

## Sanction: Decision by Ofcom

Imposed on **Al Mustakillah Television Limited** in respect of the service: **Al Mustakillah Television**

---

For the broadcast of two programmes, the first on 9 October 2011 and the second on 25 October 2011.

**Ofcom's consideration of a sanction against:**

Al Mustakillah Television Limited ("Al Mustakillah") in respect of its service **Al Mustakillah Television** (TLCS-138).

**For:**

Breaches of the Ofcom Broadcasting Code ("the Code") in respect of:

- Rule 5.4: "Programmes in the services (listed above) must exclude all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy (unless that person is speaking in a legislative forum or in a court of law). Views and opinions relating to the provision of programme services are also excluded from this requirement."
- Rule 5.5: "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."
- Rule 5.11: "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 (listed above) in each programme or in clearly linked and timely programmes."
- Rule 5.12: "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. Views and facts must not be misrepresented."
- Rule 6.1: "The rules in Section Five, in particular the rules relating to matters of major political or industrial controversy and major matters relating to current public policy, apply to the coverage of elections and referendums."

**On:**

*Arab Dream* 9 October 2011 21:00  
*Arab Dream* 25 October 2012 18:00

**Decision:**

To impose a financial penalty (payable to HM  
Paymaster General) of **£25,000**.

**In taking this Decision Ofcom noted that on 20 November 2012 Al Mustakillah  
Television Limited surrendered TLCS-138 for the Al Mustakillah Television service.**

## Case Summary

1. Al Mustakillah Television was a news, current affairs and general entertainment service broadcast in Arabic. The Licence for the service (TLCS-138) was held by Al Mustakillah Television Limited (“Al Mustakillah”) until it was surrendered to Ofcom on 20 November 2012.
2. In Ofcom’s finding (“Finding”) published 23 April 2012 in Broadcast Bulletin 204<sup>1</sup> (Annex 1), Ofcom found that two programmes broadcast by the Al Mustakillah breached Rules 5.4, 5.5, 6.1, 5.11 and 5.12 of the Code.
3. The Finding followed complaints from three viewers who considered the programmes broadcast on 9 and 25 October 2011 were used to promote the Popular Petition for Freedom, Justice and Development (“the Popular Petition”) in Tunisia also known as ‘Aridah Chaabia’ and ‘Al Aridah’.
4. Ofcom understands the Popular Petition was a manifesto written by Dr Mohamed Elhachmi Hamdi (“Dr Hamdi”), who featured in both of these programmes, adopted by the political party known as the Party of Progressive Conservatives in Tunisia.<sup>2</sup> Ofcom’s records show that Dr Hamdi was also the Ofcom compliance contact for Al Mustakillah Television while it was broadcasting under TLCS-138. Dr Hamdi is also sole director of Al Mustakillah. Dr Hamdi is also sole director and majority shareholder of Al Mustakillah (Holdings) Limited which owns Al Mustakillah.

### Both programmes – Breach of Rule 5.4

5. Ofcom noted that during these programmes Dr Hamdi himself regularly spoke directly to the camera while setting out in detail the manifesto of the Popular Petition and promoted various policies and promises of the Popular Petition. These included the provision of: free healthcare for all Tunisians; unemployment benefits; and free travel for those of the age of 65.
6. Ofcom considered that: Dr Hamdi was the “person providing the service”; and in this programme he clearly expressed his views and opinions on the Popular Petition both two weeks before (and then immediately after) the Tunisian General Election, when that election was clearly a matter of major political controversy and a major matter relating to current public policy.
7. This was in breach of Rule 5.4 (Programmes must exclude all expressions of the views and opinions of the person providing the service on matters of political controversy and matters relating to current public policy).

### Programme broadcast on 9 October 2011

8. In its Finding, Ofcom considered the content and views expressed during the 9 October 2011 programme, prior to the Tunisian Election held on 23 October 2011, were almost entirely positive statements about the Popular Petition and the parties adopting it as a manifesto. Any references to other parties during the programme were, in Ofcom’s view pejorative.

---

<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb204/obb204.pdf>

<sup>2</sup> Ofcom understands that Dr Hamdi has recently given the Party of Progressive Conservatives permission to formally adopt the name of the Popular Petition Party. Ofcom also understands that Dr Hamdi was Secretary General of the Party of Progressive Conservatives from 4 February 2012 until his resignation on 10 June 2012.

9. This was in breach of Rules 6.1 (the rules in Section Five, in particular the rules relating to matters of major political controversy and major matters relating to current public policy, apply to the coverage of elections), 5.11 (due impartiality must be preserved on matters of major political controversy and matters relating to current public policy) and 5.12 (in dealing with matters of major political controversy and 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).

#### Programme broadcast on 25 October 2011 – Rule 5.5

10. Ofcom considered that the programme broadcast on 25 October 2011, i.e. after the Tunisian General Election, dealt with a matter of political controversy and matters relating to current public policy. The broadcaster did not provide any evidence of the viewpoints of, for example, other Tunisian political parties or their supporters, on the aftermath of the Tunisian General Election, the future policy direction of Tunisia and the policy platform of the Popular Petition, being included on the channel in a series of programmes taken as a whole. Ofcom therefore considered the 25 October programme to be in breach of Rule 5.5 of the Code.

