

# **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.

## Note to Broadcasters

### Broadcasting Code changes: Section Ten of the Code

On 1 September 2010 new rules within Section Ten came into force. The amended Code can be seen at <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>.

New guidance to Section Ten was also published at the same time and can be found at: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/programme-guidance/bguidance/>.

The new rules were consulted on as part of Ofcom's examination of 'Participation TV'. Ofcom's consultation-statement confirming the introduction of the rules is at: <http://stakeholders.ofcom.org.uk/binaries/consultations/participationtv3/summary/ptv3.pdf>.

The new rules tighten the regime for the use of premium rate telephone services (PRS) which are permitted to be used in editorial programmes. Licensees are urged to familiarise themselves with the new rules and the guidance to them.

As rules have been added to Section Ten, the numbering of the later rules in the section has changed accordingly.

### New BCAP Code

Licensees should also note that on 1 September 2010 the new BCAP Code: the UK Code of Broadcast Advertising came into force. The new 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).

The BCAP code now contains certain rules that allow PRS-based long-form advertising offers of 'adult' chat and 'psychic' services. Ofcom has responsibility for regulating (under the BCAP Code) long-form advertising material 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 long-form advertising or 'teleshopping'.

BCAP and ASA will, however, continue to regulate conventional teleshopping content and spot advertising for the types of service mentioned above where it is permitted.

### Broadcasting Code Review: Sections Nine and Ten of the Code

Further, broadcasters are reminded that on 28 June 2010 Ofcom published its proposals for revising Sections Nine (sponsorship) and Ten (commercial references and other matters) of the Code.

The proposals include new rules to allow product placement on television and liberalisation of the rules on paid-for references to brands and products in radio programming.

The proposals are set out in two separate consultations which are open **until Friday, 17 September 2010**.

The consultation for the proposals relating to television programming can be found here: <http://stakeholders.ofcom.org.uk/consultations/bcrtv2010/>.

The consultation for the proposals relating to radio programming can be found here: <http://stakeholders.ofcom.org.uk/consultations/bcrradio2010/>.

**Sections Nine and Ten of the Code will therefore undergo further substantial revision after the conclusion of the consultations and subsequent publication of regulatory statements. The statements are expected to be published later this year.**

**Until Ofcom has issued the revised Code, broadcasters are reminded that the current Code rules - as operative on 1 September 2010 - remain in force.**

## Standards cases

### In Breach

#### The Jon Gaunt Show

*Talksport Radio, 10 October 2008*

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##### Introduction

This edition of *The Jon Gaunt Show* was broadcast from the Hotel Almyra in Cyprus. Among other subjects, it tackled the global economy, the Icelandic banking crisis, the division of Cyprus, the British Army in Cyprus, the alleged state of 'Broken Britain', choosing to live in another country, and buying property abroad.

The programme featured phone-in contributions from listeners and interviews with a number of different individuals including:

- A director of property company Thomson OPI, which offers investment in Cypriot properties;
- A representative from a Cypriot property development company, Aristo Developers; and
- Tony Jacklin, the golfer, who was designing a golf course for an Aristo Developers resort.

The programme followed the general pattern of *The Jon Gaunt Show*, containing interviews, chat, contributions from listeners and comment from the host.

Three listeners complained that the programme amounted to advertising and promoted, in particular, the property company Thomson OPI which offers overseas property ownership opportunities. The complainants were also concerned that the programme contained claims for investment potential in Thomson OPI properties without warnings about risk. The complainants also alleged that Jon Gaunt may have a personal financial interest in promoting Thomson OPI, and questioned the acceptability of the content on this basis.

Ofcom noted the following content in the programme as broadcast:

##### Thomson OPI

Throughout the programme various comments were made about the desirability of Cyprus as a destination and the benefits of buying property abroad. On numerous occasions details of the services offered by Thomson OPI were referred to and the company's website was given. For example:

Jon Gaunt:

*"Well let's speak to one of Talksport's partners in crime, so to speak, at the moment, certainly in property – Thomson OPI...";*

*"And a very good morning to you listeners. Gaunty coming to you live from Hotel Almyra here in Paphos. If you want any tips on property investment, wherever in the world, remember you've just got to go to one place – [www.thomsonopi.com](http://www.thomsonopi.com).*

*www.thomsonopi.com. Any of the places we're talking about today or investments round the globe, they're the people to have a look at first. Check out their website and see what you make of it...";*

*"And we're taking your views on overseas property development. Here's a good email to start us off with, and Mike Thomson's here. Tell us about the website. If you want to check it out, you're under no obligation of course, it's www.thomsonopi.com. Have a look on there. You might get yourself some good tips and some good bargains in terms of overseas property investment..."; and*

*"Remember, although we're here in Cyprus, it's only really for illustration. Thomson OPI have got development opportunities all around the globe, in places like France, Spain, America, Bulgaria. So you might want to have a chat with him. You might want to check out their website and then come forward with a question. If you do, it's www.thomsonopi.com, and then give Mike a call...."*

### Secret Valley

The programme also contained discussions about a Cypriot property resort called Secret Valley. This resort was being developed by Aristo Developers, with investment opportunities offered through Thomson OPI. Jon Gaunt interviewed a representative of the development company about the resort and they discussed Cyprus and Cypriot culture more generally. Discussions about the resort included:

Aristo Developers representative:

*"We are redesigning the whole resort. We have a number of very well known companies like Ramsa, who has the responsibility to do a fantastic retail centre on our beachfront. Remember, we have about a kilometre of beach front"; and*

Jon Gaunt:

*"So it's basically a golf resort with a beachfront as well. And it's a kind of place where there's going to be all, a kind of whole range of properties on offer. Is that right?"*

The presenter also conducted a telephone interview with Tony Jacklin about golf, and Mr Jacklin's role in designing golf courses at the Secret Valley development. Before speaking to Mr Jacklin, the presenter told the audience:

*"We're going to be speaking live to Tony Jacklin from his home in Florida. As I say, he's designed this brand-new course up at Secret Valley on the outskirts of Paphos. I've actually seen some of the plans. It's going to be an outstanding place when that is sorted, let me tell you. And if you want to look at some investment opportunities at that development or other developments, you know where to go, www.thomsonopi.com. They're our partners in this. Just quickly go to their website, www.thomsonopi.com..."*

### Hotel Almyra

In addition to the complaints, Ofcom noted that throughout the programme the presenter made frequent references to the Hotel Almyra, the venue of the broadcast, including references to the venue's facilities. Towards the end of the programme the presenter conducted an interview with a representative of the hotel and discussed its history, its recent refurbishment and its facilities. For example, reference was made to the hotel's new spa and the treatments it offered. At the end of the interview, the presenter said:

*“Well, we think it’s a lovely hotel. Thank you for looking after us. That’s the Hotel Almyra, if you ever want to check it out, why don’t you? You know it makes sense”.*

Ofcom asked Talksport, the licensee, to provide it with a range of information relating to the broadcast, including any contractual arrangements between Talksport and Thomson OPI that had been in place. Ofcom also requested Talksport’s comments under the following Code rules:

- Rule 2.1 – 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;
- Rule 10.1 – Broadcasters must maintain the independence of editorial control over programme content;
- Rule 10.2 – Broadcasters must ensure that the advertising and programme elements of a service are kept separate;
- Rule 10.3 – Products and services must not be promoted in programmes;
- Rule 10.4 – No undue prominence may be given in any programme to a product or service; and
- Rule 10.5 – Product placement is prohibited.

In addition, in the course of Ofcom’s investigation, Jon Gaunt informed Ofcom that he wished to submit third party representations to be taken into account as part of Ofcom’s consideration of this case. Ofcom agreed to consider Jon Gaunt’s representations on those elements of the case that related specifically to him.

### **Talksport’s response**

Talksport stated that the purpose of the programme was to look at ‘Broken Britain’, a premise of many of the presenter’s programmes. The programme was seeking to discover if life could be better elsewhere. On previous occasions the programme had explored why a record number of British citizens were looking to make a life for themselves abroad. The broadcast picked up the topic and looked at the pitfalls of living in another country and what people should take into consideration before making such a decision. Talksport said that Cyprus was chosen as a suitable place to broadcast from as it has strong connections with Britain, including a large British military presence.

Talksport explained that although an outside broadcast, the programme continued to be a phone-in discussion show including a range of topics and guests. Among the subjects discussed were the global economy, the Icelandic banking crisis, national service, pride in being British, families, zero tolerance policies, the British military in Cyprus, the EU, the division of Cyprus, and sports.

### **Thomson OPI**

Talksport said that no discussion took place with the programme director or the producer regarding the “inclusion of any commercial element in the planning of the show”. Talksport asserted that on the day of the broadcast, Jon Gaunt told the

producer that he would be interviewing two additional guests – a representative of Aristo Developers and a representative of Thomson OPI – during the show. Talksport explained that it is not unusual for presenters or producers to introduce unplanned guests live during outside broadcasts as and when the situation arises.

Talksport stated that the representative of Thomson OPI was featured in the programme because of the company's expertise in purchasing property overseas. Given the complexities of moving to another country, it was felt that talking to an individual about how it is done was necessary for the audience's understanding.

As to the risks in investing in property, Talksport said that Thomson OPI does not offer financial advice and that such advice and provision of finance must be sought by prospective purchasers themselves. In relation to Rule 2.1 (adequate protection from harmful material), Talksport pointed out that during the programme there was discussion about how any buyer needs to be aware that things can go wrong and that the interview had contained repeated references to purchasers needing to do research, consult a good lawyer and that "*the buyer must beware*".

Talksport acknowledged that it did have a commercial arrangement with Thomson OPI but did not believe the programme amounted to an advertisement for the company. Talksport calculated that 12 and-a-half minutes of the three-hour programme were taken up by discussion with Mike Thomson of Thomson OPI.

Talksport supplied Ofcom with a copy of its contract with Thomson OPI. In summary, it was a condition of the contract that Talksport would provide editorial promotion of Thomson OPI – including an annual outside broadcast from a Thomson OPI property, for which Talksport would "endeavour to have this feature hosted by Jon Gaunt". The contract also referred to "editorial support" in other shows, and the promotion of Thomson OPI in pre-recorded advertisements and online. In return, Thomson OPI had agreed to pay Talksport a monthly fee, and Talksport would also receive an additional fee for each Thomson OPI property sold.

Talksport said that the value of the Thomson OPI deal was, in fact, very low in comparison to the station's commercial revenue for the final quarter of 2008. In any event, the licensee stated that it had received no money from Thomson OPI for property sales and the total income Talksport had generated was only three months' worth of the monthly fee.

Talksport told Ofcom that the contract with Thomson OPI had been arranged by UTV Radio's [Talksport's parent company] Director of New Media, and ran contrary to the station's established compliance practices. Talksport explained that the Director of New Media's expertise was in telephony and new media and not compliance or commercial arrangements for radio programming. The Director of New Media had operated outside of the licensee's compliance procedures so that the usual scrutiny was not applied in this case. Talksport explained that central to those standard procedures was that no one individual could be responsible for the approval of an on-air project, "...yet, due to a malfunction within the internal Talksport commercial management structure, that is precisely what happened".

Other senior staff had not questioned the terms of the deal with Thomson OPI as it had been assumed that the necessary procedures had been followed. When the contract came to the attention of senior Talksport executives it was terminated. Talksport told Ofcom that the individual in question had since been subject to a disciplinary procedure and had undergone additional compliance training.

In relation to the allegation made by the complainants that Jon Gaunt may have had a personal financial interest in Thomson OPI, Talksport stated that Jon Gaunt had given it his personal assurance that he has no financial association with Thomson OPI, and had not received any recompense from Thomson OPI for this broadcast. Talksport also stated that Mr Gaunt had bought a property in Cyprus through Thomson OPI, before Talksport's relationship with the company.

Talksport was of the view that "Jon Gaunt's personal relationship with a director of the company and the fact that he had bought a property through Thompson OPI should have been taken more in account, and whilst the presenter and programme were honest about this relationship it put both in an invidious situation that by default there was confusion about whether or not the presenter and programme were endorsing the product, Talksport accepts this and apologises for any confusion this may have created with the audience..." [It should be noted that Jon Gaunt denied having bought a property through Thomson OPI – see below.]

In conclusion, Talksport admitted that the broadcast had been conducted under the terms of its contract with Thomson OPI and that the contract did not comply with station policy or Ofcom rules. Talksport was of the view that the programme was in breach of Rules 10.2, 10.3, 10.4, and 10.5. However, Talksport denied that Rule 10.1 (independence of editorial control) had been breached, as it stated that Thomson OPI had had no influence in respect of scheduling.

#### Secret Valley Resort

Talksport stated that there are no connections and have never been any connections between Talksport and the developers of Secret Valley development. However, Talksport admitted that the broadcast did promote and give undue prominence to the development, in breach of Rules 10.3 and 10.4.

#### Hotel Almyra

Talksport also admitted that promotion and undue prominence (Rules 10.3 and 10.4) had been given to the Hotel Almyra, the hotel used for the broadcast. However, Talksport stated that it had no commercial arrangement with the hotel. Furthermore, Jon Gaunt and Thomson OPI had assured Talksport that they had no commercial interest in the hotel. Talksport confirmed that none of its employees had received any payment for referring to the hotel. Talksport explained that the hotel had been selected as it was the most suitable location technically from which to broadcast the programme. It stated that there had been no discussion in advance of the broadcast about the content featuring or referring to the hotel, therefore "the issue of compliance did not arise..."

Overall, Talksport stated that it believed it "can learn" from the broadcast. In particular Talksport acknowledged that there should have been a clearer division between the editorial content of the programme and Talksport's commercial interests with Thomson OPI. It also accepted that a wider range of property experts should have been used in the broadcast.

Talksport emphasised the remedial steps it had taken to prevent any repetition. These include a requirement that no commercial arrangement is entered into without the signature of both the Sales Director and the Programme Director or their designated deputies. Further, all producers, presenters and sales staff had been comprehensively briefed on the importance of compliance regarding commercial references and a training programme had been initiated for all new starters and existing personnel.

The licensee wished to stress that it “deeply regrets” the breaches of the Code that had taken place. Talksport said that it was wholly committed to compliance with its obligations as a licensee and to dialogue with Ofcom.

### **Jon Gaunt’s representations<sup>1</sup>**

Jon Gaunt wished to clarify that he was “merely the presenter” of the programme and the content of the programme was controlled by the Editor and Producer, save to the extent that Mr Gaunt suggested the inclusion of representatives of the local football team and the British Army Garrison as programme guests.

Mr Gaunt stated that, while he had assisted the Producer in working out the running order of the show, it was clear from the outset that the representative from Thomson OPI would be a major guest. Mr Gaunt was of the view that senior management at Talksport was “absolutely aware” of this. Mr Gaunt stated that he was not the person who decided who would be on the programme as guests - Talksport managers decided that. Mr Gaunt firmly believed “that the producer was fully aware of the commercial element of the programme”.

Mr Gaunt confirmed to Ofcom that he has never had any financial interest in Thomson OPI and has not received financial compensation from Thomson OPI. Further, he was never involved in any commercial negotiations with Talksport or Thomson OPI.

Mr Gaunt advised that, contrary to Talksport’s representations, he did not buy a property through Thomson OPI before Talksport’s relationship with the company. He explained that he did not proceed to buy a property through the company at all.

Mr Gaunt also stated to Ofcom that he does not have any commercial interest in the Hotel Almyra and that it was the Talksport’s decision to broadcast from this venue.

In conclusion, Mr Gaunt stated that any breach of the Code that Ofcom may find was not as a result of any decisions or actions on his part, and was, in his opinion, “...something that lies firmly in the lap of Talksport’s management...”.

### **Decision**

The rules in Section Ten of the Code are based on two fundamental principles: to ensure that the independence of editorial control over programme content is maintained and that programmes are not distorted for commercial purposes; and to ensure that the advertising and programme elements of a service are clearly separated.

