

Ofcom Content Sanctions Committee

Consideration of sanctions against	The British Broadcasting Corporation (“the BBC”) in respect of its service BBC 6 Music.
For	<p>Breaches of the Ofcom Broadcasting Code (“the Code”) of:</p> <p>Rule 2.11: <i>“Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.”</i></p> <p>Relating to the following conduct:</p> <p>Faking ‘winners’ of two listener competitions, <i>Ruff Riff</i> and <i>Listening Post</i>, on up to 17 occasions in pre-recorded episodes of <i>The Liz Kershaw Show</i>.</p>
Between	25 July 2005 and 6 January 2007
Decision	To impose a financial penalty (payable to HM Paymaster General) of £115,000 and, in addition, to require the BBC to broadcast a statement of Ofcom’s findings on its service BBC 6 Music in a form to be determined by Ofcom on two specified occasions.

Summary

- 1.1 For the reasons set out in full in the Decision, under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee ("the Committee"), the Committee decided to impose statutory sanctions on the BBC in light of the serious nature of its failure to ensure compliance with the Ofcom Broadcasting Code ("the Code").
- 1.2 This adjudication under the Code relates to the broadcast of *The Liz Kershaw Show* ("*Liz Kershaw*") on BBC 6 Music between 25 July 2005 and January 2007. BBC 6 Music is a free-to-air digital radio service owned and operated by the BBC.
- 1.3 *Liz Kershaw* was a music programme in which music was mixed with thoughts and reflections from the presenter, Liz Kershaw. The programme discussed music, listeners' views on the music, what listeners were doing at the weekend and what Liz Kershaw had been doing during the week. It was broadcast on BBC 6 Music, originally five days a week on weekdays, and then at weekends only. The programme contained two competitions: *Ruff Riff* and *Listening Post*. In *Ruff Riff*, the main competition in *Liz Kershaw*, listeners were invited to email or text BBC 6 Music to identify a guitar melody that had been played. A winner would be selected, called by the production team and awarded a prize on air. In *Listening Post*, which did not feature in every *Liz Kershaw* programme, listeners were invited to email or text BBC 6 Music to answer a multiple choice question about music played on the programme. The name of the winner would be announced on air by the presenter. The listener competitions in *Liz Kershaw* did not use premium rate services¹ ("PRS"). SMS entry was charged at local rate and typically cost listeners between 10 and 12 pence. Email entry was regarded as free.
- 1.4 *Liz Kershaw* was normally broadcast live. However, between 25 July 2005 and January 2007 there were a number of occasions when editions of the programme were pre-recorded. Nevertheless, these pre-recorded editions were broadcast as live and included encouragements to listeners to enter one or both of the *Ruff Riff* and *Listening Post* competitions. Fictitious names were presented as genuine 'winners' of the competitions in up to 17 pre-recorded *Liz Kershaw* programmes and listeners who entered the competitions on any of these occasions stood no chance of winning. Additionally, some email and SMS entries relating to both competitions and other forms of listener interaction were not genuine emails or text messages from listeners but fabricated by the production team. The BBC identified the same conduct in up to six other episodes of *Liz Kershaw* broadcast between 1 May 2005 and 24 July 2005².
- 1.5 Upon being interviewed, the presenter recalled that during the recording of the pre-recorded programmes, the Producer or Broadcast Assistant would hand her emails and texts with the instruction to read them out to suggest audience participation. They would tell her that a "caller" was ready, she

¹ Premium rate services are services that offer some form of information or entertainment and which are charged to consumers' telephone bills. Premium rate calls cost between 10p and £1.50 per call, or per minute, from a BT landline (charges from other networks may vary).

² The Code came into force on 25 July 2005. The BBC was not required to comply with the previous code (the Radio Authority Programme Code 2002), which was in force at the time of broadcast of the pre-recorded programmes between 1 May and 24 July 2005.

would be given a name and they would be put through to “air”. Around ten members of the BBC’s production staff “posed as winners” or contributors at various times. The prizes (if there was a real prize) were put back into the programme’s stock of prizes to be used for a later live programme or, in some cases, the prize was “made up” by the Producer or Broadcast Assistant.

- 1.6 For each pre-recorded programme, a compliance form should have been submitted by the production team to BBC 6 Music’s Head of Programmes for his sign-off and then logged in the BBC’s systems. However, only nine such forms were logged in the BBC’s systems. On all but two of the logged forms, the Head of Programmes’ sign-off stated that he had not listened to the programme as there was an experienced production team involved.
- 1.7 Reacting to press interest in the mishandling of the use of PRS in competitions and voting by a number of broadcasters, including the BBC, the BBC carried out two separate “trawls” of its output. The first was launched on 7 March 2007 and looked into the BBC’s use of PRS. The second, launched on 12 July 2007, was much wider in scope, to include any audience deception.
- 1.8 On 18 July 2007 the BBC issued a statement admitting serious breaches of its editorial standards in a number of its programmes, including *Liz Kershaw*, and an Ofcom investigation was launched.

Summary of the Committee’s Findings

- 1.9 The BBC exists to serve the public interest. The Code breaches in this case involved pre-meditated and repeated faking of competition ‘winners’ in pre-recorded editions of *Liz Kershaw*, which were then passed-off as live. The BBC deceived its audience in this way on up to 17 occasions, which constituted a very significant breakdown in the trust between the BBC and its audience. The BBC unequivocally accepted that these breaches of the Code (and its own fundamental principle of straight dealing with its audience) were “absolutely unacceptable”.
- 1.10 The trust that the audience places in a broadcaster is essential to their relationship and the audience is entitled to believe when entering into a relationship of trust with a broadcaster that their trust is not misplaced. This is particularly pertinent in the case of the most long-standing public service broadcaster, the BBC, which has a relationship of trust with its radio audiences going back over 80 years.
- 1.11 Ofcom was extremely concerned by the repeated instances of pre-meditated, deliberate deception in this case over a period spanning nearly 17 months. The breaches involved the production team taking steps in advance of pre-recording to identify members of BBC production staff to pose as ‘winners’. The programmes as broadcast included encouragements to listeners to enter the *Ruff Ruff* and *Listening Post* competitions. Over 1,000 SMS entries were made to the affected competitions by listeners, in the belief that they would stand a fair and equal chance of winning. In fact, because ‘winners’ were faked by the production team and the programmes were pre-recorded, those listeners who entered the affected competitions stood no chance of winning. Furthermore, prior to the Code coming into force on 25 July 2005, there had been up to six earlier instances where competition ‘winners’ were faked in pre-recorded editions of *Liz Kershaw*.

- 1.12 Ofcom was concerned that the deliberate decisions to fake ‘winners’ in pre-recorded editions of *Liz Kershaw* were taken with the full knowledge of the production team and the presenter. On the basis of the BBC’s evidence, it appeared that other 6 Music production staff, who posed as ‘winners’, might have believed that they were recording a pilot, “off-air” item, rather than posing as competition ‘winners’ in an item to be broadcast on air.
- 1.13 Furthermore, the BBC 6 Music Head of Programmes repeatedly failed to complete (or properly complete) the compliance forms for pre-recorded programmes that were required, during the relevant period, under the BBC’s own compliance procedures. Ofcom was of the view that the BBC’s oversight of BBC 6 Music, BBC 6 Music’s Head of Programmes and the individual programmes broadcast was inadequate during the relevant period. There were insufficient systems in place between May 2005 and January 2007 to prevent or identify the unfair conduct that occurred in this case, over a substantial period of time. Ofcom was very concerned about these shortcomings and considered that it was clear that, at the relevant time, BBC 6 Music’s management, risk management and compliance process and procedures were inadequate to ensure the fair conduct of listener interactive competitions and compliance with the Code. This was totally unacceptable.
- 1.14 Ofcom welcomed the steps taken by the BBC to investigate, seek to address the breaches and prevent recurrence of the same or similar failures, which included:
- Suspending all phone-in competitions and voting on 18 July 2007, while it implemented a comprehensive review of the relevant Editorial Guidelines and processes;
 - Carrying out wide-ranging investigations into PRS and instances involving “audience deception” in its programmes;
 - Enhancing training programmes on editorial compliance across the BBC and implementing a mandatory training programme for staff called “Safeguarding Trust” (which all BBC production staff and 2,000 freelancers had completed);
 - Issuing new guidance and creating a new Code of Conduct in relation to competitions;
 - Setting up a new “Interactive Advice and Compliance Unit”;
 - Re-writing staff contracts and contracts with external suppliers;
 - Changing the BBC structure to include a senior manager on every divisional board with specific responsibility for editorial compliance and co-ordination;
 - Taking significant and wide-ranging disciplinary action against a number of staff;
 - Apologising publicly on several occasions in general terms for the breaches that occurred in this case and others;

