

# **Ofcom Broadcast Bulletin**

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## Introduction

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes with which broadcasters regulated by Ofcom are required to comply. These include:

- a) Ofcom's Broadcasting Code ("the Code"), the most recent version of which took effect on 1 September 2010 and covers all programmes broadcast on or after 1 September 2010. The Broadcasting Code can be found at:  
<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>.

Note: Programmes broadcast prior to 1 September 2010 are covered by either the 2009, 2008 or the 2005 versions of the Code (depending on the date of their broadcast).

- b) the Code on the Scheduling of Television Advertising ("COSTA") which came into effect on 1 September 2008 and contains rules on how much advertising and teleshopping may be scheduled in programmes, how many breaks are allowed and when they may be taken. COSTA can be found at:  
<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/advert-code/>.

- 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 (see Rules 9.2 and 9.3 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>1</sup>; and
  - the imposition of statutory sanctions in advertising cases.

The BCAP Code can be found at:

[www.bcap.org.uk/The-Codes/BCAP-Code.aspx](http://www.bcap.org.uk/The-Codes/BCAP-Code.aspx)

Other codes and requirements may also apply to broadcasters, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant licensees must provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code. Links to all these codes can be found at:

<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/>

It is Ofcom's policy to describe fully the content in television and radio programmes that is subject to broadcast investigations. Some of the language and descriptions used in Ofcom's Broadcast Bulletin may therefore cause offence.

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<sup>1</sup> BCAP and ASA continue to regulate conventional teleshopping content and spot advertising for these types of services where it is permitted.

## **Broadcasting Licence Condition cases**

### **Note to Broadcasters**

#### **Publication of some breach findings in a summary table**

Some broadcasting cases investigated by Ofcom relate to quantitative requirements (such as limits on advertising minutage) or broadcasting licence conditions (such as the provision to Ofcom of information or a recording).

In such cases, a finding of a breach of the relevant code or licence condition is likely to be self-evident from the information available to Ofcom. While all cases will continue to be handled in accordance with Ofcom's published procedures, broadcasters should note that Ofcom has decided it will now normally publish a summary breach finding in such cases, rather than a full finding. These summary findings will be presented in the form of a table in the Broadcast Bulletin.

Whether or not a decision will be published in summary form or as a full finding will be at Ofcom's discretion. Ofcom is likely to conclude that a full finding is more appropriate in circumstances including (but not limited to):

- (a) cases of repeated breaches of a similar nature;
- (b) cases of a serious or complex nature; or
- (c) where a full decision would assist other broadcasters in ensuring compliance with the relevant code or licence condition.

## In Breach

### Breach findings

#### *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, be run on a not-for-profit basis, involve members of their target communities and be accountable to the communities they serve.

Anyone applying for a community radio licence is required to set out proposals as to how they will meet these various statutory requirements. If they are awarded a licence, their proposals are then included in their 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 Community Radio Order 2004). 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.

Like the 'key commitments' explained above, it is of fundamental importance that Ofcom is able to verify that a licensee is complying with its licence requirements relating to funding. In this respect too, we require licensees to submit an annual report setting out how they have met their licence obligations.

Station annual reports also inform Ofcom's own annual report on the sector 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.*

The following stations have been found in breach on the grounds of failure to submit an annual report in accordance with the required deadline; these licensees have subsequently submitted a late report:

<b>Channel</b>	<b>Transmission date and time (if applicable)</b>	<b>Code and rule / licence condition</b>	<b>Summary finding</b>
Youthcomm Radio, Worcester	n/a	Community Radio licence condition 9 (1)	Youthcomm Radio did not submit its financial annual report by the date required. (Date required 25 June 2010; date received 24 August 2010.) Finding: <b>In breach</b>
Colchester Garrison FM	n/a	Community Radio licence condition 9 (1)	Colchester Garrison did not submit its annual key commitments and financial reports by the date required. (Date required 25 June; key commitments report received 6 August, financial report received 11 August.) Finding: <b>In breach</b>
Edinburgh Garrison FM	n/a	Community Radio licence condition 9 (1)	Edinburgh Garrison did not submit its annual key commitments and financial reports by the date required. (Date required 25 June; key commitments report received 6 August, financial report received 11 August.) Finding: <b>In breach</b>

Salisbury Plain Garrison FM	n/a	Community Radio licence condition 9 (1)	Salisbury Plain Garrison did not submit its annual key commitments and financial reports by the date required. (Date required 25 June; key commitments report received 6 August, financial report received 11 August.) Finding: <b>In breach</b>
Aldershot Garrison FM	n/a	Community Radio licence condition 9 (1)	Aldershot Garrison did not submit its annual key commitments and financial reports by the date required. (Date required 25 June; key commitments report received 6 August, financial report received 10 August.) Finding: <b>In breach</b>
106.9 Garrison FM, Catterick	n/a	Community Radio licence condition 9 (1)	106.9 Garrison FM did not submit its annual key commitments and financial reports by the date required. (Date required 25 June; key commitments report received 6 August, financial report received 10 August.) Finding: <b>In breach</b>
Hayes FM, Middlesex	n/a	Community Radio licence condition 9 (1)	Hayes FM did not submit its annual key commitments and financial reports by the date required. (Date required 25 June; date received 2 August.) Finding: <b>In breach</b>
Leith FM, Midlothian	n/a	Community Radio licence condition 9 (1)	Leith FM did not submit its annual key commitments and financial reports by the date required. (Date required 25 June; date received 16 August.) Finding: <b>In breach</b>
Black Diamond FM, East & central Midlothian	n/a	Community Radio licence condition 9 (1)	Black Diamond FM did not submit its financial annual report by the date required. (Date required 25 June; date received 10 August.) Finding: <b>In breach</b>
Somer Valley FM, Midsomer Norton and Radstock, Somerset	n/a	Community Radio licence condition 9 (1)	Somer Valley FM did not submit its annual key commitments and financial reports by the date required. (Date required 25 June; key commitments report date received 30 July, financial report received 16 August.) Finding: <b>In breach</b>

Bro Radio, Barry, Vale of Glamorgan	n/a	Community Radio licence condition 9 (1)	Bro Radio did not submit its annual key commitments and financial reports by the date required. (Date required 25 June; date received 3 August.) Finding: <b>In breach</b>
Gravity FM, Grantham, Lincolnshire	n/a	Community Radio licence condition 9 (1)	Gravity FM did not submit its annual key commitments and financial reports by the date required. (Date required 25 June; date received 13 August.) Finding: <b>In breach</b>
Cheshire FM, mid Cheshire	n/a	Community Radio licence condition 9 (1)	Cheshire FM did not submit its annual key commitments and financial reports by the date required. (Date required 25 June; key commitments report received 12 August, financial report received 20 August.) Finding: <b>In breach</b>

The following licensees have been found in breach of Condition 6 (5) and (6) which states:

*6. Advertising and sponsorship*

(5) *The Licensee shall ensure that no more than 50 per cent. of the relevant income for the Licensee is attributable to either one of, or a combination of, the following:*

*(a) the inclusion in the Licensed Service of remunerated advertisements; or*

*(b) the sponsorship of programmes included in the Licensed Service.*

(6) *The Licensee must ensure that, in calculating its relevant income for the purposes of condition 6(5):*

*(a) at least 25 per cent. of the relevant income is attributable to sources of funding other than: remunerated advertisements; the sponsorship of programmes included in the Licensed Service; and volunteer contributions; and*

*(b) the Licensee has regard to guidelines published by Ofcom.*

Channel	Transmission date and time (if applicable)	Code and rule / licence condition	Summary finding
Cheshire FM, mid Cheshire	n/a	Community Radio licence condition 6 (5) and (6)	Cheshire FM contravened the requirement to obtain no more than 50% of its income from on air advertising and sponsorship, and no more than 25% from volunteer in-kind support. Finding: <b>In breach</b>
Seaside FM, Withernsea, East Yorkshire	n/a	Community Radio licence condition 6 (5) and (6)	Seaside FM contravened the requirement to obtain no more than 50% of its income from on air advertising and sponsorship, and no more than 25% from volunteer in-kind support. Finding: <b>In breach</b>

In addition, continued failure to submit an annual report despite repeated requests to do so may potentially warrant the consideration of a statutory sanction.

The following licensees have failed to provide Ofcom with annual reports. Despite repeated requests for this information, Voice of Africa Radio and Burngreave Community Radio have not, to date, supplied their annual reports. As a consequence of this serious and continuing licence breach, Ofcom is putting these licensees on notice that their present contravention of their licences is being considered for the imposition of a statutory sanction.

Channel	Transmission date and time (if applicable)	Code and rule / licence condition	Summary finding
Voice of Africa Radio, Newham, East London	n/a	Community Radio licence condition 9 (1)	Voice of Africa Radio did not submit its annual key commitments and financial reports by the date required. (Date required 25 June; neither report has been received.) Finding: <b>In breach</b> , with sanctions under consideration as neither report has been received.
Burngreave Community Radio, Sheffield	n/a	Community Radio licence condition 9 (1)	Burngreave Community Radio did not submit its annual key commitments and financial reports by the date required. (Date required 25 June; key commitments report received 7 August, financial report not received.) Finding: <b>In breach</b> , with sanctions under consideration in relation to the financial report, which has still not been received.

## Standards cases

### In Breach

#### Ruhaniat Aur Tib-e-Nabvi

Venus TV, 9 September 2009, 12:05 to 13:00

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**This Review Decision replaces a previous decision published in Ofcom's Broadcast Bulletin on 25 January 2010.**

#### Summary of Original Decision

##### Introduction

Venus TV is a general entertainment television channel for the Asian community, broadcasting in English, Urdu, Hindi, Punjabi, Gujarati and Bengali.

*Ruhaniat aur Tib-e-Nabvi* is a daily phone-in programme aimed at the Muslim community. The presenter of the programme normally gives lifestyle advice to members of the public based on practices advocated in the Qu'ran. In this edition, the presenter gave advice to a number of callers about a range of health and diet related issues.

A viewer was concerned the advice given by the presenter in the programme could be potentially dangerous to viewers.

