

## Sanction: Decision by Ofcom To be imposed on DM Digital Television Limited

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For material broadcast on 25 November 2011 and 4 December 2011<sup>1</sup>.

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

DM Digital Television Limited (the "Licensee") in respect of its service **DM Digital** (TLCS-873).

**For:**

Breaches of the Broadcasting Code (the "Code")<sup>2</sup> in respect of:

Rule 5.4: "Programmes in the services...must exclude all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy (unless that person is speaking in a legislative forum or in a court of law). Views and opinions relating to the provision of programme services are also excluded from this requirement".

Rule 5.5: "Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole".

**On:**

*POAF Conference* ("the Programmes"), 25 November 2011 at 21:00 and 4 December 2011 at 21:00

**Decision:**

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

To issue a direction to the Licensee directing it to broadcast a statement of Ofcom's findings in this sanctions case, on a date and in a form to be determined by Ofcom.

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<sup>1</sup> The material broadcast on DM Digital and found in breach of Ofcom's Broadcasting Code is detailed in Broadcast Bulletin 205, dated 8 May 2012. See:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb205/obb205.pdf> .

<sup>2</sup> The version of the Code which was in force at the time of the broadcasts took effect on 28 February 2011. All references to the Code in this Preliminary View are therefore references to that version of the Code (unless otherwise specified) which can be found at:

<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>

## **Executive Summary**

1. DM Digital is a television channel primarily aimed at an Asian audience in the UK, which features broadcasts in a number of languages including English, Punjabi, Urdu, Sindhi, Kashmiri and Hindi. The service is also received in the Middle East and parts of Asia.
2. In Ofcom's finding ("the Finding") published on 8 May 2012 in Broadcast Bulletin 205<sup>3</sup>, the Executive found that material broadcast by the Licensee breached Rules 5.4 and 5.5 of the Code.
3. The Finding related to two programmes which included coverage of a conference, held in the UK, of the Pakistan Overseas Alliance Forum ("POAF")<sup>4</sup>. In this sanctions paper these broadcasts are referred to, for the sake of convenience, as *POAF Conference* or "the Programmes". Each programme was in Urdu and was approximately three hours in duration.
4. In the Finding, Ofcom stated that the breaches of Rules 5.4 and 5.5 were so serious as to warrant the consideration of a statutory sanction.
5. In relation to Rule 5.4, the Finding stated that in both Programmes Dr. Liaqat Malik, the Chief Executive and Chairman of the Licensee was expressing his views on matters of political and industrial controversy and matters relating to current public policy in contravention of Rule 5.4 of the Code<sup>5</sup>.
6. The Finding also found that both Programmes gave one-sided views on matters of political and industrial controversy and matters relating to current public policy, in contravention of Rule 5.5 of the Code. In particular:
  - in the programme broadcast on 25 November 2011, there were a number of statements that Ofcom considered to be highly critical of some of the policies and actions of the MQM<sup>6</sup>, including allegations of violence and killings sanctioned by the MQM, that had taken place in Karachi during 2011, but did not reflect alternative viewpoints, such as the viewpoint of the MQM as regards its policies and actions as the governing political party in Sindh province, especially in relation to the allegations that it had sanctioned violence and killings in Karachi; and

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<sup>3</sup> See Finding at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb205/obb205.pdf>

<sup>4</sup> POAF describes itself as a "non political and non religious welfare organisation for overseas Pakistanis and dedicated to welfare of all overseas Pakistanis". See <http://poafglobaltrust.com/>. The POAF website contains various references to and appears to have close links to DM Digital and its Chairman, Dr. Liaqat Malik: see e.g. <http://www.poafglobaltrust.com/DrLiaqatMalikChairmanProfile.htm>; and <http://www.poafglobaltrust.com/DMDigitalNetworkProfile.htm>

<sup>5</sup> As Ofcom's Guidance Notes make clear, as Dr. Liaqat Malik, is a "company officer" and a person that holds "editorial responsibility for the service", he would be considered the "person providing the service".

<sup>6</sup> Muttahida Qaumi Movement ("MQM"), currently the governing political party in the Pakistani province of Sindh.

- in the programme broadcast on 4 December 2012, there were a number of statements that Ofcom considered to be highly critical of NATO and the US Government and their policies towards Afghanistan and Pakistan, but did not reflect alternative viewpoints, such as the viewpoint of NATO or the US Government, with regard to their policies and actions relating to Pakistan.

### **Summary of Ofcom's Sanction Decision**

7. Ofcom considered that this breach was sufficiently serious to warrant the imposition of a sanction on the Licensee in this case.
8. In accordance with Ofcom's Procedures for the consideration of statutory sanctions in breaches of broadcast licences ("the Sanctions Procedures")<sup>7</sup>, and having considered all the evidence and all the representations made to it by the Licensee, Ofcom has decided for the reasons set out in paragraphs 62 to 64 below that it would be appropriate to impose a financial penalty.
9. Having regard to the serious nature of the Code breach, the Licensee's representations and the Ofcom Penalty Guidelines ("the Penalty Guidelines")<sup>8</sup>, Ofcom decided it was appropriate and proportionate in the circumstances to impose a financial penalty of **£20,000** on the Licensee in respect of the breaches of Rules 5.4 and 5.5.
10. In addition, Ofcom decided it should issue a direction to the Licensee to broadcast a statement of Ofcom's findings, on a date and in a form to be determined by Ofcom.
11. Ofcom is concerned by the very weak compliance record of the Licensee and expects the Licensee to take immediate and effective steps now to redress this position. In addition to the statutory sanctions imposed, Ofcom puts DM Digital on notice as follows. Ofcom will visit the Licensee at its premises to agree how to improve its understanding of, and compliance with, all applicable legal and regulatory requirements. Ofcom will review the Licensee's compliance arrangements periodically as appropriate and necessary to ensure they are fit for purpose and the Licensee's content will also be monitored for a period of three months to ensure it remains compliant with the Code

### **Legal Framework**

#### **Communications Act 2003**

12. 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)).

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<sup>7</sup> Ofcom's Procedures for the consideration of statutory sanctions in breaches of broadcast licences. These procedures came into effect on 1 June 2011.

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

<sup>8</sup> See: Ofcom's Penalty Guidelines published 13 June 2011.

<http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

13. Ofcom has a specific duty under section 319 of the Act to set such standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives set out in section 319(2). These objectives include that the impartiality requirements of section 320 are complied with (section 319(2)(c)).
14. Under section 320 of the Act, Ofcom has a duty to require licensees to observe special impartiality requirements in relation to matters of political or industrial controversy and matters relating to current public policy. These requirements include the exclusion from programmes of all expressions of the views or opinions of the person providing a service on such matters (section 320(1)(a)); and the preservation of impartiality, in particular in relation to matters of major political or industrial controversy and major matters relating to current public policy (section 320(6)).
15. In performing its duties, Ofcom is required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, to have regard to a number of other considerations including the need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g)).