- Broadcasting fewer competitions on BBC 6 Music, with the expectation that no pre-recorded programmes should carry competitions;
 - Using BBC 6 Music's weekly team meetings as an official forum to update staff on any new editorial advice and any issues that have arisen; and
 - Seeking to compensate SMS entrants to the affected *Liz Kershaw* competitions.
- 1.15 However, notwithstanding the steps taken by the BBC, Ofcom considered that this case involved very serious failures by the BBC to comply with a basic requirement to conduct competitions fairly. This not only breached the Code, but also the BBC's own Editorial Guidelines and its fundamental principle of straight dealing with its audiences. As a result, the BBC repeatedly deceived its audience as to the conduct of an interactive listener competition on up to 17 occasions over approximately 17 months.
- 1.16 In setting the level of the financial penalty to be imposed in this case, Ofcom specifically took into account the fact that BBC 6 Music is a free-to-air digital radio service established relatively recently and that audience expectations in relation to its output are, perhaps, not as high as those for mainstream, long-established BBC radio channels. It also had specific regard to the fact that *Liz Kershaw* was a mainstream Saturday morning radio show broadcast between 1000 and 1300 and that, between April 2004 and March 2006, it had also been broadcast on Sundays.
- 1.17 This is by far the most serious case in relation to the BBC that Ofcom has considered to date. It involved active, pre-meditated decisions to transmit competitions which listeners were encouraged to enter but which they would stand no chance of winning. Despite the fact that this occurred on numerous occasions over a long period, BBC senior management were unaware of the repeated deception of listeners until it was revealed during the BBC's investigations into PRS and audience deception during 2007.
- 1.18 While recognising that any fine would be taken from monies paid by the public (the licence fee payer), the Committee noted that Parliament had decided that it was appropriate in certain circumstances for Ofcom to impose a financial penalty on the BBC (though at a lower threshold to other Public Service Broadcasters, i.e. set at a maximum of £250,000 on any occasion).
- 1.19 Having considered the relevant facts as outlined above and all the representations made by the BBC, the Committee decided to impose a financial penalty on the BBC of **£115,000** (payable to HM Paymaster General), which it considered to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed the BBC to broadcast a statement of findings in relation to *Liz Kershaw* on BBC 6 Music in a form determined by Ofcom on two specified occasions.

Background

- 2.1 The issues in this case are set out at paragraphs 1.3 to 1.8 in the Summary above.
- 2.2 As set out at paragraphs 1.7 and 1.8 above, the BBC carried out two “trawls” of its output in response to press interest in the mishandling of the use of PRS in competitions and voting by a number of broadcasters, including the BBC. On 18 July 2007, the BBC issued a statement admitting serious breaches of its editorial standards in a number of BBC programmes, including *Liz Kershaw*, and an Ofcom investigation into the matter was subsequently launched.
- 2.3 Ofcom carried out an investigation into *Liz Kershaw*, as summarised in section 4 below. During that investigation, the BBC was given the opportunity to make written submissions on the case. In light of the evidence and the BBC’s responses, Ofcom concluded that the BBC’s conduct of the listener competitions in up to 17 pre-recorded editions of *Liz Kershaw* was in breach of the Code. The Code breaches occurred in the context of up to six other pre-recorded editions of *Liz Kershaw* broadcast between 1 May and 24 July 2005 in which the BBC had identified the same conduct³.
- 2.4 In addition, Ofcom found the breaches to be sufficiently serious and repeated to warrant the referral of the case for the consideration of the Content Sanctions Committee (“the Committee”). Throughout the consideration of the imposition of a statutory sanction, the BBC was given opportunities to make written and oral representations, which are summarised below.

Legal Framework

The Communications Act 2003

- 3.1 Ofcom has a duty under section 319 of the Communications Act 2003 (“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.
- 3.2 The standards objectives are set out in section 319(2) of the Act. They 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)).
- 3.3 In discharging its functions, Ofcom’s principal duties are to further the interests of citizens in relation to communications matters and the interests of consumers (section 3(1)) and to secure a number of other matters including:
 - The application in the case of all television and radio services of standards that provide adequate protection to members of the public from

³ The Code came into force on 25 July 2005. The BBC was not required to comply with the previous code (the Radio Authority Programme Code 2002), which was in force at the time of broadcast of the pre-recorded programmes between 1 May and 24 July 2005.

the inclusion of offensive and harmful material in such services (section 3(2)(e)).

3.4 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, 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)).

3.5 Under section 198 of the Act, Ofcom is required to regulate the BBC's services as well as other activities connected to the provision of the BBC service. Ofcom's duties and powers in relation to the BBC are conferred on it under statute and the BBC Charter and Agreement. Clause 46 of the BBC Agreement which accompanies the BBC Charter states that the BBC must observe certain standards set by Ofcom under section 319 of the Act, including those relating to the application of generally accepted standards so as to provide adequate protection for the public from harmful or offensive material (s.319(2)(f)). Therefore it is in light of this Clause that the BBC is required to comply with Rule 2.11 of the Code, which is relevant to this Adjudication.

3.6 Section 198(3) of the Act requires the BBC to pay penalties to Ofcom in respect of any contraventions of the conditions contained in these provisions. The BBC is in a unique position in comparison to other Public Service Broadcasters ("PSBs") with respect to the maximum fine that can be imposed on it. Commercial PSBs can be fined up to a maximum of 5% of their qualifying revenue. The BBC's maximum limit of £250,000 is due to the BBC being funded by the licence fee. Section 198(5) states that

- "the maximum penalty that may be imposed on the BBC on any occasion by Ofcom in exercise of a power conferred by virtue of the BBC Charter and Agreement is £250,000".

The BBC Agreement

3.7 Clauses 93 and 94 of the BBC Agreement set out the possible sanctions that Ofcom can impose against the BBC in relation to a breach of the Code. These are:

- a direction to broadcast a correction or statement of Ofcom's findings or both (Clause 93(1));
- a direction not to repeat a programme (Clause 93(5)); and
- the imposition of a financial penalty up to a maximum of £250,000 on any occasion (Clause 94).

The Ofcom Broadcasting Code

- 3.8 Standards set by Ofcom in accordance with section 319 of the Act are set out in the Code which came into force on 25 July 2005.⁴
- 3.9 Guidance Notes accompanying each section of the Code are published, and from time to time updated, on the Ofcom website.⁵ The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Code.
- 3.10 By virtue of section 198 of the Act and section 46 of the BBC Agreement, the BBC must observe relevant programme Code standards which include, but are not limited to, those relating to harm and offence.
- 3.11 The relevant provision of the Code is Rule 2.11, which states that:
- “Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.”

The Human Rights Act 1998

- 3.12 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 of Human Rights (“the Convention”).
- 3.13 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”. 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).
- 3.14 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.

Investigation

- 4.1 In its investigation, Ofcom asked the BBC to address the following key points, among other issues, and to provide certain relevant material. This included details of:
- The nature of the item involving (or purporting to involve) participation by viewers or listeners (e.g., a phone in competition);
 - What efforts were made to anticipate before broadcast any problems that might arise with the item;

⁴ The Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

⁵ Guidance Notes can be found at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/>

- What compliance processes, standard or otherwise, were in place regarding the management and running of interactive listener competitions; and
- At what point decisions were made that effectively involved deception of the audience (e.g., a decision to fake 'winners').

