

Sanction: Decision by Ofcom

Sanction: to be imposed on Ariana Television and Radio Network

For material broadcast on Ariana Television and Radio Network on 20 July 2016 at 12:00pm¹

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

Ariana Television and Radio Network ("ATRN" or the "Licensee") in respect of its service **Ariana International** (TLCS-1086).

For:

Breaches of the Ofcom Broadcasting Code (the "Code")² in respect of:

Rule 2.3: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context (...). Such material may include, but is not limited to offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender, race, religion, beliefs and sexual orientation). Appropriate information should also be broadcast where it would assist in avoiding or minimising offence."

Rule 3.1: "Material likely to encourage or to incite the commission of crime or to lead to disorder must not be included in television or radio services".

Rule 3.2: "Material which contains hate speech³ must not be included in television and radio programmes except where it is justified by the context".

Decision:

To impose a financial penalty (payable to HM Paymaster General) of **£200,000**; and,

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

¹ See https://www.ofcom.org.uk/data/assets/pdf_file/0018/96012/Issue-319-of-Ofcoms-Broadcast-and-On-Demand-Bulletin,-to-be-published-on-19-December-2016.pdf for the material broadcast on Ariana International and found in breach of Ofcom's Broadcasting Code (the "Code") as detailed in Broadcast Bulletin 319.

² See Section Two and Section Three of the Code: https://www.ofcom.org.uk/data/assets/pdf_file/0005/100103/broadcast-code-april-2017.pdf. See also Ofcom's Guidance Notes on Section 2 of the Code: https://www.ofcom.org.uk/data/assets/pdf_file/0037/86788/section2-july15.pdf; and, on Section 3 of the Code: https://www.ofcom.org.uk/data/assets/pdf_file/0021/24258/section_3_2016.pdf.

³ The Code defines "hate speech" as: "all forms of expression which spread, incite, promote or justify hatred based on intolerance on the grounds of disability, ethnicity, gender, gender reassignment, nationality, race, religion or sexual orientation".

Executive Summary

1. Ariana International is a general entertainment channel originating from Afghanistan, and broadcast by satellite in the UK. The licence for Ariana International is held by ATRN. The Licensee currently holds no other broadcasting licences.
2. On 20 July 2016, the Licensee broadcast a news item which featured a video produced by an individual, Muhammad Riyad, before he carried out an attack on a train in Germany where he injured five people.
3. In the video, Muhammad Riyad stated that he was a "*Mujahid [holy warrior] of Islamic State*". He also stated his and ISIL's⁴ intentions to carry out acts of extreme violence against members of the public and his words could be interpreted as being a direct call to action to members of the Muslim community to join ISIL and to commit violence, up to, and including murder, against members of the police and the army in the West.
4. The news item made clear that "*Daish⁵ have now accepted that this young man [i.e. Mr Riyad] was one of their followers*". In addition, it has been widely reported that several individuals, such as Muhammad Riyad, have been inspired to carry out acts of violence in the name of ISIL.

The Breach Decision

5. In Ofcom's Decision ("the Breach Decision") published on 19 December 2016 in issue 319 of the Broadcast and On Demand Bulletin⁶, Ofcom's Executive found that material in the Ariana News programme ("the Programme") breached Rules 2.3, 3.1 and 3.2 of the Code.
6. The Breach Decision set out specific examples of broadcast material that were in breach, along with reasoning as to why, in relation to each breach, the material had breached each rule.
7. Ofcom put the Licensee on notice in the Breach Decision that it considered these breaches to be serious, and that it would consider them for the imposition of a statutory sanction.

The Sanction Decision

8. In accordance with Ofcom's Procedures for the consideration of statutory sanctions in breaches of broadcast licences ("the Sanctions Procedures")⁷, Ofcom considered whether the Code breaches were serious, deliberate, repeated or reckless so as to warrant the imposition of a sanction on the Licensee in this case. It reached the Decision that a sanction was merited in this case since the breach was serious for the reasons set out in paragraphs 43 to 52.

⁴ Daish or ISIL (Islamic State of Iraq and the Levant) is a proscribed terrorist organisation. The UK Government's list of proscribed terrorist organisations dated 15 July 2016 states the following in relation to ISIL: "Islamic State of Iraq and the Levant (ISIL) also known as Dawlat al-'Iraq al-Islamiyya, Islamic State of Iraq (ISI), Islamic State of Iraq and Syria (ISIS) and Dawlat al Islamiya fi Iraq wa al Sham (DAISh) and the Islamic State in Iraq and Sham - Proscribed June 2014. ISIL is a brutal Sunni Islamist terrorist group active in Iraq and Syria. The group adheres to a global jihadist ideology, following an extreme interpretation of Islam, which is anti-Western and promotes sectarian violence. ISIL aims to establish an Islamic State governed by Sharia law in the region and impose their rule on people using violence and extortion". See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/538297/201607_15-Proscription-website-update.pdf.

⁵ See footnote 4.

⁶ See footnote 1.

⁷ See https://www.ofcom.org.uk/_data/assets/pdf_file/0030/71967/Procedures_for_consideration.pdf

9. Ofcom's Decision is that the appropriate sanction should be a financial penalty of £200,000. Ofcom also considers that the Licensee should be directed to broadcast a statement of Ofcom's findings, on a date and in a form to be determined by Ofcom.

Legal Framework

Communications Act 2003

10. Ofcom's principal duty, set out in section 3(1) of the Communications Act 2003 ("the Act"), is to further the interests of citizens in relation to communications matters and the interests of consumers in relevant markets. In carrying out its functions, Ofcom is required to secure a number of other matters. These include the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services (section 3(2)(e)).
11. Ofcom has a specific duty under section 319 of the Act to set such standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives set out in section 319(2). These objectives include that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material (section 319(2)(f)). This requirement is reflected in Section Two of the Code.
12. In performing these duties, Ofcom is required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and, where relevant, to have regard to a number of other considerations including the need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g)).

