Sanction: Decision by Ofcom
To be imposed on ESPN (Europe, Middle East, Africa) Limited

For the levels of audio description\(^1\) provided between 1 January 2012 and 31 December 2012\(^2\).

Ofcom’s consideration of a Sanction against: ESPN (Europe, Middle East, Africa) Limited (the “Licensee”) in respect of its service ESPN (TLCS-1384).

For:
The level of audio description provision across the channel, which was found to be in breach of Ofcom’s Code on Television Access Services\(^3\) (the “Code”) in respect of:

Rule 9\(^4\): “…broadcasters are required to meet the targets set out below:

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<th>Anniversary of relevant date</th>
<th>Subtitling</th>
<th>Signing</th>
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<td>Second</td>
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In the period: 1 January 2012 to 31 December 2012.

Decision:
1. To impose a financial penalty of £120,000 (payable to HM Paymaster General); and
2. To direct the Licensee to broadcast a statement of Ofcom’s findings, on a date and in a form to be determined by Ofcom.

\(^1\) Audio description is an access service provided for visually impaired consumers constituting a separate audio track inserted amongst the normal audio track in which visual elements of the programme, such as facial expressions and gesticulations, are audibly described.


\(^3\) See the Ofcom Code on Television Access Service [http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/tv-access-services/code-tv-access-services-2013/](http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/tv-access-services/code-tv-access-services-2013/).

\(^4\) During most of the period of the breach, this was referred to as Rule 8. The revised Code published on 18 December 2012 renumbered it as Rule 9, but made no substantive change.
Executive Summary

1. ESPN is a sports television channel broadcasting a combination of live sports events and sports related programming. The licence for this service is held by ESPN (Europe, Middle East, Africa) Limited (“ESPN” or “the Licensee”).

2. The Code requires Ofcom licensed television broadcasters to provide access services (subtitling, signing and audio description services) to accompany a proportion of their programming. They are required to meet targets that vary depending on the number of years since the service began broadcasting.

3. Rule 9 of the current version of the Code states that broadcasters are required to meet the targets set out below.

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<th>Audio Description</th>
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4. Condition 9(1) of ESPN’s licence states “…the Licensee shall ensure that the provisions of the Code on Subtitling, Signing and Audio-Description are observed in the provision of the Licensed Service.”

5. In early 2013 ESPN submitted end-of-year returns to Ofcom covering the level of access services they had provided in 2012 in which they indicated that ESPN had not met its requirements for audio description. Given this and following an investigation in line with Ofcom procedures, on 5 August 2013 Ofcom published a Finding (“the Finding”) in Broadcast Bulletin 235, which found that ESPN had breached the Code.

6. In accordance with Ofcom’s Procedures for the consideration of statutory sanctions in breaches of broadcast licences (“the Sanctions Procedures”), Ofcom has considered whether this Code breach is sufficiently serious to warrant the imposition of a sanction on the Licensee in this case. It has reached the Decision that it is.

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5 See 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/proceduresjuly2013/Procedures_for_consideration.pdf
7. 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 of the relevant material in this case and with reference to Ofcom’s Penalty Guidelines (“the Penalty Guidelines”)\(^6\).

8. Ofcom’s Decision is that the appropriate sanction should be a financial penalty and that it should be £120,000. Ofcom also considers that the Licensee should be directed to broadcast a statement of Ofcom’s findings, on a date and in a form to be determined by Ofcom.

**Change of Control**

9. British Telecommunications Limited (“BT”) notified Ofcom in April 2013 that it was in the process of acquiring ESPN Global, the company which owned ESPN (Europe, Middle East, Africa) Limited. BT, in line with Ofcom procedures, completed Change of Control documentation for the ESPN licence to reflect this change in ownership.

10. This change of control was effective from 1 August 2013. The legal entity that holds the licence, ESPN (Europe, Middle East, Africa) Limited, remains the same, although the controlling interest is now held by British Telecommunications Limited.

11. In its Finding Ofcom noted that this change of ownership was pending and notes here that the regulatory responsibility for previous breaches of licence conditions remains with the legal entity which holds the licence, even if the licence is under new ownership.