The BBC's response to Ofcom's investigation

- 4.2 The BBC responded by way of a general statement, which applied to this case and a number of other cases, and a specific statement in relation to *Liz Kershaw*.

General statement

- 4.3 It stated that the conduct was "entirely unacceptable" and there was "no excuse for it". It said that whilst there might be different factors in each of the cases that rendered the decisions made understandable and more or less serious, it did not seek to suggest that any of those decisions were acceptable. It took the view that each of the incidents, in varying degrees, involved production staff falling seriously short of the high standards of conduct it expected, and of misleading the audience and thereby breaching the Code.
- 4.4 The BBC said that the problems had not stemmed from an absence of clear BBC standards and guidelines. It said that in addition to promoting its own Editorial Guidelines, it made "strenuous efforts to ensure that the highest ethical standards of programme-making are observed by all involved in content production".
- 4.5 It stated that whilst each case involved misleading the audience, none was profit-led and that each of the systems and methods used were designed to maintain caller costs at the lowest practical levels for the programme in question; no profit was made by the BBC. It also added that in those cases where there were prizes, nobody on the programmes had benefited, with all of the prizes either being reused shortly afterwards or returned to the BBC.
- 4.6 The BBC said that its Director General, Mark Thompson and other senior BBC managers had discussed the breaches and apologised for them in public and on various BBC services.
- 4.7 It added that although the number of incidents was of particular concern, "it was necessary to maintain perspective". The incidents were relatively infrequent, compared to the number of hours of programmes that were broadcast during the relevant period.
- 4.8 The BBC described in considerable detail the process by which the incidents had been identified, the investigations that had been undertaken and the steps that had been and/or were being taken to address these problems and prevent recurrence. It also stated that given the failures that had occurred, the BBC was urgently examining what steps might need to be taken to ensure that the relevant Guidelines were clearly understood by programme makers and staff; and that key principles, such as not misleading audiences in any circumstances, were driven home. As a first step, the BBC had announced,

on 18 July, that all 16,500 programme and content staff would attend a new mandatory training programme called “Safeguarding Trust”.

Specific statement regarding *Liz Kershaw*

- 4.9 The BBC confirmed that when presenters are working throughout the year at weekends, music stations sometimes allow them to pre-record shows. *Liz Kershaw* was originally transmitted five days a week. When it moved to a weekend slot, the presenter took more work at a local radio station, which meant she was working seven days a week. It was subsequently agreed that because of this heavy workload, she could pre-record a higher number of programmes than would, under normal circumstances, be expected. The BBC said that the intention had been to make the pre-recorded *Liz Kershaw* programmes sound “as live as possible” by retaining regular features in the usual sequence. It continued that it was common in the radio industry that pre-recorded mainstream music programmes were made to sound as live as possible. Since *Liz Kershaw* had usually been broadcast live, the audience expectation at that time of day would have been for there to be levels of audience interaction in the programme.
- 4.10 In the pre-recorded editions of *Liz Kershaw*, the BBC said that email and SMS entries for the *Ruff Riff* and *Listening Post* competitions were not provided by the audience, but by the production team. The listener put on air as the ‘winner’ of *Ruff Riff* had been a member of staff. The BBC said that it made no money from text messages. However, it had no say over what network operators charged as it depended on the particular package that the customer was on. The typical cost to a listener sending a text message to the BBC was 10 to 12 pence per SMS. It added that the majority of emails sent as a result of the transmission of the pre-recorded *Liz Kershaw* programmes had been read by Producers and that all had been read by the presenter. Some emails (those containing generic information about listeners’ plans for the weekend and comments on the music itself) were used on later programmes. However, the BBC said that it appeared that not all text messages sent to the programme by listeners were read.
- 4.11 The BBC said that when its second “trawl” had been announced in July 2007, the Controller of BBC Radio 2, 6 Music & Popular Music had been asked to conduct an initial investigation looking at production processes going back to 2005 and specifically relating to instances where the audience had been deceived. Both Producers of *Liz Kershaw* had come forward and given full details of pre-recording dates and the practices used. When the presenter was asked to discuss the issue, she had done so freely.
- 4.12 The BBC’s investigation had confirmed that, insofar as it could be ascertained, the programme included faked competitions in up to 23 pre-recorded programmes broadcast between 1 May 2005 and 6 January 2007. The ‘winner’ of *Ruff Riff* who was “spoken to on air” would be a production staff member and the ‘winner’ of *Listening Post* would be a fictitious name. The main objective of those involved had been to meet audience expectations and to maintain levels of audience interaction. The prizes were of very low value and *Ruff Riff* and *Listening Post* were largely used to generate editorial talking points. It had not occurred to those involved to think about this from the point of view of audience deception.

4.13 The presenter recalled that during the recording of the pre-recorded programmes, the Producer or broadcast assistant would hand her emails and text messages with the instruction to read them out to suggest audience participation. They would tell her that a “caller” was ready, she would be given a name and they would put the “caller” through to “air”. Around ten members of the BBC’s production staff “posed as winners” or contributors at various times.

4.14 The BBC stated that a compliance form should have been submitted for each of the radio programmes that were pre-recorded. However, a search of its compliance system revealed only nine such forms for the programmes. All should have been signed off by the BBC 6 Music Head of Programmes but, on all but two of the nine forms in the system, the Head of Programmes’ sign-off stated that he had not listened to the programme as there was an experienced production team involved.

4.15 Liz Kershaw apologised to the audience on 21 July 2007, in the last *Liz Kershaw* programme before it was “rested”:

“Please do not mistake my bright mood for arrogance...I’m anything but happy clappy. I can’t go into detail because there’s a BBC investigation into the production of my programmes. However, you do deserve some answers. In 2005, I did 250 shows of which 243 were live..lots of shows are recorded in this way, but this one has been singled out. I never saw the texts but I did read the emails. I did feel uncomfortable about it at the time, but I didn’t do anything about it. I’d like to apologise to the licence payers who pay my wages unreservedly...for being a coward...I’d like to say sorry for being part of a charade.”

4.16 The BBC outlined a number of ways in which it had sought or was seeking to address the issues that had occurred in this and other cases, including:

- re-training all production and interactive staff in the use of appropriate SMS and email communication and compulsory re-training of all production and relevant staff in programme compliance;
- programme Senior Producers being accountable for the adherence to compliance procedures through a monthly compliance meeting with the Head of Programmes, Head of Compliance and Controller;
- Radio 2’s Head of Compliance being responsible for BBC 6 Music to ensure consistency of approach;
- fewer competitions being run on BBC 6 Music, with the expectation that no pre-recorded programmes should carry competitions or audience interaction;
- any competitions that were run would have to adhere to written guidelines before going on air and would be approved by the Controller of BBC 6 Music; and
- fewer programmes would be pre-recorded.

Ofcom's Findings on the breaches

- 5.1 Ofcom took the BBC's submission into account when reaching its conclusions on the question of Code breaches. It noted that on up to 23 occasions when pre-recorded editions of *Liz Kershaw* had been broadcast⁶ listeners had who entered the *Ruff Ruff* and *Listening Post* competitions by SMS had 'paid' to do so on the basis that they had a fair and equal chance of winning. Due to the fact that the competitions were pre-recorded and members of the production team went on air as fake 'winners', those listeners who entered in fact had no chance of winning. Therefore, the audience had been deceived as to the fair conduct of the affected competitions.
- 5.2 Ofcom concluded that serious and repeated breaches of Rule 2.11 of the Code had occurred. However, Ofcom clarified that it was only recording breaches from 25 July 2005, the date on which the Code came into force. The BBC was not required to comply with the previous code (the Radio Authority Programme Code 2002) that was in force at the time of broadcast of the pre-recorded programmes between 1 May and 24 July 2005 and, therefore, no breaches were being recorded in respect of the incidents between those dates. Ofcom considered the breaches to be sufficiently serious to warrant the consideration of the imposition of a statutory sanction.

