police investigations, including the investigation into the abduction and murder of Milly Dowler. To suggest on air through various remarks that UK police forces had employed the psychic in this way was meant to show that the psychic could provide reliable and substantiated readings to help the police solve ‘cold cases’.

Further Ofcom decided that all three broadcast pieces did not make clear that the advertising content was for entertainment purposes only.

Ofcom therefore found that the advertisements breached Rules 15.5.2 and 15.5.3 of the BCAP Code:

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb224/obb224.pdf> (published 18 February 2013)

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

Rule 15.5.3 Advertising permitted under rule 15.5 may not:

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

In accordance with Ofcom's Penalty Guidelines, Ofcom decided it was appropriate and proportionate in the circumstances to impose a financial penalty of **£12,500** on Majestic TV Limited in respect of the Code breaches (payable to HM Paymaster General). 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.

The full adjudication is available at:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/majestic-tv.pdf>

## Notice of Sanction

### Psychic Today

*Big Deal, 6 May 2012 at 23:21, 2 June 2012 at 23:15, and 20 June 2012 at 22:30*

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#### Introduction

On the above dates Big Deal<sup>1</sup> broadcast a live simulcast of advertising content provided by another Ofcom licensee, Majestic TV Limited, called *Psychic Today*. This content is classified as advertising and offers psychic readings to callers. It consists of promotions for premium rate telephone services (“PRS”), both voice and text, by which viewers can obtain psychic readings, and it provides a facility for viewers to pay for these by credit card. Callers can select to be connected to a psychic off air, or to the presenter in the studio – in which case the reading is broadcast live, subject to the psychic’s availability.

The licence for the Big Deal service is held by Square 1 Management Limited.

#### Summary of Decision

In the findings published on 18 February 2013 in issue 224 of Ofcom’s Broadcast Bulletin <sup>2</sup>, Ofcom found that three pieces of psychic advertising content broadcast on Big Deal contained explicit and/or implicit claims of efficacy and accuracy in particular:

- The broadcast on 6 May 2012 on Big Deal included an onscreen graphic which stated that a particular psychic (“Mollie”) could give “*accurate and precise*” readings.
- The broadcast on 2 June 2012 on Big Deal included a psychic who referred to a previous reading given many years earlier. By referring to that reading she purported to have correctly predicted a number of events that had since occurred. The psychic also referred to evidence to confirm that her predictions had come true.
- During the broadcast on 20 June 2012 on Psychic Today, the host and psychic referred to the psychic’s direct involvement with various police investigations, including the investigation into the abduction and murder of Milly Dowler. To suggest on air through various remarks that UK police forces had employed the psychic in this way was meant to show that the psychic could provide reliable and substantiated readings to help the police solve ‘cold cases’.

Further Ofcom decided that all three broadcast pieces did not make clear that the advertising content was for entertainment purposes only.

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<sup>1</sup> Square 1 Management Limited changed the name of this service to ‘Movie Mix’ on 20 November 2012. It no longer broadcasts psychic reading advertising content.

<sup>2</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb224/obb224.pdf> (published 18 February 2013)

Ofcom therefore found that the advertisements breached Rules 15.5.2 and 15.5.3 of the BCAP Code:

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

Rule 15.5.3 Advertising permitted under rule 15.5 may not:

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

In accordance with Ofcom’s Penalty Guidelines, Ofcom decided it was appropriate and proportionate in the circumstances to impose a financial penalty of **£10,000** on Square 1 Management Limited in respect of the Code breaches (payable to HM Paymaster General).

The full adjudication is available at:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/square1.pdf>

## Notice of Sanction

### Rock All Stars

Scuzz TV, 19 August 2012, 20:40

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#### Introduction

Scuzz TV is a UK digital satellite television channel that broadcasts music videos and related programming. This sanction relates to a music video called “Undead” by the American ‘rap-rock’ band Hollywood Undead, which was broadcast on Scuzz TV in a block of music video programming called *Rock All Stars* at 20:40 on 19 August 2012.

The licence holder for Scuzz TV is CSC Media Group Limited (“CSC Media” or “the Licensee”)<sup>1</sup>.

#### Summary of Decision

In its findings published on 17 December 2012 in Broadcast Bulletin 220<sup>2</sup>, Ofcom found for the reasons summarised below that the “Undead” music video contained material that was inappropriate for children to view, and also likely to cause offence because the broadcaster had not applied generally accepted standards. In particular Ofcom found that the video contained: frequently repeated use of the most offensive language; a significant number of close-up images of nudity; images of semi-naked female performers dancing provocatively while simulating sex acts; and depictions of what appeared to be illegal drug paraphernalia and illegal drug consumption. Ofcom concluded that the Licensee had not taken adequate steps to protect children from this unsuitable material by appropriate scheduling.

Ofcom found that the video breached Rules 1.3, 1.10, 1.14, 1.16, 1.21 and 2.3 of the Code:

- Rule 1.3: “Children must ...be protected by appropriate scheduling from material that is unsuitable for them.”
- Rule 1.10: “The use of illegal drugs, the abuse of drugs, smoking, solvent abuse and the misuse of alcohol:
- must generally be avoided and in any case must not be condoned, encouraged or glamorised in other programmes broadcast before the watershed (in the case of television)... unless there is editorial justification.”
- Rule 1.14: “The most offensive language must not be broadcast before the watershed (in the case of television)...”.
- Rule 1.16: “Offensive language must not be broadcast before the watershed (in the case of television)... unless it is justified by the context. In any

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<sup>1</sup> CSC Media Group Limited currently holds 16 Television Licensable Content Service licences, of which Scuzz TV is one. The compliance function for Scuzz TV is managed centrally by CSC Media Group Limited.

<sup>2</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb220/obb220.pdf>

event, frequent use of such language must be avoided before the watershed.”

Rule 1.21: “Nudity before the watershed 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...”.

In accordance with Ofcom’s Penalty Guidelines, Ofcom decided it was appropriate and proportionate in the circumstances to impose a financial penalty of **£10,000** on CSC Media Limited in respect of the Code breaches (payable to HM Paymaster General). 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.

The full decision is available at:

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

## Standards cases

### In Breach

#### Breaches of Licence Conditions 12(1) and 17(1)

#### AI Ehya Digital Television Limited Licence No. TLCS 1049 (“Licence”)

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##### Introduction

AI Ehya Digital Television Limited (“AI Ehya” or “the Licensee”) holds the licence for Noor TV. The channel broadcasts programmes about Islam in a number of languages, including English, Urdu and Punjabi. It can be received in the United Kingdom on the Sky platform, and is also receivable in Europe, Africa, the Middle East and Asia.

On 28 September 2011, Ofcom imposed statutory sanctions on AI Ehya for serious breaches of the Broadcasting Code, involving a broadcast appeal to viewers for donations to fund the service.

The sanctions imposed on the Licensee were in the form of a financial penalty in the sum of £75,000 and a direction to broadcast a statement of Ofcom’s findings on Noor TV.<sup>1</sup>

In addition, Ofcom made clear that it would consider requiring the Licensee to provide further information as to the accounting arrangements it had put in place for the treatment of such donations in order to demonstrate that it was now complying with the Code.

Ofcom therefore subsequently requested the Licensee to provide evidence of its compliance.

However, AI Ehya failed to provide the requested information.

Ofcom therefore wrote to AI Ehya, directing it to provide the information to Ofcom by a specified deadline stated in the Direction.

Under Condition 17(1) of the Licence, AI Ehya is obliged to comply with any direction given by Ofcom in respect of any matter, subject or thing for which a direction is, in the opinion of Ofcom, appropriate, having regard to any duties which are or may be imposed on it, or on AI Ehya as the Licensee, by or under the relevant UK legislation, international obligations or codes and guidance. Failure to comply with a direction can therefore result in a breach of the Licence.

AI Ehya provided some of the information it had been directed to provide by the specified date but failed to comply with the Direction in significant respects. Ofcom therefore wrote to the Licensee again, setting out which pieces of information

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<sup>1</sup> Sanctions Decision 69(11): <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/AI-Ehya.pdf>. In the Sanction Decision, Ofcom decided: (1) to impose on AI Ehya a financial penalty of £75,000; and (2) to direct AI Ehya to broadcast a statement of Ofcom’s findings on Noor TV.

remained outstanding and giving Al Ehya a final opportunity to provide that information.

Ofcom also requested Al Ehya to provide further specified information under Condition 12(1) of the Licence which obliges Al Ehya to provide any information Ofcom reasonably requires for the purpose of exercising the functions assigned to it by or under the 1990 or 1996 Broadcasting Acts or the Communications Act 2003 (as amended).

Al Ehya provided some of the requested information to Ofcom, but again failed to comply in significant respects.

Consequently, Ofcom provided to Al Ehya its Preliminary View that Al Ehya was in breach of Condition 17(1) and 12(1) of the Licence and that these were serious breaches. Al Ehya was given ten working days to provide any representations it wished to make in response to the Preliminary View.

### **Response**

Al Ehya provided some of the outstanding information. However, the Licensee has still not provided all of the information requested by Ofcom in the Direction and the additional request for information.

### **Decision**

Al Ehya has failed to comply with a direction to provide all of the specified information to Ofcom by the deadline given. It has failed to provide a significant amount of the information sought including written confirmation from the directors of Al Ehya that the Licensee was complying with the relevant Code rule. Al Ehya has also failed to provide any satisfactory explanation for its failure and is therefore in breach of Condition 17(1) of its Licence.

Al Ehya also failed to provide all of the requested additional information by the specified deadline. Again, the Licensee provided no satisfactory explanation for this failure. Al Ehya is therefore in breach of Condition 12(1) of its Licence.

These are serious breaches because, without the requested information, Ofcom cannot carry out its statutory duties to assess whether the Licensee is complying with the relevant Code rule.

The Licensee is put on notice that Ofcom is considering the imposition of a statutory sanction in this case including revocation of the Licence.

### **Breaches of Licence Conditions 12(1) and 17(1)**

## In Breach

### News

Channel Nine UK, 16 February 2013, 18:00

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#### Introduction

Channel Nine UK is a free-to-air satellite general entertainment channel aimed at the Bangladeshi community in the UK and Europe. The licence for Channel Nine UK is held by Runners TV Limited (“Runners TV” or “the Licensee”).

A complainant alerted Ofcom to a news report about the protests then taking place in Bangladesh concerning the International Crimes Tribunal (“ICT”)<sup>1</sup>. In particular, the complainant considered that the news broadcast was biased in the manner it reported allegations that members of a Bangladeshi political party, Jamaat-e-Islami (also known as the Jamaat Party)<sup>2</sup>, were involved in the killing of a ‘Shahbag Movement’<sup>3</sup> blogger Rajib Haider.

Ofcom reviewed the news item in question, which was broadcast in Bangla. Ofcom therefore commissioned an independent translation of the output. We noted that the report relating to events concerning the ICT in Bangladesh lasted approximately 15 minutes, and included coverage of the on-going Shahbag protests taking place in Bangladesh, including reaction to the death of the Shahbag protester, Rajib Haider. We noted that during the news item, there were the following references to the Jamaat Party (taken from Ofcom’s translation):

Interviewee: “[Rajib Haider] wrote against the religious extremists. They understood that they would not be able to stop him with their pens. That is why a fundamentalist and extremist party like Jamaat Shibir<sup>4</sup> has removed him from the face of the earth”.

\*\*\*\*

Newsreader: “Prime Minister Sheikh Hasina said that Jamaat is not a democratic party. Jamaat do not have the right to participate in politics. The Prime Minister went to Rajib Haider’s house to console his family. The Parliament member Ilias Molla was also present there. Consoling Rajib Haider’s parents and family, the

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<sup>1</sup> The ICT was set up by the current Bangladeshi Government in 2010 to investigate alleged war crimes alleged to have taken place during the 1971 war in which Bangladesh obtained its independence from Pakistan.

<sup>2</sup> The Jamaat Party is the main Islamist party in Bangladesh. It is part of an opposition coalition, led by the Bangladesh Nationalist Party, which is the largest opposition party in Bangladesh.

<sup>3</sup> The Shahbag protests were so-called because they were associated with the Shahbag district of Bangladesh’s capital, Dhaka. These protests had started on 5 February 2013 when the ICT had sentenced the Jamaat Party politician Kader Molla to life imprisonment for war crimes. The protests also called for the execution of individuals found guilty by the ICT of war crimes. The Shahbag movement has subsequently called for the banning of the Jamaat Party in Bangladesh.

<sup>4</sup> Jamaat Shibir is the student wing of the Jamaat Party.

*Prime Minister said that the killers will be found immediately and brought to justice. At that time, the Prime Minister called Jamaat a non-democratic party”.*

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Sheikh Hasina (Bangladeshi Prime Minister)<sup>5</sup>: *“The voice of youth today. I have also said that in the Parliament that I express my solidarity with them. We will meet their demand. We will make this country free of the defeated force. We need to free Bangladesh from Jamaat Shibir. I want the help of the nation to fulfil that task. Many people call them a democratic and political party. Today, it has been proved that they don’t believe in democracy. They believe in terrorism. Therefore, the politics of Jamaat Shibir is politics of terrorism. So we will do whatever we need to do against them. They do not have any right to participate in politics in this free country. I will not give that right as long as I am alive”.*

\*\*\*\*

Shahbag protester: *“Threats are coming. I have also been threatened. We have been threatened in blogs and facebook. The people who are threatening are Shibir activists. They have been giving threats for a long time. When we started this movement, we have been threatened over phone, in blogs and facebook”.*

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Reporter: *“The crowd demands that the war-criminals need to be punished and the politics [of] Jamaat needs to be banned. They say that they will stay in the street until their demands are met”.*

\*\*\*\*

Newsreader: *“Viewers, you have seen that the Shahbag movement has a new demand now including the execution of war-criminals, which is, they want Rajib’s murderer to be punished. The whole country is also agitated like the Shahbag movement. Rajib’s murder has given the movement new drive, and now they want banning of religious parties like Jamaat”.*

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Reporter: *“People are requested to be united to ban Jamaat Shibir”.*

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Reporter: *“People from all walks of life...want Jamaat to be banned”.*

Ofcom considered the material raised issues warranting investigation under Rule 5.1 of the Code, which states:

Rule 5.1: *“News, in whatever form, must be reported with due accuracy and presented with due impartiality”.*

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<sup>5</sup> Sheikh Hasina is leader of the Awami League, the biggest party in the coalition governing Bangladesh.

We therefore sought the Licensee's comments as to how this material complied with this rule.

## **Response**

By way of background, Runners TV said that during the months preceding the broadcast "the political and national security of Bangladesh has been in a volatile state and there have been various political groups that have been identified by the state as fundamental organisations trying to put hard line views to the public sphere and as a result hate, extremism and violence has been spreading in Bangladesh". Therefore, according to the Licensee, the Bangladeshi Government has "been trying to ban some organisations" such as the Jamaat Party.

In terms of the broadcast in question, Runners TV said that Channel Nine UK has permission to broadcast the "news content of Channel Nine Bangladesh and Shomoy TV Bangladesh in UK and Europe". As a consequence, the Licensee said that in this case "the current news feed [was] maybe lacking viewpoints of" the Jamaat Party. Runners TV went on to say that: "As a UK based channel, we are purely dependent on the content we receive from the Bangladesh feed for Channel Nine and Shomoy TV and hence limited to editorial within the content". Therefore, according to the Licensee "none of the local journalistic views of UK have been highlighted in the news content and in no way reflects our views locally".

Runners TV stressed that it does not "support or take sides on any political organisations in UK or abroad and would wholly remain neutral and fair". It added that "the sensitive scenario of political subjects are always open to debate". However, the Licensee stated its belief that the "news content from Shomoy TV Bangladesh" had factually and fairly shown the current situation in Bangladesh.

In conclusion, Runners TV said that "all efforts within our control are given to broadcast in a non-bias[ed] way", and it "will continue to monitor the news content and also the suitability of the content for viewers".

## **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 news on television and radio services is presented with due impartiality. This objective is reflected in Section Five of the Code.

When applying the requirement to preserve due impartiality, Ofcom must take into account the broadcaster's and audience's right to freedom of expression. This is set out in Article 10 of the European Convention on Human Rights and encompasses the right to hold opinions and to receive and impart information and ideas without 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, with 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, for example, 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.

In reaching decisions concerning due impartiality, Ofcom underlines that the broadcasting of comments either criticising or supporting the policies and actions of any government, state or political organisations 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 in an appropriate way in order to ensure that Section Five is complied with.

Rule 5.1 of the Code states that: “News, in whatever form, must be reported with due accuracy and presented with due impartiality”.

The obligation in Rule 5.1 to present news with due impartiality applies potentially to any issue covered in a news programme, and not just to matters of political or industrial controversy and matters relating to current public policy. 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.

In assessing whether any particular news item has been reported with due impartiality, we take into account all relevant facts in the case, including: the substance of the story in question; the nature of the coverage; and whether there are varying viewpoints on a news story, and if so, how a particular viewpoint or viewpoints on a news item could be or are reflected within news programming.

In this case, Ofcom noted that in the news bulletin in question there was a lengthy (around 15 minutes) report on serious disturbances in Bangladesh which had been sparked by the decisions of the ICT. In particular, the news report focused on the on-going Shahbag protests taking place in Bangladesh, including reaction to the death of the Shahbag protester, Rajib Haider.

We recognise that this item of news dealt with a story and issue of interest to the UK Bangladeshi community in particular. The news item related to the on-going demonstrations and political disturbances in Bangladesh arising from the activities of the ICT. It is important that broadcasters – in recognition of their and the audience’s right to freedom of expression – are able to report such stories to their viewers or listeners. As indicated above, the Code does not in any way prohibit news programmes from including views that are critical of particular organisations, such as political parties, however that news must be reported with due accuracy and presented with due impartiality.

We considered that there were a number of statements which could be reasonably characterised as being critical of the Jamaat Party in this news item. For example, we noted that the news item included reference to: various calls, including from the Bangladeshi Prime Minister, to ban the Jamaat Party; and allegations of violence undertaken by members of the Jamaat Party members during demonstrations in Bangladesh. In particular, the news item reported allegations that the Jamaat party had been responsible for the death of the Shahbag protester, Rajib Haider

We noted that at no point did the report reflect the Jamaat Party's viewpoint on the statements being made against it, nor did it even suggest that the Jamaat party had at any point been asked to comment. Given the critical and serious nature of the statements made about this party, we considered it was incumbent on the Licensee to ensure that the Jamaat Party's viewpoint was presented in the news item to at least some extent to counter the universally critical or adverse statements made in the report about the Jamaat party, for example, calling for the banning of this political party in Bangladesh.

In reaching a decision in this case, we have taken into account the Licensee's various representations.

Firstly, Runners TV pointed to the political situation in Bangladesh leading up to this broadcast, and in particular the fact according to the Licensee that the Bangladeshi Government has "been trying to ban some organisations" such as the Jamaat Party. However, just because in this case the Bangladeshi Prime Minister had stated that Bangladesh need to be "free" from the Jamaat Party, did not obviate the obligation on Runners TV to reflect alternative viewpoints, as appropriate. The Jamaat Party is an established opposition party (with elected members of the Bangladeshi Parliament) which is in an opposition alliance with the Bangladesh Nationalist Party. It was being heavily criticised within the news item, which reported various calls in Bangladesh for this party to be banned. We therefore considered that the Licensee needed to reflect the views of the Jamaat party in the news bulletin to at least some extent; or at least indicate to viewers that the broadcaster had sought a comment from the Jamaat Party. We considered that this was especially the case given that Sheikh Hasina (the leader of the Awami League, the main governing party in Bangladesh) was shown heavily criticising<sup>6</sup> the Jamaat Party, one of the parties in the opposition alliance opposing her government.

Similarly, Runners TV: stressed that it does not "support or take sides on any political organisations in UK or abroad and would wholly remain neutral and fair"; and said that "the sensitive scenario of political subjects are always open to debate". We noted these representations, but on the facts of this case, considered that at least to some extent the viewpoint of the Jamaat Party needed to be reflected in this bulletin in response to the serious criticisms being made about it and the calls for the party to be banned.

Second, the Licensee said that: "As a UK based channel, we are purely dependent on the content we receive from the Bangladesh feed for Channel Nine and Shomoy TV and hence limited to editorial within the content". Although Runners TV stated its belief that the news item had factually and fairly shown the current situation in Bangladesh, the news bulletin did not reflect "the local journalistic views of UK" or "our view locally". However, because the Licensee received its news content from channels in Bangladesh did not, in our view, release Runners TV from the obligation to maintain due impartiality, and in this particular case reflect the view of the Jamaat Party to at least some extent in response to the various critical or adverse statements made in the report about the party. We noted that the Licensee acknowledged that in this case "the current news feed [was] maybe lacking viewpoints of" the Jamaat Party.

All licensees must ensure that the content they broadcast – whatever the source – complies with the Code. Ofcom was concerned that the Licensee in this case

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<sup>6</sup> For example, Sheikh Hasina as shown stating that the Jamaat party "*don't believe in democracy. They believe in terrorism*".

appeared to be re-broadcasting news content from two overseas channels without appearing to have adequate compliance processes in place to ensure this happened.

Ofcom emphasises that there is no requirement for broadcasters to provide an alternative viewpoint on all news stories or issues in the news, or to do so in all individual news programmes. It is also legitimate for a programme to be, for example, supportive of certain nation-states or political parties. However, all news stories must be presented with due impartiality: that is with impartiality adequate or appropriate to the subject and nature of the programme. Presenting stories with due impartiality in news programmes very much depends on editorial discretion being exercised appropriately in all the circumstances.

In reaching our decision we took account of the Licensee's representations that "all efforts within our control are given to broadcast in a non-bias[ed] way", and it "will continue to monitor the news content and also the suitability of the content for viewers". However, given the analysis set out above, we concluded that on balance and on the specific facts of this case the news item was not presented with due impartiality. It was therefore in breach of Rule 5.1 of the Code.

### **Breach of Rule 5.1**

## In Breach

### Jackpot247

ITV1, 23 November 2012, 00:30 and 11 January 2013, 00:10

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#### Introduction

*Jackpot247* is a teleshopping feature transmitted late at night on ITV1. Viewers are invited to take part in live roulette. As material that seeks to sell a service, i.e. paying participation in games of chance, it is classified by Ofcom as teleshopping, in other words long-form advertising.

ITV Broadcasting Limited (“ITV” or “the Licensee”) is responsible for compliance of the advertising on behalf of the ITV network for ITV1.

*Jackpot247* is operated by NetplayTV Group Ltd<sup>1</sup> (“Netplay”). It is also the name of one of the advertiser’s websites.

Because it is a form of advertising, *Jackpot247* is subject to the BCAP Code: the UK Code of Broadcast Advertising (“the BCAP Code”) that governs broadcast advertising. For most matters the BCAP Code is enforced by the Advertising Standards Authority (“the ASA”). Ofcom, however, remains responsible for enforcing the rules in respect of certain types of advertising, including teleshopping transactional gambling.

We received two complaints about *Jackpot247*, one each for the transmissions of the dates given above. The substance of the two complaints was similar: that the offers of bonuses were misleading.

In the first complaint – made in relation to the 23 November 2012 transmission – the complainant objected that he had taken up the offer of a bonus to match the amount of a first deposit (“the Welcome Bonus”) and subsequently discovered that the terms of the bonus were such that he was unable to withdraw any of £300 of winnings or even the £30 deposit he had made initially.

In the second, and separate, complaint – made in relation to the transmission of 11 January 2013 – the complainant objected to the use of “free cash” as a description of a “free £10 bonus” (“the £10 Bonus”). This bonus offer made £10 of ‘playable’ value available without the need for a deposit by the customer. However, the complainant drew attention to the need to satisfy certain conditions before any benefit from the bonus could be realised.

The offers are promoted many times in the features. For example, the presenter in the 23 November 2012 edition of *Jackpot247* said:

*“..Deposit, the first time you deposit we will match that for you. So anything from £10 all the way up to £200 is doubled, which is amazing. This is something we do as ongoing [sic]. So £200 becomes 400, 30 becomes 60. It’s also enough for you to get your mitts on part two of the offer here tonight. Again do read the terms*

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<sup>1</sup> Netplay is also an Ofcom licensee, holding a licence to broadcast a separate service available on satellite.

*and conditions and betting requirements that are related to our bonus cash offers. Table closed...”.*

When offers were promoted a large plasma monitor behind the presenter displayed the offer headline and qualifying text. In this case the monitor carried the following wording:

Headline: *“We’ll match your first deposit up to £200.”*

Smaller qualifying text: *“For new players only.*

*Terms apply, see Jackpot247.com. 18+. Not available in N. Ireland/C. Islands. Bonus is for gameplay. Betting requirements apply to bonus.”*

A separate superimposed banner carried the last few games’ results. Beneath the banner was a small scrolling ‘ticker’. Among the messages were these:

*“Any bonuses issued are for gameplay.”*

*“Betting requirements apply to bonuses.””*

*“Not all bets count 100% towards betting requirements.”*

In the edition of 11 January 2013 the presenter said, for example:

*“...we’ll never expect you to use your money to play our games when we’ve got ours available for you to come and take...”*

*“...us giving you a little free gift of £10 of playable bonus money.”*

*“...why would you use your money when we’ve got some to give you?...”*

*“...you can win money off the back of our tenner.”*

*“...if you want to grab a tenner, you’ve never grabbed one before, basically the rules are this: 18 or over, there’s no service unfortunately in Northern Ireland or the Channel Isles, and to get your one of these there’s a few ways you can do it...”*

*“...we want to give you some free money. I promise you, never use your money if we’ve got some available. Hey, take it from us! If you want to grab one of these [the £10 Bonus] we’ve got ten pounds of free, playable bonus money...”*

Again, when the offer was being promoted the monitor displayed the headline offer and smaller qualifying text including, for this offer, that *“Bonus is for gameplay”*, since the £10 value is never redeemable (see below).

For each offer Netplay has two sets of terms and conditions, a general set and a separate set for the particular offer. The general terms contain the following summary of the principal conditions:

- “The bonus amount will be placed into a Bonus Balance and will be kept separate from your Cash Balance;

- When you place a bet, the bet will be deducted from your Cash Balance. If there are no funds remaining in your Cash Balance, then bets will be deducted from your Bonus Balance;
- Any winnings that you receive will be placed on to your Bonus Balance and cannot be withdrawn until you have met the Wagering Requirements for that bonus;
- The bonus amount itself may also not be withdrawn until you have met the Wagering Requirements. In some cases the bonus is Non-Redeemable, in which case the bonus amount can never be withdrawn. We will make this clear in the offer for that bonus;
- When you have met the Wagering Requirements, the sum in your Bonus Balance that is linked to the active bonus will be transferred into your Cash Balance and may then be withdrawn at any time.
- Low risk roulette bets will not count towards wagering. These are defined as ANY bet spread combination on roulette games covering 25 or more (25-37 spots) of the 37 unique number spots on the table. For example, if You bet on Red and Black, You are covering 36 of the 37 possible outcomes, therefore this bet would not count towards any wagering requirements.”

The general terms also contain this statement:

“PLEASE NOTE that if You withdraw funds from your Cash Balance before you have met the Wagering Requirements you will forfeit all Bonuses and all accrued winnings.”

The terms and conditions that applied to the Welcome Bonus included these conditions:

“Before you can withdraw winnings gained by the Welcome Bonus from your account, you must play through your deposit and the bonus 25 times within 30 days of receiving it. The bonus and any winnings accrued will be removed from your account if either (a) you do not play through your Welcome Bonus 25 times within the allotted timeframe, or (b) you decide to withdraw any cash amount from your account.

All Blackjack, Casino Hold'em and Video poker games (Jacks or Better, Aces and Faces, etc) contribute 5% of actual wagering on these games. Baccarat, 2 Ways Royal, Craps and Sic Bo games contribute 5% and Roulette, Slots and Instant Win games contribute 100%, excluding "low risk" bets. Low risk roulette bets are defined as bet spread combinations covering 25 or more of the unique 37 numbers on the roulette table (25-37 inclusive spots). If you wish to make a withdrawal before meeting the wagering requirements then you will forfeit your winnings accrued, your bonus amount and opt out of the bonus offer.”

The terms and conditions that applied to the £10 Bonus included these conditions:

- “If you accept the bonus, any winnings accrued and deposits made to your account will not be withdrawable until you have met the bonus wagering criteria.
- Betting Requirements:

- Bonus offer only available during Promotion Period.
- The bonus itself is non-withdrawable. In order for you to be able to withdraw any winnings accrued on this offer, you must wager 99x your bonus within 7 days of the issue date.
- In order for the player to qualify for the withdrawal of any winnings on their account they must have made a minimum deposit of £10.
- If you wish to make a withdrawal before meeting the wagering requirements then you will forfeit your winnings accrued, and opt out of the bonus offer.
- Not all games will count 100% of your wagering towards your target figure for the wagering criteria. All Blackjack, Casino Hold'em, Video poker games (Jacks or Better, Aces and Faces, etc), 2 Ways Royal, Baccarat, Craps and Sic Bo games contribute 5% of actual wagering on these games. Roulette, Slots and Instant Win games contribute 100%, excluding "low risk" bets. Low risk Roulette bets are bet spread combinations covering 25 or more of the 37 unique number spots on the table."

Given the description of the offers made in the shows, the nature and wording of the qualifications and the actual conditions that applied to the offers, we considered the shows to warrant investigation under the following rules of the BCAP Code:

BCAP Rule 3.1: "Advertisements must not materially mislead or be likely to do so."

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

Material information is information that consumers need in context to make informed decisions about whether or how to buy a product or service. Whether the omission or presentation of material information is likely to mislead consumers depends on the context, the medium and, if the medium of the advertisement is constrained by time or space, the measures that the advertiser takes to make that information available to consumers by other means."

BCAP Rule 3.10: "Advertisements must state significant limitations and qualifications. Qualifications may clarify but must not contradict the claims that they qualify."

BCAP Rule 3.25: "Advertisements must make clear the extent of the commitment consumers must make to take advantage of a "free" offer."

We therefore sought ITV's comments on how the offers within the shows complied with the above rules.

ITV responded with comments on the two complaints. These are set out below. However, during this investigation the ASA recorded a breach of the BCAP Code against a spot advertisement by a different gambling advertiser that also offered a

bonus subject to conditions<sup>2</sup>. The ASA's decision is summarised in the Response section, below.