**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. This includes a duty to secure in the carrying out of its functions the availability of a wide range of television services (section 3(2)(c)) and, in doing so, to have regard to the needs of disabled people (section 3(4)(i)).

13. Ofcom also has a specific duty under section 303 of the Act to draw up and from time to time review and revise a code promoting the understanding and enjoyment of television services by individuals with sensory impairments. The legislation includes specific targets in respect of subtitling, audio description and signing of relevant programmes. The duty conferred on Ofcom by this section aims to ensure that people with sensory impairments who would otherwise be excluded from television content are able to enjoy such content so far as practical to the same extent as people without sensory impairments.

14. Section 303(3) to 303(5) sets quotas for relevant broadcasters to provide specific levels of audio description (as well as subtitling and signing). These are related to the amount of time that has elapsed since the “relevant date” (as defined by section 305). For ESPN, this is the date the service began broadcasting in July 2009. Section 303(10) and 303(11) allows Ofcom to impose interim targets for relevant channels to meet in advance of those set in the Act.

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\(^6\) See Ofcom’s Penalty Guidelines published 13 June 2011.  
15. All quotas imposed under these sections must be met by a given anniversary of the relevant date of a channel. The given anniversary and the relevant quotas can be found in the table in paragraph 3 above. In order to align reporting of compliance with the calendar year, revised quotas apply to services which began broadcasting after the Act came into force, which are notified in advance to broadcasters; this was relevant in the case of ESPN, whose statutory targets for audio description for 2012 was 5%.

16. Under section 307 of the Act the regulatory regime for every service to which the Code applies includes the conditions that Ofcom consider appropriate for securing that the code maintained by them under section 303 of the Act is observed in the provision of those services. Accordingly condition 9 of ESPN's broadcasting licence sets out that the Licensee shall ensure that the provisions of the Code on Subtitling, Signing and Audio-Description are observed in the provision of the Licensed Service.

**Ofcom Code on Television Access Services**

17. The requirements set by Ofcom in accordance with section 303 of the Act (as amended) are set out in the Code.

18. The relevant Code rule in this case is, as set out on the first page of this Decision, Rule 9.

**Remedial action and penalties**

19. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or statement of findings (or both) to be included in programmes at such times as Ofcom may determine.

20. Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence of a maximum of whichever is the greater of £250,000 and 5 per cent of its qualifying revenue on each occasion that a breach of the Licence has occurred (whether as a result of a breach of the Television Access Services Code or another Licence condition).

21. 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 there under.

**Background – The Finding**

22. Ofcom requires relevant channels to provide end-of-year returns to Ofcom outlining the amount of audio description (and other access services) they have provided over the course of the previous year. ESPN’s access service returns for 2012 indicated that they had provided audio description on 2.3% of its relevant content. In light of this, Ofcom initiated an investigation in February 2013 regarding a possible breach of the Television Access Services Code which resulted in the publication of the Finding.

23. In its Finding in August 2013, Ofcom noted that ESPN did not dispute that its audio description provision of 2.3% in 2012 was below its 5% target. As a result visually impaired consumers had been excluded from 2.7% of ESPN’s relevant content in 2012.

24. The publication of the Finding followed a previous breach of the same Code rule by ESPN in 2011 when the licensee had provided no audio description against the quota set under the Code of 3%. As a result visually impaired consumers had been excluded from 3% of ESPN’s relevant content in 2011. Ofcom’s breach decision on the earlier
matter was published in June 2012. The Finding in 2013 therefore related to a repeated breach.

25. Ofcom’s Finding noted ESPN’s representations on the reasons for its under-provision of audio description in 2012. In particular, ESPN had set out the difficulties it believed it faced in meeting the audio description requirements. In particular, it stated that its output consisted of a significant amount of live content, including sports and studio discussions, and "current" non-live content (i.e. material repeated only within the 24 hours following first broadcast). It contrasted its position with that of a comparator, Sky Sports, which it said could spread live content across several live sports channels, leaving space for material such as documentaries which are repeated over a longer cycle, and are less challenging to audio-describe. It noted the difficulties in audio-describing sports and other live programming, quoting guidance from Ofcom’s predecessor, the ITC, recognising this as an issue. It also stated that it had not undertaken to catch up with 2011 under-provision in 2012, but had instead stated an intention to do so over 2012 and 2013.