The BBC's written representations on the imposition of a sanction

- 6.1 The BBC clarified that six of the 23 pre-recorded *Liz Kershaw* programmes had been broadcast before 25 July 2005 (i.e. before the Code came into force) and 17 had been broadcast between 25 July 2005 and 6 January 2007. It said that the telephony data demonstrated that 1,067 SMS entries to the affected competitions had been made from 986 mobile phone numbers. On 1 October 2007, it had sent two text messages to these mobile phone numbers offering compensation of 50p per entry.
- 6.2 The BBC stated that it did not dispute the imposition of a financial penalty in relation to the Code breaches and accepted that, at least in principle, it would be appropriate for the BBC to broadcast a statement of Ofcom's findings. The BBC said that from the outset it had recognised that the issue of breaches of editorial standards in its output were symptoms of a serious problem that needed to be urgently addressed. It continued that it had made the most strenuous efforts to identify and deal with the individual irregularities and had sought to be open and transparent throughout with Ofcom and the BBC Trust. The BBC said it had focused on the lessons learned and applied them across the BBC's output. The BBC said that in addressing the issues, it had taken numerous, costly and complex steps to examine its internal processes and revise them where necessary. This had involved:

Editorial compliance

- 6.3 The BBC said that a review of its editorial compliance systems had found that overall the systems and processes had been effective and fit for purpose, but that there had been insufficient awareness of them among content producers. The BBC said that it had identified failures by individual producers to submit

⁶ The BBC subsequently clarified that 17 of the editions of *Liz Kershaw* had been broadcast after 25 July 2005, when the Code came into force, as explained further in paragraph 6.1.

compliance forms when they should have done so. Its review had recommended that training programmes should be enhanced and that a new editorial compliance forum should be created to co-ordinate and spread best practice around the entire organisation. In addition, efforts would be made to ensure that independent production companies understood the BBC's compliance procedures. The BBC said that it had undertaken to implement all the proposals of its compliance review.

- 6.4 The BBC said that it was making strenuous efforts to ensure that this commitment was followed up. It said there was now a senior manager responsible for editorial standards in compliance on each of the production division's boards. A new editorial compliance forum (chaired by the Director of Editorial Policy & Standards) met monthly, which, in turn, reported to the Editorial Standards Board.
- 6.5 The BBC said that the steps it had taken were designed to ensure that there was no repetition of similar breaches to those in the cases under consideration for the referral to the Committee for the imposition of a statutory sanction.

Review of competitions

- 6.6 The BBC said that it had suspended all phone-related and interactive competitions on 18 July 2007 and that it had instituted a comprehensive review of the relevant Editorial Guidelines and processes. It said that new guidance had been issued to content producers and a new Code of Conduct had been created. This had been published and was available on the BBC's website. Further, the BBC said that it had not begun the phased return of competitions until 21 January 2008, over six months after they had been suspended.
- 6.7 The BBC said that it would run far fewer competitions in future and that its internal procedures had been extensively revised, as follows:
- The decision whether to include a competition in a programme now had to be referred to a designated senior manager within the relevant production department. A senior editorial figure would then be made responsible for overseeing the running of the competition;
 - Where telephony was involved, there was a separate approval procedure, requiring authorisation by a senior manager;
 - All content production staff involved with competitions were now required to complete an on-line training module. There was a second, higher level training module for all those responsible for approving or managing any aspect of competitions; and
 - Clear rules on publishing the terms and conditions, stating the start and end of the competition period, ensuring all entrants have a fair chance of winning, contingency plans for failures, turnaround times for announcing winners and the selection of winners had been promulgated.
- 6.8 The BBC said that it had undertaken a publicity campaign to ensure that its audience was aware of these changes. The changes were designed to

embed in the BBC's culture the overriding principle that competitions had to be run fairly, and that, where there was a tension between fairness and any other consideration whatsoever, fairness had to prevail. It said that the changes would significantly change the character of large parts of BBC output, particularly in radio.

Telephony

- 6.9 The BBC said that it was clear that a key factor leading to the crisis around interactivity had been a lack of understanding between production teams and the technical teams involved in the design, implementation and delivery of telephony and text services. It continued that although the BBC Trust, not Ofcom, regulated the BBC's use of PRS, the Trust had requested that BBC management addressed Ofcom's requirements and identified where the BBC intended to comply or diverge, to ensure that the controls implemented by the BBC were at least as effective as those proposed by Ofcom.
- 6.10 The BBC said that its telephony review had recommended the creation of an in-house centre of expertise (provisionally entitled the Interactive Advice and Compliance Unit). The BBC said that using the services of the Unit would be a mandatory part of the commissioning process for interactive services together with being an integral step in the new BBC approvals process for competitions. The BBC said that this was a large commitment: estimated set-up costs were over £1 million and it expected the annual running costs to be around £1.3 million.

Staff contracts

- 6.11 As the BBC had noted in its earlier submissions, all staff in a role which could have an effect on BBC output were required to sign a contract and an Editorial Policy compliance form confirming their agreement to comply with the BBC's editorial standards. In order to address previous shortcomings in this area, the BBC said that line managers were now required to ensure that contracts and, where relevant, the Editorial Policy compliance form, were signed and returned prior to any employee, freelancer or casual member of staff starting work at the BBC. To ensure compliance, no payments would be processed by the BBC for any individual until it had been confirmed that the relevant paperwork had been received. Any individual who refused to sign the contract and/or the Editorial Policy compliance form would be likely to have his/her employment terminated.
- 6.12 The BBC said that newly contracted staff in content areas would also have to complete an interactive online course as part of their induction. In addition, all current staff would be required to sign a new Editorial Policy compliance form stating they agreed to comply with the BBC's Editorial Guidelines. This exercise would be completed by Autumn 2008.

Disciplinary action

- 6.13 The BBC said that it had taken disciplinary action against a number of individuals over the breaches notified to Ofcom and that it had made plain to all its employees that any further breaches of editorial standards might be considered as disciplinary matters. In addition, the senior manager with

overall responsibility for compliance on BBC 6 Music, the BBC 6 Music Head of Programmes, had accepted responsibility and resigned.⁷

'Safeguarding Trust'

- 6.14 In relation to its mandatory training programme, 'Safeguarding Trust', the BBC said that by the end of March 2008 the total number of its staff and freelancers who had completed the course was 19,350. It said that only a few dozen of its staff who had been required to complete the course had failed to do so. It continued that all future recruits to the content production areas of the BBC would be required to complete the course.
- 6.15 The BBC said that independent production companies would be required to certify that all of their staff working on BBC commissions had completed the web-based 'Safeguarding Trust' course, available on the BBC's website at www.bbc.co.uk/safeguardingtrust. It said that contracts with such companies now contained clauses requiring them to represent and warrant that their staff had completed the course and detailing the sanctions the BBC might impose if they breached this requirement.
- 6.16 The BBC said that the exercise had been costly. It had already spent over £500,000 on creating the course and training its staff and there would be ongoing costs in operating and maintaining its internal and public websites.

External Efforts

- 6.17 The BBC said that it had undertaken a programme of inquiry into the nature of public trust in broadcasting and the Director General had summarised the findings in a speech delivered on 15 January 2008⁸. The BBC had also taken part in a joint Ofcom/ BBC Trust seminar on 26 November 2007, at which it had been represented by the Director General. Other BBC Executive Board members and senior managers had also been present.

The BBC Trust

- 6.18 The BBC submitted that it was also regulated by the BBC Trust, which had exercised its powers in respect of the breaches. The BBC Trust had requested a number of actions by the BBC Executive and had endorsed the approach taken in the Director General's Action Plan. Later, the BBC Trust had commissioned an independent evaluation of the Action Plan. The BBC said that the findings of this evaluation, which took account of the Trust's requests and the BBC's extensive actions, had been published on 9 May 2008⁹. It submitted that its conduct had been subject to the regulatory oversight and requirements of the BBC Trust and that the Trust's evaluation amounted to a regulator's approval of the BBC's response to the editorial breaches.