The rules are designed to safeguard editorial integrity and ensure that programming and advertising are distinct from each other. This provides important protection for listeners by ensuring that they can differentiate between an independent editorial voice and paid-for marketing material. Listeners should be made aware of when they

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<sup>1</sup> Having taken account of both Talksport’s and Jon Gaunt’s representations in this case, Ofcom noted that there were areas of dispute between Talksport and Jon Gaunt in relation to various aspects of this broadcast and its surrounding circumstances. Ofcom considered that some of the specific areas of factual dispute between Talksport and Mr Gaunt were not relevant to Ofcom’s consideration of this case, and therefore they have not been detailed in this finding.

are being sold to, as a result of a commercial arrangement between the station and a third party.

In this case, a commercial agreement was in place between Talksport and Thomson OPI. A condition of this contract was that Thomson OPI would receive promotion in Talksport's programming. This resulted in paid-for promotional references to Thomson OPI and an associated company, Aristo Developers, featuring prominently within the editorial content of the programme.

Further, there was a revenue share arrangement in place - it was a condition of the commercial agreement that Thomson OPI would pay Talksport a specified amount for each Thomson OPI property sold, on a quarterly basis in arrears. This was to be offset against the 'tenancy fee' already paid for the quarter.

Ofcom noted Talksport's submission that it had not, in fact, received any sales-related payment, and could not have done as no sales were made. Nevertheless, the agreement between Talksport and Thomson OPI led to the programme being distorted for commercial purposes. It was clear that this commercial arrangement was entirely at odds with the fundamental principles of Section Ten of the Code.

In relation to the broadcast itself, Ofcom noted that there was disagreement between Talksport and Jon Gaunt, namely about: whether the presenter had been responsible for arranging for some of the guests to appear in the broadcast; and whether the presenter had had a personal interest in Thomson OPI (as alleged by the complainants). Given that a commercial arrangement had been put in place between Talksport and Thomson OPI, Ofcom did not consider this disagreement to be material to its consideration of the case. Irrespective of the details, it was the fundamental responsibility of Talksport to ensure the compliance of the material it broadcast. Ofcom considered it wholly unacceptable that Talksport had submitted that, in advance of the broadcast, it had had no knowledge of either the commercial agreement or the intended programme content.

Ofcom noted that Talksport had argued that the broadcast had been editorially justified as it featured topics ('Broken Britain' and living abroad) that had been a premise of many of the presenter's previous programmes. However, the licensee had also admitted that the programme "was broadcast under the terms of the commercial agreement" and was therefore not compliant with the Code.

Ofcom concluded that, irrespective of any editorial justification, the frequent references to Thomson OPI and the Secret Valley resort had resulted from a commercial arrangement in which Thomson OPI had paid for the editorial exposure. The commercial arrangement met the definition of product placement which is prohibited by the current Code, and the broadcast was therefore in breach of Rule 10.5. Ofcom was particularly concerned that the commercial arrangement in question had not been made sufficiently clear to the audience.

Ofcom did not accept Talksport's submission that the broadcast was not in breach of Rule 10.1 (independence of editorial control) on the basis that no influence had been exercised by Thomson OPI over scheduling. In so doing, Ofcom took into account that Talksport had admitted that the contract underlying this broadcast had not adhered to its internal compliance procedures, and did not comply with either station policy or Ofcom rules. Ofcom concluded that Talksport had failed to maintain its independence of editorial control over its programme content, and found that the broadcast was in breach of Rule 10.1 of the Code.

In Ofcom's view, the commercial agreement Talksport had entered into with Thomson OPI gave rise to broadcast content that dissolved the necessary distinction between editorial and advertising, to the extent that the broadcast was in breach of Rule 10.2 (separation of advertising and programming). This arrangement led inevitably to the promotion of Thomson OPI's business and the Secret Valley resort, with several endorsements employing a highly promotional and positive tone, such as: *"If you want any tips on property investment, wherever in the world, remember you've just got to go to one place – www.thomsonopi.com"* and *"Remember, although we're here in Cyprus, it's only really for illustration. Thomson OPI have got development opportunities all around the globe, in places like France, Spain, America, Bulgaria..."*.

The broadcast also included frequent encouragements to listeners to contact Thomson OPI for the purpose of property purchases and investment, for example: *"Any of the places we're talking about today or investments round the globe, they're the people to have a look at first. Check out their website and see what you make of it..."* and *"... You might get yourself some good tips and some good bargains in terms of overseas property investment..."*.

Given the highly promotional nature and tone of these references, Ofcom found the broadcast in breach of Rule 10.3 (no promotion of products or services). Furthermore, the extent and frequency of the references also resulted in a breach of Rule 10.4 (no undue prominence).

Ofcom found no evidence to suggest that the references to the Hotel Almyra resulted from a commercial arrangement. However, as admitted by Talksport, the references were promotional and unduly prominent. Ofcom found that there was unjustifiable exposure given to the hotel in the course of the broadcast, including a range of details about its facilities, an interview with a hotel representative, and encouragement to listeners and endorsement in relation to the hotel, for example: *"That's the Hotel Almyra, if you ever want to check it out, why don't you? You know it makes sense"*. Ofcom concluded that the references to the hotel were therefore also in breach of Rules 10.3 and 10.4 of the Code

In relation to the risks involved in property investment, Ofcom acknowledged that cautions were given about the desirability of research and, more importantly, of independent advice before buying overseas property. In this case Ofcom concluded that adequate care had been taken such that listeners could not be said to have been exposed to the potential for harm through unqualified investment claims. We judged therefore that Rule 2.1 was not breached.

Nonetheless, the circumstances in which the unequivocal breaches of Section Ten in this case had occurred were a matter of great concern to Ofcom, particularly as the existence of the commercial relationship between Thomson OPI and the broadcaster had not been made sufficiently clear to the audience. The result was that Talksport had effectively passed off paid-for advertising as editorial programming.

Ofcom was extremely concerned by Talksport's submission that the commercial arrangement had been put in place, and the resulting programming broadcast, without the knowledge of Talksport's senior management. It remained unclear to Ofcom how such a situation could have arisen. The incident indicated to Ofcom that there were significant flaws in the licensee's compliance procedures.

**The circumstances of both this case and the associated case (see following finding) have raised significant concerns about Talksport's enforcement of the**

**compliance procedures it had in place at this time of these breaches. Ofcom is therefore requiring Talksport to attend a meeting to provide further detail on the measures it has taken to improve its compliance procedures. Talksport should be in no doubt that if similar compliance issues arise, Ofcom will consider taking further regulatory action.**

**Breaches of Rules 10.1, 10.2, 10.3, 10.4 and 10.5**

## In Breach

### The Jon Gaunt Show

*Talksport Radio, April 2006*

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#### Introduction

During Ofcom's investigation of the *The Jon Gaunt Show* broadcast on 10 October 2008 ("the Cypriot property case" - see previous finding), Talksport, the licensee, volunteered information to Ofcom about another of its commercial contracts.

In 2006, Talksport entered into a contract with a company called Football Village Ltd, the agent for a Spanish property developer, Valle Romano. The contract – a copy of which Talksport disclosed voluntarily to Ofcom – committed Talksport to providing, among other things, commercial airtime "using pre-recorded commercials across every week" and "an online presence during the contract period". Football Village Ltd undertook to pay Talksport a fee for every property sold. The contract did not include any condition about the use of editorial time for the promotion of Football Village Ltd.

While the contract was in operation, two outside broadcasts of the *Jon Gaunt Show* were made from Spain. However, given the time which had passed between the broadcasts and Talksport's bringing them to Ofcom's attention, the licensee no longer held any recordings of the broadcasts.

Ofcom independently obtained three extracts of one of the broadcasts from Spain. These were available from the Football Village Ltd website and could be downloaded, apparently as promotional material. All three extracts contained considerable discussion of the merits of the area and the development; one of them containing a highly promotional contribution from the Sky Sports presenter Claire Tomlinson. In the latter, Tomlinson was said to have a commercial relationship with Football Village Ltd.

Talksport acknowledged that another Sky Sports presenter, Jeff Stelling, had been a contributor to the same programme on the subject of the development.

The extracts included the following comments:

Jon Gaunt:

*"...we're giving away these [premier league football match] tickets in association with the people who invited us over here, they're the people from the Village, this Football Village I've been telling you about, where they're building these apartments where you can make an investment, buy yourself an apartment – and they're not a great deal of money either, I must tell you – I went to see the site yesterday and it's really coming on: there's going to be an 18-hole golf course, and another golf course as well, there's swimming pools, there's tennis courts, it's the business. If you want to check it out have a look at their website [villagespain.com](http://villagespain.com)... [villagespain.com](http://villagespain.com)... [villagespain.com](http://villagespain.com), well worth a look at...we're going to talk to Claire Tomlinson later in the programme from Sky, she's one of the people behind it...";* and

Jon Gaunt:

*“We’ll also in the next half hour or so talk more about this new village that’s setting up. Basically it’s a football village. You can buy an apartment over here, have a little bit of an investment. It’s up on this massive hill, right, that overlooks the ocean. And there’s gonna be about a thousand of these apartments, and it’s got football fields, two 18 hole championship golf courses. Beautiful, beautiful setting, and the idea is that you come in, you buy one of these and then they’re rented out during the year; you can come over with your family as well. Bit of an investment abroad. If you want to find out more details about it just have a look at their website [villagespain.com](http://villagespain.com), now that’s all one word: [villagespain.com](http://villagespain.com). Go on that website and I tell you what, I defy you not to be impressed: I was up there yesterday, it is just a building site at the moment, but they’ve built the clubhouse and the quality of the finishing is top, top notch. They’ve got a load of people behind it as well...and they’re gonna have like the top teams, people like Rangers, Celtic, I think the Villa – they’re gonna do summer training camps there as well, so you might have the chance for your kids to meet heroes – so if you’re into sport, you’re into a bit of sun down on the Costa del Sol, kids can play tennis, there’s swimming pools in the apartments, there’s gonna be a 5-star hotel there as well, this could be the investment you’re looking for, and I reckon...they were telling me last night that it’s about 40 or 50 grand to get into it, but you’ll see it all on the website. These apartments are about 200 grand aren’t they?... £200,000, something like that, it could be the investment you’re looking for: [villagespain.com](http://villagespain.com). I was impressed, I was impressed. And as you know, I never tell you anything, I don’t promote anything, that I don’t believe in, and I was pretty, pretty impressed by this place. Looking over the ocean. [villagespain.com](http://villagespain.com). But I’ll be straight with you, you’ve got to get in now, and when you come and see it it’s still a building site...it’s one of these things where you’re buying it off plan...but they’ve got all the visuals on the website. You can see it on the website...anyway, [villagespain.com](http://villagespain.com)... [villagespain.com](http://villagespain.com), have a look at it, make your own mind up: I ain’t telling you what to do with your money, you don’t need tips on finance from Gaunty, I can tell you that, looking at the state...” [extract ends].*

Claire Tomlinson:

*“...I have bought one of these. I mean what can I tell you? Is it the location? Is it the weather? Is it the facilities? Is it the fact that you’re right in the middle of everything? Or, I’ll tell you why I got involved, it’s because the confidence I have in this project and the integrity of this project. If you think that 12 major football clubs in Britain have done due diligence, spent their own money in doing due diligence on this project, so that you have absolute confidence that an investment cannot go wrong, then that is a big plus in my opinion if you’re buying somewhere that you don’t know the market... the clubs have put the money in, the clubs have in effect sponsored this project, they’re behind it, they are recommending it to their fans...football clubs have actually spent their money and done that due diligence on your behalf, then there’s no way this project can go wrong...it’s the integrity and the confidence that people can have...it’s such an easy purchase I can’t tell you...the location of it is absolutely perfect, it’s just 45 minutes from the airport...”*

Ofcom considered that the material raised questions similar to those arising from the Cypriot property case (see previous finding). It therefore provided the extracts of the material it had obtained independently to Talksport, and sought its comments about the broadcast in relation to the following Code rules:

- Rule 10.1 – Broadcasters must maintain the independence of editorial control over programme content;
- Rule 10.2 – Broadcasters must ensure that the advertising and programme elements of a service are kept separate;
- Rule 10.3 – Products and services must not be promoted in programmes;
- Rule 10.4 – No undue prominence may be given in any programme to a product or service; and
- Rule 10.5 – Product placement is prohibited.

Ofcom did not seek the licensee's response in respect of Rule 2.1 (adequate protection against harmful material) in the context of the absence of investment warnings. This was because any decision in respect of that rule would depend on the possible presence in the programming of cautionary advice, something on which no proper conclusion could be reached in the absence of a full recording or transcript.

In addition, as with the Cypriot property case, Jon Gaunt informed Ofcom that he wished his third party representations to be taken into account as part of Ofcom's consideration of this case. Ofcom agreed to consider Jon Gaunt's representations on those elements of the case that related specifically to him.

### **Talksport's response**

Talksport explained that the contract ran between April 2006 and June 2008 when Talksport terminated the contract after the closure of Football Village's UK offices after the collapse of the Spanish property market.

Talksport pointed out that, unlike the Thomson OPI deal in the Cypriot property case, this contract was limited to an arrangement for spot advertising of Football Village Ltd on Talksport. The contract did not include a commitment by the broadcaster to provide editorial promotion for Football Village Ltd. Talksport explained that it had entered into a sales-linked revenue arrangement because:

"All we wanted to do was put together a deal that got us revenues from the client that was proportional to the success of their business. The client was unable to provide the market price for on-air promotion, so this arrangement was drawn up in an effort to maximise revenues – and the only way this could be achieved was through underwriting the deal through success from advertising. Consequently a property sales revenue arrangement was entered into..."

Talksport said that, as with the Thomson OPI arrangement, senior management within Talksport, including the Programme Director and Sales Director, "...were indirectly aware of the FV [Football Village] and Thomson OPI commercial arrangements but not the detail of the contract or the editorial requirements involved. Neither of these arrangements was handled internally using the set procedures laid down by the radio station. Neither the Programme Director nor the Sales Director was aware that there was an element of editorial inclusion involved. Consequently, the outside broadcasts were regarded to be free of commercial elements and so the issue of compliance in this case did not arise."

As with the Cyprus case (see previous finding), Talksport emphasised the remedial steps it had taken to prevent any repetition. These include a requirement that no commercial arrangement is entered into without the signature of both the Sales Director and the Programme Director or their designated deputies. Further, all producers, presenters and sales staff had been comprehensively briefed on the importance of compliance regarding commercial references and a training programme had been initiated for all new starters and existing personnel.

The licensee wished to stress that it “deeply regrets” the breaches of the Code that had taken place. Talksport said that it was wholly committed to compliance with its obligations as a licensee and to dialogue with Ofcom.

### **Jon Gaunt’s representations<sup>1</sup>**

As with the Cypriot property case, Jon Gaunt wished to clarify that he was “merely the presenter” of the programmes and that the content of the programmes was controlled by the Editor and Producer.

As to the contributions of Ms Tomlinson and Mr Stelling, Mr Gaunt submitted that they were “paid ambassadors for the Football Village and were flown to Spain by the company to be interviewed to promote the Spanish village.”

In respect of the cancellation of the contract drawn up between Talksport and Football Village Ltd, Mr Gaunt commented that, “The Football Village contract only ended because the company went into liquidation in the midst of a local planning scandal that included the arrest of the local mayor.”

In conclusion, and again as with the Cypriot property case, Mr Gaunt stated that any breach of the Code that Ofcom may find was not as a result of any decisions or actions on his part, and was, in his opinion, “...something that lies firmly in the lap of Talksport’s management...”.

### **Decision**

The rules in Section Ten of the Code are based on two fundamental principles: to ensure that the independence of editorial control over programme content is maintained and that programmes are not distorted for commercial purposes; and to ensure that the advertising and programme elements of a service are clearly separated.

The rules are designed to safeguard editorial integrity and ensure that programming and advertising are distinct from each other. This provides important protection for listeners by ensuring that they can differentiate between an independent editorial voice and paid-for marketing material. Listeners should be made aware of when they are being sold to, as a result of a commercial arrangement between the station and a third party.

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<sup>1</sup> Having taken account of both Talksport’s and Jon Gaunt’s representations in this case, Ofcom noted that there were areas of dispute between Talksport and Mr Gaunt in relation to various aspects of this broadcast and its surrounding circumstances. Ofcom considered that some of the specific areas of factual dispute between Talksport and Jon Gaunt were not relevant to Ofcom’s consideration of this case, and therefore have not been detailed in this finding.