Human Rights Act 1998

13. Under section 6 of the Human Rights Act 1998, Ofcom (as a public authority) has a duty to ensure that it does not act in a way which is incompatible with the European Convention on Human Rights ("the Convention"). In particular, in the context of this case, Ofcom has taken account of the related rights under Article 9 and Article 10 of the Convention.
14. Article 9 of the Convention provides for the right to freedom of thought, conscience and religion. This Article makes clear that freedom to "manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of health...or for the protection of rights and freedoms of others".
15. Article 10 of the Convention provides for the right to freedom of expression. Applied to broadcasting, this right encompasses the broadcaster's freedom to impart and the audience's freedom to receive information and ideas without interference by public authority and regardless of frontiers (Article 10(1) of the Convention). The exercise of these freedoms may be subject only to conditions and restrictions which are "prescribed in law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary" (Article 10(2) of the Convention).
16. Ofcom must exercise its duties in light of this right and not interfere with the exercise of these freedoms in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

Ofcom Broadcasting Code

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

Remedial action and penalties

20. Under section 325 of the Act, a licence for a programme service issued by Ofcom under the Broadcasting Act 1990 or 1996 must include conditions for securing that the standards set under section 319 are observed by the licensee. In the case of a television licensable content service ("TLCS") licence, Condition 6 of the licence requires the licensee to ensure that the provisions of any Code made under section 319 are complied with. The Licensee holds a TLCS licence.
21. Where Ofcom has identified that a condition of a TLCS licence has been contravened, its powers to act are set out in sections 236 to 239 of the Act insofar as relevant to the case.
22. 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.
23. Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence. The maximum penalty which may be imposed in respect of each contravention of a licence condition is whichever is the greater of £250,000 and 5 per cent of the qualifying revenue from the licensed service for the licensee's last complete accounting period falling within the period for which its licence has been in force.
24. Section 239 of the Act sets out a revocation process in relation specifically to the inclusion in a service of programming that is likely to encourage or incite the commission of crime or lead to disorder (as in this case). Ofcom is required to serve a notice under section 239(2) if we are satisfied that:
 - (a) the holder of the licence has included in the service one or more programmes containing material likely to encourage or to incite the commission of crime or to lead to disorder (i.e. in breach of Rule 3.1);
 - (b) that in doing so, the licensee has contravened conditions contained by virtue of Chapter 4 of Part 3 of the Act in the licence to provide that service; and
 - (c) that the contravention is such as to justify the revocation of the licence.

Under section 239 there is no requirement that the breach must be ongoing for Ofcom to revoke the licence; it can be a one-off breach of Rule 3.1 as it was in this case.

25. The effect of a notice under section 239(2) is to suspend the licence from the time the notice is served i.e. the licensee must stop broadcasting immediately. A notice under section 239(2) must give the licensee an opportunity to make representations and state that Ofcom may revoke the licence after 21 days. If the licensee makes representations to Ofcom and, having considered those representations, Ofcom is satisfied that it is necessary in the public interest to revoke the licence, Ofcom is required under s239(4) to serve a further notice to revoke the licence, stating the date from which the licence is revoked. This must be no less than 28 days after that notice has been served.

⁸ See footnote 2.

Background – The Breach Decision

26. In the Breach Decision, the Executive found that material broadcast by the Licensee on Ariana International breached Rules 2.3, 3.1 and 3.2 of the Code. The Breach Decision set out the reasons for each of these breach findings.
27. The Breach Decision noted that the Programme, broadcast in Pashto, included a news item relating to Muhammad Riyad, a 17-year old, who was described as *“said to be an Afghan”*. He had injured five people when he attacked a train, armed with a knife and axe, in Wuerzburg, Germany in July 2016. The news item featured a video showing Muhammad Riyad talking straight to camera and at times brandishing a knife.
28. In the first part of the two minutes and 15 seconds video, Muhammad Riyad described himself as a *“Mujahid [holy warrior] of Islamic State”*. Making clear that he was addressing his comments to the non-Muslim (i.e. *“Kuffar”*) community in Germany, Muhammad Riyad stated on the video his hope that such people *“will be slaughtered in [their] homes”* by ISIL. He also stated his belief that ISIL has *“enough strength to get you [i.e. residents of Germany] everywhere, even in your parliament”*. Muhammad Riyad then signalled the attack he was about to carry out in Germany by stating: *“I am living here amongst you and inshallah I have made a plan to deal with you here in your homes inshallah. I tell you, that I will slaughter you in your homes”* and *“I make this promise that I will be the last thing that you see in this life. Inshallah I will slaughter you with this knife [waving knife at camera] Inshallah I will destroy you, and tear you to pieces”*.
29. At the end of the video, Muhammad Riyad then said the following: *“I want to address the Muslim Ummah. How long are you going to remain sleeping? Wake up! The Khilafa⁹ has been established. Swear the oath of allegiance to Abu Bakr Baghdadi Al Quraish¹⁰. Go to your Vilayats¹¹. It has been made easy for you in every nation of the world you have been promised a Vilayat. Go to these Vilayats and if you cannot reach Iraq or Sham at the very least get this Murtad¹² police, army”*.
30. In relation to Rule 3.1, Ofcom considered that the various statements made by Muhammad Riyad in the first part of the video described in highly positive and graphic terms his and ISIL’s intentions to carry out acts of extreme violence against the German population. We also considered that the statement made by Muhammad Riyad at the end of the video was a direct call to action to members of the Muslim community to join ISIL because he explicitly called on members of the Muslim community to *“Swear the oath of allegiance to Abu Bakr Baghdadi Al Quraish”*, the leader of ISIL. We also considered that, given what Muhammad Riyad had already said in the video, his final words were an indirect call to the Muslim community to commit violence, up to and including murder, against members of the police and the army in the West.
31. In relation to Rule 3.2, Ofcom considered that the various statements made by Muhammad Riyad as set out above were a clear example of hate speech as defined¹³ in the Code. We considered that his statements amounted to promoting and justifying hatred and violence towards the persons who did not conform to his definition of Islam. [8<] We were particularly concerned that the Licensee broadcast a prolonged example of hate speech in a news bulletin with no surrounding content that sought to challenge, rebut or otherwise contextualise Muhammad Riyad’s highly extreme views. Therefore, given the very strong nature of the

⁹ Khilafa: The Caliphate.

¹⁰ Abu Bakr Baghdadi Quraish: Self-proclaimed Caliph and leader of ISIL.

¹¹ Vilayat: An administrative division, usually translated as “province”, or occasionally as “governorate” in an Islamic State.

¹² Murtad: A Muslim who renounces his faith.

¹³ See footnote 3.

material in this case, we considered that there was clearly insufficient context to justify the inclusion of hate speech in this broadcast, and Rule 3.2 was breached.

32. In relation to Rule 2.3 of the Code, for the reasons highlighted above, we considered that this content contained highly challenging material which we identified as hate speech and incitement to crime. As such the content clearly had the potential to be extremely offensive. As already discussed, we did not consider that this high level of offence could be justified by the context, and therefore Rule 2.3 of the Code was also breached.
33. Ofcom stated in the Breach Decision that the contraventions of Rule 3.1 and Rule 3.2 and 2.3 of the Code were serious and were being considered for statutory sanction.

Ofcom's Decision to impose a Statutory Sanction

34. As set out in paragraph 1.10 of the Sanctions Procedures, the imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly or recklessly breached a relevant requirement.
35. In this case, Ofcom issued a preliminary view ("the Preliminary View") that it was minded to impose a statutory sanction in the form of a financial penalty and to direct the Licensee to broadcast a statement of Ofcom's findings, on a date and in a form to be determined by Ofcom. Ofcom sent a copy of the Preliminary View to the Licensee on 13 April 2013 and at the same time gave the Licensee the opportunity to provide written and oral representations on the Preliminary View. The Licensee responded to the Preliminary View in a letter dated 8 May 2017, in which it provided written representations. The Licensee also provided oral representations on 7 June 2017. The oral and written representations of the Licensee ("the Representations") are summarised in paragraphs 37 to 42 below.
36. In reaching its Decision on whether to impose a statutory sanction and if so, what type and level of sanction, Ofcom was not bound by the Preliminary View. Ofcom took account of all the evidence and representations made by the Licensee, including the Representations, and has had regard to the Sanctions Procedures and to Ofcom's Penalty Guidelines in reaching its Decision (see further below).