When ITV became aware of this ASA decision it submitted further comments in respect of the complaints we had put to them, essentially to confirm that it would be requiring changes to the *Jackpot247* teleshopping. It stressed that the prior position had been adopted within a context of "established custom and practice mechanisms for identifying 'play through' and 'cash out requirements' in gambling advertisements" which had been in place "for a considerable period of time". These further comments are also reflected below.

## **Response**

### Edition of 23 November 2012

ITV said that on-air promotions of bonus offers follow a strict presentation format. The presenter, it said, must always make clear that terms apply, where they can be found and that betting requirements apply to the bonus. The Licensee drew attention to the qualifying text and 'tickers' explained in the Introduction, above.

The Licensee stressed that it is not the policy of online gambling operators to mislead customers. On the contrary, it told us, "...trust is incredibly important to the Netplay/Jackpot247 online casino operation."

Further, ITV said, Netplay had never had a complaint upheld in this regard by their gambling regulator.

ITV emphasised the steps that customers taking up offers would have to go through. A prospective customer registers at the Jackpot247 website. As part of this registration process, ITV said, a customer must provide their personal details such as name, address, date of birth etc, while also selecting a username and password for the account. On the online form in which this information is given a customer must also tick two check-boxes – one to indicate their acceptance of the terms and conditions for the casino overall, and another to serve as confirmation that they wish to have the bonus itself added to the account. ITV stressed that Netplay does not automatically add bonuses to player accounts: they must first indicate their understanding and tick the check-box before any bonus will be added. This, the Licensee said, is "...critical due to the fact that active bonuses will restrict withdrawals until betting requirements have been fulfilled."

ITV said that it is not possible for a customer to obtain a bonus on their account without ticking the check-box on the registration form. If this box is left unchecked then the customer will not receive the Welcome Bonus, or any future bonuses, on their account: "The customer must pro-actively opt-in to receive bonuses on their account."

ITV pointed out that next to the check-box there is a live link to the terms of bonus offers. The link appears as the words "affect your account" in the text, "Find out how bonuses affect your account." If this link is clicked a 'pop up' appears that contains the full general terms and conditions that apply to bonus offers. Further, ITV said,

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<sup>2</sup> The advertiser was Betfair. The ASA's decision can be found at:  
[http://www.asa.org.uk/Rulings/Adjudications/2013/2/Betfair-Ltd/SHP\\_ADJ\\_213807.aspx](http://www.asa.org.uk/Rulings/Adjudications/2013/2/Betfair-Ltd/SHP_ADJ_213807.aspx)

“...to be absolutely certain that users are aware of the most important terms without having to read the entire set, the most important terms are replicated in a short six point list at the very top of the terms; in this way the most pertinent terms are immediately presented to the player allowing them to read and understand them carefully.”

ITV therefore considered the complainant to have been presented with “clear and transparent terms associated with the offer”. The Licensee said further that not only are the terms presented as part of the registration process, but are also available on the promotions page of the website, as explained by the presenter during the call to action.

The Licensee drew attention to the *Jackpot247* web page where the particular promotions are listed, with links to their particular conditions.

As to the complainant’s objection that he was unable even to remove the original £30 he had deposited, ITV said that it doubted this was in fact so. The Licensee said that cash amounts on a player’s account are spent first, with bonus amounts and accrued winnings being spent after the cash balance has reached zero. ITV therefore thought it:

“...probably fair to assume that [the complainant] wagered more than £30 in total, therefore their initial £30 deposit would have been spent at the beginning of their wagering and therefore would no longer be available for withdrawal.”

ITV said that it is never Netplay’s intention to restrict a customer’s access to their initial deposit outside of the terms that have been accepted for the bonus offer. It said that the terms of the offer state that the bonus and any winnings will be removed if the player wishes to withdraw before completing wagering requirements, but if any of the initial deposit is remaining on the account the customer is obviously entitled to that amount and it is part of Netplay’s processes to uphold that commitment to the customer.

In respect of the BCAP rules raised by Ofcom, ITV said it did not consider the presentation of the bonus within the advertising as materially misleading in the context of the established means to qualify bonus offers in place prior to the ASA decision.

ITV again stressed that this presentation of the qualifications to offers reflected long-standing pre-clearance advice.

For all these reasons the Licensee argued that the advertising was not misleading. It was clear, ITV said, that the mechanisms employed within the teleshopping presentation drew the customer’s attention to the most important factors and conditions related to the bonus offer.

Further, ITV drew attention to BCAP Rule 3.2’s recognition that judgement about the omission of material information has to take account of whether “...the advertisement is constrained by time or space...”. During the *Jackpot247* teleshopping presentation, the Licensee said, advertised calls to action for specific bonuses must be made within a short one-and-a-half minute window between the live spins of the roulette wheel:

“Within this limited timeframe (and cognisant of any impairment to clarity) prospective customers are made aware that terms and betting requirements

apply, along with how to find those terms so that they can make an informed decision before making a commitment to deposit.”

The Licensee reiterated that other measures were in place, i.e. the check-box that must be ticked to indicate acceptance of the bonus on the customer account and the pop-up window containing the full general terms along with a synopsis of the most pertinent of these general terms that could affect the customer’s account should they accept bonuses. By these means, the Licensee said, a reasonably well-informed consumer participating in gaming activity would be aware of any significant qualifications relating to bonus offers.

Finally, the Licensee said:

“...in relation to more general concerns surrounding terms of bonuses and relying on web pages to display them, it is critical in this case to appreciate the fact that a prospective customer cannot receive a bonus on their account when registering unless they pro-actively indicate their acceptance of bonuses overall. The default status for the check box within the registration form is unchecked; Netplay do not force the user to check the box, nor do they present it as pre-checked in an effort to mislead the customer into making the wrong decision – the customer is in control of acceptance, while also presenting them with the relevant information at several points along the customer journey.

In conclusion, it is important to point out that *Jackpot247* teleshopping on ITV1 is operated within a live TV environment; as part of established governance and compliance procedures, ITV proactively monitor and carry out spot-checks on live teleshopping presentations scheduled on our channels.”

#### Edition of 11 January 2013

ITV acknowledged that the core issues were broadly similar for the issues raised by the offer in this transmission and reiterated the general points made in respect of the earlier show about the presentation of offers and the steps required to accept them. The Licensee did, however, seek to offer further reassurance and address specifics of the £10 Bonus offer highlighted by the second complainant.

ITV said that it was important to remember that in the case of the £10 Bonus the bonus amount is not redeemable at any point, regardless of winnings being secured or other wagering conditions being met. The Licensee stressed that this is illustrated not just within the published terms of the offer but also within the on-screen text located behind the presenter when the offer is being discussed which stated that, “Bonus is for gameplay”. According to ITV this was a commonly used precedent for non-redeemable bonus offers in gambling advertising. Similarly, the Licensee said, this wording reflected established Clearcast<sup>3</sup> advice (under the provisions of the BCAP Code), as a suitable phrase to explain the non-redeemable nature of the offer.

Drawing Ofcom’s attention to Rule 3.25 of the BCAP Code, ITV said:

“...it is perhaps useful to consider that the use of the word “free” in connection with this offer may be considered appropriate and in accordance with published BCAP Guidance. In order for a prospective customer to take advantage of the

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<sup>3</sup> Clearcast is a specialist advertising clearance house to which the larger TV broadcasters belong. Clearcast advises on scripts and examines finished commercials before accepting or rejecting them for broadcast.

offer, insofar as it relates to an offer of £10 worth of non-redeemable credit to play the games on the website, there is no requirement for that customer to make a deposit, register a credit or debit card, or make any other form of payment. Therefore the offer of £10 worth of credit is totally free of charge to the consumer.”

Even so, the Licensee said, it did recognise that the word “free” carried wider connotations in this context and accepted that there was some weight in an argument that the combination of the word “free” alongside other mentions of terms such as “cash”, “money” and “tenner” – such as are given in the quotes cited in the Introduction – could “...add a layer of complexity and perhaps imply a more generally unconstrained offer without due attention towards the associated wagering requirements that must be fulfilled before any accumulated winnings could be withdrawn.”

Because it recognised that the use of “free” was open to challenge in this way, ITV said it had made changes to the presentation of this type of offer. These changes would: clarify the wording of the qualifications to underline that the £10 is for game play only; ensure that presenters’ scripts distinguished clearly between the gameplay value of £10 being free and the need for customers to fulfil the wagering requirements and other terms; ensure that no reference to “cash”, “money”, “tenner” etc is made when £10 Bonus offers are promoted; remove other phrases suggesting the customer is not expected to use their own money, or that *Jackpot247* is giving them “our cash” or “our money”; and further train presenters in respect of these changes.

In addition, ITV said that the comment “...if you want to grab a tenner, you’ve never grabbed one before, basically the rules are this: 18 or over, there’s no service unfortunately in Northern Ireland or the Channel Isles...” was not part of a standard on-air presentation and should not have been used. It was not an acceptable way to promote offers, the Licensee said, but was an isolated incident. Again, ITV said, presenter training would cover this.

ITV also said that Netplay would be amending the layout of its site such that additional text will be placed at the top of the pop-up information screen explaining the general nature of the presented terms to provide a link to the promotions page where detailed terms and conditions for all active promotions, giveaways and prize draws can be found.

Finally, ITV told us that in its partnership with Netplay it had always adopted compliant processes and advertising methodology that, in its opinion, went above and beyond existing requirements in the area of teleshopping advertising of gambling products as they currently stand.

### The ASA adjudication

As is mentioned in the Introduction, while Ofcom was investigating this case the ASA published a breach adjudication against a spot advertisement by a different advertiser. The issue raised in that case was substantially similar to that in the present case, i.e. the effectiveness of qualifications about wagering conditions attached to a “free bonus” offer. The spot advertisement contained qualifying text that said, “Cash out restrictions apply, bonus must be activated within 7 days see [web address] for full details”. In that case the conditions required that in order to withdraw the “free £20” and any accrued winnings, £800 had to be wagered within seven days.

The ASA held that:

“...the fact that consumers would have to wager the £20 bonus 40 times was a significant condition that would have an impact on a consumer's decision to enter the promotion. We therefore considered that the extent of the cash out restrictions should have been communicated to the viewer during the ad itself. Because it was not, we concluded that the ad was misleading.”

When ITV became aware of the ASA's decision it added the following comment:

“As you are aware, an ASA adjudication...was upheld in relation to bonus cash-out conditions subject to a promotional offer. The ASA considered the fact that consumers would have to wager the bonus amount a multiple of times before withdrawal of winnings was a "significant condition" to the offer. As a result, as a responsible broadcaster and gambling operator respectively, ITV and Netplay will ensure compliance with this ASA Adjudication with immediate effect. In doing so, ITV and Netplay undertake to make amendments to all superimposed text on all teleshopping content and advertising to include an explanation of the wagering requirements for bonus offers where applicable. This will be in the form of an on-screen statement such as “wager X times bonus in X days before withdrawal... Moreover, all presenters and producers have now been clearly told to ensure that mentions of betting requirements are reaffirmed for all promotions.”

## Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that “the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented”. This objective is reflected in the rules set out in the BCAP Code.

Section 3 of the BCAP Code is concerned with misleading advertising. Among other rules it contains the following:

BCAP Rule 3.1: “Advertisements must not materially mislead or be likely to do so.”

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

Material information is information that consumers need in context to make informed decisions about whether or how to buy a product or service. Whether the omission or presentation of material information is likely to mislead consumers depends on the context, the medium and, if the medium of the advertisement is constrained by time or space, the measures that the advertiser takes to make that information available to consumers by other means.”

BCAP Rule 3.10: “Advertisements must state significant limitations and qualifications. Qualifications may clarify but must not contradict the claims that they qualify.”

BCAP Rule 3.25: “Advertisements must make clear the extent of the commitment consumers must make to take advantage of a “free” offer.”

In Ofcom’s view, the facts of the present case divide into two core areas: that area covered by BCAP Rules 3.1, 3.2 and 3.10, i.e. general misleadingness by virtue of the omission or lack of clarity of attached conditions; and the further consideration of the use of “free” under BCAP Rule 3.25. Both transmissions raised questions under the first area, but the transmission of 11 January 2013 also engaged BCAP Rule 3.25.

Misleadingness and the need to make clear significant conditions – 23 November 2012 and 11 January 2013

The terms of the Welcome Bonus were, in summary, that:

- the amount of the bonus and deposit had to be played through, i.e. wagered, 25 times within 30 days of receiving the bonus.

This meant that a first deposit of £200 and the matching bonus of £200 (the maximum allowed) would have required  $25 \times £400 = £10,000$  to have been played through the account, i.e. wagered, within 30 days for the bonus and any winnings to become available.

- the bonus and any winnings accrued would be removed from the account if either (a) the ‘play through’ amount was not reached within 30 days or (b) any cash amount was withdrawn.

The effect of (b) was to lock any winnings accrued, whether from cash deposit or bonus funds, until the bonus conditions were fulfilled. The cash deposit, if unspent, would always be available to the customer, but would cause the bonus and any winnings to be given up if withdrawn before the bonus conditions were fulfilled.

In Ofcom’s view these were very substantial conditions.

We gave full consideration to the qualifying statements and text that were present in the two transmissions and to the Licensee’s explanation of the sign-up mechanism, the need for the player to opt in to the bonus scheme and the attendant link to the general terms. However, we concluded that the operation of the bonus was such that these defences to an accusation of misleadingness were insufficient.

The terms of the £10 Bonus were, in summary, that:

- the bonus itself could never be withdrawn;
- to be able to withdraw any winnings accrued by the £10 Bonus, 99 x the value of the bonus – in other words £990 – had to be wagered within 7 days of receiving the bonus;
- if this bonus was accepted, to be able to withdraw any winnings on their account the consumer must in any event have had to make a minimum deposit of £10;
- any withdrawals made before meeting the wagering requirements forfeited any winnings accrued and cancelled the bonus offer.

Again, in Ofcom's view these were very substantial conditions.

We were mindful as before of the qualifying statements and text that were present in the two transmissions and to the Licensee's explanation of the sign-up mechanism, the need for the player to opt in to the bonus scheme and the attendant link to the general terms. However, as with the Welcome Bonus we concluded that the operation of the £10 Bonus was such that these defences to an accusation of misleadingness were similarly insufficient.

Additionally in respect of the transmission of 11 January 2013 we considered the presenter's statement that:

*"...if you want to grab a tenner, you've never grabbed one before, basically the rules are this: 18 or over, there's no service unfortunately in Northern Ireland or the Channel Isles..."*

compounded the problem of misleadingness by potentially suggesting that the 'rules' referred to were complete or at least represented the principal conditions that applied, which they clearly did not. We noted ITV's admission that that statement was not acceptable but was not standard and was an isolated instance.

By omitting sufficiently full and clear references to the wagering conditions and the effect of withdrawal from the account we concluded that the advertising on both dates breached BCAP Rules 3.1 (misleadingness), 3.2 (omission of material information), and 3.10 (failing to state significant limitations and qualifications).

In coming to this view we rejected one argument in particular put forward by the Licensee.

This was the argument advanced about the constraints of time and space. Each edition of *Jackpot247* is about two-and-a-half hours long. In our view there was ample time for the advertiser to spell out the conditions in sufficient detail: if roulette games needed to be delayed that should have happened.

We wish to be clear that in some cases we believe it will be reasonable for conditions to be left to steps taken after seeing advertising. Whether that is so will depend on all the circumstances, but particularly on the reasonable prior knowledge of those to whom the advertising is addressed, the nature of the conditions and what qualification is given in the advertising and how. In this case we considered the conditions so onerous that the qualification given was insufficient, and the advertising was therefore in breach of the rules given above.

#### Use of "free" – 11 January 2013

BCAP Rule 3.25 makes a general requirement that commitments entered into to take advantage of a free offer are made clear. It follows from our view of the breach of the wider requirement under BCAP Rule 3.10 to make qualifications clear that we were also concerned about the advertising's compliance with Rule 3.25.

Not only were the qualifying conditions not made clear in the advertising, including the need for the consumer to actually deposit £10 or more to access winnings, but the 'virtual' nature of the £10 Bonus was unclear also. Since the £10 Bonus figure could never be withdrawn it could only ever operate as simulated value playable on the advertiser's games. In that respect alone "free" was a dubious description.

Further, and as ITV commented, the use of such terms as “cash”, “money”, “tenner” and so on – in other words descriptions suggesting convertible money – were also inappropriate for a bonus that had only a notional (and heavily qualified) value.

We concluded that BCAP Rule 3.25 had also been breached.

We noted the Licensee’s commitment in light of the ASA adjudication to include much clearer and more detailed information about the conditions that attach to bonuses.

We wish to be clear, however, that we reserve the right to assess the presentation of bonus offers in gambling teleshopping at any point. This Decision should not, therefore, be taken to accept or approve either the generality or any specifics of the changes proposed in light of the ASA adjudication.

**Breaches of BCAP Rules 3.1, 3.2, 3.10 and 3.25**

## In Breach

### Super Casino

Channel 5, 5 January 2013, 00:10

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#### Introduction

*Super Casino* is a teleshopping feature transmitted late at night on Channel 5 (“Channel 5” or “the Licensee”). Viewers are invited to take part in live roulette. As material that seeks to sell a service, i.e. paying participation in games of chance, it is classified by Ofcom as teleshopping, in other words long-form advertising.

*Super Casino* is operated by NetplayTV Group Ltd<sup>1</sup> (“Netplay”). It is also the name of one of the advertiser’s websites.

Because it is a form of advertising, *Super Casino* is subject to the BCAP Code: the UK Code of Broadcast Advertising (“the BCAP Code”) that governs broadcast advertising. For most matters the BCAP Code is enforced by the Advertising Standards Authority (“the ASA”). Ofcom, however, remains responsible for enforcing the rules in respect of certain types of advertising, including teleshopping transactional gambling.

We received a complaint about a statement made about a bonus offer on *Super Casino*. After assessment, Ofcom judged that the complaint did not raise issues warranting investigation. However, when examining the complaint we became aware of terms and conditions attached to bonuses promoted in the advertising which we considered did warrant further investigation.

The bonus offered in this edition of *Super Casino* was a ‘300% bonus offer’ (“the 300% Bonus”) which was described as increasing a deposit by a customer by 300%, i.e. three times the customer’s deposit would be added to the deposit – a £50 deposit would result in £200 of credit, and so on, with a maximum deposit of £200 (to make a maximum credit of £800).

Offers were promoted many times in the course of the teleshopping. For example, the presenter in this edition of *Super Casino* said:

*“It is a 300% massive bonus that we’re offering you tonight live on the telly. If you come on through and put between £10 and £49 into your account as a brand new player tonight, we’ll match it. But if you put fifty quid or upwards into your account we’re going to give you a 300% bumper bonus, a maximum of £600. So, as a brand new player if you put fifty quid in you’ll actually get £200 to play with on any of our games. Put £100 in that becomes £400 to play with. £200 becomes £800. More than a handful once again. Just remember you’ve got to be 18 or over, not in Northern Ireland, read the terms and conditions please and the betting requirements.”*

When offers were promoted a large plasma monitor behind the presenter displayed the offer headline and qualifying text. In this case the monitor carried the following wording:

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<sup>1</sup> Netplay is also an Ofcom licensee, holding a licence to broadcast a separate service available on satellite.

Headline: "300% BONUS"

Smaller qualifying text: "New players only  
Until 4am  
First deposit: £50 or more  
Min bonus £150, max £600  
Betting requirement for this bonus.  
18+  
Not available in N. Ireland. Terms apply,  
see [SuperCasino.com](http://SuperCasino.com)."

A separate superimposed banner included a small scrolling 'ticker'. Among the messages were these:

*"Any bonuses issued are for gameplay."*

*"Betting requirements apply to bonuses."*

*"Not all bets count 100% towards betting requirements."*

For each offer Netplay has two sets of terms and conditions, a general set and a separate set for the particular offer. The general terms contain the following summary of the principal conditions:

- "The bonus amount will be placed into a Bonus Balance and will be kept separate from your Cash Balance;
- When you place a bet, the bet will be deducted from your Cash Balance. If there are no funds remaining in your Cash Balance, then bets will be deducted from your Bonus Balance;
- Any winnings that you receive will be placed on to your Bonus Balance and cannot be withdrawn until you have met the Wagering Requirements for that bonus;
- The bonus amount itself may also not be withdrawn until you have met the Wagering Requirements. In some cases the bonus is Non-Redeemable, in which case the bonus amount can never be withdrawn. We will make this clear in the offer for that bonus;
- When you have met the Wagering Requirements, the sum in your Bonus Balance that is linked to the active bonus will be transferred into your Cash Balance and may then be withdrawn at any time.
- Low risk roulette bets will not count towards wagering. These are defined as ANY bet spread combination on roulette games covering 25 or more (25-37 spots) of the 37 unique number spots on the table. For example, if You bet on Red and Black, You are covering 36 of the 37 possible outcomes, therefore this bet would not count towards any wagering requirements."

The general terms also contain this statement:

"PLEASE NOTE that if You withdraw funds from your Cash Balance before you have met the Wagering Requirements you will forfeit all Bonuses and all accrued winnings."

The terms and conditions that applied to the 300% Bonus included these conditions:

“All eligible players will receive their 300% Bonus in accordance with these terms and conditions. Once the 300% Bonus has been received, any winnings accrued by eligible players who have received the 300% Bonus will not be capable of withdrawal until that player has met the 300% Bonus wagering requirements as set out at paragraph below. If you do not wish to receive the 300% Bonus please contact our Customer Support team on [telephone number] or at [email address] prior to making your First Deposit.

Wagering Requirements for Bumper Bonus:

- The 300% Bonus offer is only available during the Promotion Period.
- The 300% Bonus amount received and any winnings accrued (whether accrued through wagering with the First Deposit amount or with the 300% Bonus amount) may not be withdrawn until players have fulfilled the wagering requirements for this offer. In order for players to be able to withdraw the 300% Bonus and winnings accrued on this offer, eligible players must wager an amount equal to or exceeding 25 times the 300% Bonus amount and their First Deposit within 30 days of the 300% Bonus issue date. For example, if the First Deposit amount was £50, the 300% Bonus amount would be £150, and the total required to be wagered before withdrawal could take place would be £5,000 ( $25 \times (\pounds 50 + \pounds 150) = \pounds 5,000$ ). If players wish to make a withdrawal before meeting the wagering requirements then they will forfeit any winnings accrued, their 300% Bonus amount and opt out of the 300% Bonus offer.
- Not all games will count 100% towards the target figure for your wagering requirement. All Blackjack, Casino Hold'em, Video poker games (Jacks or Better, Aces and Faces, etc), 2 ways Royal, Baccarat, Craps and Sic Bo games contribute 10% of actual wagering on these games. Roulette, Slots and Instant Win games contribute 100%, excluding "low risk" bets. Low risk Roulette bets are bet spread combinations covering 25 or more of the 37 unique number spots on the table.”

Given the description of the offer made in the show, the nature and wording of the qualifications and the actual conditions that applied to the offer, we considered the show to warrant investigation under the following rules of the BCAP Code:

BCAP Rule 3.1: “Advertisements must not materially mislead or be likely to do so.”

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

Material information is information that consumers need in context to make informed decisions about whether or how to buy a product or service. Whether the omission or presentation of material information is likely to mislead consumers depends on the context, the medium and, if the medium of the advertisement is constrained by time or space, the measures that the advertiser takes to make that information available to consumers by other means.”

BCAP Rule 3.10 “Advertisements must state significant limitations and qualifications. Qualifications may clarify but must not contradict the claims that they qualify.”

We therefore sought Channel 5’s comments on how the offer within the show complied with the above rules.

Channel 5 responded with comments on the above matters. These are set out below. However, during this investigation the ASA recorded a breach of the BCAP Code against a spot advertisement by a different gambling advertiser that also offered a bonus subject to conditions<sup>2</sup>. The ASA’s decision is summarised in the Response section, below.

When Channel 5 became aware of this ASA decision it submitted further comments in respect of the matters raised, essentially to confirm that changes were to be made to the offer of bonuses in *Super Casino* teleshopping. These further comments are also reflected below.

## Response

Channel 5 said that on-air promotions of bonus offers follow a strict presentation format that all presenters are trained in, with regular updates and bespoke training sessions conducted by Netplay’s Head of Compliance. The presenter, it said, must always make mention of the fact that terms apply, where they can be found and that betting requirements apply to the bonus. The Licensee drew attention to the qualifying text and ‘tickers’ explained in the Introduction, above.

The Licensee said that each of the restrictions was displayed in order to satisfy the requirements of BCAP Rule 3.10. The phrase “Betting requirements for this bonus” was a commonly used phrase for bonus offers in gambling advertising. Channel 5 said further that the phrase also reflected established Clearcast<sup>3</sup> advice under the provisions within the BCAP Code as a suitable phrase to explain the fact that wagering requirements apply to the offer.

The Licensee stressed that it is not the policy of online gambling operators to mislead customers. On the contrary, it told us, “...trust is incredibly important to the Netplay/Super Casino online casino operation.”

Channel 5 emphasised the steps that customers taking up offers would have to go through. A prospective customer registers at the Super Casino website. As part of this registration process, Channel 5 said, a customer must provide their personal details such as name, address, date of birth etc, while also selecting a username and password for the account. On the online form in which this information is given a customer must also tick two check-boxes – one to indicate their acceptance of the terms and conditions for the casino overall, and another to serve as confirmation that they wish to have the bonus itself added to the account and that they understand any associated restrictions.

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<sup>2</sup> The advertiser was Betfair. The ASA’s report can be found at:  
[http://www.asa.org.uk/Rulings/Adjudications/2013/2/Betfair-Ltd/SHP\\_ADJ\\_213807.aspx](http://www.asa.org.uk/Rulings/Adjudications/2013/2/Betfair-Ltd/SHP_ADJ_213807.aspx)

<sup>3</sup> Clearcast is a specialist advertising clearance house to which the larger TV broadcasters belong. Clearcast advises on scripts and examines finished commercials before accepting or rejecting them for broadcast.

The Licensee emphasised that the efforts made to ensure customers understand the restrictions are made at the point of registration.

Channel 5 stressed that Netplay does not automatically add bonuses to players' accounts: they must first indicate their understanding and tick the check-box before any bonus will be added. This, the Licensee said, is "...critical due to the fact that active bonuses will restrict withdrawals until betting requirements have been fulfilled."

Channel 5 said that it is not possible for a customer to obtain a bonus on their account without ticking the check-box on the registration form. If this box is left unchecked then the customer will not receive the Welcome Bonus, or any future bonuses, on their account: "The customer must pro-actively opt-in to receive bonuses on their account."

Channel 5 pointed out that next to the check-box there is a live link to the terms of bonus offers. The link appears as the words "click here" in the text:

"Tick to indicate that you would like to receive your First Deposit bonus and future bonuses. Active bonuses carry wagering requirements. [Click here](#) to find out how this affects your account."

If this link is clicked a 'pop up' appears that contains the full general terms and conditions that apply to bonus offers. Further, Channel 5 said,

"...at the top of this text, the most pertinent points are reproduced in an effort to ensure that any prospective customer choosing not to scroll down and read through all of the text is at least presented immediately with the critical rules relating to wagering requirements, withdrawal restrictions, and low-risk bet contribution rates."

Channel 5 said that it understood that as part of global standard industry practice, bonus offers from online casinos require the user to "play through" [wager] the bonus amount a certain amount of times. It added that there are two important areas to consider in this regard, betting requirements and contribution percentages.

In respect of the wagering requirements, the Licensee explained that the wagering, or "play through" total was that layed in bets: "This figure is achieved by placing bets from their cash balance first, then their bonus balance, plus any winnings received can also be rebet to form part of the accumulative total." This means, the Licensee said, "a player does not necessarily need to commit more funds through depositing; all bets placed from cash, bonus or winnings, count towards the accumulative total."

As to contribution percentages, Channel 5 said this:

"Netplay informs us that in relation to its flagship product, roulette, it operates a considerably fairer scheme than other online casinos in comparison with standard industry practice. Due to the fact that televised roulette forms a cornerstone of its offerings to the public, Netplay offers a full 100% wagering contribution of bets placed on roulette towards wagering targets, as opposed to other online casinos which offer as little as a 10% contribution for that game, or even 0% in some cases.

We understand that wagering contributions from other casinos for roulette are very low due to the fact that it is extremely easy to "play through" a bonus amount on roulette by betting on low-risk events that cover vast amounts of the board,

such as betting on red and black simultaneously, effectively guaranteeing the return of a player's original stake no matter the result of the wheel.

Therefore, Netplay makes clear within the terms of its bonuses that although roulette wagering contributes 100% towards the requirements, low-risk bets covering 25 numbers or more on the table do not count towards the wagering requirements. If such low-risk bets were permitted, an unfair advantage would be created, allowing the exploitation of bonus schemes by unscrupulous players. This is apparently a widespread problem for online casinos and we are informed it is commonly known as "bonus abuse" or "bonus seeking".

Channel 5 reiterated the point that new customers are not forced into accepting bonuses and are presented with the betting requirements and contribution percentages, and that such customers have actively agreed to these conditions before receiving the bonus.

Channel 5 also supplied customer satisfaction information which included the facts that under 3.2% of all communications with Netplay's customer services department concern bonus offers, and that in December 2012 four complaints (0.4% of communications in general) were made to Netplay about bonuses. It said that these were "easily resolved".

In respect of the BCAP rules raised by Ofcom, Channel 5 said it did not consider the presentation of the bonus within the advertising as materially misleading. In its view:

"...in order to materially mislead an advertisement and/or a marketing communication must, by the nature of its form and/or content, impair a consumer's ability to make an informed decision, thereby causing him to make a transactional decision that he would not have taken otherwise. However, the most relevant factors likely to influence a person's decision to participate are at all times made clear within the *Super Casino* teleshopping presentation, verbally by the presenter, via the on-screen text and related information or both. We understand from Netplay that whenever a bonus offer is made on-air, the presenter always makes clear that terms apply to the offer, explains where those terms can be found and read and makes separate mention of the fact that the bonus is subject to betting requirements. We believe that the current presentation style of terms and betting requirements is in line with advice and guidance received from Clearcast under the provisions of the UK BCAP Code.

Additionally, the on-screen text present within the plasma screen behind the presenter makes all other geographical, technical and personal restrictions known. Similarly, the on-screen text achieves a standard of legibility that enables a prospective customer to understand that conditions apply to the bonus offer in the same way that spot advertising does so for similar bonus offers."