### **Summary of Ofcom’s Decision**

11. In accordance with Ofcom’s Procedures for the consideration of statutory sanctions in breaches of broadcast licences (“the Sanctions Procedures”)<sup>3</sup>, Ofcom has considered whether these Code breaches are sufficiently serious to warrant the imposition of a statutory sanction on Al Mustakillah. It has decided, for the reasons set out below, that they are.
12. This paper sets out Ofcom’s Decision on the type and level of sanction to be imposed on Al Mustakillah, having taken into account all of the evidence and submissions provided to it on behalf of Al Mustakillah and with reference to Ofcom’s Penalty Guidelines (“the Penalty Guidelines”)<sup>4</sup>.
13. Ofcom decided, for the reasons set out below, it was appropriate and proportionate in the circumstances to impose a financial penalty of **£25,000** (payable to HM Paymaster General) on Al Mustakillah in respect of the Code Breaches which took place during the period it held Licence TLCS-138.

### **Legal Framework**

#### **Communications Act 2003**

14. In discharging its functions, Ofcom’s principal duties set out in section 3(1) of the Communications Act 2003 (“the Act”) are to further the interests of citizens in relation to communications matters and the interests of consumers and to secure a number of other matters.
15. Ofcom has a specific duty under section 319 of the Act to set such standards for the content of programmes to be included in television and radio services as appear to it best calculated to secure the standards objectives set out in section 319(2). These

<sup>3</sup> Ofcom’s Procedures for the consideration of statutory sanctions in breaches of broadcast licences. These procedures came into effect on 1 June 2011.

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

<sup>4</sup> <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/> Published 13 June 2011

objectives include that the impartiality requirements set out in section 320 of the Act are complied with (section 319(2)(c)).

16. Under section 320 of the Act, Ofcom has a duty to require licensees to observe special impartiality requirements in relation to matters of political or industrial controversy and matters relating to current public policy. These requirements include: the exclusion from programmes of all expressions of the views or opinions of the person providing a service on such matters (section 320(1)(a)); and the preservation of impartiality, in particular in relation to matters of major political or industrial controversy and major matters relating to current public policy (section 320(6)).
17. In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)).

### **The Human Rights Act 1998**

18. Under section 6 of the Human Rights Act 1998, there is a duty on Ofcom (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention on Human Rights (“the Convention”).
19. Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster’s right to “impart information and ideas” and also the audience’s “right to receive information and ideas without interference by public authority” (Article 10(1) of the Convention). Such rights may only be restricted if the restrictions are: “prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary” (Article 10(2) of the Convention).
20. Ofcom must exercise its duty 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 necessary to achieve a legitimate aim.

### **Ofcom Broadcasting Code**

21. Standards set by Ofcom in accordance with section 320 of the Act are set out in the Code.
22. Accompanying Guidance Notes to each section of the Code are published and, from time to time updated, on the Ofcom website. The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Code<sup>5</sup>.
23. The relevant Code rules in this case are set out in full on the first page of this Decision.

### **Remedial action and penalties**

24. Under section 325 of the Act, every programme service holding a licence issued by Ofcom under the Broadcasting Act 1990 or 1996 (“a Broadcasting Act Licence”) must

---

<sup>5</sup> Section 5 Guidance Notes: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section5.pdf>  
 Section 6 Guidance Notes: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section6.pdf>

include conditions for securing that the standards set under section 319 are observed by the licensee. In the case of a television licensable content service (“TLCS”) licence, Condition 6 of the licence requires the licensee to ensure that the provisions of any Code made under section 319 are complied with. At the time of the Code Breaches Al Mustakillah held a TLCS licence.<sup>6</sup> Where Ofcom has identified that a Condition of a TLCS licence has been contravened, its powers to take action are set out in sections 236 to 238 of the Act insofar as relevant to the present case.

25. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or statement of findings (or both) or not to repeat a programme on contravention of a licence condition.
26. Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence of a maximum of whichever is the greater of £250,000 and 5 per cent of its qualifying revenue on each occasion that a contravention of a Condition of the licence has occurred.
27. Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence where a licensee is in contravention of a condition of a TLCS licence or direction thereunder.