⁷ The BBC provided further information on the disciplinary action it had taken when it addressed the Committee at a hearing on 17 June 2008. See paragraph 8.13 below.

⁸ http://www.bbc.co.uk/pressoffice/pressreleases/stories/2008/01_january/15/trust.html

⁹ http://www.bbc.co.uk/bbctrust/research/editorial_standards.html

Sanctions

- 6.19 The BBC submitted that it had at all times co-operated with Ofcom's investigation.
- 6.20 The BBC reiterated that it had suspended all competitions across all networks on 18 July 2007, thereby ensuring that no further breaches of Rule 2.11 of the Code could take place.
- 6.21 The BBC said that it wished to make a number of general comments on the issue of compensation:
- The BBC reiterated that in all but one of the cases, PRS had not been used and it had not received any revenue from the affected competitions;
 - The BBC said that it had made efforts to compensate the audience where the BBC had retained the relevant data, but that it had no means to identify or contact entrants to the affected competitions, other than by sending a reply to entries submitted by text message. If that reply did not elicit a further response, the BBC said that it simply had no means of taking the matter further;
 - In relation to the cases where refunds had been offered (including *Liz Kershaw*), the BBC said that the take-up rate had been low. It noted from published sanctions decisions that there had been a very low take-up rate for the compensation offered by ITV plc;
 - The BBC said that it could have offered general compensation to anyone who had approached the BBC, but that it would have had no way of verifying that these individuals had entered the affected competitions. It said that this would have potentially exposed the BBC and licence fee payers' money to claims which might not be warranted or might be fraudulent; and
 - The BBC noted from published sanctions decisions that where commercial broadcasters had had a similar lack of data or where they had received few responses to offers of compensation, they had made donations to charity. The BBC stated that any payment it made to charity would have to be funded from the licence fee and, under its Agreement with the Secretary of State for the Department of Culture, Media and Sport, it had no ability to make charitable donations. Furthermore, the BBC said that any donation to charity would not, in fact, be compensating those audience members who had been harmed financially. It said that the purpose of a charitable donation for commercial broadcasters had been to divest themselves of profits where restitution could not be made to the relevant viewers.

Referral to the Content Sanctions Committee

- 7.1 It was considered that, taking all the circumstances into account and, in particular, the severity and repeated nature of the breaches and the resulting harm caused to the audience overall, the breaches were sufficiently serious and repeated to warrant the consideration of the imposition of a statutory sanction.

- 7.2 Therefore, in accordance with Ofcom's outline procedures for consideration of statutory sanctions in content and content-related cases, the case was referred to the Committee.

Sanctions Hearing

- 8.1 Ofcom's Content Sanctions Committee ("the Committee") held a hearing on 17 June 2008, at which the BBC was given the opportunity to make oral representations before the Committee decided whether the breach warranted the imposition of a statutory sanction and, if so, of what type(s) and at what level(s).
- 8.2 The Committee was addressed by Mark Byford (BBC Deputy Director General) and James Eadie QC (Counsel), with evidence supplied by Lesley Douglas (Controller, BBC 6 Music), David Jordan (Director of Editorial Policy and Standards), Philip Abrams (Complaints Director, Editorial Complaints Unit) and Alexis Hawkes (BBC Legal Advisor).

The BBC's general representations on the cases

- 8.3 The BBC restated that what had happened in these programmes was completely unacceptable and it recognised that the BBC had let down its audiences, "got it wrong" and that trust with the audience had been broken. It continued that these cases went to the absolute fundamental values of the BBC, which were integrity, trust and being straight with the audience. It said that its audiences were entitled to be able to trust what they saw or heard and to receive programmes that were made with integrity and that did not deceive them. The BBC said that whenever the audience entered its competitions, even if it was "a bit of fun for small prizes or as a chance of bit of a bonus for giving money to charity", the competitions had to be run absolutely fairly. All the entries had to count, the winner(s) had to be picked fairly and the prize(s) had to go to a real viewer or listener. It acknowledged that in the programmes under consideration by the Committee this had not happened.
- 8.4 The BBC said that, to some extent, it had been caught out by the speed of change in the industry. Within BBC programmes, the use of competitions using phones, texts and emails had grown rapidly in recent years, as technology allowed the BBC to connect with its audiences in new ways. It said that interactivity and, especially, interactive competitions were an area of particular risk and that when a competition was conducted there were a number of serious and important editorial issues to be considered. It acknowledged that, in production terms, competitions could go wrong very quickly. Production staff who had not thought a competition through beforehand might have to deal with problems very quickly, in circumstances where problems needed to be addressed with clarity of thought and the right decisions taken straight away.
- 8.5 It said that in the programmes under consideration by the Committee, those involved had not understood or properly focused on either the true nature of the risks or the seriousness of the decisions that they were taking. The relevant individuals had thought that they were doing the right things or, at least, acceptable things, such as "keeping the show on the road" and providing entertainment. They had failed to understand that by putting production values first, they were actually breaching the audience's trust. The

BBC said that although it now appreciated the editorial challenges in competitions “in the round”, it had failed to do so and had not done enough to make sure that all those involved with competitions knew how to avoid the risks and what to do when those risks turned into reality.

- 8.6 The BBC re-emphasised that it was completely unacceptable “always and without exception” to solve a broadcasting problem by breaching the fundamental, unalterable principle of straight-dealing with the audience and telling them the truth. The BBC continued that it had had policies in place during the relevant period, and that it was not saying that the relevant Producers had not been aware of the rules, its Editorial Guidelines and the Code. However, given the scale of the problems that had been uncovered, it believed the key message (that it was never acceptable to breach trust with the audience, whatever the circumstances) had not got through to all areas. With hindsight, it said that it had not done enough to train everyone in how to use interactivity properly and to apply the guidelines properly, which was why, as a first step, it had put 20,000 people (all its creative programming staff and freelancers) through its “Safeguarding Trust” course, because trust was absolutely crucial.
- 8.7 The BBC said that it did not believe that anyone working within the BBC had an appetite for deliberate deception. However, it accepted that the programme-makers in the cases before the Committee, who made wrong decisions, albeit sometimes under pressure, should have told their managers, and that those managers should have escalated the matter further.
- 8.8 The BBC did not wish to leave Ofcom in any doubt regarding the seriousness with which it had taken these matters and said that it believed the steps it had taken and the standards that it demanded from everyone at the BBC made that clear. The BBC reiterated that it accepted each of the cases in question were serious contraventions of the Code and its own Editorial Guidelines. It accepted the imposition of financial penalties in all eight cases before the Committee and that it should broadcast a statement of Ofcom’s findings in seven of the eight cases. It continued that the cases before the Committee were “a heavy hammer blow”, damaging to the reputation of the BBC as the most trusted public service broadcaster in the United Kingdom, which it said was a damning punishment in itself. The BBC said that it had spent a great deal of time, energy and effort over the past year reviewing, examining and reflecting on what to do about the breaches. It had put new mechanisms in place and believed that it had done a very substantial amount to minimise the risks of recurrence of similar breaches.
- 8.9 The BBC asked the Committee to bear in mind that none of the incidents was profit-led and that it had not made money from any of them. In addition, the programme-makers had not made any money for the BBC or for themselves from the affected competitions and had not taken home any prizes. Some of them had thought they were doing the right thing, such as making better programmes or helping charities. The BBC said that whilst these were not excuses, it made it harder to criticise the motives of someone who genuinely considered they were doing the best for a charity. Whilst this did not make what occurred right, the BBC considered that it deserved some understanding.
- 8.10 The BBC stated that its senior management had taken the issues it had identified extremely seriously. It accepted that the failures included serious

management failures: (i) a failure to ensure that the fundamental principle of straight dealing with the audience got through to all those involved in production with sufficient clarity; (ii) a failure to appreciate that interactive competitions, in particular, carried very significant risks of things going wrong; and (iii) a failure to have systems in place that would have ensured escalation of problems of the kind that had occurred to more senior levels of management. It said that it had realised it needed to take a “very careful look” at all its programming across all its services. As a consequence, the two trawls of its programming had been thorough and wide-ranging. Under the leadership of the BBC’s Editorial Standards Board, the BBC had gone over all its compliance procedures, created a new Competition Code of Conduct, developed detailed additional guidance on competitions and launched a new in-house centre of expertise for telephony. The BBC submitted that all and each of these actions demonstrated that it had known it was not dealing with a small failure; it was a big problem that needed major review and reform.