By means of an independent summary translation of the programme, Ofcom identified five excerpts that it considered to amount to medical advice on potentially serious conditions, such as high blood pressure and diabetes. The five excerpts were as follows:

Presenter: *"I tell people in my programme, blood pressure is actually due to constipation. Try to get rid of blood pressure, try to get rid of constipation. Then you will not need to take any tablets. If you try my suggestion – eat gulkand [conserve of roses] continuously – it will work..."*

Presenter: *"To control blood pressure she [the caller's friend] should not eat hot food. Avoid hot food, for example, egg and fish etc. She should avoid these foods."*

Presenter: *"Let me tell you one thing, eating eggs increases your blood pressure. Therefore, I advise to eat eggs made as a halva [Anday Ka Halva/Egg Halva]"*

Presenter: *"People who have diabetes should not eat roti [chapati] for at least three months. Instead feed them gram flour roti [chapati]. Do not give them rice, potato, cauliflower, okra etc to eat. They should also avoid drinking tea... Diabetes is usually a disease caused by dryness and hotness. Those people who get diabetes face a problem of dryness and hotness."*

Presenter: *“Whenever blood pressure appears in any part of your body you should drink Shikangbeen [lemon drink]... When you drink it for three to five days you will feel that your high blood pressure problem has been controlled. If you drink it with faith in God, God will solve this problem for you... After three months of drinking this drink, many of my friends called me to tell me that their blood pressure problems had been solved, along with controlling their diet as advised.”*

Ofcom therefore asked Venus TV Limited (“Venus TV”) for its comments with regard to Rule 2.1 of the Code, which states:

“Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material.”

### Response

Venus TV stated that the programme gives advice to the Muslim community based on what is said in the Holy Qu’ran and teachings of the Prophet Mohammed. It explained that *“Tib-al Nabvi”* means practices and sayings of Prophet Muhammad on hygiene, sanitation and treatment of diseases and is traditionally followed by Muslims. It said that it did not consider the programme to be harmful or offensive to the Muslim community or any other religious community.

The broadcaster continued that the presenter, Allama Qadri, is a qualified scholar of the Islamic religion, is well known in the Asian community and has 40 years of experience in natural remedies. Venus TV stated that the products that the presenter advised viewers to use were all natural and fresh, and available in the high street. It also said that viewers were advised to take the products for a few days only.

The broadcaster stated that the programme *Ruhaniat and Tib-e-Nabvi* does apply protections for members of the public as it runs a continuous scroll during the programme which states, *“If you have any health problems please contact your GP”*. Venus TV supplied Ofcom with evidence that other programmes in this series, broadcast on and around the same date, carried the scroll (which was in English). Further, Venus stated that the presenter verbally advised callers to contact their doctor. The broadcaster said that the scroll was not included on this occasion due to human error.

### Original Decision

In its original decision, which cited the excerpts from the programme listed above, Ofcom recognised that *Ruhaniat aur Tib-e-Nabvi* is a programme which provides advice to the Muslim community based on practices of the Qu’ran. Ofcom also noted from the broadcaster’s comments that the presenter is experienced and well known in the Asian community and the title of the programme would have provided an indication to viewers as to the nature of the programme and the advice it included.

Ofcom noted the broadcaster’s assertion that the programme normally includes a scroll on the bottom of the screen which states that callers with health problems should contact their doctor. It also noted that omission of the scroll on this occasion was due to human error. The independent translator commissioned by Ofcom to review the programme confirmed that no such information was provided during this particular programme, either by the presenter or by the use of a scroll.

Therefore it was Ofcom's view that the programme allowed this presenter - who was not a qualified medical practitioner - to give unsubstantiated and potentially dangerous medical advice about high blood pressure and diabetes, without any reference to the need to seek help from a qualified doctor. Ofcom concluded that as a result of watching this broadcast, there was an appreciable risk that viewers who suffer from such serious medical conditions might forego or delay orthodox medical treatment in favour of the advice given during the programme. This in turn could have led to significant consequences for their health.

Ofcom concluded that this programme failed to apply generally accepted standards by not providing adequate protection to viewers from material which had a potential to cause vulnerable members of the audience serious harm. Ofcom found that the programme was in breach of Rule 2.1 of the Code and published its decision in the Broadcast Bulletin on 25 January 2010.

### **Request for Review**

Venus TV submitted a request for a review of Ofcom's decision, on the grounds that:

- i) it was materially flawed because the advice given by the programme's host related only to diet and nutrition and was described incorrectly as "medical advice";
- ii) the advice given in the programme did not constitute claims that either the host or the use of natural foods could cure illnesses, but rather that such foods could prevent or control them;
- iii) the presenter of the programme did not actively say that viewers should not contact their doctors for serious conditions; and
- iv) there was an implied understanding on viewers' parts that the dietary solutions were complementary to any medication.

Venus TV also argued that the decision was not proportionate, because the absence of a scroll urging viewers to contact a health professional was a rare omission due to a member of technical staff who "simply forgot" to turn on the scroll on this occasion. Further, it argued that the evidence it had provided to show that the scroll was present on several other occasions was not given due weight by Ofcom.

Venus TV was also of the view that the decision was discriminatory in comparison to Ofcom's decision on a BBC programme *After You've Gone*<sup>1</sup>. An episode of this comedy series, broadcast at 19:30 on BBC1, included a scene in which a character took a large quantity of prescription painkillers. In its finding, Ofcom acknowledged that there was a risk of harm to younger children watching the programme but, on balance, decided that the case was resolved. Ofcom reached this decision on the basis of the BBC's recognition that the content had not been appropriately scheduled for children, and its assurance that the programme would only be repeated in a later slot of 20:30.

Venus TV argued that, in its case, its assurance that the scroll would always appear in future broadcasts of the programme had not been accepted by Ofcom as grounds

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb121/issue121.pdf>

to resolve the matter in the same way, leading Venus TV to conclude that it was being treated differently to the BBC because it was a minority channel.

A member of the Ofcom Executive who had not been involved in the original decision considered this request for review in accordance with Ofcom's Procedures for the handling of broadcasting standards or other licence-related cases<sup>2</sup> (the "Procedures").

The Executive decided that a new, independent translation of the whole programme was necessary to assess the request for review. This was commissioned and Venus TV was given an opportunity to comment on it. Venus TV reiterated its desire for Ofcom's decision to be reviewed.

Having considered the new, independent translation and the request for review, the Executive decided that Venus TV had put forward a case that the decision was materially flawed and that there was a reasonable prospect of success on the grounds that three of the five programme excerpts on which the decision was based did not appear to suggest "cures" for the medical conditions in question and that, while the first and fifth excerpts could be understood as implying cures, the excerpts did not provide clear evidence of potentially harmful advice. Rather, they could be perceived as generic dietary advice.

Additionally, it was decided that the Committee should consider whether the original decision was potentially disproportionate on the basis of the particular evidence on which it relied – namely the five excerpts (see Introduction, above) and in light of Venus TV's explanation that the absence of a scroll (the measure usually taken by Venus TV to provide adequate protection for the audience from potential harm to their health) was the result of human error.

The case was therefore referred to the Broadcasting Review Committee<sup>3</sup> ("the Committee"), together with the full independent translation of the programme.

## **Review Decision**

The first decision for the Committee was whether or not Venus TV had demonstrated that there were sufficient grounds to review the original decision of 25 January 2010. In the light of the new, independent translation, the Committee assessed that it had. It was therefore appropriate for the Committee to reconsider the case having regard to all of the submissions made throughout the process and to the new, independent translation and with specific regard to the grounds for review laid out by the complainant in the review request (see above).

The Committee then went on to consider whether or not the broadcast complained of had breached Rule 2.1 of the Code. This rule reflects one of Ofcom's key standards objectives, namely to ensure that broadcasters apply "generally accepted standards"

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<sup>2</sup> <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>

<sup>3</sup> The Broadcasting Review Committee is a sub-committee of the Ofcom Board consisting of members of the Ofcom Content Board. It reviews the decisions of the Ofcom Executive in fairness and privacy investigations, broadcasting standards investigations and other licence-related cases where either the complainant or the licensee is able to demonstrate that the decision is materially flawed.

to the content of television programmes so as to provide adequate protection from the inclusion of offensive or harmful material.

Programmes that provide lifestyle and health advice about potentially serious medical conditions, can be broadcast providing that adequate protection is provided for members of the public so as to comply with the Code.

In this instance, the Committee first considered the context in which this programme was broadcast, noting that Venus TV had explained that the programme "...was for the Muslim community and was to remind and guide them to how simple daily things were still the best along with their month of fasting (Ramadan) for a healthy life".

The Committee then turned to the question of the nature of the advice given in the programme and whether it had the potential to cause harm, in particular to viewers' health by providing misleading or unsubstantiated advice.

Having considered the full independent translation of the programme, the Committee acknowledged that much of the advice given within the programme could be described as generic dietary advice, where less serious conditions were referred to and a variety of general nutrition advice was given as a means of alleviating particular symptoms. For example:

To a caller who had experienced stomach pain for a year and a half, the presenter diagnosed that the problem was due to "gastric bloating" and suggested:

*"Just eat curry made with ginger and black pepper ... and don't put anything in there: red chillies, green chillies, stop all these chillies ... after this, you can, if you don't eat curry that's good, you should eat your chapatti with just milk ... and if you try then you can also have this experiment that you eat potatoes, cauliflower, bahmia [okra] and rice, stop all of them".*

When discussing fasting more generally, the presenter stated:

*"As we maintain this topic and both these things in view in our programme, of both these things we will first tell you what food you will eat and what things you will avoid and then we tell you how great spiritual powers are obtained in it to perform any of the duties."*

The Committee therefore considered that the programme was intended to an extent to provide dietary advice to those undertaking fasting during Ramadan, and to encourage and offer spiritual support to practising Muslims at this time.

The Committee also acknowledged that it was possible for dietary advice of this nature to complement conventional medicine. As such, the Committee was of the view that it was unlikely that any potential harm could be caused to viewers by these particular parts of the programme, which did not therefore raise issues under Rule 2.1 of the Code.