Further, the Licensee said that:

"...the most relevant factors likely to influence a person's decision to participate were at all times made clear within the teleshopping presentation and as a result, we did not consider that the presentation was misleading or was *likely* to mislead."

For all these reasons the Licensee argued that the advertising was not misleading. It was clear, Channel 5 said, that the mechanisms employed within the teleshopping

presentation drew the customer's attention to the most important factors and conditions related to the bonus offer.

Further, Channel 5 said that the phrase "Betting requirement for this bonus", used by Netplay pursuant to guidance issued by Clearcast under the provisions of the BCAP Code, was a proper and adequate indication of restrictions. It alerted prospective customers, Channel 5 said, and allowed full explanations to be given at registration, rather than "...attempting to provide summary blanket advice that will not address all concerns for all consumers, inevitably leading to consumer confusion or at worst information that could be construed as misleading."

Channel 5 also drew attention to BCAP Rule 3.2's recognition that judgement about the omission of material information has to take account of whether "...the advertisement is constrained by time or space...". During the *Super Casino* teleshopping presentation, the Licensee said, advertised calls to action for specific bonuses must be made within a short one-and-a-half minute window between the live spins of the roulette wheel:

"Within this limited timeframe (and cognisant of any impairment to clarity) prospective customers are made aware that terms and betting requirements apply, along with how to find those terms so that they can make an informed decision before making a commitment to deposit."

Referring to a previous Ofcom Finding in which a breach decision was recorded against a feature on Channel 5, *SCXtra* ('Super Casino Extra')<sup>4</sup>, also provided by Netplay, the Licensee said:

"Netplay's interpretation of the *SCXtra* decision and subsequent Note to Broadcasters was that this "*associated content that...must be both highly limited and clearly related to the offers themselves*" should be made within the window of opportunity presented by the spins of the roulette wheel and not outside those spins."

The Licensee reiterated that other measures were in place, i.e. the check-box that must be ticked to indicate acceptance of the bonus on the customer account and the pop-up window containing the full general terms along with a synopsis of the most pertinent of these general terms that could affect the customer's account should they accept bonuses.

The Licensee stressed that:

"...there may be more general concerns...surrounding terms of bonuses and reliance on web pages to display them, but it is important to appreciate that prospective customers of Netplay cannot receive a bonus on their account when registering unless they pro-actively indicate their acceptance of bonuses overall. We understand that the default status for the check-box within the registration form is unchecked; Netplay does not force the user to tick the box, nor does it present the check-box pre-ticked in an effort to mislead the customer into making the wrong decision. The customer is in control of acceptance and is presented with the relevant information at several points along the customer journey towards registration and first deposit.

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<sup>4</sup> Available at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb193/obb193.pdf>

Channel 5 emphasised Netplay's commitment to working with Ofcom and the ASA in relation to the advertising of gambling in the United Kingdom, particularly where bonus offers are concerned. Channel 5 said that Netplay was a highly experienced eGambling operator and was extremely proud of its existing track record where customer complaints and dissatisfaction was concerned, having seen no upheld complaints since commencing operations in 2005.

The Licensee said further that Netplay considers that it has always adopted compliant processes and advertising methodology that goes above and beyond existing advice and guidance issued by BCAP and Clearcast in the area of teleshopping advertising of gambling products as they stand today.

Finally, Netplay, Channel 5 said, is a responsible operator that seeks advice on its advertising from the official sources and assesses and amends the terms and conditions it applies through in-house compliance teams, along with content executives within Channel 5 and their other broadcasting partners, on an ongoing basis. According to Channel 5 Netplay also takes an active interest in Ofcom investigations and ASA adjudications that can impact on its sector:

“...enhancing and improving its own techniques to ensure they always remain in line with, and where possible ahead of, rulings that could set a future precedent for the eGambling industry...”

Netplay informs us that it has always been its intention to establish and maintain transparent relations with all regulators and other official bodies, not least Ofcom and the ASA, in an effort to help shape the landscape of eGambling advertising in the United Kingdom as it develops, producing consumer friendly and compliant teleshopping output, serving as a flagship organisation for best practice in this area. As a result, Netplay, being a former DTSP and existing TLCS licence holder<sup>5</sup>, would welcome further dialogue with Ofcom in this regard to establish any improvements or alterations towards their advertising of eGambling products within the United Kingdom under the BCAP Rules.”

### The ASA adjudication

As is mentioned in the Introduction, while Ofcom was investigating this case the ASA published a breach adjudication against a spot advertisement by a different advertiser. The issue raised in that case was substantially similar to that in the present case, i.e. the effectiveness of qualifications about wagering conditions attached to a “free bonus” offer. The spot advertisement contained qualifying text that said, “Cash out restrictions apply, bonus must be activated within 7 days see [web address] for full details”. In that case the conditions required that in order to withdraw the “free £20” and any accrued winnings, £800 had to be wagered within seven days.

The ASA held that:

“...the fact that consumers would have to wager the £20 bonus 40 times was a significant condition that would have an impact on a consumer's decision to enter the promotion. We therefore considered that the extent of the cash out restrictions should have been communicated to the viewer during the ad itself. Because it was not, we concluded that the ad was misleading.”

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<sup>5</sup> See footnote 1

When Channel 5 became aware of the ASA's decision it added the following comment:

"Netplay TV has confirmed that it is happy to make amendments to all superimposed text on all teleshopping content and spot ads to include an explanation of the wagering requirements for bonus offers where applicable, in the form of a statement such as "wager X times bonus in X days before withdrawal".

Netplay TV has confirmed that all its promotion slates are currently in the process of being changed and will feature this super [superimposed text] from this evening's broadcast, while its spot ads are already under assessment by Clearcast for clearance with this super included.

Netplay TV has reiterated to us its desire to work with its regulators and is keen to immediately amend its content to accommodate any changes or improvements in CAP and BCAP Rules and their interpretation within the eGambling industry."

## Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that "the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented". This objective is reflected in the rules set out in the BCAP Code.

Section 3 of the BCAP Code is concerned with misleading advertising. Among other rules it contains the following:

BCAP Rule 3.1: Advertisements must not materially mislead or be likely to do so.

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

Material information is information that consumers need in context to make informed decisions about whether or how to buy a product or service. Whether the omission or presentation of material information is likely to mislead consumers depends on the context, the medium and, if the medium of the advertisement is constrained by time or space, the measures that the advertiser takes to make that information available to consumers by other means."

BCAP Rule 3.10: "Advertisements must state significant limitations and qualifications. Qualifications may clarify but must not contradict the claims that they qualify."

The terms of the 300% Bonus were, in summary, that:

- the amount of the bonus and deposit had to be played through, i.e. wagered, 25 times within 30 days of receiving the bonus,

This meant that a first deposit of £200 and the treble bonus of £600 (the maximum allowed) would have required  $25 \times £800 = £20,000$  to have been

played through the account, i.e. wagered, within 30 days for the bonus and any winnings to become available.

- the bonus and any winnings accrued would be removed from the account if either (a) the ‘play through’ amount was not reached within 30 days or (b) any cash amount was withdrawn.

The effect of (b) was to lock any winnings accrued, whether from cash deposit or bonus funds, until the bonus conditions were fulfilled. The cash deposit, if unspent, would always be available to the customer, but would cause the bonus and any winnings to be given up if withdrawn before the bonus conditions were fulfilled.

In Ofcom’s view these were very substantial conditions.

We gave full consideration to the qualifying statements and text that were present in the transmission and to the Licensee’s explanation of the sign-up mechanism, the need for the player to opt in to the bonus scheme and the attendant link to the general terms. However, we concluded that the operation of the bonus was such that these defences to an accusation of misleadingness were insufficient.

By omitting sufficiently full and clear references to the wagering conditions and the effect of withdrawal from the account we concluded that the advertising breached BCAP Rules 3.1 (misleadingness), 3.2 (omission of material information), and 3.10 (failing to state significant limitations and qualifications).

In coming to this view we rejected three arguments in particular put forward by the Licensee.

The first of these was the suggestion that:

“...in order to materially mislead an advertisement and/or a marketing communication must, by nature of its form and/or content, impair a consumer’s ability to make an informed decision, thereby causing him to make a transactional decision that he would not have taken otherwise.”

This is not a test of misleadingness that we accept. In Ofcom’s view BCAP rules on misleadingness do not require that a transactional decision be made before the rule is triggered. It is sufficient that an advertisement is judged *to be capable of* leading to a transactional decision that would not have been taken otherwise. Rule 3.1 of the BCAP Code clearly reflects this, as follows: “Advertisements must not materially mislead or *be likely to do so*” [emphasis added].

In some cases it will be reasonable for conditions to be left to steps taken after seeing the advertising. Whether that is so will depend on all the circumstances, but particularly on the reasonable prior knowledge of those to whom the advertising is addressed, the nature of the conditions and what qualification is given in the advertising and how. In this case we considered the conditions so onerous that the qualification given was insufficient, and the advertising was therefore in breach of the rules given above.

Secondly, we did not accept the argument about the constraints of time and space. Each edition of *Super Casino* is at least two-and-a-half hours long. In our view there was ample time for the advertiser to spell out the conditions in sufficient detail: if roulette games needed to be delayed that should have happened.

In respect of the Licensee's reference to the *SCXtra* Finding, we take the view that the two cases are fundamentally different in nature. In the *SCXtra* Finding we pointed out that:

"This edition of *SCXtra* did include some promotion of particular games – live roulette, Roulette Express Premium and the Rocky slot game – but these occupied only a small fraction of the 30-minute advertisement, some six minutes..."; and

"Further, *SCXtra* included much material that contained no element of offer for sale at all – items covering the world's top five casinos, how playing cards are made, the history of the Joker card, a casino in a South Coast resort town, how a roulette wheel works, and a spoof behind-the-scenes "investigation" of Supercasino's presenters."

Our finding in that case – and as set out in a Note to Broadcasters appended to it – reiterated the need for teleshopping to contain constant or near constant direct offers, i.e. that there should be little else in teleshopping that is not related to the direct offers. (It was for that reason that the Note to Broadcasters drew attention to how permanent on-screen graphics featuring product, price and ordering details can fulfil this requirement and allow some latitude for other material to be shown at the same time.) In the present case, delaying roulette games to enable a fuller description of the terms attached to bonus offers is most unlikely to have fallen foul of the requirement to make at least near constant offers. *Super Casino* contained essentially only games of roulette, with sufficient frequency that the time required to make clear the extent of the betting 'play throughs', the period that applied and the basic consequences of not meeting those conditions would not have changed the nature of the acceptable teleshopping format.

Thirdly, we noted the assertion that "a player does not necessarily need to commit more funds through depositing; all bets placed from cash, bonus or winnings, count towards the accumulative total." We understood that this assertion relates to theoretical Return to Player ratios and the rebetting of accumulated winnings in order to reach the wagering target. However it must still be noted that this assertion is only true to the extent that a given consumer does actually win in order to have funds to rebet – e.g. a consumer depositing £200 and receiving a £600 'welcome bonus', must make sufficiently successful bets on games of chance to generate an additional £19,200 in 'play through' wagers before they are able to withdraw winnings without forfeit. In that respect, the use of "not necessarily" we view as very optimistic indeed.

We noted the Licensee's comments that in light of the ASA adjudication Netplay would be improving the messages given to viewers to include much clearer and more detailed information about the conditions that attach to bonuses.

We wish to be clear, however, that we reserve the right to assess the presentation of bonus offers in gambling teleshopping at any point. This Decision should not, therefore, be taken to accept or approve either the generality or any specifics of the changes proposed in light of the ASA adjudication.

### **Breaches of BCAP Rules 3.1, 3.2 and 3.10**

## In Breach

### Cowboy Builders

Channel 5, 26 March 2013, 19:00

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#### Introduction

*Cowboy Builders* is a documentary series in which presenters Dominic Littlewood and Melinda Messenger pursue rogue operators in the domestic building trade. The programme often features altercations between the presenters and the “cowboy builders”.

Ofcom was alerted by a complainant to the broadcast of a heated telephone conversation between Dominic Littlewood and the representative of a building company in this particular episode. The conversation lasted 70 seconds and was broadcast at around 19:50. It was accompanied by subtitles because of the poor sound quality. The subtitles contained nine instances in total of “f\*\*\*” or “f\*\*\*\*\*” to reflect fully bleeped uses of the word “fuck” or a derivative, and one “c\*\*\*” to reflect one fully bleeped instance of the word “cunt”. For example:

Dominic: *“You’ve got all your facts wrong”*.

Builder: *“I haven’t got the facts wrong you f\*\*\*\*\* stupid c\*\*\*”*.

The complainant believed that although bleeped, the builder’s language was made clear by the accompanying subtitles.

Ofcom considered the material raised issues warranting investigation under Rule 1.3 of the Code, which states:

“Children must...be protected by appropriate scheduling from material that is unsuitable for them”.

We therefore sought comments from Channel 5 Broadcasting Limited (“Channel 5” or “the Licensee”) as to how the content complied with this rule.

#### Response

The Licensee said that broadcast of this material was a result of human error. It explained that two versions of this episode were prepared, one for broadcast after the 21:00 watershed and one suitable for broadcast at any time with the bleeped language and corresponding subtitles removed. Unfortunately, the post-watershed version was incorrectly labelled as being the version suitable for broadcast at any time and consequently was broadcast at 19:00. Channel 5 said that on receiving Ofcom’s correspondence about the matter, the two versions were correctly labelled.

Channel 5 said it took the scheduling of its programmes very seriously and regretted that an error had occurred on this occasion. It added that the incident has served as reminder to all staff involved of the care required when marking versions of programmes for broadcast.

## 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 1.3 requires that children must be protected by appropriate scheduling from material that is unsuitable for them. Ofcom first assessed whether the broadcast contained material unsuitable for children.

Ofcom noted that this 70 second scene contained nine bleeped uses of the word “fuck” or a derivative and one bleeped use of the word “cunt”. Although not audible, the accompanying subtitles “f\*\*\*\*\*”, “f\*\*\*” and “c\*\*\*”, left viewers in no doubt of what the builder had actually said. Ofcom’s research on offensive language<sup>1</sup> notes that the words “fuck” and “cunt” are considered by audiences to be amongst the most offensive language. Further Ofcom noted in its Guidance on “Observing the watershed on television”<sup>2</sup> that: “If the use of the masked offensive language in a [pre-watershed] programme is frequent, such that the programme requires multiple instances of bleeping, there can be a cumulative effect on viewers similar to that of the offence caused by repeated broadcast of the unedited offensive language.” In Ofcom’s view, the combination of the repeated bleeped use of these offensive words in a relatively short space of time, and the subtitles which made clear exactly what most offensive language the builder was using, made the material unsuitable for children.

Ofcom then went on determine whether the material was appropriately scheduled. Appropriate scheduling is judged by a number of factors including: the likely number and age range of the audience; the start and finish time of the programme; and likely audience expectations.

While *Cowboy Builders* is not a programme aimed at or likely to appeal to a significant number of children, Ofcom noted that this section of the programme was broadcast well before the 21:00 watershed when children would have been available to view. The combination of the repeated use of the bleeped language with the subtitles made clear exactly what offensive language the builder was using, and this resulted in material which was unsuitable for children and which clearly exceeded the expectations of viewers for a programme shown at this time on this public service channel. Therefore, Ofcom did not consider the programme was appropriately scheduled, and was in breach of Rule 1.3

Ofcom acknowledged Channel 5’s explanation of how the incident occurred and its acknowledgement that the material was not suitable for broadcast at this time.

## Breach of Rule 1.3

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<sup>1</sup> Audience attitudes towards offensive language on television and radio, August 2010: <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>.

<sup>2</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/watershed-on-tv.pdf>.

## Resolved

### Loose Women

ITV, 1 May 2013, 12:30

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#### Introduction

*Loose Women* is a lunchtime female panel-led discussion programme broadcast live and known for its light-hearted topical discussion and celebrity guests. The programme is compiled by ITV Broadcasting Limited (“ITV”), on behalf of the ITV Network.

Two complainants alerted Ofcom to the broadcast of offensive language in this programme during an interview with actor Rupert Everett.

Ofcom viewed a recording and noted the following comment by Rupert Everett while discussing his feelings as a gay man during the AIDS epidemic in the 1980s:

*“I was bitten by a mosquito...I looked at the mosquito bite and thought, ‘Fuck, this is it’...Oh...sorry...”*

The lead presenter, Carol Vorderman, apologised immediately, “*apologies, apologies...*”, and at the end of the interview said, “*Thank you, the ever troublesome Rupert Everett. We do apologise for some fruity language earlier on.*”

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...”.

Ofcom therefore requested comments from ITV on how the programme material complied with this rule.

#### Response

ITV said its general compliance procedures for *Loose Women* include that: every guest on the programme is fully briefed in advance on the importance of not using offensive language; the programme “anchor” presenters are aware that if any guest does swear they should immediately issue an apology and await further instruction from the producers as to whether to issue any further statement or apology later in the show; and, processes are in place to ensure any offensive material which is broadcast is edited before it appears on the ITV+1 channel, or ITV’s catch up video on demand services.

ITV confirmed that Rupert Everett was fully briefed in advance and reminded it was a live show and that he should not swear. When he did inadvertently swear, in what appeared to have been a genuine mistake and not a deliberate act intended to cause offence, he immediately apologised. The producers instructed the lead presenter, Carol Vorderman, to make an apology, which she did immediately. The production team instructed the presenter to repeat the apology at the end of the interview, which she did.

ITV said the production team discussed the incident with the Head of Compliance for Daytime, and it was agreed that in the context, and in light of the two broadcast apologies, no further action was required during the live show. As soon as the incident occurred, steps were taken to ensure the language was edited and removed from the ITV+1 broadcast and ITV's catch up video on demand services.

ITV offered apologies for any offence caused and said that following the interview, Rupert Everett and his managers told the production team that he was extremely apologetic, that it was not deliberate, and that he acknowledged he had been fully briefed before the show.

Taking into account the information ITV had already provided, Ofcom did not consider it necessary to seek further representations before reaching a Preliminary View in this case.

### **Decision**

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that "persons under the age of eighteen are protected". These objectives are reflected in Section One of the Code.

Rule 1.14 of the Code states that "the most offensive language must not be broadcast before the watershed...". Ofcom research on offensive language<sup>1</sup> clearly notes that the word "fuck" and other variations of this word are considered by audiences to be among the most offensive language.

The broadcast of the word "fuck" in this programme before the watershed was therefore a breach of Rule 1.14.

However, Ofcom took into account that: this was a live show, where the production team had followed its compliance guidelines and briefed the guest in advance; *Loose Women* is aimed at an adult audience and this particular edition was screened during term time; two apologies were broadcast on air during the programme; and, action was taken immediately to edit the offensive language out of repeat broadcasts.

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

### **Resolved**

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<sup>1</sup> Audience attitudes towards offensive language on television and radio, August 2010 (<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>)

## Resolved

### The Secret Millions

Channel 4, 7 April 2013, 20:00

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#### Introduction

*The Secret Millions* is a documentary series on Channel 4 following notable celebrity figures as they work with charities on social projects to attempt to secure funding from the Big Lottery Fund.

A member of the public alerted Ofcom to the use of offensive language by entrepreneur Dave Fishwick in an episode broadcast on 7 April 2013 at 20:00. The complainant specifically referred to a part of the programme when Dave Fishwick used the word “fuck”.

Ofcom noted that at approximately 20:20 Dave Fishwick, when examining a dilapidated building, exclaimed “*for fuck sake*” as a piece of ceiling fell down. The word “fuck” was bleeped to some extent, but Ofcom considered the word “fuck” to be clearly identifiable.

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...”.

Ofcom asked Channel 4 how this broadcast of offensive language complied with this rule of the Code.

#### Response

Channel 4 said that prior to the programme being broadcast the material was reviewed by the Commissioning Editor, a producer and a lawyer. The swear word in question was picked up, and a request was made for the word “fuck” to be bleeped to ensure compliance with Rule 1.14 of the Code. Channel 4 explained however that due to human error the bleeping “was not executed to a standard we would normally expect”.

Channel 4 apologised for any offence caused to viewers watching at the time, and said that the programme had been re-edited for all future broadcasts to ensure effective masking of swear words. Channel 4 has reminded its technical departments of the need as appropriate to bleep or dip sound fully when strong language is used, in order to mask the entire word.

#### 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 “persons under the age of eighteen are protected”. This duty is reflected in Section One of the Code.

In reaching this Decision Ofcom has taken account of the audience’s and the broadcaster’s right to freedom of expression. This is set out in Article 10 of the

European Convention on Human Rights. Article 10 provides for the right of freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority.

Rule 1.14 states that “the most offensive language must not be broadcast before the watershed”. Ofcom research on offensive language<sup>1</sup> notes that the word “fuck” and other variations of this word are considered by audiences to be amongst the most offensive language. The watershed begins at 21:00. The instance of the word “fuck” in this programme occurred at around 20:20. Given that the word “fuck” was clearly recognisable in spite of the attempt at bleeping, this was a breach of Rule 1.14.

Ofcom noted however that the word was not said in an emphatic way, and Channel 4 did make an attempt to bleep the word (which failed due to human error), apologised to viewers, and has taken various measures to ensure the most offensive language is masked effectively in future. Taking all these factors into account, Ofcom considers the matter resolved.

## **Resolved**

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<sup>1</sup> Audience attitudes towards offensive language on television and radio, August 2010.  
<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>

## Not in Breach

### Refusal to broadcast advertisements for BT Sport channels *Sky Sports channels*

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This Decision was originally published on 20 June 2013.

#### Introduction

##### Background and legal framework

Following an apparent breakdown in negotiations between the parties, on 26 February 2013, British Telecommunications plc (“BT”) submitted a complaint to Ofcom against British Sky Broadcasting Limited (“Sky”) claiming that Sky had breached the Code on the Prevention of Undue Discrimination between Broadcast Advertisers (“the Code”). Rule 4.1 of the Code provides that “A television broadcaster must not unduly discriminate between advertisers that seek to have advertising included in its licensed service”. All broadcasters licensed by Ofcom have to comply with the provisions of the Code under their licence.

The Code is the means whereby Ofcom has discharged its duty, under section 319 of the Communications Act 2003 (“the Act”), to set standards for the content of programmes to be included in television and radio services, and in particular, under section 319(2)(k), to secure that “there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services”.

Section 319(2)(k) has its origin in the Television Act 1954, which provided that “in the acceptance of advertisements, there must be no unreasonable discrimination either against or in favour of any particular advertiser”. The provision was subsequently carried over into the Television Act 1964, the Broadcasting Act 1981, the Broadcasting Act 1990, and, finally, the Communications Act 2003 (at which point the prohibition on “unreasonable discrimination” became the prohibition on “undue discrimination”).

Although information around the rationale for the no unreasonable discrimination rule as conceived in 1954 is limited, it seems to have sought to ensure that, in principle, advertising airtime on television was not reserved for a limited group of advertisers. The Television Act 1954 marked the start of commercial television. At that time, there was only one commercial channel, and Parliament seems to have wanted to give equal access to television advertising airtime on that channel<sup>1</sup>.

Since 1954, the commercial television landscape has changed significantly with a proliferation of commercial television services. During this period, the no

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<sup>1</sup> On 3 November 1954, during discussions of the 1954 Television Act, the following exchange took place in the House of Commons:

Q: “Will the Government give us an undertaking that no one financial backer who has large industrial or retail interest will have a monopoly for the advertisement of his own wares?”

R (from the Minister): “that is already provided for in the Act”

We understand this exchange to be a reference to the unreasonable discrimination rule in the Television Act 1954.

unreasonable/undue discrimination rule has been retained<sup>2</sup>. We consider that the rule needs to be understood against the backdrop of a changed television landscape. In particular, we are conscious of the fact that in today's environment, advertisers have a range of opportunities to advertise their products on television, with different channels having different audiences both in terms of audience level and demographic mix.

Ofcom is not bound by decisions made by legacy regulators. We note however that the Independent Television Commission ("ITC") considered a complaint by BSkyB against ITV in 1999 for its refusal to accept a Sky Digital advertisement. ITV had refused to accept an advertisement for Sky Digital on the grounds that it included a reference to a particular day of the week by mentioning "...football on Monday nights". BSkyB believed it had been discriminated against unreasonably because some ITV companies had previously run an advertisement by ONdigital (the digital terrestrial television service provider) which contained an even more specific reference to a date of broadcast: "*Saturday January 16th live and free only with ONdigital*". The ITC found in favour of BSkyB.

In addition, the ITC also noted generally in relation to competing broadcasters:

"After consultation on whether it was acceptable for television companies to refuse to accept advertising for competing television broadcasting services, the ITC notified its licensees that it would be likely to regard a refusal to accept advertising of a generic kind from competing broadcasters as "unreasonable discrimination". However, it would not be unreasonable for ITC licensees to refuse advertisements which promote specific programmes at particular times on a competing service".

Advertisements which promote specific programmes at particular times on a competing service are known as "appointment to view" advertisements.

Keeping in mind the legislative background set out above, and in considering whether or not Sky has engaged in undue discrimination against BT in breach of Rule 4.1 of the Code, Ofcom has followed the steps set out in the Guidance accompanying the Code<sup>3</sup> which states that:

- (i) Firstly, Ofcom will assess whether or not the licensee has discriminated between advertisers;
- (ii) If it has, Ofcom will go on to consider whether such discrimination was undue.

Discrimination will not be undue where it can be objectively justified.

#### Ofcom's approach to handling the complaint

We considered that BT's complaint raised issues warranting investigation under Rule 4.1 of the Code.

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<sup>2</sup> However, we have not identified any discussion of the rule during the parliamentary debates since its inclusion in the Television Act 1954, and in particular, in the course of its adoption as part of the Communications Act 2003. The fact of its retention suggests Parliament saw continued value in the existence of the rule.

<sup>3</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/undue-discrimination.pdf>

In accordance with paragraph 5.12 of the Code, in investigating this matter, Ofcom applied its procedures for investigating breaches of content standards for television and radio (“the Procedures”).

As set out in paragraph 1.22 of the Procedures, we therefore sought Sky’s comments on the complaint. We provided Sky with a copy of the complaint on 18 March 2013, and Sky made representations responding to the complaint on 3 April 2013.

On 3 May 2013, we provided the parties with our Preliminary View and invited representations in relation to the same. We also provided BT with a non-confidential copy of Sky’s representations in response to the complaint.

On 20 May 2013, both parties provided us with their representations in response to the Preliminary View. This decision is our Final Decision and takes full account of all representations made by the parties, both as part of the complaint and response to the complaint, and as part of the representations to the Preliminary View.

### **BT’s complaint and representations in response to the Preliminary View**

BT explained in its complaint that it holds two Television Licensable Content Service (TLCS) licences and that August 2013 will see it launching two BT Sport channels, which will broadcast a range of premium sport content.

Sky holds TLCS licences for a number of services, including nine sports channels (the “Sky Sports channels” or “Sky Sports”). Sky also retails packages of pay television content to subscribers. Sky Media sells advertising airtime on Sky channels on behalf of Sky.

In January 2013, media buying agency Maxus UK (Maxus) approached Sky Media to request advertising airtime for a BT Sport campaign on the Sky Sports channels. Sky Media’s offer to BT stated that Sky accepts most advertising on its channels, subject to a limitation that “Sky will not carry advertising from a sports TV retailer on Sky Sports”.

BT complained to Ofcom under the Code, that by refusing to carry BT Sport advertising on its Sky Sports channels, Sky was behaving in an unduly discriminatory manner in breach of the Code. In particular, BT considered that Sky had discriminated: (a) between BT Sport and the Sky Sports channels because Sky carries self-promotions and cross-promotions advertising Sky’s own sports channels; and (b) between BT Sport and the ESPN sports channels because the Sky Sports channels also carry, and have carried, advertising for the ESPN sports channel.

### Discrimination

BT argued that Sky’s reason for refusing BT Sport advertising, namely that Sky does not (currently) retail the BT Sport channels (whereas Sky does retail the ESPN channels), is irrelevant when assessing discrimination under the Code. In addition, BT argued that the characteristics of BT as a pay TV platform operator and any concern that Sky may have about inducing subscribers to the Sky Sports channels to switch from Sky Sports subscriptions to BT Sport subscriptions, are irrelevant for distinguishing between broadcast advertisers. Rather, BT Sport and the ESPN channel are both sports channels which compete with each of the individual TLCS licensed Sky Sports channels.

### Undue discrimination

BT argued that Sky's discrimination is undue because Sky's conduct is not objectively justified. In particular, Sky's conduct does not pursue a legitimate aim, and, in any case, Sky's conduct is not proportionate to its aim.

#### *Not a legitimate aim*

In response to Sky's argument that it is seeking to protect the brand and the revenue of the Sky Sports channels, BT argued that any aim should be objective and of general application (as stated in Ofcom's guidance to the Code), i.e. it should not target directly or indirectly a particular company, in order to qualify as an objective justification. As Sky's refusal targets "competing sports pay TV retailers" and there is no other sports pay TV retailer with its own sports channel, Sky is effectively targeting BT. Sky's alleged legitimate aims cannot therefore be legitimate.

BT also argued that Sky's alleged legitimate aims should be considered in light of Sky's market power in relation to the wholesale supply of Core Premium Sports Channels and argues that its incentives are therefore to defend and strengthen its market power, and limit the growth of the BT Sport channels and brand.

Finally, BT argued that legitimate aims should not include ordinary commercial motives, that any rationally operated channel is likely to pursue these aims and could therefore rely on these aims to refuse to carry a generic advert for a competing channel.

Specifically with respect to Sky's argument that it is refusing advertising for the BT Sport channels because it is seeking to protect its brand, BT argued that such brand protection concerns are not valid in relation to the carrying of BT Sport advertising. In particular:

- It is disingenuous for Sky to rely on concerns that BT's advertising would be denigratory, because Sky is already protected from this by (1) Sky's media terms (which allow it to reject scripts or adverts at its discretion), (2) the BCAP Code; and (3) the Clearcast pre-clearance process.
- There is no reason to think BT's advertising will lead to customer confusion or advertising clutter, because Sky advertisements and ESPN advertisements have run alongside each other for the last three years and have focussed on the same elements as Sky's advertising, but this does not seem to have caused concern.
- In any case, BT has offered to address Sky's concerns by giving it an undertaking (1) not to run BT Sport advertising on Sky Sports that would be denigratory to or mention the Sky Sports channels either collectively or individually; and (2) not to run BT Sport airtime at weights any greater than the average annual weights seen for ESPN on Sky Sports channels since ESPN's launch.

