

Sanction: Decision by Ofcom

Imposed on Sunrise TV Ltd

For the broadcast of *Beauty Simplified* on 13 June 2011, 13 and 14 July 2011, and 27 September 2011.

Consideration of sanction against:

Sunrise TV Ltd (“Sunrise” or “the Licensee”) in respect of its service **Sunrise TV** (TLCS-640).

For:

Breaches of the UK Code of Broadcast Advertising (“the BCAP Code”) in respect of:

Rule 2.1 “Advertisements must be obviously distinguishable from editorial content, especially if they use a situation, performance or style reminiscent of editorial content, to prevent the audience being confused between the two. The audience should quickly recognise the message as an advertisement.”

Rule 11.2.3: [Teleshopping for these products or services is not acceptable:]

“medical treatments for humans or animals.”

Rule 11.13.1: “Advertisements must not contain offers to prescribe or treat remotely (including by phone, post, e-mail or fax). That does not preclude advertisements containing offers to distribute general information on health-related matters, such as leaflets or information packs.”

On:

Sunrise TV, 13 June 2011, 19:15 – 20:15
Sunrise TV, 13 July 2011, 19:15 – 20:15
Sunrise TV, 14 July 2011, 19:15 – 20:15
Sunrise TV, 27 September 2011, 19:15 – 20:15

Decision:

To impose a financial penalty of **£20,000** (payable to HM Paymaster General).

Summary

1. For the reasons set out in this Decision, Ofcom has decided to impose a statutory sanction of £20,000 on Sunrise TV Limited.
2. The service Sunrise TV is a general entertainment television channel for the UK Asian community. The licence for the channel is held by Sunrise TV Limited (“Sunrise” or “the Licensee”).
3. Sunrise TV is available free-to-air on the Sky satellite platform. The service is listed in the Sky EPG’s International section under channel number 830.
4. *Beauty Simplified* was a regular one-hour item, broadcast in Hindi and English, that offered viewers advice about beauty and well-being. Throughout the show a very prominent, permanent banner was displayed encouraging viewers to call the show using a premium rate telephone number. The presenter, Bina Khan (also known as Farzana Begum), also regularly encouraged viewers to call. Calls were charged at a premium rate of £1.50 per minute.
5. Ofcom examined the format of *Beauty Simplified* and concluded that it was “participation television” (“PTV”), in other words content that is predicated on generating revenue through viewers’ phone calls. Ofcom regulates PTV as teleshopping, i.e. as long-form advertising¹. Being advertising, PTV content is regulated under the UK Code of Broadcast Advertising (“the BCAP Code”)². *Beauty Simplified* was therefore required to comply with the BCAP Code.
6. In Ofcom’s finding published on 2 April 2012 in Broadcast Bulletin 203 (“the April 2012 Finding”)³ Ofcom found that four transmissions of *Beauty Simplified* breached BCAP Code Rules 2.1, 3.42, 11.12.3 and 11.13.1.
7. BCAP Rule 2.1 requires that viewers be in no doubt about whether they are watching advertising or editorial material. This is a fundamental requirement for television services, reflecting the importance of allowing viewers to know when they are being offered commercially motivated material or material prepared with an independent editorial voice. When advertising can be misunderstood as being editorial, the motive for the messages received, and therefore the purpose of the claims and presentation adopted, is obscured. This can result in viewers being misled and their trust in the medium being eroded. This is particularly significant in the case of consumer-style content in which advice and specific products are recommended to the audience.
8. The requirement of clear advertising-editorial distinction is so significant that it has always been the subject of an unqualified rule in broadcast advertising codes. It is also derived directly from specific requirements in EU broadcasting legislation – the Audiovisual Media Services Directive.

¹ Ofcom published a Regulatory Statement in June 2010, *Participation TV: Regulatory Statement – Rules on the promotion of premium rate services*, that confirmed that PTV material would be considered as advertising and regulated accordingly.