However, the Committee also noted that the full independent translation contained several references to serious medical conditions, some of which had not been included within the excerpts on which Ofcom's original decision relied. The Committee focused on the following sections of the programme in particular:

- 1) A caller asked for advice about diabetes, specifically asking *“what could be done to prevent it so that diabetes doesn’t occur?”* The presenter gave advice on foods to avoid and stated that:

*“Diabetes is an illness of dryness and heat, whoever suffers from this, if you observe them you will see that there is a major element of dryness and heat in them. I have by the Grace of Allah many people whom we have found and told them, they were cured through food and are normal. Their blood sugar level which used to be above twenty is now five, five and a half.”*

- 2) A little later, the presenter told the same caller:

*“...And if one can control food, then a dangerous illness such as diabetes can be rid of forever on the condition that they are mentally well.”*

- 3) Another caller was concerned about her husband’s frequent sneezing. The presenter diagnosed this condition as *“influenza”* and, when told by the caller that influenza had been ruled out by doctors, replied *“The real problem is that whatever name you give it, this is in reality influenza”*. He then stated:

*“To treat this fully or to cure this to completely rid of this contact me on this phone and I will advise you to avoid a few things, advise your husband and advise about eating a few things, surely this illness will go away.”*

- 4) Another caller asked about blood pressure, to which the presenter responded:

*“For blood pressure we advise that whenever this appears in any part of the body then you drink lemon drink straight away. Drink it for three or four days and you yourself will notice that your high blood pressure, Allah willing, this will make a difference and Allah will cure you if you keep drinking with faith ... Many friends called me after drinking this for three months. We didn’t have an illness such as blood pressure after continuing to act on this procedure. On condition that they kept concentrating on those procedures and acting on the things that we advised them of that you must not eat these things and you can eat these things. They kept acting on this and Allah rid them of that illness completely.”*

- 5) One caller had been in touch with the presenter previously, and had been advised to eat gulkand (sweet preserve of rose petals). He stated that this *“did not bring any relief to me at all”* and the presenter made further suggestions involving hot milk. He then stated: *“if God wishes, your constipation will go away with it”*. The caller pointed out that he had high blood pressure and asked if he could *“still eat it like that”*. The presenter said:

*“Blood pressure has nothing to do with it ... blood pressure ... on the contrary, I usually say in my programmes that the reality of high blood pressure is that it is caused by constipation.”*

- 6) The caller pointed out that he took tablets every day for his blood pressure problem and the presenter replied:

*“Try first, and when you get rid of your constipation, then see if you feel the need to take a tablet every day or not. You will see the difference.”*

- 7) Another caller wanted to discuss his mother’s back pain. He explained that:

*“An injection was administered in her back and she is taking the rest of the pain killers ... She also has high blood pressure as well. So is there any remedy...?”*

The presenter responded:

*“The discs, I usually say that I don’t know, it may be in the doctor’s books but it is not in our books ... there is a muscle, which we call nerves, [Allah] created such a nerve so that the discs cannot be damaged ... So by taking injections or eating such things which create wind ... We continue on one sort of food for many years that cause us to feel so much pain that the doctors have no other words to say except that ‘your discs are damaged’.”*

The Committee considered that these examples clearly contained references to serious medical conditions (diabetes, blood pressure and spinal disc problems). The nature of the advice given within these examples was therefore particularly significant in terms of the potential for the programme to have caused harm to the audience.

As stated above, in circumstances where a programme provides health advice that may include references to potentially serious medical conditions, the Code requires that the broadcaster applies “generally accepted standards” to provide adequate protection from harmful material. The purpose of this requirement is to mitigate any risk that viewers who suffer from such conditions might forego or delay orthodox medical treatment in favour of the advice given during the programme, with consequent harm caused to their health.

In this case, the Committee concluded that the examples above referring to serious medical conditions appeared to go further than simply providing generic dietary or nutrition advice. Instead the examples demonstrated instances where the presenter had directly claimed and/or implied that such conditions could be cured or alleviated with particular foods or drinks, such as in example 1, above: *“...they were cured through food and are normal.”* The Committee noted that the word “cure” was not used in every instance. However, it was of the view that the repeated use of other phrases such as *“can be rid of forever”* (example 2); *“to completely rid of this”* (example 3); and *“..didn’t have an illness such as blood pressure after continuing to act on this procedure”* (example 4) were likely to have been taken to mean “cure” by viewers.

Moreover, the Committee noted that some of the references to conventional medicine appeared to disparage it, for instance in example 7: *“We continue on one sort of food for many years that cause us to feel so much pain that the doctors have no other words to say except that ‘your discs are damaged’.”* There were also examples of the presenter suggesting that callers had been misdiagnosed by their doctor, such as in example 3: *“The real problem is that whatever name you give it, this is in reality influenza”*. The Committee was particularly concerned by instances where the presenter stated that conventional treatments prescribed to them could be harming them (for example: taking injections in the case of back problems *“caused wind”* (example 7) or could be unnecessary (for example taking tablets in the case of blood pressure, *“then see if you feel the need to take a tablet every day”* (example 6)).

In the Committee’s view, it was also important to take into account the status of the presenter, an Islamic scholar, which appeared high in relation to the callers (through the use of terms of respect on their part and a more familiar form of address on his part). The Committee considered this was a significant factor in terms of the

programme's potential for harm, in that viewers were more likely to defer to the presenter's advice.

The Committee considered that there was the potential for the advice given in the programme to discourage viewers from seeking conventional medical treatment for these potentially serious medical conditions, in favour of the presenter's suggestions. The Committee therefore concluded that the programme's advice had the potential to cause harm.

It then turned its attention to whether the original decision had been proportionate in finding the programme in breach of Rule 2.1, taking into account Venus TV's submissions to date.

In particular, the Committee considered what steps the broadcaster had taken to provide the audience with adequate protection from harm, as required by Rule 2.1. The Committee noted that a scroll was normally included in broadcasts of this programme reminding viewers with health problems to contact their GP. The Committee considered that such a scroll may have offered a counterbalance to the messages given by the presenter and may therefore have provided protection against potential harm, had it been included in this particular broadcast. However, without the scroll, there was no other sufficient protection for the audience from the potentially harmful advice about serious medical conditions. In particular, the Committee noted that on no occasion did the presenter verbally advise viewers to contact their doctor, as Venus had said was the case.

The Committee acknowledged that Venus TV had explained the absence of the scroll in this case as the result of human error, and took into account the broadcaster's assurance that greater care would be taken in future to ensure that this scroll would be included. However, the Committee was concerned that Venus TV had given no explanation of the measures it had taken or was intending to take to ensure future compliance, for example by means of improved procedures or technical processes.

The Committee considered whether, in reaching the original decision, Ofcom was, as alleged by Venus TV in its request for review, discriminating against Venus TV, when compared to the case of the BBC programme *After You've Gone*<sup>4</sup>. In that case Ofcom had resolved the issue following assurances from the broadcaster. The Committee noted that, in that case, the BBC had itself acknowledged that the programme had been scheduled inappropriately. Further, the BBC had given a specific guarantee (as opposed to a general assurance) - namely that it would only repeat the programme in a later timeslot.

In addition, the Committee considered that *After You've Gone* was a comedy programme, rather than a factual, advisory programme as in the case of the broadcast by Venus TV. Taking into account the significant contextual differences between these two programme genres, the Committee did not consider the cases to be comparable. In the Committee's view, the potential for harm was much greater in the Venus TV case, compared to the BBC case cited. Nor did it find any evidence to suggest that Venus TV had been discriminated against by Ofcom.

In light of the nature of the potential harm the Committee had identified, as set out above, it decided it was proportionate in this instance to record a breach of the Code.

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<sup>4</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb121/issue121.pdf>

The Committee therefore found that this broadcast of *Ruhaniat aur Tib-e-Nabvi* was in breach of Rule 2.1 of the Code.

**Breach of Rule 2.1**

## In Breach

### The Ministry

*BEN TV, 3 July 2010, 11:00 to 11:30*

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#### Introduction

BEN TV describes itself as a “black oriented, urban, diverse and cosmopolitan family channel” which broadcasts entertainment and news programmes to Europe and North Africa. The licence for Ben TV is held by Greener Technology Limited (“the Licensee”).

*The Ministry* was a religious programme broadcast on BEN TV in which viewers phoned in to seek healing and prayers about a range of personal matters including their children’s physical and mental health. It featured a visiting pastor, speaking in Twi (a Ghanaian dialect), who delivered his guidance in a prophetic style. To assist the pastor and the callers a woman sat beside him and translated his comments into English.

A caller from Italy asked the pastor to pray for her two daughters who had headaches and stomach pain. The pastor offered his prayers and asked the caller if she knew someone called Ama. The caller confirmed there was an Ama in her family to which the pastor replied (in translation from the original Twi):

*“In the spirits I see you standing beside someone called Ama...you are a crying woman. If you don’t pray, by the end of December, the Ama you know in your family will die...”*

In the same programme, a caller from Germany asked the pastor to pray for her 13 year old son who was “a bit delayed in his talking and all the activities he performs”. During the course of the conversation that followed the pastor asked the caller if she knew someone called “Serwaa”.

The caller confirmed “Serwaa” was her daughter, to which the pastor replied (in translation from the original Twi):

*“If you don’t pray for her, exactly one month from today she will die. A demon will go and hit her heart so she will get a heart attack, the incident would have occurred exactly one month from today but because you have called we refuse it in Jesus’ name. May God touch her. They are looking for someone called Serwaa to be used as a sacrifice for a river located in Asante Bekwai, in Mampong<sup>1</sup>. There is a river lying there and they want someone called Serwaa to be sacrificed. We refuse it. Do three days of fasting.”*

Ofcom received a complaint from a viewer who said he was shocked by the pastor’s comments, and suggested they were not acceptable and “downright wicked” because the pastor was informing parents that their children would die if the parents did not pray.

The broadcaster was asked to provide comments with respect to the following Rules:

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<sup>1</sup> Mampong is a district of Ghana in the Ashanti region.

- Rule 2.1: broadcasters must apply generally accepted standards to provide adequate protection for members of the public from the inclusion of harmful material; and
- Rule 4.6: religious programmes must not improperly exploit any susceptibilities of the audience.

## **Response**

In response the broadcaster explained that the pastor was a visiting preacher from Ghana who had not been properly briefed about the requirements of the Code before he went on air. The pastor was preaching in a “prophetic style” which was common “in their churches”.

Ben TV stated that in future - to ensure similar material was not broadcast again - it would ensure that all pastors or ministries delivering prophetic content on air would be advised before broadcast of the Code rules and they would be required to sign compliance agreements.

In addition the broadcaster stated that as soon as Ofcom had notified them of the complaint an extensive on-air apology, delivered by a senior pastor, was transmitted to viewers on 8 July 2010. The apology explained that the statement was made by a visiting pastor and whilst it was “misconstrued” it was also “highly regrettable”.

The broadcaster offered its “sincerest” apologies to viewers for the harm or offence the material may have caused.

## **Decision**

In reaching this decision Ofcom has considered the fact that broadcasters have a right to freedom of expression which gives the broadcaster a right to transmit and the audience a right to receive creative material, information and ideas without interference from a public body, but subject to restrictions prescribed by law and necessary in a democratic society. Although broadcasters and viewers have this right, broadcasters must therefore ensure that the material they transmit is in accordance with the general law and the Code.