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

16. In addition to section 3(4)(g) of the Act, 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”).
17. Article 10 of the Convention provides for the right to freedom of expression. Applied to broadcasting, this right 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). The exercise of these rights may be subject only to conditions and restrictions which are “prescribed in law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary” (Article 10(2) of the Convention). Article 10 protects not only the substance of ideas or information expressed, but also the form in which they are conveyed. In some circumstances, this may include a polemical or aggressive tone. On the other hand, some types of expression, such as racist literature and expressions of political support for terrorism, have been regarded as deserving of lesser (or no) protection against restrictions.
18. Ofcom must exercise its duties in light of this right and not interfere with the exercise of these freedoms in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

#### **Ofcom Broadcasting Code**

19. Standards set by Ofcom in accordance with section 319 and 320 of the Act are set out in the Code which has been drafted in the light of the Human Rights Act 1998 and the Convention.

20. Accompanying Guidance Notes to each section of the Code are published and from time to time updated on the Ofcom website. The Guidance Notes are intended to assist broadcasters to interpret and apply the Code<sup>9</sup>.
21. The relevant Code rules in this case are set out in full on the first page of this Decision.

### **Remedial action and penalties**

22. Under section 325 of the Act, a licence for a programme service issued by Ofcom under the Broadcasting Act 1990 or 1996 must include conditions for securing that the standards set under section 319 are observed by the licensee. In the case of a television licensable content service (“TLCS”) licence, Condition 6 of the licence requires the licensee to ensure that the provisions of any Code made under section 319 are complied with. The Licensee holds a TLCS licence.
23. Ofcom’s powers to take action for the contravention of TLCS licence conditions are set out in sections 236 to 239 of the Act insofar as relevant to the case.
24. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or a statement of Ofcom’s findings (or both), or not to repeat a programme which was in contravention of a licence condition.
25. Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence. The maximum penalty which may be imposed under section 237 is whichever is the greater of £250,000 and 5 per cent of the qualifying revenue on each occasion that a breach of the licence has occurred (whether as a result of a breach of the Code or another Licence Condition).
26. Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence where a licensee is in contravention of a condition of a TLCS licence or direction thereunder.

### **Background – The Finding**

27. In the Finding, the Executive found that material broadcast by the Licensee breached Rules 5.4 and 5.5 of the Code. Further, in the Finding<sup>10</sup> Ofcom stated that the breaches in this case were serious and warranted consideration of a statutory sanction.
28. The Decision related to two programmes which included coverage of a conference, held in the UK, of the Pakistan Overseas Alliance Forum (“POAF”) <sup>11</sup>. In this paper these broadcasts are referred to for the sake of convenience as *POAF Conference* or “the Programmes”. Each programme was in Urdu and was approximately three hours in duration.

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<sup>9</sup> See <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/> : for relevant extracts of the Broadcasting Code and Ofcom’s Guidance Notes on the Code.

<sup>10</sup> See Finding at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb205/obb205.pdf>

<sup>11</sup> POAF describes itself as a “non political and non religious welfare organisation for overseas Pakistanis and dedicated to welfare of all overseas Pakistanis”. See <http://poafglobaltrust.com/> The POAF website contains various references to and appears to have close links to DM Digital and its Chairman, Dr. Liaqat Malik: see e.g. <http://www.poafglobaltrust.com/DrLiaqatMalikChairmanProfile.htm>; and <http://www.poafglobaltrust.com/DMDigitalNetworkProfile.htm>

29. In the Finding, Ofcom stated that the breaches of Rules 5.4 and 5.5 were so serious as to warrant the consideration of a statutory sanction.
30. Rule 5.4 of the Code requires programmes to exclude all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy (unless that person is speaking in a legislative forum or in a court of law). The Finding found Dr. Liaqat Malik, the Chief Executive and Chairman of DM Digital, expressed his views on the policies and actions of the current coalition government of Pakistan led by the Pakistan People's Party ("PPP")<sup>12</sup>. In Ofcom's view these were a matter of political and industrial controversy and a matter relating to current public policy.
31. Under the Act, the person who is to be treated as providing the service is the person with general control over which programmes and other services and facilities are comprised in it. In accordance with this, Ofcom's published Guidance to Rule 5.4 states that this rule refers to the licensee, the company officers and those persons with an editorial responsibility for the service or part of the service rather than, for example, the programme presenter. As Chief Executive and Chairman of DM Digital, Dr Liaqat Malik is a "company officer" and a person that holds "editorial responsibility for the service" and was therefore the person providing the service. Therefore, by the channel broadcasting his views and opinions on a matter of political and industrial controversy and a matter relating to current public policy, Rule 5.4 of the Code was breached.
32. The Finding also found that both Programmes gave one-sided views on matters of political and industrial controversy and matters relating to current public policy, in contravention of Rule 5.5 of the Code. In particular:
- in the programme broadcast on 25 November 2011, there were a number of statements that Ofcom considered to be highly critical of some of the policies and actions of the MQM<sup>13</sup>, including allegations of violence and killings sanctioned by the MQM, that had taken place in Karachi during 2011, but did not reflect alternative viewpoints, such as the viewpoint of the MQM as regards its policies and actions as the governing political party in Sindh province, especially in relation to the allegations that it had sanctioned violence and killings in Karachi; and
  - in the programme broadcast on 4 December 2012, there were a number of statements that Ofcom considered to be highly critical of NATO and the US Government and their policies towards Afghanistan and Pakistan, but did not reflect alternative viewpoints, such as the viewpoint of NATO or the US Government, with regard to their policies and actions relating to Pakistan.

Further, Ofcom was not aware of any evidence in the Programmes, or in a series of programmes taken as a whole (i.e. more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience) of the necessary alternative viewpoints being broadcast. For example:

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<sup>12</sup> The PPP is the majority party in Pakistan's coalition government at national level, and the MQM is a junior partner in that government.

<sup>13</sup> Muttahida Qaumi Movement ("MQM"), currently the governing party in the Pakistani province of Sindh.

- regarding the programme broadcast on 25 November 2011, the views of the MQM were not reflected in relation to the matters of political and industrial controversy and matters relating to current public policy in question, i.e. the MQM's policies and actions as the governing political party in Sindh province, especially in relation to the allegations that it had sanctioned violence and killings in Karachi; and
- concerning the programme broadcast on 4 December 2011, the views of NATO and the US Government were not reflected, in relation to the matters of political and industrial controversy and matters relating to current public policy in question i.e. the policies and actions of NATO or the US Government relating to Pakistan.