Ofcom was particularly concerned about the commercial arrangement entered into by Talksport and Football Village Ltd. Further, the similarity of the terms of the contract drawn up with Football Village Ltd to those of the Thomson OPI agreement (including commissions linked to property sales) suggested to Ofcom that similar expectations between Talksport and its client had been present. However, Ofcom acknowledges that the contract in this case did not explicitly commit Talksport to promote the development in editorial airtime, and therefore it did not record a breach of Rule 10.5 (no product placement).

Ofcom was particularly concerned by Talksport's submission that the commercial arrangement in place did not adhere to its internal procedures, and that Talksport's senior management had been unaware of the detail or requirements of the contract, or its impact on the programming. In Ofcom's view, the evidence of the excerpts suggested strongly that the incentive to promote the development, and so attract income through sales, had driven at least some of the programme content. Ofcom therefore concluded that the licensee's independence of its editorial control had been compromised, in breach of Rule 10.1.

Ofcom acknowledged that there were only excerpts of one of the programmes in question available, rather than the whole programmes as broadcast. However, the excerpts strongly indicated that a similar degree of promotion as had been afforded to Thomson OPI in the Cyprus-based programming was present in the broadcasts from Spain in respect of Football Village Ltd. Ofcom could not envisage any other editorial material that could have balanced or otherwise editorially justified the nature and extent of the promotion given to the property company. In particular, Ofcom noted the following (see extracts from the programme in Introduction):

- the repeated emphasis and exposure given to the company's website;
- the extent of the uninterrupted promotion and endorsement of the property development;
- the use of at least one interview containing unrestrained praise and promotion of the development; and
- frequent and explicit encouragement to listeners to consider investing in the development.

All these factors led Ofcom to conclude that the programme contained unequivocal promotion and clear undue prominence for Football Village Ltd. In Ofcom's view, this editorial content amounted to advertising material within the programming. Further, it did not appear to have been sufficiently clear to the audience that the programming was linked to a commercial arrangement. Therefore, based on the excerpts available, Ofcom concluded that Rules 10.2 (separation of advertising and programming), 10.3 (no promotion of products and services) and 10.4 (no undue prominence) had been breached.

Because Ofcom did not have access to the whole of either programme as broadcast, we could not determine whether investment warnings, or sufficient investment warnings, were present: any possible breach of Rule 2.1 (harm – in this case, potential financial harm) remained impossible to judge.

**The circumstances of both this case and the associated case (see previous finding) have raised significant concerns about Talksport's enforcement of the compliance procedures it had in place at this time of these breaches. Ofcom is therefore requiring Talksport to attend a meeting to provide further detail on the measures it has taken to improve its compliance procedures. Talksport**

**should be in no doubt that if similar compliance issues arise, Ofcom will consider taking further regulatory action.**

**Breaches of Rules 10.1, 10.2, 10.3, 10.4**

## In Breach

### The Rundown

ABS-CBN News Channel, 18 June 2010, 18:00

### Balitang America

ABS-CBN News Channel, 18 June 2010, 19:00

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#### Introduction

ABS-CBN News Channel covers news from the Philippines and is broadcast on the Sky platform. During routine monitoring, Ofcom viewed two programmes, *The Rundown*, the channel's daily prime-time newscast, and *Balitang America*, the channel's 30-minute nightly news programme, which both raised concerns under the Code.

#### *The Rundown*

##### Weather sponsored by ConZace

During *The Rundown*, Ofcom noted that the weather was sponsored by a vitamin product called ConZace. Sponsorship credits were broadcast before and after the weather segment. However, in addition, Ofcom noted that during the weather segment, a caption for ConZace appeared which stated, "*Vit A, E, C + Zinc ConZace.*"

##### Health Fix sponsored by Rogin-E

It was also noted that a segment called *Health Fix* was sponsored by a health product called Rogin-E. The sponsorship credits broadcast before and after the segment consisted of the following:

- Visual: A man using weights (or on a bike in an alternative version), followed by an image of a Rogin-E capsule with "rogin-E" written on it.
- Voiceover: "*This segment is brought to you by ROGIN-E. ROGIN-E every day. The better habit.*"
- On-screen text: "GOOD"  
"BETTER"  
"+ Ginseng rogin-E Endurance"  
"\*vs. single ingredient vitamins of average healthy adults"  
"Multivitamins + Minerals + Deanol + Royal Jelly + Korean Panax Ginseng rogin-E THE BETTER HABIT \*vs. single ingredient vitamins of average healthy adults. If symptoms persist consult your doctor."

We also noted that during the *Health Fix* segment, a caption appeared on the screen for 25 seconds. It stated: "*Buy a bottle of ROGIN-E and get FREE FUEL from Oetron. For inquiries call 689 1234.*"

In relation to both the *Weather* and *Health Fix* segments broadcast during *The Rundown*, Ofcom asked ABS-CBN Europe Limited, the licensee for the channel, for its comments in relation to Rule 9.5. This rule states:

“There must be no promotional reference to the sponsor, its name, trademark, images, activities, services or products or to any of its other direct or indirect interests. There must be no promotional generic references. Non-promotional references are permitted only where they are editorially justified and incidental”.

In addition, in relation to the Health Fix sponsorship credit, Ofcom asked ABS-CBN Europe Limited for its comments in relation to Rule 9.13 which states;

“Sponsorship must be clearly separated from advertising. Sponsor credits must not contain advertising messages or calls to action. In particular, credits must not encourage the purchase or rental of the products and services of the sponsor or a third party”.

#### EXCELROOF scrolling caption

Ofcom also noted that during the programme *The Rundown*, the following text appeared in a scrolling caption on the screen for 25 seconds:

*“Does your roof have a warranty? Only EXCELROOF Colored Roofing provides up to 25 YEARS WARRANTY against fading, rust and flaking. EXCELROOF. GUARANTEED TO LAST! Call 524-555 during office hours for more information.”*

This scrolling caption was overlaid on top of the programme and was not separated from it. Ofcom therefore asked the broadcaster for its comments with regards to Rule 10.2 of the Code. This rule states:

“Broadcasters must ensure that the advertising and programme elements of a service are kept separate”.

#### Reference to BLIMS fine furniture and Samsung

Ofcom noted that during the programme, a logo for BLIMS fine furniture appeared on the screen for three seconds followed by a Samsung logo for six seconds.

Ofcom asked the broadcaster for its comments in relation to the following Code rules:

- Rule 10.4 - No undue prominence may be given in any programme to a product or service; and
- Rule 10.5 - Product placement is prohibited.

#### *Balitang America*

During this programme, the presenter who was in the news studio, was interviewing a man via a video call. A logo for Skype<sup>1</sup> appeared on the video screen throughout the interview, which was approximately 3 minutes and 10 seconds in duration.

Ofcom asked the broadcaster for its comments in relation to the following Code rule:

- Rule 10.4 - No undue prominence may be given in any programme to a product or service.

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<sup>1</sup> Skype is a service which enables video and voice calls via the Internet.

## Response

The broadcaster said that as a result of Ofcom contacting it with regard to this content, it had “realised that there is huge amount of difference between the advertising and sponsorship rules and requirements for Europe and the UK and the Rest of the World.” It said that it was now actively seeking to ensure that it understood the requirements in the UK. It also explained that it is considering investment into specialist equipment which will allow it to distinguish between the feeds which it broadcasts in the UK and will enable it to filter out content which does not conform to Ofcom’s rules. Alternatively, it stated that it is considering broadcasting alternative content in the UK where necessary.

In response to the specific issues raised, the broadcaster commented as follows:

### *The Rundown*

#### Weather sponsored by ConZace

In relation to Rule 9.5 of the Code, the broadcaster argued that there was no promotional reference to the sponsor during the programme and that any reference was factual. It added that “any other reference was incidental.”

#### Health Fix sponsored by Rogin-E

In its response on the Rogin-E sponsorship credit, the broadcaster said that the voiceover contained a factual message with no specific advertising content. It continued that there was “no detectable call to action” and that the words are those which identify the sponsor and which they use as a strapline. The broadcaster submitted that the on-screen text contained further factual information to assist in the identification of the sponsor. It continued that the words “good” and “better” were used “to identify the sponsor’s products in the marketplace.”

With regards to Rule 9.5 of the Code, the broadcaster argued that the references to the sponsor during the programme via on-screen text were “incidental only, editorially justified and factual only, with no particular advertising content.” It continued the text was descriptive of the components of the product and this was part of the ID given by the sponsor.”

The broadcaster admitted that, in relation the words “*Buy a bottle of ROGIN-E....*”, it “may have inadvertently made a call to action through a misunderstanding of the rules or lack of familiarity with such.” It added that “this was a genuine mistake and steps will be taken so that this captioning does not happen again.”

#### EXCELROOF scrolling caption

With regards to the EXCELROOF caption which appeared during the programme, the broadcaster said that in relation to Rule 10.2 of the Code, the scrolling advertisement was included in error during a news item.

The broadcaster added that “in mitigation...the scrolling caption was not overly intrusive and many viewers may not have noticed the captioning or its content. It was a very quickly scrolling segment and last only very briefly.”

#### Reference to BLIMS fine furniture and Samsung

The broadcaster said the logos for BLIMS fine furniture and Samsung each appeared for “a couple of seconds”. It said that it “accepted that this could be construed as not separating advertising from the programme elements of the broadcaster and was done in error.” It continued that “for technical reasons, the logos appeared

prematurely because the program had been expected to close by that stage.” The broadcaster considered that there was no undue prominence of any product or service. Further, in relation to Rule 10.5 of the Code, the broadcaster stated that it did not “receive any revenues from any sponsorship”.

### *Balitung America*

With regards to the Skype logo which appeared during a video interview, the broadcaster said that “the Skype logo appeared embedded on the screen of the person being interviewed and was not an advertising message but was merely informing that the interview was conducted through the medium of Skype.” It therefore did not consider that the appearance of the logo had breached Rule 10.4 of the Code. Further, in relation to Rule 10.5 of the Code, the broadcaster stated that it did not “receive any revenues from any sponsorship.”

## **Decision**

The rules in Sections Nine (sponsorship) and Section Ten (commercial references) of the Code are derived from the requirements of European legislation, the Audiovisual Media Services Directive, and from the Communications Act 2003 (“the Act”).

One of the key principles underpinning the rules in Section Nine of the Code is to ensure that sponsorship messages are separated from programmes and to maintain a distinction between advertising and sponsorship. Likewise, one of the fundamental principles of Section Ten of the Code is to ensure that the advertising and programme elements of a service are kept separate.

### *The Rundown*

#### *Weather sponsored by ConZace*

Ofcom considered that the caption “*Vit A, E, C + Zinc ConZace.*” which appeared during the segment sponsored by ConZace was a non-promotional reference to the sponsor. However, there was no editorial justification for the reference and it could not be considered to be an incidental reference. Ofcom therefore found the programme in breach of Rule 9.5 of the Code (sponsor references in sponsored programmes).

#### *Health Fix sponsored by Rogin-E*

Ofcom considered that the amount of information provided about the product in both sound and vision (e.g. “+ *Ginseng rogin-E Endurance*” and “*Multivitamins + Minerals + Deanol + Royal Jelly + Korean Panax Ginseng rogin*”) placed the focus of the sponsorship credit on the sponsor’s product rather than the sponsorship arrangement. Ofcom also considered the phrase “*The BETTER HABIT\* \*vs. single ingredient vitamins of average healthy adults*” to be a claim about the efficacy of the product. Ofcom therefore found the sponsorship credit in breach of Rule 9.13 of the Code (no advertising messages in sponsor credits).

With regards to the caption which appeared during the sponsored segment which stated: “*Buy a bottle of ROGIN-E and get FREE FUEL from Oetron. For inquiries call 689 1234.*”, Ofcom considered this to be a promotional reference to the sponsor’s product, in breach of Rule 9.5 of the Code.

#### EXCELROOF scrolling caption

Ofcom also noted that, during the programme *The Rundown*, the following text appeared for a total of 25 seconds in a scrolling caption, which was overlaid on top of the programme and was not separated from it:

*“Does your roof have a warranty? Only EXCELROOF Colored Roofing provides up to 25 YEARS WARRANTY against fading, rust and flaking. EXCELROOF. GUARANTEED TO LAST! Call 524-555 during office hours for more information.”*

Ofcom considered that this scrolling caption appeared in a style which viewers would associate with material which is related to the programme. Ofcom therefore judged the scrolling caption to be an advertisement which was not separated from the programme. Ofcom did not accept the broadcaster’s argument that “in mitigation...the scrolling caption was not overly intrusive and many viewers may not have noticed the captioning or its content. It was a very quickly scrolling segment and last only very briefly.” Irrespective of its duration, the advertisement was not separated from the programme, in breach of Rule 10.2 of the Code.

#### Reference to BLIMS fine furniture and Samsung

Ofcom acknowledged that the BLIMS fine furniture and Samsung logos appeared during the programme in error. However, there was no editorial justification for their appearance during the programme, and Ofcom therefore judged the logos to be unduly prominent, in breach of Rule 10.4 of the Code.

#### *Balitang America*

Ofcom noted that the broadcaster stated it had not entered into a product placement arrangement to feature the Skype logo on screen. However, we considered that there was a lack of editorial justification for the appearance of the logo during this interview for such a prolonged period of time (i.e. approximately 3 minutes and 10 seconds). Ofcom therefore found the reference to be unduly prominent, in breach of Rule 10.4.

Ofcom is taking this opportunity to remind ABS-CBN Europe Limited that, as a condition of its licence to broadcast the ABS-CBN News Channel service, the licensee is responsible for ensuring that all material broadcast on the service complies with Ofcom codes. Ofcom is particularly concerned that, in this case, ABS-CBN Europe Limited admitted that after Ofcom had contacted it about these programmes, it “realised that there is a huge amount of difference between the advertising and sponsorship rules and requirements for Europe and the UK and the Rest of the World.” Ofcom therefore considered that the broadcaster had transmitted material on its Ofcom licensed service without ensuring it was compliant.

Ofcom welcomes the fact that the broadcaster is now seeking ways to prevent such breaches occurring again, but is putting ABS-CBN Europe Limited on notice that it may monitor its output in due course. If similar compliance issues arise, Ofcom may consider further regulatory action.

***The Rundown, 18 June 2010 - Breaches of Rules 9.5, 9.13, 10.2 and 10.4***  
***Balitang America, 18 June 2010 - Breach of Rule 10.4***

## In Breach

### The Sports Bar

Gold (Birmingham), 28 April 2010, 18:00

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#### Introduction

During regular speech programming on this radio station, the presenter interviewed “a spokesperson for *The Midlands Music Festival*” about this upcoming event. The twelve and a half minute interview opened with a discussion about the charity, Just 1 Life, and the fact that profit from the music festival went towards providing hospitals with equipment needed by premature babies. It also included a discussion about football.

However, the interview mainly comprised discussion about the event itself, including the various acts that were to appear in the two-day festival and other attractions that would be found there, together with the following ticket information:

*“...look at the market, look at the economy. People haven’t got a lot of money in their pockets. Let’s give ‘em something that’s really goin’ to be value for money. So, to see what will be a total on the Saturday – ten acts – if you want a standard admission ticket – £29.50 ... so you get all of them. Then on the Sunday – same again – it’s goin’ to be for about nine or ten acts – £29.50 ... If you come for the weekend – for 50 quid, if you wanna come for both days ... Now, there are obviously more expensive ones that, you know, there’s a Gold Circle pit at the front – they are a bit more expensive, they’re about £50 – if you really desperately want to be at the front, then I think people are willing to pay for that, bearing in mind the cause it’s for. Just in terms of value for – I mean, take the Sunday for example, we already know ... [names various acts that will play] £29.50 just for that four alone, and there’s five more to come to that ... and the biggest band of them all, which is a four piece male band – I shall say no more ... you’re goin’ to get all of that for £29.50 as well ... under sixes, go free of charge as well...”*

[approximately 4 minutes later in the programme, following a discussion about football]

*...Listen, you can get them – all the main ticket agents are goin’ to have – so, Ticket Factory, Ticketmaster, See Tickets – the best place to go is via our website, which is [festival web address]. Now, on there right now, if you’ve got a PayPal account, you can buy them now by PayPal, but their official on sale date is not until Friday ... and there’s a good limited offer on out there as well – that you can buy a group ticket, for four people, for either day, £100 – so you’re saving £4.50 on each one. That’s only goin’ to be up there for the first four or five weeks – so it’s a short deal so get in quick and grab those tickets – but it’s [festival web address]. And there’s loads of other stuff on the site as well ... everything you’ll need is all contained on that site ... it’s [festival web address].”*

A listener told Ofcom that, during the programme, having anticipated hearing the latest football news, he was “...initially surprised, and then became quite angry, to hear a blatant advertisement for a pop music concert ... it went on forever...”