² Under a memorandum of understanding (“MoU”) with Ofcom, the Broadcast Committee of Advertising Practice administers this Code. While broadcast advertising complaints are generally considered by the Advertising Standards Authority, under the same MoU, issues concerning PTV are not. Ofcom therefore remains responsible for enforcing the BCAP Code with regard to such content. The BCAP Code is available at: <http://www.cap.org.uk/Advertising-Codes/Broadcast-HTML.aspx>

³ Available at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb203/obb203.pdf>

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9. BCAP Rules 11.12.3 and 11.3.1 prohibit the offer of medical treatment remotely, the former applying specifically to teleshopping, i.e. to direct offers made in return for payment. Through these rules the BCAP Code recognises, and seeks to prevent, the potential for harm that can arise from medical treatment – including advice – being given at a distance and therefore without proper assessment of the condition.
10. The April 2012 Finding also recorded that it was the seventh breach finding against the Licensee since April 2010.
11. Two of the previous breach findings are of particular concern. In Broadcast Bulletin 175, published on 7 February 2011, breaches of the Broadcasting Code (“the Code”) were recorded against the Licensee in respect of a PTV programme called *Kundli Aur Kismat* (Fate & Fortune).⁴ Attached to that finding was a Note to Broadcasters explaining that PTV material was, after 1 September 2010, to be understood as advertising material and that:

“...In the latter case [where PTV material has been re-classified by licensees as advertising], programmes must meet the requirements for teleshopping and licensees may need to adapt the item’s format accordingly. Also, broadcasters must make absolutely clear to the audience that what they are watching is advertising material...”

12. This guidance was directed especially at ensuring compliance with BCAP Rule 2.1.
13. The most recent of the previous six breach findings – published in Broadcast Bulletin 187 on 1 August 2011 – also concerned PTV material: *Your Health*, a PTV series that offered advice to callers on how to treat medical conditions.⁵ This item was found in breach of BCAP Rules 2.1 and 11.13.1.
14. At the conclusion of the breach finding against *Your Health* Ofcom issued the following caution:

“However, this is the sixth breach Finding recorded by Ofcom against Sunrise TV over the past 15 months, all of which have concerned the broadcast of promotional material. Ofcom is therefore putting the broadcaster on notice that any further breach of this nature is likely to result in our consideration of the imposition of statutory sanctions.”

April 2012 Finding: breaches of BCAP Code Rule 2.1

15. Rule 2.1:

“Advertisements must be obviously distinguishable from editorial content, especially if they use a situation, performance or style reminiscent of editorial content, to prevent the audience being confused between the two. The audience should quickly recognise the message as an advertisement.”

16. The April 2012 Finding explained Ofcom’s view that studio-based PTV chat formats remain sufficiently novel and unfamiliar as advertising that unless the generality of the presentation is very clearly that of advertising some positive indication should be given to viewers about the status of the material. In this case, Ofcom considered that the

⁴ Available at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb175/issue175.pdf>. In this case *Kundli Aur Kismat* was treated as a programme and judged under the Broadcasting Code as its transmission took place before 1 September 2010, the date on which the June 2010 statement on participation TV took effect.

⁵ Available at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb187/obb187.pdf>

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presentation was not distinctively that of advertising and could have been understood by some viewers as programming, given the long-form format and the studio setting involving a presenter and a phone-in by viewers.

17. Ofcom concluded that each of the identified four transmissions of *Beauty Simplified* had breached BCAP Code Rule 2.1.

April 2012 Finding: breaches of BCAP Code Rules 11.12.3 and 11.13.1

18. Rule 11.12.3:

[Teleshopping for these products or services is not acceptable:]

“medical treatments for humans or animals.”

19. Rule 11.13.1:

“Advertisements must not contain offers to prescribe or treat remotely (including by phone, post, e-mail or fax). That does not preclude advertisements containing offers to distribute general information on health-related matters, such as leaflets or information packs.”

20. Both of these rules prohibit remote treatment. Rule 11.12.3 does so in the specific context of teleshopping – which *Beauty Simplified* was judged to be – and thus prohibits direct offers for medical treatment. Rule 11.13.1’s prohibition is general, banning the advertising of remote medical treatment however fulfilled.
21. Ofcom explained in the April 2012 Finding that the prohibition in these rules is not limited to offers of products or advice concerning licensed medicines or other recognised medically therapeutic treatments. Offers to treat or to advise on medical or health matters attract the prohibitions under these rules, whether they result in recognised treatments or in “home remedies” being supplied or self-administered. The trigger for these rules is the inclusion in advertising of offers of treatment of medical or health matters, including diagnosis and advice, by any person.
22. Ofcom concluded that each of the identified four transmissions of *Beauty Simplified* had breached BCAP Code Rules 11.12.3 and 11.13.1.

April 2012 Finding: breaches of BCAP Code Rule 3.42

23. Rule 3.42:

“Advertisements must not discredit or denigrate another product, advertiser or advertisement or a trade mark, trade name or other distinguishing mark.”