### Rule 4.6

Ofcom is required by the Act to set standards to ensure that religious programmes protect listeners and viewers from the failure of a proper degree of responsibility and improper exploitation. In particular, section 319(6)(a) states that “any improper exploitation of any susceptibilities of the audience for such a [religious] programme” should be avoided. This is reflected in Rule 4.6 of the Code which aims to ensure that broadcasters do not exploit the audience at a time when they are potentially vulnerable. This approach is supported by Ofcom’s research in this area which is in the Guidance to this Rule.

“Respondents to Ofcom research on religious programmes believe that all people are susceptible at one time or another. There are times when it will be clear to the broadcaster that they are soliciting an actual response from their audience. At these times broadcasters need to take care and recognising the possible risk to audience members particularly the vulnerable.”

Ofcom noted that in both of the examples set out above, the pastor stated that specific members of each callers’ family would die if the caller did not pray for the

individual. In the second example, the pastor seemed to forecast that the caller's daughter would be saved from being sacrificed in a river if the caller prayed for her. It was of particular concern to Ofcom that the pastor was therefore implying that it was only because the viewer had telephoned the programme that a personal catastrophe had been avoided. It is Ofcom's view that this was improper exploitation of the audience and therefore in breach of Rule 4.6 and unacceptable.

### Rule 2.1

Rule 2.1 requires that broadcasters apply generally accepted standards to provide protection for members of the public from the inclusion of harmful or offensive material.

Ofcom noted that in the response from the broadcaster, the "prophetic style" of ministry, where a pastor foretells future events (as demonstrated in this programme), was common "in their churches". However, while mindful of the range of styles and modes of worship practised within different traditions, Ofcom is of the view that forecasts or claims to viewers or listeners of a specific forthcoming death or other dire event should be excluded from religious programming, however earnestly believed in particular churches. To encourage any form of religious observance through such warnings carries serious risks of distress, harm and offence and improper exploitation of viewers. In these circumstances - as in this case - broadcasters do not provide adequate protection for members of the public from harmful and/or offensive material, and fail to apply generally accepted standards in accordance with the requirements of Rule 2.1.

Ofcom welcomes the broadcaster's on-air apology and acknowledgement that, although viewers can continue to seek this style of religious ministry in a church, when broadcast it must comply with the Code.

It is Ofcom's view that this is a serious breach of the Code and we would urge other religious licensees considering broadcasting content of a similar nature to take careful note of this breach finding.

### **Breach of Rules 2.1 and 4.6**

## In Breach

### Club Paradiso

*Club Paradiso, 24/25 June 2010, 00:15 to 00:45*

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#### Introduction

*Club Paradiso* is a daytime and adult sex chat television service broadcast under a licence held by Chat Central Limited ("Chat Central" or "the Licensee"). The service is available freely without mandatory restricted access on Sky channel number 966. This channel is situated in the 'adult' section of the Sky electronic programme guide ("EPG"). The channel broadcasts chat and teleshopping services during the daytime, and programmes after the 21:00 watershed based on interactive 'adult' sex chat services. Viewers are invited to contact onscreen female presenters via premium rate telephony services ("PRS"). The female presenters dress and behave in a flirtatious way during the day and more sexually provocative way after the watershed while encouraging viewers to contact the PRS numbers.

Ofcom received a complaint which said that this broadcast was too explicit and included sexual activity between a male and female presenter including simulated or mimed oral sex, sexual intercourse and other sexually provocative acts.

Ofcom noted that between 00:15 and 00:45, the broadcast featured a male as well as a female presenter. The male was wearing underpants and the female fishnet stockings and a black thong. During the broadcast the female presenter adopted various sexual positions for relatively prolonged periods of time, including on her back with her legs apart, on all fours with buttocks to camera and sat on top of and astride the male presenter's chest. The male presenter also adopted various positions, which included kneeling with his crotch by the female presenter's mouth, kneeling behind the female presenter whilst she was on all fours and lying on his back while under the female presenter. While in these positions, the female and male mimed oral sex on each other, they both gyrated their hips miming sexual intercourse, the male squirted white lotion on the female's buttocks and rubbed it in, and the male licked the female's breasts and nipples. Furthermore the male stroked and gently spanked the female's body and buttocks. At times the squirted lotion was left on the female's buttocks for a period of time. While adopting these positions or engaging in these activities, neither presenter touched the other's genital area.

Ofcom requested formal comments from Club Paradiso in relation to the following Code rules:

- Rule 1.18 ('Adult sex material' - material that contains images and/or language of a strong sexual nature which is broadcast for the primary purpose of sexual arousal or stimulation - must not be broadcast at any time other than between 2200 and 0530 on premium subscription services and pay per view/night services which operate with mandatory restricted access. In addition, measures must be in place to ensure that the subscriber is an adult);
- Rule 2.1 (the broadcaster must apply generally accepted standards); and
- Rule 2.3 (offensive material must be justified by context).

## Response

Club Paradiso said that it decided to run a section of programming with both male and female presenters on a trial and one off basis. This trial took place midweek and well past the watershed and the presenters kept a safe distance between themselves with no sexual touching of the genital area. It said that the material was not of a strong sexual nature, did not constitute explicit material and did not go beyond generally accepted standards. Club Paradiso said it did not intend to push any boundaries of acceptability and apologised if Ofcom felt this was the case. The Licensee said it was keen to ensure that its output adhered to Ofcom's Code Rules.

## Decision

Ofcom has a duty to ensure that generally accepted standards are applied to the content of radio and television services so as to provide adequate protection from the inclusion of harmful or offensive material. In relation to generally accepted standards, including those in relation to sexual material, Ofcom recognises that what is and is not generally accepted is subject to change over time. When deciding whether or not particular broadcast content is likely to fall within generally accepted standards it is necessary to assess the character of the content itself and the context in which it is provided.

In relation to the broadcast of material of a sexual nature this normally involves assessing the strength or explicitness of the content and balancing it against the particular editorial or contextual justification for broadcasting the content. Ofcom seeks to ensure that material of a sexual nature, when broadcast, is editorially justified, appropriately scheduled and where necessary access is restricted to adults.

Broadcasters are allowed to broadcast after the watershed (and without other access restrictions) material which is of a strong sexual nature as long as it is justified by the context. However, this material must not be considered to be 'adult sex material' (i.e. it is not strong sexual images which are broadcast for the primary purpose of sexual arousal or stimulation), or BBFC R-18 rated films or their equivalent.

Rule 1.18 of the Code requires 'adult sex material' to be broadcast only between 22:00 and 05:30, and then only if mandatory restricted access is in place. In judging whether material is 'adult sex material', and therefore is subject to this rule, broadcasters should be guided by the definitions used by the BBFC when referring to "sex-works at '18'". This guidance has been supplemented by various decisions of Ofcom through a series of published findings, and published decisions of the Content Sanctions Committee. By these means Ofcom has made clear what constitutes 'adult sex material'<sup>1</sup>.

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<sup>1</sup> For example:

- Sanctions decision against Square 1 Management Limited concerning its channel Smile TV, dated 10 July 2008, [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/SmileTV.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/SmileTV.pdf);
- Breach Finding on SportxxxBabes, Ofcom Broadcast Bulletin 115, dated 11 August 2008; [http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb115/](http://www.ofcom.org.uk/tv/obb/prog_cb/obb115/);
- Breach Finding on SportxxxBabes, Ofcom Broadcast Bulletin 119, dated 13 October 2008; [http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb119/](http://www.ofcom.org.uk/tv/obb/prog_cb/obb119/);
- Sanctions decision against Satellite Entertainment Limited concerning its channel SportxxxBabes, dated 26 August 2008, [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/sportxxxbabes.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/sportxxxbabes.pdf); and

In considering the contents of this programme Ofcom asked itself two questions:

- was the content of the programme 'adult sex material'; and
- did the broadcaster ensure that the content was provided with sufficient contextual justification so as to ensure that it fell within generally accepted standards.

When setting and applying standards in its Code to provide adequate protection to members of the public from harm and offence, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention of Human Rights, as incorporated in the Human Rights Act 1998. This is the right of a broadcaster to impart information and ideas and the right of the audience to receive them. Accordingly, Ofcom must exercise its duties in light of these rights and not interfere with the exercise of these rights in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and are necessary to achieve a legitimate aim. Ofcom notes however that a broadcaster's right to freedom of expression, although applicable to sexual content and pornography, is more restricted in this context compared to, for example, political speech, and this right can be legitimately restricted if it is for the protection of the public, including the protection of those under 18.

Ofcom considered this broadcast in respect of Rules 1.18, 2.1 and 2.3 of the Code.

In relation to Rule 1.18, Ofcom examined the content of the broadcast and considered that it contained material of a strong sexual nature, including scenes of simulated and mimed sexual activity. For example, during the broadcast the male presenter mimed sexual intercourse with the female and they both mimicked the performance of oral sex on each other, The female presenter adopted various sexual positions including astride the male presenter's chest near his face. In addition, the white lotion used as a prop in the performance was squirted onto and allowed to remain on the female presenter's buttocks, and the male licked the female presenter's breasts and nipples in sexual and intimate manner. Even though neither

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- Sanctions decision against Satellite Entertainment Limited concerning its channel SportxxxBabes, dated 26 August 2008, [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/sportxxxbabes.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/sportxxxbabes.pdf);
  - Sanction decision against Playboy TV UK/Benelux Limited concerning its channel Playboy One, dated 2 April 2009, [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/playboytv.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/playboytv.pdf);
  - Breach Finding on Bang Babes licensed by Bang Channels Limited, Broadcast Bulletin 151, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb151/>; and
  - Breach Finding on Bang Babes, Broadcast Bulletin 152, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb152/>
  - Breach Finding on Bang Babes, Broadcast Bulletin 153, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb153/>
  - Breach Finding on Bang Babes, Broadcast Bulletin 157, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb157/>
  - Breach Finding on Bang Babes, Broadcast Bulletin 163, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb163/issue163.pdf>
  - Breach Finding on Bang Babes, Broadcast Bulletin 164, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb164/>

presenter directly touched the other's genital area, the performance and provocative actions of both presenters were clearly suggestive of various sexual acts. Ofcom took account of the fact that the sequences were, in some cases, relatively prolonged and repeated throughout the 30 minute broadcast. In Ofcom's view, the primary purpose of broadcasting this material was clearly sexual arousal. Given the above, the material was, in Ofcom's view, of a strong sexual nature. Having assessed this programme's content and purpose, Ofcom considered that this content constituted 'adult-sex' material. Its broadcast, without mandatory restricted access, was therefore in breach of Rule 1.18 of the Code.