8.11 In summarising what had occurred as a consequence of the matters coming to light, the BBC stated that:

- senior managers had investigated the problem programmes;
- there had been disciplinary action against a number of staff;
- all phone and interactive competitions had been suspended while procedures were rethought, reconsidered and rewritten and staff were retrained;
- every member of staff and 2,000 freelancers who were working in the creative programming area were put through the “Safeguarding Trust” workshops (the biggest training programme ever undertaken by the BBC);
- staff contracts and contracts with external suppliers were rewritten; and
- the BBC structure had been changed so that there was a senior manager on every divisional board with specific responsibility for editorial compliance and co-ordination.

8.12 The BBC said that it had told every member of staff that the kind of lapses that it had seen were “absolutely unacceptable” and that it would not tolerate them. It continued that everyone who was responsible for its output knew now, and better than they used to, that breaching trust with the audience would not be tolerated.

8.13 The BBC confirmed that it had taken disciplinary action in relation to every case before the Committee and that the matters had been taken seriously. It said that a range of disciplinary procedures had taken place within the BBC and that the “punishments” ranged from a verbal warning, a written warning, a final written warning and to what the BBC described as “left employment. However, for reasons of confidentiality it was unable to provide more specific details to the Committee.

8.14 In relation to a number of the cases before the Committee, the BBC submitted that the relevant programme-makers had not appreciated that they were running a competition. It said that there was now a definition of a

“competition” within its guidelines and that alertness to competitions and the issues they raised had been heightened as a result of the steps it had taken.

- 8.15 Although it accepted, in principle, the imposition of a financial penalty in each of the cases before the Committee, the BBC submitted that the appropriate level of financial penalty was important. The reasons for imposing a financial penalty were, in its submission, two-fold. First, to incentivise the person on whom the financial penalty was imposed to seek to ensure that the breach was not repeated and, secondly, to act as a deterrent for others. The BBC submitted that there was no suggestion that it was any part of Ofcom’s function to “punish”. The BBC believed it had demonstrated in a concrete way to Ofcom that it needed no further incentive to “put its house in order.” It submitted that acting as a deterrent for others “should be very much a lesser purpose”. Furthermore, that it was hard to see how any fine imposed on the BBC would impact on any other organisations, given the BBC’s particular circumstances. Finally, the BBC said that because it was funded by the licence fee and not by commercial motivation, it was driven (and those who worked within it were driven) by reputation. Therefore, whilst it had accepted, in principle, that directions to broadcast statements of Ofcom’s findings were appropriate in seven of the eight cases before the Committee, such directions were the most serious “punishments” that could be imposed on the BBC.
- 8.16 The BBC concluded its general representations to the Committee by stating that its senior managers (the Director General, the Deputy Director General (as Chair of the Editorial Standards Board), all the divisional directors and the channel controllers) had to continue to ask questions, be open to discussion, run proper compliance systems and review them regularly, think carefully about the implications of what their teams were doing and ensure their staff were properly trained and had the right principles. It said that every single person who made a BBC programme had to be absolutely sure that it was produced with “impeccable integrity” because otherwise its audiences, the licence-fee payers, understandably would not give the BBC their trust.

The BBC’s specific representations regarding *Liz Kershaw*

- 8.17 The BBC fully acknowledged that the issues in *Liz Kershaw* were serious, principally because of the number of instances involved, the repetitious nature of the breaches and the degree of pre-meditation involved. It apologised for the breaches.
- 8.18 The Controller of 6 Music said that, prior to the BBC’s two “trawls”, she had been made aware by the Head of Compliance for Radio 2 that there was not 100% adherence within BBC 6 Music to filling out compliance forms. She had spoken to the BBC 6 Music Head of Programmes twice. The first time she had done so, adherence to compliance procedures had improved and then it fell away again. At that point, the Controller of 6 Music went to see the BBC Director of Audio & Music to see whether she could restructure to put the Head of Compliance for Radio 2 in charge of compliance for BBC 6 Music.
- 8.19 The BBC said that it had put systems in place to ensure that any instances where individuals either naively or wilfully wished to or did break the rules would be captured before they affected the audience. The Controller of 6 Music now had a weekly compliance meeting with the Head of Compliance, at which Ofcom findings, BBC editorial policy updates and other issues were discussed. The “managed programme risk register” was also reviewed to

consider any programmes which might have legal issues. The minutes of the weekly compliance meetings were distributed to all BBC 6 Music Executive Producers and any issues arising out of the meetings were taken to the Director of Audio & Music's meeting with all Controllers. A bi-annual "health check" was also implemented to review all daily and weekly regular programmes on Radio 2 and BBC 6 Music and examine how the programmes were made, their quality and their editorial standards. The Head of Compliance also met with every new joiner to go through the Editorial Guidelines in order to ensure that they understood the implications of them all.

- 8.20 In response to questions from the Committee, the BBC said that BBC 6 Music's Head of Programmes had been appointed because of his "breadth of background and knowledge". He had held various senior positions in BBC radio, commercial radio, BBC television production and ITV television production. The BBC said that he had been "across" the Editorial Guidelines; the Controller of 6 Music confirmed that she had discussed them with him "a lot" and that he had been trained on them. The Controller of 6 Music was the Head of Programmes' line manager, but she had received no feedback from anyone who worked within or dealt with 6 Music or from the audience that there was anything wrong. The Head of Programmes had since resigned having accepted responsibility for what had occurred.
- 8.21 In response to questions from the Committee in relation to the new Producer for *Liz Kershaw*, who stopped the practice of faking winners in pre-recorded editions of the programme in September 2006, the BBC said that it did not know why the Producer had not referred the matter upwards. There were many avenues that the Producer could have gone through.
- 8.22 The BBC said that on the vast majority of occasions on which a 'winner' had been faked in *Liz Kershaw*, those involved had been one Producer, and the Head of Programmes who had resigned. In terms of those staff who posed on air as 'winners', the BBC said that they would not necessarily have appreciated that they were being asked to be fake 'winners'; they might have thought that they were being used off air to "pilot" programme items.
- 8.23 On questioning from the Committee, the BBC accepted that the apology broadcast in relation to *Liz Kershaw* was "not as strong as it should have been" and was personalised in a way that it should not have been. The Controller of 6 Music said that she had not signed off the apology and that she had not been aware of it until she heard it on air.
- 8.24 The BBC said that *Liz Kershaw* (i.e. the programme) was no longer on air and that the presenter was now presenting a completely different show with a different format, which was transmitted live and did not include any competitions.

Sanctions Decision

- 9.1 In reaching its decision, the Committee considered carefully all the written and oral submissions made by the BBC. The Committee decided, for the reasons set out below, to impose a financial penalty and to issue a direction requiring the BBC to broadcast a statement of Ofcom's findings on BBC 6 Music in relation to *Liz Kershaw* in a form to be determined by Ofcom on two specified occasions. In deciding on an appropriate and proportionate level of

financial penalty in this case, the Committee had regard to Ofcom's Penalty Guidelines¹⁰.