26. In response to the points raised by ESPN, Ofcom’s Finding reiterated points made in its earlier breach decision that the difficulties in audio-describing content referred to by ESPN were not insuperable. It noted that this had been recognised by ESPN in the process leading to the earlier breach decision, during which it had expressed an ability and willingness to meet audio-description requirements going forward. Ofcom noted that the ITC guidance, while potentially helpful reference material, is not part of Ofcom’s Code. It also noted, without prejudice to any formal request by ESPN for exclusion of certain content, that it is important that licensees continue to meet statutory obligations until such time as an exemption is granted, and do not under-deliver in anticipation that of a retrospective exemption.

27. In the Finding, Ofcom found that the under-provision of audio-description by ESPN in 2012 constituted a serious breach of the Code. In light of a previous breach of the same requirements in 2011, it was also a repeated breach. The quota that ESPN was required to meet in 2012, as per the Act, was to provide audio description on 5% of its relevant content.

28. In light of the difficulties ESPN set out regarding its on-going provision of audio description, it stated that it could not commit to making up the 2.7% shortfall from 2012 (or the previous shortfall of 3% from 2011) during 2013 unless Ofcom were to agree to the exclusion of certain programming with effect from 2013 onwards.

29. Given this, Ofcom noted that in this case there is no mechanism to make up the shortfall to those consumers who had been excluded from ESPN’s content nor to ensure that ESPN does not profit financially from the breach.

30. It is noted that the Finding also found ESPN in breach of its obligations in relation to subtitling in 2012. However, ESPN made binding commitments to make up the shortfall in 2013, and Ofcom proposed not to consider the breach in relation to subtitling for sanction; this breach is not considered further in this Decision.

Ofcom Decision to Impose a Statutory Sanction

31. 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

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

32. In this case, Ofcom issued a preliminary view (“Preliminary View”) that the Licensee 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 the Licensee 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 the Licensee on 13 March at the same time as giving the Licensee the opportunity to provide written and oral representations (“the Representations”) to Ofcom. BT, on behalf of the Licensee, provided its written representations to Ofcom on 3 April 2014, and the Licensee (represented both by ESPN and BT as its current owner) also made oral representations at the Sanctions Hearing on 14 April 2014. The Representations are summarised in paragraphs 34 to 44.

33. 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 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

34. In its Representations, the Licensee did not dispute that it had breached the Code, and acknowledged it had been slow to increase the amount of audio described output, whilst noting the particular challenges it faced in doing so given the nature of its broadcast material. It also made a number of points as to why it considered the breach did not merit a sanction (or that the level of any sanction should be lower than proposed). In the summary of the Licensee’s principal Representations below, Ofcom sets out its view as appropriate.

35. The Licensee’s Representations emphasised that the Licensee takes its regulatory obligations seriously. It gave examples of resolving the particular challenges involved in compliance in relation to live sport.

36. The Licensee’s Representations also set out some of the alternatives that they investigated due to the difficulty in providing audio description on live sport such as, where possible, providing ESPN viewers access to the radio commentary of the event in question. The Licensee also set out the process they had for planning provision of audio description against quotas, and the escalations process they followed once they realised they would struggle to meet their quota.

37. The Licensee’s Representations noted that the Code referred to the former ITC’s guidance on the provision of access services. The Licensee noted this describes the provision of audio description on live sports events as “impractical since it is impossible to know when the commentator will speak or what he or she will say” and says that, “there will often be insufficient time to prepare a description for pre-recorded sporting events since they are usually broadcast only after a short delay.” The Licensee noted that, although it did not form part of the Code, the ITC guidance has not been updated or superseded since its publication.

38. The Licensee argued the ITC guidance should lead Ofcom to conclude that the challenges faced in providing audio description on live sports are insuperable, contrary to
39. The Licensee’s Representations noted that Ofcom use audience share as a means of ensuring access services are required on the most popular channels. The Licensee argued that Ofcom should take into account the significant fluctuations in ESPN’s audience share as a mitigating factor in the harm caused by the channels under provision of audio description. It argued this because, as audio description would be more likely to be provided on the less popular non-live programmes, the under provision would impact less significantly on the audience overall.