Licensee's Representations

37. In its Representations, the Licensee reiterated that including the full length of the video on the ATRN international feed "was a serious error resulting from the breakdown of our editorial controls at the time" and that it was "gravely regretful" about the incident. It acknowledged that the material should not have been broadcast without "vehement opposition" to Muhammad Riyad's "call to action".
38. ATRN did not dispute that "there was some theoretical level of risk that broadcast of this video might have encouraged an impressionable viewer to commit a crime". However, it argued that Ofcom had "materially exaggerated the level of risk" posed by the broadcast of the material in this case. In the Licensee's view, the risk that the material broadcast was "inciting crime" was "minimal" and would have been reduced by various factors including: the small size of the audience¹⁴; the limited use of the Pashto language amongst the "Afghan expatriate community"; the "well-established reputation" of the channel and its audience expectations which made it unlikely that any "evil-minded Afghan viewer in the UK" would have been watching Ariana International and likely that the "overwhelming majority" of viewers would have been "repulsed

¹⁴ ATRN estimated that Ariana International's audience is "at most, less than one thousand viewers at any one time". It added that the majority of viewers would be "in Germany, with some viewers watching in the United Kingdom".

or puzzled” by the content in this case; and, the single broadcast of the video featuring Muhammad Riyad.

39. ATRN also argued that Ofcom had provided no evidence to support “its concern that the statements made by Muhammad Riyad had the clear potential to influence impressionable viewers by encouraging serious crime, up to and including murder”¹⁵.
40. ATRN provided further details of the steps it had taken since to enhance its editorial control over the content broadcast on Ariana international, which included: a “revamped and strengthened...Editorial Oversight Team”; and a process whereby “all terrorism related coverage...is discussed with and approved by ATRN’s senior executive team before it is put on air”. The Licensee added that, on Wednesday 3 May 2017, it had broadcast an apology to its viewers for the broadcast of the video featuring Muhammad Riyad in the three languages used by “most Afghans and Afghan expatriates worldwide (Pashto, Dari and English)” on three separate occasions”. It said that the message “explained what happened to our viewers, admitted our mistake and apologized for it, and underlined our condemnation of Islamist extremism and ISIS in particular”.
41. ATRN welcomed Ofcom’s conclusions that the revocation of its licence “would be inappropriate and disproportionate” and that the Licensee remained fit and proper to hold an Ofcom Licence. However, it disputed the “disproportionately high fine” proposed by Ofcom. It argued that Ofcom did not give enough weight to the fact that ATRN “did not have a history of contraventions to the Code”. The Licensee also argued that the proposed level of penalty was “inconsistent with previous precedents”. In this regard, ATRN expressed concern that Ofcom “may have ‘double’ or ‘triple counted’” the potential financial penalty for the breaches of Rules 2.3 and 3.2, in addition to the breach of Rule 3.1.
42. The Licensee provided further details on its financial position, and said that although ATRN had significant revenue “both ATRN overall and the international channel...are running at huge losses”. It also pointed to: the high operational costs of running both Ariana International and its domestic channel in the context of the “overall fragility of the Afghan economy”; the fact that it was being “subsidised mainly by the channel’s owner’s donations and by revenues from ad sale from an independent subsidiary (Afghan Wireless mobile company) and one-off public service type campaigns”; and a “dramatic reduction in ad revenues” in Afghanistan. ATRN argued that given all of these factors, the imposition of a substantive financial penalty “would almost certainly force ATRN to shut down” and put hundreds of “Afghan media professionals out of work and stopping the largest free-to-air network in the country from being able to share accurate and balanced news and content”. It therefore argued that such a penalty “would have the same effect as revocation”.

¹⁵ The Licensee cited two pieces of “recent evidence”:

- an August 2016 report by the House of Commons Home Affairs Select Committee on radicalisation (see: <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/135/135.pdf>). The Licensee stated that in this report, there were “no references at all to concerns that any material...on any television channel might be contributing to radicalisation, and so encouraging crime”; and
- March 2017 research published by the Henry Jackson Society into Islamic terrorism (see: <http://henryjacksonsociety.org/wp-content/uploads/2017/03/Islamist-Terrorism-preview-1.pdf>). ATRN said that the report “makes no reference at all to Afghans, or people of Afghan heritage”.

Serious nature of the breaches

43. As set out in paragraph 34 above, the imposition of a sanction against a broadcaster is a serious matter. Ofcom considered that for the reasons set out below, the breaches of Rules 2.3, 3.1 and 3.2 were serious and therefore warrant the imposition of a statutory sanction.
44. Section 319(2)(b) of the Act requires that material likely to encourage or incite the commission of crime or to lead to disorder is not included in television and radio services (section 319(2)(b)). This requirement is reflected in Rule 3.1 of the Code. Any breach of this rule must be regarded as potentially serious because it necessarily involves the broadcast of material judged by Ofcom to be likely to encourage or incite the commission of crime or lead to disorder, and so potentially cause serious harm. Indeed, Ofcom is given specific powers under section 239 if we are satisfied that a breach of Rule 3.1 is such as to justify revocation.
45. In considering the seriousness of the breach and whether it was such as to justify revocation of the licence (see paragraphs 55 to 65), Ofcom has the following considerations:
46. Ofcom regards any breach of Rule 3.1 as a very serious matter. Ofcom is given a specific statutory duty to ensure broadcasters do not transmit material that is likely to encourage or incite crime or lead to disorder. Where such material is broadcast in contravention of this requirement, the Act recognises the potential for serious harm to be caused to society and that, where justified by the breach, the regulator may be required to act to be able to remove a broadcaster's entitlement to hold a licence.
47. In this case, the breaches were serious because Muhammad Riyad made various statements in the video describing in highly positive and graphic terms his and ISIL's intentions to carry out acts of extreme violence against the German population (see paragraphs 27 to 29). His last statement contained a direct call to action to members of the Muslim community to join ISIL and an indirect call to the Muslim community to commit violence, up to and including murder, against members of the police and the army in the West. The video appeared in a news item broadcast in Pashto and we consider it likely that his words would have been viewed predominantly by members of the Afghan Muslim community in the UK.
48. We also noted that Muhammad Riyad delivered his views directly to the camera, speaking in emotive terms, at times brandishing a knife. In judging the likely effect of such content on those watching, Ofcom had regard to concerns about ISIL's use of propaganda to radicalise and recruit citizens of the UK and elsewhere. In our view, this would have been likely to have a greater persuasive impact and effect on the audience. The likely effect in our view would also have been exacerbated by the fact that Muhammad Riyad spoke uninterrupted for two and a quarter minutes and there were no views or statements in the programme which challenged or otherwise softened the inflammatory effect or the considerable level of potential offence caused by his statements.
49. Depending on the circumstances, Ofcom generally considers the potential harm arising from any form of incitement to crime to be serious. The potential for very serious harm if this video incited others is clear. Ofcom was concerned that the statements made by Muhammad Riyad had the clear potential to influence impressionable viewers by encouraging serious crime, up to and including murder, and/or leading to disorder in relation to members of the public, the police and the army.
50. In assessing the seriousness of this broadcast, we noted ATRN's representations during the original investigation that the remarks being considered for sanction should not have been broadcast on the international feed licensed by Ofcom. [8<] We further noted the content was: contained in one programme, not several over a period of time; and was broadcast on a channel providing a variety of programming to the Afghan community in the UK. In addition, the