Ofcom then went on to consider whether the broadcast was also in breach of Rules 2.1 and 2.3 of the Code. In light of Ofcom's view that the programme contained material that constituted 'adult sex material' and was therefore unsuitable for broadcast without mandatory restricted access, the broadcast was clearly capable of causing considerable offence. Ofcom therefore examined the extent to which there were any particular editorial or contextual factors that might have limited the potential for offence. Ofcom noted that the programme was broadcast at 00:15, therefore a long time after the watershed, and that viewers tend to expect stronger sexual material to be shown later at night. Ofcom also took account of the fact that the channel is positioned in the 'adult' section of the Sky EPG and that viewers tend to expect the broadcast of stronger sexual material on channels in this section of the EPG than would be expected to be included on other channels.

However, in this case, given the relatively prolonged and repeated scenes of intimacy and the strong sexual nature of the performance (for the purpose of sexual arousal), the time of broadcast and location of the channel were not sufficient to justify the broadcast of the material. The material shown was so strongly sexual that it would have exceeded the likely expectation of the vast majority of the audience. Ofcom concluded that the content was clearly not justified by the context and was in breach of generally accepted standards and in breach of Rules 2.1 and 2.3.

Ofcom welcomed the Licensee's apologies and confirmation it was keen to adhere to the Code and put in place new procedures if necessary. It also noted the broadcaster's statements that this was a trial broadcast piece which has not been repeated, and that its record of compliance until now has been good. However, in Ofcom's opinion, the content of this programme exceeded that which should be broadcast free to air without mandatory restricted access and there was a clear breach of Rules 1.18, 2.1 and 2.3 of the Code.

Ofcom has provided a considerable amount of guidance to adult sex chat broadcasters about what constitutes 'adult sex material' and what is acceptable under the Code. These broadcasters need to take particular care when they feature more than one presenter on screen and the presenters are or appear to be intimate with each other in a sexual manner.

### **Breach of Rules 1.18, 2.1 and 2.3**

## In Breach

### Early Bird

*Tease Me TV (Freeview), 3 August 2010, 08:00 to 09:00*

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#### Introduction

*Earlybird* is a televised daytime interactive chat programme broadcast on Tease Me TV between 05:30 and 09:00 and without mandatory restricted access. Viewers are invited to contact onscreen female presenters via premium rate telephony services ("PRS"). The presenters generally dress and behave in a flirtatious manner. Tease Me TV is located on the Freeview platform on channel number 98. The licence for the service is held by Bang Media (London) Ltd ("Bang Media").

Ofcom received a complaint from a viewer about this broadcast. The complainant was a parent of young children and was concerned "that during the morning until 9am the Early Bird digital channel is broadcasting sexually explicit television". The complainant said that the material was broadcast at "a time when many young children watch television, before school and in the holidays and the channel is easily accessible".

The Licensee provided a recording. Ofcom noted that the female presenter was wearing a revealing red lace bra and thong, red fish net stocking and suspenders, and red stilettos. During the broadcast the presenter adopted certain positions including lying on her side, back and front with her legs wide open, lying on her side with one leg raised in the air, and on all fours with her hips and buttocks raised. While in these positions the presenter repeatedly: stroked and touched her body including her crotch area, legs and breasts; moved and gyrated her hips in a sexually provocative way; and lightly jiggled her breasts. The presenter was also shown licking her lips and showing her tongue to reveal a tongue stud. A number of times during the broadcast the camera moved up and down the presenter's body so that her covered breasts were shown in close up.

Ofcom requested comments from Bang Media under Rule 1.3 (children must be protected from unsuitable material by appropriate scheduling).

#### Response

Ofcom formally requested comments from Bang Media on a number of occasions. Bang Media did not provide any comments. In the absence of any response from the Licensee, Ofcom proceeded to reach a decision on this material against the Code.

#### Decision

Rule 1.3 makes clear that children should be protected by appropriate scheduling from material which is unsuitable for them. Appropriate scheduling is judged according to factors such as: the nature of the content; the likely number of children in the audience, taking into account such factors as school time; the start and finish time of the programme; the nature of the channel; and, the likely expectations of the audience for a particular channel or station at a particular time and a particular day. It should be noted that the watershed starts at 21:00 and material unsuitable for children should not, in general, be shown before 21:00 or after 05:30.

Ofcom has made clear in numerous previous published findings what sort of material is unsuitable to be included in daytime interactive chat programmes without mandatory restricted access<sup>1</sup>. In the context of daytime interactive chat programmes where the presenters generally dress and behave in a flirtatious manner for extended periods in order to solicit PRS calls, Ofcom underlined that the presenters should not, for example, appear to mimic or simulate sexual acts or behave in an overtly sexual manner and clothing should be appropriate for the time of broadcast. These decisions were also summarised in a guidance letter sent by Ofcom to daytime and adult sex chat broadcasters in August 2009. Some of these findings involved Bang Media.

This broadcast was transmitted during the early morning and featured a female presenter wearing very skimpy lingerie of a sexual nature. The presenter was shown acting in a sexualised way – for example by adopting sexual positions for prolonged periods of time, such as: lying on her side and back with her legs wide open or in the air (albeit away from camera) and kneeling on all fours with her hips and buttocks raised in the air. While in these positions the presenter repeatedly mimicked sexual activity by moving and gyrating her hips in a sexual manner and her breasts were shown in close up. The presenter also repeatedly stroked her breasts and crotch area and licked her lips in a sexualised rather than flirtatious way.

Ofcom concluded that the content included in the broadcast as described above had no editorial justification since its sole purpose was to elicit PRS calls. In Ofcom's view, the revealing and sexual clothing, and repeated actions and sexual positions of the presenter were intended to be sexually provocative in nature and the broadcast of such images was not suitable to promote daytime chat. In light of this behaviour, together with its lack of editorial justification, in Ofcom's view the material was clearly unsuitable for children.

Ofcom went on to consider whether this material was appropriately scheduled. Ofcom took into account that this material was broadcast from 08:00 in the morning and therefore at a time when children may have been in the audience, some unaccompanied by an adult. While Ofcom noted that the material was broadcast on a channel that is not located directly next to children's channels on the Freeview platform, there was the potential for children, should they be flicking through the Freeview electronic programme guide, to come across the channel unawares. Ofcom then considered the likely expectations of the audience for programmes broadcast at this time of day on a channel without mandatory restricted access. In its opinion,

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<sup>1</sup> Earlybird, Tease Me TV, 3 June 2010, 05:45 and 08:00, Bulletin 164 at <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb164/issue164.pdf>; Earlybird, Tease Me TV, 30 January, 20 March, 27 April 2010 and Earlybird, Tease Me, 21 April 2010 – all Findings in Bulletin 163 at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb163/>; Tease Me: Earlybird, Tease Me TV (Freeview), 15 February 2010, 05:30 and Tease Me: Earlybird, Tease Me TV (Freeview), 25 January 2010, 07:15 – both Findings in Bulletin 158 at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb158/>; The Pad, Tease Me, 26 February, 11:45, The Pad, Tease Me 3, 27 February 2010, 11:45, Tease Me: Earlybird, Tease Me TV (Freeview) 26 January 2010, 07:15 - all in Bulletin 157 at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb157/>; The Pad Tease Me, 6 November 2009, 12:00 to 13:00 and 14:00 to 15:00, Bulletin 152 at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb152/>; Elite Days, Finding in Bulletin 151 at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb151/>;

viewers would not expect to come across such material on this channel or any other unencrypted channel at this time.

Taking into account the factors above, Ofcom concluded that the content of the broadcast was clearly unsuitable for children and not appropriately scheduled so as to protect them from it. Therefore the content breached Rule 1.3 of the Code.

On 29 July 2010 Ofcom fined Bang Media (London) Limited and Bang Channels Limited a total of £157,250 for serious and repeated breaches of the Code as regards the broadcast of programmes between June 2009 and November 2009, and for breaches of Licence Conditions.

In addition, as a result of the serious and repeated nature of breaches recorded previously against Bang Channels Limited and Bang Media (London) Ltd in Bulletins 157, 158, 163 and 165, Bang Media has already been put on notice that these contraventions of the Code are being considered for further statutory sanction.

### **Breach of Rule 1.3**

## In Breach

### Early Bird

*Tease Me TV (Freeview), 15 July 2010, 08:30 to 09:00*

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#### Introduction

*Early Bird* is a televised daytime interactive chat programme broadcast without mandatory restricted access. Viewers are invited to contact onscreen female presenters via premium rate telephony services. Tease Me TV is a daytime chat channel available from 05:30 until 09:00 on Freeview. The programming is broadcast without mandatory restricted access. The licence for the service Tease Me TV is held by Bang Media (London) Ltd (“Bang Media”).

Condition 11 of Bang Media’s licence states that the Licensee must make and retain a recording of all its programmes for a period of 60 days from broadcast, and at Ofcom’s request must produce a recording “forthwith”. Ofcom has made clear that recordings “must be of a standard and in a format which allows Ofcom to view the material as broadcast.”

Ofcom received one complaint about alleged inappropriate adult content between 08:30 and 09:00. Ofcom requested a recording of that material from Bang Media.

#### Response

Between 20 July and 25 August 2010 Ofcom asked Bang Media on several occasions and set various deadlines to provide a recording of the programme. In correspondence Bang Media stated that it was having difficulty in retrieving the material Ofcom had requested. The Licensee did not provide a recording. Ofcom therefore asked the Licensee for formal comments on its compliance with Condition 11 of its licence, and in particular the obligation to provide Ofcom with a copy of its output “forthwith” on request. Bang Media did not provide any comments in response.

#### Decision

The failure by Bang Media to supply the recording in this instance is a serious and significant breach of Condition 11 (Retention and production of recordings) of its licence to broadcast. This breach will be held on record.

On 29 July 2010 Ofcom fined Bang Media (London) Limited and Bang Channels Limited a total of £157,250 for serious and repeated breaches of the Code as regards the broadcast of programmes between June 2009 and November 2009, and for breaches of Licence Conditions. In addition, as a result of the serious and repeated nature of breaches recorded previously against Bang Channels Limited and Bang Media (London) Ltd in Bulletins 157, 158, 163 and 165, Bang Media has already been put on notice that these contraventions of the Code are being considered for further statutory sanction.