BT also argued that Sky's concerns in relation to brand protection would equally apply to ESPN. Sky is therefore unduly discriminating between ESPN and BT.

Specifically with respect to Sky's argument that it is refusing advertising for the BT Sport channels because it is seeking to protect its revenue, BT argued that such

revenue protection concerns are not valid in relation to the carrying of BT Sport advertising. In particular, there is no realistic prospect that the Sky Sports channels will lose significant wholesale subscription revenues because BT Sport is a largely complementary offering (in the same way as ESPN). Indeed Sky Sports customers are unlikely to cease their Sky Sports subscription in light of:

- the nature and content of BT Sport (Sky Sports has 116 Premier League and Champions League games whereas BT has 38 Premier League games and no Champions League coverage); and
- the price positioning of BT Sport (BT Sport is free to all broadband customers and £12/15 per month on a standalone basis), whereby BT is encouraging existing sports fans to take their broadband from BT and encouraging new customers to take a sports subscription, rather than encouraging large numbers of Sky Sports customers to cease their Sky Sports subscription. BT noted that it is seeking the wholesale supply of Sky Sports 1 and 2 in order to sell attractive bundles packages. This would tempt some Sky Sports pay TV subscribers away from Sky's satellite platform however this would not involve switching between Sky Sports and BT Sport.

BT also argued that Sky's concerns in relation to revenue protection equally apply to ESPN, if Sky is seeking to protect the subscription revenues of the Sky Sports channels as opposed to other Sky revenue sources. Sky is therefore unduly discriminating between ESPN and BT.

#### *Not proportionate*

BT argued that in assessing proportionality, we should consider whether Sky could have taken a less restrictive approach (i.e. was Sky's refusal the least onerous measure necessary to achieve its aims?). Instead of an outright ban on advertising for BT Sport, Sky could have agreed certain conditions regarding the nature, content and frequency of BT Sport advertising. BT noted that it has sought to address Sky's concerns by giving it a specific undertaking (as discussed above).

BT further argued that, in assessing the effect of Sky's refusal on BT, we should take account of both the "quantitative harm" to BT and the "qualitative harm" to BT.

- First, excluding BT Sport from advertising on Sky Sports channels excludes BT from reaching the biggest proportion of sports viewing on commercial television (it argues that Sky Sports channels carry c. 60% of sport viewing). If BT is unable to advertise BT Sport on the Sky Sports channels, either BT will be required to spend [ $\%$ ] more to achieve the same weight of advertising (measured by number of television viewership ratings (TVRs)) or BT will be faced with a decrease of [ $\%$ ] in its number of TVRs as against BT's advertising plan for BT Sport. BT further noted that the quantitative harm must be judged by reference to the broadcast advertising spend and not the total operational expenditure of a broadcaster such as the cost of sports rights, talent fees or running a customer call centre. BT considered that it would be an "absurd outcome" – rendering the Code redundant for all but the smallest of advertisers – if Ofcom were to take into account a company's total cost base when assessing impact on advertising spend.
- While there are many other ways for BT to advertise its sports channel, BT is seeking to access sports viewers in the most effective and targeted way, and

therefore needs access to the key demographic of 60% of sport viewing on commercial TV that the Sky Sports channels represent.

- BT is entitled to target its campaign to the audience that it deems most relevant to its advertising needs. Indeed, a tightly defined target audience is critical to effective advertising, and BT's selection of a targeted audience ("men who watch sports") is entirely consistent with industry best practice.
- Even if judged against the broader demographic of "ABC1 Men" the Sky Sports channels still account for 43% of the top-reaching programmes within the Sky universe.
- That Sky accounts for very few of the overall top 100 programmes across all airtime is irrelevant.
- The programming environment is important to effective advertising, and BT has sought to place BT Sport adverts in sport programming.
- BT would be forced to redeploy on more expensive channels, and despite the redeployment, there is a loss over and above the additional advertising cost.

BT also submitted that excluding BT Sport from the Sky Sports channels not only prevents BT from reaching viewers of the channels on the Sky DTH satellite platform but also on all other platforms on which Sky Sports channels are carried.

BT further argued that Sky's refusal to carry BT Sport advertising is likely to reduce the number of subscribers to the BT Sport channel and is likely to have a detrimental impact on BT's ability to monetise its existing sports rights, and to compete effectively in the long term for sports rights.

#### Application of the Code

Generally in relation to the manner in which the Code should be applied, BT argued that if Ofcom were to accept brand protection and revenue protection as legitimate aims, the Code would become redundant, as practically any commercial channel could rely on such arguments to justify a discriminatory refusal.

BT further argued that it would be appropriate for the ITC's guidance in relation to unreasonable discrimination to be taken into account when assessing what constitutes undue discrimination under the Code, and that, applying the previous ITC guidance, Sky's refusal of BT's generic advertising is in breach of the Code.

#### **Sky's representations in response to the complaint and in response to the Preliminary View**

Sky argued (1) that Sky's treatment of BT is not discriminatory; and (2) that any discrimination would in any case not be undue.

#### No discrimination

Sky argued that there are relevant differences as between Sky and BT, and as between BT and ESPN. In particular, Sky argued that the "principal" relevant difference is that Sky retails both the Sky Sports and ESPN channels, whereas it does not currently retail the BT Sport channels. It argued that the broadcaster of a

pay TV channel A will be less willing to carry advertisements from a competing pay TV channel B where that competing channel B is carried by different pay TV retailers, because the broadcaster of channel A risks losing subscribers if advertising for channel B induces consumers to switch to a retailer that does not carry channel A. Sky argued that differences in the relationships between pay TV broadcasters and retailers are differences that a pay TV broadcaster can legitimately take into account when deciding whether to carry advertising from rival broadcasters.

In relation to the alleged discrimination between Sky and BT, Sky further argued that its use of promotional airtime on the Sky Sports channels to promote Sky Sports cannot be relevant to Ofcom's assessment of the existence of discrimination in relation to the access granted to commercial airtime on Sky Sports.

In relation to the alleged discrimination between BT and ESPN, Sky further argued that

- BT is the retailer and broadcaster of its sport channels, and a "triple play" provider offering TV, telephony and broadband services, whereas ESPN is solely a broadcaster of its sport channels; and
- BT wishes to promote retail subscriptions to its sports channels from BT, primarily in combination with communications services (broadband, telephony and line rental) that it also retails, whereas ESPN's advertising focuses on the content of its sports channels and the availability of that content across all its appointed retailers.

#### No undue discrimination

Sky argued that any discrimination could in any case not be considered undue because (1) Sky's approach is objectively justified; and (2) any impact on viewers or on competition is immaterial. Sky added that the threshold for whether any discrimination could be considered "undue" should be a high one in the present case, because to compel Sky to grant access to commercial airtime on the Sky Sports channels would involve interference with the fundamental rights of a firm's freedom to contract and its ability to exploit its intellectual property rights, and because the law on undue discrimination requires that for discrimination to be undue, it must be capable of having a material impact on competition.

Sky submitted that it is objectively justified in not carrying advertising from BT Sport channels because of the risks posed to the Sky Sports channels and brands, and to Sky's substantial related investments and IP therein. In particular, Sky submitted that:

- It has employed significant expertise, taken significant risks and made substantial investments in creating the Sky Sports channels (in particular in acquiring sports rights). In doing so, it has generated substantial intellectual property in the Sky Sports channels, as reflected in the Sky Sports brand.
- Brand identity is a key asset in competition among broadcasters. They generate consumer loyalty, provide information about the types of programmes likely to be found on a channel, thereby driving audiences and, in the case of pay TV channels, subscribers.
- To advertise BT Sport channels on the Sky Sports channels could adversely impact the Sky Sports brand, in particular because:

1. BT could seek to run advertisements that involve negative comparisons with Sky Sports and/or denigration of the Sky Sports brand; and
2. BT's advertising for its sports channels is likely to reduce the clarity and effectiveness of Sky's own advertising of its sports channels. In order to ensure that Sky's own advertising is effective, it should be clearly separated from rivals' advertising. Indeed, it is to preserve the impact and value of advertising that, in relation to TV advertising, advertisers often seek a degree of exclusivity as against competing brands or products. In relation to advertising for BT Sport channels this is of particular concern because:
  - (i) The similarity of the products being promoted, whereby BT advertising is likely to focus to a significant extent on sports or in some cases even events that are common both to Sky Sports and BT Sport channels; and
  - (ii) The likely frequency of BT's sports channels advertisements in order to achieve adequate audience coverage (in light of the relatively small sizes and the nature of audiences, with a significant number of casual viewers who watch irregularly). In order to ensure that Sky Sports advertisements and promotions were not "crowded out" of viewers' attention, Sky would be likely therefore to increase the frequency with which its advertisements and promotions were shown.

There is therefore a risk of advertising "clutter", diminishing audience attention to advertisements and causing consumer confusions, as well as resulting in a poorer viewing experience.

- Sky submitted that it is further objectively justified in not carrying advertising from BT Sport channels, because there is a risk that by carrying competitor sports broadcaster advertising that seeks to encourage switching to the competing broadcaster's service, the "host" broadcaster would be worse off having taken the advertising revenues, if those were outweighed by the lost wholesale revenues. This is similar to the concern with appointment to view advertising.
- Sky further submitted that this approach is proportionate, because it is willing to carry advertising for the BT sport channels on non-flagship programming on Sky entertainment channels and on Sky Movies, and on all programming on non-core Sky branded channels, where the risk to Sky brands is reduced.

Sky further submitted that in treating BT differently from ESPN, Sky is not unduly discriminating because it faces relatively little risk of advertising by ESPN being of a type that would either damage Sky Sports brands or its revenues which it says has been borne out in practice. By contrast, Sky's view, which it said had also been borne out in practice, was that there would be a high risk of BT Sport advertising being of a type that would damage Sky Sports' brand or its revenues, for the following reasons:

- Differences in commercial objectives between ESPN and BT – ESPN acts solely as a pay TV channel broadcaster, whereas BT's principal interest in developing its BT Sport channels is in support of its efforts to attract and retain broadband and telephony subscribers.

- Differences in distribution channels – ESPN’s channels are distributed broadly, with ESPN choosing to make them available via all main pay TV retailers in the UK, whereas BT is currently the exclusive retailer of its sports channels.
- Sky’s commercial relationship with ESPN – Sky retails ESPN’s channels on its DSat platform, and various obligations flow from this distribution agreement, including :
  - The distribution agreement appoints Sky as seller of commercial airtime on the ESPN channels.
  - The confidential terms of the distribution agreement provide for various obligations imposed on both ESPN and Sky in relation to the marketing and advertising of the ESPN channels. [3<]

Sky submitted that these factors have the following effect:

- In relation to the Sky Sports brand, ESPN’s business objectives, its contractual relationship and the collaborative nature of that relationship gave Sky comfort that ESPN would not seek to denigrate Sky’s sports channels or the Sky Sports brand.
- In relation to revenues, Sky’s role as distributor of ESPN’s channels and ESPN’s platform neutral approach to the distribution of its channels, meant that the risk of ESPN advertising in such a way as to encourage Sky Sports subscribers to switch to distributors/platforms view which Sky Sports channels were not available, was low.
- In relation to advertising clutter, again Sky considered there was limited risk of ESPN advertising in such a way as to significantly reduce the clarity and effectiveness of Sky’s own promotions [3<].

### Proportionate

Sky submitted that in order for discrimination to be “undue” it should be capable of having a material impact on competition. In particular, it argued that an assessment of whether discrimination is undue should be undertaken consistently with established law and regulation, including competition law. Otherwise, Ofcom runs the risk of intervention that is disproportionate to any harm and likely to interfere unduly with the fundamental principle of a firm’s freedom to contract and exploit its IP.

Sky submitted that BT has vastly overstated the likely effect of it not being able to advertise its sports channels on Sky Sports channels. As BT will be able to advertise BT Sport channels on all channels other than the Sky Sports channels, and given that Sky Sports channels account for less than 3% of commercial airtime (6.5% of impacts in relation to ABC1Men), over 97% of commercial airtime (over 93% of ABC1 Men impacts) remains available to BT.

Generally, Sky submitted that TV advertising accounts for only a small proportion of overall customer acquisition and retention costs, that the cost of TV advertising is also small in the context of rights costs and other costs associated with launching a

sports channel, and that BT can reach its target audience via a wide range of advertising media of which TV is but one.

Sky further submitted that any assessment of the impact of Sky's approach to advertising of BT's sports channels on competition should be conducted with a frame of reference no narrower than "all TV advertising", and that anything narrower than that, including "men who watch sports" is artificial.

Sky also submitted that the audiences delivered by Sky Sports are readily replicable elsewhere. In particular:

- Sky Sports channels do not deliver, even collectively, the mass audiences that ITV1 individually does.
- The Sky Sports channels collectively account for only 9% of viewing by "men who watch sport" across all commercial TV channels. BT can therefore reach their target audience by other means.
- BT's analysis overstates the effect on BT's TVRs and costs of not being able to advertise on the Sky Sports channels. In particular:
  - Even an [X]% reduction in TVRs (as claimed by BT) results in a less than 3% reduction in terms of coverage achieved with ABC1 Men;
  - The reduction in TVRs which BT claims to be [X]% is in fact smaller, and is the result from the manner in which BT has re-allocated its spend across the other commercial channels (up-weighting on ITV and excluding all Sky Media channels).
  - Sky asked a third party media auditor to run two hypothetical campaigns aiming at delivering 500 TVRs in ABC1 Men for the same budget, one with Sky Sports and one without Sky Sports, and the auditor was able to plan a campaign that delivers ABC1 Men at a similar coverage level without Sky Sports than with Sky Sports.
- Targeting efficiency is also replicable via other channels and conversion rates demonstrate that for ABC1 Men, other channels can be more efficient than Sky Sports.

Sky therefore argued that Sky Sports airtime is not indispensable, or necessary to effectively advertise a sports channel. There is no material impact on BT, still less any material impact on competition.

Sky argued that the above arguments are valid both when considering discrimination between Sky and BT and between ESPN and BT. Sky has also noted that BT's offer of an undertaking would not address all of Sky's concerns and would be unlikely to be workable in practice.

## **Decision**

### Relevant facts

In assessing BT's complaint, we have taken account, in particular, of the following relevant, uncontested facts:

Sky is the holder of TLCS licences for a number of sports channels, namely Sky Sports 1, Sky Sports 2, Sky Sports 1 HD, Sky Sports 2 HD, Sky Sports 3 HD, Sky Sports 4 HD, Sky Sports F1 HD, Sky Sports News International and Sky Sports News HD (further referred to as a “Sky Sports channel” or the “Sky Sports channels”). It is in Sky’s capacity as licence holder for these channels that Ofcom has considered the complaint (and not in its capacity of licence holder for other channels).

BT is the holder of two TLCS licences for two channels, Sailing 1 and Sailing 2, which BT intends to modify for the launch of two BT Sport channels. Our understanding is that BT is likely to “self-retail” the BT Sport channels on DSat. BT also operates its own retail platform.

ESPN is the holder of TLCS licences for its sports channels ESPN, ESPN America and ESPN Classic. The ESPN channels are retailed by Sky, as well as a number of other pay TV retailers. They are not, however, retailed by ESPN itself. We note that ESPN has recently sold sports channels to BT, and that the wholesale relationship between ESPN and Sky for sports channels will soon end.

Sky carries advertisements (albeit during promotional airtime) for the Sky Sports channels on Sky Sports channels. It also carries advertisements (during commercial airtime) for the ESPN sports channels on Sky Sports channels, or it has at least done so in the period during which BT requested advertising time on Sky Sports in order to advertise its sports channels (January/February 2013). However Sky has refused to carry advertising for the BT Sport channels on Sky Sports channels on the basis of Sky’s advertising terms, which contains a general ban on “advertising from a sports TV retailer” on Sky Sports.

### Analysis

As set out above, we first assess whether or not Sky has discriminated between advertisers, and, if it has, we go on to consider whether such discrimination was undue.

### Discrimination

All broadcasters licensed by Ofcom have to comply with the provisions of the Code under their licence.

Sky Sports carries advertising for Sky Sports channels and for the ESPN sports channels. As a first step, Ofcom has assessed whether Sky, as the broadcaster, has discriminated between BT and other advertisers, and in particular (a) between BT and Sky; and (b) between BT and ESPN.

Discrimination in this context means that Sky does not reflect relevant similarities or differences in the circumstances of advertisers (i.e. Sky, ESPN and BT which are each advertisers) in deciding whether or not to include advertisements in its licensed service and the terms on which it agrees to broadcast the advertisements.

In order to assess whether Sky has treated BT in a different manner from other advertisers, the relevant question is whether the advertisers are in comparable positions.

BT Sport, ESPN and Sky are all operators of sports channels. In that respect they are in very similar positions as potential advertisers on Sky Sports channels, wishing

to promote viewing of their respective channels. The “principal” difference identified by Sky in this instance is that Sky retails both the Sky Sports and ESPN channels on its DSat platform, whereas Sky does not retail the BT Sport channels. In addition, in considering discrimination between Sky and BT, Sky argued that its use of promotional airtime on the Sky Sports channels to promote Sky Sports cannot be relevant to Ofcom’s assessment of the existence of discrimination in relation to the access granted to commercial airtime on Sky Sports. Finally, in considering discrimination between ESPN and BT, Sky argued that BT is a retailer and broadcaster of its sports channels, whereas ESPN is solely a broadcaster, and BT wishes to promote retail subscriptions to its sports channels from BT, whereas ESPN’s advertising focuses on the content of its sports channels and the availability of that content across all its appointed retailers.

In considering whether a difference is relevant for the purposes of analysing the existence of discrimination we have focussed on the similarities and differences from the perspective of the advertisers and the product they want to advertise. We believe this is important because we are considering whether one advertiser (i.e. a person in his capacity as advertiser, and not, for example, in his capacity as broadcaster) is being disadvantaged relative to another.

#### *Discrimination between Sky and BT*

The difference identified by Sky, i.e. Sky retails the Sky Sports channels but does not retail the BT Sport channels, relates not to the characteristics of BT as an advertiser, but to the relationship which Sky, as the retailer of subscription sports channels, has / does not have with BT.

In relation to Sky’s argument that its use of promotional airtime on the Sky Sports channels cannot be relevant, we note that Rule 4.1 of the Code provides “A television broadcaster must not unduly discriminate between advertisers that seek to have advertising included in its licensed service” whereby “advertising” is defined as “any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment”.

Accordingly, promotions broadcast in promotional airtime can qualify as advertising, although this is not necessarily the case; we consider that this question turns on whether such promotions promote “the supply of goods or services (...) in return for payment”. In this case, neither Sky nor BT has made specific submissions in relation to the precise nature of Sky’s promotions for the Sky Sports channels, and in particular whether they promote Sky Sports channels “in return for payment”. However, we note that Sky promotes its Sky Sports channels both to viewers who already have access to such channels as well as to viewers who do not (for example, Sky Sports 1 may show promotions for Sky Sports 2 or Sky Sports F1 to viewers who do not already subscribe to Sky Sports 2 or Sky Sports F1). Sky therefore promotes those channels “in return for payment”. Those promotions therefore qualify as advertising under the Code, although, in accordance with Ofcom’s Cross-promotion Code, and Article 23(2) of the AVMS Directive, because these promotions are “announcements made by the broadcaster in connection with its own programmes”, they do not count as advertising for the purposes of calculating advertising minutage.

We therefore conclude that in not accepting advertising for the BT Sport channels, Sky is discriminating between Sky and BT.

### *Discrimination between ESPN and BT*

As indicated above, the difference identified by Sky, i.e. Sky retails the ESPN channels but does not retail the BT Sport channels, relates not to the characteristics of BT as an advertiser, but to the relationship which Sky, as the retailer of subscription sports channels, has / does not have with BT.

In addition, the other difference identified by Sky, i.e. BT is a sports channel retailer whereas ESPN is not, similarly does not relate to the characteristics of BT as an advertiser of its sports channel. While Sky argued that this difference has consequences for the type of advertising each of BT and ESPN would wish to broadcast (namely, that BT would wish to promote retail subscriptions, whereas ESPN would focus on the content of its sports channel), this speculates as to the manner in which BT would advertise its BT Sport channel. We also note that Sky similarly is a retailer of sports channels.

We therefore conclude that Sky's rejection of all advertising by BT for the BT Sport channels on the Sky Sports channels amounts to discriminatory behaviour. We therefore proceed to consider whether such discrimination is undue.

### Undue discrimination

As a second step, Ofcom has assessed whether Sky's discrimination against BT is undue within the context of the Code. As indicated above, paragraph 5.8 of the Guidance states that discrimination will not be undue where it can be objectively justified.

As set out above, the "no unreasonable discrimination" rule was enacted in 1954, when there was only one commercial channel on which advertisers were able to place their television advertisements. In the absence of competition law as it exists today, the "no unreasonable discrimination" rule ensured that the monopoly provider of television advertising airtime would not have been able to block access to advertising on television at will.

Today's broadcasting landscape is different. With its multitude of commercial television channels, it provides advertisers with a large number of opportunities to place advertisements. In some cases, broadcasters themselves have become advertisers. We believe that the "no undue discrimination" rule as applied today should reflect these changed circumstances.

We have set out above that the ITC gave guidance that it would be likely to regard a refusal to accept advertising of a generic kind from competing broadcasters as "unreasonable discrimination". The ITC's guidance was given at a particular point in time, when commercial television was less developed, and against the background of a particular case. While on the particular facts of that case, we may well agree with the ITC's conclusions, in light of the changed television broadcasting landscape, we believe that not accepting advertising of a generic kind from competing broadcasters should not necessarily be seen as "unreasonable/undue discrimination".

We note BT's submission in response to our Preliminary View that our approach undermines the Code and, in its view, would leave it redundant. We do not agree with this view, but we recognise that the applicability of the Code in today's broadcasting landscape may be limited.

In assessing whether there is an objective justification, we consider firstly whether Sky has pursued a legitimate aim in its discrimination, and secondly, if so, whether its approach is proportionate to that aim.

### ***Legitimate aim***

Sky identified two main reasons for its position:

- (a) Brand protection. Sky submitted that to advertise the BT Sport channels on Sky Sports could negatively impact the Sky Sports channels, in particular through the impact on the Sky Sports brand. In particular, Sky has submitted that BT could seek to run advertisements that involve negative comparisons with Sky Sports and/or denigration of the Sky Sports brand. It has also submitted that BT's advertising for its sports channels is likely to reduce the clarity and effectiveness of Sky's own advertising of its sports channels. In order to ensure that Sky Sports advertisements and promotions are not "crowded out" of viewers' attention, Sky would be likely therefore to need to increase the frequency with which its advertisements and promotions were shown, resulting in risk of advertising "clutter", diminishing audience attention to advertisements and causing consumer confusion, as well as resulting in a poorer viewing experience.
- (b) Revenue protection. Sky has also submitted that there is a risk that by carrying competitor sports broadcaster advertising that seeks to encourage switching to the competing broadcaster's service, the "host" broadcaster would be worse off having taken the advertising revenues, if those were outweighed by the lost wholesale revenues.

BT on the other hand argued that legitimate aims should not include ordinary commercial motives, that any rationally operated channel is likely to pursue these aims and could therefore rely on these aims to refuse to carry a generic advert for a competing channel. In addition, in this particular case, BT's advertising for its sports channels could not give rise to concerns around brand protection and revenue protection because (1) Sky is in any case protected from denigratory advertising and there is no reason to think BT's advertising would lead to customer confusion or advertising clutter; and (2) there is no realistic prospect that the Sky Sports channels will lose significant wholesale subscription revenues because BT Sport is a largely complementary offering.

In assessing whether Sky was pursuing a legitimate aim, we consider below separately discrimination between (a) Sky and BT; and between (b) ESPN and BT.

### ***Discrimination between Sky and BT***

In assessing discrimination between Sky and BT, we accept that a broadcaster may in principle have legitimate commercial reasons to refuse advertising from a direct competitor on its own service. We consider that ordinary commercial motives can be a legitimate aim in considering discrimination between a broadcaster and its direct competitor.

In particular, we accept that brand identity can be an important asset for a broadcast channel, that brand protection is in principle a legitimate aim, and that a broadcaster may therefore decide to refuse advertising from a competitor with a channel in the same genre, if it perceives a threat to its brand from the presence of advertising by the competing channel.

We also accept that there may be a risk to a broadcaster's revenue in the existence of a competitor channel in the same genre, which a broadcast channel might legitimately seek to protect, and that a broadcaster may therefore make a judgement to refuse advertising from a competitor in order to avoid exacerbating such risk.

We therefore consider that in discriminating between Sky and BT, Sky is pursuing legitimate aims, requiring us to go on and consider whether Sky's approach is proportionate to those aims.

#### *Discrimination between ESPN and BT*

The position in relation to discrimination between BT and ESPN is different. Sky has taken a decision to allow advertising from ESPN, a competing sports channel. We therefore need to consider the basis on which Sky is distinguishing between BT and ESPN and whether that also reflects the pursuit of a legitimate aim.

We note in this respect that ESPN's commercial strategy was developed around a model whereby it would wholesale its channel to multiple platforms. The relationship between Sky and ESPN is thus affected by the fact that Sky retails the ESPN channels on its DSat pay TV platform. While we do not believe that such differences are sufficient to determine that there is no discrimination, they may affect a broadcaster's commercial incentives and as such affect our assessment as to whether any discrimination is undue.

Sky submitted to us that in distinguishing between BT and ESPN, it was pursuing a legitimate aim, because the risk to its brand and to its revenue that it faced in accepting ESPN advertising was different from the risk that it would face if it were to accept advertising for the BT Sport channels.

Sky submitted evidence demonstrating that ESPN's business model generally, and its commercial relationship with Sky specifically gave Sky a significant degree of comfort that ESPN would not damage the Sky Sports brand or its wholesale revenues. In particular, Sky informs us that the agreement between Sky and ESPN for the distribution of the ESPN channels on Sky's Dsat platform specifies a range of obligations which ensure that when accepting advertising from ESPN, Sky's brand and revenue are protected. [X]

Sky further submitted that, by contrast, BT's advertising and public statements since the launch of the BT Sport channels, BT's business objectives and different approach to Sky means there is a high risk that the BT advertising will undermine Sky's brand and revenue. Sky also does not have a wholesale relationship with BT which further affects the risk assessment. Sky submitted that it made an assessment that it is not able to manage these risks to its commercial interests in the same way as it did for ESPN.

In light of the evidence which Sky has provided in relation to its relationship with ESPN, we accept that there is a difference between BT and ESPN, with differing consequences for the assessment, generally, of the risk to Sky's brand and revenue. We therefore consider that in discriminating between ESPN and BT, Sky is pursuing legitimate aims, requiring us to go on and consider whether Sky's approach is proportionate to those aims.

Finally, while the particular facts of this case may lead us to conclude that Sky is in principle pursuing legitimate aims, we emphasise that different factual circumstances may well lead to a different conclusion. As indicated above, we do not agree with

BT's submission that legitimate aims should not be able to include "ordinary commercial motives" and that to accept such aims would render the Code meaningless. As in this instance, we believe that it is possible for "ordinary commercial motives" such as brand and revenue protection to be legitimate aims, and we do not consider that this would render the Code meaningless. In each instance, we will assess the commercial aims presented to us. It may be the case, depending on the particular facts, that we conclude that objectives presented as ordinary commercial motives are not legitimate.

### ***Proportionality***

BT has argued that in assessing proportionality, we should consider whether Sky could have taken a less restrictive approach. Instead of an outright ban on advertising for BT Sport, Sky could have agreed certain conditions regarding the nature, content and frequency of BT Sport advertising.

We accept BT's argument that a particular advertisement for the BT Sport channels may not involve negative comparisons with Sky Sports and/or denigration of the Sky Sports brand and may not lead to advertising clutter or cause consumer confusion. We also accept that the Sky Sports channels will not necessarily lose significant wholesale subscription revenues to the BT Sport channels. As such, we accept that it may be possible to negotiate and agree specific conditions around the nature, content and frequency of BT Sport advertising which could alleviate Sky's concerns with respect to the protection of its brand and revenue. However, in today's broadcasting landscape, where advertisers have a large number of opportunities to place advertisements on a range of broadcast channels, we consider that when assessing the proportionality of a refusal to advertise on a particular channel, it is more important to assess whether an advertiser is able to access its audience on other channels and can advertise its product with reasonably limited additional cost.

Acknowledging that Sky was pursuing a legitimate aim both when discriminating between itself and BT, and between ESPN and BT, we assess proportionality in relation to discrimination between Sky and BT and discrimination between ESPN and BT together, as we consider that the effect on BT would be the same.

With respect to the effect of Sky's refusal on BT, BT argued that:

- In the absence of advertising on the Sky Sports channels it has calculated that its TV advertising campaign costs will be [X%] higher. It would purchase advertising impacts against the "ABC1 Men" demographic, but purchasing advertising on the Sky Sports channels would more efficiently target its desired narrower target audience of "men who watch sports". It commented that the Sky Sports channels provided 63% of the "top rated programming" for "men who watch sports". BT also argued that selecting a tightly defined target audience is critical to effective advertising and is consistent with industry practice.
- The programming environment is important to effective advertising, and BT has sought to place BT Sport adverts in sport programming; and
- BT would be forced to redeploy on more expensive channels, and despite the redeployment, there is a loss over and above the additional advertising cost.

Sky disputed the level of the potential additional costs to BT.

We are not able to reach a definitive conclusion on the likely additional cost but we consider on the basis of the information provided by BT that any additional cost to BT from purchasing ABC1 Men impacts as a result of the inability to advertise on Sky Sports channels is likely to be limited.

With regard to the increased efficiency of Sky Sports channels in targeting “men who watch sports”, we note that from information provided by BT that it originally intended to target no more than [X%] of its expenditure on the Sky Sports channels, with the rest of its expenditure largely spread across programming on general entertainment channels. Sky Sports may therefore be well placed to target “men who watch sports”, but it is not unique in accessing such audiences and achieving such advertising impacts as required by BT to build its campaign, as shown by BT’s “revised plan” for advertising in the absence of access to the Sky Sports channels. To the extent that the Sky Sports channels do offer a more efficient means of targeting “men who watch sports” we therefore consider that this would itself have a limited impact on BT’s planned advertising campaign.