24. The breach of this rule recorded in the April 2012 Finding was not directly the subject of sanction but formed part of the licence’s compliance history – see paragraphs 100 to 103.
25. Ofcom concluded that the identified four transmissions of *Beauty Simplified* had breached BCAP Code Rule 3.42.

Summary of Ofcom’s Sanction Decision

26. In accordance with Ofcom’s *Procedures for the consideration of statutory sanctions in breaches of broadcast licences* (“the Sanctions Procedures”)⁶ Ofcom considered whether the breaches of BCAP Code Rules 2.1, 11.12.3 and 11.13.1 were sufficiently

⁶ Available at: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/procedures-statutory-sanctions/>

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serious as to warrant the imposition of a sanction on the Licensee in this case. It concluded that the imposition of a sanction was warranted when considered in the context of the compliance history of the licence, and in particular the repeat breaches of BCAP Rules 2.1 and 11.13.1 within a matter of months.

27. Having regard to the serious and repeated nature of the breaches of the BCAP Code, and having regard to the Licensee's representations and to Ofcom's Penalty Guidelines⁷, Ofcom decided it was appropriate in the circumstances to impose a financial penalty of **£20,000** on the Licensee (payable to HM Paymaster General).

Legal Framework

General

28. 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. 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)).
29. Ofcom has a specific duty under section 319 of the Act to set 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). One of those objectives is that "the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented." (Section 319(2)(h)).
30. Ofcom is also under a duty created by section 319(7) of the Act to "take account of such of the international obligations of the United Kingdom as the Secretary of State may notify to them for the purposes of this section." Article 19 of the Audiovisual Media Services Directive requires, among other things, that "television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content."
31. 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)); 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)); and
 - the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection (section 3(4)(h)).

The Human Rights Act 1998

32. 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").

⁷ Available at: <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>

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33. 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).
34. 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.

The UK Code of Broadcast Advertising

35. Standards set by Ofcom in accordance with section 319(2)(h) of the Act relating to advertising are set out in the BCAP Code. The BCAP Code is drawn up and published by the Broadcast Committee of Advertising Practice Ltd ("BCAP") pursuant to contracting out arrangements entered into between Ofcom and BCAP⁸.
36. However, Ofcom remains responsible for the regulation of long-form "participation television" ("PTV") advertising. This class of advertising includes premium rated telecommunications-based chat and advice services.

Remedial action and penalties

37. Under section 325 of the Act, every programme service licensed 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. Where Ofcom has identified that a condition of a TLCS licence has been contravened, it may impose sanctions as set out below.
38. 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.
39. 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.
40. 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.

⁸ Further details of the contracting out arrangements are contained in the Memorandum of Understanding between Ofcom and the ASA and BCAP and BASBOF (published May 2004) which can be found at:

http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/mou.pdf

Ofcom’s Decision to impose a Statutory Sanction

41. As set out in 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.
42. In this case, Ofcom issued a preliminary decision (“Preliminary View”) that the Licensee had seriously and repeatedly breached the BCAP Code such that a statutory sanction should be imposed.
43. Ofcom sent a copy of the Preliminary View to the Licensee on 7 August 2012, indicating that it was minded to impose a financial penalty on Sunrise. The Licensee was given the opportunity to provide written and oral representations on the Preliminary View. The Licensee did not provide written representations – it offered an explanation for not doing so at the oral hearing (see paragraph 65) – but attended a hearing at Ofcom on 30 October 2012 to provide oral representations (“Oral Representations”). These are summarised below.
44. In reaching its final decision, Ofcom was not bound by the Preliminary View. Ofcom therefore took into account the Oral Representations of the Licensee, and had regard to the Sanctions Procedures and to Ofcom’s Penalty Guidelines.

