

Sanction: Decision by Ofcom Imposed on E Entertainment UK Limited

For material broadcast on 27 December 2011 at 10:00 to 13:00 and 16:00 to 21:00¹.

Consideration of Sanction against:

E Entertainment UK Limited ("E Entertainment") and (the "Licensee") in respect of its service **E! Entertainment (E!)** (TLCS-524).

For:

Breaches of the February 2011 version of Ofcom's Broadcasting Code (the "Code")² in respect of:

Rule 1.3: Children must also be protected by appropriate scheduling from material that is unsuitable for them.

Meaning of "children": Children are people under the age of 15 years.

Meaning of "appropriate scheduling": Appropriate scheduling should be judged according to:

- the nature of the content;
- the likely number and age range of children in the audience, taking into account school time, weekends and holidays;
- the start time and finish time of the programme;
- the nature of the channel or station and the particular programme; and
- the likely expectations of the audience for a particular channel of station at a particular time and on a particular day.

Decision:

To impose a financial penalty (payable to HM Paymaster General) of **£40,000** and;

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

¹ See Broadcast Bulletin 204, dated 23 April 2012 (known as "the Finding"):
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb204/>

² See Broadcasting Code (dated 28 February 2011):
<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>

Case Summary

1. E! is an American celebrity based entertainment service broadcast on cable and satellite platforms in the UK. The licence for the service is held by E Entertainment UK Limited ("E Entertainment") or ("the Licensee")³.
2. In Ofcom's Finding ("the Finding") published on 23 April 2012 in Broadcast Bulletin 204⁴, the Executive found that material broadcast by the Licensee breached Rule 1.3 of the Code.
3. That material comprised of episodes from the series *Girls of the Playboy Mansion* which were broadcast on 27 December 2011 from 10:00 to 13:00 and 16:00 to 21:00 ("the Broadcasts").
4. In the Finding, Ofcom stated that the contravention of Rule 1.3 was serious and that the Licensee was being considered for statutory sanction.
5. The Finding set out specific examples of broadcast material that were in breach of Rule 1.3. Ofcom found that the material in these examples was not appropriately scheduled and resulted in the broadcast of material that was unsuitable for children.
6. In the Finding, Ofcom first considered whether the material was suitable for children. In Ofcom's opinion these episodes of *Girls of the Playboy Mansion* were clearly unsuitable for children. They included prolonged sequences of nudity (albeit with breasts, buttocks and genitals blurred), particularly during the consecutive episodes showing the search for the 55th Playmate glamour model. These sequences featured numerous scenes of the models being filmed as they posed and were photographed during casting sessions for Playboy magazine. In addition, there was a sequence of the lingerie party at the Playboy Mansion which featured numerous scantily clad Playboy glamour models posing for the cameras; and shots of a male stripper wearing a thong thrusting his buttocks in the face of the mother of one of Mr Hefner's girlfriends, with a commentary: "she needed a good ass in her face". The episodes also featured repeated bleeped and masked offensive language throughout, which (taken together with the scenes of nudity) demonstrated in Ofcom's opinion that these programmes contained themes of an adult nature and were aimed at an adult audience.
7. Ofcom then went on to consider whether the material was appropriately scheduled. These episodes were broadcast consecutively at various times during the day on a Bank Holiday during the Christmas period when it was likely that children – some unaccompanied by an adult - would have been watching. Further, no announcement was

³ Comcast, the parent company of E Entertainment UK Limited completed an acquisition of NBCUniversal ("NBCU") in January 2011 and following that date a programme of integration commenced between the international channel groups of E Entertainment and NBCUniversal.

The channel compliance function for E!, at the time of the relevant Broadcasts, was based in Los Angeles ("LA") and the NBCU compliance function for the NBCU licensed channels based in London. However, a London based manager based at NBCU retained the overall compliance responsibility for the LA based compliance operation. This same NBCU member of staff provided written representations to Ofcom in October/November 2011 in respect of two previous breach decisions recorded in Broadcast Bulletin 195 in December 2011. In February 2012, formal control of the compliance function was transferred from LA to NBCU in London.

⁴ See Finding at:
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb204/>

made before the start of, or between any of the programmes to warn viewers in advance about the content. Therefore, it was clear in Ofcom's view that the material was not scheduled appropriately.

8. Ofcom has previously found the Licensee in breach of rules in Section One of the Code on two separate occasions, both recorded in Broadcast Bulletin 195 on 5 December 2011⁵. As a result of these two breach decisions, Ofcom advised the Licensee at that time that Ofcom was putting the Licensee on notice that it was particularly concerned about the Licensee's compliance procedures and it would proceed to consider further regulatory action should any similar incidents occur in the future. The Licensee had stated that as a result of these compliance lapses it had reviewed its processes, improved training and retrained staff. It stated, in particular, that any content which might raise concerns under the Code would be viewed by two separate compliance staff prior to scheduling. However, despite these assurances, the Broadcasts of *Girls of the Playboy Mansion* were transmitted on 27 December 2011, soon after these earlier compliance failures were recorded in Broadcast Bulletin 195. The Broadcasts were transmitted because the Licensee admitted that this material had not been complied in accordance with its new compliance processes that it had informed Ofcom it had put in place following the earlier breaches recorded in Broadcast Bulletin 195. This was because *Girls of the Playboy Mansion* had been scheduled several weeks ahead of transmission and therefore prior to the introduction of the new compliance arrangements. In Ofcom's view the Code breaches published by Ofcom on 23 April 2012 in Broadcast Bulletin 204 therefore clearly resulted from the Licensee's repeatedly poor compliance.

Summary of Ofcom's Decision

9. In accordance with Ofcom's Procedures for the consideration of statutory sanctions in breaches of broadcast licences ("the Sanctions Procedures")⁶, Ofcom has considered whether these Code breaches are sufficiently serious and repeated to warrant the imposition of a statutory sanction on the Licensee. It has decided, for the reasons set out below, that they are.
10. This paper sets out Ofcom's Decision on the type and level of sanction to be imposed on the Licensee, having taken into account all the evidence and the submissions provided to it on behalf of the Licensee and with reference to Ofcom's Penalty Guidelines ("the Penalty Guidelines")⁷.
11. Ofcom decided, for the reasons set out below, it was appropriate and proportionate in the circumstances to impose a financial penalty of **£40,000** on the Licensee in respect of the Code Breaches (payable to HM Paymaster General) and to direct the Licensee to broadcast a statement of Ofcom's findings, on a date and in a form to be determined by Ofcom.