broadcaster admitted its error and the potential seriousness of the comments and has taken steps to ensure that this type of serious incident would not be repeated.

51. The breaches of Rules 3.2 and 2.3 of the Code compounded the seriousness in this case because Muhammad Riyad spoke in positive terms about jihad¹⁶ and about both the violent capabilities of ISIL and his own intention to kill non-Muslims and Muslims who renounce their faith. As such, his statements amounted to spreading, inciting, promoting or justifying hatred based on intolerance of those of a different religion, i.e. they were a form of hate speech. We were therefore concerned that the Licensee broadcast a prolonged example of highly offensive hate speech in a news bulletin with no surrounding content that sought to challenge, rebut or otherwise contextualise Muhammad Riyad's highly extreme views. In our view, this was evidence of ATRN not having adequate compliance processes.
52. We considered the serious nature of these breaches (the broadcast of hate speech and incitement to commit crime in pre-recorded content) and the fact that the material even came to be broadcast to be a matter of grave concern. In Ofcom's view, it indicated a failure of compliance oversight by the Licensee, and a lack of sufficiently robust compliance procedures on the part of ATRN.
53. In view of the factors set out above, Ofcom considered that the breaches were serious and so warranted the imposition of a statutory sanction. The following paragraphs set out Ofcom's Decision on the appropriate sanction to be imposed.

Sanction

54. As mentioned in paragraph 21 to 25, Ofcom's powers to take action are set out in sections 236 to 239 of the Act insofar as relevant to the present case.

Imposition of sanctions other than a financial penalty

Consideration of the revocation of the licence

55. Given the seriousness of this case, Ofcom first considered whether the breach of Rule 3.1 was such as to justify revocation of the Licence under Section 239 of the Act.
56. This is a matter of judgment for Ofcom. Revocation of a licence is the ultimate enforcement action available to Ofcom. Therefore, in considering whether it is appropriate to serve a notice under Section 239(2), which has the effect of suspending the licence (and so depriving a licensee of its right to broadcast until Ofcom reaches a final decision on revocation), Ofcom must take account of all the relevant considerations. These include in this case:
 - the words used in the content broadcast and the circumstances in which they were spoken (see paragraphs 27 to 29);
 - previous licence breaches by ATRN, and especially any previous occasions when material likely to incite or encourage crime has been broadcast;
 - the explanation and response provided by ATRN to Ofcom in response to this incident (see paragraphs 37 to 42); and
 - the likelihood of further breaches.
57. In summary, Ofcom must ensure that any decision that the breach is such as to merit revocation of the licence is proportionate. A relevant factor for Ofcom to consider in this regard is whether any sanction short of revocation could ensure that ATRN would comply with the terms of its licence.

¹⁶ Jihad: holy war.

58. Ofcom must also have regard to the balance to be given to competing rights under the Convention. In particular, this includes: the right to freedom of expression under Article 10 (see paragraphs 16 above), against the competing rights and the protections necessary in a democratic society for the protection of citizens, including Ofcom's statutory duty to ensure material likely to encourage crime or disorder is not included in television services; and also the right to freedom of thought, conscience and religion under Article 9.
59. Concerning Article 10 of the Convention, as pointed out above, the rights of the broadcaster to impart information and ideas and of the audience to receive them are also subject to restrictions "prescribed in law...in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime...".
60. Ofcom's statutory obligation is to set standards to secure that material likely to encourage crime is not broadcast. Article 10 protects not only the substance of ideas or information expressed, but also the form in which they are conveyed. In some circumstances, this may include a polemical or aggressive tone. On the other hand, some types of expression, such as expressions of political support for terrorism, have been regarded by the courts as deserving of lesser (or no) protection against restrictions. On the facts of this case, Ofcom must therefore carefully balance the competing rights of the broadcaster and audience to freedom of expression against the duty to protect the public from material likely to encourage crime or disorder.
61. Ofcom notes that in this case, Muhammad Riyad's comments were not merely polemical or aggressive; he made direct calls to members of the Muslim community to join ISIL, a proscribed terrorist organisation. He also made an indirect call on members of the Muslim community to commit violence, up to and including murder, against members of the police and the army in the West. No attempt was made by the Licensee to place the statements in a context to make them potentially less harmful. In Ofcom's view, therefore, the broadcasting of these remarks during a news programme broadcast to a wide geographical area deserves a lower level of protection under Article 10 than for example the inclusion in a programme of comments about a controversial political issue within the context of a debate presenting differing views on that issue.
62. On the other hand, Ofcom noted that the broadcast was the result of a failure of compliance oversight. There is no evidence that the Licensee's purpose in broadcasting the content was to incite crime or promote hatred; the evidence is that the Licensee wished to establish Muhammad Riyad's nationality for audiences. We also noted that the breaches had not been repeated and are not ongoing. The Licensee admitted to breaching Rules 3.1, 3.2 and 2.3 of the Code and acknowledged its error and the potential seriousness of the comments and condemned them in its representations to Ofcom during the investigation. The Licensee also explained steps it had taken in light of the breaches to improve its compliance procedures and prevent similar breaches occurring in the future.
63. We also noted that the comments were contained in one programme, not several over a sustained period of time. We also considered that these comments were broadcast on a channel providing a variety of programming to the Afghan community living in the UK and that if this licence were revoked, a number of viewers (and their rights to receive the service) would be adversely affected by them being deprived of this service. As a general observation, we also noted that the Licensee had not previously been found in breach of these Code rules, or the Code more generally.
64. Based on the facts before Ofcom of this case at this time, we therefore considered that the rights of the broadcaster and audience to freedom of expression (i.e. freedom to impart and to receive information) may be disproportionately affected by a decision that the breach justified revocation of the licence under section 239, in circumstances where other sanctions may be

sufficient to act as a deterrent against future breaches. Ofcom's consideration of those other sanctions is set out in paragraph 66 onwards below.