### **Background – The Finding**

28. In the Finding, the Executive found that two programmes broadcast on 9 and 25 October 2011 by Al Mustakillah breached rules 5.4, 5.5, 5.11, 5.12 and 6.1 of the Code. The Finding set out:
  - that both broadcasts were in breach of Rule 5.4. Ofcom noted that Dr Hamdi is the founder and leader of the Popular Petition.<sup>7</sup> Ofcom’s records show that Dr Hamdi was at the time of the Code Breaches the Ofcom compliance contact for Al Mustakillah Television. Dr Hamdi is also the sole director of Al Mustakillah.<sup>8</sup> Ofcom considered that: Dr Hamdi was the “person providing the service” at the time of the Code Breaches; and, in the 9 October 2011 programme he clearly expressed his views and opinions on the political policies of the Popular Petition two weeks before the Tunisian General Election, when that election was clearly a matter of *major* political controversy and a *major* matter relating to current public policy. With regard to the programme broadcast on 25 October 2011 Dr Hamdi also expressed his views on the aftermath of the Tunisian General Election, the future policy direction of Tunisia and the policy platform of the Popular Petition (i.e. a matter of political and industrial controversy and a matter relating to current public policy).
  - that the 9 October 2011 Broadcast was in breach of Rules 5.11, 5.12 and 6.1. Ofcom noted that the content and views expressed in five examples highlighted in the Finding, and in the Broadcasts as a whole (as translated and transcribed for Ofcom), were almost entirely in support of parties adopting the Popular Petition and Dr Hamdi, and critical of political parties taking part in the Tunisian General Election to be held on 23 October 2011.

---

<sup>6</sup> The licence was surrendered on 20 November 2012.

<sup>7</sup> Ofcom now understands that the Popular Petition is a manifesto authored by Dr Hamdi rather than a political body.

<sup>8</sup> The Finding incorrectly stated that Al Mustakillah (Holdings) Limited was the company that holds the Licence. The Licence was in fact held by Al Mustakillah Television Limited. Ofcom notes that Dr Hamdi is the sole director and majority shareholder of Al Mustakillah (Holdings) Limited which owns Al Mustakillah Television.

- that the 25 October 2011 programme was in breach of Rule 5.5. Ofcom considered this broadcast dealt with the policies and actions of Dr Hamdi and the Popular Petition in the political landscape of the aftermath of the Tunisian General Election (i.e. a matter of political or industrial controversy and matter relating to current public policy). Ofcom considered that taken overall the programme consisted overwhelmingly of views (including a substantial contribution by Dr Hamdi himself) that were supportive of Dr Hamdi, and of the policies set out by the Popular Petition, or were critical of other political parties. The broadcaster did not provide any evidence of the viewpoints of, for example, other Tunisian political parties or their supporters, on the aftermath of the Tunisian General Election, the future policy direction of Tunisia and the policy platform of the Popular Petition, being included on the channel in a series of programmes taken as a whole. Al Mustakillah said that it had invited guests from the main Tunisian political parties to take part in the show. Ofcom noted that merely inviting other political parties to participate in the programme did not discharge Al Mustakillah from its obligations under Rule 5.5 to preserve due impartiality. The programme therefore did not include sufficient alternative viewpoints to maintain due impartiality in this case.

29. In the Finding Ofcom stated that the contraventions of Rules 5.4, 5.5, 5.11, 5.12 and 6.1 in this case were particularly serious and that they warranted consideration of a statutory sanction.

### **Background – Licensing Investigation**

30. During the course of assessing whether this case warranted a statutory sanction, it was necessary for Ofcom to establish whether Al Mustakillah was a person subject to a disqualification contained in Schedule 2 of the Broadcasting Act 1990 (the “1990 Act”) in particular, that relating to the disqualification of persons connected with bodies whose objects are of a political nature. Specifically, Ofcom sought to clarify whether Dr Hamdi, who is sole director of Al Mustakillah and controls the Al Mustakillah by virtue of his majority shareholding in Al Mustakillah (Holdings) Limited, was a ‘disqualified person’ for the purposes of the 1990 Act. Pending the outcome of this investigation Ofcom suspended its consideration of the imposition of a statutory sanction.
31. On the basis of information provided on behalf of Dr Hamdi and Al Mustakillah, Ofcom concluded on 20 August 2012 that neither Dr Hamdi nor Al Mustakillah were, at that time, a disqualified person for the purposes of the 1990 Act.

### **Ofcom Decision to Impose a Statutory Sanction**

32. As set out in paragraph 1.10 of the Sanctions Procedures the imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly<sup>9</sup>, or recklessly breached a relevant requirement.
33. In this case, Ofcom issued a preliminary view (“Preliminary View”), that Al Mustakillah had seriously breached the Code and that Ofcom was minded to impose a statutory sanction in the form of a financial penalty of **£25,000** and to direct Al Mustakillah to broadcast a statement of Ofcom’s findings in this sanctions case, on a date and in a

---

<sup>9</sup> A repeated breach of a relevant requirement, would include, for example: a repeat of the breach of the same requirement as has already been recorded; repetition of the same or similar conduct as that which earlier contravened a requirement; or multiple breaches of other requirements.

form to be determined by Ofcom. Ofcom sent a copy of the Preliminary View to Al Mustakillah on 20 November 2012 at the same time giving Al Mustakillah the opportunity to provide written and oral representations on the Preliminary View. Al Mustakillah provided its written representations (“Written Representations”) to Ofcom on 27 November 2012. The Written Representations are summarised in paragraphs 50 to 55 below.