⁵ Broadcast Bulletin 195 also at: <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb195/>

⁶ 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>

⁷ Ofcom's Penalty Guidelines: www.ofcom.org.uk/files/2010/06/penguid.pdf

Legal Framework

Communications Act 2003

12. Ofcom's principal duty, set out in section 3(1) of the Communications Act 2003 ("the Act"), is to further the interests of citizens in relation to communications matters and the interests of consumers in relevant markets. In carrying out its functions, Ofcom is required to secure a number of other matters. These include the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services (section 3(2)(e)). In performing those duties Ofcom must have regard to "the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection" (section 3(4)(h)).
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: persons under the age of eighteen are protected (section 319(2)(a)).
14. In performing these duties, Ofcom is required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, to have regard to a number of other considerations including:
 - the need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g)).

Human Rights Act 1998

15. 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").
16. Article 10 of the Convention provides for the right to freedom of expression. Applied to broadcasting, this right encompasses the broadcaster's freedom to impart and the audience's freedom to receive information and ideas without interference by public authority and regardless of frontiers (Article 10(1) of the Convention). The exercise of these freedoms may be subject only to conditions and restrictions which are "prescribed in law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary" (Article 10(2) of the Convention).
17. 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

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

Remedial action and penalties

21. 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.
22. Where Ofcom has identified that a condition of a TLCS licence has been contravened, its powers to take action are set out in sections 236 to 238 of the Act insofar as relevant to the case.
23. 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.
24. Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence. The maximum penalty which may be imposed in respect of each contravention of a licence condition is whichever is the greater of £250,000 and 5 per cent of the qualifying revenue for the licensee's last complete accounting period falling within the period for which its licence has been in force.
25. 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

26. In the Finding, the Executive found that material broadcast by the Licensee breached Rule 1.3 of the Code. The Finding set out the reasons why Ofcom considered that the material was unsuitable for children to view and the reasons why the material was not appropriately scheduled.
27. The Finding noted that the episodes of *Girls of the Playboy Mansion*⁹ broadcast featured:
 - at 10:54 a male stripper wearing a pouch thong (his buttocks were blurred and genitals covered) thrusting his buttocks into the face of the mother of one of Hugh Hefner's girlfriends during a lingerie party at the Playboy Mansion with the

⁸ See Broadcasting Code and Ofcom's Guidance Notes on the Code:

⁹ *Girls of the Playboy Mansion* is a reality television series, filmed in the US home of Hugh Hefner, the American magazine publisher and founder of the adult entertainment company Playboy Enterprises. It features the day to day activities of the women who live with Hugh Hefner in his house, known as the "Playboy Mansion".

accompanying comment: “she needed a good ass in her face” (this scene and comment were also broadcast as part of a preview at the start of the episode);

- a number of sequences showing women and female glamour models, posing and being photographed during casting sessions for the 55th anniversary Playmate cover (with naked breasts, genitals and buttocks blurred) in consecutive episodes broadcast between 16:00 and 21:00; and
- numerous examples of bleeped and masked offensive and most offensive language.

28. Ofcom first considered whether the material was suitable for children. In Ofcom’s opinion these episodes of *Girls of the Playboy Mansion* were clearly unsuitable for children. They included prolonged sequences of nudity (albeit with breasts, buttocks and genitals blurred), particularly during the consecutive episodes showing the search for the 55th anniversary Playmate glamour model. These sequences featured numerous scenes of the models being filmed as they posed and were photographed during casting sessions for Playboy magazine. In addition, there was a sequence of the lingerie party at the Playboy Mansion which featured numerous scantily clad Playboy glamour models posing for the cameras; and shots of a male stripper wearing a thong thrusting his buttocks in the face of the mother of one of Mr Hefner’s girlfriends, with a commentary: “she needed a good ass in her face”. The episodes also featured repeated bleeped and masked offensive language throughout, which (taken together with the scenes of nudity) demonstrated in Ofcom’s opinion that these programmes contained themes of an adult nature and were aimed at an adult audience.

29. Ofcom then went on to consider whether the material was appropriately scheduled. These episodes were broadcast consecutively at various times on a Bank Holiday during the Christmas holiday period when it was likely that children – some unaccompanied by an adult – might have been watching. Ofcom also noted that no announcement was made before the start of the first programme, or between any of the programmes, to warn viewers in advance about the content. This material was therefore not scheduled appropriately. Ofcom therefore found the Broadcasts to be in breach of Rule 1.3.

30. In the Finding, Ofcom noted that it had recently found¹⁰ that on two separate occasions in September 2011, the Licensee had breached Section One of the Code and that in the second of the two recorded breaches, Ofcom had stated that it was putting E! “on notice that it is particularly concerned about the Licensee’s compliance procedures and will proceed to consider further regulatory action should any similar incidents occur.” Ofcom noted that the Licensee had assured Ofcom that it would improve its compliance procedures following the September 2011 breaches. Ofcom was therefore concerned that the improvements did not appear to have been quickly and thoroughly implemented sufficiently. This failure led to the Licensee broadcasting these episodes of *Girls of the Playboy Mansion*.

31. In the Finding¹¹ Ofcom therefore stated that the contravention of Rule 1.3 in the present case was serious and that it warranted consideration for the imposition of a statutory sanction.

Ofcom’s Decision to Impose a Statutory Sanction

32. As set out in paragraph 1.10 of the Sanctions Procedures, the imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a

¹⁰ Broadcast Bulletin 195, dated 5 December 2011

<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb1941/obb195.pdf>

¹¹ See: Footnote 1

sanction if it considers that a broadcaster has seriously, deliberately, repeatedly or recklessly¹² breached a relevant requirement.