33. In the Finding Ofcom stated that the breaches of Rules 5.4 and 5.5 were particularly serious and warranted the consideration of a statutory sanction.

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

34. As set out in paragraph 1.10 of the Sanctions Procedures, the imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly<sup>14</sup> or recklessly breached a relevant requirement.

35. In this case, Ofcom issued a preliminary view ("Preliminary View") that DM Digital had seriously breached the Code and that Ofcom was minded to impose a statutory sanction in the form of a substantial financial penalty and to direct DM Digital to broadcast a statement of findings on this sanctions case, on a date and in a form to be determined by Ofcom. Ofcom sent a copy of this Preliminary View to DM Digital on 17 May 2013 at the same as giving DM Digital the opportunity to provide written and oral representations ("the Representations") to Ofcom. DM Digital provided its written representations ("Written Representations") to Ofcom on 10 June 2013. The Representations are summarised in paragraphs 37 to 45.

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

### **Licensee's Representations**

37. The Licensee accepted that the breaches of Rules 5.4 and 5.5 took place and Dr Malik accepted that his participation in the Programmes was not compliant with the Code, but the Licensee argued that any penalty imposed on the Licensee should reflect the following:

- the breaches were not deliberate and could not have been foreseen as efforts were made to invite representatives with other viewpoints to share their opinions on the programmes but they failed to attend;

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<sup>14</sup> A repeated breach of a relevant requirement, would include, for example: a repeat of the breach of the same requirement as has already been recorded; repetition of the same or similar conduct as that which earlier contravened a requirement; or multiple breaches of other requirements.

- the views expressed by the contributors on the programme were their personal views and not those of the Licensee;
- greater editorial awareness of “due impartiality” has now been implemented and further compliance measures are now in place “to prevent such a reoccurrence” of breaches of Section Five of the Code;
- the Licensee has recognised that “greater training needs are apparent for its broadcasters in the form of the questions they ask so as not to express any view which could be taken as the views of the broadcaster”; and
- the Licensee is willing to work with the regulator “to achieve these ends”;

Background to the Code Breaches

38. DM Digital made written and oral representations (the “Representations”) on Ofcom’s Preliminary View, which included supporting evidence in the form of various letters to organisations inviting them to contribute to the programme. Ofcom took careful account of the Representations in reaching its final decision. Below Ofcom sets out the principal and relevant points made by DM Digital and Ofcom’s response to those points, as appropriate.
39. With regard to the breach of Rule 5.4, in its Written Representations the Licensee did not specifically address the issue of the participation of the DM Digital Chief Executive and Chairman, Dr Malik, in the Programmes. However, the Licensee did argue, in its Written Representations, that the views expressed during the Programmes were “entirely those of the speakers views [sic] and not those of DM Digital.” During its oral representations, Ofcom was concerned that the Licensee did not acknowledge that the participation of Dr Malik, as the Chairman of DM Digital and a speaker in the Programmes, constituted an example of a “person providing the service” (i.e. the Chief Executive and Chairman of the licensed service) giving his views on issues of political controversy on-air in a way which was prohibited by Rule 5.4. With the benefit of hindsight, DM Digital did accept that it was not appropriate for the Chairman to express his views on these issues in the programmes but said that the view at DM Digital at the time of the breaches was that other guests had been invited to appear and therefore they had been given the opportunity to present their views if they wished to. Ofcom remained concerned that DM Digital still had not demonstrated a clear understanding of the requirements of Rule 5.4.
40. With regard to the breach of Rule 5.5, the Licensee explained that efforts were made to invite individuals and NATO to represent their views at the POAF conference but they chose not to attend. Evidence of the invitation letters were sent to Ofcom as part of the Licensee’s written representations and these were referred to during the oral representations. Further, during oral representations, DM Digital explained that representatives “from the other side” were invited to attend the conference and were actually present in the audience. DM Digital would have been happy for them “to air their views”, “but they did not come forward to air those views.” The Licensee said it was therefore not possible to ensure the other side of the argument was presented and the Licensee “can only do so much in relation to giving an unbiased or a balanced view if parties are willing to participate.”
41. Whilst acknowledging the efforts made by the broadcaster to invite other parties, Ofcom remained deeply concerned that DM Digital was of the view that it could ensure the Programmes complied with Section Five of the Code simply by inviting individuals to attend with alternative viewpoints. DM Digital argued that “any reasonable broadcaster” would still broadcast a programme even if they could not get individuals representing alternative viewpoints to attend and it was “a legitimate broadcasting tool” used by many

broadcasters to say on-air that an individual was invited but could not attend. The Licensee further explained that should such a similar situation arise now, where invitations were sent for representatives to participate in a programme and they chose not to attend then the programme would not be broadcast at all.

42. Ofcom made clear to the Licensee that if an alternative viewpoint needs to be represented on a programme to ensure compliance with Section Five, this aim can be achieved in a variety of ways other than not broadcasting the programme at all, for example, through the remarks or questions of a presenter. Staff should therefore be adequately trained to know what is required to ensure compliance. DM Digital accepted this was the case.
43. Finally, the Licensee said in its Representations that it only recently moved into a modest profit and that the imposition of “a severe financial penalty would have the effect of revocation.” The Licensee provided several written references from various individuals as part of its Written Representations in support of the DM Digital channel and set out the important and unique role which it considers DM Digital plays in the community as an “interfaith” service, helping to foster understanding between faiths and supporting Muslim women and young Muslims.

#### Improvements to Compliance

44. The Licensee explained that since the breaches were recorded DM Digital had taken steps to “tighten” compliance in the following ways: the staff responsible for these breaches had been dismissed and replaced by a Head of Compliance with legal training and broadcasting experience and further new staff have been taken on and trained by the Chief Executive and Chairman of DM Digital, Dr Malik; multi-lingual staff have been employed within the “control room” so that there is knowledge of the range of languages and dialects broadcast by contributors; and the time delay on live broadcasts has been extended from five seconds to 10 seconds to enable more time for staff to respond to problematic live content. DM Digital argued that the “mistakes” that were made had been acknowledged and as a result compliance procedures had now been tightened.
45. The Licensee summarised its current compliance arrangements to underline how, in its opinion, they are now robust. In terms of live programming, Dr Malik, the general manager and the compliance manager review any scripts before broadcast to ensure that no broadcast content is likely to raise issues under the Code. Whilst the live programme is being broadcast, the compliance manager will watch as the material is played out and take any necessary action to intervene or stop the broadcast if required. In terms of pre-recorded material, the Licensee stated that all material is viewed first by Dr Malik and then by at least three other members of staff, and if the programme raises issues with regard to the Code it will be rejected or edited to ensure it is suitable. Regular monthly meetings take place with compliance staff and presenters where Ofcom’s Broadcast Bulletins are reviewed and regular training takes place.