The seriousness of the breach

- 9.2 Having considered all the evidence and the BBC's representations, the Committee found that the breaches in this case were serious, deliberate and repeated, as set out at paragraphs 9.3 to 9.10 below.
- 9.3 The breaches of the Code involved pre-meditated and repeated faking of 'winners' in pre-recorded editions of *Liz Kershaw*, which were then passed off as live. This occurred over a lengthy period of time. Listeners were actively encouraged to enter the *Ruff Ruff* and *Listening Post* competitions in the programmes as broadcast, despite the fact that the production team knew that those listeners who entered would have no chance of winning. The BBC deceived its audience in this way on up to 17 occasions. The BBC exists to serve the public interest¹¹ and the Code breaches constituted a very significant breakdown in the trust between the BBC and its audience. In this regard, the Committee noted the BBC's unequivocal acceptance that, in this case, the breaches of the Code (and its own fundamental principle of straight dealing with its audience) were "absolutely unacceptable".
- 9.4 Breaches of the Code that result in the audience being deceived or materially misled have always been considered by Ofcom (and Ofcom's predecessor regulators) to be amongst the most serious breaches that can be committed by a broadcaster. The trust that the audience places in a broadcaster is essential to their relationship and the audience is entitled to believe when entering into a relationship of trust with a broadcaster that their trust is not misplaced. This is particularly pertinent in the case of the most long-standing public service broadcaster, the BBC, which has a relationship of trust with its radio audiences going back over 80 years.
- 9.5 The Committee was extremely concerned by the repeated instances of pre-meditated, deliberate deception in this case over a period spanning nearly 17 months. The breaches involved the faking of 'winners' in pre-recorded programmes and the production team taking steps in advance of pre-recording to identify members of BBC production staff to pose as 'winners'. The programmes as broadcast included encouragements to listeners to enter the *Ruff Ruff* and *Listening Post* competitions. Over 1,000 SMS entries were made to the affected competitions by listeners, in the belief that they would stand a fair and equal chance of winning. In fact, because 'winners' were faked by the production team and the programmes were pre-recorded, those listeners who entered the affected competitions stood no chance of winning. Furthermore, prior to the Code coming into force on 25 July 2005, there had been up to six earlier instances where competition 'winners' were faked in pre-recorded editions of *Liz Kershaw*.

¹⁰ Ofcom's Penalty Guidelines are available at <http://www.ofcom.org.uk/about/account/pg/>. Section 392 of the Act requires Ofcom to prepare and publish a statement containing guidelines it proposes to follow in determining the amount of any penalties imposed by Ofcom, which Ofcom must have regard to in setting any penalty.

¹¹ Clause 3(1) of the Royal Charter. The Royal Charter, together with the Agreement between the BBC and the Secretary of State for Culture, Media & Sport, provides the constitutional basis for the BBC.

- 9.6 Unlike other broadcasters, the BBC is funded directly by the public through the licence fee and it is not a commercial organisation. The telephony systems and methods in this case were designed to maintain SMS costs at the lowest practical levels for listeners and the BBC did not profit from the text messages. However, whilst the BBC did not receive any money from the interaction with listeners, entry to the affected competitions still entailed some expenditure on the part of listeners. They had to pay the cost of a local rate SMS to their mobile phone service provider in order to enter. Therefore, entry to the competitions by SMS was not “free” and, when the competitions were not conducted fairly, this was to the financial detriment of those listeners who had entered.
- 9.7 The Committee was extremely concerned that the decisions to fake ‘winners’ in pre-recorded editions of *Liz Kershaw* were pre-meditated and were taken with the full knowledge of the production team and the presenter. On the basis of the BBC’s evidence, it appeared that other 6 Music production staff, who posed as ‘winners’, might have believed that they were recording a pilot, “off-air” item, rather than posing as competition ‘winners’ in an item to be broadcast on air.
- 9.8 The Committee noted that the BBC 6 Music Head of Programmes, whose experience in television and radio production was extensive, had been responsible for ensuring the editorial compliance of programmes broadcast on BBC 6 Music. The Controller of 6 Music had relied upon the Head of Programmes to carry out this function and, ultimately, this reliance had been misplaced. In this case, the Head of Programmes repeatedly failed to complete (or properly complete) the compliance forms for pre-recorded programmes that were required, during the relevant period, under the BBC’s compliance procedures. On some occasions, he failed to complete the compliance forms at all and, on other occasions, he signed off the compliance forms without listening to the programmes. The Committee noted that the Controller of 6 Music had become aware that the Head of Programmes’ adherence to the BBC’s compliance procedures was not “anywhere near 100%” as a result of routine compliance “spot checks”, before the BBC’s “trawls”. Accordingly, she had started to take action. However, the Committee noted that the action taken had not prevented the occurrence of further failures.
- 9.9 Whilst the Committee was impressed by the honest and frank admissions made by the Controller of 6 Music in the hearing held on 17 June 2008, it was of the view that the BBC’s oversight of BBC 6 Music, BBC 6 Music’s Head of Programmes and the individual programmes broadcast had clearly been inadequate during the relevant period. Moreover, there were insufficient systems in place between May 2005 and January 2007 to prevent or identify the unfair conduct that occurred in this case, over a substantial period of time. The Committee was very concerned about these shortcomings and welcomed the steps taken by the BBC to seek to address the issues and prevent recurrence of similar breaches.
- 9.10 The Committee noted the Controller of 6 Music’s unequivocal acceptance that the apology broadcast in relation to *Liz Kershaw* did not adequately describe the unfair conduct that occurred and that it was personalised by the presenter in a way that it should not have been. However, the Committee was also concerned by the Controller’s admission that she had not known Liz Kershaw was going to broadcast an apology for the unfair conduct, which indicated at

the least a failure of communication, if not a lack of proper control over the presenter and production team.

- 9.11 The Committee was of the view that due to the serious, deliberate and repeated nature of the breaches and compliance failures and the resulting harm caused to those listeners who entered the affected competitions in *Liz Kershaw* and the audience overall, this was a very serious case, involving a fundamental breach of the audience's trust. Therefore, the Committee considered that the imposition of a significant financial penalty was warranted.

Precedent

- 9.12 In considering the appropriate level of financial penalty, the Committee took account of its previous decisions in cases relating to the unfair conduct of interactive competitions, as well as the specific representations made by the BBC. The Committee was satisfied that its decision as to the appropriate and proportionate level of financial penalty to be imposed in this case was consistent with previous cases, and reflected the particular circumstances of this case.

Incentive

- 9.13 In setting the level of financial penalty, the Committee took into account the fact that the BBC had taken wide-ranging steps to investigate and learn lessons from the breaches. In particular, in this case, the Committee noted that the BBC had sought to remedy the breaches by offering compensation to all those who had entered the affected competitions by SMS. However, the Committee also noted that one of the purposes of imposing of a financial penalty was to deter both the party involved and third parties from committing future breaches. In this case, the Committee considered that a significant financial penalty would represent an appropriate incentive to ensure compliance in the future.

Other specific criteria

- 9.14 The Committee considered that the following specific criteria, as set out in Ofcom's Penalty Guidelines, were relevant to adjust the starting figure of any financial penalty:
- 9.15 The Committee noted that the BBC had received no money from the affected competitions. It acknowledged the steps taken by the BBC to seek to compensate SMS entrants to these competitions.
- 9.16 The Committee considered that the harm to those listeners who entered the affected competitions and the audience of *Liz Kershaw* overall was significant. The audience was deceived and materially misled by the BBC's repeated and deliberate unfair conduct of the *Ruff Riff* and *Listening Post* competitions over a period of some 17 months. This was a very substantial breach of the audience's trust.
- 9.17 The Committee noted that the BBC is not a commercial broadcaster. Nonetheless, it is a large organisation with significant resource available to it.
- 9.18 The Committee noted that the breaches of the Code were not caused by any third party or any circumstances beyond the control of the BBC. It further

noted that no penalty in respect of the same conduct had been imposed already by Ofcom or another body.

- 9.19 The Committee noted that BBC 6 Music is a free-to-air digital radio service established relatively recently and considered that audience expectations in relation to its output are, perhaps, not as high as those for mainstream, long-established BBC radio channels such as BBC Radio 1, 2, 3 and 4. Notwithstanding this, the Committee considered that the audience generally has high expectations for output transmitted by the BBC and, furthermore, it noted that Liz Kershaw is an experienced presenter with a large following.
- 9.20 The Committee also noted that *Liz Kershaw* was a mainstream Saturday morning radio show broadcast between 1000 and 1300 and that, between April 2004 and March 2006, it had also been broadcast on Sundays.