33. Ofcom considered that the breach of Rule 1.3 was sufficiently serious and repeated to warrant the imposition of a statutory sanction for the reasons set out below.
34. In this case, Ofcom issued a preliminary view ("Preliminary View"), that the Licensee had seriously and repeatedly breached the Code and that Ofcom was minded to impose a statutory sanction in the form of a financial penalty of **£40,000**. In addition, Ofcom proposed that the Licensee should be directed to broadcast a statement of Ofcom's findings, on a date and in a form to be determined by Ofcom. Ofcom sent a copy of the Preliminary View to the Licensee on 3 August 2012 at the same time giving the Licensee the opportunity to provide written and oral representations on the Preliminary View. The Licensee provided its written representations ("Written Representations") to Ofcom on 24 August 2012 and attended an oral hearing at Ofcom on 17 September 2012 to provide oral representations ("Oral Representations") (together the "Representations"). The Representations are summarised in paragraphs 43 to 54 below.
35. 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 the Licensee, including representations on the Preliminary View, and has had regard to the Sanctions Procedures and to Ofcom's Penalty Guidelines in reaching its Decision (see further below).

Serious and Repeated Nature of the Breaches

36. Ofcom considered the breach of Rule 1.3 was sufficiently serious and repeated to warrant the imposition of a statutory sanction for the reasons set out below.
37. Section 319 of the Act requires Ofcom 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: children under the age of eighteen are protected (section 319(2)(a)). This requirement is reflected in Section One of the Code, and in particular Rule 1.3 which exists to ensure that material that is not suitable for children to view is scheduled appropriately.
38. Given the fundamental importance placed upon protecting children from unsuitable material, Ofcom previously published additional guidance to broadcasters regarding Section One of the Code and relating to the protection of children from unsuitable content broadcast pre-watershed. The Pre-Watershed Guidance¹³ ("the Guidance") to broadcasters published on 30 September 2011, specifically advised broadcasters to take particular care if they chose to show, before the watershed, content originally produced for a post-watershed audience and that they should take care "to ensure adult themes of a more sexualised nature are suitable for broadcast pre-watershed." This Guidance to Licensees was published well in advance of the scheduling and subsequent transmission of the Broadcast on 27 December 2011. The Broadcasts clearly contained a

¹² 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.

¹³ See: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/programme-guidance/bguidance/>

considerable amount of material based on sexualised adult themes that were not suitable for broadcast pre-watershed, as was acknowledged by NBCU on behalf of the Licensee¹⁴.

39. These breaches were therefore serious, firstly because in Ofcom's view the Licensee failed to ensure it was aware of, and had applied recent guidance issued by Ofcom regarding the importance of ensuring that material of a more sexualised nature is suitable for broadcast pre-watershed.
40. Secondly, these breaches were serious and repeated because the Licensee, despite previous similar compliance breaches of Section One of the Code, and being specifically warned by Ofcom, had failed to ensure sufficient and robust compliance arrangements were in place following these previous breaches to prevent similar compliance issues in the future. This failure directly resulted in the transmission of the Broadcasts. Following the two breaches in September 2011 (subsequently recorded in Broadcast Bulletin 195 in December 2011), the relevant manager at NBCU who had overall compliance responsibility for E!¹⁵ had sought to reassure Ofcom that, as well as reviewing processes and retraining staff, any content which could raise concerns under the Code would be "subject to viewing by two separate compliance viewers prior to being scheduled"¹⁶. However, despite this reassurance, the Broadcasts (transmitted at the end of December 2011, some two months later) were not subject to this new procedure. According to Licensee's representations, this was because the Broadcasts had been scheduled several weeks ahead of transmission in mid to late October 2011, based on the original compliance review by the LA team prior to June 2011, and prior to the introduction of the new referral process. In Ofcom's view, this demonstrates that, despite being aware of the inadequacy of the previous compliance decisions made by the LA team, E! had failed to apply the additional compliance checks to material already scheduled for future broadcast. In addition, even though the Broadcasts were not subject to further compliance checks prior to scheduling, Ofcom considers that the title of this programme alone should have been sufficient to alert E! to the possibility that its content may not have been suitable for children and take action to re-comply it before it was scheduled. This failure to ensure sufficient and robust compliance arrangements were in place enabled material which was clearly unsuitable for children to view to be broadcast pre-watershed and – in view of the previous Code breaches – the contravention was repeated due to the Licensee's repeated failure to ensure adequate compliance procedures were implemented and applied.
41. Thirdly, this breach was serious because of the sustained sexualised nature of the material broadcast. *Girls of the Playboy Mansion* featured the day to day activities of a group of women who live with Hugh Hefner, the American magazine publisher and founder of the adult entertainment company Playboy Enterprises. The material included for example: auditions for the 55th Playmate with women removing clothing to reveal their breasts (albeit blurred) and posing for the camera; the finalists of the search for the 55th Playmate posing naked for a glamour shoot (albeit with genitals and breasts blurred) in

¹⁴ See: Footnote 2 - NBCU (acting as the Licensee's representative) apologised for the inappropriate scheduling of the broadcast material. It explained that as soon as the Licensee was alerted to Ofcom's concerns about the content, E Entertainment placed a post-22:00 scheduling restriction on the entire series of *Girls of the Playboy Mansion* until it was fully re-complied and re-edited where necessary.

¹⁵ The representations provided to Ofcom, during the course of the investigation for the cases reported in Broadcast Bulletin 195, were provided by the London based NBCU manager responsible for overseeing the E! compliance decisions made in LA.

¹⁶ See: the Licensee's response as set out in Broadcast Bulletin 195, dated 5 December 2011 also at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb1941/obb195.pdf>

an overtly sexual way; and, naked glamour models (albeit with breasts and genitals blurred) posing in a range of positions, such as bending over a car, in a sauna and in a pool as Hugh Hefner and his entourage watched and commented on how good they looked in front of the camera.

42. Further, the breach was serious because the material was not contained in a single or isolated programme but broadcast throughout the day in a series of back to back programmes scheduled from 10:00 to 13:00 and from 16:00 to 21:00 on a Christmas Bank Holiday when children were available to view. For example, the male stripper sequence was broadcast at 10.54 and the search for the 55th anniversary Playmate started from 16:00.