#### **Seriousness of the breaches**

46. Ofcom considered that the breaches of Rules 5.4 and 5.5, taken together, were sufficiently serious and repeated to warrant the imposition of a statutory sanction for the reasons set out below.

#### Rule 5.4

47. Section 320(1)(a) of the Act requires the exclusion from programmes of the views or opinions of the person providing a licensed service on matters of political and industrial

controversy and matters relating to current public policy. This requirement is reflected in Rule 5.4 of the Code and exists to help maintain the due impartiality of a licensed service. Any breach of this rule must be regarded as potentially serious. This is because it shows - as in this case - that the due impartiality of a licensed service has been compromised by the views of the licence holder on a matter of political or industrial controversy or a matter of current public policy being included in the service. Ofcom considers that to preserve due impartiality and maintain the editorial independence of the service, it is a fundamental principle that the services it licenses must not be used by licence holders as platforms for their views on matters of political or industrial controversy or current public policy.

48. Rule 5.4 prohibits the broadcast of a licensee's own views and opinions on any matter of political and industrial controversy and any matter relating to current public policy. In this case Dr. Liaqat Malik (the Chief Executive and Chairman of the licensed service) was the "person providing the service and his views and opinions on the policies and actions of the current coalition government of Pakistan led by the PPP were included in content that was broadcast. These breaches were serious because Dr. Liaqat Malik clearly used his position as the Chief Executive and Chairman of the licence holding body to influence the editorial content of the service by appearing on the service to criticise the policies and actions of the Pakistani Government.
49. Second, we considered that the breaches were serious because they highlighted the Licensee's clear lack of understanding about the requirements of Rule 5.4. For example, as the Finding made clear, the Licensee sought to justify the statements made by Dr. Liaqat Malik on air in relation to Rule 5.4, by stating that the views he expressed were his own and not those of the Licensee. In Ofcom's view, this lack of understanding was underlined in the Licensee's Representations (see paragraphs 37 to 45 above). The Code breaches and submissions by the Licensee to Ofcom in relation to this case demonstrate a fundamental misunderstanding of Rule 5.4 and weakness in the Licensee's compliance processes.
50. Third, these breaches of Rule 5.4 were repeated. They related not to one programme but to two separate broadcasts.

#### Rule 5.5

51. As detailed in paragraphs 27 to 33 above, the Programmes gave one-sided views on matters of political and industrial controversy and matters relating to current public policy, in contravention of Rule 5.5 of the Code. These breaches were serious because they occurred in a sustained manner over the course of two three hour programmes, and also repeated to the extent that the programme of 4 December 2011 was a repeated breach of Rule 5.5 by the Licensee following the programme broadcast on 25 November 2011 and illustrated the Licensee's failure to understand and ensure compliance with its duty to preserve due impartiality.
52. In Ofcom's view, the seriousness of the breaches of Rule 5.5 was highlighted by the Licensee's fundamental lack of knowledge about and understanding of the requirements of Rule 5.5 at the time of the broadcasts. For example, this was evidenced by the Licensee suggesting to Ofcom during the course of Ofcom's investigation of this case and consideration of sanction that the programme broadcast on 25 November 2011 was compliant with Rule 5.5 because:
  - the Licensee had issued invitations to persons and groups holding alternative viewpoints to attend;

- the views of the MQM were reflected because Dr. Zulfiqar Mirza “is a PPP minister...[and] in Pakistan, the PPP is in coalition government with the MQM”. However, just because Dr. Zulfiqar Mirza is a member of a coalition that contains the MQM, did not, in Ofcom’s view, mean that his appearance in the programme ensured that the viewpoint of the MQM was reflected in the programme (as regards its policies and actions as the governing political party in Sindh province, especially in relation to the allegations that it had sanctioned violence and killings in Karachi). That this was so was underlined by the fact that Dr. Zulfiqar Mirza strongly criticised the MQM during the programme; and
- members of the MQM were in the audience featured in the programme. However, the fact that members of the MQM were in the audience, and audience members were “encouraged” to express their views, did not ensure that due impartiality was preserved under Rule 5.5 because their views were not reflected in the broadcasts.

#### Rules 5.4 and 5.5

53. Reflecting the Licensee’s manifest lack of knowledge and understanding of how to apply Rules 5.4 and 5.5, the extent and seriousness of the breaches was compounded by the Licensee’s wholly insufficient compliance arrangements. This is evidenced by the following facts:

- the Licensee previously breached Section Five of the Code in 2010<sup>15</sup> and at that time Ofcom raised concerns about DM Digital’s fundamental lack of understanding of due impartiality and its processes for ensuring compliance with the Code yet the Licensee did not indicate during their Representations that it had taken any steps to improve its compliance in this area at this time;
- the Licensee had also provided no evidence to Ofcom to show that it had adequate procedures or systems in place in November and December 2011 for ensuring compliance with the due impartiality requirements of the Code; and
- Ofcom had already imposed two statutory sanctions in the form of financial penalties on the Licensee for the service DM Digital in 2008 and 2010; and also recorded numerous breaches of the Code, other Ofcom codes, and the BCAP Code between 2008 and 2012, and of the broadcaster’s Ofcom licence (see paragraph 71 below).

54. Finally, Ofcom noted that the service, DM Digital, broadcaststo a wide geographic area (throughout the UK as well as abroad) and significant numbers of viewers could have viewed the material.

#### **Imposition of sanctions**

55. As mentioned in paragraphs 22 to 26 above, Ofcom’s powers to take action are set out in sections 236 to 239 of the Act insofar as relevant to the present case.

56. In view of the factors set out above, Ofcom considers that the breaches are sufficiently serious to warrant the imposition of a statutory sanction. The following paragraphs set out the enforcement action we have considered and the sanctions to be imposed.