Underlying this assessment of the extent of the effects on BT is the wide availability on other commercial channels of airtime that can provide the advertising impacts sought by BT. The extent of the availability of advertising airtime on other channels has a key bearing on our assessment of proportionality.

As noted above, our view in relation to the discrimination between Sky and BT is that Sky is pursuing a legitimate commercial interest. We also consider, given the limited extent of the effects on BT, that Sky’s approach is proportionate to its aim. We therefore consider that Sky has not unduly discriminated against BT in that respect.

**Not in breach of the Code on the Prevention of Undue Discrimination between Broadcast Advertisers**

## Advertising Scheduling Findings

### In Breach

#### Advertising minutage

*Attheraces, 10 March 2013, 15:00*

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#### Introduction

Attheraces is a television channel focused on horse racing. The licence is held by Attheraces Limited (“Attheraces” or “the Licensee”).

Rule 4 of the Code on the Scheduling of Television Advertising (“COSTA”) states: “time devoted to television advertising and teleshopping spots on any channel in any one hour must not exceed 12 minutes.”

During monitoring of licensees’ compliance with COSTA, Ofcom noted that on 10 March 2013 Attheraces transmitted two minutes more advertising than the amount permitted in a single clock hour.

Ofcom therefore sought comments from the Attheraces under Rule 4 of COSTA.

#### Response

The Licensee explained that the extra minutage was due to the late running of races scheduled in the 15:00 clock hour, and an additional break being played in error.

The Licensee apologised for the error and acknowledged “this was not the first time that this has happened”. It said that since this latest incident, Attheraces has reduced the amount of time devoted to television advertising on the channel while it works on a permanent technical solution, which it hopes to be in place “very shortly”.

#### Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content which it considers are best calculated to secure a number of standards objectives. One of these objectives is that “the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with”.

Articles 20 and 23 of the EU Audiovisual Media Services (AVMS) Directive set out strict limits on the amount and scheduling of television advertising. Ofcom has transposed these requirements by means of key rules in COSTA. Ofcom undertakes routine monitoring of its licensees’ compliance with COSTA.

In this case, Ofcom found that the amount of advertising broadcast by Attheraces was in breach of Rule 4 of COSTA.

This compliance failure follows a number of previous breaches recorded by Ofcom covering a series of minutage overruns on Attheraces, as recorded in issue 222<sup>1</sup> of the Broadcast Bulletin. In those cases, Attheraces had provided assurances to

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<sup>1</sup> Ofcom Broadcast Bulletin 222, 21 January 2013, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb222/obb222.pdf>

Ofcom that adequate procedures had been implemented to minimise the risk of a recurrence.

Ofcom is particularly concerned that despite these previous assurances by Attheraces, its procedures have not proved sufficiently robust to prevent a further breach of Rule 4 of COSTA.

In light of our concerns, Ofcom is requiring the broadcaster to attend a meeting to discuss its compliance processes and procedures.

#### **Breach of Rule 4 of COSTA**

## In Breach

### Breach findings table

*Code on the Scheduling of Television Advertising compliance reports*

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Rule 4 of the Code on the Scheduling of Television Advertising (“COSTA”) states:

“... time devoted to television advertising and teleshopping spots on any channel must not exceed 12 minutes.”

<b>Channel</b>	<b>Transmission date and time</b>	<b>Code and rule / licence condition</b>	<b>Summary finding</b>
UMP Movies	18 March 2013, 20:00	COSTA Rule 4	Ofcom noted, during monitoring, that the channel exceeded the permitted advertising allowance by 120 seconds.  <b>Finding: Breach</b>

## Broadcast Licence Condition cases

### Community radio station compliance reports

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Community radio stations are, under the terms of The Community Radio Order 2004 (“the Order”), defined as local radio stations provided primarily for the good of members of the public or for a particular community, rather than primarily for commercial reasons. They are also required to deliver social gain, operate on a not-for-profit basis, involve members of their target communities and be accountable to the communities they serve.

Any group applying for a community radio licence is required to set out how proposals as to how it will meet these various statutory requirements. If the group is awarded a licence, these proposals are then included in the licence so as to ensure their continued delivery. This part of a community radio station's licence is known as the 'key commitments'.

Given that each station's 'key commitments' are designed to ensure that the station continues to provide the service for which it has been licensed, it is of fundamental importance that Ofcom is able to monitor delivery of these 'key commitments'. Licensees are therefore required to submit an annual report setting out how they have been meeting their licence obligations.

In addition to the requirements set out above, there are also statutory restrictions on the funding of community radio stations (section 105(6) of the Broadcasting Act 1990, as modified by the Order). Specifically, no community radio station is allowed to generate more than 50% of its annual income from the sale of on-air advertising and sponsorship. In certain circumstances, some stations are not allowed to carry any paid for advertising or sponsorship.

It is also a characteristic of community radio services that any profit that is produced by providing the service is used “wholly and exclusively for securing or improving the future provision of the service, or for the delivery of social gain to members of the public or the community that the service is intended to serve” (clause 3(3) of the Order).

As with the 'key commitments', it is of fundamental importance for Ofcom to verify that a licensee is complying with its licence requirements relating to funding and licensees are therefore required to submit an annual report setting out how they have met their financial obligations.

The annual reports from stations also inform Ofcom’s own report on the sector, to be featured in the annual Communications Market Report and late submission of annual reports from individual stations impacts on this.

Failure by a licensee to submit an annual report when required represents a serious and fundamental breach of a community radio licence, as the absence of the information contained in the report means that Ofcom is unable properly to carry out its regulatory duties.

Licence condition 9(1) states:

9. General provision of information to Ofcom

(1) The Licensee shall maintain records of and furnish to Ofcom in such manner and at such times as Ofcom may reasonably require such documents, accounts, estimates, returns, reports, notices or other information as Ofcom may require for the purpose of exercising the functions assigned to it by or under the 1990 Act, the 1996 Act or the Communications Act and in particular (but without prejudice to the generality of the foregoing):

(a) a declaration as to the Licensee's corporate structure in such form and at such times as Ofcom shall specify;

(b) such information as Ofcom may reasonably require from time to time for the purposes of determining whether the Licensee is on any ground a disqualified person by virtue of any of the provisions in Section 143 (5) of the 1996 Act and/or Schedule 2 to the 1990 Act or whether the requirements imposed by or under Schedule 14 to the Communications Act are contravened in relation to the Licensee's holding of the Licence;

(c) such information as Ofcom may reasonably require for the purposes of determining whether the Licensee is complying with the requirements of the Community Radio Order 2004 for each year of the Licensed Service;

(d) such information as Ofcom may reasonably require for the purposes of determining the extent to which the Licensee is providing the Licensed Service to meet the objectives and commitments specified in the Community Radio Order 2004; and

(e) the provision of information under this section may be provided to Ofcom in the form of an annual report which is to be made accessible to the general public.

Ofcom has reached the following decisions on Community Radio licensees' compliance with their licence conditions:

Station	Licence condition	Summary finding
Voice of Africa Radio	Community Radio licence condition 9(1)	The licensee, Voice of Africa Radio, did not submit either of its annual reports by the date required (3 April). An extension was given to 17 April and a further deadline of 1 May 2013 was then set. The key commitments report was submitted. However the financial report has not been received.  Finding: <b>In breach</b> , in relation to the financial report.
Speysound Radio	Community Radio licence condition 9(1)	The licensee, Speysound Radio Limited, did not submit either of its annual reports by the date required (3 April). An extension was given to 17 April and a further deadline of 1 May 2013 was then set. The key commitments and financial reports have both now been received.  Finding: <b>Resolved</b>

## Fairness and Privacy cases

### Not in Breach

#### **“Canoe Man” and news items relating to Mr John Darwin and Mrs Anne Darwin**

*Sky News Channel, various broadcasts between July and December 2008*

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#### **Summary**

Ofcom has found that British Sky Broadcasting Limited (“BSkyB”), the licensee<sup>1</sup> for the Sky News Channel, in obtaining and subsequently broadcasting material accessed improperly by gaining unauthorised access to the email accounts of Mr John Darwin and his wife, Mrs Anne Darwin, is not in breach of Rule 8.1 of Ofcom’s Broadcasting Code.

Ofcom concluded that the broadcaster’s right to freedom of expression, including the freedom to receive and impart information and ideas without interference, in the exceptional circumstances of this case, outweighed Mr and Mrs Darwin’s expectation of privacy.

#### **Introduction**

Between July and December 2008, Sky News, a 24 hour news channel, broadcast various news reports and programmes relating to Mr John Darwin and his wife, Mrs Anne Darwin, both of whom were convicted in 2008 of fraud related offences committed in connection with Mr Darwin’s staging of his own death in 2002.

By way of background to the story, on 21 March 2002, Mr John Darwin had staged his own apparent drowning at sea in a canoeing accident and his wife, Mrs Anne Darwin, subsequently received approximately £250,000 through claims on insurance and pension policies. In January 2008, Mr Darwin confessed to having staged his own death and was convicted, along with his wife, to a term of imprisonment. The prosecution case used emails that had been provided by Sky News to the police.

On 5 April 2012, Mr John Ryley<sup>2</sup>, Head of Sky News, issued a press statement in which he revealed that Sky News had authorised a journalist, Mr Gerard Tubb, to “access the email of individuals suspected of criminal activity”.

#### **Exceptional reasons**

Ofcom had not received a fairness and/or privacy complaint from Mr Darwin or Mrs Darwin (or anyone authorised by them to make a complaint on their behalf). However, Ofcom has a general duty under section 3 of the Communications Act 2003 (“the 2003 Act”) to (among other things) secure the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both (i) unfair treatment in programmes included in such services; and (ii) unwarranted infringements of privacy

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<sup>1</sup> Television Licensable Content Service (TLCS) 402.

<sup>2</sup> <http://skynews.skypressoffice.co.uk/press-releases/items/2012-04/2532/john-ryleys-statement-regarding-sky-news-darwin-story>

resulting from activities carried on for the purposes of such services (Section 3(2)(f) of the 2003 Act)<sup>3</sup>.

Ofcom's Procedures for the consideration and adjudication of Fairness & Privacy complaints<sup>4</sup>, published on 1 June 2011, state at paragraph 1.5 that:

*"in exceptional circumstances, where Ofcom considers it necessary in order to fulfil its general duty (under section 3(2)(f) of the 2003 Act) to secure the application of standards that provide adequate protection to members of the public (and all other persons) from unfair treatment in programmes and unwarranted infringements of privacy, Ofcom may consider fairness or privacy issues in the absence of a complaint from "the person affected" ... In those exceptional circumstances, Ofcom would set out in advance the procedures that it intends to follow and allow any relevant parties to respond accordingly. The procedures would be similar to these but adapted as appropriate to ensure that they are fair in the particular circumstances".*

In this case, Ofcom considered that "exceptional circumstances" existed for it to consider the privacy issues raised in the absence of a complaint from Mr Darwin or Mrs Darwin, in order to fulfil its general duty to secure the application of standards that provide adequate protection to members of the public from unwarranted infringements of privacy.

Unauthorised access to computer material is a criminal offence under section 1 of the Computer Misuse Act 1990<sup>5</sup> ("the CMA 1990"). Ofcom considered that Sky News' admission of the *prima facie* commission of a criminal offence was very serious and warranted further investigation. There is particular current public concern about unauthorised accessing of voicemail and emails by journalists and/or by persons instructed on their behalf. Ofcom considered that this case raised clear questions of privacy for the persons whose emails were accessed. It may also be relevant to Ofcom's ongoing duty to be satisfied that broadcast licensees remain fit and proper to hold a broadcast licence. Given these considerations, it was appropriate for Ofcom to consider the case even though neither Mr Darwin nor Mrs Darwin had complained to Ofcom.

### **Framework for considering the case**

The 'standards', with respect to privacy, are set out in Section Eight of Ofcom's Broadcasting Code ("the Broadcasting Code")<sup>6</sup>. This section sets out a Principle and a Rule (Rule 8.1) to be observed by broadcasters.

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<sup>3</sup> <http://www.legislation.gov.uk/ukpga/2003/21/section/3>

<sup>4</sup> <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>

<sup>5</sup> Section 1 of the CMA 1990 states that: *A person is guilty of an offence if—*  
(a) *he causes a computer to perform any function with intent to secure access to any program or data held in any computer, or to enable any such access to be secured;*  
(b) *the access he intends to secure, or to enable to be secured, is unauthorised; and*  
(c) *he knows at the time when he causes the computer to perform the function that that is the case.*

On conviction on indictment for this offence, the maximum penalty is two years imprisonment and/or a fine. On summary conviction, the maximum penalty for this offence is 12 months imprisonment and/or a fine.

<sup>6</sup> <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/privacy/>

The Principle is “to ensure that broadcasters avoid any unwarranted infringement of privacy in programmes and in connection with obtaining material included in programmes”.

Rule 8.1 states that:

“Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted”.

The Broadcasting Code sets out a series of “practices to be followed” by broadcasters when dealing with individuals or organisations participating in or otherwise directly affected by programmes, or in the making of programmes in order to avoid an unwarranted infringement of privacy. Broadcasters are required to observe the ‘standards’ set out in the Broadcasting Code.

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.

Under Rule 8.1 of the Broadcasting Code, 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 what is in the public interest include “*detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations*”. The Broadcasting Code states in Practice 8.9 that the means of obtaining material must be proportionate in all the circumstances and, in particular, to the subject matter of the programme.

Ofcom had, therefore, to consider:

- whether Mr and Mrs Darwin had a legitimate expectation of privacy which was infringed by the accessing of their emails without their consent;
- if so, whether there was a public interest reason for the infringement; and
- if so, whether the public interest outweighed Mr and Mrs Darwin’s legitimate expectation of privacy, such that in all the circumstances B SkyB’s conduct was warranted.

The essential facts of what occurred were not disputed by B SkyB. It acknowledged that it accessed the emails and that this was done on the authority of the then Deputy Head of News and Managing Editor, who did not take legal advice. It acknowledged too that it did not have written guidelines concerning the authorisation of potentially unlawful conduct. B SkyB has subsequently introduced and provided Ofcom with its new Guidelines setting out the referral and sign off process in relation to any future proposal to gather a story using potentially unlawful means.

Ofcom sets out the evidence in detail below. However, Ofcom’s decision, in summary, is that:

- Mr and Mrs Darwin did have a legitimate expectation of privacy which was infringed by the accessing of their emails without their consent;
- Detecting and revealing crime may be a public interest reason for the infringement and there was a genuine public interest in events surrounding Mr and Mrs Darwin's case; and
- BSkyB's conduct was warranted in all the circumstances.

Ordinarily, Ofcom would be unlikely to consider it warranted for a broadcaster to allow its journalists to access private email accounts and subsequently disclose email correspondence without permission or authority from the account holder for such programme content. Ofcom had further significant concerns about the particular facts of this case, in that the accessing of the email accounts had taken place while a police investigation and a criminal prosecution were ongoing and there was no suggestion that Mr Tubb had been investigating a failure in either the police investigation or the criminal prosecution. The lack of formal procedures for authorising the activity was also a matter of concern.

However, after careful consideration Ofcom came to the view that the conduct was warranted. The case had attracted considerable media and public attention at the time. The emails were accessed with a view to detecting or revealing a serious crime in circumstances where there appears to have been a real prospect that the relevant evidence would go unnoticed by investigating authorities. Ofcom does not consider that BSkyB could have obtained consent from Mr or Mrs Darwin to access the emails. BSkyB behaved responsibly once it had obtained the emails, passing them to the police and ensuring that there was no publication until after proceedings had concluded. Overall, although BSkyB's conduct is at the boundaries of what is appropriate, Ofcom considered that it was warranted in the particular circumstances of this case.

## **Background**

By way of background to the story, on 21 March 2002, Mr John Darwin staged his own apparent drowning at sea in a canoeing accident. The Coroner's Inquest on 16 April 2003 returned an open verdict and Mr Darwin was declared dead. Mrs Darwin made claims on insurance and pension policies and, in total, approximately £250,000 was paid out to her.

However, shortly after his disappearance, Mr Darwin had returned home in disguise. He had used the identity ('John Jones') of a child who had died in 1950 and was able to obtain the necessary documents to be able to live under a false identity undetected. With money obtained by Mrs Darwin through the pension and insurance policies and the selling of properties in the UK owned by the couple, Mrs Darwin set up a property-owning company in Panama. In October 2006, Mrs Darwin emigrated to Panama leaving her family with the impression that she, now a widow, was financially secure and settled in a new country. During this time, Mr Darwin had also moved to Panama.

On 1 December 2007, Mr Darwin returned from Panama and walked into a London police station stating that he believed that he was listed as a missing person. He claimed that he had amnesia and could not account for his whereabouts over the past five years. However, in January 2008, Mr Darwin confessed to having staged his own death in order to claim money that he was not entitled to. Mrs Darwin also admitted that they had staged Mr Darwin's death in order to claim the money and to clear their debts. Mr Darwin indicated his intention to plead guilty from an early stage.

Mrs Darwin initially pleaded not guilty in relation to the alleged offences, but later relied on the defence of marital coercion at her trial in July 2008. The jury rejected her defence and Mrs Darwin was found guilty on 23 July 2008. Both Mr and Mrs Darwin were each sentenced to over six years' imprisonment.<sup>7</sup>

On 5 April 2012, Mr John Ryley<sup>8</sup>, Head of Sky News, issued a press statement in which he revealed that Sky News had authorised a journalist, Mr Gerard Tubb, to access the email accounts of individuals suspected of criminal activity. The statement referred specifically to Sky News' coverage of "the Darwin story" about which Mr Ryley said:

"[i]n the 2008 case of Ann[e] Darwin, Sky News met with Cleveland police and provided them with emails offering new information relevant to Mrs Darwin's defence. Material provided by Sky News was used in the successful prosecution and police made it clear after the trial that this information was pivotal to the case. We stand by these actions as editorially justified and in the public interest".

Ofcom also noted the surrounding news coverage about this story, in particular, an article in The Guardian newspaper entitled "Sky News admits hacking emails of 'canoe man'" dated 5 April 2012<sup>9</sup> and the Sky press release of the same date headed "A case of double standards?"<sup>10</sup>.

### **Broadcast footage**

#### **1. Live coverage on 23 July 2008 – Teeside Crown Court**

Ofcom considered the footage of Mr Tubb reporting the verdict of the jury in Mrs Darwin's trial. Mr Tubb, who was filmed live outside the courthouse, made the following comments:

*"Anne Darwin, I'm just hearing, is guilty...Little surprise really to anyone who was sitting in court and let me tell you, now that the Contempt of Court Act no longer applies, no surprise at all to Sky News because it was Sky News who played a central part in this case. What I haven't been able to tell you over the last week is that we supplied a considerable amount of the information that was used in court. As a result of my investigations over the last seven months, we uncovered correspondence between Anne and John Darwin, we handed it to the police and that correspondence was used in court. The prosecuting barrister gave it to the jury, the jury was told by Andrew Robertson QC, these emails – although they weren't told they'd come from Sky News – these emails show that John and Anne Darwin were partners in marriage and in fraud. Until we discovered those documents and handed them over to the police, they really didn't have any documents that showed that there was this equal partnership between the two of them".*

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<sup>7</sup> Mr Darwin was sentenced to six years and six months. Mrs Darwin received a sentence of six years and three months.

<sup>8</sup> <http://skynews.skypressoffice.co.uk/press-releases/items/2012-04/2532/john-ryleys-statement-regarding-sky-news-darwin-story>

<sup>9</sup> <http://www.guardian.co.uk/media/2012/apr/05/sky-news-hacking-emails-canoe-man>

<sup>10</sup> <http://skynews.skypressoffice.co.uk/press-releases/items/2012-04/2534/case-double-standards>

The Sky News presenter in the studio, Mr Dermot Murnaghan, asked Mr Tubb what tone the letters took, in response to which Mr Tubb stated:

*“They showed that they were very, very much in love, they showed that they were working as a very close team, they showed that the prosecution who – and whilst we made all of this information available to the police, it came quite late, it was on July 9<sup>th</sup> that we were able to hand the information to the police. They didn’t get the chance to look at everything, they decided to continue with the prosecution and they weren’t able to assess all of the information which I have been able to assess and was able to work out exactly what it meant. That last critical email, you will remember, we handed that to the police, the one in which she sent to John Darwin as he was flying through the air to come back and hand himself in London, her email said ‘Don’t leave me’. That was what everyone thought they’d had a huge row, the prosecuting barrister in the court said ‘Come on Mrs Darwin, tell us the truth’ and it wasn’t the case. ‘Don’t leave me’ was just a pet phrase between them. She’s guilty of everything, all 15 charges, the jury has announced and get a load of this – this is the answer to the question that everyone wants to know, why did John Darwin come back? This is his master plan, it lays out...we found this in the investigation that I did, it shows why John Darwin came back. It was all...he explained that she had to come to Panama, he needed to come back to get a visa. He was living as John Jones in Panama and John Jones was no good, he had to be legitimate or he couldn’t stay in Panama, the full story can now be revealed by Sky News”.*

Ofcom noted that at this point in the programme, pre-recorded material was broadcast in which Mr Tubb set out the detail of his investigation that uncovered the email evidence and the events leading up to Mr and Mrs Darwin’s conviction. In particular, Mr Tubb stated that:

*“A Sky News investigation uncovered evidence that proves she was lying. This exclusive picture shows Mrs Darwin on holiday in Costa Rica last November...Another exclusive of her picking up a luxury car, bought with the proceeds of crime in October...And we found correspondence from John to Anne proving he got her to make decisions, he even apologised to her for not asking her permission...”.*

Ofcom understood that the photographs of Mrs Darwin accompanying Mr Tubb’s statements had been obtained from the email correspondence that Mr Tubb had accessed. The programme also showed some of this email correspondence on a computer screen and, although whole messages could not be read, parts of the detail of the emails could be seen.

Mr Tubb’s pre-recorded report continued and referred to some of the detail he had discovered in the email correspondence:

*“The emails we uncovered reveal every aspect of their lives and demonstrate how much they were in love. They decided to move to Panama, bought land there and installed him in an apartment. We uncovered a romantic photo he sent her when she returned home to sell up. In Panama he gloated they were ‘filthy rich’, she moaned about England and they tried to talk late at night”.*

The “romantic photo” referred to by Mr Tubb depicted a “love-heart” drawn in the sand on a beach, within which the names “John” and “Anne” were written.

An extract of a voice message sent via email (i.e. Skype) to Mr Darwin's email account by Mrs Darwin was also included in the pre-recorded report:

*(Mrs Darwin's voice) "Hello, it's me, I'm a bit later than planned but I'll try again in a few minutes, you must have a storm or something, I'll try and catch you tomorrow. Love you, bye".*

Mr Tubb went on to state that:

*"The evidence we uncovered and handed to the police was central to this trial. The jury was told these emails showed the Darwins were equal partners in marriage and in fraud, but we also discovered why John Darwin came back. This is his master plan, he laid it out. It shows there was no row, it was all planned".*

Ofcom noted that Mr Tubb was then shown holding the "master plan", part of which were shown in close up. Mr Tubb was also shown holding documents that appeared to be copies of some of the email correspondence. The detail of these documents could not be read on screen. Mr Tubb went on to announce a special *Sky News* programme that would be broadcast that evening, in which it:

*"reveals sort of all the evidence that I uncovered in that investigation and on the Sky News website, [skynews.com/news](http://skynews.com/news), there is a full time line of what I found out about the Darwins, with all those exclusive photographs of her enjoying herself in Panama, more of the emails that we uncovered, really explosive stuff. Don't forget, she was telling the jury 'I had no will of my own, I never enjoyed the benefits of the fraud' and yet we uncovered that photograph of her receiving the keys to the car, that is, effectively receiving the proceeds of crime. You couldn't want a better photograph to prove someone's guilt than I'm holding up an envelope stuffed full of cash. Just an astonishing story, blown wide open by our investigation".*

Mr Tubb went on to outline some of the story behind the reason for Mr Darwin's return to the UK.

While Mr Tubb was discussing the details of the case with Mr Murnaghan in the studio, Detective Inspector Andy Greenwood of Cleveland Police, the senior investigating officer in the case, appeared outside the court to give a statement to the media. Ofcom noted the following exchange between Mr Tubb and DI Greenwood:

Mr Tubb: *"Mr Greenwood, Sky News handed over the documents that it found...that we couldn't get them to you any earlier. How important were those emails showing that they had a loving relationship as far as you were concerned in the prosecution?"*

DI Greenwood: *Yes it was vital evidence. I'm sure that those emails were reacted to appropriately by the people who have heard the content of them. I am aware that there are others but we couldn't enter those as evidence because of the fact that we couldn't obtain them legitimately in the time frames that we had but they were pivotal to the case. However what I will say is that we did have a strong case in any event, there was a question arose in relation to the other emails and should we delay the trial or at least pose that question. I was confident that we should pursue the trial with the evidence that we had, clearly if she had walked from the court with a not*

- Mr Tubb: *guilty today I might not be saying that even now but I was confident that we had a strong case in any event.*  
*The prosecuting barrister said that they proved that they were equal partners, those emails, proved that they were equal partners in marriage and in fraud.*
- DI Greenwood: *Yes and certainly the information that I've had all along is that they were partners in this crime. In the trial...John was the maths behind the equation and Anne was the English...they worked as a team and I think that was fairly evident to all...[break in transmission]...emails where it was alluded to that Mr Darwin had something hot waiting for Anne when she got across to Panama might have summed the relationship up. Clearly Anne and John brought the family up in a somewhat traditional way, but clearly the events over the last five years, who can really describe that? I can't".*

Later in the conversation, Mr Tubb referred to Mr Darwin being able to:

*"get around money laundering in this country, we found two emails where people actually said sorry you can't do this because of money laundering regulations..."*

After DI Greenwood had made his statement to the media outside court, Mr Tubb said to camera that:

*"...as you heard him say there, they had a good case anyway they thought before we came forward with our evidence but to be honest they did not have, and they know they didn't have, any documentary evidence that showed the Darwins had a close relationship and these emails that we've turned up and as I say you can see on the Sky News website, sky.com/news, have a look at the timeline that we've built up detailing those emails and that very close loving relationship, this partnership described in court when those emails were given to the jury as evidence of a partnership in marriage and a partnership in fraud, that was really what sank Anne Darwin".*

Ofcom noted that the remainder of the footage provided to it by BSkyB contained a repeat of the pre-recorded footage that appeared earlier in the broadcast and already noted above.

2. *"Canoe Man: The Rise and Fall of John Darwin" broadcast on 23 July 2008 and in December 2008*

BSkyB provided Ofcom with a recording of Sky News' programme entitled *Canoe Man: The Rise and Fall of John Darwin*, which was first broadcast on the evening of 23 July 2008, after the conviction of Mrs Darwin. The programme broadcast in December 2008 was an edited edition of the original broadcast in July 2008. However, the parts of the programme relevant to Ofcom's investigation remained unaltered from the original broadcast of the programme. Below are excerpts taken from the footage that Ofcom believed relevant to its investigation into whether or not Rule 8.1 of the Broadcasting Code was breached by the access and subsequent broadcast of information obtained from that access.

Ofcom noted that the programme began with Mr Tubb introducing the story of Mr and Mrs Darwin's deception and stated that:

*“With John and his wife Anne now in jail for fraud, we have obtained exclusive access to the Darwin’s emails, their photographs and their master plan and we can reveal why he did it, how he got away with it and why he blew it by coming back”.*

In the second part of the programme, Ofcom noted that Mr Tubb stated that *“With our exclusive access to John and Anne’s emails, we can reveal what they did next”*. The programme went on to detail a number of activities by Mr Darwin in trying to obtain property and luxury yachts with the money he and his wife had obtained through deception. Later in the programme, Mr Tubb referred to the apartment which Mr and Mrs Darwin had bought in Panama City and stated:

*“Their emails show him stuck in the rainy season on his own with no car and lost without his wife. He had problems with fleas and the language. They used an internet phone to talk and secret email accounts to exchange internet messages, not always with the greatest success”.*

At this point, an extract of a voice message sent via email to Mr Darwin’s email account by Mrs Darwin was included:

(Mrs Darwin’s voice) *“Hello it’s me, you’ve logged off Skype, I thought I’d try and catch you on Yahoo but you’re not answering this now. I’ll go and put the kettle on and try in a minute. I’m ringing, are you not hearing it ring? You must have a storm or something. I’ll try and catch you tomorrow”.*

Mr Tubb then stated:

*“John took a holiday over the border in Costa Rica and sent Anne a token of his affection, all the while they planned their next deceit. In John’s own words they were filthy rich gringos, they dreamed once again of becoming property tycoons on a far grander scale”.*

This was accompanied by photographs, captioned as *“John Darwin’s photographs”*, taken in Costa Rica including a photograph of a “love-heart” drawn on a beach, within which the names “John” and “Anne” were written. Also, details from plans of a house that Mr Darwin had drawn up were shown as was his “master plan” for his return to the UK. The programme also showed the photographs of Mrs Darwin that Ofcom understood had been obtained from the email correspondence accessed by Mr Tubb.

Towards the end of the programme, Mr Tubb stated:

*“The secret emails between John and Anne show that for six years Mark and Anthony had no idea their father was alive. Their mother had consistently lied to them and conned them into believing she would follow the Panama dream alone”.*

### 3. Compilation of broadcast material relating to “Canoe Man”

BSkyB provided Ofcom with a compilation of material that Sky News broadcast at various times and dates relating to Mr and Mrs Darwin’s case in 2008. Below are excerpts taken from this footage that Ofcom believed relevant to its investigation into whether or not Rule 8.1 of the Broadcasting Code was breached by the access of email accounts and subsequent broadcast of information obtained from that access.

Ofcom noted one example of broadcast material (undated, but presumably after the conviction of Mrs Darwin) in which Mr Tubb stated:

*“A series of emails was read out in court. One from September last year from John Jones to Anne Darwin said ‘Update on your time left in the UK. Look at it so that you can decide the best dates. Love you, see you this Sunday and pound went up – LOL’. Another sent from Anne Darwin to John Jones a few hours before Darwin handed himself in at a London police station says ‘I hope you had a good flight and everything is okay with the family. Did you manage to write the last chapter for your book on the way there. Love you, missing you already xxxxx’”.*

Mr Tubb’s comments were accompanied with on screen images depicting an email page containing the wording of the emails.