40. The Licensee’s Representations stated that, given the inherent nature of the commentary of live sports, a degree of access already exists for visually impaired consumers. They further noted that this mitigating factor is borne out by the fact ESPN has received no complaints from consumers regarding the lack on audio description on the channel.

41. The Licensee’s Representations set out their previous attempts to agree an exemption from the audio description requirements on grounds of technical difficulty, arguing that this constitutes an attempt to remedy the consequences of the contravention.

42. The Licensee stated it had not formally requested an exemption because, when it had first met with Ofcom on this matter in 2010, it was given the impression that no exemption would be granted. The Licensee said it had instead sought to pursue the matter informally. It arranged a meeting for August 2012 but this was cancelled by Ofcom. The Licensee argued therefore that “Ofcom and ESPN share responsibility for the issue being allowed to continue unresolved for so long and, consequently, any sanction should reflect that.”

43. The Licensee’s Representations stated that Ofcom’s move to a sanction in August 2013 was premature because it was over-providing audio description for 2013 at that stage and could only not unequivocally commit to making up the earlier shortfall because of the on-going transfer of the service to BT and associated changes in schedule and personnel.

44. In its Representations, the Licensee noted that “Ofcom…recognises that AD of certain content (live sport) is ‘challenging.’” With this in mind it noted that that the majority of ESPN’s content (66% in 2012 and 56% in 2013) was first run and thus likely to be either live sport or talking-heads, neither of which, they argue, lends themselves to audio description. Given this, the Licensee submitted that “the attempts to meet the obligation were…very significant.”

**Seriousness of the breach**

45. Ofcom is given a specific statutory duty under the Act to promote the understanding and enjoyment by people with sensory impairments of broadcast content with the aim of ensuring that, so far as practicable, people with sensory impairments are able to engage as fully in this aspect of society as people without sensory impairments. Whilst no combination of access services can fully replicate the TV experience for a blind or partially-sighted consumer, audio description goes a long way to achieving this and therefore section 303(5(c)) makes specific mention of this access service and sets quotas for relevant broadcasters for its provision. The non-provision, or under-provision,
of access services (in this case audio description), is therefore potentially a serious matter as those with sensory impairments are excluded from programming they have an expectation, based on the regulatory framework, that they will be able to access.

46. Ofcom does, though, also have a duty to be proportionate in its regulation and, under section 303(8) of the Act, therefore takes account of the number of people who would be likely to benefit from the provision of access services. Ofcom has set an audience share threshold below which the likely benefit to people with sensory impairments of the access services provided is likely to be outweighed by the financial burden to the broadcaster of providing them. This audience share threshold is 0.05%. This requirement has been reviewed by public consultation twice, once in 2006\(^9\) and once in 2009\(^10\), and on both occasions Ofcom has concluded it to be appropriate and proportionate. Therefore this threshold remains in force and is reflected in section 12.a of the Code. ESPN’s audience share was over 0.05% in 2011 and so the likely audience benefit from the provision of access services was likely to outweigh the cost to the broadcaster of providing the service. As such ESPN was required to provide access services in 2012.

47. ESPN’s under-provision of audio description in 2012 was the second consecutive year in which it has failed to meet its statutory requirements. ESPN was found in breach of Rule 8 (as it then was; now Rule 9) for its under-provision during 2011. The 2012 breach therefore represented a repeated breach of the Code.

48. The fact that targets for signing, subtitling and audio-description are for annual periods, and that Rule 9 of the Code gives a degree of certainty for a number of years in advance, gives ample opportunity for broadcasters to plan and allocate adequate resources for provision well in advance. It also means that, if there are exceptional reasons for lower provision in the early part of a year, there is time for broadcasters to address the issue internally, and make arrangements to catch-up over the course of the full year. ESPN under-provided in 2011, and provided less than half the requirement for audio description in 2012 despite having had the opportunity to plan adequately and scope to correct projected under-provision over the full year. Ofcom considers this a very serious breach, particularly given the 2011 finding which should have led to the matter having a high priority within ESPN.