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<sup>15</sup> See: <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb167/>

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

57. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or a statement of Ofcom's findings (or both), if Ofcom is satisfied that the contravention can be appropriately remedied by such a direction. This may include a direction not to repeat the programme.
58. Ofcom considers that directing the Licensee to broadcast a statement of Ofcom's findings (as provided by Ofcom and at a date and time stipulated by Ofcom) is an appropriate way to remedy the breaches. It is potentially harmful for a broadcaster to transmit biased material in breach of the due impartiality rules because it undermines the editorial independence of the broadcaster concerned. It is therefore appropriate for the broadcaster to transmit a statement of findings as a way, publicly, to: correct that potential harm; to bring the breaches, and Ofcom's concern and robust action in response to the breaches, to the attention of DM Digital's viewers; and, demonstrate that the complaint to Ofcom, which drew Ofcom's attention to the issue of DM Digital broadcasting material which was not duly impartial, has been fully and properly addressed.
59. Ofcom considers that on its own, a direction to broadcast a statement of Ofcom's findings in this sanctions case would not be a sufficient statutory sanction, given the seriousness of the breaches in this case. Such a statement by itself would not act as an effective disincentive to discourage the Licensee from repeating similar breaches of the Code or other licensees from contravening the Code in a similar manner. However, Ofcom considers that a direction to broadcast a statement of Ofcom's findings in combination with a financial penalty would act as an effective deterrent to discourage the Licensee from repeating the sanctionable content or other licensees from contravening the Code in a similar manner.
60. It is Ofcom's view that a direction not to repeat the Programmes found in breach would – either by itself or in combination with other sanctions – not be an appropriate or sufficient statutory sanction in the circumstances. This is because the programmes related to a particular political situation at the time of the original broadcasts.
61. In light of the above, and taking into account the broadcaster's right to freedom of expression and the information currently available, Ofcom's decision is that it would not be proportionate to recommend revocation of the Licence as an appropriate statutory sanction in respect of the current breaches under consideration.

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

62. Under section 237 of the Act, the maximum level of financial penalty that can be imposed on the holder of a TLCS licence is £250,000 or five per cent of the licensee's qualifying revenue relating to its last complete accounting period falling within the period for which its licence has been in force, whichever is greater.
63. 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.
64. The Penalty Guidelines state that: "Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement." In reaching its

Decision, Ofcom has taken full account of the need to ensure that any penalty acts as a deterrent and has also taken account of the specific factors set out at paragraph 4 of the Penalty Guidelines<sup>16</sup>.

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

65. In considering the appropriate and proportionate amount of a financial penalty for each of the breaches, Ofcom took account of relevant factors in accordance with the Penalty Guidelines, as set out below:

#### 66. Deterrence

The Penalty Guidelines make clear that the “central objective of imposing a penalty is deterrence” and that “the amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement”.<sup>17</sup> Ofcom considered that a financial penalty was necessary to ensure not only that the Licensee fully understands the very serious nature of the Code breaches recorded against it but implements all necessary improvements to ensure compliance with the Code in future. Ofcom also considers that a financial penalty is needed to send a message to other licensees underlining the need to understand and respect the Code, and, in particular, the requirement to comply with Rules 5.4 and 5.5 of the Code.

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

It was not possible to point to any specific actual harm to viewers or consumers caused by the contraventions of Section Five of the Code. However, it is Ofcom’s view that material which is not duly impartial and editorially independent is potentially harmful to viewers. Rule 5.4 is derived directly from statute and has a clear purpose in the public interest: holders of a television licence must not compromise the editorial independence of their channel by being allowed to express their views on the service about controversial political and current public policy issues. DM Digital was used by Dr. Liaqat Malik as a platform for his own critical views of the policies and actions of the Pakistani Government, and this was clearly harmful to the editorial independence of this channel.

With regards to Rule 5.5 Ofcom noted that the content and views expressed during the programme broadcast on 25 November 2011 were highly critical of some of the policies and actions of the MQM<sup>18</sup>, including allegations of violence and killings sanctioned by the MQM, that had taken place in Karachi during 2011. Further, Ofcom considered the content and views expressed during the programme broadcast on 4 December 2011 to be highly critical of NATO and the US Government and their policies towards Afghanistan and Pakistan. The Licensee repeatedly failed to provide alternative viewpoints to viewers on different matters of political and industrial controversy and matters relating to current public policy. In Ofcom’s view, this failure to ensure that alternative viewpoints were appropriately reflected in the Programmes so as to preserve due impartiality would have been potentially harmful to viewers. The due impartiality rules in Section Five exist to ensure that audiences are appraised of all relevant views on issues of political or industrial controversy and issues of current public policy. Therefore

<sup>16</sup> See: Ofcom’s Penalty Guidelines published 13 June 2011: <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

<sup>17</sup> See Paragraph 3 of the Penalty Guidelines

<sup>18</sup> Muttahida Qaumi Movement (“MQM”), currently the governing party in the Pakistani province of Sindh.

it would have been to viewers' detriment that the broadcaster in this case failed to broadcast a range of viewpoints on important policy and political matters.

68. The duration of the contravention

Ofcom noted in the Finding that the recorded breaches of Rules 5.4 and 5.5 were in relation to material broadcast in two programmes of about three hours each in duration broadcast on 25 November 2011 and 4 December 2011.

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

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

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

Ofcom is not aware of any specific steps taken by the Licensee to remedy the consequences of this contravention.

However, the Licensee did state in its oral representations that since the breaches were recorded DM Digital had taken steps to "tighten" compliance in the following ways: the staff responsible for these breaches had been dismissed and replaced by a Head of Compliance with legal training and broadcasting experience and further new staff have been taken on and trained by the Chief Executive and Chairman of DM Digital, Dr Malik. In addition, the Licensee stated that now, before it proceeds with any programme which may raise issues relating to Section Five of the Code, it would ensure contributors with a range of viewpoints were available to take part or otherwise the programme would not be made.

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

There is a considerable history of contraventions by the holder of the licence for DM Digital between 2008 and 2012, two of these breaches so serious that they led to Ofcom imposing a statutory sanction (see below). The breaches concerned principally the Code but also related for example to other Ofcom codes, the BCAP Code, and conditions in the broadcaster's Ofcom licence.

*Breaches where Ofcom imposed a statutory sanction:*

Sanction against DM Digital Television Network Limited, DM Digital, 28 October 2008<sup>19</sup>: Sanction of £15,000 and a direction to broadcast a statement of Ofcom's findings for breaches of Rule 2.1, Rule 9.4, Rule 9.5, Rule 9.6, Rule 9.7 of the July 2005 version of the Code<sup>20</sup>. This case concerned a programme featuring Dr Professor Mohammed Jamil Jilu ("Dr Jamil"), a homeopath, who made potentially dangerous claims regarding the successful use of his homeopathic medicines to treat and cure serious conditions including cancer, diabetes and hepatitis. The programme was also used as a platform for promoting Dr. Jamil's homeopathic practice.

<sup>19</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/dmdigital.pdf> (published 28 October 2008).