Seriousness and repeated nature of breaches

Breaches of BCAP Rules 2.1 and 11.12.3

45. The purpose of BCAP Code Rules 11.12.3 and 11.13.1 is to protect viewers from the inappropriate and potentially harmful advertising technique of offering to advise on, diagnose, prescribe or treat ill health remotely. These rules provide this protection by making any such activity in teleshopping a breach of the BCAP Code.
46. Ofcom considers this an important prohibition that seeks to prevent both potentially harmful treatments being offered and to prevent viewers from failing to seek proper medical advice and treatment, or discontinuing such treatment.
47. For these reasons, Ofcom considered the multiple breaches of Rules 11.12.3 and 11.13.1 across four programmes to be serious breaches.
48. BCAP Rule 2.1 requires that viewers be in no doubt about whether they are watching advertising or editorial material. This a fundamental requirement for television services, reflecting the importance of allowing viewers to know when they are being offered commercially motivated material or material prepared with an independent editorial voice. When advertising can be misunderstood as being editorial, the motive for the messages received, and therefore the purpose of the claims and presentation adopted, is obscured. This can result in viewers being misled and their trust in the medium being eroded. This is particularly significant in the case of consumer-style content in which advice and specific products are recommended to the audience.
49. The requirement of clear advertising-editorial distinction is so significant that it has always been the subject of an unqualified rule in broadcast advertising codes. It is also derived directly from specific requirements in EU broadcasting legislation – the Audiovisual Media Services Directive.
50. Ofcom therefore considered the breach of Rule 2.1 recorded against the Licensee for *Beauty Simplified* also to be serious.

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51. Further, as noted in paragraphs 13 and 14 above, previous breaches of BCAP Rules 2.1 and 11.12.3 had been recorded against Sunrise.
52. In the finding of August 2011 (Broadcast Bulletin 187) about Sunrise's PTV teleshopping series *Your Health* a breach of BCAP Rule 11.12.3 was recorded. That finding contained a warning of consideration of sanction in the event of further breaches.
53. Also in that Finding a breach of BCAP Rule 2.1 was recorded against *Your Health*. That finding followed guidance published in February 2011 in a finding concerning another of Sunrise's programmes (*Kindli Aur Kismat*) in which licensees' attention was specifically drawn to the need to ensure that the audiences of PTV content are made aware that such material is advertising.
54. The breaches of BCAP Rules 2.1 and 11.12.3 recorded against *Beauty Simplified* in the April 2012 Finding were therefore repeated breaches. Only one of the transmissions (that of 27 September 2011) took place in the context of a warning as to the likelihood of consideration of sanction that was issued in the *Your Health* finding, published in August 2011.
55. In these circumstances Ofcom considered the breaches of BCAP Rules 2.1, 11.12.3 and 11.13.1 – which concerns closely related prohibitions to those in Rule 11.12.3 – recorded in the April 2012 finding to warrant the imposition of a statutory sanction.

Consideration of lesser sanctions and other sanctions

56. As noted in paragraph 55 above, Ofcom considers a sanction to be warranted in this case.
57. Ofcom has considered whether sanctions other than a financial penalty would be appropriate. As set out at paragraph 1.11 of the Sanctions Procedures⁹, the sanctions available to Ofcom include a decision to:
 - issue a direction not to repeat a programme or advertisement;
 - issue a direction to broadcast a correction or a statement of Ofcom's findings which may be required to be in such form, and to be included in programmes at such times, as Ofcom may determine;
 - impose a financial penalty;
 - shorten or suspend a licence (only applicable in certain cases); and/or
 - revoke a licence (not applicable to the BBC, S4C or Channel 4).
58. Before deciding that it should impose a financial sanction Ofcom considered whether a direction not to repeat the programme or to broadcast a correction or a statement of Ofcom's findings, or both, would be appropriate lesser measures. Ofcom concluded that they would not be appropriate.
59. In the case of a direction not to repeat a programme or advertisement, this sanction is not a suitable action where the breaches relate not only to the content of a specific transmission, but more generally to the format of the programming or advertisement. In relation to *Beauty Simplified*, a direction not to repeat a particular transmission would not have been sufficient to prevent further breaches if the format of the item had remained unchanged. Further, as live phone-in content which generated revenue

⁹ See footnote 6

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through viewers' phone calls, particular editions of *Beauty Simplified* were not in Ofcom's view at all likely to be repeated.

60. In any event, Sunrise confirmed that *Beauty Simplified* had been dropped from its schedules.
61. In respect of a direction to broadcast a correction or a statement of Ofcom's findings, Ofcom concluded that the nature of the breaches was unsuitable for this form of non-monetary sanction. The nature of the rationale behind BCAP Rules 2.1, 11.12.3 and 11.13.1 mean that a finding in relation to a breach of these rules will be directed mostly at the Licensee and, importantly, at other licensees who will wish to know Ofcom's stance on these matters. Ofcom's publication of the April 2012 Finding in Bulletin 203 had already fulfilled the aim of propagating to other licensees the reasoning and effect of its intervention in relation to *Beauty Simplified*.
62. Ofcom's view was that there would be little or no benefit in directing the Licensee to broadcast a statement of these findings. The public would not have benefited from an explanation of the formulation of the rules and the reasoning for them, or from an explanation of the breaches of the rules and the reasoning for them. (Although Ofcom emphasises that the protection afforded to the public through adherence to the rules is great.)
63. Revocation of the licence held by Sunrise was viewed by Ofcom as a wholly disproportionate outcome. (Shortening the licence is not relevant in the case of a TLCS licence.)