Licensee's Representations¹⁷

43. In its Representations, the Licensee's representative accepted that the Licensee had committed a "very serious" Code breach which it considered to be "extremely regrettable" and for which it apologised unreservedly. The Licensee's representative sought to explain why the breaches had happened rather than to excuse them in any way. It stressed that regulatory compliance was a priority for its business and that it invested "very significant amounts of time and resources" to ensure its compliance record was as strong as it could be. It explained that the breaches occurred during a time of significant organisational change, and that it had started to put in place improvements to E!'s compliance from as early as September 2011. The Licensee's representative also questioned whether the imposition of a financial penalty by Ofcom was appropriate and proportionate. In the summary of the Representations below, Ofcom has set out its response to each of the principal Representations, as necessary or appropriate.

Background to the Code breach

44. The Licensee's representative first explained the compliance arrangements in place in the period leading up to the breach as this was significant to understanding that the broadcast of the *Girls of the Playboy Mansion* was, in its view, a result of "unfortunate process failings" rather than an absence of compliance processes at the time of the broadcast of the material.
45. The Licensee's representative explained that up to February 2012, when NBCU formally took over the compliance function for E!, the compliance operation for E! was based in Los Angeles ("LA") with compliance undertaken there. Ofcom was surprised to learn this during the course of the oral hearing. It had not been referred to prior to the oral hearing despite the fact that the Licensee's representative had previously been in correspondence with Ofcom on several occasions over a number of months in the course of the investigations into *50 Super Epic TV Moments*, *Keeping Up with the Kardashians* and *Girls of the Playboy Mansion*. The LA based compliance team reported into a London based senior manager at NBCU who had overall compliance responsibility for compliance decisions on E!. Following notification by Ofcom of its investigation into *50 Super Epic TV Moments* at the start of September 2011 and *Keeping Up With the Kardashians* at the end of September 2011 (subsequently recorded in Broadcast Bulletin 195), the Licensee's representative explained that a "whole chain of workstreams" were introduced to identify and review the compliance concerns identified. These included: additional training provided by an external consultant; a new referral process requiring that any new content viewed by the compliance team which raised issues under the Code be referred to an external consultant for full screening/viewing; a system review to

¹⁷ The Licensee's representations were provided on its behalf by NBCU who had taken over full control of E!'s compliance. See: Footnote 3.

address process failings which led to the incorrect version of the *Keeping Up with the Kardashians* being scheduled in daytime; and, a meeting with the senior management of NBCU to discuss the E! compliance concerns.

46. In addition, the Licensee's representative explained that it had commissioned an external consultant to conduct a "root and branch" audit at the LA facility of the compliance arrangements in place. A preliminary summary of this audit was made available in December 2011 with the full report following in January 2012. It was after this report, that the Licensee made additional resources available to review all 1400 hours of programming under licence to E! in its programming library.
47. The Licensee's representative further explained that it was not until it had received the full report back from the external consultant in January 2012 that it concluded that the entire compliance function for E! should move from LA to London. The full compliance function was passed to the NBCU compliance team in London in February 2012.
48. The Licensee's representative argued that in the context of compliance improvements implemented since September 2011 to remedy previous concerns, the *Girls of the Playboy Mansion* transmissions on 27 December 2011, "while undoubtedly...very serious and deeply regrettable, resulted from unfortunate process failings, rather than at any stage, an absolute absence of any adequate processes on the part of the licensee, or indeed NBCUniversal."
49. The Licensee's representative explained specifically the reasons why these episodes of *Girls of the Playboy Mansion* came to be broadcast on 27 December 2011. The episodes had been originally compiled prior to June 2011 by the LA based team and the information - that they were suitable for daytime broadcast - had been recorded on the system. The London based senior manager, who had responsibility for the compliance function, relied upon, and accepted, those previously recorded compliance instructions because, according to the representations made by the Licensee's representative, he had had "no reason to doubt" that the instructions were reliable when he scheduled the material in mid to late October 2011 for transmission on 27 December 2011.
50. Ofcom therefore noted, from the Licensee's representations, that the London-based senior manager took the decision to rely upon the previous compliance decision taken by the LA team and to schedule *Girls of the Playboy Mansion* for daytime broadcast in mid to late October 2011 on the basis there was "no reason to doubt" the instructions recorded on the system. However Ofcom also noted, from the chronology provided during the Licensee's representations, that from as early as September 2011, (the point at which the Licensee was alerted to concerns regarding the broadcast of the programme *50 Super Epic TV Moments*), steps were being taken to review the existing compliance processes in place in LA. In Ofcom's view, these steps clearly demonstrate that from as early as September 2011, the Licensee had had concerns about the competence of the LA based compliance team and the processes then in place. The steps that were taken included introducing a referral process to an external consultant for any new content viewed by the compliance team, monitoring of the competences of the compliance viewing team and reviewing previous decisions likely to raise issues under the Code. Ofcom also noted that when the same London based senior manager provided formal representations to Ofcom with regard to the broadcast of *50 Super Epic TV Moments*, on 24 October 2011, it was confirmed that "any content" that might raise concerns would be subject to viewing by two compliance managers "prior to it being scheduled" and that "we have spent some time reviewing our processes to reduce the risk of any lapses such as this happening again in the future". Therefore, Ofcom questioned the assertion made that there was "no reason to doubt" the compliance instructions recorded on the system in LA and the consequent decision to accept,

without question, the compliance decision which directly led to the scheduling of *Girls of the Playboy Mansion* throughout the day during a Christmas Bank Holiday. In fact, the Broadcasts were scheduled at, or around, the same time that it was widely acknowledged there were clear concerns regarding compliance decisions and processes in LA, as demonstrated by the steps that had been taken to improve these same compliance processes, during September and up to the decision to schedule in October 2011. Ofcom was therefore concerned that in light of an acknowledgment regarding the competence of the compliance processes in LA, the Licensee had not taken a decision to doublecheck the material scheduled for broadcast in December. Such a decision might have prevented the daytime broadcast of *Girls of the Playboy Mansion* at the end of December 2011.