<sup>20</sup> See relevant extracts of the July 2005 version of the Code <http://stakeholders.ofcom.org.uk/binaries/broadcast/Broadcast-Code-2005.pdf>.

Sanction against DM Digital Television Limited, DM Digital, 20 July 2010<sup>21</sup>: Sanction of £17,500 and a direction to broadcast a statement of Ofcom's findings for breaches of the CAP (Broadcast) TV Advertising Standards Code ("the BCAP Code")<sup>22</sup>. This case concerned the broadcast of an advertisement offering advice to individuals based on faith-based practices for personal problems which was likely to exploit vulnerable viewers. The advertisement caused financial harm of £1,150 to one viewer and potential harm to viewers in general.

*Other breaches recorded by Ofcom also under consideration for sanction:*

Breaches recorded on 8 May 2012 in Broadcast Bulletin 205:

-Breach of Rule 3.1 (material likely to encourage or incite the commission of crime or lead to disorder must not be included in television and radio services) - *Rehmatul Lil Alameen*, DM Digital, 9 October 2011

*Breaches recorded by Ofcom which were not considered for sanction:*

Breaches recorded on 10 March 2008 in Broadcast Bulletin 104<sup>23</sup>:

-Breach of Code Rules: 1.14 (the most offensive language must not be broadcast before the watershed) and 1.16 (prewatershed use of offensive language) – Yasmin, DM Digital, 15 October 2007.

Breaches recorded on 10 November 2008 in Broadcast Bulletin 121<sup>24</sup>:

-Breach of Code Rule: 10.10 (Any use of premium rate numbers must comply with the Code of Practice issued by PhonepayPlus formerly) – Premium rate services promoted in programme content, DM Digital, various dates in 2007.

-Breach of Code Rules: 10.2 (advertising and programming must be kept separate); 10.4 (undue prominence); 10.5 (product placement is prohibited); and breach of Rules on the Amount and Distribution of Advertising ("RADA")<sup>25</sup>: 1.2 (only 12 minutes of advertising per hour) – Good Morning Manchester, DM Digital, 11 and 12 February 2008.

Breaches recorded on 23 November 2009 in Broadcast Bulletin 146<sup>26</sup>:

-Breach of Code Rule: 10.2 (advertising and programming must be kept separate); and Breach of Ofcom's Code on the scheduling of television advertising ("COSTA")<sup>27</sup> Rule: 4 (only 12 minutes of advertising per hour) – Scrolled advertisement for Manchester College of Higher Education and Media Technology, DM Digital, 19 and 20 August 2009.

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<sup>21</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/dmdigitaltd.pdf> (published 20 July 2010).

<sup>22</sup> See relevant extracts of the BCAP Code (<http://www.cap.org.uk/The-Codes/BCAP-Code/BCAP-Code-pdfversions.aspx>)

<sup>23</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb104/bb104.pdf>

<sup>24</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb121/issue121.pdf>

<sup>25</sup> See: <http://stakeholders.ofcom.org.uk/consultations/rada/summaryl>.

<sup>26</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb146/Issue146.pdf>

Breach recorded on 7 December 2009 in Broadcast Bulletin 147<sup>28</sup>:

-Breach of TLCS Licence Condition 11 (Retention and production of recordings) – Baba Ji Online, DM Digital, 13 May 2009.

Breach recorded on 21 December 2009 in Broadcast Bulletin 148<sup>29</sup>:

-Breach of Code Rule: 2.13 (flashing images) – Flashing images on programme content, DM Digital, 22 September 2009.

Breach recorded on 8 February 2010 in Broadcast Bulletin 151<sup>30</sup>:

-Breach of TLCS Licence Condition 12 (Provision of Information – revenue returns).

Breach recorded on 10 May 2010 in Broadcast Bulletin 157<sup>31</sup>:

-Breach of TLCS Licence Condition 11 (Retention and production of recordings) – Chai Sitaroon Ki, DM Digital, 18 February 2010.

Breach recorded on 19 July 2010 in Broadcast Bulletin 162<sup>32</sup>:

-Breach of Code Rule: 2.8 (astrology and life-changing advice) – Chai Sitaroon Ki, DM Digital, 18 February 2010.

Breach recorded on 11 October 2010 in Broadcast Bulletin 167<sup>33</sup>:

-Breach of Code Rule: 5.5 (due impartiality) – Assan Na Kashmir, DM Digital, 20 July 2010.

Breaches recorded on 8 November 2010 in Broadcast Bulletin 169<sup>34</sup>:

-Breach of Code Rule: 9.13 (sponsorship messages must not contain advertisements);  
and

-Breach of TLCS Licence Condition 11 (Retention and production of recordings) – Islamabad Grill sponsorship of Zaika he Zaika, DM Digital, 10 July 2010.

Breach recorded on 20 February 2012 in Broadcast Bulletin 200<sup>35</sup>:

-Breach of Code Rule: 9.22(a) (sponsorship messages must not contain advertisements)  
– Zaika he Zaika, DM Digital, 12 November 2011.

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<sup>27</sup> See: <http://stakeholders.ofcom.org.uk/binaries/consultations/rada08/statement/costa.pdf> for relevant extracts of COSTA.

<sup>28</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb147/Issue147.pdf>

<sup>29</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb148/Issue148.pdf>

<sup>30</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb151/Issue151.pdf>

<sup>31</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb157/Issue157.pdf>

<sup>32</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb162/issue162.pdf>

<sup>33</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb167/issue167.pdf>

<sup>34</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb169/issue169.pdf>

<sup>35</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb200/obb200.pdf>

*Breaches recorded by the Advertising Standards Authority not leading to sanction:*

Breaches published on 15 February 2012<sup>36</sup>:

Breaches of BCAP<sup>37</sup> Rules: 1.2 (social responsibility); 3.1 (misleading advertising); 3.12 (exaggeration); and 11.3 (medicines, medical devices, treatments and health) – Advertisement for Islamic ‘Taweez’ lockets.

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

Ofcom is not aware of any appropriate steps taken by the Licensee to prevent the contraventions. In particular, as mentioned in paragraphs 37 to 43 above, the Licensee has continued to demonstrate a fundamental lack of understanding of the due impartiality requirements of the Code, in relation to the contraventions of Rule 5.4 in the Programmes, and the contravention of Rule 5.5 in the programme broadcast on 25 November 2011.

Indeed, Ofcom highlighted to DM Digital during its oral representations that it had been responsible for a similar breach of Rule 5.5 published on 11 October 2010<sup>38</sup> when the fundamental importance of representing a range of viewpoints on matters of political or industrial controversy and matters relating to current public policy was set out.