Licensee's Oral Representations

64. As noted above, the Licensee attended a hearing held on 30 October 2012 but did not submit prior written representations as allowed for under Ofcom's Sanctions Procedures.
65. The Licensee explained that it had drafted written representations but that these had conveyed the impression that Sunrise wished to challenge Ofcom's decisions, which was not the Licensee's intention, thus Sunrise elected to limit its explanations to its oral representations.
66. Sunrise explained that its primary business is running radio stations and that television is a new experience for them. Further, that Sunrise TV is an "unusual" TV channel as it is aimed at first and second generation Asian viewers in the UK.
67. The use of the premium rate service (PRS) phone line was introduced, the Licensee said, simply because the number of callers was so high that it had to adopt a means of dampening demand. Although other channels might offer health and beauty programming without audience participation, Sunrise had wanted to do "something different". The interactive approach of *Beauty Simplified* had proved very popular.
68. Further, the Licensee said, the problems with the programme's provision of health advice arose because of the combination of two factors: the Asian community's reliance on homemade remedies, and the wish of presenters to be liked. Viewers' questions would stray from the subject of beauty into health and the presenter would be inclined to respond because she did not wish to be "abrupt" with callers: the presenter is a celebrity among Asian viewers. Indeed, if viewers were told that they should consult a doctor and have their call terminated, some would simply call back to repeat the request for advice.

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69. In response to a question from Ofcom, the Licensee emphasised the number of times that viewers had been told that they should consult their GP in relation to health concerns. However, it acknowledged that no remedial action had been taken with particular callers who had been given health advice in the show, for example by contacting the callers subsequently to say that they should seek qualified medical advice. This was because viewers were strongly in favour of the presenter dispensing advice.
70. The Licensee stressed its desire to comply with Ofcom's rules and that it did recognise and understand the reasons for Ofcom recording breaches in respect of health advice given in a teleshopping feature. The compliance failures came about because of the expectations of Asian viewers to seek homemade remedies and their keenness to raise such matters of health in their calls to *Beauty Simplified*. In this way the feature had strayed from the subject of beauty into health, with insufficient control exercised by the presenter in a live show.
71. Sunrise had dropped a previous show, *Your Health*, after Ofcom had found against it under the Code and the Licensee reminded Ofcom that it had also dropped *Beauty Simplified* following the finding published in Bulletin 203. This demonstrated the Licensee's commitment to observing Ofcom's rules.
72. At the time of the transmission of *Beauty Simplified*, the Licensee said that some compliance measures were in place. In particular, staff were given a copy of Ofcom's rules and a sheet of "dos and don'ts" was given to presenters. Specific compliance issues that arose were discussed at fortnightly meetings and some written warnings had been given to presenters. In response to a question from Ofcom, the Licensee said that the programme producer had the capability to intervene in the live transmission (e.g. by muting, etc.) if the presenter strayed away from the intended subject matter. However, the producer at the time of the transmissions was new and "sometimes, whoever is in the gallery does not pay that much attention". Overall, the Licensee acknowledged that, at the time of the transmissions, "the processes were not as rigid as they could have been". As the show had not complied with Ofcom's rules it had been axed.
73. The Licensee said that its roots in the radio industry meant that consultants it had sought advice from were familiar with Ofcom rules as they apply to radio, and the Licensee as a whole was "geared up to follow radio rules".
74. New, more rigorous policies are now in place such that: live programming is now transmitted only in office hours, ensuring that greater numbers of staff are available for compliance duties; continuing training is in place for producers, presenters and others; weekly meetings are held with support staff and presenters; and a legal 'back office' operation in Delhi was to be operational within two months and would further service compliance procedures, including the translation and adaption of rules into internal working documents. The Licensee also said that it now carried out risk assessments in respect of every programme and, unless risk could be eliminated satisfactorily, the programme is not aired. More specifically, the Licensee said that it had no plans to transmit any interactive health or beauty shows in future, as it considered the compliance risk to be too great.
75. As to Rule 2.1, the Licensee said "it was a failure on our side to understand what rules we should have applied". However, the Licensee stressed that it did now fully understand the rules and policies Ofcom operates towards material predicated on premium rate services, in particular the need for such material to be treated as advertising rather than programming.
76. The Licensee said further that if Ofcom was concerned to ensure that its rules were properly enforced, it should regard that aim as already met as *Beauty Simplified* has been dropped by Sunrise.