51. In response to this point, the Licensee's representative stated that although there was a further breach decision regarding the programme *Keeping Up with the Kardashians*, which was broadcast at the end of September 2011 (and subsequently recorded in Broadcast Bulletin 195), this breach had occurred due to "technical error rather than a judgement error". Therefore, the breach of *50 Super Epic TV Moments* alone meant there was no "clear pattern" to the breaches which would suggest an overall or systemic problem with the compliance process at E!
52. Ofcom asked the Licensee's representative why the title of the programmes on its own: *Girls of the Playboy Mansion*, did not trigger any concerns on the part of the London based senior manager, responsible for the compliance function, when he made the scheduling decision to place this material during the daytime, particularly in the light of the concerns about the compliance decision made by the LA team to pass *50 Super Epic TV Moments* for daytime broadcast. The Licensee's representative acknowledged that the title should in itself have warranted further investigation but stated that at the relevant time neither the manager nor others felt they had any reason to doubt the decision taken by the LA based compliance team that this material was suitable for daytime scheduling.
53. Further, the Licensee's representative stated that an external consultant who NBCU commissioned to undertake the audit of the LA compliance function in early December 2011, had raised concerns regarding the daytime scheduling of *Girls of the Playboy Mansion* in a meeting with the LA compliance team. She had noted, prior to the 27 December 2011 transmission that *Girls of the Playboy Mansion* had been recorded on the system as suitable for daytime broadcast and had recommended to a member of the LA compliance staff that this decision should be reviewed. Ofcom asked why this advice was not acted on and, in particular, what processes were in place to record the advice so that it could be acted upon. The Licensee's representative explained that it did not know if this information was recorded but acknowledged that it was "a very unfortunate process failing that the advice was not escalated to a more senior level to be actioned". This was due to the fact that subsequent to this recommendation being made, the relevant member of the LA compliance team was absent from the office for personal reasons. The Licensee's representative acknowledged that had that advice been followed it could have "avoided the 27 December transmissions".
54. Finally, Ofcom asked the Licensee's representative, whether there was a process in place to check or report on the suitability of material as it is being played out on E!, particularly given that in this case the episodes of *Girls of the Playboy Mansion* were broadcast back to back throughout the day. The Licensee's representative confirmed that no members of management were watching or monitoring the channel on the day. Although spot checks of channels were done on an ad hoc basis by the playout provider and senior management, there did not appear to have been any undertaken on the day this content was broadcast. The Licensee's representative explained that this was because all material, prior to being scheduled, would have been viewed before being

placed on the scheduling system. This system alone - if the material had been complied correctly in the first place - should have prevented content which was unsuitable for daytime broadcast from being scheduled inappropriately.

Improvements to Compliance

55. In relation to changes put in place to improve compliance, the Licensee's representative said these had been initiated as early as September 2011 when it had first been alerted by Ofcom to concerns regarding two E! Programmes, *50 Super Epic TV Moments* and *Keeping Up With the Kardashians*.
56. The Licensee's representations stated that in September/October 2011 a referral process was introduced whereby any new content viewed by the compliance team which raised issues under the Broadcasting Code was to be referred to an external consultant for full screening/viewing to ensure correct edit instructions and to monitor competence of compliance viewing team. In addition, around this time, E! content previously viewed by the LA based compliance manager responsible for the inadequate compliance of *50 Super Epic TV Moments* and likely to raise issues under the Broadcasting Code was to be reviewed again to identify any oversights. As *Girls of the Playboy Mansion* had been complied prior to June 2011, by a previous compliance manager, it was not reviewed under either of these processes. A system review to address the earlier process failings (which had led to the incorrect version of *Keeping Up With the Kardashians* being broadcast) was also undertaken.
57. In November 2011, NBCU's senior compliance team discussed the two recent Code breaches and intensive training for compliance staff was introduced. In December 2011, a root and branch audit was commissioned of all of E!'s compliance processes. This was completed in January 2012 and resulted in an agreement to move responsibility for all E! compliance to NBCU's compliance team and for all content to be overseen by NBCU from February 2012.
58. In addition, from January 2012, the NBCU compliance team started the process of checking the full programme back catalogue on E!, which amounted to 1400 hours of programming in total to ensure the compliance information recorded for each and every programme was correct. According to the Licensee's representative this resulted in whole series being pulled from the schedule and the service needing to run on a smaller range of programmes to ensure that every programme was re-complied before it could be shown again. The Licensee's representative stated that this had had a significant financial impact on the business.
59. In February 2012, formal compliance responsibility for E! was transferred from LA to NBCU in London with a new structure and new compliance staff in place. The Licensee's representative explained that the compliance team were now wholly based in London and had expanded to include two compliance co-ordinators, a compliance manager and a Head of Compliance. The Licensee's representative pointed out that Ofcom had not recorded any further breaches of the Broadcasting Code since the broadcast of *Girls of the Playboy Mansion* on 27 December 2011 nor commenced any new investigations into potential breaches of the Code against E! since that date.

Financial Penalty

60. In relation to the appropriate level of financial penalty set out in Ofcom's Preliminary View (in this case £40,000), the Licensee's representative submitted that "a penalty of any amount is not necessary". The Licensee's representative said that the action it had taken from September 2011 to the present demonstrated its commitment to maintaining

robust compliance procedures and demonstrated that “those structural changes in processes have been very effective”. In these circumstances, the Licensee’s representative argued that no financial penalty was necessary to produce a deterrent effect, and that E! did not make any financial gain from these breaches. Indeed the Licensee’s representative argued that since September 2011 considerable costs had already been incurred to make the compliance of the service robust.

Imposition of sanctions other than a financial penalty

61. 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.
62. It is Ofcom’s view that a direction not to repeat the programmes found in breach would not be an appropriate or sufficient sanction in all the circumstances, because the Licensee, as set out in the Finding, has already taken action and placed a post 22:00 scheduling restriction on the whole series of *Girls of the Playboy Mansion* until it had been re-complied and re-edited as necessary.
63. Ofcom considers that, on its own, a direction to broadcast a statement of Ofcom’s findings in this sanctions case is not a sufficient statutory sanction, given the seriousness and repeated nature of the breaches in this case. Ofcom therefore considers that a direction to broadcast a statement of Ofcom’s findings in combination with a financial penalty would act as a more effective deterrent to discourage the Licensee from repeating the sanctionable content or other licensees from contravening the Code in a similar manner.
64. In light of the above, and taking into account the broadcaster’s right to freedom of expression and the information currently available, Ofcom’s Preliminary View 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

65. Under section 237 of the Act, the maximum level of financial penalty that can be imposed on the holder of a TLCS licence in respect of each breach of a TLCS licence 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.
66. 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.
67. Under the Penalty Guidelines, in determining the extent to which a level of any penalty is proportionate, Ofcom must take into account the size and turnover of the regulated body.
68. 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 Preliminary View, 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 Guidelines¹⁸.