Yet, the Licensee did not identify any steps that it had taken following the recording of this previous breach decision in 2010 to improve its compliance arrangements with Section Five of the Code. Further, Ofcom noted that the Licensee had advised the regulator following the two previous sanctions decisions recorded against it by Ofcom that it was taking action to improve its compliance. In Ofcom’s view the Licensee’s failure to adequately address shortcomings in its compliance processes over time played a significant part in the circumstances which gave rise to the breaches.

73. *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*

Ofcom acknowledges in this case that the breaches were not deliberate. However, Ofcom was of the view that these breaches arose through negligence and a failure to understand the requirements of Section Five of the Code on the part of senior management. In particular, the Licensee did not have adequate compliance arrangements in place and its failure to understand the requirements of Section Five was illustrated throughout the Licensee’s representations to Ofcom. For example, with regard to the breach of Rule 5.4, we noted that the Licensee, in its Written Representations suggested that the views presented in the Programmes were those of the speakers “and not those of DM Digital” even though one of those speakers was Dr. Malik the Chief Executive and Chairman of DM Digital.

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<sup>36</sup> [http://www.asa.org.uk/ASA-action/Adjudications/2012/2/DM-Digital-Television-Ltd/SHP\\_ADJ\\_167626.aspx](http://www.asa.org.uk/ASA-action/Adjudications/2012/2/DM-Digital-Television-Ltd/SHP_ADJ_167626.aspx)

<sup>37</sup> See: <http://www.cap.org.uk/The-Codes/BCAP-Code/BCAP-Code-pdfversions.aspx>.

<sup>38</sup> See: Broadcast Bulletin 205, dated 8 May 2012.  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb205/obb205.pdf>

This view was highlighted again during the oral representations when Dr. Malik himself explained that he considered that it was acceptable, at the time of the breaches, to express his views because he had invited others to present their views even though these individuals chose not to attend.

Also, with regard to Rule 5.5, the Licensee suggested during its oral representations that it considered its obligation to ensure a range of viewpoints were presented on matters of political controversy was satisfied by inviting guests to contribute, even if those guests chose not to participate. The Licensee did not demonstrate to Ofcom in any of its Representations, any understanding of the editorial steps it might take to ensure programmes meet the requirements of due impartiality, in the absence of guests taking part in a programme and presenting a necessary alternative viewpoint.

The Licensee's apparently casual approach to compliance is of great concern to Ofcom, particularly in view of the previous compliance history of DM Digital which included a previous breach of Section Five of the Code in 2010. Ofcom considers that the lack of any effective compliance arrangements at DM Digital in November and December 2011 was seriously negligent. The senior management was well aware from previous breach findings recorded against the Licensee, and two statutory sanctions that Ofcom had previously imposed on it of its obligations under the Code and the need to have robust compliance procedures in place.

Ofcom still has concerns regarding the Licensee's understanding of and compliance with Section Five of the Code. In particular, Ofcom notes from the Licensee's oral representations that it has decided not to proceed with the broadcast of any programme where in the Licensee's view the due impartiality rules are engaged but it is not possible to secure guests with a range of viewpoints. This suggests that the Licensee does not appreciate that under Section Five there are a variety of ways in which alternative viewpoints can be represented in a programme other than by contributors with those alternative viewpoints necessarily taking part in the broadcast. Ofcom is also concerned that the Chairman of DM Digital, who as Chief Executive was in charge of overall compliance and training at all times in the period running up to and at the time of the breaches, continues to be undertaking this role now. This is because the Licensee has demonstrated a very weak compliance record overall throughout the extensive period that he has had overall responsibility for compliance (see paragraph 71 above), and not taken numerous opportunities to improve its compliance arrangements sufficiently.

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

Timely steps were not taken to end the contraventions which consisted of repeated breaches of Rules 5.4 and 5.5 in two lengthy (three hour ) programmes.

Despite a previous breach of Rule 5.5 by the Licensee in 2010 (and various other contraventions of the Code), compliance arrangements were not improved and sufficient measures were not taken before broadcast to ensure both the 25 November and 4 December 2011 programmes complied with Section Five. Indeed, it became clear to Ofcom from the Licensee's representations that the Licensee's understanding of the application of Section Five was defective at the time of the breaches and in some respects remained so at the date of the sanctions hearing (see paragraphs 37 to 43 above).

Further, Ofcom noted that the Licensee did not admit any of the breaches when initially asked to comment by Ofcom at the time of the original investigation which led to the Finding. Dr Malik in fact told Ofcom at that time that the "complaint should be dismissed

because it is without merit.” It was evident that the Licensee did not become aware of the contraventions until well after the programmes had been broadcast when Ofcom produced its Preliminary View on the Code breaches. The Licensee therefore did not take any timely steps to end the contravention itself.

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

The Licensee explained its current financial situation and the difficulties posed by the current economic climate which it said were threatening the future of the service. The Licensee provided copies of its recent accounts to support these representations and urged Ofcom not to impose a substantial financial penalty, saying it would lead to the closure of the service. The Licensee also explained that it was a small operation, employing 25 staff, including part-time staff and free-lancers. Taking account of the Licensee’s representations about its size and financial situation Ofcom considered whether the level of penalty was proportionate in all the circumstances.

Ofcom recognised that the penalty must be proportionate taking into account the Licensee’s rights under Article 10 of the Convention. If any financial penalty was to be so high that its effect would be to close a service down, then it might be a disproportionate interference with the Licensee’s and the audience’s right to freedom of expression in particular and exceed the purposes of imposing a penalty. Ofcom therefore took this point into account and carefully weighed it in reaching its decision on the proportionality of the financial penalty.

However, Ofcom noted that according to its Penalty Guidelines: the “central objective of imposing a penalty is deterrence”. The breaches recorded in this case were serious for the reasons explained above (see paragraphs 46 to 52) and arose from what in Ofcom’s view was serious negligence and lack of understanding of the relevant Code rules by the senior management of the broadcaster.

Ofcom is given a specific statutory duty to ensure the special impartiality requirements are respected. Ofcom therefore concluded that any penalty had to reflect the consequences of failing to comply with the relevant Code rules in this area and provide a clear deterrent to other broadcasters. Ofcom carefully assessed all the evidence provided by the Licensee about its current financial situation, including the Licensee’s accounts, the Licensee’s Representations and the Licensee’s responses at the hearing to Ofcom’s questions about sources of funding which had not been apparent before the hearing.

Having weighed all these factors with the utmost care, Ofcom considered that a penalty of £20,000 would be proportionate taking into account all the relevant circumstances, and in particular the need to achieve an appropriate level of deterrence and the serious nature of the Code breach in this case.