#### **Breach of Licence Condition 11 (retention and production of recordings)**

## Not In Breach

### Marie Stopes International advertisement

Channel 4, May and June 2010, various dates and times

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#### Introduction

Ofcom received 270 complaints about an advertisement by Marie Stopes International. The advertisement was broadcast between 24 May and 24 June 2010 by Channel 4<sup>1</sup>. The complaints alleged that the advertisement was ‘political’ in nature.

Marie Stopes International (“MSI”) is a registered charity. It provides a variety of services in the fields of sexual health, sterilisation and pregnancy. MSI offers a post-conception advice service. This service includes advice about and the provision of abortions.

Political advertising is prohibited on television and radio under the terms of section 321 of the Communications Act 2003 (“the Act”) and, for television, by Section 4 of the Broadcast Committee of Advertising Practice (BCAP) Television Advertising Standards Code (“the TV Advertising Code”). The relevant extracts from the Act and the TV Advertising Code are given in full at the end of this Finding.

The TV Advertising Code, formerly Ofcom’s Advertising Standards Code, is now administered by the Advertising Standards Authority (ASA) and BCAP. Ofcom, however, remains responsible under the terms of the Memorandum of Understanding, between Ofcom and the ASA, for enforcing the rules on Political Advertising, namely Section 4 of the TV Advertising Code.

The ASA itself received some 1,054 complaints, and a petition, about the advertisement which did not raise objections of a political nature. These have been considered by the ASA; no breach of the TV Advertising Code was found<sup>2</sup>.

The advertisement showed three women in everyday settings - a bus stop, a park, a café - and each time a caption appeared with a name and the words ‘is late’: “*Jenny Evans is late*”; “*Kate Simmons is late*” and “*Shareen Butler is late*”.

The voice-over said:

*“If you’re late for your period you could be pregnant. If you’re pregnant and not sure what to do, Marie Stopes International can help.”*

An end title slate contained the text “*Are you late?*” and displayed a telephone number and the Marie Stopes website address.

A large number of the complaints included the following wording or essentially similar wording:

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<sup>1</sup> The advertisement was not broadcast in Northern Ireland.

<sup>2</sup> The ASA’s adjudication on the Marie Stopes advertisement can be found at: [http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2010/8/Marie-Stopes-International/TF\\_ADJ\\_48869.aspx](http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2010/8/Marie-Stopes-International/TF_ADJ_48869.aspx)

“...Abortion and its provision in the UK is a matter of continuing political debate and controversy and Marie Stopes International actively campaigns to change abortion law, referring to this advert as part of a ‘wider campaign’.”

Other complaints objected variously that the advertisement was biased; tended to normalise a contentious issue; promoted a political agenda; was part of a wider political campaign; was ‘propaganda’; and/or had been placed by a ‘political lobby’.

## Decision

Under the terms of the TV Advertising Code post-conception advice services that are not commercial in nature may advertise on television<sup>3</sup>. Therefore MSI, as a not-for-profit organisation, is permitted to advertise on television.

Ofcom has a statutory duty to ensure that political advertising, as defined by the Act, is not included in television or radio services. Section 321(2) of the Act explains that an advertisement contravenes the prohibition on political advertising if it is:

- a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;
- b) an advertisement which is directed towards a political end; or
- c) an advertisement which has a connection with an industrial dispute.

Therefore an advertisement may fall foul of the prohibition on political advertising either because of the character of the advertiser or because of the content and character of the advertisement. Section 321(3) sets out an inclusive, non exhaustive list of examples of “objects of a political nature” and “political ends”.

In order to consider whether the advertisement was political and therefore prohibited, Ofcom considered the above criteria in turn.

### Is MSI a body whose objects are wholly or mainly of a political nature?

MSI is a registered charity. MSI’s Amended Memorandum of Association states that:

“The Company is established for the general benefit of the public:

- (i) to educate the public about population growth and control particularly about family planning, birth control and contraceptives with a view to preventing the poverty, hardship and distress caused by unwanted conception;
- (ii) to preserve and protect the good health, both mental and physical of parents, young people and children, and to prevent the poverty, hardship and distress caused by unwanted conception;
- (iii) to give medical advice and assistance to persons who are suffering from any physical or mental illness or distress as a result of involuntary sterility or of difficulties connected with the marriage relationship or sexual problems for

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<sup>3</sup> Rule 3.1 of the TV Advertising Code lists unacceptable product categories. Paragraph (j) prohibits ‘commercial services offering individual advice on personal or consumer problems’. (A note explains that exceptions include advertisers offering legal or financial advice.) Non-commercial services are therefore acceptable in general, so including those who operate in the field of medical and health advice.

which medical advice or treatment is appropriate, including the provision of treatment in connection with lawful birth control in clinics or medical centres for relief and benefit of such persons;

- (iv) to relieve sickness and preserve and protect good health by the provision of screening programmes to detect early stages of treatable and preventable disease and by advising and educating persons in the way they can take responsibility for their own health and adapt their lifestyle beneficially.”

On its website MSI says the following under a heading of “goal, mission and vision”:

“Goal – The prevention of unwanted births.

Mission – Children by choice not chance.

Vision – In pursuit of its Goal and Mission, Marie Stopes International works with its Partners to:

- respond to unmet need for family planning services and supplies
- empower and develop Partner organisational and programming capacity
- improve efficiency and effectiveness
- build sustainable programmes
- maximise leverage of available donor resources through charging affordable fees to achieve financial sustainability
- set a standard in facilities and quality of care to increase client awareness and act as a catalyst to drive up the quality provided by all service providers”

MSI’s website also contains a brief section explaining that the organisation believes that abortion should be available to women on demand. Relative to the range and generality of the information provided on the website about the health services available to women and men, fees, contact and geographical details and so on, the details given of MSI’s beliefs and campaigning occupy a very small minority of the links and page space.

Therefore, while noting the objection made by many complainants that MSI advocates changes in abortion law, Ofcom is satisfied that any such aspect of MSI’s activities would not bring the organisation within the terms of the prohibition contained within section 321(2)(a) of the Act i.e. it could not reasonably be described as a body whose objects are “wholly or mainly of a political nature”. The large majority of the organisation’s activities and objectives as outlined above could not be described as political in nature. Charities and other bodies can, and regularly do, campaign or comment on matters relevant to their interests, including on legislative change. But where, as here, such activity is not the chief or principal purpose of the advertiser, Ofcom considers that it does not fall within the prohibition in section 321(2)(a) of the Act.

Accordingly, Ofcom concluded that MSI is not a body whose objects are “wholly or mainly of a political nature”.

#### Is the advertisement directed towards a political end?

Ofcom then considered whether the advertisement is directed towards a “political end”. Section 321(3) of the Act sets out a non-exhaustive list of “objects of a political nature” – see the end of this Finding for the full text of s.321(3). Ofcom concluded that the advertisement is not directed towards a political end, and in doing so, Ofcom considered in particular two examples of “objects of a political end” in the list contained in section 321(3).:

*(b) bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory;*

*(f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;*

In neither case did Ofcom consider that these objects could reasonably be ascribed to the content of the advertisement.

In respect of section 321(3)(b) of the Act above, Ofcom does not consider that the content of the advertisement itself in any way sought to bring about changes in the law or influence the legislative process. The advertisement was the promotion of MSI as an organisation that gives post-conception advice and to encourage viewers who needed such advice to contact them. The advertisement did not deal with any issues relating to changes to the law or influencing the legislative process.

Similarly, in respect of 321(3)(f) above, Ofcom does not consider the contents of the advertisement were aimed at influencing the public on a matter of public controversy. Ofcom accepts that the issue of abortion itself is a matter of public controversy. However, the advertisement made no attempt whatever to present a point of view on this issue. The advertisement made no reference at all to abortion, or indeed to any particular medical treatment or procedure. Instead, it promoted, as stated above, the availability of a general advisory service for women who were dealing with an unplanned pregnancy.

More generally, Ofcom's view is that the mere fact of an advertisement referring to pregnancy placed by an advertiser that provides abortions – among other sexual health and reproductive services – and that has a commitment to, *inter alia*, women's access to abortion, does not bring the advertisement within the terms of either section 321(2)(a) or 321(3)(f).

Some complainants believed that the advertisement was a component of a 'wider campaign' (to change abortion law). We note that MSI issued a press release at the time the advertisement was broadcast stating that "For the first time ever, a commercial for unplanned pregnancy and abortion advisory services will be aired on British television". Having considered the contents of this press release, Ofcom found nothing within it to suggest that the advertisement was part of a wider campaign to change abortion law.

#### Is the advertisement in connection with an industrial dispute?

Finally, Ofcom considered whether the third limb contained in section 321(2)(c) applied – an advertisement contravenes the prohibition on political advertising if it has a connection with an industrial dispute – and concluded that it did not.

Therefore Ofcom concluded that the advertisement featured the availability of a service allowed by the TV Advertising Code, was placed by an advertiser whose objects were not wholly or mainly of a political nature, and was not directed towards a political end.

#### **Not in Breach**

## Extracts from the relevant legislation and code

### Communications Act 2003

#### Section 319:

*(1) It shall be the duty of OFCOM to set, and from time to time to review and revise, such standards for the content of programmes to be included in television and radio services as appear to them best calculated to secure the standards objectives.*

*(2) The standards objectives are—*

...

*(g) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services;*

#### Section 321:

##### *Objectives for advertisements and sponsorship*

*(1) Standards set by OFCOM to secure the objectives mentioned in section 319(2)(a) and (g) to (j)—*

*(a) must include general provision governing standards and practice in advertising and in the sponsoring of programmes; and*

*(b) may include provision prohibiting advertisements and forms and methods of advertising or sponsorship (whether generally or in particular circumstances).*

*(2) For the purposes of section 319(2)(g) an advertisement contravenes the prohibition on political advertising if it is—*

*(a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;*

*(b) an advertisement which is directed towards a political end; or*

*(c) an advertisement which has a connection with an industrial dispute.*

*(3) For the purposes of this section objects of a political nature and political ends include each of the following—*

*(a) influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;*

*(b) bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory;*

*(c) influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere;*

*(d) influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom or of a country or territory outside the United Kingdom;*

*(e) influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;*

*(f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;*

*(g) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends.*

## BCAP Television Advertising Standards Code, Section 4

*No advertisement:*

*(a) may be inserted by or on behalf of any body whose objects are wholly or mainly of a political nature.*

*(b) may be directed towards any political end.*

*(c) may have any relation to any industrial dispute (with limited exceptions).*

**Note to 4(c):**

The Broadcasting Act 1990 specifically exempts public service advertisements by or on behalf of a government department from the prohibition of advertisements having 'any relation to any industrial dispute'.