Factors taken into account in determining the amount of a penalty

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

Deterrence

70. Ofcom noted the Licensee's representative's view that a financial penalty was not necessary to produce a deterrent effect, given the significant steps it had already taken to improve compliance since concerns were first raised about material broadcast on E! by Ofcom in September 2011.
71. However, Ofcom believes that a financial penalty is necessary to reflect the serious and repeated nature of the Code breaches recorded against the Licensee, and to act as an effective incentive to ensure that adequate arrangements are in place at all times to ensure compliance with the Code, both for the Licensee and other licensees. In this case, Ofcom was particularly concerned at the lack of effective oversight of the decisions taken by the LA compliance team, based in a foreign jurisdiction with different broadcasting standards and the apparent unquestioning reliance on these compliance decisions in the present case, despite problems having been identified with previous decisions. Ofcom considered that, in these circumstances, the Licensee should have taken earlier and more extensive action to ensure it had robust compliance arrangements in place which could have prevented the broadcast of the material.

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

72. It is not possible to point to any specific and actual harm to child viewers caused by these contraventions of Rule 1.3. However, the purpose of the rules contained within Section One of the Code is to protect children from potential as well as actual harm and to ensure they are not exposed to material that is unsuitable for them to view, and to provide reassurance to their parents and carers that this is the case. Material which is in breach of Rule 1.3 clearly has the potential to cause harm, even if that harm cannot be quantified. (We have no evidence in this case of any increased costs being incurred by consumers or others).

The duration of the contravention

73. Ofcom noted in the Finding that the recorded Code breaches were in relation to material included in consecutive broadcasts of the series *Girls of the Playboy Mansion* on E! between 10:00 and 13:00 and between 16:00 and 21:00 on 27 December 2011 i.e. over eight hours in total.

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

74. We have no evidence to show whether or not the Licensee made any financial gain from these breaches of the Code. However, the Licensee's representative has stated in its oral representations that no financial gain was made from these breaches.

¹⁸ See footnote 8: Penalty Guidelines

Any steps taken for remedying the consequences of the contravention

75. Ofcom notes from the representations given on behalf of the Licensee that various steps have been taken since September 2011 to improve the compliance of the E! service (see paragraphs 43 to 54 above). These steps notably included:

- holding detailed training sessions for E!'s programme and editing teams (based in LA) on the Broadcasting Code (including Ofcom's Pre-Watershed Guidance) which were conducted by an external UK broadcast consultant;
- commissioning an external UK consultant to conduct a "root and branch" audit of E!'s compliance processes, which led to the re-compliance of more than 1,400 hours of programming in the E! programme library; and
- moving over the sole management of compliance procedures for E!, which had been based in LA, to NBCU's legal department in London in February 2012 with a newly created and expanded team. This now reflects the current compliance structure in place for all other NBCU and E Entertainment UK Ofcom licensed services.

76. It is Ofcom's view that these steps have played a significant part in remedying the weakness in the former compliance arrangements of E!, illustrated by the *Girls of the Playboy Mansion* Code breaches, and in helping to ensure adequate compliance going forward. However, in Ofcom's opinion, they were not implemented swiftly enough in the first instance nor were they as extensive as they should have been. If they had been, the broadcast of *Girls of the Playboy Mansion* may not have taken place. In particular, Ofcom noted that:

- the Licensee had previously been alerted by Ofcom to concerns regarding the broadcast of *50 Super Epic TV Moments* in September 2011. The Licensee's representative, by its own admission during its oral representations, considered the compliance of this programme was based upon "very poor judgement decisions" by a LA based compliance team member. However, despite being on notice of Ofcom's investigation into that case, programmes continued to be complied by the LA team members and their compliance decisions entered onto the system, so that the decision to schedule and broadcast *Girls of the Playboy Mansion* during the daytime, was simply accepted, with no further checks being made by the London based senior manager whose task it was to oversee the LA team's compliance decisions;
- the "root and branch" audit, which resulted in the re-compliance of over 1400 hours worth of programming on the E! service, did not commence until December 2011 and the findings were not presented until January 2012. Taking into consideration the time it takes to conduct such a review, Ofcom is still of the view that robust action to remedy the concerns relating to the inadequate compliance of E! content could and should have been taken more promptly, given that concerns first came to light as early as September 2011.
- when compliance advice, offered as part of the training of the LA compliance team, regarding the unsuitability of *Girls of the Playboy Mansion* for daytime broadcast, was provided by an external consultant it was not recorded or escalated by the staff in any formal way and as a result when the same staff were subsequently away from the LA office, this recommendation was not acted upon and the programme was broadcast in the UK.

77. In Ofcom's view therefore the two most significant steps taken by the Licensee to improve compliance (namely: the audit and re-compliance of E!'s programme library, and the decision to relocate the compliance function from LA to London) did have the potential to remedy the contravention going forward but neither was implemented in time or extensively enough to prevent the contravention happening.

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

78. Two previous breaches were recorded in Broadcast Bulletin 195. The first concerned the programme *50 Super Epic TV Moments* broadcast on 7 September 2011 which Ofcom found in breach of Rules 1.3, 1.4 and 2.3. This programme was found to be unsuitable for children because it featured a clip from *Big Brother* in which a participant was shown behaving in a highly sexual and potentially dangerous way which was broadcast in a programme from 11:00. It was also found to be not appropriately scheduled because it appeared during the day and at the weekend when children might have been watching. Ofcom found the breaches to be clear and serious and stated it did not expect any similar compliance failures by E Entertainment in future.
79. The second breach concerned the programme *Keeping Up with the Kardashians* which included the broadcast of the word “fuck” or a derivative on six occasions during a programme broadcast at midday. This was in breach of Rule 1.14. Ofcom also noted the previous finding published in that issue of the Broadcast Bulletin recording breaches of Section One of the Code against the Licensee and stated that in the circumstances, Ofcom was putting E Entertainment on notice that it is particularly concerned about the Licensee’s compliance procedures and will proceed to consider further regulatory action should any similar incidents occur.
80. In addition, prior to these contraventions, Ofcom found the Licensee in breach of Rule 1.14 on four separate programmes between 2005 and 2008 for the inclusion of the word “fuck” or its derivatives in programmes broadcast before the watershed¹⁹.