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

### **Seriousness of the breaches**

35. Ofcom considered that the breaches of Section 5 (Rules 5.4, 5.5, 5.11 and 5.12) and Section 6 in this case were sufficiently serious to warrant the imposition of a statutory sanction for the reasons set out below.
36. Under section 320 of the Act, Ofcom has a duty to require licensees to observe special impartiality requirements in relation to matters of political or industrial controversy and matters relating to current public policy. These requirements include: the exclusion from programmes of all expressions of the views or opinions of the person providing a service on such matters (section 320(1)(a)); and the preservation of impartiality, in particular in relation to matters of major political or industrial controversy and major matters relating to current public policy (section 320(6)). These requirements are set out in Section Five and Section Six of the Code.
37. Ofcom considers breaches of Rules 5.4, 5.5, 5.11, 5.12, 6.1 by a licensee as a result of comments made during a programme broadcast during the election period of general election to be serious in nature. Where, as here, the comments were numerous and contained in two lengthy programmes Ofcom considered such breaches to be particularly serious. This is because at a general election voters make a crucial decision about their future. The result of such elections can turn on the decisions of relatively few voters. The special due impartiality requirements of the Code applicable to coverage of elections and referendums exist to ensure viewers who are going to vote are not inappropriately influenced by what they see on television services licensed by Ofcom – in particular by a licensee broadcasting partial coverage of that election through material that supports only one political party or viewpoint.

### **Both programmes - Rule 5.4**

38. Section 320(1)(a) of the Act requires the exclusion from programmes of the views or opinions of the person providing a licensed service on matters of political and industrial controversy and matters relating to current public policy. This requirement is reflected in Rule 5.4 of the Code and exists to help maintain the due impartiality of a licensed service and ensure that a channel cannot be used as a means for a provider of a service to broadcast and so promote his or her views and opinions on controversial political or policy issues. Any breach of this rule must be regarded as serious. This is because it shows - as in this case - that the due impartiality of a licensed service has been compromised by the views of the licence holder on a matter of political or industrial controversy or a matter of current public policy being included in the service. Ofcom considers that to preserve due impartiality and maintain the editorial independence of the services we regulate, it is a fundamental principle that they must not be used by licence holders as platforms to promote their views on matters of political or industrial controversy or current public policy.

39. This is especially important when a licensed channel is used by the provider of a service to express his opinions on policies and other controversial matters during coverage of an election, and arguably even more so when that election is a general election and voters are about to exercise their right to elect a new government. Rule 6.1 of the Code makes clear that the rules of Section Five (and in particular the rules relating to matters of major political controversy and major matters relating to current public policy) apply to the coverage of elections.
40. In this case at the time of the Code Breaches Dr Hamdi (the named Ofcom compliance contact for the Al Mustakillah Television service at the time of the Code Breaches, sole director of Al Mustakillah and majority shareholder and sole director of Al Mustakillah (Holdings) Limited) was the “person providing the service”. As the “person providing the service” in the programme on 9 October 2011 he clearly expressed his views and opinions on, and directly promoted the political policies of, the Popular Petition (the political manifesto he himself had written) two weeks before the Tunisian General Election, when that election was clearly a matter of major political controversy and a major matter relating to current public policy. His broadcast comments therefore had the potential to influence the voting intentions of those watching this programme or those connected with them in the forthcoming Tunisian General Election.
41. Ofcom noted the programme on 25 October 2011 was broadcast after the general election. It included: an interview with Dr Hamdi, which explored the initial results from the election and the election promises of the Popular Petition; and Dr Hamdi’s views on his future plans as a key figure in the Popular Petition. Dr Hamdi’s comments in support of the Popular Petition in this broadcast breached Rule 5.4 and highlighted Al Mustakillah’s lack of impartiality as regards the Popular Petition.
42. In conclusion, Ofcom considered the breaches of Rule 5.4 were serious because Dr Hamdi clearly used his position to influence to editorial content of the service to promote the Popular Petition in programmes broadcast prior to and after the Tunisian General Election, as set out in the Finding.

Programme broadcast on 9 October 2011 - Rules 5.11 and 5.12 and 6.1

43. The breaches of Rules 5.11 and 5.12 related to the 9 October programme are very serious because they relate to major matters of political controversy or current public policy during the election period of a general election. The obligations on licensees to take measures to preserve due impartiality are correspondingly more onerous where Rules 5.11 and 5.12 are applicable. Rule 6.1 provides that the rules in Section 5, particularly those relating to matters of major political or industrial controversy and major matters relating to current policy, applies to the coverage of elections. In this case the major matter of political controversy and major matter relating to current public policy was the issues arising in the context of the Tunisian General Election, including the policies and actions of the Popular Petition.
44. The breaches of Rules 5.11 and 5.12 in this case were serious because the broadcast on 9 October 2011 occurred during the election campaign a fortnight before the Tunisian General Election. As detailed in the Finding and above, the content and views expressed in that 2 hour and 39 minute broadcast were almost entirely in support of and so directly promoted the interests of parties adopting the Popular Petition in that election, and were critical of political parties, such as The Ennahda Party. The content and views therefore had the potential to influence the voting intentions of those watching this programme or those connected with them in the forthcoming Tunisian General Election.
45. The breaches of Rules 5.11 and 5.12 were also serious because this programme had a duration of 2 hours and 39 minutes. Dr Hamdi’s made his comments in contravention of

these rules throughout this broadcast. Therefore these rules of the Code were breached in a sustained manner.