**Notes to Section 4:**

(1) The purpose of this prohibition is to prevent well-funded organisations from using the power of television advertising to distort the balance of political debate. The rule reflects the statutory ban on 'political' advertising on television in the Broadcasting Act 1990.

(2) The term 'political' here is used in a wider sense than 'party political'. The rule prevents, for example, issue campaigning for the purpose of influencing legislation or executive action by legislatures either at home or abroad. Where there is a risk that advertising could breach this rule, prospective advertisers should seek guidance from licensees before developing specific proposals.

## Fairness and Privacy Cases

### Not Upheld

#### Complaint by Ms K on her own behalf and on behalf of her son (a minor)

*EastEnders*, BBC1, 11 and 12 March 2010

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**Summary:** Ofcom has not upheld this complaint of unwarranted infringement of privacy in the programme as broadcast.

These two episodes of *EastEnders* included brief audio of Ms K and footage of her son, during labour and immediately after her son's birth.

Ms K complained that her privacy and that of her son was unwarrantably infringed in the broadcast of the programme.

In summary Ofcom found that Ms K and her son had only a limited expectation of privacy with regard to the footage and audio. Although the footage was of an intimate and personal nature it was very brief and unlikely to have rendered Ms K and her son identifiable. In the circumstances, and taking into account the fact that the footage was already in the public domain (as a result of Ms K's arrangement with the The National Childbirth Trust ("NCT") to film the birth and disseminate the footage), their privacy was not unwarrantably infringed in the programme as broadcast.

#### Introduction

On 11 March 2010, BBC1 broadcast an episode of its regular soap, *EastEnders*. In this episode, one of the characters, Ian Beale, decided to show his pregnant teenage daughter, Lucy Beale, a DVD of his employee, Marie, giving birth in the hope that it would scare his daughter into having an abortion.

At two points in the programme, the family was shown gathered around the television and painful audio from the DVD could be heard. Finally, audio of the birth from the DVD was broadcast together with footage from the DVD of the baby having its face cleaned immediately after birth.

On 12 March 2010, BBC1 broadcast a further episode of *EastEnders*, at the beginning of which the footage from the DVD of the baby immediately after birth was again broadcast, but without any audio.

Ms K, the mother actually featured in the DVD filmed for educational purposes for the NCT, complained on behalf of herself and her three-year old son that their privacy was unwarrantably infringed in the broadcast of the programmes.

#### The Complaint

##### Ms K's case

In summary, Ms K complained that her privacy and that of her son was unwarrantably infringed in the programmes as broadcast in that audio of her giving birth was broadcast in the programme on 11 March 2010 and footage of her newborn son was broadcast in the programmes on 11 and 12 March 2010 without consent.

By way of background, Ms K said that the programmes had “trampled” over the birth of her son and had ruined her memories of the birth forever.

In addition, Ms K provided Ofcom with correspondence between the NCT and the BBC about the broadcast of the NCT’s material. This correspondence included an assurance from the BBC regarding the context in which the material was likely to be used, and was made available to Ms K by the NCT at the time she made her complaint to Ofcom.

### **The BBC’s case**

In response to this complaint, the BBC first noted that the footage which was shown in the first programme (specifically several seconds of audio, in which Ms K’s voice could be briefly heard, and a short clip of her son after being born and cleaned) was used during a sequence in which a character in the programme tried to persuade his daughter not to proceed with her pregnancy but rather to have an abortion. It added that the second programme showed one of the characters briefly viewing the same clip of her son after his birth but that on this occasion no audio was used.

The BBC argued that Ms K’s expectation of privacy, and that of her son, in these circumstances was negligible. However, the broadcaster added that if Ofcom concluded that Ms K and her son did have a reasonable expectation of privacy it considered that it was entitled to believe that Ms K had consented to the use of the material in question and that, in any event, any breach was nugatory.

The BBC said that the DVD of Ms K’s confinement and the birth of her son was filmed by an independent production company, for the NCT. It also said that the filming was done with Ms K’s consent and recorded her during examinations, in labour and during and after the birth, and included images of Ms K in various states of undress and during the more intimate moments of labour and childbirth.

The BBC said that this footage was placed in the public domain by the NCT with Ms K’s consent by means of the DVD. It also said that this DVD was advertised by the NCT as being available free of charge to “any mum-to-be in the UK” and was available for order either online from the NCT website or from the NCT’s Pregnancy and Birth telephone line, with no indication that its availability would in fact be restricted to expectant mothers.

The broadcaster argued that the fact that this intimate material was placed in the public domain, with Ms K’s consent and with effectively unrestricted availability, precluded a claim that her privacy or that of her son was breached by the use of some of that footage in the programmes, particularly as the material used fell far short of what had already been made publicly available with Ms K’s consent, in terms of the intimate and identifying material it contained.

However, the BBC added that if Ofcom concluded that Ms K did have a reasonable expectation of privacy, it would argue that the programme makers were entitled to rely upon assurances (given to them by the NCT) that Ms K had consented to the use of the material in question. It said that during discussions with the NCT prior to the broadcasts the programme makers were informed that the rights to the DVD resided with the NCT and that this point had not been disputed during the course of this complaint.

The BBC added that, notwithstanding this assurance given to the programme makers by the NCT, they sent the NCT an email on 15 December 2009 asking it to confirm

that the mothers in the DVD [one of whom was Ms K] were happy with the possibility of an extract being used in *EastEnders* and that the NCT confirmed this was the case in a subsequent phone call. (A copy of the email was provided to Ofcom) The broadcaster added that this point has not been disputed during the course of this complaint.

The BBC recognised that when Ms K was contacted by the production company that made the DVD [after the programme makers had approached the NCT regarding using an extract from this DVD] she gave her consent for the footage of her son to be used with the proviso that she “be advised by the NCT: if it was a definite, and when it would occur, and for what use, for my final authority”. However, the broadcaster said that these were conditions imposed by Ms K upon the NCT, and she apparently relied upon the production company to ensure that they were conveyed to the NCT. The BBC argued that there was no sense in which this communication between Ms K and the production company might be taken as imposing conditions for consent upon the BBC, given that they were never conveyed to the BBC by either the production company or the NCT who effectively acted as Ms K’s agent in the negotiation.

The BBC also said that in its communications with the NCT, the NCT had placed no conditions upon the use of the footage generally and certainly said nothing to suggest that Ms K had imposed conditions on the use of footage of her son. The broadcaster acknowledged that the email sent on 15 December did not ask for consent to broadcast the audio of the footage. However, the BBC said that it had been made clear to the NCT, in an earlier email, sent on 2 December 2009 (a copy of which was also provided to Ofcom), that the request included audio and that therefore it believed that it was not unreasonable to assume that audio was also covered by the inquiry as to the mothers’ consent. The BBC added that nothing was said by the NCT in reply to suggest that the two things should be considered separately and that the mothers might not agree to the audio being used.

The BBC also acknowledged the NCT’s belief that the BBC had not met the assurances it had made about the use to which the footage would be put. However, the BBC pointed out that the NCT had not made a complaint of unfairness on its own behalf and those assurances were not given to Ms K herself; rather, her consent rested upon separate assurances which she sought from the production company on behalf of the NCT. In light of this the BBC said that it could not be held responsible if these assurances were not forthcoming and argued that Ms K’s grievance in this respect, lay with the production company and/or the NCT.

The broadcaster added that it believed that there was nothing in Ms K’s complaint which suggested that the assurances given by the BBC to the NCT were in fact conveyed to her, and hence nothing to suggest that they formed part of the basis for her decision to consent to the footage being used. It surmised that the fact that Ms K had asked the production company and the NCT to advise her as to the specific use to which the footage would be put suggests either that no assurance was passed on to her or that Ms K was given an assurance which she considered insufficient. The BBC argued that whichever was the case, her consent was not based on any assurance given by the BBC and that the responsibility for contacting the BBC for further information which could be conveyed to Ms K lay squarely with the production company or the NCT. It added that given that the *EastEnders* production team could not know that further assurance might be required by Ms K, particularly as no indication to this effect was given in response to the 15 December email, they were entitled to rely upon the verbal assurances provided by the NCT that Ms K (and others) had consented to the use of the kind of material previously discussed with the NCT.

Finally, the BBC said that if Ofcom believed that the BBC was not entitled to conclude that consent had been obtained and that therefore there was an unwarranted breach of Ms K's privacy, this breach was merely nugatory given the nature of the footage used in the programmes.

In this context the BBC said that the audio was of Ms K panting or grunting and the only words she was heard uttering were "*I don't want to do this any more*" and "*hello*" (to her son after he was born). It added that Ms K was not seen in vision and nor was her name heard. The BBC also said that the only person that Ms K has claimed actually recognised her as the person in the video was the midwife, who was actually present at this birth as it was being filmed, and that it did not believe that she or her son would have been recognisable from the material used, except perhaps to intimate acquaintances or those actually present at the birth.

## **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 unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included 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 on Ms K's complaint, Ofcom considered all the relevant material provided by both parties. This included recordings of the programmes as broadcast and the written submissions provided by both parties.

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 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 Ofcom's Broadcasting Code ("the Code") which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted. Ofcom also had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

Ofcom considered Ms K's' complaint that her privacy and that of her son was unwarrantably infringed in the programme as broadcast in that footage of them was shown without her consent.

In considering whether or not there had been an unwarranted infringement of either Ms K's or her son's privacy in the programme as broadcast, Ofcom first assessed the extent to which they had a legitimate expectation of privacy in respect of the material that was broadcast.

Ofcom observed that this footage (namely sounds of Ms K during part of her labour – including one distinct comment – and the welcome she gave her son as he was presented to her after his birth, as well as a short visual clip of her son soon after his birth) was of a very intimate and personal nature. Such footage may give rise to a legitimate expectation of privacy. However, Ofcom notes that in the particular circumstances of this case, Ms K's expectation of privacy is limited by her decision to permit the birth to be filmed by the NCT and disseminated to the public at large.

Ofcom noted that the material in question was taken from a DVD filmed on behalf of the NCT. It recognised that Ms K agreed to be filmed during her labour and for both her and her son to be filmed immediately after her son's birth in order for the material to be used within this NCT DVD which she believed would be used by the charity to promote its aims, i.e. helping prospective parents prepare for the birth of their child(ren).