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

81. During the Ofcom investigation into the two earlier E! breaches (subsequently recorded in Broadcast Bulletin 195 and published on 5 December 2011), NBCU of behalf of the Licensee sought to reassure Ofcom, that it was taking steps to improve its compliance processes and had improved training and retrained staff. Further, it said it had implemented an enhanced compliance process whereby any content which could raise concerns under the Code would be subject to viewing by two separate compliance viewers prior to scheduling. The Licensee’s representative also provided further information in its representations to highlight additional steps taken in December 2011, such as training sessions for the LA based compliance team and a compliance audit. During the training sessions advice was given to the team that *Girls of the Playboy Mansion* was not suitable for daytime broadcast.
82. Ofcom is of the view that, although these steps were helpful to some extent, they were not implemented in a sufficiently rigorous and timely manner so as to prevent the contraventions, because they were only applied to new material which had yet to be scheduled for broadcast. Therefore, because *Girls of the Playboy Mansion* had already been entered onto the system prior to June 2011 and later scheduled in October 2011, it was not re-compiled or checked again prior to broadcast - even though the name of this well-established series and its subject matter should have alerted the Licensee that it potentially contained problematic material if shown pre-watershed. As set out in

¹⁹See: Broadcast Bulletins 52,100 & 112 also at:
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/pcb43/>
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb100/>
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb112/>

paragraph 54, Ofcom also notes that no members of management were watching or monitoring the channel on the day. Although spot checks of channels were done on an ad hoc basis by the playout provider and senior management, there did not appear to have been any undertaken on the day this content was broadcast.

83. Further, the compliance advice provided by the external consultant about *Girls of the Playboy Mansion* during training with staff in December 2011 (see paragraph 53 above) was not recorded in anyway by the LA compliance team, who were subsequently on leave from work, so no action was taken to amend the recorded decision on the system. Such action could have avoided the 27 December breach.

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

84. The Licensee was aware from as early as September 2011 when it was first notified by Ofcom of the investigation into *50 Super Epic TV Moments* (subsequently recorded as a breach in Broadcast Bulletin 195 and which one the Licensee's representative has accepted as demonstrating "very poor judgement") that there were problems with the compliance function based in LA. During the course of the investigation, the Licensee's representative advised Ofcom that action was being taken to remedy these concerns: processes were reviewed, training was introduced and "any content which could raise issues" under the Code was to be subject to two separate compliance viewers. However, even though there was a clear concern about the inadequacy of compliance decisions being made by the LA team, no intervention was made with regard to any previously complied E! material and it was only future material to which this applied allowing the *Girls From the Playboy Mansion* to be broadcast. Indeed, the decision to review all 1400 hours of the E! programme catalogue was only implemented after the audit findings were presented in January 2012 and after *Girls From the Playboy Mansion* was broadcast. Ofcom considers this to be a serious oversight in this case. It is Ofcom's view therefore that the Licensee, including its senior management, should have been aware that a serious contravention of the Code might occur if the inadequate compliance processes identified as early as September 2011, and which led to the breach decisions recorded in Broadcast Bulletin 195, were not acted upon promptly and thoroughly. Indeed, it was only after the current contravention occurred at the end of December 2011 that steps were taken to re-comply and re-edit *all* previously complied material regardless of whether or when it was or had been scheduled.

85. Further, Ofcom is concerned that this material, which contained content clearly unsuitable for children, was broadcast throughout the day from 10:00 to 13:00 and from 16:00 to 21:00 (i.e. over 8 hours in total) on a Christmas Bank Holiday, yet the Licensee failed to have any process in place to take action to remove the material from the schedule before it was brought to its attention by Ofcom.

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

86. As recorded in the Finding, the Licensee took immediate action to remove the entire series of *Girls of the Playboy Mansion* once the initial concerns regarding the Broadcasts were brought to their attention by Ofcom.

87. Further extensive steps were then taken by the Licensee from January 2012 to re-comply all E! material, to establish the NBCU compliance team as having responsibility

for complying the service E! and move the compliance function from LA to London and in doing so create a new extended team.

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

88. In their representations, the Licensee's representative questioned whether the proposed penalty was appropriate and proportionate and stated in the circumstances a financial penalty was "not necessary" and was not required to produce a deterrent effect for the Licensee.
89. However, Ofcom considered that this current contravention was serious and repeated and therefore a financial penalty was appropriate because during the investigation into the previous breach decision for *50 Super Epic TV Moments* (subsequently published in Broadcast Bulletin 195) NBCU on behalf of the Licensee took steps to reassure Ofcom that its compliance was in order stating that they "have processes in place to ensure all content is checked thoroughly against Ofcom Harm & Offence standards, but unfortunately those processes were not followed in that case". NBCU on behalf of the Licensee also informed Ofcom that they had spent some time reviewing their processes "to reduce the risk of any lapses such as this happening again in the future, these changes involving improved training and retraining of staff" and that processes had been put in place to ensure "any content" which could raise concerns under the Code "will be subject to viewing by two separate compliance viewers prior to being scheduled". However, despite the assurance that its compliance was in order and that they had taken steps to reduce the risk of any lapses in the future, the steps taken were clearly not sufficient to prevent the contraventions in the present case. The licensee told us that this was because the Broadcasts had been scheduled several weeks ahead of transmission in mid to late October 2011, based on the original compliance review by the LA team (which was simply accepted by the London based senior manager whose task it was to oversee the LA team decisions), and prior to the introduction of the new referral process. In Ofcom's view, this demonstrates that, despite being aware of the inadequacy of the previous compliance decisions made by the LA team, E! had failed to apply the additional compliance checks to material already scheduled on the basis of compliance advice from the LA based compliance team. In addition, even though the Broadcasts were not subject to further compliance checks prior to scheduling, Ofcom considers that the title of this programme alone should have been sufficient to alert E! to the possibility that its content may not have been suitable for children and taken action to reassess it. This serious breach was therefore a result of repeated and ongoing compliance failures originating from basing the compliance function for E! overseas without sufficient oversight from the London based senior manager who in this case had simply relied on the compliance decisions made by the LA team, when scheduling the material.
90. Ofcom considered that a penalty of **£40,000** would be proportionate taking into account all the relevant circumstances, including: the need to achieve an appropriate level of deterrence for this and other *licensees*; *the serious* and repeated nature of the Code breach in this case; the measures taken by the Licensee to improve its compliance arrangements since September 2011.