65. On balance, after considering all the relevant factors, it is Ofcom's Decision that, although the contravention of the Code in this case is serious, it would not be proportionate to decide that the breach of Rule 3.1 by ATRN is such as to justify revocation of its licence under section 239. Given that Ofcom does not consider that these breaches warranted revocation of its licence, it follows that these breaches by themselves do not render ATRN unfit to hold a broadcast licence.

Considerations in relation to directing the Licensee to broadcast a statement of Ofcom's findings

66. 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.
67. It is Ofcom's view that a direction not to repeat the programme found in breach would not be an appropriate sanction in all the circumstances. This is because, as set out in the Breach Decision, the Licensee accepted that Muhammad Riyad's comments breached rules 3.1, 3.2 and 2.3 of the Code and ATRN stated that such content "will not be aired on our international feed in the future". We therefore took this as a clear indication that ATRN had no intention of repeating the Programme.
68. Ofcom considers that directing the Licensee to broadcast a statement of Ofcom's findings is necessary to bring the breaches, and Ofcom's action in response to the breaches, to the attention of Ariana International's viewers. However, we considered that, on its own, a direction to broadcast a statement of Ofcom's findings in this sanctions case is not a sufficient statutory sanction, given the serious nature of the breaches.
69. Ofcom therefore decided that a direction to broadcast a statement of Ofcom's findings in combination with a financial penalty will act as a more effective deterrent to discourage the Licensee (and other licensees) from contravening the Code in a similar manner.

Imposition of a financial penalty

70. 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 contravention of a TLCS licence condition is £250,000 or five per cent of the licensee's qualifying revenue relating to its last complete accounting period falling within the period for which its licence has been in force, whichever is greater.
71. In light of the Licensee's qualifying revenue for this period¹⁷ for the Ariana TV licensed service, the maximum financial penalty that Ofcom could impose is £250,000 in respect of the contravention of its licence conditions committed by the Licensee in this case. Ofcom's Penalty Guidelines¹⁸ state (in paragraph 11) 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. Ofcom will have regard to the size and turnover of the regulated body when considering the deterrent effect of any penalty". In reaching its Decision on the imposition of a sanction in this case, Ofcom has taken full account of the need to ensure that any penalty acts as a deterrent and has also taken account of the specific factors set out in the Penalty Guidelines.

¹⁷ The accounting period for Ariana TV was the year ending 20 December 2016.

¹⁸ See http://www.ofcom.org.uk/content/about/policies-guidelines/penalty/Penalty_guidelines_2015.pdf

72. In this case Ofcom believed that a financial penalty was necessary to reflect the serious nature of the Code breaches recorded against the Licensee, and to act as an effective incentive to comply with the Code, both for the Licensee and other licensees.

Factors taken into account in determining the amount of a penalty

73. In considering the appropriate amount of a financial penalty for the Code breaches in this case, Ofcom took account of the specific relevant factors set out at paragraph 12 of the Penalty Guidelines as set out below:

The seriousness and duration of the contravention

74. Ofcom was minded to regard the breaches to be serious for the reasons set out in paragraphs 43 to 53. We were particularly concerned by the fact that the Licensee had broadcast a video lasting two minutes 15 seconds, unchallenged and without context, which, in Ofcom's view, constituted incitement to crime up to and including murder, which had the clear potential to cause harm.

75. The Breach Decision related to material broadcast on 20 July 2016. We are unaware of the material having been broadcast again and the Licensee confirmed that it had taken steps for such serious incident not to happen again.

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

76. Under Rule 3.1, Ofcom is not required to identify any causal link between the content included in the Programme and any specific actions of criminal behaviour. However, as the Breach Decision made clear, given the background of recent multiple terrorist assaults on targets all over the world by people following a radical terrorist agenda against those perceived not to be Muslim, Ofcom was concerned that the statements made by Muhammad Riyad had the clear potential to incite crime and/or lead to disorder. In this respect, Ofcom noted concerns about ISIL's use of propaganda to radicalise and recruit citizens of the UK and elsewhere¹⁹.

77. The Licensee accepted that "there was some theoretical level of risk that broadcast of this video might have encouraged an impressionable viewer to commit a crime". It however was concerned that Ofcom "exaggerated the level of risk" when taking into account various factors laid out in paragraph 38, such as the small audience of Ariana international and the well-established reputation of the channel.

78. Ofcom has taken these factors into account. For example, Ofcom acknowledged the small audience that typically watches Ariana International. However, we noted that, according to the Licensee, the majority of viewers would be in Germany. Given that Muhammad Riyad was speaking and carried out his attack in Germany, we were concerned about the potential effect of his words to any viewers in that country, who make up the majority of Ariana International's audience. In addition, we were not persuaded by the two pieces of "recent evidence" that ATRN provided²⁰. In our view, just because the two reports cited by the Licensee had not referred to: "any television channel [that] might be contributing to radicalisation"; or to any "Afghans, or people of Afghan heritage" being involved in Islamic terrorism, negate the fact that ATRN had broadcast a clear example of incitement to crime and hate speech.

79. Ofcom is also mindful of its duties: under section 3(4)(j) of the Act to have regard to the desirability of preventing crime and disorder; and under section 3(2)(e) of the Act to secure, in

¹⁹ For example, the UK Government has summed up the potential effect of ISIL propaganda as follows: "The threat Da[i]sh [i.e. ISIL] poses to the UK and the rest of the world continues to grow as it seeks to expand its terror network, using propaganda to radicalise and recruit citizens of the UK and elsewhere". See <https://www.gov.uk/government/topical-events/daesh>

²⁰ See footnote 15.

the carrying out of its functions, the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services. Ofcom concluded that the risk that the broadcast material was likely to encourage or incite the commission of crime, up to and including murder or to lead to disorder was however real and that, as a result there was a serious risk of harm to members of the public, the police and the army who did not conform to Muhammad Riyad's definition of Islam.

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

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

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

81. In its representations during Ofcom's investigation, as set out in the Breach Decision, the Licensee said that the content featuring Muhammad Riyad had been broadcast "unintentionally" on its international feed licensed by Ofcom as a result of a break down in editorial control. It added that at the time of broadcast the editorial team for Ariana International was "effectively a single person", who was responsible for compiling the content for the Ariana International (taking content from ATRN's domestic channel). It added that "in retrospect, it was a grave error to leave effectively a lot of responsibility to a single person [without] a senior person providing oversight".

82. ATRN said that in retrospect it recognised that "such content is not acceptable for an international audience" and therefore such content "will not be aired on our international feed in the future". It added that "we clearly recognize that [the video] should not have been included on the international [feed] nor presented without some additional context or Ofcom notification/sub-titling below to ensure our viewing audience understood that [ATRN] did not support such views nor was it being shared as an endorsement of such in any fashion". The Licensee also acknowledged that "with the benefits of hindsight, we freely admit that ATRN could and should have done more to prevent this serious incident from happening". ATRN added that it had "inadvertently omitted a segment immediately adjacent to the video disapproving of the statements due to a failure in editorial controls". Taking into account the elements above, it was clear to Ofcom therefore that ATRN had ample opportunity to review this pre-recorded content but failed to do so, and the Licensee had acknowledged a failure in its editorial controls. We therefore considered this was evidence of seriously inadequate compliance processes for identifying potentially harmful content.