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77. A fine of the preliminary level was “too steep” and would be “very painful” for the Licensee, it told Ofcom.

Imposition of a financial penalty

78. Under 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 is £250,000 or 5% of the licensee’s ‘qualifying revenue’, whichever is the greater.
79. 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.
80. Ofcom took note of Sunrise TV’s qualifying revenue and considered a financial penalty of up to the relevant amount prescribed by the statutory formula as set out under section 237 of the Act.
81. In arriving at an appropriate level of financial penalty to apply in this case, Ofcom had regard to Ofcom’s Penalty Guidelines. These 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”.
82. Ofcom took full account of the need to ensure that any penalty acts as a deterrent and also took account of the specific factors set out at paragraph 4 of the Penalty Guidelines.

Factors taken into account in determining the amount of a penalty

83. In considering the appropriate amount of financial penalty for each of the breaches, Ofcom took account of relevant factors in accordance with Ofcom’s Penalty Guidelines, as set out below, and the Licensee’s representations:

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

84. The breaches by the Licensee concerned three rules of the BCAP Code: Rule 2.1, Rule 11.12.3 and Rule 11.13.1.

Rule 2.1

85. Under Rule 2.1, broadcasters are required to ensure that advertisements are obviously distinguishable from editorial content.
86. As noted in paragraphs 7 and 8 above, where this rule is broken and advertising is not obviously distinguishable from editorial the potential for misleadingness and for damage to viewer trust and other harm can arise. The regime for broadcast content regulation has always operated strict rules requiring the clear division of advertising and programming and the need for viewers to be able to readily distinguish between them. The Audio-visual Media Services Directive (AVMS) contains provisions to prevent “surreptitious advertising” for example.
87. When advertising is not readily recognisable as such a viewer may be confused or misled about the status of what he or she is watching and trust in programming’s

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disinterested editorial voice is potentially compromised. In turn, the protection for the viewer of knowing that what is being watched is placed and prepared in line with an advertiser's interests may be absent.

88. Ofcom noted that no indication was given in *Beauty Simplified* that the material was classified under Ofcom's rules as teleshopping. The material therefore carried the potential to mislead the audience about its nature.

Rules 11.12.3 and 11.13.1

89. Under Rules 11.12.3 and 11.13.1, medical treatments for humans may not be the subject of teleshopping, and, more generally, advertisements must not contain offers to prescribe or treat remotely.
90. As noted in paragraph 9 above, these provisions seek to prevent the potential for harm that can arise from medical treatment – including advice – being given at a distance and therefore without proper assessment of the condition.
91. The rules are proscriptive, avoiding harm through prohibiting an advertising technique. Ofcom has no evidence of actual harm caused in this case, but considers the potential for harm – potential harm being a stated ingredient of the factor above – to be significant whenever rules against the offer of remote medical treatment are engaged.
92. Ofcom noted the breaches of these rules that had been recorded in Bulletin 203 and considered these to be serious breaches in view of the potential harm that the rules seek to avert.

The duration of the contravention.

93. Ofcom noted that the breaches recorded in the April 2012 Finding applied to four editions of *Beauty Simplified* across the period 13 June to 27 September 2011.

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

94. There was insufficient evidence available to Ofcom to determine whether or not the Licensee made any financial gain from the breaches of the BCAP Code.

Any steps taken for remedying the consequences of the contravention.

95. Ofcom noted that remedial action in respect of particular callers had not been undertaken, mindful of the Licensee's explanation.
96. More generally, Ofcom acknowledged that the Licensee has taken some steps to improve compliance, such as the appointment of a lawyer in Delhi to assist with compliance and the preparation of company-specific documentation based on Ofcom rules. However, in Ofcom's view, these steps were dilatory and demonstrated a general lack of attention to compliance and licence responsibilities.
97. In Ofcom's view the improvements made to compliance processes, preparation and training were slow and lacked the urgency that the Licensee might have been expected to adopt in view of the interventions made by Ofcom. The Delhi-based arrangements would not be operating for a further two months from the October 2012 hearing, despite

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the publication of the *Beauty Simplified* Finding in April 2012, and the six previous findings of breaches against the Licensee since April 2010 (see paragraphs 10 – 14).