46. In considering this case, Ofcom has had due regard to Al Mustakillah's representations, made during the course of the investigation leading to the Finding, that allegedly parties adopting The Popular Petition and Dr Hamdi were excluded from the main Tunisian media, despite the fact that they attracted significant electoral support ( as demonstrated by the election results). Ofcom recognises the particular importance of freedom of expression and has taken it into account in this case by balancing Al Mustakillah's right to freedom of expression (which is not absolute) on one hand, with the requirement in the Code (imposed explicitly by statute) to preserve "due impartiality" on matters of major political and industrial controversy and major matters relating to current public policy. In this case, Al Mustakillah did not include an "appropriately wide range of significant views" and give them "due weight" in the programmes and did not preserve due impartiality.
47. In Ofcom's view, in light of the factors set out above, the breaches of Rules 5.11, 5.12 and 6.1 were sufficiently serious to warrant the consideration of a statutory sanction.

#### Programme broadcast on 25 October 2011 - Rule 5.5

48. The programme on 25 October 2011 when considered alone gave a one-sided view of matters of political controversy (i.e. the political landscape in Tunisia after the general election and uncertainty of whether the Popular Petition would retain its seats and therefore potentially form part of a future coalition government). Further, the broadcaster did not provide any evidence of the viewpoints of, for example, other Tunisian political parties or their supporters, on the aftermath of the Tunisian General Election, the future policy direction of Tunisia and the policy platform of the Popular Petition, being included on the channel in a series of programmes taken as a whole (i.e. more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience). Rule 5.5 was therefore breached in a sustained manner for the duration of this 1 hour 46 minute programme.

#### All breaches

49. Ofcom also considers all these Code breaches above to be sufficiently serious as to warrant the considerations of a statutory sanction because taken together they underline the Al Mustakillah's failure to understand and ensure compliance with its duty to preserve due impartiality. The failure to anticipate and take steps to prevent these breaches demonstrates that Al Mustakillah's compliance arrangements were systemically ineffective.

#### **Al Mustakillah's Representations**

50. Dr Hamdi, on behalf of Al Mustakillah, made written representations to Ofcom on 27 November 2012 ("the Representations") on Ofcom's Preliminary View on this sanctions case dated 20 November 2012. Ofcom took careful account of the Representations in reaching its final decision. Below Ofcom sets out the principal and relevant points made by Al Mustakillah in the Representations and Ofcom's response to each of those points, as appropriate.
51. In the Representations, Al Mustakillah requested that Ofcom consider whether the imposition of a financial penalty was appropriate and proportionate given Al Mustakillah's "usually clean record". It said that only one other breach of a UK regulatory broadcasting code has been recorded against it since it started broadcasting in 1999 and that was approximately ten years ago (see paragraph 74).

52. In response, although acknowledging that the Code Breaches in this case were the first recorded against Al Mustakillah under the Ofcom Broadcasting Code, Ofcom was concerned by the serious nature of those breaches, for the reasons set out in paragraphs 36-50. Ofcom considered that given the time that has elapsed since the previous breach was recorded under the Independent Television Commission (the "ITC") Programme Code, it was not appropriate to take this earlier breach into account at all in setting the level of the financial penalty in the current case.
53. Second, in its Representations, Al Mustakillah said that it had surrendered three<sup>10</sup> Ofcom TLCS licences (including the licence for Al Mustakillah TV (TLCS-138)) on 20 November 2012. Al Mustakillah added that the decision to surrender the licences had been a difficult one and that the subsequent loss of viewers of the broadcast services and internet live stream, was regrettable given it had been broadcasting for "more than a decade".
54. Ofcom noted Al Mustakillah had surrendered its television broadcast licences on 20 November 2012, however given the service was licensed by Ofcom at the time of the breaches, Ofcom's consideration of the imposition of a statutory sanction continued to be relevant. Ofcom also took into account the serious nature of the breaches. In considering this point, Ofcom took account of its Penalty Guidelines which explicitly state that the "central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement". In Ofcom's view the imposition of a statutory sanction was therefore necessary to act as a deterrent and effective incentive to compliance to other licensees by underlining the need to understand and respect the Code and in particular the rules on due impartiality and the need to uphold editorial independence.
55. Third, Al Mustakillah argued that it incurred considerable costs ("legal fees...very close to the amount of sanctions you intend to impose [ie £25,000]") obtaining legal advice as a result of Ofcom's Licensing investigation as referred to in paragraph 30 and 31. It requested that Ofcom "drop the sanctions that [it] intends to impose, or reduce [the] level...appropriate".