The compilation included footage of Mr Tubb’s live broadcast on 23 July 2008 outside Teeside Crown Court and the pre-recorded footage. Excerpts from this footage are already set out above. It also included some footage from the Sky News documentary programme, the parts of which that were relevant to Ofcom’s investigation are also detailed above.

## **Ofcom’s investigation and the broadcaster’s response**

### *Background to the investigation*

This matter first came to Ofcom’s attention on 5 April 2012 through an article on The Guardian website and a press release from Sky News the same day in which Mr Ryley (Head of Sky News) said the broadcaster had “authorised a journalist to access the emails of individuals suspected of criminal activity”. On 20 April 2012, Ofcom asked BSkyB, the Ofcom licence holder for the Sky News channel, for its formal representations on how the conduct of Sky News, specifically a journalist accessing the emails of individuals without appropriate authorisation from them, complied with Rule 8.1 (and the relevant “practices to be followed”) of the Broadcasting Code. In particular, Ofcom asked the broadcaster to explain whether there was *prima facie* evidence that a story was in the public interest and whether there were reasonable grounds to suspect that further material evidence could be obtained. It also requested BSkyB to demonstrate how it considered that the public interest outweighed the right to the privacy of those persons affected by Sky News’ actions and how any infringements of privacy were warranted in compliance with the Broadcasting Code.

In response, before addressing the specific concerns raised by Ofcom’s investigation, BSkyB said that Sky News did not usually undertake investigative journalism, however when it does, the record showed that it is extremely rare for it to authorise conduct which has the potential to involve contravention of the law. It said that when confronted with such concerns, Sky News’ approach was not *ad hoc* or in any way casual, but was serious and systematic as Sky News takes compliance with both the law and the Code very seriously. BSkyB also provided Ofcom with a copy of the written statement<sup>11</sup> given by Mr Ryley on 19 April 2012 to the Inquiry into the Culture, Practices and Ethics of the Press, (chaired by Lord Justice Leveson) (“the Leveson Inquiry”). This statement was made in response to a notice sent to BSkyB by the Leveson Inquiry which asked BSkyB to give a full account of the occasions on which it, or those acting for it, had accessed the emails of third parties. In this statement, Mr Ryley said that he was aware of two stories involving access of emails

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<sup>11</sup> <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Witness-Statement-of-John-Ryley.pdf>

of third parties by Sky News and that they involved the same journalist, Mr Gerard Tubb. He explained that on each occasion, authorisation for third party access had been given to Mr Tubb by his line manager, Mr Simon Cole, the then Managing Editor and Deputy Head of Sky News.

Ofcom noted that on 23 April 2012, Mr Ryley appeared in person to give oral evidence to the Leveson Inquiry<sup>12</sup>. Mr Ryley was examined by one of the Counsel to the Inquiry (Mr David Barr) on a number of points relating to the accessing by Mr Tubb of Mr Darwin's email accounts and raised in Mr Ryley's witness statement. Ofcom took this evidence into account and considered the transcript of his oral evidence together with BSKyB's response to Ofcom.

In its statement in response to Ofcom, BSKyB said that historically (and at the time Mr Tubb obtained permission from Mr Cole), Sky News had no written guidelines specifically relating to its procedures for the authorisation of potentially unlawful conduct. In part, BSKyB said that this was due to the fact that such instances had been extremely rare. Sky News' approach to authorising stories which might have involved legal or regulatory considerations had been to require the approval of a senior editor (at the level of the Head of Home News or the Head of International News or higher). Normally, BSKyB said that that editor would also then consult BSKyB's in-house lawyers, although this had not been a prerequisite. It said that those in senior editorial positions at Sky News were well aware of the high ethical standards which Sky News demanded. They had received training and legal advice and had years of experience which enable them to make appropriate judgments on whether and how to proceed with a given story.

BSkyB said that Mr Tubb (Sky News' North of England Correspondent) had been following the story from the beginning, ascertained from open-source internet searches of publicly available information that Mr Darwin had assumed the identity of "John Jones" and had used this pseudonym to open a Yahoo email account. Mr Tubb was also aware that Yahoo email accounts could be accessed by guessing answers to a series of simple security questions. BSKyB said that by June 2008, Mr Tubb had strong grounds to believe that the email account was likely to contain messages between Mr and Mrs Darwin during the time that Mr Darwin was presumed dead and which would undermine Mrs Darwin's denial of complicity in the deception. He said it became apparent to Mr Tubb from "sources close to the prosecution" that the email account in question would not be investigated by the police.

In his statement to the Leveson Inquiry, Mr Ryley said that on 12 May 2008, Mr Tubb had shared with Mr Cole his belief that the email account may contain information relevant to Mr and Mrs Darwin's trial and that the prosecuting authorities would be unlikely to access the account. After consideration of the public interest justification, Mr Ryley said that Mr Cole gave Mr Tubb permission to access the email account with the intention of disclosing any relevant information to the police. On 14 May 2008, Mr Tubb emailed Mr Cole referencing their earlier discussion and said:

"Next year we can all celebrate being awarded the Queen's Police Medal for bringing the Darwins to justice..."<sup>13</sup>

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<sup>12</sup> <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-23-April-20121.pdf>

<sup>13</sup> <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Exhibit-JHR1.pdf>

Mr Ryley went on to state that in early June 2008, and prior to accessing any emails, Mr Tubb had again spoken to “sources close to the prosecution” who confirmed that the police would not be examining the ‘John Jones’ email account. The email account in question was a *Yahoo!* Account. Mr Tubb knew that the security of those accounts was at the time notoriously weak and access would be possible if either the password to the account or a security question (such as the account holder’s favourite film) could be guessed.

BSkyB said that it was at this stage that Mr Tubb sought and obtained permission from his line manager, Mr Cole, the then Deputy Head of News and Managing Editor, to access the email account, explaining also his understanding that the police would not be pursuing their own investigation into the email account. Mr Cole agreed to this request on the basis that there was a compelling public interest justification in securing information that Mr Tubb reasonably suspected could be found in the email account (and which, if found, would likely prove highly valuable to the prosecution in the case against Mrs Darwin).

In his statement to the Leveson Inquiry, Mr Ryley said that Mr Tubb accessed the email account on 13 June 2008 and discovered emails from Mrs Darwin which led to the identification of a number of email accounts in her name. At this point, Mr Cole gave Mr Tubb permission, verbally, to access these further accounts on the same basis as the access to the ‘John Jones’ account. Within five days, Mr Tubb had accessed at least one further account, but was still struggling to access a further two accounts. Mr Ryley said that on 18 and 19 June 2008, Mr Tubb and Mr Cole exchanged emails on Mr Tubb’s progress. In an email sent to Mr Cole on 19 June 2008 at 08:58 hours, Mr Tubb said:

“I’m tracing the IP addresses of the emails to and from Panama – to show who was where and when...

[redacted] have told me the info I have (which they think I am still looking for) is very important.

I’ve also found five voicemail messages from her trying to contact him last year – ‘where are you, I’ve been ringing and ringing...’. She sounds a right drip”.

Later on the same day at 13:44 hours, Mr Tubb concluded the exchange by saying that he had located enough material in relation to Mrs Darwin “to make her put her hands up for sure”. In relation to the reference to “voicemail messages” in Mr Tubb’s email, Mr Ryley clarified in his statement that these were voice messages that sat in an email account, rather than on any telephone. They were delivered via a system by which people could communicate to each other by voice via a computer over the internet. Mr Ryley said that he was not aware of any Sky News reporter ever having accessed voicemails on telephones or otherwise having engaged in telephone “hacking”.

In his oral evidence to the Leveson Inquiry, Mr Ryley was asked how certain he could be that the police were not going to examine the email accounts when preparing for the trial of Mrs Darwin. In response, Mr Ryley said that “Because of conversations, both formal and informal, that would have taken place between the correspondent [i.e. Mr Tubb] and close...sources close to the prosecution”. Counsel to the Inquiry asked Mr Ryley if he knew whether or not Mr Tubb tried to persuade the police to investigate, first of all, the ‘John Jones’ email account and then later other email accounts. Mr Ryley responded by referring to paragraph 20 of his witness statement in which he stated that “it became apparent to him from sources close to the

prosecution that this email account would not be examined by the prosecution” and he said that “so I would suggest that he would probably have been wasting his time”. Lord Justice Leveson observed that “if the police had wanted to do so, they had to get all sorts of warrants and all sorts of authority. Otherwise they would run into evidential problems as to admissibility”. Mr Ryley said that “sources close to the prosecution were...made clear that they weren’t going to be following up the emails”. Mr Ryley said that he did not think that there had been any encouragement from the police for Mr Tubb to access the accounts.

Counsel to the Inquiry also asked Mr Ryley what his view was that at this stage his reporter was in effect investigating the crime rather than reporting on it. Mr Ryley said Mr Tubb had been researching a “court backgrounder”. In response to this, Lord Justice Leveson said “But he clearly was investigating it. I mean, that’s what he was doing. It’s different from the situation where the press find out about some evidence to create a story. Here the police were on the task, they were on the job, there was a prosecution going, there was a trial set up, and your reporter decided: well, he could help it along a bit by investigating it. Indeed, he almost says as much in one of his later emails, doesn’t he?” Mr Ryley confirmed that he did. Mr Ryley acknowledged that investigating a crime and reporting a crime were not the same and said that the “job of a journalist is to report the news”.

Turning again to Mr Ryley’s written statement, Mr Ryley went on to say that on 23 June 2008, Mr Cole and Mr Tubb met with the Head of Home News at Sky News, Mr Mark Evans, to discuss providing the pertinent emails to the police. Mr Ryley said that he was told by Mr Tubb that it was agreed, given Mrs Darwin’s impending trial, that the emails should be provided as soon as possible. Mr Tubb was asked to put all the emails he thought relevant into a database and to analyse them. On 27 June 2008, Mr Tubb emailed Mr Cole and Mr Evans and a producer involved in the production of the Sky News documentary into the Mr and Mrs Darwin, which was broadcast after Mrs Darwin’s conviction, to confirm that he had accessed the remaining email accounts and to summarise what he perceived as the highlights. Mr Cole replied to indicate that Mr Ryley wanted to be updated on the documentary (though Mr Ryley made it clear in his statement that he was not aware of any details of Mr Tubb’s investigation or that it had involved access to Mr and Mrs Darwin’s email accounts). In this email, sent at 09:26 hours, Mr Tubb said:

“I’ve got into the last of the email accounts – we now have most of her correspondence with her kids and friends – up to and after he turned up here. None of them knew anything.

I’ve found two good pictures of her in Panama and Costa Rica, and details of their last romantic holiday together in Costa Rica just before he came back (including hotel, route taken and holiday pictures)”.

An email sent in reply by Mr Cole at 09:27 hours on the same day stated:

“Excellent – Ryley is keen for an update so when all this secret squirreling is complete is the time to brief him”.

On 30 June 2008, Mr Cole emailed Mr Tubb about briefing Mr Ryley, stating that:

“He’s been told you’ve nailed the missus and cleared the boys. Keep the presentation brief as he has a low boredom threshold”.

Mr Ryley also said in his statement to the Leveson Inquiry that he was briefed so that he could confirm that he was happy that Sky News should run the story and provide the emails to the police. Mr Ryley said that he was eventually briefed by Mr Evans and Mr Tubb on 1 July 2008 and immediately following the meeting, Mr Evans sent him an email to confirm what had been discussed:

“Gerard Tubb has uncovered startling and exclusive evidence in his investigation into the John and Anne Darwin backgrounder.

He has evidence that the two were colluding, that her defence of acting under coercion is a sham and that further financial crime appears to have been committed. This evidence is not known to the police.

It was obtained by Gerard hacking an email account and there is a possibility that this may have contravened the law”.

Mr Ryley said in his statement that this email also referenced both external and internal legal advice (taken after the emails had been accessed) on the risks of prosecution associated with running the story and disclosing the emails to the police. He also said that since the whole purpose of the access had been to uncover evidence to assist the police to prosecute a crime, Mr Ryley said that he had taken the view that there was a clear public interest in the police being provided with the relevant material. In his oral evidence to the Inquiry, Mr Ryley acknowledged that it was a bit too altruistic to say that the “whole purpose” had been to assist the police and that another motivation was journalistic investigation for the purposes of a story. Having been apprised of the background, Mr Ryley authorised Mr Evans and a BSkyB lawyer to visit Cleveland Police on 9 July 2008 to share their findings with them. He said the police were provided with a number of the emails which were most significant to the offences for which Mrs Darwin was charged, the log-in and password details of the various accounts accessed, and a summary of why Sky News believed that her defence must fail.

In his oral evidence to the Inquiry and in response to a question about how the police had used the log-in and password details of the email accounts accessed by Mr Tubb, Mr Ryley said that he understood that the police had used the passwords that Mr Tubb had obtained and provided to them to access the accounts themselves. Mr Ryley said that he did not know if the trial judge had been informed that the emails had initially been uncovered as a result of them being accessed by a Sky News reporter. Lord Justice Leveson explained that if the prosecution had wanted to use the emails, they would have had to find a way of obtaining the information lawfully. Mr Ryley confirmed that he did not know if the police had obtained any legal authority to access the emails themselves.

BSkyB said in its statement in response that Sky News only broadcast the story following Mrs Darwin’s conviction on 23 July 2008. It said that Sky News did not seek to conceal the source of the information that it had provided to the police, and had also made it clear in its coverage of the trial that evidence gained through its own investigation into Mr and Mrs Darwin had been handed over to the police. BSkyB said that the police acknowledged publicly the “*pivotal*” role played by Sky News in securing Mrs Darwin’s conviction.<sup>14</sup> (See excerpts from the Sky News footage set out in the “Broadcast footage” section above). In his oral evidence to the Inquiry, Mr Ryley acknowledged that the broadcast footage which referred to Sky News

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<sup>14</sup> Detective Inspector Andy Greenwood of Cleveland Police, as reported by Sky News in 2008 (see extract from programme as set out in the “preliminary view” section below).

obtaining the material from email accounts did not go so far as to say how Mr Tubb had accessed the email accounts in question.

*BSkyB's response to Ofcom's request for representations in relation to Rule 8.1*

In relation to the question whether Rule 8.1 of the Code was complied with, BSKyB said in its response to Ofcom that Sky News contended that if any infringement of privacy took place, it was warranted as Mr and Mrs Darwin had engaged in criminal activities and/or made misleading claims. BSKyB said that in the particular circumstances of Mr and Mrs Darwin's case the necessary public interest requirement in obtaining and then broadcasting the material was satisfied. It said that Mr Tubb intended to access the email accounts in order to demonstrate that Mrs Darwin was not the innocent victim that she portrayed publicly and that she had been involved in the deception from the beginning. BSKyB said that the Broadcasting Code states that "*detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations*" may all be considered appropriate public interest justifications for an infringement of privacy, and accordingly, the action was warranted as being in the public interest for the purposes both of detecting and revealing crime, and exposing the fraudulent claims made by Mr and Mrs Darwin. Therefore, BSKyB said that Rule 8.1 was not infringed.

BSkyB said that Mr and Mrs Darwin's case had stirred a great deal of public curiosity and, in relation to Mrs Darwin's assertions of innocence, there was a public interest in exposing the truth behind those assertions as part of the wider story. As such, BSKyB said that there could be no doubt (particularly once the criminal issues became apparent following Mr Darwin's confession and guilty plea in March 2008) that there was *prima facie* evidence that the matter was in the public interest and that, in turn, any potential infringement of Mr and Mrs Darwin's privacy was warranted on that basis.

Regarding the issue of "reasonable grounds to suspect that further material evidence could be obtained" as raised in Ofcom's letter of 20 April 2012, BSKyB said that Mrs Darwin's initial claims of innocence and stated ignorance of her husband's activities appeared, in the circumstances, unlikely and, therefore, it was reasonable for Sky News to suspect that email messages between the couple might have taken place. It said that when it became apparent to Mr Tubb that the police would not be investigating the 'John Jones' email accounts, it was clear to him that unless he reviewed that account any material would go undisclosed. Mr Tubb's accessing of the account was therefore the only way that information of significant public interest would come to light.

BSkyB said that it was self-evident that it was necessary to the credibility and authenticity of the programme that Sky News obtained the material in question, in the manner that it did, and to include references to that information in broadcast programmes. It said that there would not have been a story without the material found in the emails. Furthermore, at no time did Sky News or Mr Tubb seek to conceal the source of the information, either from police, or in the broadcast material, which included screen shots of the emails between Mr and Mrs Darwin.

BSkyB recognised that persons under investigation may retain some right to privacy. In this case, it said that Mr and Mrs Darwin's legitimate expectations of privacy must, however, be considered in the light of their criminal conduct and misleading claims. In this regard, BSKyB said that it was worth noting that the common law recognises

that exposing misleading claims<sup>15</sup> and criminality<sup>16</sup> are well-established justifications for the invasion of a person's privacy. The significant level of publicity and interest in the extraordinary aspects of their story made them a legitimate focus for a "public interest" based investigation by Sky News, where there was no other way of obtaining the information.

BSkyB said that given the covert and criminal nature of Mr and Mrs Darwin's activities that Mr Tubb was seeking to uncover, it would have been unrealistic for consent to have been sought from the parties in question. This would, logically, be the case in respect of both obtaining material to make a programme and in relation to the actual broadcast of a programme containing the obtained material.

BSkyB said that in the context of a potential infringement of privacy in which questions of public interest arise, the proportionality requirement largely boils down to whether the infringement at issue is, again, warranted (i.e. that the methods deployed are justified by the purported objective). Beyond this, BSKyB said that it would also seem to require that there is no less intrusive way of achieving the stated objective of serving the identified public interest. Mr Tubb determined that the police were unlikely to pursue an investigation into the 'John Jones' email account. Suspecting that crucial information could be brought to light, the appropriate public interest consideration was confirmed with Mr Tubb's superiors at Sky News and the decision was made to proceed with accessing the email accounts. The information that ultimately came to light as a result of the Mr Tubb's investigation, and which was "pivotal" in securing Mrs Darwin's conviction, would not have come to the police's attention without Mr Tubb's efforts. Accordingly, BSKyB said that in Sky News' view, the means of obtaining the material was, in the particular and exceptional circumstances of this case, proportionate.

In conclusion, BSKyB said that Sky News firmly believed that the broadcasts relating to the Mr and Mrs Darwin's case did not infringe Rule 8.1 of the Broadcasting Code as the public interest outweighed any potential infringement of privacy, such that any such infringement was warranted. It also said that that the issues raised by this case are complex, dealing with the interaction between broadcasting regulation, the balancing of freedom of expression with the right to privacy and the need to consider whether it is in the public interest to enforce aspects of criminal law.

#### Further information requested by Ofcom and BSKyB's response

On 28 June 2012, Ofcom requested from BSKyB further information relating to the matters under investigation and on 13 July 2012, BSKyB provided Ofcom with its response. BSKyB said that it had not provided all the information requested by Ofcom as to do so would result in, or would be likely to result in, the disclosure of journalistic sources. BSKyB said that Ofcom would be aware that the protection of journalistic sources was an essential element of the protection afforded by Article 10 of the European Convention of Human Rights (i.e. the right to freedom of expression). BSKyB said that in the context of the present matters under investigation, this

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<sup>15</sup> BSKyB referred to *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 and *Ferdinand v Mirror Group Newspapers Limited* [2011] EWHC 2454 (QB) stating that unlike in Mrs Darwin's case, the misleading claims by Rio Ferdinand and Naomi Campbell related to matters which were not criminal offences, and as such the justification for invading their privacy was considerably lower than in this case.

<sup>16</sup> BSKyB referred to the comments of Eady J at paragraphs 118-119 of *Mosley v News Group Newspapers Limited* [2008] EWHC 687 (QB).

protection was recognised and respected during the questioning of Mr Ryley during the Leveson Inquiry.<sup>17</sup> It said that it expected Ofcom also to respect its right to protect journalistic sources during its investigation into the alleged unwarranted infringement of Mr and Mrs Darwin's privacy.

Details of Ofcom's request for further information and BSkyB's response are summarised as follows:

- i) Ofcom asked BSkyB to explain exactly what the "strong grounds" were in June 2008 which formed the basis of Mr Tubb's belief that the 'John Jones' email account was likely to contain communications which would undermine Mrs Darwin's defence of marital coercion.

BSkyB said that, as documented in Mr Ryley's witness statement and elaborated upon further in his oral testimony to the Leveson Inquiry, Mr Tubb had learned from information released by the police in December 2007 that Mr Darwin had used the pseudonym 'John Jones'. It said that it had also been reported in the press that the 'John Jones' pseudonym had been taken by Mr Darwin **after** [BSkyB's emphasis] his disappearance. Through a number of internet searches of the name 'John Jones', Mr Tubb discovered publicly available information that a 'John Jones' had previously objected to a planning application relating to a property adjoining the Darwin family home, and for which an email address for that 'John Jones' was provided.

Therefore, prior to accessing the 'John Jones' email account in June 2008, BSkyB said that Mr Tubb had strong grounds to believe that it was an account that was used by Mr Darwin only after his disappearance and, as such, that it would very likely contain emails relevant to Mr Darwin's deception. BSkyB said that the existence of an email account used by Mr Darwin after his disappearance, coupled with Mr Darwin's subsequent admission of guilt, made the contents of the email account even more relevant to the question of Mrs Darwin's potential involvement in the fraud. This was particularly relevant once it became known to Mr Tubb in 2008 from "sources close to the prosecution" that she proposed to run a defence of marital coercion to the charges against her. BSkyB said that it was these facts that provided Mr Tubb with the "strong grounds" that were referred to in BSkyB's letter of 21 May 2012.

- ii) Ofcom requested BSkyB to provide further explanation exactly how it became apparent to Mr Tubb by June 2008 that the 'John Jones' email account would not be examined by the police and precisely when this became apparent to him.

BSkyB referred to what Mr Ryley had already said in his witness statement and his oral testimony to the Leveson Inquiry and said that Mr Tubb had formed the view that the email account would not be reviewed by the police based on information received from "sources close to the prosecution". For the reasons identified above concerning the protection of journalistic sources, BSkyB said that it declined, respectfully, to disclose further information that might disclose that source. It also said that the requested information was not determinative of the question of whether Rule 8.1 of the Broadcasting Code had been infringed, and that there was no overriding requirement in the public interest that might require disclosure in the present circumstances.

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<sup>17</sup> See page 12, line 17 of the transcript of Mr Ryley's oral evidence to the Inquiry (see footnote 14 above).

- iii) Ofcom requested BSkyB to provide details of all and any communications (including notes of conversations and emails) between Mr Tubb and the police during the course of Mr Tubb's investigations into Mr and Mrs Darwin (between December 2007 to July 2008). In particular, Ofcom requested the communications which lead Mr Tubb to take the view that the police would not investigate the 'John Jones' account and the communications between Mr Tubb and/or Sky News and the police and/or the prosecution team which disclosed the material obtained from the accessed email accounts.

BSkyB referred to what Mr Ryley had already said in his witness statement and his oral testimony to the Leveson Inquiry and said that Mr Tubb "spoke to sources close to the prosecution who confirmed that the police would not be examining the John Jones email account". It went on to say that for the reasons given in point ii) above, BSkyB declined, respectfully, to disclose further information in response to Ofcom's request that might lead to the disclosure of the identity of those sources. BSkyB also said that the requested information was not determinative of the question of whether Rule 8.1 of the Broadcasting Code had been infringed, and that there was no overriding requirement in the public interest that might require disclosure in the present circumstances.

However, BSkyB did provide Ofcom with a copy of the letter sent by Sky News to Cleveland Police dated 9 July 2008 setting out the results of the Sky News investigation into Mr and Mrs Darwin to the police. The letter provided the police with copies of relevant emails and disclosed the details and passwords for those accounts that had been accessed in order that the police could investigate. BSkyB said that the letter was not provided previously to Ofcom as, until very recently, Sky News had been unable to locate a copy of the version sent to the police.

- iv) Ofcom requested BSkyB to state exactly what the grounds were on which Mr Tubb relied in making his requests to Mr Cole, the then Deputy Head of News, for permission to access the email accounts in question.

In relation to the four email accounts for which permission was sought prior to the broadcasts of the news reports immediately following Mr and Mrs Darwin's convictions, BSkyB referred Ofcom again to Mr Ryley's statement which it said made it clear that the ground relied on by Mr Tubb in each instance was to investigate a story that was in the public interest; namely, the likely disclosure of information that would undermine Mrs Darwin's defence of marital coercion.

- v) Ofcom requested the dates of each of the requests for permission made by Mr Tubb to Mr Cole, and to provide it with any documents recording any communications between Mr Cole and Mr Tubb on the matter.

BSkyB said that permission for initial access was sought by Mr Tubb on 12 May 2008. Thereafter, permission was again sought in mid-June 2008 (shortly after the first actual access on 13 June 2008). BSkyB said that it confirmed that all relevant documents of which it was aware recording communications between Mr Tubb and Mr Cole had been provided to the Leveson Inquiry as an exhibit which was provided to Ofcom with its initial letter of response dated 21 May 2012.

- vi) Ofcom requested BSkyB to explain precisely how Mr Tubb accessed each of the email accounts.

BSkyB said that the letter to Cleveland Police dated 9 July 2008 set out the email accounts initially identified by Mr Tubb, those actually accessed and the means by which access was achieved (i.e. the passwords to those accounts). In addition, BskyB said that Mr Ryley's statement to the Leveson Inquiry described how Mr Tubb initially gained access – namely, by guessing the answers to security questions. The same means of access was thereafter deployed in the case of all other accessed accounts except one where Mr Tubb was able to deduce the password of the account directly, which he was able to do by acquiring knowledge, through reading emails in other accounts, of the types of password used by Mr and Mrs Darwin.

- vii) Ofcom requested BskyB to provide details of all the other related accounts subsequently accessed by Mr Tubb.

BskyB said that the letter to Cleveland Police of 9 July 2008 provided details of the first four accounts.

- viii) Ofcom requested BskyB to explain when and how Mr Tubb learned of the existence of the other email accounts.

BskyB said that Mr Ryley's statement to the Leveson Inquiry described how Mr Tubb became aware of the 'John Jones' email account. Through that account, Mr Tubb discovered the three other email accounts that were disclosed to Cleveland Police in the letter of 9 July 2008.

- ix) Ofcom requested from BskyB details of the information obtained by Mr Tubb from the accessed email accounts which Sky News considered was evidence of criminal activity, including copies of all the emails obtained (not limited to those handed to the police).

BskyB said that the information that Mr Tubb was seeking when accessing the four relevant email accounts was evidence that would demonstrate the extent of the criminal activities of Mr and Mrs Darwin, in particular the disclosure of facts that would undermine Mrs Darwin's defence of marital coercion, thereby exposing her misleading claims.

It said that Sky News had handed over all the relevant information by providing the Cleveland Police in the letter of 9 July 2008 with information to enable them to access the relevant accounts. BskyB said that Sky News (which, for the avoidance of doubt, included Mr Tubb as its employee) did not take copies of all of the emails reviewed by Mr Tubb in the course of his investigation. In any event, BskyB submitted that it was not the case that such emails were relevant to Ofcom's investigation into a possible breach of Rule 8.1 of its Broadcasting Code. Other than those emails attached to the Cleveland Police letter dated 9 July 2008, BskyB said that Sky News did not have copies of any of the emails accessed by Mr Tubb in 2008, or referenced in the Sky News broadcasts.

- x) Ofcom requested BskyB to state how many of the emails accessed by Mr Tubb in the accounts in question were handed to the police and/or were regarded by him as relevant to the prosecution of Mrs Darwin. It also asked what Mr Tubb did with the remaining emails not handed to the police, and to account where they were now.

BskyB said that the emails of particular relevance to the case against Mrs Darwin were provided to Ofcom along with the Cleveland Police letter dated 9 July 2008.

Other emails and documents considered relevant were referenced in the Sky News broadcasts. However, BSkyB said that no copies of these emails were retained by Sky News. It said that all the emails remained in the original email accounts to which the police had access (i.e. the emails were not deleted from the accounts).

BSkyB concluded its response by stating that Cleveland Police had contacted Sky News regarding the events in question (i.e. Mr Tubb's unauthorised accessing of Mr Darwin's email accounts) and were investigating the matter.

### **Ofcom's consideration of Sky News' Compliance Procedures**

During the course of Ofcom's investigation, Ofcom considered whether Sky News' compliance procedures were adequate. In this instance, even though the accessing of the email accounts was done on the authority of the then Deputy Head of News and Managing Editor, Ofcom was concerned that there appeared to be an absence of any formal approval process in place.

On 13 June 2012, BSkyB's General Counsel wrote to Ofcom explaining that Sky News would be introducing new Guidelines which would mandate that any future proposal to gather a story using potentially unlawful means would have to be approved in advance by the relevant senior editor, the Head of Sky News and Sky's in-house legal department. He explained that such approvals would also have to be documented. BSkyB has subsequently sent Ofcom these new Guidelines containing this referral process and further stating that "*given the potential ramifications for the company as a whole, the Head of Sky News will also consult with Sky's Chief Executive*".

Ofcom has reviewed Sky News' new Guidelines: they state that there may be "*very rare occasions where providing accurate, impartial and fair coverage in the public interest involves possible conflict with the law*". Ofcom considers that with this more senior oversight and formal sign-off process in place, Sky News' compliance procedures are now adequate.

### **Decision**

As set out in the "Introduction" above, 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 programmes, 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 the broadcaster in response to Ofcom's investigation.

This included recordings of the footage broadcast provided to Ofcom by BSkyB (excerpts of which are set out in the "Broadcast footage" section at the beginning of this document) and BSkyB's written submission in response, and supporting material

including transcripts of the relevant broadcasts. Ofcom also considered Mr Ryley's written statement and accompanying exhibit provided to the Leveson Inquiry and the transcript of his oral evidence to the Leveson Inquiry.

Ofcom provided BSkyB with the opportunity to make representations on its Preliminary View (which was not to find BSkyB in breach of the Broadcasting Code). BSkyB confirmed to Ofcom that it did not have any representations to make on Ofcom's Preliminary View.

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 Broadcasting Code, which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted. The explanation of the meaning of "warranted" under Rule 8.1 of the Broadcasting Code states 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 would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations, disclosing incompetence that affects the public.