98. Further, the Licensee explained in its Oral Representations that advice it had been receiving previously came from consultants more familiar with the rules that apply to radio services. But it had not suggested that other, more appropriately experienced advisors had been retained, even temporarily, nor that any steps had been taken to explore this possibility.
99. Mindful of the Licensee's statements about the heightened emphasis on risk assessment and the transmission of live programming only in office hours, Ofcom nevertheless considered the Licensee's general approach to compliance after the contravention to be worryingly lax. All output requires compliance – including, and sometimes especially, content acquired from other territories – and the lack of detailed information in respect of a comprehensive compliance framework operated by the Licensee was in Ofcom's view a matter of concern.

Whether the regulated body in breach has a history of contraventions.

100. Ofcom had not imposed any sanctions on Sunrise to date.

101. Prior recorded Broadcasting Code breach findings:

A breach was recorded on 7 December 2009 in Broadcast Bulletin 147

Breach of Code Rule 10.4 (no undue prominence): *Beauty Simplified*, 28 July 2009, 11:00

A breach was recorded on 12 April 2010 in Broadcast Bulletin 155

Breach of Code Rules 10.3 (no promotion) and 10.4 (no undue prominence): *Your Health*, 28 December 2009, 15:15

A breach was recorded on 24 May 2010 in Broadcast Bulletin 158

Breach of Code Rule 10.3 (no promotion): *Asiana Bridal Show 2010*, 21 February 2010, 20:00

A breach was recorded on 7 February 2011 in Broadcast Bulletin 175

Breach of Code Rules 10.2 (need for separation of advertising and programming) and 10.3 (no promotion): *Kundli Aur Kismat* (Future & Fortune), 20 July 2010, 14:00 to 16:00

102. Prior recorded BCAP Code breach findings:

A breach was recorded on 1 August 2011 in Broadcast Bulletin 187

Breach of BCAP Code Rules 2.1 (need for distinction between advertising and programming), 11.13.1 (prohibition on offer of remote treatment): *Your Health*, 10 April and 8 May 2011, 12:00

103. Two findings for breaches of COSTA¹⁰ had also been published against Sunrise TV.

¹⁰ Ofcom's Code on Scheduling of Television Advertising, available at: <http://stakeholders.ofcom.org.uk/consultations/rada08/statement/>

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

104. Ofcom considered the compliance arrangements operated prior to transmission by the Licensee to have been very poor, indeed possibly on occasion non-existent. The Licensee acknowledged in its Oral Representations that, prior to transmission, its processes were not as robust as they should have been.
105. Ofcom was concerned at the apparent lack of emphasis placed by the Licensee on compliance within Sunrise TV at the time of the transmissions. The channel's management did not in Ofcom's view appear to apply the necessary attention and urgency to compliance required of a broadcast licence holder.
106. Ofcom stresses that this head of relevant factors is very important in its consideration of potential sanctions and took the view that this aspect of the instant case was of great concern.

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.

107. In respect of BCAP Rule 2.1, as noted in paragraphs 11 and 12 above a Note to Broadcasters – attached to a finding against one of the Licensee's own programmes – drawing attention to the need for PTV material to be clearly presented as advertising was published on 7 February 2011 in Broadcast Bulletin 175. In addition, Ofcom published a breach finding against the Sunrise PTV show *Your Health* on 1 August 2011 in Broadcast Bulletin 187 which included a breach decision under BCAP Rule 2.1.
108. In respect of BCAP Rules 11.12.3 and 11.13.1, as noted in paragraph 13 above Ofcom published a breach finding against the Sunrise PTV show *Your Health* on 1 August 2011 in Broadcast Bulletin 187 which included a breach decision under BCAP Rule 11.13.1.
109. Senior management therefore ought to have been fully aware of these provisions of the BCAP Code and the Note to Broadcasters, and should have ensured that procedures were in place to ensure compliance. Ofcom noted that the Licensee apparently failed to recognise that the material was problematic under the BCAP Code and was in conflict with the guidance provided in Ofcom's Note to Broadcasters. In Ofcom's view this demonstrated a very poor level of compliance.

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

110. Ofcom noted that *Beauty Simplified* was removed from Sunrise TV after Ofcom had notified the Licensee of its view that the BCAP Code had been breached.
111. Ofcom acknowledges that these steps were timely and effective in preventing further breaches by the same programme.