**Precedent**

76. In accordance with Ofcom’s Penalty Guidelines, published on 13 June 2011<sup>39</sup>, Ofcom will have regard to any relevant precedents set by previous cases in determining a penalty but may depart from them depending on the facts and context of each case.

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<sup>39</sup> See: <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

77. In this instance, the following precedent case has some relevance to the present case in terms of sanction, because it involved breaches of Rule 5.4 (as well as Rules 5.11 and 5.12). However, this Dama case was based on very different facts and also involved breaches of Rule 2.4.

78. **8 May 2012, Dama (Liverpool) Limited (Aden Live)**<sup>40</sup> – Sanction of £10,000 and a direction to broadcast a statement of Ofcom’s findings, for breaches of Rule 2.4, 5.4, 5.11 and 5.12. This case concerned various programmes broadcast on Aden Live, a service that broadcasts predominantly to a South Yemeni audience. Ofcom concluded that, in relation to Rule 5.4, the Licensee’s views and opinions on the contemporaneous political situation in Yemen, including the policies and actions of the Government of Yemen (that is on a matter of major political controversy and a major matter relating to current public policy), could reasonably be inferred from the contents of its website and its representations. Ofcom considered that those views and opinions were, in turn, expressed in different ways and to varying degrees in the output of the channel, contrary to the requirements of Rule 5.4.

79. There are two other previous sanctions cases concerning breaches of Section Five (in particular Rule 5.12) and Section Six (which cross refers to Section Five), which may have some relevance to the present case – although again their facts were very different.

80. **31 July 2007, Islam Channel**<sup>41</sup> - This case concerned: breaches of Rule 6.6 in relation to 20 separate programmes when the Respect Party electoral candidate Yvonne Ridley hosted her own programme *The Agenda with Yvonne Ridley*; two breaches of Rule 5.5 and one breach of 5.12 in relation to *The Agenda with Yvonne Ridley*; four breaches of Rule 6.6 and breaches of Rule 6.8 and 6.9 in relation to the programmes *Politics and the Media*; and a breach of Rule 5.12 in relation to *Jerusalem: A Promise of Heaven*. Here Ofcom imposed a fine of **£30,000** and a direction to broadcast a statement of Ofcom’s findings for breaches of Rule 6.6, Rule 6.8, Rule 6.9, Rule 5.5, Rule 5.12 and Licence Condition 11 (failure to provide a recording to Ofcom).

81. **8 December 2008, Talksport Limited**<sup>42</sup> - This case concerned comments made by the presenter James Whale on *The James Whale Show* regarding candidates for the 2008 London Mayoral Election which encouraged listeners to vote for Boris Johnson. The case related to an election and therefore Section Six of the Code applied. For this serious breach of Rule 6.1 of the Code, which provides that “the rules in Section Five, in particular the rules relating to matters of major political or industrial controversy and major matters relating to current public policy, apply to the coverage of elections and referendums”, Ofcom imposed on Talksport a penalty of **£20,000** and a direction to broadcast a statement of Ofcom’s findings.

82. Ofcom is satisfied that the level of penalty proposed in this case is consistent with the precedent cases, taking due account of the factors outlined in the Penalty Guidelines and the seriousness of the breaches in this case.

<sup>40</sup> [http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/Aden\\_Live\\_sanctions\\_decisio1.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/Aden_Live_sanctions_decisio1.pdf) (published 8 May 2012).

<sup>41</sup> <http://www.ofcom.org.uk/files/2010/07/islamchannel.pdf> (published 31 July 2007)

<sup>42</sup> See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/talksport.pdf> (published 8 December 2008)

### Cooperation

83. In accordance with the Penalty Guidelines, Ofcom may increase the penalty where a licensee has failed to cooperate with Ofcom's investigation.
84. In Ofcom's view, the Licensee has, in general, been cooperative. For example, it has: provided full representations in response to Ofcom's formal requests for comments with regard to this sanction; it has now accepted that its compliance with regard to these contraventions was not satisfactory; and it has expressed a willingness to take steps to remedy its failure to apply Section Five. Ofcom does not therefore consider it appropriate to increase the penalty on account of a failure to cooperate in this case.

### Conclusion

85. Any financial penalty Ofcom imposes on the Licensee must be appropriate and proportionate to the contravention in respect of which it is imposed. Ofcom's central objective in setting a penalty is deterrence both for the Licensee and other broadcasters. An appropriate penalty would be one that secures this objective (doing so in a proportionate way).
86. As regards the weighting of the factors considered above, it is Ofcom's view that the following factors are of particular importance in the circumstances of this case, and in consideration of the level of penalty to be imposed:

#### Factors which serve to increase the penalty

- (a) the degree of potential harm caused as a result of Dr Malik using the channel as a platform for his views on the policies and actions of the Pakistani Government by transmitting material which failed to provide alternative viewpoints on important policy and political matters so as to preserve due impartiality (see paragraph 67);
- (b) the considerable previous history of code contraventions by the Licensee, including the imposition by Ofcom of two statutory sanctions (see paragraph 71);
- (c) the Licensee's failure to adequately address shortcomings in its compliance processes, over time, which has played a significant part in the circumstances giving rise to the breaches (see paragraph 72);
- (d) the fact that the breach arose through negligence on the part of senior management and a failure to understand the requirements of Section Five of the Code (see paragraph 73); and
- (e) the failure to take timely and effective steps to end the contravention, particularly in view of the failure to improve compliance arrangements following a previous breach of Rule 5.5 (see paragraph 74).

#### Factors which serve to reduce the penalty

- (a) the Licensee referred to steps it had taken to "tighten" compliance following the breaches, including ensuring contributors with a range of viewpoints are available to take part or otherwise the programme would not be made (see paragraph 70); and
  - (b) the Licensee has cooperated with Ofcom during the sanctions process (see paragraph 84).
87. Having regard to all the factors referred to in this Decision and all the Representations from the Licensee, Ofcom's decision is that an appropriate and proportionate sanction would be a financial penalty of **£20,000**.

88. In addition, Ofcom considers that the Licensee should broadcast a statement of Ofcom's findings in this case, on a date and in a form to be determined by Ofcom.
89. Ofcom is concerned by the very weak compliance record of the Licensee and expects the Licensee to take immediate and effective steps now to redress this position. In addition to the statutory sanctions imposed above, Ofcom puts DM Digital on notice as follows. Ofcom will visit the Licensee at its premises to agree how to improve its understanding of, and compliance with, all applicable legal and regulatory requirements. Ofcom will review the Licensee's compliance arrangements periodically as appropriate and necessary to ensure they are fit for purpose and the Licensee's content will also be monitored for a period to ensure it remains compliant with the Code.

**5 July 2013**