Ofcom also recognised that all of the material of Ms K and her son, included on this NCT DVD, was of a very intimate and personal nature to Ms K and her son.

However, Ofcom observed that, as the BBC noted in its response to the complaint, the NCT had disseminated this DVD, and therefore all of the extensive and highly intimate footage of Ms K and her son included in it, widely. An NCT press release from March 2007 (provided to Ofcom by the BBC) makes it clear that the DVD had been freely available for anyone to obtain and view for three years prior to the broadcast of these programmes.

In the light of this Ofcom considers that the footage of Ms K's labour and the birth of her son contained in the NCT DVD, including the material taken from this DVD and used in these two episodes of *EastEnders*, was already in the public domain prior to the broadcasts.

Ofcom also took account of the precise nature of the footage that was included in these programmes. It considered that the short sections of the audio of an unnamed woman during labour included in the first programme, and the brief visual of a newborn baby, again unnamed, used in both programmes, would not have rendered either Ms K or her son identifiable to anyone watching these programme, other than to people who were either present at the birth or already very familiar with them (i.e. Ms K herself, the midwife who was present and perhaps some other very close family or friends).

Taking into account the fact that the material used in these programmes had been so widely disseminated during the previous three years, and the nature and extent of the material used in the broadcast, Ofcom does not consider that the privacy of either Ms K or her son was unwarrantably infringed in the programmes as broadcast.

**Accordingly Ofcom has not upheld Ms K's complaint of unwarranted infringement of her privacy, and that of her son, in the broadcast of the programme.**

## Other Programmes Not in Breach

Up to 6 September 2010

Programme	Transmission Date	Broadcaster	Categories	Number of complaints
Advertising Scheduling	25/08/2010	Zee TV	COSTA	1
Afternoon Live	24/08/2010	Sky News	Due impartiality/bias	1
Afternoon Live	25/08/2010	Sky News	Generally accepted standards	1
All the Hits, All the Time!	25/08/2010	The Box	Sexual material	1
Any Questions	20/08/2010	BBC Radio 4	Race discrimination/offence	5
ASOS.com's sponsorship of America's Next Top Model	various	Living	Race discrimination/offence	2
Australian Rules Football: Geelong v Collingwood	07/08/2010	ESPN	Materially misleading	1
BBC News	20/08/2010	BBC 1	Drugs, smoking, solvents or alcohol	1
Big Brother 11	03/08/2010	Channel 4	Generally accepted standards	1
Big Brother 11	19/08/2010	Channel 4	Generally accepted standards	1
Big Brother 11	20/08/2010	Channel 4	Materially misleading	4
Big Brother 11	20/08/2010	Channel 4	Premium rate services	1
Big Brother 11	22/08/2010	Channel 4	Generally accepted standards	2
Big Brother 11	22/08/2010	Channel 4	Nudity	1
Big Brother 11	24/08/2010	Channel 4	Offensive language	3
Big Brother 11	24/08/2010	Channel 4	Nudity	1
Big Brother's Big Mouth	24/08/2010	E4	Generally accepted standards	1
Bounty Hunters	29/08/2010	ITV4	Generally accepted standards	1
Britain's Best Dish	30/08/2010	ITV1	Competitions	1
Britain's Next Top Model	23/08/2010	Living	Generally accepted standards	7
Capital Summertime Ball promotions	12/04/2010	Capital Radio	Product placement	1
Celebrity Juice (trailer)	30/08/2010	ITV1	Sexual material	1
Channel S News	27/10/2009	Channel S	Due impartiality/bias	1
Chris Moyles Show	25/08/2010	BBC Radio 1	Generally accepted standards	1
Coronation Street	29/08/2010	ITV1	Drugs, smoking, solvents or alcohol	1
Coronation Street	30/08/2010	ITV1	Offensive language	1
Coronation Street	02/09/2010	ITV1	Offensive language	1
Coronation Street	02/09/2010	ITV1	Disability discrimination/offence	1
Dara O'Briain Live at the Theatre Royal	30/08/2010	BBC 2	Offensive language	1
Dave Berry Show	25/08/2010	XFM	Generally accepted standards	1
Dispatches	15/03/2010	Channel 4	Due Impartiality/Bias	1

Dispatches: When Cousins Marry	23/08/2010	Channel 4	Under 18s in programmes	1
Doc Martin	20/08/2010	ITV1	Religious/Beliefs discrimination/offence	1
EastEnders	16/08/2010	BBC 1	Religious/Beliefs discrimination/offence	1
EastEnders	23/08/2010	BBC 1	Sexual material	1
EastEnders	23/08/2010	BBC 1	Drugs, smoking, solvents or alcohol	1
EastEnders	24/08/2010	BBC 1	Race discrimination/offence	1
Elite	18/08/2010	Elite TV	Generally accepted standards	1
Emmerdale	22/07/2010	ITV1	Generally accepted standards	1
Entertainment News	25/08/2010	ITV2	Disability discrimination/offence	1
Faith School Menace (trailer)	14/08/2010	Film4	Religious/Beliefs discrimination/offence	1
Faith School Menace?	18/08/2010	More4	Due impartiality/bias	4
Faith School Menace?	18/08/2010	More4	Materially misleading	1
Faith School Menace?	18/08/2010	More4	Religious/Beliefs discrimination/offence	1
GMTV	26/08/2010	ITV1	Harm	1
GMTV	25/08/2010	ITV1	Due accuracy	1
GMTV	30/08/2010	ITV1	Due accuracy	1
Holby City	24/08/2010	BBC 1	Drugs, smoking, solvents or alcohol	1
Home Video Heroes	22/08/2010	Virgin 1	Animal welfare	1
How to Look Good Naked	25/08/2010	Channel 4	Nudity	1
Hurricane Katrina	26/08/2010	Channel 4	Generally accepted standards	1
ITV News	30/08/2010	ITV1	Due accuracy	1
ITV News	31/08/2010	ITV1	Due accuracy	1
James O'Brien	24/08/2010	LBC 97.3FM	Age discrimination/offence	1
Jedward: Let Loose	31/08/2010	ITV2	Violence and dangerous behaviour	1
Les Watts	18/06/2010	Radio Hartlepool	Due impartiality/bias	1
Live at Five	23/08/2010	Sky News	Due accuracy	1
Midsomer Murders	05/08/2010	ITV1	Offensive language	1
Midsomer Murders	21/08/2010	ITV1	Violence and dangerous behaviour	2
Newcastle v Aston Villa	22/08/2010	ESPN	Generally accepted standards	1
Newsnight	25/08/2010	BBC 2	Offensive language	1
Newsround	24/08/2010	BBC 1	Offensive language	1
Peter Andre: The Next Chapter	29/06/2010	ITV2	Advertising/editorial separation	1
Police Interceptors	20/08/2010	Five	Generally accepted standards	1
Pop TV	26/06/2010	Pop TV	Generally accepted standards	1

Riva Starr feat. Noze - "I Was Drunk"	04/09/2010	Chart Show TV	Under 18s in programmes	1
Russell Howard's Good News	10/08/2010	BBC 2	Religious/Beliefs discrimination/offence	1
School of Comedy	18/08/2010	Channel 4	Generally accepted standards	1
School of Comedy	01/09/2010	Channel 4	Under 18s in programmes	1
Sky News at Six	23/08/2010	Sky News	Violence and dangerous behaviour	1
Sky Text Page 403 5/12	03/09/2010	Sky Text	Race discrimination/offence	1
Suck My Pop!	various	Viva	Sexual material	1
TalkTalk's sponsorship of The X Factor	various	ITV	Sponsorship	1
That Mitchell and Webb Look	17/08/2010	BBC 2	Religious/Beliefs discrimination/offence	1
The Alan Brazil Sports Breakfast	01/09/2010	Talksport	Race discrimination/offence	2
The Armstrong and Miller Show	23/08/2010	BBC 1	Generally accepted standards	1
The Armstrong and Miller Show	23/08/2010	BBC 1	Crime	1
The God Delusion	25/08/2010	More4	Religious/Beliefs discrimination/offence	1
The Hospital	16/08/2010	Channel 4	Materially misleading	1
The Inspector Lynley Mysteries	03/09/2010	BBC 1	Offensive language	1
The Jeremy Kyle Show	03/09/2010	ITV1	Violence and dangerous behaviour	2
The Jeremy Kyle Show	31/08/2010	ITV1	Generally accepted standards	1
The Jeremy Kyle Show	06/09/2010	ITV2	Generally accepted standards	1
The Michael Ball Show	02/09/2010	ITV1	Generally accepted standards	1
The One Show	24/08/2010	BBC 1	Offensive language	1
The Secret Tourist	18/08/2010	BBC 1	Race discrimination/offence	1
The Today Programme	25/08/2010	BBC Radio 4	Animal welfare	2
The Wright Stuff	24/08/2010	Five	Generally accepted standards	3
The Wright Stuff	02/09/2010	Five	Generally accepted standards	6
The Wright Stuff	23/08/2010	Five	Generally accepted standards	1
The Wright Stuff	24/08/2010	Five	Animal welfare	1
The X Factor	21/08/2010	ITV1	Religious/Beliefs discrimination/offence	3
The X Factor	21/08/2010	ITV1	Generally accepted standards	3
The X Factor	21/08/2010	ITV1	COSTA	2
The X Factor	28/08/2010	ITV1	Generally accepted standards	6
This Morning	23/08/2010	ITV1	Generally accepted standards	1
Two and a Half Men	18/08/2010	Viva	Drugs, smoking, solvents or alcohol	1

Ultimate Big Brother	25/08/2010	Channel 4	Violence and dangerous behaviour	1
Ultimate Big Brother	27/08/2010	Channel 4	Generally accepted standards	1
Ultimate Big Brother	28/08/2010	Channel 4	Generally accepted standards	3
Ultimate Big Brother	03/09/2010	Channel 4	Race discrimination/offence	4
Ultimate Big Brother	03/09/2010	Channel 4	Generally accepted standards	4
UTV Live Tonight	16/08/2010	UTV	Due impartiality/bias	1
Vexed	15/08/2010	BBC 2	Generally accepted standards	1
Wedding Daze	04/09/2010	ITV2	Generally accepted standards	1
What's the Point Of. . . Marylebone Cricket Club?	24/08/2010	BBC Radio 4	Race discrimination/offence	1
Wheeler Dealers	25/08/2010	Discovery Turbo	Violence and dangerous behaviour	1
X Factor ident	various	ITV1	Hypnotic and other techniques	2
You've Been Framed!	28/08/2010	ITV1	Generally accepted standards	1