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

83. The Licensee only became aware of the potentially serious issue raised by the Programme on being alerted to the material by Ofcom on 6 October 2016. This followed Ofcom identifying the content featuring Muhammad Riyad as part of routine monitoring.

84. As already explained above, the Licensee said that the content featuring Muhammad Riyad had been broadcast "unintentionally" on its international feed as a result of a breakdown of the editorial control. [8<] The Licensee further apologised for the seriousness of the breach.

85. However, we consider that the Licensee ought to have had adequate compliance processes in place to prevent the broadcast of this content featuring Muhammad Riyad.

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

86. As noted above, the Licensee only became aware of the potentially serious issue raised by the programme on being alerted to the material by Ofcom on 6 October 2016 following routine monitoring of the service. It was only on 3 May 2017 (as mentioned in paragraph 87 below) that the Licensee voluntarily broadcast a series of on air apologies. The Licensee has however given Ofcom assurances about steps it said it has taken to improve its compliance processes immediately following being made aware of the incident by Ofcom.

Any steps taken for remedying the consequences of the contravention

87. ATRN said that it had “used this incident to remind and augment our production/editorial team working on the ATN international beam that reaches the UK so that they remain editorially vigilant on all content that goes out”. In addition, the Licensee set out details of “additional news editorial guidelines...[and] content oversight controls” it had put in place as a result of this incident, including:

- “[r]eplaced and augmented the senior team”, including the addition of a new Managing Director of Ariana International;
- the implementation of a bi-annual training program on the sensitivity, role and importance of editorial oversight in news media and content production; and a weekly meeting “to review all broadcast material to ensure that we are maintaining the highest levels of vigilance and global reporting standards”;
- the establishment of a “proper editorial oversight team” to check the output on Ariana International, including: the individual putting the material together; the Managing Director of Ariana International; an individual from the production team; and, an individual from the creative team;
- the introduction of a policy for senior editorial checking when “terrorist-related” material is to be broadcast on Ariana International; and
- broadcasting in Pashto, Dari and English a “full apology for this serious compliance error in advance of Ofcom’s sanction decision”.

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

88. Ofcom noted that the Licensee did not have a history of contraventions of the Code prior to the breach now being considered for statutory sanction. We considered ATRN’s argument that Ofcom had not given “sufficient weight” to this factor. However, the Licensee’s previous good compliance record, in our view, only provided very limited mitigation for it broadcasting an example of incitement to murder unchallenged in this case.

The extent to which the regulated body in breach has cooperated with our investigation.

89. In Ofcom’s view, the Licensee has been cooperative. For example, it admitted the breaches of the Code in this case and provided full representations in response to Ofcom’s formal requests for information (including financial information) relating to the material broadcast and the service in general, well within the deadlines set by Ofcom. The Licensee expressed a willingness to take, and stated that it has taken, steps to ensure that it complies with the Code in future.

Precedents

90. In considering the appropriate amount of a financial penalty for the Code breaches in this case, Ofcom also had regard to relevant precedents set by previous cases in accordance with paragraph 14 of the Penalty guidelines.

91. The first two cases concern material broadcast that was found to be so harmful as to be likely to encourage or incite the commission of crime or lead to disorder and hence in breach of Rule 3.1.
92. **23 November 2012, Radio Asian Fever Community Interest Company**²¹ – Ofcom imposed a penalty of £4,000 on the licensee and directed it to broadcast a statement of Ofcom's findings for breaches of Rules 2.3, 2.4, 3.1 and 4.1. This case concerned two editions of the Sister Ruby Ramadan Special 2011. In the first programme the presenter was highly critical of homosexuality in the context of discussing aspects of the Qur'an. In the second programme the presenter made critical remarks about marriages between Muslims and those of other faiths, in the context of discussing elements of the Qur'an. Ofcom concluded that the material in the first programme was likely to encourage violent behaviour towards homosexual people and was therefore in breach of Rule 3.1. Ofcom also considered the material to breach Rule 2.4 as it could reasonably be considered likely to encourage others to copy such violent behaviour. Ofcom concluded that the material in both programmes had the potential to cause offence, which was not justified by the context, in breach of Rule 2.3. Ofcom held that both programmes failed to exercise the proper degree of responsibility required in religious programmes, in breach of Rule 4.1.
93. **5 July 2013, DM Digital Television Limited**²² – Ofcom imposed a penalty of £85,000, directed the licensee to broadcast a statement of Ofcom's findings, and not to repeat the programme, for breaching Rule 3.1. In the programme an Islamic scholar delivered a live televised lecture about points of Islamic theology with reference to the shooting dead in 2011 of the Punjab Governor Salmaan Taseer, who had been a vocal critic of Pakistan's blasphemy law. Ofcom concluded that the material was likely to encourage or incite the commission of crime or to lead to disorder. We did so on the basis that, on a reasonable interpretation of the scholar's remarks, we considered he was personally advocating that all Muslims had a duty to attack or kill apostates or those perceived to have insulted the Prophet Mohammed. Ofcom considered the breach to be particularly serious because the material was delivered to a predominantly Muslim audience, although the case differs from the current case in that it was a part of a religious programme, delivered by a religious scholar. As in the current case, the breach was compounded by the fact the programme made no condemnation of the acts of killing or violent action referred to.
94. **21 August 2013, Al Ehya Digital Television Limited**²³ – Ofcom imposed a penalty of £85,000 on the licensee, directed the licensee to broadcast a statement of Ofcom's findings and directed it not to repeat the programme for breaching Rule 3.1. This case concerned the broadcast of a live programme in which a presenter answered questions put to him by telephone by viewers about a wide range of issues and personal conduct relating to Islam and Islamic teachings. The presenter made various statements which appeared to make clear that it was acceptable, or even the duty of a Muslim, to murder any person thought to have shown disrespect to the Prophet Mohammed where the relevant government had failed to take any action. In particular, the presenter made honorific references to individuals who had killed people in the name of Islam, including statements condoning the murder of the Punjab Governor Salmaan Taseer in 2011 by Mumtaz Hussein. Ofcom considered that on a reasonable interpretation of the presenter's remarks, he was personally advocating that all Muslims had a duty to carry out the actions he suggested. Ofcom considered the seriousness of the breaches was further compounded by the fact the statements were delivered to a Muslim audience, in a religious programme, spoken directly to the camera by a person held out to be an expert on Islamic teachings (i.e. a person holding a position of respect and authority in the Muslim community). The seriousness was compounded because the programme made no condemnation of the killings or violent action referred to.