In assessing whether or not the broadcaster breached Rule 8.1 of the Broadcasting Code, Ofcom considered whether or not the privacy of Mr and Mrs Darwin had been unwarrantably infringed, first, in the obtaining of material included in the programme and, second, in the programmes as broadcast.

Before assessing whether or not Mr and Mrs Darwin's privacy was unwarrantably infringed in connection with the obtaining of material included in the programmes and in the programmes as broadcast, Ofcom noted the footage broadcast by Sky News and the specific references made by Mr Tubb regarding accessing Mr Darwin's email accounts and Mr and Mrs Darwin's email correspondence.

Having carefully viewed the recordings of the broadcast footage provided by BSkyB and read the transcripts, Ofcom went on to consider whether or not the matters under investigation resulted in a breach under Rule 8.1 of the Broadcasting Code.

a) Unwarranted infringement in connection with the obtaining of material included in the programmes as broadcast

Ofcom had regard to Practice 8.3 of the Broadcasting Code which states that when people are caught up in events which are covered by the news they still have a right to privacy in both the making and the broadcast of the programme, unless it is warranted to infringe it. It also had regard to Practice 8.5 which states that any infringement in the making of a programme should be with the person's consent or otherwise be warranted. It also had regard to Practice 8.9 which states that the means of obtaining material must be proportionate in all the circumstances and in particular to the subject matter of the programme.

In considering whether or not Mr and Mrs Darwin's privacy was unwarrantably infringed in connection with the obtaining of material included in the programmes as broadcast, Ofcom first considered the extent to which they had a legitimate expectation of privacy in respect of the material that was obtained (i.e. their private email correspondence through four private email accounts). Ofcom also had regard to the "Meaning of 'legitimate expectation of privacy'" as set out in the Broadcasting Code which states that people under investigation or in the public eye, and their immediate family and friends, retain the right to a private life, although private behaviour can raise issues of legitimate public interest.

Ofcom considered an individual's personal email account and the email correspondence and data contained therein could reasonably be considered as being private and that an individual would have an expectation that correspondence held in a private email account would not be accessed by another without appropriate authorisation. In this regard, Ofcom noted that it is a criminal offence under section 1 of the CMA 1990 (see footnote 5 above) knowingly to access computer material without authorisation. In this particular case, Ofcom noted that Mr and Mrs Darwin's email correspondence was accessed by Mr Tubb in the course of his own investigation into the circumstances surrounding Mr and Mrs Darwin's case. Ofcom noted too that Mr and Mrs Darwin were subject to an ongoing police investigation and a criminal prosecution at the time of the first unauthorised access (i.e. 13 June 2008).<sup>18</sup> Ofcom considered that in these circumstances, if the police had wished to investigate the email accounts in question, they would have done so by obtaining the appropriate warrants and authorisation. As Lord Justice Leveson observed when Mr Ryley was giving evidence to the Leveson Inquiry, "*...if the police had wanted to do so, they had to get all sorts of warrants and all sorts of authority. Otherwise they would run into evidential problems as to admissibility*".

While no complaint of unwarranted infringement of privacy has been received by Ofcom from either Mr Darwin or Mrs Darwin, it was not a matter of dispute that Mr Tubb had accessed four email accounts prior to Mrs Darwin's conviction on 23 July 2008 without either Mr or Mrs Darwin's consent. Nor was it disputed that the unauthorised accessing of computer material is a criminal offence (contrary to section 1 of the CMA 1990). Ofcom also noted that in its representations, BSkyB said that it recognised that persons under investigation may retain some right to privacy. In all these circumstances, Ofcom considered that both Mr and Mrs Darwin had a legitimate expectation of privacy in relation to their private email correspondence and, in particular, that it would not be accessed in the manner it was.

Having concluded that Mr and Mrs Darwin had a legitimate expectation of privacy in relation to Mr Tubb's access to the four email accounts prior to Mrs Darwin's conviction, and the email correspondence discovered as a result of that access, Ofcom went on to consider whether there was a public interest reason for the infringement.

In this regard, Ofcom accepted that Mr Tubb's reason for accessing the email accounts was to detect or reveal crime and that this may constitute a public interest reason for the infringement of the individuals' expectations of privacy.

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<sup>18</sup> Mr Darwin had pleaded guilty to the charges against him on 15 March 2008. Mrs Darwin's trial began on 14 July 2008 and the jury returned a guilty verdict on 23 July 2008.

Mr Tubb had credible grounds for his suspicion that the first account he accessed did indeed relate to Mr Darwin. Ofcom noted that BSkyB said that Mr Tubb had learned from information released by the police in December 2007 that Mr Darwin had used the pseudonym 'John Jones' and that through a number of internet searches, Mr Tubb discovered publically available information that a 'John Jones' had previously objected to a planning application in relation to the property adjoining the Darwin family home, and for which an email address for that 'John Jones' had been provided. Having accessed that account, there was reason to believe that the other accounts identified through the 'John Jones' account were also associated with the couple.

Ofcom noted that BSkyB said that Mr Tubb had strong grounds to believe that the email account was likely to contain messages between Mr and Mrs Darwin during the time that Mr Darwin was presumed dead and which would undermine Mrs Darwin's denial of complicity in the deception. BSkyB said these "strong grounds" were that he believed that the 'John Jones' account was an account used by Mr Darwin only after his disappearance and, as such, that it would very likely contain emails relevant to Mr Darwin's deception. Ofcom also noted that BSkyB said that the existence of an email account used by Mr Darwin after his disappearance, coupled with Mr Darwin's subsequent admission of guilt, made the contents of the email account even more relevant to the question of Mrs Darwin's potential involvement in the fraud.

Ofcom noted that BSkyB said that this was particularly relevant once it became known to Mr Tubb in 2008 from "*sources close to the prosecution*" that she proposed to run a defence of marital coercion to the charges against her. Ofcom requested further information from BSkyB about these "*sources close to the prosecution*" and for it to explain how exactly it became apparent to Mr Tubb that the email account would not be examined by the police. In reply, BSkyB said it "*declined, respectfully, to disclose further information as to do so would result in, or would be likely to result in, the disclosure of journalistic sources which were protected by Article 10 of the European Convention on Human Rights*". Ofcom is aware of and acknowledges the important protections afforded to journalists' confidential sources under Article 10 of the European Convention on Human Rights. In this particular case, Ofcom considered that it had sufficient information to proceed to reach its decision in the matter. Therefore, Ofcom did not request that BSkyB disclose any further information about the "sources close to the prosecution", as to do so would be a disproportionate interference with the journalist's and the broadcaster's Article 10 rights to protect the identity of the confidential sources. As BSkyB declined to provide any further information, Ofcom was unaware of the exact reasons why the police had decided not to investigate the email account any further. Whatever reason the police had for deciding not to investigate the 'John Jones' email account, Ofcom accepted that Mr Tubb had been told by a credible "source close to the prosecution" that this email account would not be investigated.

In these circumstances, Ofcom considered that there was a genuine public interest in Mr Tubb, as a journalist, seeking to obtain information about the commission of a serious criminal offence and which may, in some way, rebut Mrs Darwin's defence of marital coercion.

Ofcom had then to consider whether the public interest outweighed Mr and Mrs Darwin's legitimate expectation of privacy, such that in all the circumstances BSkyB's conduct was warranted.

Ordinarily, in the context of Ofcom's statutory duty to secure the application of standards to provide adequate protection to members of the public from unwarranted infringements of privacy resulting from activities for the purpose of television services, Ofcom would be unlikely to consider it proportionate for a broadcaster to allow its journalists to access private email accounts and subsequently disclose email correspondence without permission or authority from the account holder for such programme content.

Ofcom noted that the manner in which the four email accounts had been accessed by Mr Tubb prior to Mr and Mrs Darwin's convictions had been without their consent and each occasion of accessing was *prima facie* a criminal offence under section 1 of the CMA 1990. Ofcom therefore considers that the threshold for demonstrating that the means used were warranted is a high one.

Ofcom had further significant concerns about the particular facts of this case, in that the accessing of the email accounts had taken place while a police investigation and a criminal prosecution were ongoing and there was no suggestion that Mr Tubb had been investigating a failure in either the police investigation or the criminal prosecution. The lack of formal procedures for authorising the activity was also a matter of concern.

However, Ofcom recognised that Mr and Mrs Darwin's case had attracted considerable media and public attention at the time and it considered that there was a genuine public interest in Sky News' investigation into events surrounding Mr and Mrs Darwin's case. Ofcom placed weight on the broadcaster's competing right to freedom of expression, including the right to receive and impart information and ideas without interference by a public authority. In assessing the proportionality of the way in which the material was obtained in the circumstances of this particular case, Ofcom referred to the Director of Public Prosecutions "Guidelines for prosecutors in assessing the public interest in cases affecting the media" ("the Guidelines").<sup>19</sup> These Guidelines were published on 13 September 2012 and were not in place at the time of Mr Tubb's accessing of the email accounts but were useful in assisting Ofcom in its consideration of this case. The Guidelines remind prosecutors that journalists are not afforded special status under the criminal law but that in cases affecting the media and freedom of expression, a number of specific principles apply. The Guidelines acknowledge that offences under the CMA 1990 are some of the criminal offences "most likely to be committed in cases affecting the media" and that such offences do not carry an express public interest defence. In such cases, the Guidelines say that prosecutors, where there is sufficient evidence to prosecute, must go on to consider whether a prosecution is required in the public interest and they should specifically consider "*whether the public interest served by the conduct in question outweighs the overall criminality?*". If the answer to this question is "yes", it is less likely that a prosecution will be required in the public interest. The Guidelines note that "conduct which is capable of disclosing a criminal offence has been committed, is being committed, or is likely to be committed" is an example of conduct which is capable of serving the public interest.

Ofcom was aware that the Guidelines above were prepared to assist prosecutors in deciding whether or not to bring criminal proceedings against journalists and not for deciding whether broadcast journalists are in breach of the Broadcasting Code. However, Ofcom found the Guidelines useful in illustrating circumstances where it may not be in the public interest for a journalist to be prosecuted for an

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<sup>19</sup> [http://www.cps.gov.uk/consultations/media\\_guidelines.pdf](http://www.cps.gov.uk/consultations/media_guidelines.pdf)

offence under the CMA 1990 even where such an offence does not carry an express public interest defence.

Ofcom noted that on 18 March 2013, the Crown Prosecution Service (“the CPS”) announced its decision not to prosecute Mr Tubb in relation to the access of the email accounts belonging to Mr and Mrs Darwin. In particular, Ofcom noted the CPS’s view that “the evidence indicates that the public interest served by the conduct in question outweighed the potential overall criminality, should an offence be proved”. Furthermore, the CPS said that in reaching its decision it “took into account that the emails were accessed with a view to showing that a criminal offence had been committed and that a number of the same emails were subsequently lawfully obtained by the police and used by the prosecution at the criminal trial of Anne Darwin”. The CPS considered that any potential prosecution would not be in the public interest.

Ofcom considered that the purpose of revealing and detecting crime is an important reason why it may be appropriate to infringe a person’s legitimate expectation of privacy. In this case the emails were accessed with a view to detecting or revealing a serious crime in circumstances where there appears to have been a real prospect that the relevant evidence would go unnoticed by investigating authorities.

Ofcom had regard to the eventual outcome of Mr Tubb’s access of the email accounts (namely, the collapse of Mrs Darwin’s defence of marital coercion). Ofcom accepted that given the covert and criminal nature of Mr and Mrs Darwin’s activities, it would have been unrealistic for consent to have been sought from the parties in question.

It noted too that Mr Tubb had secured prior authorisation from the Deputy Head of News and Managing Editor before accessing the four email accounts.

BSkyB behaved responsibly once it had obtained the emails, passing the relevant emails voluntarily to the police in spite of the risk that this could trigger proceedings against BSkyB, and ensuring that there was no publication until after proceedings had concluded.

On balance and given all the factors set out above, Ofcom concluded that the broadcaster’s right to freedom of expression including the freedom to receive and impart information and ideas without interference, in the circumstances of this particular case, outweighed Mr and Mrs Darwin’s legitimate expectation of privacy. Overall, although BSkyB’s conduct is at the boundaries of what is appropriate, Ofcom considered that there was no unwarranted infringement of the Darwins’ privacy in connection with the obtaining of material included in the programmes as broadcast.

b) Unwarranted infringement of privacy in the programmes as broadcast

In considering whether Mr and Mrs Darwin’s privacy was unwarrantably infringed in the programmes as broadcast, Ofcom again had regard to Practice 8.3 of the Code (set out in head a) above) and Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless that infringement of privacy is warranted.

In considering whether or not Mr and Mrs Darwin's privacy was unwarrantably infringed in the programmes as broadcast, Ofcom first considered the extent to which they had a legitimate expectation of privacy in respect of the broadcast of details relating to their private email correspondence which had been accessed unlawfully. As stated in head a) above, Ofcom also had regard to the "Meaning of 'legitimate expectation of privacy'" (which states that people under investigation or in the public eye, and their immediate family and friends, retain the right to a private life, although private behaviour can raise issues of legitimate public interest) when considering the extent of Mr and Mrs Darwin's expectation of privacy.

Ofcom noted that the various programmes broadcast by Sky News made numerous references to the private email correspondence between Mr and Mrs Darwin which Mr Tubb had obtained, although Ofcom also noted that the programmes did not explain precisely how Mr Tubb had obtained the information from the email accounts. Also, Ofcom noted that footage of some of the email correspondence was shown in the programmes. This material is set out under the "Broadcast footage" section above.

For all the reasons set out above in head a), Ofcom considered that both Mr and Mrs Darwin had a legitimate expectation of privacy in relation to their private email correspondence that had been accessed without their knowledge or permission by the broadcaster and subsequently disclosed in broadcast programmes.

Having concluded that Mr and Mrs Darwin had a legitimate expectation of privacy in relation to the disclosure of the content of the email accounts accessed by Mr Tubb in the programmes broadcast, Ofcom went on to consider whether any infringement of Mr and Mrs Darwin's expectation of privacy was warranted. In doing so, Ofcom considered the broadcaster's competing right to freedom of expression including the freedom to receive and impart information and ideas without interference by public authority. In this respect, Ofcom considered whether, in the circumstances there was a sufficient public interest justification for the intrusion into Mr and Mrs Darwin's privacy.

As found in head a) above, Ofcom considered that it was warranted for Mr Tubb to have obtained the material from the private email accounts in the manner he did. For the same reasons, Ofcom considered that the subsequent broadcast of the material obtained from those private email accounts was warranted in the circumstances.

On balance, therefore, and given all the factors set out above, Ofcom concluded that the broadcaster's right to freedom of expression including the freedom to receive and impart information and ideas without interference, in the circumstances of this particular case, outweighed Mr and Mrs Darwin's expectation of privacy. Ofcom therefore found that the disclosure in the programmes broadcast of private email correspondence in the email accounts belonging to Mr Darwin that had been accessed without his knowledge or permission was warranted in the circumstances and that there was no unwarranted infringement of Mr and Mrs Darwin's privacy in the programmes as broadcast.

**Accordingly, Ofcom found BSkyB not to be in breach of Rule 8.1 of the Broadcasting Code.**

## Not Upheld

### Complaint by Mr Gary Radford

*Ultimate Police Interceptors, Channel 5, 2 and 4 April 2012*

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#### Summary

Ofcom has not upheld this complaint by Mr Gary Radford that he was unjustly or unfairly treated in the programme as broadcast and that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

The programme was part of a series which followed the operations of a number of high-speed mobile police units. It included footage from a previously broadcast episode of a series called *Police Interceptors*. This edition showed footage of Mr Radford being stopped in his car on a public highway and arrested for stealing petrol. He was also shown at the police station. In the broadcast footage Mr Radford's face was obscured by pixellation.

Mr Radford's solicitors, Howells LLP, complained to Ofcom on his behalf that he was treated unjustly or unfairly in the programme and that his privacy was unwarrantably infringed in connection with the obtaining of the material in the programme and in the programme as broadcast.

Ofcom found that:

- The broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of the complaint) were not presented, omitted or disregarded in a way that portrayed Mr Radford unfairly.
- On the particular facts of this case Mr Radford had a legitimate, albeit considerably limited, expectation of privacy in the circumstances in which he was filmed and in the subsequent broadcast of that footage. However, the public interest in filming and subsequently broadcasting footage showing the work of the police outweighed the intrusion into Mr Radford's privacy. Therefore, Mr Radford's privacy was not unwarrantably infringed in connection with the obtaining of material included in the programme or in the programme as broadcast.

#### Introduction

On 2 April 2012, Channel 5 broadcast an edition of its reality series *Ultimate Police Interceptors*, which followed the work of a police interception unit<sup>1</sup> in Derbyshire. The programme was repeated on 4 April 2012.

The programme was introduced with the commentary:

*"Ultimate Police Interceptors, the best arrests from the high speed high adrenalin pursuit specialists".*

After the title sequence, the commentary stated:

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<sup>1</sup> A police interception unit is a high-speed mobile police response team.

*“Coming up on this edition of Ultimate Police Interceptors: we turn the spotlight on Derbyshire’s team of pursuit specialists; there is a face off with a fuel thief”.*

The programme showed police officers investigating reports of a “suspected petrol thief”. The programme’s narrator later referred to the police officers “*hunting a fuel thief who has been hitting the local garages*”. One of the police officers, PC Nick Lovatt, said:

*“We’ve put an operation together to try and identify and detain the driver and the vehicle that’s responsible for over 37 recorded bilkings, making off without payment for fuel....Thousands of pounds worth of fuel that he’s had from service stations.”*

The programme’s narrator continued:

*“The petrol pilferer uses a variety of crafty disguises when at the pumps but always drives the same blue Volvo”.*

Another police officer was shown following a blue Volvo as it left a petrol station. The vehicle was eventually surrounded by police officers and the man driving the Volvo was shown being arrested and taken to a police station. Later in the programme, PC Lovatt said:

*“He’s been elusive for quite a while and he’s been cocky in the fact that he thought he could get away with it, to the point that he’s been giving the finger to cashiers that have realised what vehicle he’s in and decided not to serve him”.*

Footage was also shown of the driver at the police station, together with footage of his vehicle. The face of the driver and the vehicle’s registration plate were obscured in the programme as broadcast by pixellation. The driver of the vehicle was Mr Gary Radford.

The part of the programme featuring Mr Radford concluded by showing footage of Mr Radford (with his face obscured by pixellation) being taken to a police station, and shots of Mr Radford’s blue Volvo leaving the petrol station and of the interior of his car, including footage of a wooden stick and a hat, a wig and sunglasses, over which the commentary said:

*“The driver was charged with 22 offences of making off without payment, one charge of carrying an offensive weapon and one charge of going equipped to steal”.*

Following the broadcast of the programme, Howells LLP, Mr Radford’s solicitors, complained to Ofcom on Mr Radford’s behalf that he was treated unjustly or unfairly in the programme as broadcast and that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

## **Summary of the complaint and the broadcaster’s response**

### Unjust or unfair treatment

Howells LLP complained on Mr Radford’s behalf that he was treated unjustly or unfairly in the programme as broadcast in that:

a) Mr Radford was portrayed unfairly in that:

- i) He was referred to several times as a “*petrol thief*” and the programme incorrectly said that he was suspected of being involved in 37 incidents of making off without payment and stealing thousands of pounds worth of fuel. Mr Radford had not appeared in court in relation to his arrest when the footage was first broadcast on 23 January 2012 (as part of the *Police Interceptors* series).

In response Channel 5 said that it was not Mr Radford himself that the police and the programme were referring to as a “*petrol thief*”, but the “*suspect*” the police were looking for. Any statements in relation to the driver of a blue Volvo (such as that he was suspected of involvement in 37 such offences and had stolen thousands of pounds worth of petrol) were simply statements of the facts as the police understood them at the time. Channel 5 said that Mr Radford was referred to throughout as the “*suspect*”, that Mr Radford was always filmed from a position from which his face was not visible, or if it was visible then steps were taken to obscure his face with pixellation, and that Mr Radford was never named or identified.

Channel 5 continued that the part of the programme involving Mr Radford ended with a piece of commentary making it clear that the suspect was actually charged with only 22 offences of theft.

Channel 5 said that Mr Radford had pleaded guilty to 11 offences of petrol theft at Derby Crown Court on 23 March 2012, including the offence of making off without payment on 22 October 2011 in regard to which he was filmed, and that on 17 April 2012 Mr Radford received a Community Sentence Order of 100 hours unpaid work for these offences.

Channel 5 added that, as a consequence of Mr Radford’s court appearance and subsequent convictions, by the time the footage complained of was repeated in the programmes being considered in this Decision (*Ultimate Police Interceptors*, on 2 and 4 April 2012), Mr Radford’s criminal record was already a matter of public record. In the event that viewers were able to directly link Mr Radford to the events in the programme, the claim that he was suspected of 37 offences of petrol theft would not be likely to have affected viewers’ understanding of Mr Radford in a way that was unfair to him.

- ii) The police officer said Mr Radford had started to get “*cocky*” and had stuck two fingers up at staff at petrol stations when driving off.

Channel 5 in response said that Mr Radford was neither named nor identified and that the comments complained of were made about the suspect the police were looking for. Channel 5 stated that in view of the fact that Mr Radford had subsequently pleaded guilty to 11 offences of petrol theft it did not consider that such comments would be likely to have affected viewers’ understanding of Mr Radford in a way that was unfair to him.

- iii) The programme showed the police pointing out items found in the car, including a “*baseball bat*”, which was in fact a martial arts stick.

Channel 5 reiterated that Mr Radford was not identified in the programme and said that, given that a picture of the object was included in the footage, even though the object had incorrectly been described as a “*baseball bat*”, the

public would have been able to make its own mind up about it. Further, Channel 5 said that a martial arts stick and a “baseball bat” were both capable of being used for sport or as an “offensive weapon” and that it did not consider that referring to the item as a baseball bat rather than a martial arts stick would be likely to have affected viewers’ understanding of Mr Radford in a way which was unfair to him. In response to an allegation in the complaint that the “baseball bat” had been moved “for show”, Channel 5 said that the programme makers would not have entertained the thought of interfering with evidence in such a way, nor would the police officers have allowed anyone to do so.

- b) Mr Radford was not given an appropriate and timely opportunity to respond to the allegations made in the programme.

Channel 5 responded that the programme had not identified Mr Radford, and that even if it had, the charges faced by Mr Radford were a matter of public record. Channel 5 also referred to the restrictions placed upon broadcasters by the law of contempt once criminal proceedings become active. Channel 5 said that, as by 2 April 2012, when the programme (*Ultimate Police Interceptors*) was first broadcast, proceedings were still active for the purposes of the Contempt of Court Act 1981, fairness and the law of contempt of court required that Mr Radford should not be identified in the programme.

#### Unwarranted infringement of privacy

- c) Howells LLP complained on Mr Radford’s behalf that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that he was filmed being taken from his car and transported to a police station. Howells LLP said that Mr Radford had asked the police what the camera crew were there for and was told that it was filming for *Police Interceptors* (i.e. the original programme in which the footage appeared). He was not asked for his permission for filming, which he would have refused.

In response, Channel 5 stated that the programme makers were filming openly, with the police’s permission, and that Mr Radford had subsequently pleaded guilty to the offence for which he was arrested when filmed.

Channel 5 said that Mr Radford did not have a legitimate expectation of privacy in the circumstances, particularly once he had been cautioned, and that even if he did, that was outweighed by the public interest in filming the police engaged in this type of work, and by the broadcaster’s right to freedom of expression.

Channel 5 said that, in accordance with the public’s long-standing right to know about the existence of crime within the community, in its view by committing a criminal offence an offender has no legitimate expectation that the commission of the crime would remain private or that the treatment of that crime by the criminal justice agencies would remain private.

- d) Howells LLP also complained on Mr Radford’s behalf that his privacy was unwarrantably infringed in the programme as broadcast in that he was filmed in a vulnerable position and he was shown in the programme as a shaven-headed man wearing distinctive clothing. Also, his car was described and, although his face was obscured, the pixellation was poor and consequently he was identifiable.

By way of background, Howells LLP said on behalf of Mr Radford that no crime had been proven against him at the time the footage was first broadcast (as part of the *Police Interceptors* series), and in particular the charge of carrying an offensive weapon had been dropped.

In response, Channel 5 said that by the time the footage featuring Mr Radford was re-transmitted in *Ultimate Police Interceptors* on 2 and 4 April 2012 the criminal charges that Mr Radford had faced were a matter of public record, and that he had pleaded guilty to some of them. Channel 5 said that he therefore did not have a legitimate expectation of privacy in relation to that information. Channel 5 added that once Mr Radford had committed a crime he had no legitimate expectation of keeping private the treatment of that crime by the criminal justice system.

In addition, Channel 5 said Mr Radford's identity had not been revealed because his face had been obscured. Channel 5 stated that, in its view, Mr Radford was not in a vulnerable position, in that he was not drunk or injured or being questioned by the police. Further Channel 5 did not consider that the broadcast footage of Mr Radford disclosed any private information about him and that even if his privacy had been infringed, the infringement was warranted in the public interest.

### **Representations on Ofcom's Preliminary View**

Ofcom prepared a Preliminary View that Mr Radford's complaint should not be upheld. A copy of the Preliminary View was sent to the complainant, Mr Radford, and the broadcaster, Channel 5. Mr Radford did not make any comments on Ofcom's Preliminary View.

In its representations on Ofcom's Preliminary View, Channel 5 repeated many of the points it had already made in response to Ofcom's decision to investigate Mr Radford's complaints, summarised above under the heading "Summary of the complaint and the broadcaster's response."

In addition, Channel 5 made the following points. It said that:

- Article 8 of the European Convention on Human Rights does not afford protection to a person's public activities and there was no authority for the proposition that Article 8 affords protection to a person's criminal activities and their consequences.
- Mr Radford could not have any expectation that information relating to his crime or his arrest would be private, nor was it relevant or of any weight that Ofcom considered that on arrest an individual is in a sensitive situation.
- the test of whether someone should have a legitimate expectation of privacy was an objective one and, in this case, no reasonable person would legitimately expect that the facts of Mr Radford's arrest and subsequent conviction would remain private. The mere involvement of the police, not to mention the successful prosecution, made the information public information.

## 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 and transcript of the programme as broadcast, and both parties' written submissions.

### Unjust or unfair treatment

When considering this part of the complaint, Ofcom had regard to whether the portrayal of Mr Radford was consistent with the broadcaster's obligation to avoid unjust or unfair treatment of individuals in programmes, as outlined in Rule 7.1 of the Code. Ofcom had regard to this Rule when reaching its Decision on this head, and individual sub-heads, of the complaint detailed below.

- a) Ofcom considered the complaint that Mr Radford was portrayed unjustly or unfairly in the programme as broadcast.

By way of background, Ofcom noted that the programme set out to demonstrate the work of police officers who pursue and intercept offenders on motorways and highways of the United Kingdom and the offences and incidents they tackle. In addition to the material featuring Mr Radford, this particular episode featured a compilation of material previously broadcast in the series *Police Interceptors*, and included for example footage of officers pursuing stolen vehicles, and attending the scenes of various serious crimes and accidents.

The programme makers took measures to prevent Mr Radford's identity being revealed other than to those who knew Mr Radford well, knew about the case, or were able to identify him from the footage of his blue Volvo (despite the number plates being obscured). In Ofcom's view, the majority of viewers of this programme would therefore not have known that the individual featured in the programme was Mr Radford.

In considering this head of complaint and the individual sub-heads of complaint below, Ofcom had regard to whether reasonable care was taken by the broadcaster to satisfy itself that material facts had not been presented, disregarded or omitted in a way which was unfair to Mr Radford (as outlined in Practice 7.9 of the Code).

In reaching its Decision, Ofcom considered each of the sub-heads of Mr Radford's complaint separately in order to reach an overall view as to whether or not he was portrayed unfairly in the programme as broadcast.

- i) Ofcom considered the complaint that Mr Radford was referred to several times as being a “*petrol thief*” and that he was incorrectly said to have been suspected of 37 incidents of making off without payment, and stealing thousands of pounds worth of fuel.

The part of the programme in which Mr Radford appeared followed a police interceptor unit as it attempted to find and detain a prolific petrol thief. Ofcom noted that at the beginning of this part of the programme PC Lovatt stated:

*“We’ve put an operation together to try to identify and detain the driver and the vehicle that are responsible for over 37 ‘bilkings’ – making off without payment for fuel – something in the region of thousands of pounds worth of fuel he’s had, gone.”*

The programme then reported that a blue Volvo car had been spotted by another police officer, PC Scott Jefferys, leaving a petrol station. PC Jefferys was shown following the blue Volvo, which was subsequently stopped on a public highway by police officers in a number of patrol vehicles.

At this point in the programme, Mr Radford was depicted sitting in the driving seat of the blue Volvo, and then being detained by the police officers at the side of the blue Volvo. Subsequently, Mr Radford was taken away in a marked police car and then shown being led by officers into a police station.

Ofcom noted that on each of the occasions in which Mr Radford was seen facing the camera during the programme his face was obscured by pixellation. At no point was Mr Radford referred to by name, but was referred to variously as “*the Volvo driver*”, “*the suspect*”, an “*alleged petrol thief*” and “*the driver*”.

The part of the programme featuring Mr Radford concluded with the following commentary:

*“The driver was charged with 22 offences of making off without payment, one charge of carrying an offensive weapon and one charge of going equipped to steal.”*

Ofcom acknowledged that the 37 incidents of suspected theft referred to by PC Lovatt at the beginning of this part of the programme was a considerably larger number than the 22 offences of theft that Mr Radford was said in commentary to have been finally charged with, and that Mr Radford had not yet been tried in court in relation to his arrest when the footage was first broadcast as part of the *Police Interceptors* series. However, we took the view that the statement regarding the “*37 ‘bilkings’ – making off without payment for fuel*” made in the programme was a statement of the facts as the police officer understood them at the beginning of the operation. Although PC Lovatt originally stated the number of suspected theft offences to be “37”, the programme’s commentary made it clear to viewers that the person who had been arrested was only charged with “*22 offences*” of theft.