Ofcom sought the broadcaster's comments with regard to the following Code rules:

- Rule 10.3 - Products and services must not be promoted in programmes...;
- Rule 10.4 - No undue prominence may be given in any programme to a product or service; and
- Rule 10.5 - Product placement is prohibited.

### **Response**

Orion Media Limited, which owns Gold (Birmingham), said that it had "an association as media partner" to The Midlands Music Festival, the profits from which went to the charity, Just 1 Life (which staged the event), as made clear in the broadcast. The broadcaster provided material to Ofcom to demonstrate this. It added that, while The Midlands Music Festival advertised and sponsored material broadcast on its stations, the interview in *The Sports Bar* was not paid for. Further, the festival "was an event which the radio station worked with the organisers on for successive years, and will broadcast from and thus claim as [its] own."

Orion believed that, as music accounted for 70-90% of the station's daytime output, it was difficult to imagine anything more directly connected with it than "a live event where listeners can enjoy music from artists they are likely to enjoy."

Orion explained that the coverage of the upcoming festival was local programming, as it concerned a Midlands event, and was extended, "as it was in the context of a talk segment of programming. Most discussion on any topic is longer in this context."

Orion believed the interview was both editorially justified and duly prominent. It therefore concluded that the broadcast complied with the Code.

### **Decision**

On the basis of the information provided by Orion, the interview concerning The Midlands Music Festival did not appear to have been paid for and was not therefore in breach Rule 10.5 of the Code.

Ofcom then assessed the programme's content against Rule 10.4 of the Code, which requires that no undue prominence is given in programming to a product or service. Undue prominence may result from a lack of editorial justification for a reference to the product or service and/or the way in which the reference is made.

Ofcom accepted that there was editorial justification for referring to a local charity event supported by the broadcaster, especially as some or all of the acts appearing in The Midlands Music Festival may have been of appeal to Gold's listeners. In addition, Ofcom noted that, in this instance, the guest representative of The Midlands Music Festival explained fully why the event was running and how the charity, Just 1 Life, would benefit from the profit it made.

However, no specific reference was made on air to Gold's association with the Midlands Music Festival, as a supporter, media partner or a broadcaster of event coverage. Over a fifth of the interview was spent providing listeners with detailed ticket options and referring them to The Midland Music Festival's own website, neither of which appeared to be editorially justified. The programme therefore gave

undue prominence to both the event and its website, in breach of Rule 10.4 of the Code.

Ofcom then considered the concern raised by the complainant that the feature was “a blatant advertisement for a pop music concert” that “went on forever”. We noted:

- the length of the interview concerning the Midlands Music Festival;
- the lack of context concerning the station’s involvement with the event;
- the repeated references to both the Festival and its dedicated website;
- the heavy emphasis placed on Festival ticket options and outlets; and
- the extent to which references to the Festival and its website were unduly prominent.

Taking these factors into account, Ofcom considered that the feature promoted the Midlands Music Festival and its website. The programme promoted products and services in programming, in breach of Rule 10.3 of the Code.

#### **Breaches of Rules 10.3 and 10.4**

## In Breach

### Apne Sitaray

Venus TV, 26 May, 20:00

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#### Introduction

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

*Apne Sitaray* is a chat show broadcast in Punjabi. The programme was sponsored by two restaurants, one called 'Mem Saab' and the other called 'Bilal'. Ofcom received a complaint that, during the programme, the presenter positively endorsed the sponsors' businesses.

Ofcom noted that a sponsorship credit at the start of the programme referred only to 'Mem Saab' as the programme sponsor. After this, and coming back to the programme from an advertising break, respectively, the presenter made the following comments:

*"Our sponsor Mem Saab from Leamington – Top of the Town, very delicious food is available from there. You go there and eat your meal; during lunch time also you get beautiful meal. You go over there, enjoy your meal, would thank Mem Saab and also would thank Mr Bilal who has sponsored the programme. Mr Bilalji's Kebab – humm mouth watering, Bilalji's name! Dear Bilalji I would thank you. You make many dishes for eating including; speak of Kebab, speak of biryani, speak of doner Kebab, every type of curry and many more I shall mention as we go on."*

*"I once again thank our sponsor Mem Saab located in Leamington - Top of the Town who cook very delicious meals. Even during lunch time you wish, you can go. Take your family with you, take your friends with you and would thank Kashmir Singh Koonerji, Paramjit and Mainiji who have sponsored this programme. And our other sponsor – Bilal, Melton Road Leicester who make beautiful kebabs. Kebabs look very beautiful but are very tasty; eat lamb kebab, eat chicken kebab, eat biryani and enjoy every type of taste. So you must go to Bilal and enjoy every type of food."*

In relation to the sponsorship credit only referring to one of the two programme sponsors, Ofcom asked Venus TV to comment under Rule 9.6 of the Code which states:

*"Sponsorship must be clearly identified as such by reference to the name and/or logo of the sponsor. For programmes, credits must be broadcast at the beginning and/or end of the programme"*.

In relation to the presenter's references to the sponsors during the programme, Ofcom asked Venus TV to comment under Rule 9.5 of the Code which states:

*"There must be no promotional reference to the sponsor, its name, trademark, image, activities, services or products or to any of its other direct or indirect interests. There must be no promotional generic references. Non-promotional references are permitted only where they are editorially justified and incidental"*.

## Response

### Rule 9.6

Venus TV submitted that the presenter had referred to the sponsors at the beginning of the programme and after the commercial break, and therefore it considered that the sponsorship arrangement had been clearly identified to the viewer.

### Rule 9.5

Venus TV said there was “no written, express[ed] or implied requirement by the sponsors for this material to be included in the programme.” The broadcaster said in both instances it was the presenter’s own choice to thank the sponsors and her comments were “very personal”.

Venus TV said the comments were an expression of personal gratitude and appreciation of the food which the presenter had enjoyed rather than “an intention to deliberately promote or advertise the sponsor’s products”. The broadcaster believed this did not amount to a breach of Rule 9.5 because “her thanking the sponsors was editorially justified and her other comments were simply incidental to her enthusiastic thanks to the sponsors”.

## Decision

### Rule 9.6

Rule 9.6 of the Code requires broadcasters to ensure that it is clear to the viewer when a programme has been sponsored and who it has been sponsored by. The rule also requires that sponsorship credits are broadcast at the beginning and/or end of the programme. In this case, while a sponsorship credit was broadcast at the start of the programme, it referred only to one of the programmes sponsors, the ‘Mem Saab’ restaurant, and not to the ‘Bilal’ restaurant. Ofcom therefore considered that the second of the two sponsorship arrangements in place for this programme was not clearly identified within the sponsorship credit, in breach of Rule 9.6 of the Code.

### Rule 9.5

Rule 9.5 of the Code prohibits any promotional reference to the sponsor, its name, trademark, image, activities or products. Unless they are non-promotional, incidental and justified editorially, references to the sponsor should not feature in sponsored programmes. Broadcasters must therefore take care to ensure that sponsored programmes are not - or do not appear to be - distorted for commercial purposes.

In this case, Ofcom took into account that the presenter’s references to the sponsors had not resulted from the sponsorship arrangements. However, Ofcom also noted that:

- the presenter used extremely positive language on a number of occasions when referring to the sponsors (for example: “*very delicious food*”, “*you get beautiful meal*”; “*...who cook very delicious meals*”; and “*Mr Bilalji’s Kebab –humm mouth watering*”);
- she emphasised twice the range of dishes available from one of the sponsors: (for example: “*You make many dishes for eating including; speak of Kebab, speak of biryani, speak of doner Kebab, every type of curry and many more I shall mention as we go on*”); and
- she suggested that the audience should “*Take your family with you, take your friends with you*” and “*So you must go to Bilal and enjoy every type of food.*”

Ofcom considered that these sponsor references during the programme were clearly promotional, encouraging viewers to visit the restaurants in question. Irrespective of whether, as the broadcaster had argued, the presenter had chosen to refer to the sponsors in this way of her own accord and in an “incidental” way, Ofcom could find no editorial justification for sponsor references of this nature.

The references were therefore promotional and were not editorially justified, and therefore the programme was in breach of Rule 9.5.

**Breaches of Rule 9.5 and 9.6**

## In Breach

### **Bang Babes**

*Tease Me, 23 July 2010, 21:45 to 22:30*

### **Bang Babes**

*Tease Me, 31 July 2010, 01:40 to 02:15*

### **Bang Babes**

*Tease Me, 6 August 2010, 22:00 to 22:25 and 00:00 to 00:45*

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## **Introduction**

*Bang Babes* is an adult sex chat television service, owned and operated by Bang Channels Limited ("Bang Channels" or "the Licensee"). The service is available freely without mandatory restricted access on the channel Tease Me (Sky channel number 912). This channel is situated in the 'adult' section of the Sky electronic programme guide ("EPG"). The channel broadcasts 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 sexually provocative way while encouraging viewers to contact the PRS numbers.

### *Bang Babes, Tease Me, 23 July 2010, 21:45 to 22:30*

Ofcom received a complaint about the above broadcast. The complainant said that the content transmitted was too sexually explicit to be broadcast without mandatory restricted access.

Ofcom noted that between 21:45 and 22:00 the programme featured a female presenter wearing a black and white bra and thong. During the broadcast the presenter removed her bra to expose her breasts and was shown adopting various sexual positions such as sitting while facing the camera with her legs open, and bending over on all fours with her buttocks to camera. While in these positions the presenter: heavily thrust her body as though miming sexual intercourse; mimed performing oral sex on a man; repeatedly massaged her breasts; licked her breasts; and repeatedly rubbed her outer genital area.

From 22:03 a second female presenter appeared on screen wearing a bright yellow bra and thong. During the broadcast she was shown adopting various sexual positions for prolonged periods of time, including: bending over with her buttocks to camera; pulling her buttocks apart to reveal anal and outer labial detail; lying on her side with her legs wide open; and lying on her back with her legs wide open to camera. While in these positions the presenter repeatedly carried out a number of sexual acts in intrusive detail, including: touching and rubbing her genital area; bunching her thong against her genitals; pouring oil over her buttocks and anal and genital area, and rubbing this onto her genital area; and licking her fingers both before and after vigorously rubbing her genitals. The presenter was also shown spitting saliva on her breasts and massaging this onto her breasts and nipples, and spitting on her feet.

### *Bang Babes, Tease Me, 31 July 2010, 01:40 to 02:15*

Ofcom received a complaint about the above broadcast. The complainant said that the content transmitted was too sexually explicit to be broadcast without mandatory restricted access.

Ofcom notes that the programme featured a female presenter wearing a pink thong, knee high socks and studded stilettos (she was not wearing a bra). During the broadcast she adopted various sexual positions for prolonged periods of time including: bending over on all fours with her buttocks to camera; pulling her buttocks apart to reveal anal and outer labial detail; and lying on her back with her legs spread wide open to camera. While in these positions the presenter repeatedly carried out a number of sexual acts in intrusive detail, including: touching and rubbing her genital area; rubbing her thong against her genitals; opening her legs to expose extensive labial detail in close up; and sucking her fingers to mimic performing oral sex on a man. The presenter was also shown spitting saliva and a white sticky substance from her mouth over her breasts and hands, and rubbing these onto her nipples, and genital and anal area.

*Bang Babes, Tease Me, 6 August 2010, 22:00 to 22:25 and 00:00 to 00:45*

During monitoring of the service *Tease Me*, in response to a complaint about its content, Ofcom noted that the above broadcast raised potential issues under the Code. Between 22:00 and 22:25, and 00:00 and 00:45, this programme featured a female presenter wearing a white lace body and gold chain. For the majority of the broadcast her breasts were exposed. During the broadcast she adopted various sexual positions for prolonged periods of time, including: bending over on all fours with her buttocks to camera; pulling her buttocks apart to reveal anal and outer labial detail; and lying on her back with her legs spread wide open to camera. While in these positions the presenter repeatedly carried out a number of sexual acts in intrusive detail, including: rubbing her thong against her genitals; opening her legs to expose extensive labial detail in close up; rubbing her genital area with her fingers; and sucking her fingers to mimic performing oral sex on a man. She also spat saliva onto her breasts and rubbed it onto her nipples and genital area.

Relevant Code rules

Ofcom requested comments from Bang Channels in relation to the following:

*Bang Babes, Tease Me, 23 July 2010, 21:45 to 22:30*

Material broadcast between 21:45 and 22:00

- Rule 2.1 (the broadcaster must apply generally accepted standards); and
- Rule 2.3 (offensive material must be justified by context).

Material broadcast between 22:03 and 22:30

- 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).

*Bang Babes, Tease Me, 31 July 2010, 01:40 to 02:15; and  
Bang Babes, Tease Me, 6 August 2010, 22:00 to 22:25 and 00:00 to 00:45*

- 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

### Bang Babes, Tease Me, 23 July 2010, 21:45 to 22:30

Ofcom formally requested comments from Bang Channels on a number of occasions. Bang Channels 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.

### Bang Babes, Tease Me, 31 July 2010, 01:40 to 02:15

Ofcom formally requested comments from Bang Channels on a number of occasions. Bang Channels 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.

### Bang Babes, 6 August 2010, 22:00 to 22:25 and 00:00 to 00:45

Ofcom formally requested comments from Bang Channels on a number of occasions. Bang Channels 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

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>.

In considering the contents of each of these programmes Ofcom asked itself two questions as relevant in each case:

- 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.

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<sup>1</sup> For example:

- 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);
- 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);
- Sanctions 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 Playboy One, licensed by Playboy TV UK/Benelux Limited, Broadcast Bulletin 134, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb134/>;
- Breach Finding on Live 960, licensed by Hoppr Entertainment, Broadcast Bulletin 149, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb149/>;
- Breach Finding on Bang Babes licensed by Bang Channels Limited, Broadcast Bulletin 151, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb151/>;
- 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/enforcement/broadcast-bulletins/obb163/>;
- Breach Finding on Bang Babes, Broadcast Bulletin 164, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb164/>; and
- Sanctions decision against Bang Channels Limited concerning its services Tease Me, Tease Me 2 and Tease Me 3, <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/bangchannels.pdf>.

*Bang Babes, Tease Me, 23 July 2010, 22:03 to 22:30*

*Bang Babes, Tease Me, 31 July 2010, 01:40 to 02:15*

*Bang Babes, Tease Me, 6 August 2010, 22:00 to 22:25 and 00:00 to 00:45*

All of the above broadcasts featured the same female presenter. Ofcom considered these broadcasts 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 broadcasts and considered that they all contained material of a very strong sexual nature and on occasions contained graphic and intrusive images of genital and anal detail. For example, during all the broadcasts the presenter was shown apparently performing masturbation on herself by repeatedly touching her genital and anal area and vigorously rubbing and bunching her thong against her genitals. In Ofcom's opinion, in these particular cases, a viewer could reasonably have perceived the sexual acts as real.

During all of the broadcasts the presenter was also shown pulling her buttocks apart to reveal anal and extensive labial detail, spitting on herself, and rubbing saliva onto her breasts and genital area. In addition to this, during the broadcasts of *23 July 2010, 22:03 to 22:30* and *31 July 2010, 01:40 to 02:15*, the presenter was shown pouring oil and spitting an unidentified white sticky substance from her mouth onto her breasts and genital and anal area. She then rubbed these substances onto her breasts and genital area.