#### **Imposition of sanctions other than a financial penalty**

56. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or a statement of Ofcom's findings (or both), or not to repeat a programme which was in contravention of a licence condition.
57. As set out in the Preliminary View Ofcom was originally minded to direct Al Mustakillah to broadcast a statement of Ofcom's findings in this sanctions case. However, given Al Mustakillah's surrender of the licence and that fact that the service is no longer within Ofcom's jurisdiction, Ofcom no longer has jurisdiction to require Al Mustakillah to take action with prospective effect, such as a broadcast of findings. For the same reasons, Ofcom is not able to issue a direction requiring Al-Mustakillah not to broadcast the programmes in question.
58. Ofcom considers that, for the reasons set out in this paper, the breaches were sufficiently serious that it is appropriate to impose a financial penalty. In Ofcom's view although Al Mustakillah is no longer broadcasting under Ofcom's jurisdiction, and therefore the penalty could not be considered to act as a deterrent in respect of Al-

---

<sup>10</sup> Surrendered Ofcom licenses: (i) TLCS 138 "Al Mustakillah Television" held by Al Mustakillah Television Limited; (ii) TLCS 858 "Democracy Channel" held by Al Mustakillah Television Limited ; and (iii) TLCS 1179 "Diplomat Television" held by Al Mustakillah (Holdings) Limited.

Mustakillah itself, a financial penalty would act as an effective deterrent to other licensees from contravening the Code in a similar manner.

59. In light of the fact that Al Mustakillah has surrendered its licence, Ofcom's did not need to consider whether it would be appropriate to recommend revocation of the Licence as an appropriate statutory sanction in respect of the current breaches under consideration. Nevertheless, taking into account the broadcaster's right to freedom of expression and the information currently available, Ofcom would not have considered it proportionate to recommend the revocation of licence as an appropriate statutory sanction in respect of the breaches under consideration.

### **Imposition of a financial penalty**

60. Under section 237 of the Act, the maximum level of financial penalty that can be imposed on the holder of a TLCS licence in respect of each breach of a TLCS licence in this case is up to £250,000 or five per cent (5%) of Al Mustakillah's Qualifying Revenue relating to its last complete accounting period falling within the period for which his licence has been in force ("the relevant period"), whichever is greater.
61. Qualifying Revenue is calculated by adding together revenue gained from advertising, sponsorship and subscription. It does not include revenue gained from interactive services, such as premium rate phone calls or from the selling of airtime.
62. Under the Penalty Guidelines, in determining the extent to which a level of any penalty is proportionate, Ofcom must take into account the size and turnover of the regulated body.
63. Ofcom's Penalty Guidelines state that "Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement." In reaching its decision, Ofcom has taken full account of the need to ensure that any penalty acts as a deterrent and has also taken account of the specific factors set out at paragraph 4 of the Penalty Guidelines<sup>11</sup>.

### **Factors taken into account in determining the amount of a penalty**

#### **Deterrence**

64. In assessing the appropriate amount of a financial penalty for the Code Breaches, Ofcom took account of relevant factors in accordance with the Penalty Guidelines, as set out below. In particular, given Al Mustakillah surrendered on 20 November 2012 its TLCS for Al Mustakillah TV, Ofcom has considered the extent to which any penalty would act as a deterrent to other licensees. Al Mustakillah is no longer broadcasting under Ofcom's jurisdiction, and therefore the penalty could not be considered to act as a deterrent in respect of Al-Mustakillah itself, however a financial penalty would act as an effective deterrent to other licensees underlining the need to understand and respect the Code and in particular the rules on due impartiality and the need to uphold editorial independence.

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

<sup>11</sup> See <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>

65. Ofcom has been given special duties under the Act to protect viewers from the harm caused by broadcasters falling within its jurisdiction who broadcast partial viewpoints. Under the Code, licensees are required to observe special impartiality requirements in relation to matters of political or industrial controversy and matters relating to current public policy. These requirements include: the exclusion from programmes of all expressions of the views or opinions of the person providing a service on such matters (Rule 5.4); and the preservation of impartiality, in particular in relation to matters of major political or industrial controversy and major matters relating to current public policy (Rule 5.5 in conjunction with Rules 5.11 and 5.12). This is particularly important during an election period, as set out in Rule 6.1.
66. In this case the harm that might result from the actions of Al Mustakillah was influencing the outcome of a general election in Tunisia and compromising the editorial independence of Al Mustakillah. On 23 October 2011 Tunisia held what was widely reported to be its first ever free and fair General Election. The election followed the ousting of President Zine al-Abidine Ben Ali and his Democratic Constitutional Rally in January 2011 after 23 years in power as part of the so-called "Arab Spring".
67. Rule 5.4 is derived directly from statute and has a clear purpose in the public interest: holders of a television licence must not compromise the editorial independence of their channel by being allowed to express their views on the service about controversial political and current public policy issues. This is particularly important at times of elections and more so in this case given the Dr Hamdi is the founder of the Popular Petition. Al Mustakillah Television was used by Dr Hamdi as a platform to promote the policies and aims of the Popular Petition to which he was linked, both during and after a general election in Tunisia, and this was clearly harmful to the editorial independence of this channel.
68. The content and views expressed during the 9 October 2011 programme were almost entirely positive statements about the Popular Petition and its election manifesto for the Tunisian General Election. The programme promoted the interests of the Popular Petition throughout a live broadcast over two and half hours long which was transmitted a fortnight before voting day. This programme through these partial comments therefore could have influenced voting intentions in the forthcoming General Election. Ofcom considers that, even if that influence might have been small, any change in voting intentions in a General Election as a result of the broadcast of a programme which is not unduly impartial was potentially very significant and potentially harmful to the integrity of the democratic process in Tunisia.
69. Ofcom notes that this service, although based in the UK at the time of broadcast, broadcast to Tunisia, Europe and North Africa. Any harm caused by the actions of Al Mustakillah therefore occurred predominantly outside the UK. Al Mustakillah however fell within Ofcom's jurisdiction at the time of the Code Breaches and was therefore required to comply with the rules of the Code, including those in Sections Five and Six, irrespective of where any harm may have occurred.