49. In considering alternatives to a statutory sanction, Ofcom is able to consider whether audiences would benefit from an alternative arrangement, such as a level of over-provision in subsequent years, if agreed with the broadcaster, in order to make up for under-provision in previous years. Such over-provision can ensure that people with sensory impairments are provided overall with access to the same level of content as required by the Code. However, as noted in the Finding, ESPN has stated that in light of the difficulties it set out regarding its on-going provision of audio description, it cannot commit to making up the shortfall from 2011 and 2012 during 2013 unless Ofcom were to agree to the exclusion of certain programming with effect from 2013 onwards. Therefore, in this instance there is no mechanism for ESPN to make up the shortfall and to provide consumers with access to the same level of content mandated under the Television Access Services Code.

50. In view of the factors set out above, Ofcom considers that the breach of the Code is both serious and repeated. As such they warrant the imposition of a statutory sanction. The following paragraphs set out the enforcement action we have considered and Ofcom’s Decision of the appropriate sanctions to be imposed.

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\(^9\) [http://stakeholders.ofcom.org.uk/binaries/consultations/accessservs/summary/access.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/accessservs/summary/access.pdf)
\(^10\) [http://stakeholders.ofcom.org.uk/binaries/consultations/access_services/summary/consultation.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/access_services/summary/consultation.pdf)
Level of Sanction

Imposition of sanctions

51. As set out in paragraphs 20 to 25 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.

Whether the breach is such as to justify revocation under section 239

52. Ofcom does not consider the revocation of the licence under section 239 is justified in this case. This is because we do not consider that it would be proportionate to the nature of the breach, and consider a financial penalty to be sufficient to address the matter.

Imposition of sanctions other than a financial penalty

53. 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) in relation to the contravention of a licence condition.

54. Ofcom considers that directing the Licensee to broadcast a statement of Ofcom’s findings (as provided by Ofcom and at times stipulated by Ofcom) is appropriate in this case.

55. Firstly, it will bring the breach and Ofcom’s findings to the attention of ESPN viewers. This will ensure that audience confidence in the regulatory regime is maintained.

56. Secondly, the need to broadcast such a statement is also likely to ensure that the Licensee puts in place robust procedures to ensure there is no further repetition of the breach.

Imposition of a financial penalty

57. 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 up to £250,000 or 5 per cent of the qualifying revenue for the licence holder’s last complete accounting period falling within the period for which this licence has been in force, whichever is greater.

58. 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.

59. 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.”

60. Ofcom’s view is that a financial penalty is necessary to ensure that the Licensee takes all necessary steps to avoid repeated breaches in future. Ofcom also considers that a financial penalty will ensure that other licensees are deterred from breaching their requirements under the Code.
61. 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. Each of these is set out below.

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

62. As set out above, the provision of access services is crucial in enabling people with sensory impairments to access the television services enjoyed by those without such impairments. In the case of audio description, this enables those with visual impairments to access such services. Sections 303 to 308 of the Act were enacted by Parliament in recognition of this and to put in place a binding requirement on broadcasters to secure a minimum level of provision of access services.

63. ESPN’s audience is of sufficient scale that audiences would have benefited from the access services that ESPN had a duty to provide. As a result of ESPN’s under-delivery of access services, people with visual impairments have been excluded from access to its programmes.

64. Ofcom noted the Representations, to the effect that, had it met its obligations, ESPN would have been most likely to do so by audio-describing non-live programmes with low audiences. Ofcom notes that it cannot be sure which additional programmes ESPN may have audio-described had it met its obligations. It is possible that these would have included less popular, non-live programmes, although the Representations also noted that ESPN had considered (but not actually implemented) measures to audio-describe live and recently pre-recorded content. However, it is not necessary to conclude on which programmes ESPN would hypothetically have audio-described had its obligations been met; in any event visually impaired people were excluded from a proportion of programmes.

65. Ofcom also noted that the Representations had commented that television sports commentary does give visually impaired people some level of description by its nature, and that this was reflected in a lack of consumer complaints. However, Ofcom considers that television commentary of live sport presumes the viewer can see the action. It is unlike radio commentary in this respect, and is not provided with the needs of the visually impaired in mind. We also note that complaints would not normally be anticipated in relation to a meeting a 5% audio-description quota over the course of a year as this is not readily measurable by consumers.