Ofcom took account of the fact that the sequences mentioned above were, in some cases, relatively prolonged and repeated. 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 very strong sexual nature. Having assessed the content and purpose of the programmes, Ofcom considered that the material broadcast constituted 'adult-sex' material. The broadcast of these programmes, without mandatory restricted access, was therefore in breach of Rule 1.18 of the Code.

Ofcom then went on to consider whether the broadcasts were also in breach of Rules 2.1 and 2.3 of the Code. In light of Ofcom's view that the programmes contained material that constituted 'adult sex material' and were therefore unsuitable for broadcast without mandatory restricted access, the broadcasts were 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 all of the broadcasts were transmitted after 22:00, therefore after the 21:00 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 Tease Me 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 on other channels.

However, in these cases, given the prolonged and repeated scenes of a very strong sexual nature and the inclusion of graphic images of genital and anal detail (provided for the purpose of sexual arousal), the time of the broadcasts and their location on 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 in the three broadcasts was clearly not justified by the context and was in breach of generally accepted standards.

The broadcasts were therefore also in breach of Rules 2.1 and 2.3 of the Code.

*Bang Babes, Tease Me, 23 July 2010 between 21:45 to 22:00*

Ofcom considered the material broadcast on 23 July 2010 between 21:45 and 22:00 in respect of Rules 2.1 and 2.3 of the Code only.

In Ofcom's view the sexual images included in this section of the broadcast were strong and capable of causing offence. For the majority of the 15 minute segment of the broadcast the presenter's breasts were exposed. In this time she adopted various sexual positions for prolonged periods of time, repeatedly simulated masturbation by rubbing her genital area and repeatedly massaged her naked breasts. She was also shown licking her breasts on two occasions.

Ofcom examined the extent to which there were any particular editorial or contextual factors that might have limited the potential for offence. Ofcom noted that this programme was broadcast after the 21:00 watershed and that viewers generally expect on all channels that stronger material will be shown after 21:00, within context. Ofcom took account of the fact that the Tease Me 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 in other sections.

However, in this case, given the content included prolonged and frequent scenes of a sexual nature (provided for the purpose of sexual arousal) the location of the channel in the adult section of the EPG was not sufficient to justify the broadcast of the material at 21:45. The content shown at this time would in Ofcom's view have exceeded the likely expectation of the vast majority of the audience for a channel of this nature and location. Ofcom was also concerned at the degree of offence likely to be caused to viewers who might come across this material unawares when broadcast at 21:45. Ofcom concluded that this content was clearly not justified by the context and was in breach of generally accepted standards.

This section of the 23 July 2010 broadcast was therefore also in breach of Rules 2.1 and 2.3 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/or repeated nature of the breaches recorded in this current finding, and those recorded against Bang Channels Limited previously in Bulletins 157, 158 and 163 the Licensee is put on notice that these present contraventions of the Code are also being considered for further statutory sanction.

**Bang Babes, Tease Me, 23 July 2010, between 21:45 and 22:00: Breach of Rules 2.1 and 2.3; between 22:03 and 22:30: Breach of Rules 1.18, 2.1 and 2.3**  
**Bang Babes, Tease Me, 31 July 2010, 01:40 to 02:15: Breach of Rules 1.18, 2.1 and 2.3**

**Bang Babes, Tease Me, 6 August 2010, 22:00 to 22:25 and 00:00 to 00:45: Breach of Rules 1.18, 2.1 and 2.3**

## In Breach

### Early Bird

*Tease Me TV (Freeview) 25 July 2010, 07:25 to 07:45*

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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 concerned that the "state of undress and physical movements of presenters were unsuitable for this time, particularly at a weekend when children would be more likely to be around".

Ofcom noted that the female presenter was wearing a revealing pink and black lace bra top, a pink thong, fishnet stockings and stilettos. During the broadcast the presenter adopted certain positions including lying on her side with her legs wide open and on all fours with her hips raised. While in these positions the presenter repeatedly: stroked and touched her body including her crotch area, legs, buttocks and breasts; moved and gyrated her hips in a sexually provocative way; licked her lips; and stuck her tongue out to reveal her tongue stud. The presenter was also shown lightly spanking her buttocks and jiggling her breasts.

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, such as: lying on her side with her legs wide open (albeit away from camera) throughout most of the broadcast 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 stroking particular parts of her body, including her breasts and crotch area. She also licked her lips, stuck out her tongue and opened her mouth in a sexualised rather than flirtatious way, and was shown lightly spanking her buttocks.

We 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 on a Sunday morning and therefore at a time when children may have been watching television, 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, Broadcast Bulletin 164 at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb164/>; Earlybird, Tease Me TV, 30 January, 20 March, 27 April 2010 and Earlybird, Tease Me, 21 April 2010 – all Findings in Broadcast 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 Broadcast 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 Broadcast 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, Broadcast Bulletin 152 at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb152/>; Elite Days, Finding in Broadcast 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, and 163, 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**

## Resolved

### The Drive Time Show

*Buzz Asia, 5 July 2010, 16:00*

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#### Introduction

Buzz Asia is local commercial radio station serving the Asian community in the London area. Its weekday early evening programme, *The Drive Time Show*, often features a listener competition.

During this edition, listeners were offered the chance to win a pair of tickets to the Asian Fashion Awards. Entrants were required to telephone the studio on a premium rate number and answer a question that had been read out by the presenter. Calls cost £1 per minute to enter and the first person to give the correct answer was declared the winner.

The competition question was supposed to be “which country hosted the World Cup in 2006?” However, the presenter misread the question and instead asked listeners “*which country hosted the World Cup in 2010?*”.

After a caller answered “*South Africa*” and was deemed incorrect, the presenter repeated the question, making the same error. A second caller gave the same answer but was again, told by the presenter that this was incorrect.

Ofcom received a complaint from a listener who considered that the promotion of the competition was misleading and that this impacted on the fairness of the competition.

Ofcom requested comments from the broadcaster under the following Code rules.

- Rule 2.13 – broadcast competitions must be conducted fairly; and
- Rule 2.14 – broadcasters must ensure that listeners are not materially misled about any competition.

#### Response

Buzz Asia confirmed that a total of nine listeners had entered the competition, with two of these entrants having been put to air. The broadcaster explained that the incident occurred due to a genuine mistake on the part of the presenter. After the second call, the presenter realised her error, apologised to listeners and read out the question correctly. The broadcaster said two further apologies were made during the programme the following day. It made an additional two pairs of tickets available and asked the two entrants who had been put to air to contact the station directly to arrange collection.

The broadcaster said that both it and the presenter regretted the error and accepted that initially, listeners were misled about the competition. However, it pointed out that this was “a low key presenter competition to encourage interaction with the audience” and that “immediate action was taken to remedy the error” once it was realised.

## **Decision**

In recent years, Ofcom has recorded numerous breaches of its rules relating to audience competitions. Ofcom has made it clear that it expects all broadcasters to exercise particular caution when inviting audiences to enter broadcast competitions, particularly where they are required to pay a premium rate to participate.

In this instance, it was clear to Ofcom that the presenter had not intended to mislead the audience and that her mistake was a genuine error. Ofcom also noted the swift remedial action taken by the broadcaster to ensure entrants whose answers were rejected unfairly could be compensated accordingly, and to apologise to the audience for the error. In the circumstances, Ofcom considers the matter resolved.

## **Resolved**

## Not in Breach

### An Inconvenient Truth

Channel 4, 4 April 2009 21:20 (6 April 2009 on S4C)

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#### Introduction

*An Inconvenient Truth* is a factual documentary film in which the American politician and climate change campaigner Al Gore discusses the subject of global warming. It takes the form of a lecture delivered by Mr Gore, interspersed with information about the effects of climate change, in which he makes a case that urgent action to prevent global warming is needed. It was produced as a feature film for worldwide cinema distribution.

It was broadcast on Channel 4 on 4 April 2009, and on S4C on 6 April 2009. The Channel 4 broadcast was immediately preceded by the ecological disaster film, *The Day After Tomorrow*. When the credits to *An Inconvenient Truth* finished, Channel 4 broadcast an end-card which stated:

*“In October 2007 a High Court Judge, Mr Justice Burton, referred to nine alleged ‘errors’ in An Inconvenient Truth but ruled that the film could be distributed to schools if accompanied by Guidance which would allow a balanced presentation of views.*

*“For more detail, please go to:  
[www.channel4.com/inconvenient](http://www.channel4.com/inconvenient)”*

Broadcasters must comply with standards set by Ofcom to: provide adequate protection for members of the public from the inclusion of offensive and harmful material<sup>1</sup>; and, to ensure that broadcasters preserve “due impartiality” on matters of political or industrial controversy or matters relating to current public policy.

#### Complaint

Ofcom received one complaint about the programme. In summary, the complainant believed that this programme, was in breach of Sections Two and Five of Ofcom’s Broadcasting Code (the “Code”) because it contained inaccurate and misleading content and, being, in the complainant’s view, a partisan treatment of a major matter relating to public policy, it did not meet the Code’s requirements for due impartiality. In arguing that the programme was partisan and contained inaccuracies the complainant relied on a High Court judgment in *Dimmock v Secretary of State for Education and Skills*<sup>2</sup> (“*Dimmock*”) in which Mr Justice Burton said that *An Inconvenient Truth* contained nine errors (which were “significant planks” to the film’s “argumentation”); promoted partisan views, and should be shown in schools as a teaching aid only with suitable guidance notes, in order to comply with the requirements of the Education Act 1996. Mr Justice Dimmock considered whether the film was compliant with sections 406 and 407 of the Education Act 1996. The

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<sup>1</sup> Section 319(2) of the Act requires Ofcom to set standards in a code for the content of programmes to secure certain standards objectives. One of those objectives is to ensure that generally accepted standards are applied to programmes to ensure adequate protection for members of the public from harmful or offensive material.

<sup>2</sup> *Dimmock v Secretary of State for Education and Skills* (2007) EWHC 2288

provisions of these sections are intended to prevent political indoctrination in schools and therefore forbid “*the promotion of partisan political views in the teaching of any subject in the school*” and included a duty to “*offer a balanced presentation of opposing views*” when “*political issues are brought to the attention of pupils*”. The complainant noted that a card had appeared at the end of the film, but did not consider it should be seen as a mitigating factor to any potential the film had to mislead, because the card’s contents were dismissive and it was unlikely to have been seen by viewers due to its very late appearance. The complainant also argued that the scheduling of the film immediately after the disaster film *The Day After Tomorrow* served to heighten alarm about the issue of climate change.

Ofcom wrote to the complainant, stating, in summary, that the programme was not in breach of the Code.

This complaint was considered in accordance with the Guidelines for the handling of standards complaints and cases (March 2004). These guidelines allowed dissatisfied parties to request a maximum of three reviews of a decision (including, an opportunity to appeal directly to the Chairman of the Content Board and request that the decision be put before the Content Board or a sub-committee of the Content Board). These guidelines were replaced on 16 December 2009 by Ofcom’s Procedures for the handling of broadcasting standards or other licence-related cases.

#### First Review Request

The complainant asked for this decision to be reviewed, and Ofcom considered that the complaint required further consideration and conducted a review of its previous decision. Ofcom wrote to the complainant to explain that, in summary, if there were inaccuracies in the programme, they were not so grave that it risked causing harm and/or offence (as required by the Code). Ofcom also explained that the subject matter dealt with in the programme did not constitute a matter of political or industrial controversy. There was therefore no requirement to take any special measures to comply with Ofcom’s due impartiality rules. Ofcom therefore again concluded that there had been no breach of the Code.

#### Second Review Request

The complainant also challenged this decision and asked for a further review. On this second occasion, Ofcom considered that the complainant had again raised arguments requiring further consideration and wrote to Channel 4 to seek its representations.

In response, Channel 4 stated, in summary, that, if judged to be in breach of the Code, the programme could or should not be broadcast in the UK, which would clearly, have a bearing both on Channel 4’s right to freedom of expression and the viewers’ right to receive information and ideas.

Channel 4 added that Mr Justice Burton’s judgment in *Dimmock* was relevant but not determinative of the issues Ofcom was required to decide in this particular case because the judgment related to compliance with the Education Act 1996 and not to Rule 2.2 (materially misleading) or Section Five (due impartiality) of the Code. Moreover, Channel 4 had drawn viewers’ attention to the judgment with a card broadcast at the end of the programme, which summarised the result of the court case. Channel 4 also argued that the complainant did not properly reflect the determination in respect of the nine “errors” identified in the film by Mr Justice Burton, who in reality said that these “*might be errors or where differing views should be*

*presented for balance*". Moreover, these were not findings of fact and the "errors" themselves had been the subject of critical examination. It was denied that viewers were misled, and their attention had in any case been drawn to the judgment.

Channel 4 argued that Section Five of the Code does not apply to the subject of anthropogenic climate change. Mr Justice Burton had accepted in his decision that there was scientific consensus that climate change was anthropogenic and about its effects. Finally, Channel 4 commented on the scheduling of the feature film *The Day After Tomorrow* prior to *An Inconvenient Truth*, saying that it was irrelevant to Ofcom's decision: the two were thematically similar and one was clearly a work of fiction (shown three times previously on Channel 4).

Ofcom then once again concluded that the film was not in breach of Sections Two and Five of the Code. In summary, Ofcom considered that the presence in the programme of nine "errors" did not render it materially misleading, because these errors occurred in the context of a film which was judged by Mr Justice Burton to provide a broadly correct presentation of the scientific consensus. Therefore, even if the film had in any sense misled viewers, it was not material and not to the extent that harm was caused, as the film was presented as the personal view of a leading and concerned US politician and long-time climate change campaigner; it was a feature film with an American focus; there was no evidence that the "errors" undermined in any material way the scientific evidence for man's activities being a major cause of global warming or that the effect of their inclusion was to cause harm; and the end card reduced further still the possibility of viewers being materially misled. Additionally, Mr Justice Burton's decision had been made in the context of the Education Act, and was therefore not determinative of Ofcom's decision. Ofcom reiterated its view that the film did not attract the requirements of due impartiality, because it did not deal with matters of political or industrial controversy, nor those relating to current public policy. Ofcom concluded that the scheduling of *The Day After Tomorrow* was not relevant to Ofcom's consideration as it did not make *An Inconvenient Truth* more or less potentially misleading, nor was it relevant to the decision as to whether the programme contained material requiring due impartiality within the ambit of the Code.

#### Final review request

The complainant challenged Ofcom's decision for a third time, as permitted under the guidelines in place at the time the original complaint was made, on the grounds that he had not been able to see Channel 4's full response to his second review request; that Ofcom had not given due consideration to *Dimmock* and had only considered it to be "relevant" rather than "material" to its determination; that Ofcom was wrong in saying that the errors as identified in the judgment were not material or harmful so as to put the programme in breach of Rule 2.2, and that the scheduling of the disaster film prior to *An Inconvenient Truth* did not contribute to potential harm; that Ofcom did not consider Rule 5.7<sup>3</sup>; that the complainant had never stipulated which rules in Section Five were applicable to his complaint; that for the purposes of rules 5.5, 5.11 and 5.12 Ofcom had not considered whether climate change was a (major) matter of current public policy; that Ofcom had not considered whether the film was impartial; that freedom of expression rights were not relevant; and that Ofcom had wrongly used the *Great Global Warming Swindle* as a precedent for its decision.

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<sup>3</sup> Rule 5.7 states: "Views and facts must not be misrepresented. Views must also be presented with due weight over appropriate timeframes".

In accordance with the guidelines, the Chairman of Ofcom's Content Board considered this third request for review. He granted this request on the ground that there may have been a procedural flaw in Ofcom's previous decision (that the complainant did not have the opportunity to see Channel 4's full response to his second review request) and referred the case in its entirety to the Broadcasting Review Committee ("the Committee")<sup>4</sup>.

The Chairman of the Content Board gave the complainant the opportunity to see and comment on Channel 4's representations, and then gave Channel 4 a final opportunity to comment on the complainant's representations to cure any procedural flaw that might have taken place.