Precedent

91. Ofcom's Penalty Guidelines also indicate that we will, in considering any penalty, have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case. Ofcom also notes that in setting

the level of the penalty in the precedents set out below, our previous Penalty Guidelines were in force.

92. In this instance, Ofcom notes that there are a number of previous cases which have dealt with breaches of Rule 1.3. However, Ofcom does not consider these to be *direct* precedent cases as none of them deal solely with a breach of Rule 1.3 where the material was broadcast within a general entertainment service. However, Ofcom notes that previous sanctions cases have included breaches of Rule 1.3 within editorial content but in addition to other breaches of the Code, and have primarily focused on the use of the most offensive, offensive or sexualised language which has been inappropriately scheduled pre-watershed. These sanctions cases may also be distinguished from the present case in that they included breaches which were cumulative over a period of time:
93. **4 June 2008, MTV Networks Europe (“MTV”) in respect of its channels TMF, MTV France, MTV UK and MTV Hits²⁰** - Sanction of £255,000 (in aggregate) for numerous serious breaches of Rule 1.3, Rule 1.4, Rule 1.14, Rule 2.3 and Licence Condition 11. This sanction concerned serious, repeated and persistent compliance failures on four separate channels owned and operated by MTV over an extended period of time from June 2006 to August 2007. In addition, they took place after a number of formal warnings and guidance from Ofcom which was consistently ignored by MTV. These compliance failures resulted in the most offensive language and inappropriate content being broadcast with some of this material broadcast pre-watershed. With particular reference to Rule 1.3 (inappropriate scheduling), this case concerned the following services: TMF – repeated use of the most offensive language pre-watershed during a music video and a trailer; MTV UK – repeated use of the most offensive and offensive language pre-watershed during a reality programme and a film review programme; and MTV Hits – offensive texts transmitted pre-watershed on a text messaging board and repeated use of the most offensive language during a factual entertainment programme broadcast pre-watershed.
94. **20 June 2006, Kiss FM Radio Limited²¹** - Sanction of £175,000 (in aggregate) for several very serious breaches of Rule 1.3, Rule 1.5 (when children are particularly likely to be listening), *Rule 1.14 (most offensive language)* and Rule 1.17 (discussion of sexual behaviour) as well as breaches of *Section Seven (fairness)* and *Section Eight (privacy)*. This case was concerned with serious infringements of privacy (£75,000 fine) but also the scheduling of inappropriate material such as offensive language and strong sexual content which was broadcast on the radio at breakfast time when children were likely to be listening (£100,000 fine). The material included, in studio discussions, phone-ins and ‘wind-up’ calls, comprised: inappropriate language in a discussion on the sex industry with references to anal sex; a discussion about daisy chaining (teenagers engaging in group sex); the most offensive language and inappropriate sexual language. These breaches occurred over a period of six months on the same breakfast show.
95. In addition, Ofcom has on one occasion imposed a sanction on a ‘daytime chat’ service for breaches of Rule 1.3 that is for showing material unsuitable for children. (By way of background, before 21:00 a television service may broadcast ‘daytime chat’ i.e. female presenters behave in a flirtatious manner to encourage viewers to contact them via PRS for ‘general chat’ phone calls. Until 1 September 2011 Ofcom regulated such services under the Broadcasting Code as editorial content but since that date has regulated them under the BCAP Code.)

²⁰ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/mtv.pdf>

²¹ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/kiss100.pdf>

96. **29 July 2010, Bang Channels Limited and Bang Media (London) Limited²²** -

Sanction of £157,250, of which £145,250 related to 14 individual breaches of Broadcasting Code rules 1.3, 1.24, 1.25, 2.1 and 2.3 over a period of six months, and the remaining £12,000 related to two breaches of Licence Condition 11 (failure to retain recordings). Of the 14 Code breaches, two specifically related to breaches of Rule 1.3 only for showing material unsuitable for children pre-watershed for which the Licensee was fined a total of £16,000. The first of these two breaches concerned a female presenter adopting sexual positions for prolonged periods of time and her nipples were clearly visible. A sanction of £8,000 was applied for this Code breach. The second concerned a female presenter adopting various sexual positions for prolonged periods of time including miming intercourse while stroking her body in a provocative manner. A fine of £8,000 was imposed for this Code breach. With regard to both these breaches there was no editorial context other than sexual stimulation.

97. In their representations, the Licensee's representative stated that it did not consider that the precedent sanctions decisions above "can be invoked as precedents to justify the imposition of a £40,000 penalty". This was because the Bang Media decision concerned multiple breaches of many sections of the Code and where there was tangible harm to children and the MTV decision concerned multiple breaches of the Code over an extended period of time, and where formal warnings and guidance from Ofcom were ignored, whereas in the case of *Girls of the Playboy Mansion* there was a single breach of Rule 1.3 only.

98. As set out above, Ofcom accepts that these are not direct precedents and therefore they have provided limited assistance to Ofcom in setting the level of the penalty in the present case but nonetheless Ofcom considered this to be a serious case for all the reasons outlined above.

Cooperation

99. In accordance with the Penalty Guidelines, Ofcom may increase the penalty where a licensee has failed to cooperate with Ofcom's investigation.

100. In Ofcom's view, the Licensee has been cooperative. For example, it has: provided full representations in response to Ofcom's formal requests for information relating to the material broadcast and the service in general; and it has expressed a willingness to take, and has taken, steps to remedy its recent, past failures to comply with Section One of the Code. Ofcom does not therefore consider it appropriate to increase the penalty on account of a failure to cooperate in this case.

Conclusion

101. Ofcom concluded that the Code breaches by the Licensee were serious and repeated for the reasons set out in this Decision.

102. Having regard to all the factors referred to above and all the representations from the Licensee, Ofcom has concluded that an appropriate and proportionate sanction would be a financial penalty of **£40,000**. In addition, Ofcom has decided 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.

²² See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/bangchannels.pdf>

16 November 2012