²¹ See https://www.ofcom.org.uk/_data/assets/pdf_file/0025/66706/radio-asian-fever.pdf

²² See https://www.ofcom.org.uk/_data/assets/pdf_file/0017/71072/rehmatul-dm-digital.pdf

²³ See https://www.ofcom.org.uk/_data/assets/pdf_file/0020/53309/noor-tv.pdf

95. **14 August 2014, Regis 1 Limited**²⁴ – Ofcom imposed a penalty of £30,000, and a direction to broadcast a statement of findings for breaching Rule 3.1 of the Code. This case concerned a programme about an attack on the retired Indian army general Kuldip Singh Brar, who led the controversial military operation against the Golden Temple at Amritsar in 1984. The programme contained statements from various contributors that Ofcom considered likely to encourage members of the Sikh community to take violent action against Lieutenant General Brar, other members of the Indian armed forces who had taken part in Operation Bluestar in June 1984, or those who supported the military operation.
96. In this instance, there are no direct precedents in terms of Rules 3.2 which is a rule which was only introduced by Ofcom in May 2016. However, there are two cases which dealt with breaches of Rule 2.1 and 2.3 in relation to the broadcast of content which in Ofcom's view, constituted hate speech:
97. **11 November 2016, Club TV Limited**²⁵ – Ofcom imposed a penalty of £65,000 on the licensee and directed it to broadcast a statement of Ofcom's findings for breaches of Rules 2.1 and 2.3. The case concerned two programmes consisting of public lectures given by the Islamic scholar, Dr Israr Ahmed. Dr Ahmed made a number of discriminatory remarks about Jewish people repeatedly portraying them as a homogenous group and in overwhelmingly negative and stereotypical terms. Ofcom considered that Dr Ahmed's comments had the potential to be interpreted as spreading anti-Semitism i.e. his comments could be seen as a form of hate speech and had the potential to cause harm and offence to viewers. We considered the breaches to be serious so as to warrant the imposition of sanctions. This was because the statements consisted of hate speech and were delivered to a predominantly Muslim audience. Dr Ahmed also spoke uninterrupted and there were no views in the programmes which challenged or otherwise softened the considerable level of offence caused. However, unlike the current case, they were delivered by a religious scholar, a person who holds a position of respect and authority in the Muslim community.
98. **20 December 2016, Mohuiddin Digital Television Limited**²⁶ – Ofcom imposed a penalty of £75,000 on the licensee and directed it to broadcast a statement of Ofcom's findings for breaches of Rules 2.1 and 2.3. The programme included recordings of a religious festival commemorating the death anniversary of two Sufi saints. It featured a number of religious scholars and preachers addressing an assembled congregation with short sermons, homilies and poetic verses. One of the speakers recounted a parable that lauded the killing of a Jewish trader as an example of the devotion and obedience of a disciple of the Prophet Mohammed. Ofcom considered that the speaker's comments had the potential to be interpreted as spreading anti-Semitism i.e. his comments could be seen as a form of hate speech which had the potential to cause harm and offence to viewers. In particular, we considered the content had the potential to cause harm by portraying the murder of Jewish people in highly positive terms and promoting a highly negative anti-Semitic attitude towards Jewish people. Ofcom considered the breaches to be serious so as to warrant the imposition of sanctions. Again, this was because the material contained hate speech, which was delivered to a predominantly Muslim audience by a religious scholar, who spoke uninterrupted without his views being challenged or otherwise softened.
99. There are various other cases in which Ofcom imposed statutory sanctions for breaches of Rule 2.3 which we do not consider directly relevant in this case. This is because these cases dealt with

²⁴ See

<http://webarchive.nationalarchives.gov.uk/20160702162827/http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/regis1limited.pdf>

²⁵ See https://www.ofcom.org.uk/_data/assets/pdf_file/0032/93866/Peace-TV-Urdu-Sanctions-Decision.pdf

²⁶ See https://www.ofcom.org.uk/_data/assets/pdf_file/0022/96124/Noor-TV.pdf

matters such as sexual material, harmful health claims and the pre-watershed use of offensive language.

100. A further case related to breaches of different rules, but we considered it in relation to this case because it also relates to content condoning violence.
101. **8 May 2012, Dama (Liverpool) Limited**²⁷ – Ofcom imposed a sanction of £10,000 on the licensee and a direction to broadcast a statement of Ofcom’s findings, for breaches of Rules 2.4, 5.4, 5.11 and 5.12. This case concerned various programmes broadcast on Aden Live, a service broadcasting predominantly to a South Yemeni audience. In relation to the breach of Rule 2.4, Ofcom found that material in these programmes, taken together, condoned or glamorised people dying in support of the ‘southern cause’,²⁸ revolt against the Yemeni government and the carrying of weapons. Ofcom concluded that, given that many of Aden Live’s audience would have been likely to support of the secession of South Yemen from the Republic of Yemen and/or support of the Southern Movement and oppose the Government of Yemen, the material broadcast could reasonably be considered likely to encourage others to copy violent or dangerous behaviour.
102. While Ofcom considers that the nature of the content in the cases listed in paragraphs 92 to 101 included are relevant to the current case, we note that, as set out in the Penalty Guidelines, Ofcom may depart from them depending on the facts and the context of the current case. For example, in the Radio Asian Fever case, the relatively low level of financial penalty in that case reflected the fact that Radio Asian Fever was a community radio station with a relatively small footprint and targeted at the Asian community in Leeds, broadcasting in Urdu within a narrow geographical area. As such, although the breach was serious, the overall impact of this particular broadcast may therefore have been somewhat tempered by the limited audience reach of the station. We will not regard the amounts of previously imposed penalties as placing upper thresholds on the amount of any penalty.
103. In reaching our Decision, we have taken into account the Licensee’s: argument that the proposed level of penalty was “inconsistent with previous precedents”; and concern expressed that Ofcom “may have ‘double’ or ‘triple counted’” the potential financial penalty for the breaches of Rules 2.3 and 3.2, in addition to the breach of Rule 3.1. In applying a financial penalty, we also have taken into account the particular circumstances of this case, when compared to precedent cases, including the size and turnover of the Licensee. In setting the level of financial penalty, we have viewed the totality of the breaches in this case without attributing a particular tariff to each individual Code breach.

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

104. As set out in our penalty guidelines, the central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement. In reaching its Decision on the imposition and level of a sanction in this case, Ofcom has taken account of the level of the Ariana International service’s qualifying revenue. Ofcom also took into account of all of ATRN’s Representations about its financial position including that: ATRN is in a fragile commercial position and relying mainly on “generous charitable loans and donations” to survive; the operational costs of running the channels in the context of the dire Afghan economy were significantly high; ATN International “has never been viable” commercially” and

²⁷ See

http://webarchive.nationalarchives.gov.uk/20160702162827/http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/Aden_Live_sanctions_decisio1.pdf

²⁸ i.e. greater rights for South Yemenis and the secession of South Yemen from the Republic of Yemen.

operated at significant losses in 2015 and in 2016; and, the imposition of a significant financial penalty “would almost certainly force” ATRN to shut down, resulting in the loss of work for hundreds of Afghan media professionals.