*The duration of the contravention.*

70. Ofcom noted the recorded breaches were in relation to two lengthy programmes broadcast on 9 October 2011 and 25 October 2011. Ofcom noted that the first programme was broadcast prior to the Tunisian General Election and had a duration of 2 hours and 39 minutes; and the second broadcast after the initial results of the Election were announced was 1 hour and 46 minutes in length.

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

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

*Any steps taken for remedying the consequences of the contravention.*

72. Ofcom noted in the published Finding that on 27 February 2012 Al Mustakillah renewed its invitation to other political parties to appear on the channel in an attempt to comply with its obligations under Section Five of the Code, specifically to try to ensure that a range of significant views is included in a programme or in clearly linked and timely programmes and that those views are given due weight. Al Mustakillah informed Ofcom that on 27 February 2012 it broadcast an on-screen statement for a period of 26 minutes, which invited the leaders of the other main political parties running in the Tunisian General Election, to take part in a discussion programme. However given that this invitation was broadcast four months after the Tunisian General Election, Ofcom considers that this measure was clearly too late and therefore insufficient to remedy the consequences of the Code breaches.

73. Al Mustakillah has not outlined any other measures taken in response to the breaches of the Code.

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

74. Ofcom notes that in July 2002, the ITC, one of Ofcom's predecessors, found a programme broadcast on Al Mustakillah Television to have breached Section 3.1(i) of the ITC's Programme Code. The ITC found that Dr Hamdi had used his position in Al Mustakillah to set out a personal manifesto. In particular, Dr Hamdi outlined his political opinions in full and suggested that he may contest a future election in Tunisia.<sup>12</sup>

75. However, Ofcom considers that given the time that has elapsed since this breach was recorded it would not be appropriate to take this breach into account in setting the level of the financial penalty.

*Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention.*

76. Ofcom notes that Al Mustakillah has submitted that it had issued "numerous" invitations to the leaders of other major political parties running in the election to appear in the programme and that, in the programme broadcast on 9 October 2011, this was signalled to viewers by empty seats placed around Dr Hamdi. As set out in the Finding, in this case it was imperative that an appropriately wide range of significant views were included in this programme, broadcast as it was very close to a General Election. Merely inviting other political parties to participate and placing empty chairs in a studio did not discharge Al Mustakillah from its obligations under Section Five of the Code to provide this range of views. Al Mustakillah ought, in this case, to have indicated what the views of the alternative political parties were even if they had declined to be represented themselves.
77. Further, Ofcom notes that Al Mustakillah submitted that it had preserved due impartiality by providing a sufficient right of reply in that callers with alternative views were encouraged and allowed to present their views in the programme. However, having considered the content of the two calls from viewers who did not support the Popular

<sup>12</sup> See

[http://www.ofcom.org.uk/static/archive/itc/itc\\_publications/complaints\\_reports/programme\\_complaints/show\\_complaint.asp-prog\\_complaint\\_id=525.html](http://www.ofcom.org.uk/static/archive/itc/itc_publications/complaints_reports/programme_complaints/show_complaint.asp-prog_complaint_id=525.html)

Petition, Ofcom found that they were clearly not sufficient to ensure due impartiality was preserved in the 9 October programme.

78. Ofcom therefore considers that, in all the circumstances, Al Mustakillah did not take appropriate steps to prevent the breaches.

*The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur.*

79. The breaches recorded in the finding concerned Dr Hamdi's appearance on the 9 October and 25 October programmes. As stated above Dr Hamdi was the named Ofcom compliance contact for the Al Mustakillah Television service while Al Mustakillah held TLCS-138, and he is also the sole director of Al Mustakillah and controls Al Mustakillah by virtue of his majority shareholding and role as sole director in Al Mustakillah (Holdings) Limited). Therefore, Dr Hamdi is clearly a member of senior management of Al Mustakillah. As an experienced compliance officer with years of experience related to the same Ofcom-licensed channel, Dr Hamdi should have been well aware of the UK's broadcasting rules concerning due impartiality and the need to comply with them. Therefore, senior management should have known therefore that the broadcast of the 9 and 25 October 2011 programmes would have resulted in contraventions of the Code.