Ofcom also noted that following the arrest the programme’s narration referred to the individual as the “*suspect*” and the “*alleged petrol thief*”, the police needed to gather evidence in order to charge the individual, and the individual arrested was eventually charged with 22 offences of making off without payment in relation to petrol theft. Therefore, Ofcom considered that the

description of the individual shown being arrested in the programme as a suspected “petrol thief” was a fair one and one that did not present, disregard or omit material facts in such a way as to be unfair to Mr Radford.

Taking the above factors into account, Ofcom considered that the context in which the statement by the police officer regarding “37 ‘bilkings’” was made would have been clear to viewers, and in any event, the programme’s commentary explicitly clarified that Mr Radford was actually charged with only “22 offences”. We also considered that the use of the term “*petrol thief*” fairly reflected the nature of the offence for which the individual was arrested and featured in the programme. In Ofcom’s view, these statements in the programme were unlikely to have materially and adversely affected viewers’ understanding of the circumstances surrounding the offences for which Mr Radford was arrested in a way that was unfair to him.

- ii) Ofcom next considered the complaint that Mr Radford was portrayed unfairly in that the police officer said that he had started to get “cocky” and had stuck two fingers up at the staff at petrol stations.

Ofcom noted that at the end of the motorway pursuit sequence in the programme, Mr Radford was shown being arrested by the side of his car and subsequently being detained at a police station.

In the next sequence, PC Lovatt was shown saying:

*“Obviously he [the petrol thief]’s been elusive for quite a while and he’s been cocky at the fact he thought he could get away with it, to the point where he’s been giving the finger to cashiers that have realised what vehicle he’s in and have decided not to serve him”.*

In Ofcom’s view the comments by the police officer that the petrol thief had been “cocky” and had “*been giving the finger to cashiers*” were statements of the background facts as the police officer understood them at the time. The comments made in the programme were clearly presented in the programme as being the view of PC Lovatt and were given in the context of that particular police officer’s personal opinion of the petrol thief’s behaviour in relation to the alleged offences. In this respect, Ofcom considered that the police officer’s comments were presented as being based on his own experience in dealing with the case of the petrol thief, and that the “*finger*” gesture to staff of petrol stations would be understood by viewers to have been behaviour reported to the police involved in the investigation.

Given all these factors, Ofcom considered that the inclusion of these comments would have been unlikely to have materially and adversely affected viewers’ understanding of Mr Radford in a way that was unfair to him.

- iii) Ofcom then considered the complaint that Mr Radford was treated unfairly because a martial arts stick in his car was incorrectly described as a “*baseball bat*”.

Ofcom noted that the programme included footage of the interior of the blue Volvo car which showed a hat, sunglasses, a wig and a wooden stick. The accompanying commentary from a police officer involved in the search of the car stated:

*“There’s also an offensive weapon, a baseball bat, and that’s just what was visible from the vehicle.”*

The part of the programme featuring Mr Radford ended with the following commentary:

*“The driver was charged with 22 offences of making off without payment, one charge of carrying an offensive weapon and one charge of going equipped to steal.”*

Ofcom noted Channel 5’s submission that describing the item shown in the car as a “baseball bat” was no more pejorative than describing it as a martial arts stick, as both can be used for sport or as an offensive weapon. Ofcom accepted that the item shown in the car may not have been a “baseball bat” as described in the programme, and that the item shown may well have been a stick used in martial arts. However, Ofcom considered that the reference to the item was intended to illustrate to viewers what the police had found in Mr Radford’s car when searched and the item leading to Mr Radford being charged for carrying an offensive weapon.

Ofcom considered that, in this context, the description of the item as a “baseball bat” rather than a martial arts stick would in itself have been unlikely to have materially and adversely affected viewers’ understanding that an item found in Mr Radford’s car led to him being charged with carrying an offensive weapon in a way that was unfair to the complainant. In these circumstances, Ofcom considered that the reference to a “baseball bat” in the programme did not result in any unfairness to Mr Radford.

Having assessed each of the sub-heads of complaint that the programme as broadcast portrayed Mr Radford unjustly or unfairly, Ofcom concluded that, overall, the broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of complaint above) were not presented, omitted or disregarded in a way that portrayed Mr Radford unfairly. Ofcom considered that the broadcaster had presented the incident involving Mr Radford as it happened and that the summary of the offences that Mr Radford (though he was not identified) had been charged with fairly represented the position at the time the programme was broadcast on 2 April 2012 and when it was broadcast again on 4 April 2012. In this respect, Ofcom found no unfairness to Mr Radford.

- b) Ofcom next considered Mr Radford’s complaint that he was not given an appropriate and timely opportunity to respond to the allegations made in the programme.

In considering this particular head of complaint Ofcom took into account Practice 7.11, which states that if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

As already mentioned under head a) above, Ofcom noted that throughout the relevant part of the programme the programme makers had taken steps to obscure Mr Radford’s identity by not naming him, and pixellating his face and the car registration number plate. We noted too that the purpose of the programme was to demonstrate the work of the police officers who pursue and intercept offenders and to inform viewers of any action taken as a result of the offending. It

was in this context that Ofcom considered the complaint that Mr Radford had not been given an opportunity to respond.

Mr Radford was filmed being arrested for petrol theft, and the part of the programme relating to Mr Radford ended with the following commentary:

*“The driver was charged with 22 offences of making off without payment, one charge of carrying an offensive weapon and one charge of going equipped to steal.”*

Ofcom considered that the comments made by the police officers along with those contained in the programme’s commentary as set out in the above sub-heads could be reasonably understood to be “allegations” of wrongdoing. However, in the circumstances of this particular case, Ofcom took the view that while Mr Radford was the individual shown in the programme, his identity was not revealed to the wider viewing audience. Ofcom also considered that the programme showed Mr Radford being arrested on a public highway by the police in the course of their duties and that the charges Mr Radford faced were matters of public record. In these circumstances, we did not consider that it was incumbent on the broadcaster to offer Mr Radford an opportunity to respond. Ofcom concluded therefore that there was no unfairness to Mr Radford 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.

- c) Ofcom considered Mr Radford’s complaint that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that he was filmed being taken from his car and transported to a police station without his consent.

Ofcom took into consideration Practice 8.5 of the Code which requires that any infringement of privacy in the making of a programme should be with the individual’s consent, or be otherwise warranted. We also took account of Practice 8.8 to the extent that it requires broadcasters to obtain permission from individuals filmed in sensitive places, such as police stations, separately for the filming and broadcast of the material.

In considering whether or not Mr Radford’s privacy had been unwarrantably infringed in connection with the obtaining of material included in the programme, Ofcom first considered the extent to which Mr Radford had a legitimate expectation of privacy in the particular circumstances in which he was filmed.

Ofcom distinguished here between the two different places and situations in which Mr Radford was filmed (being detained and arrested on the public highway;

and later being escorted by a police officer from an external area of a police station, i.e. a police station car park, into the police station itself).

With regard to the footage of Mr Radford being detained and arrested, having reviewed the material complained of, Ofcom noted that the footage included in the programme appeared to have been filmed by the programme makers on a public highway; and that the programme makers had filmed openly and not concealed the fact that they were filming Mr Radford and his involvement with the police.

Ofcom recognises that there can be circumstances in which an individual can legitimately expect privacy in a public place. Ofcom noted that Mr Radford was not a vulnerable person or in a distressed state as defined by the Code at the time he was arrested. Ofcom took account of the fact that Mr Radford did not appear to be in a vulnerable state, in that he was not for example ill, injured or drunk, and that the administration of criminal justice is normally an open process. We also however had regard to the fact that an individual's involvement in police investigations is not generally a matter of public record until a person has been charged with a criminal offence, and that the arrest of an individual can be an event of some sensitivity. In the particular circumstances of this case, Ofcom considered that, despite the public and open nature of the filming, the programme makers had filmed Mr Radford in a situation that could reasonably be regarded as sensitive (being arrested), and in which an individual may expect some degree of privacy. In the particular circumstances of this case, Ofcom concluded that Mr Radford had an expectation of privacy in relation to the obtaining of the material of him being arrested. However, given the public and open circumstances in which Mr Radford was filmed, Ofcom considered that Mr Radford's expectation of privacy as regards the obtaining of this footage was limited considerably.

Ofcom noted that Mr Radford was also filmed being escorted by a police officer from an external area of a police station (the police station car park) into the police station itself. Practice 8.8 of the Code cites police stations as potentially sensitive places and that separate consent should be obtained from individuals for both the filming and the broadcast stages of the production process. Consequently, Ofcom found that Mr Radford had a legitimate expectation of privacy in relation to the obtaining of the material in these particular circumstances. However, Ofcom found that again Mr Radford's expectation of privacy was considerably limited by the open nature in which the material was obtained.

Ofcom noted Channel 5's representations that Mr Radford could not have any expectation that information relating to his crime or his arrest was private and that it was not relevant, or of any weight, that Ofcom considered that on arrest an individual is in a sensitive situation.

For the reasons given above, Ofcom remains of the view that Mr Radford had a legitimate, if considerably limited, expectation of privacy in the circumstances in which he was filmed both on the public highway and on arrival at the police station. Therefore, Ofcom considered that Channel 5's representations on the Preliminary View did not alter its decision in this respect.

Ofcom then assessed whether or not the programme makers had obtained Mr Radford's consent for the footage of him to be filmed in both of the circumstances detailed above. Ofcom noted from Channel 5's submission that it accepted that

Mr Radford may have preferred not to have been filmed. We therefore took the view that the programme makers did not have Mr Radford's consent to film him.

Ofcom went on to assess whether the infringement of Mr Radford's limited expectation of privacy was warranted in the particular circumstances of this case. The Code makes it clear that: "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."

We noted that there was a conflict between Mr Radford's right to privacy (albeit limited) on the one hand, and on the other the broadcaster's competing right to freedom of expression, the need for broadcasters to have the freedom to gather information and film events in the making of programmes without undue interference and the audience's right to receive information and ideas without unnecessary interference.

Ofcom examined in particular whether there was sufficient public interest to justify the intrusion into Mr Radford's expectation of privacy as a result of the programme makers having filmed him in the circumstances they did, without Mr Radford's consent. In Ofcom's view there is a significant public interest in the work of the police being examined in broadcast programmes and in programmes which follow (as in this case) the police tackling vehicle-related crime. These programmes can demonstrate the illegal and potentially dangerous conduct in which some members of the public engage and the undesirable consequences of such activities. They also help develop the public's understanding of the police's work in trying to tackle such conduct.

In the circumstances of this case, Ofcom considered that the programme makers may not have been in a position to obtain Mr Radford's consent to filming, but there was a genuine and significant public interest in filming the material without having secured prior consent. We took the view that it would be an undesirable and disproportionate restriction of broadcasters' freedom of expression and editorial freedom if they were unable to film material in circumstances like those in the present case because they were required (but unable) to obtain consent from those involved prior to filming taking place (for example, while an arrest is happening). In these circumstances, Ofcom considers that what is important is that the broadcaster takes steps to ensure that the subsequent broadcast of material filmed in such circumstances does not result in an unwarranted infringement of privacy. This issue is dealt with at decision head d) below.

Having taken all the factors above into account (in particular the extent to which Mr Radford's legitimate expectation of privacy was considerably curtailed by the open manner in which the programme makers openly filmed him being arrested on a public highway), Ofcom considered that, on balance, the broadcaster's right to freedom of expression and the viewer's right to receive information and ideas without undue interference outweighed Mr Radford's limited legitimate expectation of privacy. We therefore found that there had been no unwarranted infringement of Mr Radford's expectation of privacy in connection with the obtaining of the footage included in the programme.

- d) Finally, Ofcom considered Mr Radford's claim that his privacy had been infringed by the programme as broadcast in that footage of him filmed in a vulnerable position was shown in the programme.

In assessing this part of the complaint, we took into account Practice 8.6 of the Code. This requires that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted. In considering whether or not there had been an unwarranted infringement of Mr Radford's privacy in the programme as broadcast, Ofcom analysed the extent to which Mr Radford had a legitimate expectation of privacy in relation to the footage of his involvement with the police as broadcast.

The programme included footage of Mr Radford being detained and arrested on a public highway and being put in a police car. Subsequently, Mr Radford was shown in the programme being escorted by a policeman from an external area of a police station into the police station. The complaint on Mr Radford's behalf stated that, despite the pixellation, Mr Radford's friends and family had said that they were still able to identify him. Channel 5 accepted that Mr Radford may have been identifiable to people who knew him well. Mr Radford's face was obscured in the programme and he was not named, but footage of him was nevertheless included in the programme.

The footage showing Mr Radford being arrested and under arrest at the police station did not depict him in a vulnerable position in that he was not for example ill, injured or drunk. In Ofcom's view, however, he was in a sensitive situation (being arrested and under arrest) in which an individual may expect some degree of privacy. In the particular circumstances of this case, Ofcom concluded that Mr Radford had an expectation of privacy in relation to the broadcast of material of him being arrested and at the police station under arrest. However, Ofcom considered that Mr Radford's expectation of privacy as regards the broadcast of this footage was limited considerably. This was due to the public and open circumstances in which Mr Radford was filmed being arrested on the public highway.

Ofcom therefore considered that Mr Radford had a legitimate expectation of privacy in relation to the material of him as broadcast, but that this expectation was considerably limited, for the reasons noted above.

In reaching this conclusion, Ofcom took into account Channel 5's representations on its Preliminary View that Article 8 does not afford protection to a person's criminal activities and their consequences, and that no reasonable person would legitimately expect that the facts of Mr Radford's arrest and subsequent conviction would remain private, because the involvement of the police and his subsequent successful prosecution made the information public information.

As noted in relation to Head c) above, an individual's involvement in police investigations is often not a matter of public record until a person has been charged with a criminal offence and the arrest of an individual can be an event which could reasonably be regarded as sensitive. Ofcom does not accept Channel 5's submission that the mere involvement of the police makes the information public information in relation to which no legitimate expectation of privacy could apply. Ofcom therefore does not consider that Channel 5's representations on this point should alter its Preliminary View on the issue of Mr Radford's expectation of privacy as regards the broadcast of the footage.

Ofcom then considered whether the broadcaster had sought Mr Radford's consent. It was not disputed that the broadcaster had not sought Mr Radford's permission prior to transmission.

We therefore went on to consider whether the infringement of Mr Radford's considerably limited expectation of privacy was warranted in the particular circumstances of this case. Regarding the broadcast of the footage, Ofcom noted that there was a conflict between Mr Radford's, albeit limited, right to privacy on the one hand, and on the other the broadcaster's competing right to freedom of expression, the need for broadcasters to have the freedom to broadcast information and material without undue interference and the audience's right to receive information and ideas without unnecessary interference.

Ofcom assessed the broadcaster's competing right to freedom of expression, the public interest in examining the work of the police and the audience's right to receive information and ideas without unnecessary interference. In this respect, Ofcom examined whether in the circumstances there was sufficient public interest to justify the intrusion into Mr Radford's considerably limited expectation of privacy.

In relation to this point, Ofcom noted that by the time that the programmes complained of were broadcast on 2 and 4 April 2012 Mr Radford had been charged with 22 offences of making off without payment, one offence of going equipped to steal and one offence of carrying an offensive weapon, and that he had also pleaded guilty to 12 criminal offences (11 of making off without payment, and one for going equipped). Consequently, Ofcom concluded that at the time at which the programmes were broadcast the facts of his arrest, the offences with which he had been charged, and that Mr Radford had pleaded guilty to 12 criminal offences, were all a matter of public record.

In addition, as noted above, Ofcom considered that there is a significant degree of public interest in the work of the police being examined in programmes and in broadcasts which follow (as in this case) the police tackling vehicle-related crime. These programmes can demonstrate the illegal and potentially dangerous conduct in which some members of the public engage and the undesirable consequences of such activities. They also help develop the public's understanding of the police's work in trying to tackle such conduct.

For all these reasons Ofcom found that there was sufficient public interest to justify the intrusion into Mr Radford's considerably limited expectation of privacy.

Consequently, Ofcom considered that the broadcast of the material complained of on 2 and 4 April 2012 had not infringed Mr Radford's privacy in a way that was unwarranted.

**Accordingly, Ofcom has not upheld this complaint of unjust or unfair treatment and of unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the broadcast of the programme made by Howells LLP on behalf of Mr Radford.**

## Other Programmes Not in Breach

Up to 17 June 2013

<b>Programme</b>	<b>Broadcaster</b>	<b>Transmission Date</b>	<b>Categories</b>
Comic Relief: Funny for Money	BBC 1	15/03/2013	Offensive language / Religious/Beliefs discrimination/offence
F*** off, I'm small	Really	12/03/2013	Offensive language
Station promotion	2BR	01/05/2013	Materially misleading
Tosh.o	Comedy Central	11/04/2013	Race discrimination/offence

## Complaints Assessed, not Investigated

Between 4 and 17 June 2013

This is a list of complaints that, after careful assessment, Ofcom has decided not to pursue because they did not raise issues warranting investigation.

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
10 O'Clock Live	Channel 4	29/05/2013	Generally accepted standards	4
10 O'Clock Live	Channel 4	31/05/2013	Generally accepted standards	1
10 O'Clock Live	Channel 4	12/06/2013	Generally accepted standards	1
4thought.tv	Channel 4	06/06/2013	Religious/Beliefs discrimination/offence	1
8 Out of 10 Cats	E4	04/06/2013	Product placement	1
Adult programming	Various	26/05/2013	Scheduling	1
Afternoon Drama: The Emperor's Babe	BBC Radio 4	23/05/2013	Generally accepted standards	1
All Star Mr and Mrs	ITV	05/06/2013	Scheduling	1
An Idiot Abroad	Sky1	01/06/2013	Nudity	1
Banshee	Sky Atlantic	06/05/2013	Flashing images/risk to viewers who have PSE	1
Barely Legal Drivers	BBC 3	02/04/2013	Violence and dangerous behaviour	52
Barely Legal Drivers	BBC 3	09/04/2013	Violence and dangerous behaviour	13
Barely Legal Drivers	BBC 3	11/04/2013	Violence and dangerous behaviour	1
Barely Legal Drivers	BBC 3	12/04/2013	Violence and dangerous behaviour	1
Barely Legal Drivers	BBC 3	16/04/2013	Violence and dangerous behaviour	1
Barely Legal Drivers	BBC 3	17/04/2013	Violence and dangerous behaviour	1
Barely Legal Drivers	BBC 3	18/04/2013	Violence and dangerous behaviour	1
Barely Legal Drivers	BBC 3	23/04/2013	Violence and dangerous behaviour	2
Barely Legal Drivers	BBC 3	25/04/2013	Violence and dangerous behaviour	1
Barely Legal Drivers	BBC 3	28/04/2013	Violence and dangerous behaviour	1
Barely Legal Drivers	BBC 3	07/05/2013	Violence and dangerous behaviour	4
Barely Legal Drivers	BBC 3	n/a	Violence and dangerous behaviour	3
BBC News	BBC News Channel	23/05/2013	Generally accepted standards	2
BBC News	BBC Radio 4	10/06/2013	Outside of remit / other	1
BBC News at One	BBC 1	05/06/2013	Scheduling	1
BBC News at Six	BBC 1	05/06/2013	Outside of remit / other	1
BBC News at Ten	BBC 1	22/05/2013	Under 18s in programmes	1

BBC News at Ten	BBC 1	31/05/2013	Generally accepted standards	1
BBC News at Ten	BBC 1	05/06/2013	Outside of remit / other	1
Bet365's sponsorship of French Open Tennis 2013	ITV4	n/a	Sponsorship	1
Beyonce	BBC 1	01/06/2013	Generally accepted standards	1
Big Brother	Channel 5	13/06/2013	Generally accepted standards	2
Big Fat Gypsy Weddings	Channel 4	10/06/2013	Violence and dangerous behaviour	1
Casualty	BBC 1	01/06/2013	Race discrimination/offence	1
Casualty	BBC 1	08/06/2013	Generally accepted standards	1
Celebrity Juice	ITV2	23/05/2013	Generally accepted standards	1
Celebrity Juice	ITV2	25/05/2013	Generally accepted standards	1
Celebrity Juice	ITV2	03/06/2013	Generally accepted standards	1
Channel 4 Racing	Channel 4	08/05/2013	Materially misleading	1
Channel 4 Racing	Channel 4	31/05/2013	Animal welfare	2
Channel 4's Comedy Gala	Channel 4	07/06/2013	Offensive language	8
Channel ident	ITV	30/05/2013	Violence and dangerous behaviour	1
Channel ident	ITV2	09/06/2013	Harm	1
Classic FM	Classic FM	n/a	Materially misleading	1
Competitions	The Breeze Bristol	n/a	Competitions	1
Confessions of a Male Stripper	Channel 4	29/05/2013	Generally accepted standards	1
Coronation Street	ITV	31/05/2013	Product placement	1
Coronation Street	ITV	05/06/2013	Information/warnings	1
Coronation Street	ITV	05/06/2013	Promotion of products/services	1
Coronation Street	ITV	07/06/2013	Outside of remit / other	1
Coronation Street	ITV	10/06/2013	Product placement	1
Dates (trailer)	Channel 4	03/06/2013	Scheduling	1
Dates (trailer)	Channel 4	10/06/2013	Scheduling	1
Daybreak	ITV	06/06/2013	Generally accepted standards	1
Deal or No Deal	Channel 4	07/06/2013	Fairness	1
Dispatches: Diets, Drugs and Diabetes	Channel 4	10/06/2013	Materially misleading	4
Dog with a Blog	Disney	27/05/2013	Under 18s in programmes	1
EastEnders	BBC 1	04/06/2013	Sexual orientation discrimination/offence	1
EastEnders	BBC 1	06/06/2013	Violence and dangerous behaviour	1
Election Cell 2013	Geo News	12/05/2013	Elections/Referendums	1

Embarrassing Bodies	Channel 4	04/06/2013	Nudity	1
Emmerdale	ITV	23/05/2013	Generally accepted standards	2
Emmerdale	ITV	31/05/2013	Generally accepted standards	1
Emmerdale	ITV	11/06/2013	Outside of remit / other	1
F1: Grand Prix	BBC 1	09/06/2013	Materially misleading	1
Feelgood Friday...Live!	4Music	31/05/2013	Gender discrimination/offence	1
Foxy Bingo's sponsorship of The Jeremy Kyle Show	ITV	11/06/2013	Generally accepted standards	1
Free Speech	BBC 3	12/06/2013	Outside of remit / other	2
Friday Night Party	Gravity FM 97.2 FM	31/05/2013	Drugs, smoking, solvents or alcohol	2
Gambling sponsorship	Various	n/a	Sponsorship	1
Game of Thrones	Sky Atlantic	03/06/2013	Animal welfare	1
Gavin Harris	Reading 107 FM	04/06/2013	Offensive language	1
Halford's sponsorship of Top Gear	Dave	n/a	Sponsorship credits	1
Have I Got a Bit More News for You	BBC 1	03/06/2013	Generally accepted standards	1
Have I Got a Bit More News for You	BBC 1	03/06/2013	Religious/Beliefs discrimination/offence	1
Heart Breakfast with Kev & Ros	Heart Cambridge	03/06/2013	Competitions	1
Heresy	BBC Radio 4	06/06/2013	Disability discrimination/offence	1
Holby City	BBC 1	04/06/2013	Scheduling	1
Hollyoaks	Channel 4	11/06/2013	Violence and dangerous behaviour	1
House on Fire	BBC Radio 4	05/06/2013	Offensive language	1
ITV News Meridian	ITV Meridian	05/06/2013	Violence and dangerous behaviour	1
Jake the Pirate	Disney Junior (Sweden)	05/04/2013	Offensive language	1
James O'Brien	LBC 97.3FM	06/06/2013	Race discrimination/offence	1
Jeremy Vine Show	BBC Radio 2	23/05/2013	Generally accepted standards	1
Jurm Bolta Hai (trailer)	ARY Digital	27/05/2013	Suicide and self harm	1
Monaco Grand Prix - Practice 1	Sky Sports F1	23/05/2013	Nudity	1
MotoGP	BBC 2	02/06/2013	Generally accepted standards	1
Mr Bean	Boomerang	08/06/2013	Nudity	1
Mukto Shonglap	ATN Bangla	15/04/2013	Due impartiality/bias	3
Music videos	Various	n/a	Generally accepted standards	1
News	Sikh Channel	29/05/2013	Under 18s - Coverage of sexual and other offences	1
News on the Hour	Sky News	09/06/2013	Product placement	1
Nugammalt (trailer)	Kanal 5	17/05/2013	Scheduling	1

Phones 4 U's sponsorship of Films on 4	Film4	27/05/2013	Sponsorship credits	1
Press Preview	Sky News	11/06/2013	Disability discrimination/offence	2
Programming	Capital TV	27/05/2013	Harm	1
Programming	Channel 4	n/a	Generally accepted standards	1
Programming	Controversial TV	n/a	Due impartiality/bias	1
Programming	Various	13/06/2013	Generally accepted standards	1
Programming	Various	13/06/2013	Outside of remit / other	1
Question Time	BBC 1	13/06/2013	Outside of remit / other	2
Radio Scotland News	BBC Radio Scotland	22/05/2013	Religious/Beliefs discrimination/offence	1
Real Radio News	Real Radio Northwest	06/06/2013	Generally accepted standards	1
Regional News and Weather	BBC 1	03/06/2013	Offensive language	1
Russia Today	Russia Today	n/a	Due impartiality/bias	1
Sarah Millican: Thoroughly Modern Millican Live	Channel 4	31/05/2013	Generally accepted standards	1
Sex Toy Stories (trailer)	Channel 4	13/06/2013	Scheduling	1
Skint	Channel 4	27/05/2013	Drugs, smoking, solvents or alcohol	1
Skint	Channel 4	27/05/2013	Generally accepted standards	1
Skint	Channel 4	03/06/2013	Due impartiality/bias	1
Skint	Channel 4	03/06/2013	Generally accepted standards	1
Sky HD promotion	Sky1	21/05/2013	Outside of remit / other	1
Sky News	Sky News	28/05/2013	Due impartiality/bias	1
Sky News	Sky News	04/06/2013	Generally accepted standards	1
Sky News at Ten	Sky News	12/06/2013	Due accuracy	1
South Today	BBC 1	04/06/2013	Outside of remit / other	1
Steve Allen	LBC 97.3FM	28/05/2013	Generally accepted standards	1
Sunday Politics	BBC 1	09/06/2013	Fairness	2
Sunday Politics	BBC 1	09/06/2013	Suicide and self harm	1
The Apprentice	BBC 1	12/06/2013	Offensive language	1
The Call Centre	BBC 3	11/06/2013	Religious/Beliefs discrimination/offence	1
The Fall	BBC 2	03/06/2013	Generally accepted standards	5
The Fall	BBC 2	03/06/2013	Religious/Beliefs discrimination/offence	1
The Food Programme	BBC Radio 4	20/05/2013	Harm	1
The Gadget Show	Channel 5	03/06/2013	Advertising/editorial distinction	1
The Gadget Show	Channel 5	03/06/2013	Crime	1

The Gadget Show	Channel 5	10/06/2013	Generally accepted standards	1
The Graham Norton Show	BBC 1	31/05/2013	Generally accepted standards	1
The Investec Derby (trailer)	Channel 4	n/a	Harm	1
The Iraq War	BBC 2	12/06/2013	Outside of remit / other	1
The Jeremy Kyle Show	ITV	12/06/2013	Offensive language	1
The Job Lot	ITV	03/06/2013	Violence and dangerous behaviour	1
The JVS Show	BBC Three Counties Radio	31/05/2013	Generally accepted standards	1
The JVS Show	BBC Three Counties Radio	06/06/2013	Materially misleading	2
The Masque of the Red Death	Horror Channel	05/05/2013	Scheduling	1
The Now Show	BBC Radio 4	01/06/2013	Offensive language	1
The Nutty Professor	ITV2	08/06/2013	Race discrimination/offence	1
The Nutty Professor	ITV2	13/06/2013	Race discrimination/offence	1
The One Show	BBC 1	10/06/2013	Generally accepted standards	1
The Returned	Channel 4	09/06/2013	Advertising scheduling	1
The Returned	Channel 4	09/06/2013	Violence and dangerous behaviour	2
The Returned (trailer)	Channel 4	14/06/2013	Scheduling	1
The Voice UK	BBC 1	07/06/2013	Drugs, smoking, solvents or alcohol	3
The Voice UK	BBC 1	07/06/2013	Religious/Beliefs discrimination/offence	7
The Voice UK	BBC 1	07/06/2013	Voting	1
The Voice UK	BBC 3	08/06/2013	Drugs, smoking, solvents or alcohol	1
The Wright Stuff	Channel 5	04/06/2013	Race discrimination/offence	1
The Wright Stuff	Channel 5	06/06/2013	Race discrimination/offence	1
This Morning	ITV	05/06/2013	Generally accepted standards	1
Today	BBC Radio 4	11/06/2013	Religious/Beliefs discrimination/offence	1
Topps Tiles' sponsorship of Daybreak National Weather on ITV	ITV	n/a	Generally accepted standards	1
Two Faced	Venus TV	14/05/2013	Religious/Beliefs discrimination/offence	1
US Open Golf	Sky Sports 2	13/06/2013	Advertising scheduling	1
Who'd Be a Teacher?: Tonight	ITV	06/06/2013	Due impartiality/bias	1
World at War	Yesterday	22/05/2013	Scheduling	1
You've Been Framed and Famous!	ITV	08/06/2013	Generally accepted standards	2

You've Been Framed!	ITV	01/06/2013	Religious/Beliefs discrimination/offence	1
You've Been Framed!	ITV2	04/06/2013	Violence and dangerous behaviour	1

## Investigations List

If Ofcom considers that a broadcast may have breached its codes, it will start an investigation.

Here is an alphabetical list of new investigations launched between 6 and 19 June 2013.

Programme	Broadcaster	Transmission date
Accountancy with Mahbub Murshed	NTV	29 April 2013
Branded a Witch	BBC 3	20 May 2013
Geo News	Geo TV	8 May 2013
Iain Dale	LBC 97.3FM	22 May 2013
Laughter BA Master	PTC Punjabi	9 May 2013
QATAR Airways' sponsorship of weather	Al-Jazeera	21 May 2013
Secrets of the Shoplifters and Pickpockets	Channel 4	16 April 2013

**It is important to note that an investigation by Ofcom does not necessarily mean the broadcaster has done anything wrong. Not all investigations result in breaches of the Codes being recorded.**

For more information about how Ofcom assesses complaints and conducts investigations go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>.

For fairness and privacy complaints go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>.