Both parties took up the opportunity to comment. In summary, the complainant added to his third review request by arguing that Channel 4 dismissed the findings in *Dimmock* that the film was "political and campaigning", partisan and alarmist without explaining why those findings were flawed; it did not address the findings in the judgment that the film contained significant errors; and presented no argument as to why the subject of the film could not be said to relate to current public policy. In particular, the complainant argued that it was unreasonable to state that global warming was not a matter relating to current public policy, as there was clearly current public policy that related to global warming. The complainant also argued that, by finding the film in breach of the Code, Ofcom would not impinge upon Channel 4's or viewers' right to freedom of expression because the film could still be shown provided other content was included in Channel 4's schedule to balance its message.

Channel 4's response added to its original comments, arguing in summary that it was neither necessary nor possible to meet the due impartiality requirements of Section Five (including Rule 5.5) of the Code by including the broadcast of the film in a series of programmes: the film was an acquired documentary feature and Channel 4 could not have included it in a series, nor did it have any influence on its editorial content. Channel 4 also added that the "errors" identified by the Judge in *Dimmock* did not relate to an analysis of the scientific questions, and the Judge was not making findings of fact or necessarily saying that there were errors in the film, merely analysing how alleged errors would affect the film's compliance with the Education Act 1996.

Channel 4 also stated its belief that anthropogenic climate change was not in itself a public policy, although it might impact on policy.

In respect of the scheduling of the film immediately before the disaster film *The Day After Tomorrow*, it would have been clear to viewers that *An Inconvenient Truth* was a documentary feature film and *The Day After Tomorrow* a fictional film, as would the difference between the two.

## Decision

The first decision for the Committee was whether or not the Complainant in this case had demonstrated that there were sufficient grounds to review the decision of the

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<sup>4</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.

Executive of 28 January 2010. The Committee believed that he had and went on to reconsider the case, having regard to all of the submissions made by the parties throughout the process and with specific regard to each of the grounds for review laid out by the complainant in the final review request (see above).

### General

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. When applying these standards, Ofcom must do so in manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g) of the Communications Act 2003 (“the 2003 Act”). This encompasses the broadcasters’ right to transmit and the audience’s right to receive creative material, information and ideas without interference but subject to restrictions proscribed by law and necessary in a democratic society. This right is enshrined in the European Convention on Human Rights.

Furthermore, viewers expect to be adequately informed about matters in the public interest, including *minority* views and opinions. Protection is provided to viewers by the requirement for broadcasters to preserve “due impartiality” on matters relating to political or industrial controversy or matters relating to current public policy.

### *Section Two and Factual Accuracy*

The Committee first considered whether the programme was in breach of Rule 2.2 of the Code.

Rule 2.2 states that:

*“Factual programmes or items or portrayals of factual matters must not materially mislead the audience”.*

The accompanying Ofcom guidance to the Code explains that “*Ofcom is required to guard against harmful or offensive material, and it is possible that actual or potential harm and/or offence may be the result of misleading material in relation to the representation of factual issues. This rule is therefore designed to deal with content which **materially misleads the audience so as to cause harm or offence.***” (Emphasis in original).

Ofcom must therefore regulate misleading material only where that material is likely to cause harm or offence. As a consequence, the requirement that content must not materially mislead the audience is necessarily a high test. Whilst Ofcom is required by the 2003 Act to set standards to ensure that *news* programmes are reported with “due accuracy” there is no such requirement for other types of programming, including factual programmes of this type.

In dealing with this issue Ofcom had to ascertain - not whether the programme was accurate - but whether it was likely to have materially misled the audience in a way that was likely to have caused harm.

In reaching its decision on whether the film breached Rule 2.2 of the Code, the Committee first considered whether the programme contained factual inaccuracies that were capable of materially misleading the audience. The Committee noted that the complainant’s view that the programme contained material factual inaccuracies was based, by his own admission, on the judgment of Mr Justice Burton in *Dimmock*.

It was not the Committee's role to agree or disagree with the findings of the Court. On its face the judgment of the Court appeared to suggest that there were specific elements of the programme that were not accurate. The Committee, therefore, considered that it was reasonable, in reaching a decision as to whether or not the film had the potential to mislead to have regard to the fact that a judge in the High Court had identified what he called errors in the film, which diverged from the IPCC<sup>5</sup>'s Fourth Assessment Report (deemed the "consensus" on climate change).

However, the Committee was mindful that these errors had been identified by Mr Justice Burton in the context of the use of the film as an educational aid and its compliance with sections 406 and 407 of the Education Act 1996. Indeed, Mr Justice Burton introduced his discussion of the "errors" in *An Inconvenient Truth* by pointing out that "*the hearing before me did not relate to an analysis of the scientific questions, but to an assessment of whether the 'errors' in question, set out in the context of a political film, informed the argument on ss406 and ss407.*" In particular, the Committee noted that the provisions of these sections were intended to prevent political indoctrination in schools and therefore forbade "*the promotion of partisan political views in the teaching of any subject in the school*" and included a duty to "*offer a balanced presentation of opposing views*" when "*political issues are brought to the attention of pupils*". Furthermore, the judgment accepted that "*Al Gore's presentation of the causes and likely effects of climate change in the film was broadly accurate*".

In the Committee's view this was a very different context to the film's compliance with the Code and any potential harm it might have caused television viewers (the majority of which would have been adults). Moreover, the Committee noted that Ofcom was not bound by the conclusions of the High Court because its role was to apply the Code and not, as was the case in *Dimmock*, the Education Act 1996. In particular, the Committee was mindful of the fact that Ofcom is required to apply "generally accepted standards" (including those set out in Rule 2.2 of the Code) in the light of the right to freedom of expression – which the Court in *Dimmock* was not required to do.

Finally, the Committee noted that Mr Justice Burton appeared satisfied for the film to be distributed to schools with a guidance note, thus suggesting that he did not consider the work to be so significantly misleading or partisan that it could not be seen at all in schools. The Committee therefore concluded that the findings of the Court were not in and of themselves demonstrative that the programme was materially misleading so as to cause harm to viewers.

In the Committee's view the programme was therefore unlikely to have materially altered viewers' understanding of Anthropogenic Global Warming in a way that would have adversely affected them or society.

Although it did not believe it was a necessary step to ensure compliance with the Code (as it did not believe that the programme was likely to materially mislead), the Committee also considered that Channel 4 had taken care to limit any potential for the film to mislead viewers by broadcasting the end-card explaining that the High

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<sup>5</sup> The Intergovernmental Panel on Climate Change is the leading body for the assessment of climate change, established by the **United Nations Environment Programme** and the **World Meteorological Organization** to provide the world with a clear scientific view on the current state of climate change and its potential environmental and socio-economic consequences.

Court judgement had highlighted errors in the film. This card appeared after the credits and remained on screen for about 30 seconds; it also pointed viewers to a website where they could read the judgment in full.

The Committee therefore considered that Channel 4 had taken reasonable steps in broadcasting the card after the end of the film to ensure that viewers were adequately informed about the High Court judgement and that the content of that card and its placement were editorial matters for Channel 4, as was its decision to refer viewers to a website rather than conveying the findings of the High Court in detail.

In the circumstances, the Committee concluded that the film (notwithstanding the Court's findings) presented an argument that was consistent with the current orthodoxy and was unlikely to have materially misled viewers in a way that would result in harm. It was not, therefore, in breach of Rule 2.2.

#### *Section Five and Due Impartiality*

The Committee then considered whether the programme was in breach of Section Five of the Code.

Rule 5.1 of the Code states:

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

Rule 5.5 of the Code states:

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

The Code states that:

“Matters of political or industrial controversy are political or industrial issues on which politicians, industry and/or the media are in debate. Matters relating to current public policy need not be the subject of debate but relate to a policy under discussion or already decided by a local, regional or national government or by bodies mandated by those public bodies to make policy on their behalf, for example non-governmental organisations, relevant European institutions, etc.”

In relation to matters of major political or industrial and major matters relating to current public policy, the Code contains the following rules:

Rule 5.11 states:

“In addition to the rules above, due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service in each programme or in clearly linked and timely programmes”.

Rule 5.12 states:

“In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. View and facts must not be misrepresented.”

The Code also gives the meaning of “matters of major political or industrial controversy and major matters relating to current public policy”:

“These will vary according to events but are generally matters of political or industrial controversy or matters of current public policy which are of national, and often international, importance, or are of similar significance within a smaller broadcast area”

When interpreting due impartiality, Ofcom must take into account the broadcaster’s and viewers’ right to freedom of expression, which includes the right to hold opinions and to receive and impart information and ideas without interference by public authority.

The Committee first considered whether *An Inconvenient Truth* dealt with matters requiring the preservation of due impartiality.

It noted that *An Inconvenient Truth* was not a news programme, and that Rule 5.1 requiring the preservation of due impartiality for all news, in whatever form, did not apply to its broadcast.

The Committee then went on to establish whether or not the matters dealt with in this programme were either: *matters of political or industrial controversy; or, matters relating to current public policy; or, matters of major political or industrial controversy and major matters relating to current public policy.*

#### *Matters of political or industrial controversy*

It appeared to the Committee that the subject matter of the film was Anthropogenic Global Warming, but that it was also a call to action by its presenter, Al Gore. The Committee felt that it was a work that evidently centred on Anthropogenic Global Warming and the scientific basis that underpins it but at its core was the proposition of the need for Anthropogenic Global Warming to be addressed, at some point, by actions on the part of individuals, corporations and governments. The Committee noted that the film did not debate to any significant degree whether or not Anthropogenic Global Warming was or was not an established fact, but rather assumed that it had already been established and attempted to persuade viewers that prompt action was required. In this, the Committee once again had regard to *Dimmock*, which noted that the film was “*political*” and “*campaigning*”.

Having reviewed the film, the Committee noted that Mr Gore described his work as travelling around the world and “*trying to identify all those things in people’s minds that serve as obstacles to them understanding this*” and to “*demolish*” those obstacles. He described himself as doing this “*city by city, person by person, family by family – and I have faith that pretty soon enough minds were changed that we cross a threshold*” (sic). It therefore seemed apparent to the Committee that the film had a clear proselytizing function as part of that very work.

However, the Committee concluded that, despite arguably being a “political film”, the subject matter could not be described as being one of “political or industrial controversy”, on the grounds that - despite being the subject of debate in the media - Anthropogenic Global Warming could reasonably be considered a subject that was already scientifically established and did not appear to be challenged by any of the established political parties or other significant domestic or international scientific institutions.

Similarly, the need to address the problem by lowering emissions also appears established and can no longer be described as a subject of controversy (as envisaged by the terms of the Code).

The Committee therefore concluded that the film’s subject was not a matter of political or industrial controversy.

*Matters relating to current public policy*

The Committee then turned to the question of whether the due impartiality rules might apply to the broadcast of the film because its subject matter was current public policy or because it related to current public policy.

The Committee considered that the film’s principal subject was Anthropogenic Global Warming and that this in itself was not public policy and would not therefore trigger the Code’s requirements for due impartiality for that reason.

However, the Committee noted that the film included calls to action, for example:

*“That’s what I’d like to finish with. The fact that we already know everything we need to know to effectively address this problem. We’ve got to do a lot of things, not just one. If we use more efficient electricity appliances we can save this much [Mr Gore indicates a graph showing CO2 emissions] off the global warming/pollution that would otherwise be put into the atmosphere. If we use other end-use efficiency: this much. If we have higher mileage cars: this much. And all these begin to add up – other transport efficiency, renewables technology, carbon capture and sequestration ... – they all add up and pretty soon we are below our 1970 emissions, We have everything we need – save perhaps political will”.*

Mr Gore listed the efforts and successes of the human race throughout history (for example, landing on the moon, ending apartheid, eradicating polio and small pox) and stated: “so now we have to use our political processes in our democracy and then decide to act together to solve those problems.”

Mr Gore then further underlined his argument:

*“We have the ability to do this. Each one of us is a cause of global warming but each of us can make choices to change that with the things we buy, the electricity we use, the cars we drive, we can make choices to bring our individual carbon emissions to zero. The solutions are in our hands, we just have to have the determination to make it happen.”*

He concluded his lecture and the film by saying: “I believe this is a moral issue. It is your time to seize this issue. It is our time to rise up again and secure our future.”

The film ended with a montage of actions that followed the words: *“The climate crisis can be solved. Here’s how to start:*

*“You can reduce your carbon emissions to zero buy energy efficient appliances and lightbulbs; change your thermostat; weatherise your house; increase insulation; get an energy audit; recycle; if you can buy a hybrid car; walk or ride a bicycle; when you can use light rail + mass transit; tell your parents not to ruin the world that you will live in; if you are a parent join with your children to save the world they will live in; switch to renewable sources of energy; call your power company to see if they offer green energy; if they don’t ask them why not; vote for leaders who pledge to solve this crisis; write to congress; if they don’t listen run for congress; plant trees; lots of trees; speak up in your community; call radio shows and write newspapers; insist that America freeze CO2 emissions and join international efforts to stop global warming; reduce our dependence on foreign oil, help farmers grow alcohol fuels; raise fuel economy standards: require lower emissions from automobiles; ... pray that people will find the strength to change ;... encourage everyone you know to see this movie; learn as much as you can about the climate crisis; then put your knowledge into action.”*

In the Committee’s view, the “solutions” outlined by Mr Gore were essentially ones requiring individual action. For example, advocating that individuals were more thoughtful about the source of the electricity they used in their homes appeared to the Committee to fall outside what could be described as “public policy”. The Committee acknowledged that not all of the advocated action points would have been achievable on an individual basis (for example, “require lower emissions from automobiles,” or “raise fuel economy standards”) but, in the context of Mr Gore’s earlier encouragement for everyone to *“use our political processes in our democracy and then decide to act together to solve those problems”*, it seemed to the Committee that the film was also intended to encourage individual action as a means of eventually changing public attitudes, behaviours and opinions among the residents, organisations and institutions of the US in the first instance and in democratic countries across the world in the longer term. In that sense, one of the underlying tenets of the film appeared to be, as Mr Gore was arguing, that public attitudes needed to evolve significantly to address the problems created by Anthropogenic Global Warming.

In the Committee’s view parts of the film addressed not only climate change, and whether it was happening, but also – crucially – that something needed urgently to change if the problem was to be addressed. The film outlined an argument for the need for a fundamental shift in behaviour on an individual level and a corresponding shift in public attitudes on a collective level. It appeared to the Committee that the film squarely placed the responsibility for this change at the door of all consumers of energy, whether on an individual or a collective basis.

The Committee then asked itself if it was therefore possible to define these calls to action as matters relating to current public policy in such a way as to require the preservation of due impartiality. As noted above, the application of the rules on due impartiality has to take into account broadcasters’ rights to freedom of expression and viewers’ rights to receive information freely, and these rules have to be applied in the context of Ofcom’s wider standards objectives.

It seemed to the Committee that public policy may be formed on almost any conceivable subject and that therefore the test of whether a programme’s subject matter was one that “related to current public policy” had necessarily to be a high one in order for Ofcom to be able to regulate in such a way that protects freedom of

expression. The Committee felt strongly that a very wide application of Section Five to cover not only discussions of a specific policy but also all issues that might in some way have a relationship to public policy (i.e. effectively any subject on which a factual documentary programme could be made) would have a chilling effect on broadcaster's ability to explore important subject matter. Therefore, in order for a programme's subject matter to fall into this category the Committee considered that it would normally need to relate to specific public policies.

In the Committee's view, *An Inconvenient Truth* did not contain any such discussion. The Committee found that the film was not focused on specific public policies that Mr Gore considered were essential to tackle climate change, but rather on persuading viewers to take individual action and alter their own behaviour so that society as a whole could come to the understanding that *something* needed to be done.

The Committee concluded that the subject matter of the film *An Inconvenient Truth* - namely, that Anthropogenic Global Warming is taking place and that public attitudes needed to be changed in order for preventative action to be possible – was not a matter relating to current public policy.

*Matters of major political or industrial controversy and major matters relating to current public policy*

Having reached this view, it was not necessary for the Committee to consider whether or not the subject matter of this programme related to **major** matters of public policy. Because it had already concluded that the programme's subject was not a matter of political or industrial controversy, it did not breach Rules 5.11 and 5.12.