105. We recognised that the penalty must be proportionate taking into account the Licensee’s rights under Articles 9 and 10 of the Convention. If any financial penalty was to be so high that its effect would be to close a service down, then it might be a disproportionate interference with the Licensee’s and the audience’s right to freedom of expression in particular and exceed the purposes of imposing a penalty. However, the imposition of a substantial financial penalty leaves open the prospect that the money may be found and the business continued and it is open to the Licensee to go to existing or new potential sources of finance who may, if they consider that the business is fundamentally sound and worth maintaining, provide the investment that is needed to defray the penalty. Ofcom took these factors into account and carefully weighed it in reaching its decision on the proportionality of the financial penalty.
106. As noted above, the “central objective of imposing a penalty is deterrence”. The breach recorded in this case was extremely serious and arose from what, in Ofcom’s view, was serious negligence of the senior management of the broadcaster. Ofcom regards any breach of Rule 3.1 and Rule 3.2, as demonstrated in this case, as a very serious matter. Ofcom is given a specific statutory duty to ensure broadcasters do not transmit material that is likely to encourage or incite crime or lead to disorder. Where such material is broadcast in contravention of this requirement, the Act recognises the potential for serious harm to be caused and that, where justified by the breach, this should require the regulator to take action to be able to remove a broadcaster’s entitlement to hold a licence. Ofcom considered this to be a genuinely unprecedented case on account of the nature and the seriousness of the breach.
107. For the reasons set out above (see paragraphs 55 to 65) Ofcom did not consider that revocation was appropriate in this case. However, as explained in paragraph 71, Ofcom considered that any penalty had to be substantial to reflect the very serious concerns which Ofcom has set out in this Decision, and act as a powerful and clear deterrent to other broadcasters.

Decision

108. Ofcom carefully assessed all the evidence provided by the Licensee about its size and current financial situation, including the Licensee’s accounts, the Licensee’s Representations about its sources of funding and its current and projected revenues. Having weighed all these factors, Ofcom’s Decision is that an appropriate and proportionate sanction would be a financial penalty of **£200,000**. In addition, Ofcom considers that the Licensee should broadcast a statement of Ofcom’s findings in this case, on a date and in a form to be determined by Ofcom.
109. Given the seriousness of the contravention committed by ATRN, we would be likely to take it into account in considering whether the Licensee is fit and proper to hold a broadcast licence, should any similar breach occur in future.

Ofcom

6 July 2017

'FIT AND PROPER' DECISION UNDER SECTION 3(3) OF THE BROADCASTING ACT 1990 AND SECTION 3(3) OF THE BROADCASTING ACT 1996: LICENCE HELD BY ARIANA TELEVISION AND RADIO NETWORK

Legal framework

1. ATRN holds a licence to broadcast under the Broadcasting Act 1990 (the "1990 Act"). Under section 3(3) of the 1990 Act, Ofcom:
 - (a) shall not grant a licence to any person unless satisfied that the person is a fit and proper person to hold it; and
 - (b) shall do all that they can to secure that, if they cease to be so satisfied in the case of any person holding a licence, that person does not remain the holder of the licence.
2. Therefore, Ofcom has an ongoing duty to remain satisfied that ATRN is fit and proper to hold a broadcast licence.

Considerations

3. In Ofcom's Decision ("the Breach Decision") published on 19 December 2016 in issue 319 of the Broadcast and On Demand Bulletin¹, Ofcom's Executive found that material in the Ariana News programme ("the Programme") broadcast on 20 July 2016 at 12:00 breached Rules 2.3, 3.1 and 3.2 of the Broadcasting Code ("the Code").
4. Ofcom considered that the intentional broadcast of the material concerned, being a direct call to action to members of the Muslim community to join ISIL and to commit violence, up to, and including murder, against members of the police and the army in the West, and being hate speech, was serious enough to raise questions as to whether the broadcaster was fit and proper to hold a broadcast licence.
5. In its representations to Ofcom during the investigation, the Licensee explained that the video featuring Muhammad Riyad had been broadcast "unintentionally" on its international feed licensed by Ofcom and covering the UK territory and acknowledged that it was a compliance failure on its part. [§<]
6. In light of ATRN's assurances that the video featuring Muhammad Riyad had been broadcast "unintentionally", its acknowledgment that it was a compliance failure on its part, and its assurances that it had taken steps to secure that the breach would not be repeated, Ofcom considers it unlikely that in allowing ATRN to remain licensed, UK audiences would be put at risk. Given that Ofcom does not consider that this isolated and unintentional breach warranted the revocation of the licence, it follows that commission of the breach does not render ATRN unfit to hold a broadcast licence.
7. Ofcom was however deeply concerned that ATRN initially appeared to suggest that it may consider it acceptable to broadcast the video featuring Muhammad Riyad in the form it was broadcast on Ariana International on 20 July 2016 at 12:00, domestically within Afghanistan, without taking any steps to contextualise or otherwise deal with it so as to secure that it did not amount to an incitement to murder. Ofcom considered that public confidence in the UK licensing regime would be put at risk if we permitted a person to remain licensed, if that person considered it acceptable intentionally to broadcast material of the type concerned, inciting violence up to and including murder, anywhere in the world. We therefore requested ATRN to

¹ See Annex 1: https://www.ofcom.org.uk/_data/assets/pdf_file/0018/96012/Issue-319-of-Ofcoms-Broadcast-and-On-Demand-Bulletin,-to-be-published-on-19-December-2016.pdf

provide us with further information to enable us to assess whether it remained fit and proper to hold a UK broadcasting licence.

8. In its response to Ofcom, the Licensee acknowledged it had made an editorial failure “to express or challenge the call to action, or to exclude the call to action from the clip...regardless of the fact that it was reaching a domestic or international audience” and that it was ATRN’s normal practice for the “editorial disapproval of statements similar to that in the video to be voiced, regardless of whether the video is broadcast domestically or on an international feed”.
9. The Licensee further acknowledged that “the lack of context or challenge, excessive duration, and failure to cut the clip off before the calls to action cannot be justified or explained by any unique cultural or linguistic attributes of our viewing market”.
10. ATRN confirmed that it has implemented several new controls, processes, and procedures to secure that neither ATRN nor any entity controlled by it, is responsible for the broadcast anywhere in the world, of content of this nature.

Conclusion

11. Based on the evidence above, Ofcom considered that the Licensee had provided sufficient assurances to Ofcom that demonstrated that ATRN did not consider it acceptable to broadcast content that is likely to encourage or incite the commission of crime or lead to disorder; or amounts to hate speech which is not contextualised, on broadcast services either in the UK or elsewhere within the world.
12. Given the above, Ofcom was therefore satisfied that ATRN remains fit and proper to hold a UK broadcasting licence. We would however have regard to the broadcast by ATRN of this content in this instance, if there were any further reason for Ofcom to need to review the fitness of this licensee in future.

Ofcom

6 July 2017