**The duration of the contravention**

66. The nature of Rule 9 of the Code is such that quotas for provision of access services are set as a percentage of content broadcast over a 12 month period and as such any breach takes place over the course of a full year. It is noted in this context that the fact that targets refer to the course of a full year means that broadcasters are able to plan, commit adequate resources, and take corrective action should projected provision deviate from earlier plans. That ESPN fell substantially short of its statutory target, audio describing less than half of what was required, indicates a continued failing over the 12 month period to address the problem.

**Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention**
67. Ofcom has assessed the cost to relevant broadcasters of providing access services in order to establish if relevant channels can afford to provide such services within 1% of their relevant turnover. The latest available data to Ofcom published on the 3 September 2009 outlines that the average hourly cost of providing audio description is £443\(^{11}\).

68. In 2012 ESPN was obliged to audio describe 5% of its relevant content and provided 2.3% resulting in a 2.7% shortfall for that year.

69. In calculating the affordability of access services provision for a relevant channel Ofcom has regard to that channel’s repeat rate as it is reasonable to assume once access services have been commissioned for a given piece of content that content is then repeated as per the normal repeat rate of the channel. Thus a relevant channel does not incur the full cost of commissioning access services against its full schedule but only against that amount that constitutes first run content.

70. From the transmission returns submitted by ESPN Ofcom understands that in 2012 the channel broadcast 4,936 first run hours of content. As it fell short of its audio description target by 133 hours (2.7% of 4,936 hours) this represents an estimate of financial gain in 2012 by ESPN of £58,919\(^{12}\).

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

71. As outlined in paragraph 22, the Licensee has previously been found in breach of the Code for a failure to provide any audio description against a target of 3%. This breach related to provision of audio description during 2011 and was published in Broadcast Bulletin 207 on the 11 June 2012.

72. In light of ESPN’s assurances at the time of the earlier breach that it would make up the 2011 deficit in audio-description during 2012, Ofcom did not proceed to sanction in relation to the 2011 breach. However, it is noted that the failure to make up the deficit may have resulted in a further financial benefit to ESPN of under-provision. In 2011, the channel broadcast 5,836 first run hours of content and should therefore have incurred the cost of commissioning audio description for 175 of these hours (3% of 5,836 hours). As ESPN did not provide any audio description this represents an estimate of financial gain in 2011 by ESPN of £77,525\(^{13}\).

**Any steps taken for remedying the consequences of the contraventions**

In the Finding, Ofcom noted that ESPN had set out what it considered to be difficulties regarding both its past and on-going provision of audio description. Ofcom noted that these points were reiterated in the Licensee’s Representations. However, it also noted that, these difficulties notwithstanding, no exemption from ESPN’s obligations under the Code had been agreed, and indeed no formal request for one had been made. The mere fact that it is possible regulation may differ at some future point is not a relevant mitigating factor in relation to a sanction for a past breach.

73. Ofcom noted points made in the Representations regarding the fact that the “run-rate” for audio-description in early 2013 was such that there was a prospect of exceeding the 2013 target. However, at the time of the Finding, the Licensee was offered the

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\(^{11}\) Ofcom 2009 Review of Television Access Services  
http://stakeholders.ofcom.org.uk/binaries/consultations/access_services/summary/consultation.pdf  
\(^{12}\) 133 hours x £443 = £58,919  
\(^{13}\) 175 hours x £443 = £77,525
opportunity formally to commit to exceeding the 2013 target as a way to partly remedy the earlier breach. The Licensee only felt able to do so in relation to subtitling (which is not subject to this Decision). Consequently, while recognising that there were reasons not to commit to over-provision (including the acquisition by BT and uncertainty as to whether the “run rate” would continue given patterns of live sport coverage over the year), in the absence of a commitment there was no mechanism to mitigate the consequences of past under-provision through future over-provision.

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

74. ESPN has outlined a number of steps it has taken in order to meet its obligations. These include:

- Adjusting the summer schedule (when there is less live sport shown) to allow for more content suitable to carry audio description;
- The commissioning of audio description on a series of sports documentaries and;
- Including a block of programming on the channel of a type which would normally appear on the ESPN Classic channel which is therefore better suited both in terms of content and shelf-life, to effective audio description.