Finally, the Committee considered that, even if it could be argued that some of the calls to action mentioned at the end of the film could be described as "relating to public policy" (for example, "*require lower emissions from automobiles*"), there were several other factors to take into account in reaching a decision on whether these had been presented with due impartiality.

The Committee considered that the preservation of due impartiality does not require a broadcaster to include every argument on a particular subject or to provide, in each case, a directly opposing argument to the one presented in the programme. For instance, it would not always be necessary or even desirable to have to present an opposing view which is at odds with the established view of the majority or inconsistent with established fact in order to preserve due impartiality. Further, whether or not due impartiality has been preserved will also be dependent on a range of other factors such as the nature of the programme; the programme's presentation of its argument; the transparency of its agenda; the audience it is aimed at and what the audience's expectations are.

In this case, the existence of anthropogenic global warming and proposed measures to limit or reduce it (for example, by reducing vehicle emissions) is consistent with the current orthodoxy. As noted above there is scientific consensus on this point. In the Committee's view, the preservation of due impartiality did not require the programme to put the opposing argument.

Additionally, the programme's perspective had been clearly established (and would have been understood by viewers) by the time these measures were advocated.

Finally, it seemed to the Committee that the calls to action in the final section of the film were addressed specifically to citizens of the United States while, in this instance, the film was not broadcast to a US audience.

Taking all of these factors into account, it appeared to the Committee that even if the final section of the film were judged to have dealt with matters relating to public policy, due impartiality was preserved.

In conclusion, the Committee found that the programme was not in breach of Section Five of the Code.

**Not in breach of Rule 2.2**

**Not in breach of rules 5.1, 5.5, 5.11 and 5.12**

## Advertising Scheduling cases

### In Breach

#### Advertising minutage

*ESPN, ESPN Classic Sport UK, ESPN America, various dates between 3 and 15 June 2010, various times*

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#### Introduction

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

Rule 17 of COSTA applies restrictions to the number of advertising breaks during a programme<sup>1</sup>.

These rules implement the requirements of the Audiovisual Media Services (AVMS) Directive.

As part of Ofcom’s routine monitoring of broadcasters’ compliance with COSTA, we observed that between 3 and 15 June 2010, there were two occasions on ESPN and one on ESPN Classic Sport UK when the broadcaster appeared to have transmitted more than the permitted allowance of advertising in one clock hour. For example, on one of these occasions, the broadcaster transmitted a total of 13 minutes and 40 seconds of advertising in one clock hour (one minute and 40 seconds more than was permitted).

Upon further monitoring of ESPN channels, Ofcom also observed that on 4 June 2010, during *NBA Fastbreak*, broadcast on ESPN America, the broadcaster appeared to have transmitted three internal breaks when only two breaks were permitted.

Ofcom wrote to the broadcaster asking it to provide comments relating to these issues under Rules 4 and 17 of COSTA.

#### Response

The broadcaster stated that it deeply regretted the incidents that had occurred across three of its channels.

The broadcaster explained it would be introducing a combination of further technical, procedural and other changes to its processes to ensure that such problems would not recur. These changes include upgrades to both its manual and automated checking processes, as well as an overall reduction to the maximum advertising minutage scheduled in clock hours featuring certain programmes that are considered potentially problematic i.e. live overseas sporting events.

The broadcaster also stated it would be re-emphasizing the COSTA rules to its staff.

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/tacode.pdf>

## **Decision**

Ofcom notes that this is the second time it has investigated issues on ESPN channels under COSTA. On 24 May 2010, Ofcom published a finding in the Broadcast Bulletin recording breaches of COSTA minutage rules<sup>2</sup> in relation to content broadcast on both ESPN and ESPN Classic Sport UK. Following these breaches, the broadcaster stated that it had improved its procedures to prevent this issue recurring. Ofcom is concerned that the broadcaster's procedures were not adequate to prevent these latest breaches of COSTA rules occurring. Accordingly, we are recording a breach of Rule 4 and Rule 17 of COSTA.

Ofcom has asked ESPN to explain how the further changes it has introduced to its internal processes will ensure that its channels are compliant with COSTA in future. Ofcom will also continue to monitor ESPN, ESPN Classic Sport UK and ESPN America and may consider further regulatory action if this problem recurs.

## **Breaches of Rules 4 and 17 of COSTA**

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<sup>2</sup> Ofcom Broadcast Bulletin 158:  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb158/Issue158.pdf>

## In Breach

### Advertising minutage

*Wedding TV Asia, 3 May 2010, 20:00*

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#### Introduction

Rule 4 of the Code on the Scheduling of Television Advertising (“COSTA”), states: “time devoted to television advertising and teleshopping spots on any channel in any one hour must not exceed 12 minutes”. This rule implements the requirements of the Audiovisual Media Services (AVMS) Directive.

As part of Ofcom’s routine monitoring of broadcasters’ compliance with COSTA, Ofcom observed that on 3 May 2010, during the 20:00 clock hour, a total of 12 minutes and ten seconds of advertising had been transmitted on Wedding TV Asia (ten seconds more than is permitted).

Ofcom wrote to Wedding TV Limited, the licence holder for Wedding TV Asia, to request its comments relating to the incident under Rule 4 of COSTA.

#### Response

The broadcaster explained that it had been checking all schedules manually to ensure they were compliant with COSTA but unfortunately had failed to detect this particular overrun.

As a result of the incident, the broadcaster said that staff at Wedding TV Asia had been reminded of COSTA minutage rules. Furthermore, a more secure checking method would be introduced through the channel’s scheduling software to prevent further overruns occurring.

#### Decision

Ofcom notes the steps the broadcaster now intends to take to improve Wedding TV Asia’s compliance with COSTA.

However, this failure followed two earlier overruns on Wedding TV on 31 January and 1 February 2010. Following these earlier incidents, the broadcaster assured Ofcom that it would be introducing a number of measures to prevent further overruns occurring on its channels. Ofcom is therefore concerned that the broadcaster’s procedures were still not adequate to prevent the latest overrun from occurring. Accordingly, we are recording a breach of Rule 4 of COSTA.

Ofcom may consider further regulatory action if this problem recurs.

#### Breach of Rule 4 of COSTA

## Fairness and Privacy Cases

### Not Upheld

#### Complaint by Miss Shamima Hussain

*Detailed Story, Channel S, 22 June 2009*

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**Summary:** Ofcom has not upheld Miss Shamima Hussain's complaint of unwarranted infringement of privacy in the making and the broadcast of the programme.

Channel S broadcast a documentary about marriage in the Bengali community. The programme looked at the age at which people married and reasons they had for delaying marriage. The programme included footage of Miss Hussain leaving a car as she arrived at her wedding and an interview with her husband. Miss Hussain complained that her privacy was unwarrantably infringed in the making and the broadcast of the programme.

In summary Ofcom found the following:

- To the extent that footage of Miss Hussain was filmed inside her wedding venue, a private place, sensitive and personal information about Miss Hussain was recorded without her consent and she had legitimate expectation of privacy in relation to it. However, in light of the public interest in recording such footage for a documentary about marriage in the Bengali community, Ofcom considered that any infringement of Miss Hussain's privacy in the making of the programme was warranted.
- As the brief footage of Miss Hussain that was included in the programme was filmed in a public place, she had no legitimate expectation of privacy in relation to the information broadcast and so her privacy was not infringed by the broadcast of the programme.

#### Introduction

On 22 June 2009, Channel S, which broadcasts to the Bengali community in the United Kingdom, broadcast a documentary about marriage in that community. The programme included interviews with a number of married couples, who spoke about the age at which they married and their reasons for delaying marriage, if they did so. The programme included footage of an interview with Miss Shamima Hussain's husband, in which he spoke of his views on the advantages of early marriage. The programme also included footage of Miss Hussain leaving a car as she arrived at her wedding.

Miss Hussain complained to Ofcom that her privacy was unwarrantably infringed in the making and the broadcast of the programme.

#### The Complaint

##### Miss Hussain's case

In summary, Miss Hussain complained that her privacy was unwarrantably infringed in the making of the programme in that:

- a) Footage of her wedding was filmed without her consent. Miss Hussain said that she had two cameramen filming with permission at her wedding. She became aware of a third person filming and he was told to stop. He said he would stop and would delete the footage he had already filmed.

In summary, Miss Hussain complained that her privacy was unwarrantably infringed in the broadcast of the programme in that:

- b) Footage of her wedding was broadcast without her knowledge or consent. Miss Hussain said that her husband had agreed to be interviewed by the programme makers but that he was not informed that the interview would be broadcast on digital television.

### **Channel S's case**

By way of background, Channel S said that the programme was a documentary about the tradition of marriage among the Bangladeshi community people in Britain. The programme focused on the customs of the marriage ceremony from both a religious and a Bengali cultural point of view. Two couples had agreed to be interviewed and have their weddings filmed for the programme. Miss Hussain was from one of those couples.

In summary, Channel S responded to Miss Hussain's complaint that her privacy was unwarrantably infringed in the making of the programme as follows:

- a) Channel S said that before production began, the programme's producer met a prominent Bengali businessman and asked if he could help him find couples who were due to marry shortly. The businessman introduced his cousin, Miss Hussain's husband, to the producer. He verbally agreed to give an interview on the wedding day and then gave that interview readily. Miss Hussain's husband also gave his consent for the wedding to be filmed for the documentary without any hesitation. On the day of the wedding, the production team started filming with the bridegroom. When Miss Hussain entered the main gate of the wedding venue, the camera crew filmed her arrival as well. However, when the crew approached the ladies area to film, they were asked not to film them. The camera team considered this a logical request from a religious point of view and in light of conservative Bengali customs.

Channel S said that it was therefore not true that the producer did not have any permission to film at all. Although there was no formal agreement, the complainant's husband verbally gave his approval and it was clear from his interview that there was no sign of any unwillingness to the filming or interviewing.

In summary, Channel S responded to Miss Hussain's complaint that her privacy was unwarrantably infringed in the broadcast of the programme as follows:

- b) Channel S said that, prior to the broadcast, Miss Hussain did not ask for the footage not to be included in the programme.

Channel S said that, after the programme was broadcast, Miss Hussain telephoned and asked for her part not to be shown. The producer edited the documentary by blurring the scene with Miss Hussain in it before repeating the programme. Channel S said that it received no complaints about the inclusion of Miss Hussain's husband's interview in the programme.

Channel S said that the four second shot of Miss Hussain was included to show her getting out of the wedding car, but that there had been no intention of infringing her privacy.

## **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, Ofcom considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and a transcript, and both parties' written submissions.

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 the Code which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted.

- a) Ofcom first considered the complaint that Miss Hussain's privacy was unwarrantably infringed in the making of the programme, as a result of footage of her being filmed without her consent.

In considering this complaint, Ofcom had regard to Practice 8.5 of the Code which states that any infringement of privacy in the making of a programme should be with the person's consent or be otherwise warranted.

In considering whether Miss Hussain's privacy was unwarrantably infringed in the making of the programme, Ofcom first considered the extent to which Miss Hussain could reasonably have expected that footage of her at her wedding would not be filmed without her prior consent by a television company.

Ofcom noted that some of the footage filmed, namely of Miss Hussain getting out of a car on arrival at her wedding venue, captured events that appear to have occurred in a public place outside the venue. These were events that any member of the public could have seen and, in Ofcom's view, did not amount to information that may be understood to be sensitive and personal and in relation to which Miss Hussain had a legitimate expectation of privacy. There was therefore no infringement of her privacy in respect of the filming of that footage.

As regards any footage of Miss Hussain filmed inside the wedding venue, Ofcom considered that this was information that may be understood to be sensitive and personal. Ofcom took the view that Miss Hussain would have a legitimate expectation of privacy in relation to the filming of such footage at her wedding by a television company.

Ofcom noted Miss Hussain's acknowledgment that her husband had agreed to be filmed and to give an interview to the programme makers and considered that it appeared from the broadcast footage that Miss Hussain's husband was comfortable giving an interview on camera. However, Ofcom also noted that Miss Hussain had not been asked for or given her personal consent to filming and had asked the programme makers to stop filming when she became aware of the filming taking place. Ofcom therefore concluded that Miss Hussain had a legitimate expectation of privacy in relation to the filming of her inside her wedding venue and that she did not give her consent to any such filming.

Ofcom then proceeded to consider the competing right of the broadcaster to freedom of expression. In this respect, Ofcom considered whether in the circumstances there was a sufficient public interest to warrant an infringement of Miss Hussain's expectation of privacy. Ofcom considered that there was some public interest in a documentary about marriage in the Bengali community and in developing the public's understanding of traditions and attitudes. In Ofcom's view, the decision to record material in this case would be warranted by the public interest in the subject matter.

In addition, Ofcom recognises that there may be pressures on programme makers in certain situations which make it difficult to judge at the time whether filming or recording is likely to unwarrantably infringe the subject's legitimate expectation of privacy. In this context, Ofcom took the view that it may not have been practicable for the programme makers to obtain the consent of all of those people at the wedding who were incidental to the filming of Miss Hussain's husband, who had given his consent to be filmed and interviewed. In these circumstances what is important is that the broadcaster takes steps to ensure that the subsequent broadcast of material recorded in such circumstances does not result in an unwarranted infringement of privacy. This issue is dealt with in the decision at head b) below.

In conclusion, therefore, Ofcom found that Miss Hussain's privacy was not unwarrantably infringed in the making of the programme.

- b) Ofcom then considered the complaint that Miss Hussain's privacy was unwarrantably infringed in the programme as broadcast, as a result of footage of her wedding being broadcast.

In considering this complaint, Ofcom 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 noted that Miss Hussain said she had not given consent for footage of her to be included in the broadcast programme, while Channel S said that Miss Hussain had not, prior to broadcast, asked for the footage not to be used. Ofcom noted that these accounts differed.

In considering whether or not there had been any unwarranted infringement of Miss Hussain's privacy, Ofcom first considered the extent to which Miss Hussain could legitimately have expected that the footage of her that was included in the programme would not be broadcast without her consent.

Ofcom examined the nature of the footage broadcast, and noted that it comprised a close-up shot, lasting approximately four seconds, of Miss Hussain getting out of a car on arrival at her wedding venue. Ofcom appreciated that Miss Hussain considered her arrival at her wedding to be a private matter. However, it appeared to Ofcom that the programme included footage of events that occurred in a public place outside the wedding venue. As set out under decision head a) above, these were events that any member of the public could have seen. In these circumstances, Ofcom considered that Miss Hussain did not have a legitimate expectation of privacy in relation to the broadcast of the clip showing her arriving at her wedding.

Having concluded that Miss Hussain did not have a legitimate expectation of privacy, Ofcom found that her privacy was not unwarrantably infringed in the programme as broadcast.