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

80. Ofcom considers that, because the presenter of the programmes at the time of the Code Breaches was Dr Hamdi (the then compliance contact for Al Mustakillah), Al Mustakillah ought to have been aware that the conduct in question amounted to a breach of the Code. Ofcom notes that Al Mustakillah made attempts to invite representatives of alternative viewpoints to appear and Ofcom did not receive further complaints in respect of broadcasts by Al Mustakillah before the date the licence was surrendered. However, Ofcom has not been provided with evidence that Al Mustakillah put in place any measures to prevent further breaches occurring during the period it held the licence.

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

81. Ofcom considered that a penalty of £25,000 would be proportionate taking into account all the relevant circumstances. These include: the need to achieve an appropriate level of deterrence and the serious nature of the Code breaches in this case, and the fact that this is the first sanction imposed by Ofcom on Al Mustakillah.

### **Precedent**

82. In accordance with the Penalty Guidelines, Ofcom has also had regard to relevant precedents set by previous cases.
83. **31 July 2007, Islam Channel** (Annex 6)<sup>13</sup> - This case concerned: breaches of Rule 6.6 in relation to 20 separate programmes when the Respect Party electoral candidate Yvonne Ridley hosted her own programme *The Agenda with Yvonne Ridley*; two breaches of Rule 5.5 and one breach of 5.12 in relation to *The Agenda with Yvonne Ridley*; four breaches of Rule 6.6 and breaches of Rule 6.8 and 6.9 in relation to the programmes *Politics and the Media*; and a breach of Rule 5.12 in relation to *Jerusalem: A Promise of Heaven*. Here Ofcom imposed a fine of £30,000 and a direction to

<sup>13</sup> See: Islam Channel Sanction Decision, 31 July 2007  
<http://www.ofcom.org.uk/files/2010/07/islamchannel.pdf>

broadcast a statement of Ofcom's findings for breaches of Rule 6.6, Rule 6.8, Rule 6.9, Rule 5.5, Rule 5.12 and Licence Condition 11 (failure to provide a recording to Ofcom).

84. **8 December 2008, Talksport Limited** (Annex 7)<sup>14</sup> - This case concerned comments made by the presenter James Whale on *The James Whale Show* regarding candidates for the London Mayoral Elections which encouraged listeners to vote for Boris Johnson. The case related to an election and therefore Section Six of the Code applied. For this serious breach of Rule 6.1 of the Code, which provides that "the rules in Section Five, in particular the rules relating to matters of major political or industrial controversy and major matters relating to current public policy, apply to the coverage of elections and referendums", Ofcom imposed on Talksport a penalty of £20,000 and a direction to broadcast a statement of Ofcom's findings.
85. **8 May 2012, Aden Live** (Annex 8)<sup>15</sup> – This case concerned six examples of broadcast material that were in breach of Rule 2.4. Ofcom found that the material in these examples, taken together, condoned and in some cases glorified: people dying in support of the southern Yemeni cause; revolt against the government; and the carrying of weapons. Of relevance to the present case, Ofcom noted that the content and views expressed in five examples highlighted in this Finding, and in the broadcasts as a whole (as translated and transcribed for Ofcom), were almost entirely in support of the Southern Movement and the independence of South Yemen, and critical of the Government of Yemen, its policies and its actions and was therefore in breach of 5.11 and 5.12. Lastly, the views and opinions of the Licensee on the contemporaneous political situation in Yemen, including the policies and actions of the Government of Yemen (that is on a matter of major political controversy and a major matter relating to current public policy) were expressed in the output of the channel, contrary to the requirements of Rule 5.4. Ofcom imposed on Aden Live a penalty of £10,000 and a direction to broadcast a statement of Ofcom's findings.
86. Ofcom is satisfied that the level of penalty proposed and statement of findings in this case is consistent with the precedent cases, taking due account of the factors outlined in the Penalty Guidelines and the seriousness of the breaches in this case.

### **Cooperation**

87. In accordance with the Penalty Guidelines, Ofcom may increase the penalty where a licensee has failed to cooperate with Ofcom's investigation.
88. In Ofcom's view Al Mustakillah was cooperative throughout the investigation. Ofcom does not therefore consider it appropriate to increase the penalty on account of a failure to cooperate in this case.

### **Conclusion**

89. Ofcom concluded that the Code breaches by Al Mustakillah were serious for the reasons set out in this Decision.

---

<sup>14</sup> See: Talksport Sanction Decision, 8 December 2008

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

<sup>15</sup> See: Aden Live Sanction Decision, 8 May 2012

[http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/Aden\\_Live\\_sanctions\\_decisio1.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/Aden_Live_sanctions_decisio1.pdf)

90. Having regard to all the factors referred to above and all the representations from Al Mustakillah, Ofcom has concluded that an appropriate and proportionate sanction would be a financial penalty of **£25,000** (payable to HM Paymaster General).

**4 January 2013**