Level of penalty

- 9.21 Taking all these factors into account (and in light of the severity and repeated and deliberate nature of the breaches), the Committee considered that the 'starting figure' for any financial penalty should be significant. In considering the level of penalty, the Committee took into account that the maximum financial penalty that could be imposed on the BBC on any occasion was £250,000.

Factors tending to increase the level of penalty

- 9.22 The Committee then considered whether any of the factors set out in the Penalty Guidelines (or any other relevant factors) aggravated or tended to increase the level of any financial penalty it might impose.
- 9.23 The contraventions occurred repeatedly. The faking of 'winners' in the *Ruff Ruff* and *Listening Post* competitions had been repeated in up to 17 pre-recorded editions of *Liz Kershaw* over approximately 17 months. These Code breaches occurred in the context of up to six other pre-recorded editions of *Liz Kershaw* broadcast between 1 May and 24 July 2005 in which the BBC had identified the same conduct¹².
- 9.24 The Committee was strongly of the view that the BBC's senior management ought to have been aware that the breaches of the Code were occurring or would occur. Oversight, scrutiny and audit of the actions of BBC 6 Music's Head of Programmes, who was responsible for the editorial compliance of programmes on the channel, was insufficient. More specifically, he repeatedly failed to complete the compliance forms for pre-recorded programmes that were required under the BBC's compliance procedures at the relevant time.
- 9.25 The Committee considered that it was clear that, at the relevant time, BBC 6 Music's management, risk management and compliance process and procedures were inadequate to ensure the fair conduct of listener interactive competitions and compliance with the Code. How the listener interactive competitions were conducted was entirely within the control of the *Liz Kershaw* production team. Because the BBC 6 Music Head of Programmes

¹² The Code came into force on 25 July 2005. The BBC was not required to comply with the previous code (the Radio Authority Programme Code 2002), which was in force at the time of broadcast of the pre-recorded programmes between 1 May and 24 July 2005.

did not complete the necessary compliance forms (or did not complete them properly) the repeated fakery of competition ‘winners’ in pre-recorded editions of *Liz Kershaw* went on un-checked for approximately 17 months. This was, in the Committee’s view, wholly unacceptable.

Factors tending to decrease the level of penalty

- 9.26 The Committee then considered whether any of the factors set out in the Penalty Guidelines (or any other relevant factors) in its view might limit or decrease the level of any financial penalty it might impose.
- 9.27 The Committee noted that the BBC had suspended all phone-in competitions and voting on 18 July 2007, while it implemented a comprehensive review of the relevant Editorial Guidelines and processes. Furthermore, the Committee noted that the BBC had carried out wide-ranging investigations into PRS and instances involving “audience deception” in its programmes.
- 9.28 The Committee noted that the BBC had put and was putting extensive new processes and procedures in place to seek to ensure that the same or similar failures were not repeated, including:
- Enhancing training programmes on editorial compliance across the BBC and implementing a mandatory training programme for staff called “Safeguarding Trust”;
 - Issuing new guidance and creating a new Code of Conduct in relation to competitions;
 - Setting up a new “Interactive Advice and Compliance Unit”;
 - Broadcasting fewer competitions on BBC 6 Music, with the expectation that no pre-recorded programmes should carry competitions; and
 - Using BBC 6 Music’s weekly team meetings as an official forum to update staff on any new editorial advice and any issues that have arisen.
- 9.29 The Committee also noted that the BBC had sought to compensate SMS entrants to the affected *Liz Kershaw* competitions.
- 9.30 The Committee noted that the BBC had made public the fact that there had been serious editorial failings in a number of its programmes, including *Liz Kershaw* and that it had publicly apologised in general terms for the issues identified by its “trawls”. It also noted that the presenter had voluntarily broadcast an apology on 21 July 2007. Whilst the Committee noted the fact that a specific apology in relation to *Liz Kershaw* had been broadcast, it was of the view (and noted that the BBC accepted) that the apology was “not as strong as it should have been” and was personalised in a way that it should not have been. Therefore, the specific apology did not, in the Committee’s view, limit or tend to decrease the level of any financial penalty it might impose.
- 9.31 The Committee noted that the BBC had taken wide-ranging disciplinary action in relation to the issues identified in this case and others. In particular, the Committee noted that the 6 Music Head of Programmes had resigned after

accepting responsibility for the serious editorial breaches that occurred in this case and two others. Finally, the Committee noted that the BBC had cooperated in a full and frank manner with Ofcom's investigation.

Conclusion

- 9.32 Cases where a broadcaster deceives or materially misleads its audience, whether knowingly or not, have always been considered to be amongst the most serious breaches of the Code by Ofcom (and its predecessor regulators).
- 9.33 The Committee was of the view that the breaches were pre-meditated and that they constituted a very significant breakdown in the essential relationship of trust between a long-established public service broadcaster and its audience. Listeners had entered the affected *Liz Kershaw* competitions and invested trust in the BBC in the belief that they would have a fair and equal chance of winning. This trust was wholly misplaced.
- 9.34 This case involved very serious failures by the BBC to comply with a basic requirement to conduct competitions fairly. This not only breached the Code, but also the BBC's own Editorial Guidelines and its fundamental principle of straight dealing with its audiences. As a result, the BBC repeatedly deceived its audience as to the conduct of an interactive listener competition on up to 17 occasions over approximately 17 months.
- 9.35 The Committee was very concerned by the inadequacy or ineffectiveness of the BBC's compliance, risk management and management procedures to ensure the fair conduct of the *Ruff Ruff* and *Listening Post* competitions in this case. In this regard, the Committee welcomed the steps the BBC had taken to seek to address these inadequacies.
- 9.36 The Committee noted that the BBC had publicly apologised in general terms on several occasions for the breaches that occurred in this case and others. The Committee also noted the apology broadcast voluntarily by the presenter on 21 July 2007. It was of the view that the specific apology broadcast by the presenter was inadequate.
- 9.37 In setting the level of the financial penalty to be imposed in this case, the Committee specifically took into account the fact that BBC 6 Music is a free-to-air digital radio service established relatively recently and that audience expectations in relation to its output are, perhaps, not as high as those for mainstream, long-established BBC radio channels. It also had specific regard to the fact that *Liz Kershaw* was a mainstream Saturday morning radio show broadcast between 1000 and 1300 and that, between April 2004 and March 2006, it had also been broadcast on Sundays.
- 9.38 As set out above, in setting the level of the financial penalty to be imposed, the Committee had regard to the extensive steps taken by the BBC to seek to prevent recurrence and to the steps taken to seek to compensate SMS entrants to the affected competitions. The financial penalty could have been higher had the BBC not taken such wide-ranging action.
- 9.39 This is by far the most serious case in relation to the BBC that the Committee has considered to date. It involved active, pre-meditated decisions to transmit competitions which listeners were encouraged to enter but which they would

stand no chance of winning. Despite the fact that this occurred on numerous occasions over a long period, BBC senior management were unaware of the repeated deception of listeners until it was revealed during the BBC's investigations into PRS and audience deception during 2007.

- 9.40 While recognising that any fine would be taken from monies paid by the public (the licence fee payer), the Committee noted that Parliament had decided that it was appropriate in certain circumstances for Ofcom to impose a financial penalty on the BBC (though at a lower threshold to other Public Service Broadcasters, i.e. set at a maximum of £250,000 on any occasion).
- 9.41 Having considered the relevant facts as outlined above and all the representations made by the BBC, the Committee decided to impose a financial penalty on the BBC of **£115,000** (payable to HM Paymaster General) which it considered to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed the BBC to broadcast a statement of its findings in relation to this case on BBC 6 Music in a form to be determined by Ofcom on two specified occasions.

Content Sanctions Committee

Philip Graf
Millie Banerjee
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30 July 2008