**Accordingly, Miss Hussain's complaint of unwarranted infringement of privacy in the making and the broadcast of the programme has not been upheld.**

## Other Programmes Not in Breach

Up to 23 August 2010

Programme	Transmission Date	Broadcaster	Categories	Number of complaints
"More Music Variety" slogan	n/a	Heart FM	Materially misleading	1
10 Years Younger: The Challenge	03/08/2010	Channel 4	Scheduling	1
10 Years Younger: The Challenge	04/08/2010	Channel 4	Scheduling	1
10 Years Younger: The Challenge	12/08/2010	Channel 4	Offensive language	1
3@Three	04/08/2010	ITV1	Generally accepted standards	2
4thought.tv	07/08/2010	Channel 4	Sexual orientation discrimination/offence	7
4thought.tv	05/08/2010	Channel 4	Sexual orientation discrimination/offence	2
4thought.tv	15/08/2010	Channel 4	Religious/Beliefs discrimination/offence	1
Absolute 80's Breakfast Show	30/07/2010	Absolute 80's	Generally accepted standards	1
Advertising	25/01/2010	GEM TV	COSTA	1
Airline	04/08/2010	Sky 3	Generally accepted standards	1
Alan Carr: Chatty Man	15/08/2010	Channel 4	Generally accepted standards	6
Alan Carr: Chatty Man	15/08/2010	Channel 4	Race discrimination/offence	1
Amish: World's Squarest Teenagers	01/08/2010	Channel 4	Religious/Beliefs discrimination/offence	1
Amish: World's Squarest Teenagers	08/08/2010	Channel 4	Generally accepted standards	1
Amish: World's Squarest Teenagers	08/08/2010	Channel 4	Religious/Beliefs discrimination/offence	1
Andy Goldstein's Sports Bar	24/07/2010	Talksport	Generally accepted standards	4
Antiques Roadshow	18/07/2010	BBC 1	Race discrimination/offence	1
Athletics	28/07/2010	BBC 2	Race discrimination/offence	1
Bargain Hunt	27/07/2010	BBC 1	Offensive language	1
Battlefield Tour	26/07/2010	Military History	Generally accepted standards	1
BBC News at Six	19/08/2010	BBC 1	Generally accepted standards	2
BBC News at Ten	19/08/2010	BBC 1	Generally accepted standards	1
Beckii: Schoolgirl Superstar at 14	12/08/2010	BBC 3	Generally accepted standards	1
Being... N-Dubz	01/08/2010	Channel 4	Violence and dangerous behaviour	1
Big Brother 11	30/07/2010	Channel 4	Violence and dangerous behaviour	7
Big Brother 11	30/07/2010	Channel 4	Violence and dangerous behaviour	1

Big Brother 11	31/07/2010	Channel 4	Generally accepted standards	1
Big Brother 11	01/08/2010	Channel 4	Violence and dangerous behaviour	40
Big Brother 11	01/08/2010	Channel 4	Generally accepted standards	2
Big Brother 11	04/08/2010	Channel 4	Harm	1
Big Brother 11	05/08/2010	Channel 4	Race discrimination/offence	4
Big Brother 11	05/08/2010	Channel 4	Generally accepted standards	4
Big Brother 11	05/08/2010	Channel 4	Generally accepted standards	12
Big Brother 11	06/08/2010	Channel 4	Generally accepted standards	9
Big Brother 11	12/08/2010	Channel 4	Generally accepted standards	2
Big Brother 11	13/08/2010	Channel 4	Premium rate services	5
Big Brother 11	13/08/2010	Channel 4	Generally accepted standards	4
Big Brother 11	17/08/2010	Channel 4	Generally accepted standards	9
Big Brother 11	18/08/2010	Channel 4	Generally accepted standards	1
Big Brother 11	19/08/2010	Channel 4	Generally accepted standards	3
Big Brother 11	17/07/2010	E4	Generally accepted standards	1
Big Brother 11	15/08/2010	E4	Generally accepted standards	1
Big Brother Live	05/08/2010	Channel 4	Generally accepted standards	5
Big Brother Live	06/08/2010	Channel 4	Generally accepted standards	3
Big Brother Live	12/08/2010	Channel 4	Violence and dangerous behaviour	4
Big Brother Live	17/08/2010	Channel 4	Generally accepted standards	5
Big Brother Live	19/08/2010	Channel 4	Generally accepted standards	22
Big Brother Live	08/08/2010	Channel 4	Religious/Beliefs discrimination/offence	1
Big Brother Live	16/08/2010	Channel 4	Generally accepted standards	1
Big Brother Live	13/08/2010	E4	Generally accepted standards	7
Big Brother Live	02/08/2010	E4	Race discrimination/offence	1
Big Brother Live	15/08/2010	E4	Crime	1
Big Brother's Big Mouth	06/08/2010	E4	Generally accepted standards	5
Big Brother's Little Brother	05/08/2010	E4	Offensive language	1
Big Brother's Little Brother	04/08/2010	E4	Premium rate services	1
BMLbaby.com's sponsorship of ITV Granada Weather	n/a	ITV1 (Granada)	Generally accepted standards	1
Carpet Right's sponsorship of Lie To Me	n/a	Sky1	Generally accepted standards	1

Casey and Brutus: Grizzly Encounters		Nat Geo Wild	Animal welfare	1
Casualty	07/08/2010	BBC 1	Suicide and self harm	2
Celebrity MasterChef	19/08/2010	BBC 1	Generally accepted standards	2
Channel 4 News	02/08/2010	Channel 4	Generally accepted standards	1
Channel 4 News	04/08/2010	Channel 4	Generally accepted standards	1
Channel 4 Pigeon ident	12/08/2010	Channel 4	Animal welfare	1
Chowder	04/08/2010	Cartoon Network	Generally accepted standards	1
Come Dine with Me	11/08/2010	Channel 4	Generally accepted standards	1
Come Dine with Me Down Under	07/08/2010	Channel 4	Offensive language	1
Copycats	20/07/2010	BBC 2	Offensive language	1
Coronation Street	07/06/2010	ITV1	Scheduling	61
Coronation Street	09/06/2010	ITV1	Scheduling	16
Coronation Street	30/07/2010	ITV1	Generally accepted standards	1
Coronation Street	09/08/2010	ITV1	Crime	1
Countdown	10/08/2010	Channel 4	Sexual orientation discrimination/offence	1
Cowards	04/08/2010	BBC 4	Generally accepted standards	1
Crank	09/06/2010	TV6 Sweden	Generally accepted standards	1
CSI: New York	05/08/2010	Five	Generally accepted standards	1
Dating in the Dark	10/08/2010	Living	Race discrimination/offence	1
Download Festival 2010 Uncut and Extreme	21/06/2010	Scuzz TV	Generally accepted standards	1
Drop Dead Fred	11/07/2010	Comedy Central	Offensive language	1
Early Bird	25/04/2010	Tease Me TV (Freeview)	Sexual material	1
EastEnders	09/08/2010	BBC 1	Drugs, smoking, solvents or alcohol	33
EastEnders	10/08/2010	BBC 1	Disability discrimination/offence	4
EastEnders	30/07/2010	BBC 1	Religious/Beliefs discrimination/offence	1
EastEnders	03/08/2010	BBC 1	Violence and dangerous behaviour	1
EastEnders	13/08/2010	BBC 1	Drugs, smoking, solvents or alcohol	1
EastEnders	17/08/2010	BBC 1	Generally accepted standards	1
EastEnders	17/08/2010	BBC 1	Drugs, smoking, solvents or alcohol	1
EastEnders	20/08/2010	BBC 1	Violence and dangerous behaviour	1
Enemies of Reason (trailer)	22/08/2010	More4	Religious/Beliefs discrimination/offence	1
FreeBlue 3	28/07/2010	LivexxBabes	Drugs, smoking, solvents or alcohol	1

Freeblue 3	29/07/2010	LivexxBabes	Drugs, smoking, solvents or alcohol	1
FreeBlue1	09/07/2010	Babeworld.tv	Drugs, smoking, solvents or alcohol	1
FreeBlue2	26/07/2010	Northern Birds	Drugs, smoking, solvents or alcohol	1
Frederm Skincare's sponsorship of Big Brother	n/a	Channel 4	Sponsorship	1
Frederm Skincare's sponsorship of Big Brother	n/a	Channel 4	Sexual material	1
Frederm Skincare's sponsorship of Big Brother	11/08/2010	Channel 4	Materially misleading	1
Gethin Jones	31/07/2010	BBC Radio 5 Live	Race discrimination/offence	1
GMTV	05/08/2010	ITV1	Race discrimination/offence	1
GMTV	13/08/2010	ITV1	Generally accepted standards	1
GMTV	15/07/2010	ITV1	Undue prominence	1
GMTV	18/08/2010	ITV1	Generally accepted standards	1
Harveys' sponsorship of Coronation Street	26/07/2010	ITV1	Scheduling	1
Help! My House is Falling Down (trailer)	12/08/2010	Channel 4	Generally accepted standards	1
Hollyoaks	30/06/2010	Channel 4	Transgender discrimination/offence	1
Hollyoaks	18/08/2010	Channel 4	Generally accepted standards	1
Horrible Histories	16/08/2010	CBBC	Harm	1
House Gift	01/08/2010	ITV1	Offensive language	1
How Lo competition	26/07/2010	LBC 97.3FM	Premium rate services	1
How to Look Good Naked	04/08/2010	Channel 4	Offensive language	2
Hyundai's sponsorship of Five Movies	06/07/2010	Five	Disability discrimination/offence	1
Inside Incredible Athletes (trailer)	n/a	Channel 4	Disability discrimination/offence	2
ITV News and Weather	03/08/2010	ITV1	Race discrimination/offence	1
ITV News and Weather	11/08/2010	ITV1	Generally accepted standards	1
ITV News at Ten and Weather	01/07/2010	ITV1	Advertising/editorial separation	1
ITV News at Ten and Weather	02/08/2010	ITV1	Violence and dangerous behaviour	1
ITV News at Ten and Weather	12/08/2010	ITV1	Violence and dangerous behaviour	1
James O'Brien	01/07/2010	LBC 97.3FM	Religious/Beliefs discrimination/offence	2
Jason Anderson	14/07/2010	Radio Hartlepool	Advertising/editorial separation	1
Jeeves and Wooster	09/08/2010	ITV3	COSTA	1
John Bishop's Britain	07/08/2010	BBC 1	Disability discrimination/offence	1
Justin Lee Collins: Good Times	08/05/2010	Five	Sexual material	1
Justin Lee Collins: Good Times	15/05/2010	Five	Generally accepted standards	2

Key 103	04/08/2010	Key 103	Competitions	1
Loose Ends	21/08/2010	BBC Radio 4	Religious/Beliefs discrimination/offence	1
Loose Women	04/08/2010	ITV1	Gender discrimination/offence	1
Madness in the Fast Lane	10/08/2010	BBC 1	Generally accepted standards	1
Magic Numbers	07/08/2010	ITV1	Race discrimination/offence	4
Magic Numbers	17/07/2010	ITV1	Premium rate services	1
Magic Numbers	14/08/2010	ITV1	Competitions	2
Man in a Van competition <sup>1</sup>	n/a	Talksport	Competitions	1
Midsomer Murders	02/08/2010	ITV1	Offensive language	1
Midsomer Murders	26/07/2010	ITV1	Offensive language	1
Midsomer Murders	13/08/2010	ITV1	Offensive language	1
Midsomer Murders	21/08/2010	ITV1	Nudity	1
Mike Parry and Mark Saggars	13/08/2010	Talksport	Generally accepted standards	1
Mike Parry and MG Graham	20/08/2010	Talksport	Race discrimination/offence	1
Must be the Music	12/08/2010	Sky1	Offensive language	1
My Super Sweet 16	n/a	MTV	Generally accepted standards	1
Natureshock: Jellyfish Invasion	16/07/2010	Five	Generally accepted standards	1
News	06/08/2010	Sky / Five	Due accuracy	1
Newsnight	16/08/2010	BBC 2	Race discrimination/offence	1
Nick Baker's Weird Creatures	04/08/2010	Five	Sexual material	1
Odd One In	14/08/2010	ITV1	Generally accepted standards	1
Omid Djalili: No Agenda	03/08/2010	Channel 4	Generally accepted standards	1
Out of Reach	08/08/2010	Five	Race discrimination/offence	1
Passport Patrol	02/08/2010	Virgin 1	Information/warnings	1
Pat and Stan	17/07/2010	CITV	Sexual material	1
Peter Andre: The Next Chapter	29/07/2010	ITV2	Undue prominence	1
Planet's Funniest Animals	31/07/2010	ITV2	Animal welfare	1
Police Interceptors	06/08/2010	Five	Violence and dangerous behaviour	1
Police, Camera, Action!	05/08/2010	ITV1	Crime	1
Police, Camera, Action!	05/08/2010	ITV1	Materially misleading	1
Police, Camera, Action!	18/08/2010	ITV1	Materially misleading	1
Premier League Football: Liverpool v Arsenal	15/08/2010	Sky Sports 1	Materially misleading	8
Press Preview	05/08/2010	Sky News	Generally accepted standards	1
Rakt Sambandh (trailer)	30/07/2010	NDTV Imagine	Violence and dangerous behaviour	1

<sup>1</sup> This case was closed on 21 January 2010 but was not included in the Broadcast Bulletin at that time due to an administrative error.

Russell Howard's Good News	17/08/2010	BBC 2	Religious/Beliefs discrimination/offence	1
Sex in the City with Jim Davis	30/07/2010	LBC 97.3 FM	Sexual material	1
Sex Lessons (trailer)	23/07/2010	Five USA	Sexual material	1
Sex Lessons (trailer)	28/07/2010	Five USA	Sexual material	1
Sex: How to Do Everything	27/07/2010	Fiver	Sexual material	2
Sex: How to Do Everything	27/07/2010	Fiver	Generally accepted standards	1
Sky News	08/08/2010	Sky News	Race discrimination/offence	1
South Park (trailer)	29/07/2010	Comedy Central	Sexual material	1
Stand Up for the Week	01/08/2010	Channel 4	Violence and dangerous behaviour	1
Stephen Tompkinson's Australian Balloon Adventure (trailer)	n/a	ITV1	Animal welfare	1
Suck My Pop!	31/07/2010	Viva	Generally accepted standards	1
Terminator 3: Rise of the Machines	22/08/2010	Five	Offensive language	1
That Mitchell and Webb Look	10/08/2010	BBC 2	Generally accepted standards	1
That Mitchell and Webb Look	17/08/2010	BBC 2	Generally accepted standards	2
The Chris Evans Breakfast Show	06/08/2010	BBC Radio 2	Religious/Beliefs discrimination/offence	1
The Deep	03/08/2010	BBC 1	Religious/Beliefs discrimination/offence	1
The Deep	17/08/2010	BBC 1	Religious/Beliefs discrimination/offence	1
The Filth Files	21/07/2010	Sky 3	Animal welfare	1
The Gadget Show	02/08/2010	Five	COSTA	1
The Gadget Show	02/08/2010	Five	Advertising/editorial separation	1
The Hospital	16/08/2010	Channel 4	Materially misleading	6
The Hospital	02/08/2010	Channel 4	Generally accepted standards	1
The Hospital	02/08/2010	Channel 4	Due impartiality/bias	1
The Hospital	09/08/2010	Channel 4	Under 18s in programmes	2
The Hotel Inspector	05/08/2010	Five	Offensive language	3
The Inbetweeners	10/08/2010	Channel 4	Disability discrimination/offence	1
The Jeremy Kyle Show	18/08/2010	ITV1	Harm	1
The Late Show with Ian Collins	05/08/2010	Talksport	Generally accepted standards	1
The Man Who Moves Buildings	22/07/2010	Five	Race discrimination/offence	4
The Nolan Show	02/08/2010	BBC Radio Ulster	Generally accepted standards	1
The Nolan Show	16/08/2010	BBC Radio Ulster	Under 18s in programmes	1
The Sex Education Show v Pornography	26/07/2010	E4	Sexual orientation discrimination/offence	1
The Simpsons	16/08/2010	Channel 4	Generally accepted	1

			standards	
The Simpsons	15/08/2010	Sky1	Drugs, smoking, solvents or alcohol	1
The Wright Stuff	13/08/2010	Five	Generally accepted standards	1
The Wright Stuff	17/08/2010	Five	Due impartiality/bias	1
This Morning	20/05/2010	ITV1	Under 18s in programmes	1
This Morning	20/08/2010	ITV1	Sexual material	1
This Morning	12/08/2010	ITV1	Under 18s in programmes	1
Top Gear	18/07/2010	BBC 2	Disability discrimination/offence	5
Unwrapped	11/08/2010	Food Network	Advertising/editorial separation	1
Vexed	15/08/2010	BBC 2	Generally accepted standards	2
Weekend Wogan	08/08/2010	BBC Radio 2	Generally accepted standards	1
Who Knows Best: Can't Sleep Kids	03/08/2010	Channel 4	Under 18s in programmes	1
Who Knows Best: Fighting the Fat	17/08/2010	Channel 4	Offensive language	1
Wife Swap USA (trailer)	12/08/2010	Discovery Real Time	Sexual orientation discrimination/offence	1
Young, Dumb and Living Off Mum	01/08/2010	BBC 3	Sexual orientation discrimination/offence	1
You've Been Framed!	14/08/2010	ITV1	Fairness & Privacy	1