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

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112. Mindful of the Licensee's reported qualifying revenue, the statutory formula for the ceiling on financial sanctions and the facts of case, including the Oral Representations made, Ofcom considered a figure of £20,000 to be a proportionate financial penalty.
113. Ofcom considered this level of penalty to achieve the appropriate level of deterrence taking into account, in particular, the repeated nature of the breaches concerned and the potential for viewer harm to have been caused in this case.

Level of financial penalty (before consideration of other factors)

114. Having regard to all the factors referred to above Ofcom's view was that an appropriate and proportionate financial penalty was:
- for the breaches of BCAP Rule 2.1, a total of £10,000;
 - for the breaches of BCAP Rules 11.12.3 and 11.13.1, a total of £10,000.
115. The total level of fine Ofcom imposed on Sunrise was therefore £20,000.
116. In reaching this figure and in accordance with the Penalty Guidelines, Ofcom gave particular weight to the following factors:
- the objective of deterrence;
 - Sunrise's history of contraventions and the repeat nature of the infringements;
 - the steps taken by the Licensee to end the contravention when it became aware of it.

Precedent

117. In accordance with the Penalty Guidelines, Ofcom has also had regard to relevant precedents set by previous cases.
118. There were no direct precedents for the present case. Those precedents summarised below were relevant in that they concerned financial penalties applied for breaches related to material offering health advice or medical products and, in the case of DM Digital Television Ltd, questions of 'transparency' – although in the different context of sponsorship.
119. Because the links between the precedents and the present case are loose, the precedents should be viewed as having had limited precedential effect. Further, it should be stressed that Ofcom's Penalty Guidelines were revised and re-issued in June 2011.
120. **1 November 2007: ARY Digital UK Ltd** – sanction imposed against a programme. A financial penalty of £15,000 was imposed, and a direction to broadcast once a statement of Ofcom's findings. The Broadcasting Code breaches concerned: the need to protect members of the public, the promotion of products in programmes, and the undue prominence of products and services in programmes.
121. **28 October 2008: DM Digital Television Ltd** – sanction imposed against an advertiser-supplied programme. A financial penalty of £15,000 was imposed, and a direction to broadcast twice a statement of Ofcom's findings. The Broadcasting Code breaches concerned: the need to protect members of the public, sponsor influence on programming, promotion of the sponsor, identification of the sponsor, and transparency of the relationship between sponsor and programme.

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122. **4 December 2008: Venus TV Ltd** – sanction imposed against five spot advertisements, three of which concerned health or cosmetic treatment. A financial penalty of **£35,000** was imposed, and a direction to broadcast twice a statement of Ofcom’s findings. The health and beauty advertisements concerned BCAP TV Code breaches¹¹ of rules on: misleadingness, dissuasion from seeking medical treatment, implication of cure, evidence, suggestion of need for dietary augmentation, presentation or approval of medical products by doctors, safety and efficacy, promise of specific weight loss, targeting the obese, fictitious testimonials, and medical claims made in the absence of a Medicines Act marketing authorisation.

Co-operation

123. In accordance with the Penalty Guidelines, Ofcom may increase the penalty where a licensee has failed to co-operate with Ofcom’s investigation.
124. Ofcom acknowledged that the Licensee had fully complied with its investigation and therefore considered that the level of penalty should not be increased on this ground.

Conclusion

125. Ofcom concluded that the breaches of BCAP Code Rules 2.1, 11.12.3 and 11.13.1 by the Licensee were serious and repeated and therefore merited the imposition of a financial penalty in accordance with section 237 of the Act.
126. In this case the Licensee broadcast material over the course of four shows in breach of the BCAP Code despite clear published guidance from Ofcom.
127. The material in question carried the potential both to mislead viewers about the nature of what was being watched and to create harm through the inappropriate provision of health advice. Both of these areas of code supervision are important; breaches of them are serious.
128. Ofcom was also extremely concerned that the Licensee had not had adequate procedures in place to ensure compliance prior to transmission, and that subsequent steps to improve compliance fell short of Ofcom’s expectations of a broadcast licence holder.
129. Ofcom was satisfied that the deterrent action proposed in this case was consistent with previous decisions (albeit noting their limited precedential effect), taking due account of the factors outlined in the Penalty Guidelines, the repeated nature of the breaches in this case and the potential for viewer harm.
130. In view of the factors set out above, Ofcom deemed the breaches sufficiently serious to warrant the imposition of a statutory sanction of **£20,000** on Sunrise TV Ltd.

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¹¹ At the time, BCAP operated two codes inherited from Ofcom, one for TV, the other for radio. These have been altered and combined following consultation and approval by Ofcom.