75. Ofcom considered that overall the Licensee did make genuine attempts to meet its obligations, and recognised that audio-description of certain content, in this case live sport, is challenging. This is reflected in the increase in provision in 2012, compared to no provision in 2011. Ofcom also recognised that the Licensee explored technical options, as set out in its Representations, to seek to resolve the issue, while noting that some of these (such as providing access to radio commentaries) did not in fact come to fruition. However, the scale of the breach in each year demonstrated that these changes were insufficient to ensure compliance.

76. Ofcom notes that the Representations argued that the challenges of audio-describing live sport were insuperable which meant ESPN was being held to a flawed standard. Ofcom does not accept that this is the case. ESPN had, following the earlier breach decision, indicated a willingness and ability to meet the requirement, including through scheduling changes if necessary. It had explored solutions, and the fact that these had not come to fruition did not in itself make them inherently impractical.

*The extent to which the contraventions 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*

77. Ofcom is satisfied that members of the Licensee’s senior management were tasked with dealing with the issue. Ofcom also acknowledges that some efforts were made to ensure compliance, as set out above. Given ESPN had outlined its intention to make such changes in advance of implementation, and offered assurances as to their expected level of effectiveness, Ofcom is satisfied that the breaches were not deliberate. However, the fact that provision fell very substantially short of the statutory target, despite the opportunities to address the issue over the course of the year indicates a serious failure of management, and a failure to escalate and resource appropriately. The repeated breach resulting in under-provision in consecutive years also suggests that there was a sustained period during which greater attention should have been given to the issue by ESPN.

*Whether the contraventions in question continued, or timely and effective steps were taken to end them, once the regulated body became aware of them*
78. Ofcom notes that ESPN has expressed continuing concerns about its ability to meet its obligations in future. Ofcom will discuss this issue with the licensee following the completion of the sanction process.

79. Further, Ofcom retains reservations over the timeliness with which the measures outlined in paragraphs 59 were introduced. That obligations increase over time is set out clearly in Ofcom’s Code. Ofcom notes that whilst these changes have allowed ESPN to provide audio description on 9.4% of its content throughout the first 6 months of 2013\(^\text{14}\) it is possible that, had these changes been implemented earlier, ESPN could have gone some way to mitigating its under-provision in 2011 and 2012.

**Cooperation**

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

81. Ofcom considered that the Licensee was co-operative during the investigation and does not therefore consider it appropriate to increase the penalty on account of a failure to co-operate in this instance.

**Precedent**

82. In accordance with the Penalty Guidelines, Ofcom has also had regard to relevant precedents set by previous cases.

83. Other than those recorded against ESPN, Ofcom has recorded one breach of Rule 8 (as it then was) of the Code and this did not result in a sanction. This was in the case of Box Television, the licensee for 4Music/The Hits and The Box, which had failed to meet some of the subtitling requirements for these channels during the period from April 2007 to December 2009\(^\text{15}\).

84. Ofcom stated in its Finding in that case that “in a serious breach of this nature, Ofcom would normally consider imposing sanctions. However, given the restitution offered by Box Television [to substantially over deliver subtitling in future], we have decided, on this occasion, not to do so.”

**Level of financial penalty**

85. Having regard to all the factors referred to above and all the representations to date from the Licensee, Ofcom’s Decision is that an appropriate and proportionate sanction would be a financial penalty of £120,000. In addition, Ofcom considers that the Licensee should broadcast a statement of Ofcom’s findings in this case, on a date and in a form to be determined by Ofcom.

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

86. Ofcom considered the proportionality of the penalty in light, in particular, of ESPN’s qualifying revenue (and total revenue) for the calendar year 2012. Ofcom considers this

\(^{14}\) [http://stakeholders.ofcom.org.uk/market-data-research/market-data/tv-sector-data/tv-access-services-reports/access-q1q2-13](http://stakeholders.ofcom.org.uk/market-data-research/market-data/tv-sector-data/tv-access-services-reports/access-q1q2-13)

to be proportionate as it achieves the appropriate level of deterrence taking into account the serious nature of the breach in this case and also addresses the financial gain to the licensee.