## Sanction: Decision by Ofcom

**Imposed on Biditis Limited**

For material broadcast on 7, 14, 21 and 29 October 2011.

### Consideration of sanction against:

| Biditis Limited (the “Licensee”) in respect of its service Al-Alamia TV (TLCS-1133). |

### For:

Four episodes of *Miss Arab London 2011* found to be in breach of the Ofcom’s Broadcasting Code (the “Code”) in respect of:

| Rule 2.13: “Broadcast competitions and voting must be conducted fairly.” |
| Rule 2.14: “Broadcasters must ensure that viewers and listeners are not materially misled about any broadcast competition or voting.” |
| Rule 9.4: “Products, services and trade marks must not be promoted in programming.” |
| Rule 9.5: “No undue prominence may be given in programming to a product, service or trade mark. Undue prominence may result from: |
| • the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or |
| • the manner in which a product, service or trade mark appears or is referred to in programming.” |
| Rule 9.8: “Product placement must not influence the content and scheduling of a programme in a way that affects the responsibility and editorial independence of the broadcaster.” |
| Rule 9.9: “References to placed products, services and trade marks must not be promotional.” |

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2. The version of the Code which was in force at the time of the broadcasts took effect on 28 February 2011. All references to the Code in this Decision are therefore references to that version of the Code which can be found at: [http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/broadcastingcode2011.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/broadcastingcode2011.pdf)
Rule 9.10: “References to placed products, services and trade marks must not be unduly prominent.”

Rule 9.14: “Product placement must be signalled clearly, by means of a universal neutral logo, as follows:

a) at the beginning of the programme in which placement appears;

b) when the programme recommences after commercial breaks; and

c) at the end of the programme.”

Breach of Biditis Limited’s Television Licensable Content Service (“TLCS”) Licence (as above) in respect of:

Condition 6(A)(3)(b)

“Where the Licensee uses a Controlled Premium Rate Service as defined under the PRS Condition in force at the time made under section 120 of the Communications Act 2003 as the method of communication for voting or competitions publicised within programme time, the Licensee shall ensure that its compliance procedures include a system of verification by an appropriate independent third party….”

On: 7, 14, 21 and 29 October 2011.

Decision: To impose a financial penalty (payable to HM Paymaster General) of £30,000.
Case summary

1. Al-Alamia TV is a London-based Arab culture and entertainment satellite broadcaster which broadcasts in Arabic and English. The licence for Al-Alamia TV is held by Biditis Limited (or “the Licensee”). Between October 2010 and 7 July 2012 the channel was broadcasting via the Nilesat satellite to parts of southern Europe and the Middle East. Between October 2010 and December 2011 the channel was also broadcasting to Europe via the Hotbird satellite. The channel is not currently broadcasting via satellite. A live stream was also available on Al-Alamia TV’s website, however, on 7 July 2012 the live stream was replaced by a two hour acquired documentary repeating on a loop.


3. The Finding related to four episodes of the programme Miss Arab London 2011, broadcast on 7, 14, 21 and 29 October 2011 (“the Programmes”), which were broadcast in English and Arabic.

Voting

4. In October 2011, Al-Alamia TV held a beauty pageant entitled Miss Arab London 2011. The accompanying television series comprised three pre-recorded episodes and a final broadcast live on 29 October 2011 (“the Live Final”). The three episodes introduced the 22 contestants and contained footage of their preparation for the final. Viewers in the UK were invited to vote for their favourite contestant via premium rate text (or “SMS”) message each costing £1.50 plus the standard network rate (normally between 10 and 12p). Viewers outside the UK were invited to vote via an international text message number, also charged at a premium rate.

5. During the Live Final, the eight contestants with the most votes were announced and went before a panel of judges. After a series of questions, the judges then determined the winner. There were also prizes for two runners up, a “talent” prize and a “popularity” prize (i.e. the contestant with the most public votes).

6. As a result of a number of errors made by the Licensee in respect of its calculation of the votes and the timing and details of its on-air invitations to viewers to vote, Ofcom found that viewers had been materially misled and the vote had not been conducted fairly, in breach of Rules 2.13 and 2.14.

7. The Licensee admitted to Ofcom that it had not had any third party verification arrangements in place for its use of premium rate telephony services (“PRS”) in this series. Ofcom therefore found the Licensee in breach of Licence Condition 6(A)(3)(b) (third party verification for PRS in voting).

Commercial references

8. The three pre-recorded programmes contained segments about four businesses which were visited by the contestants during the programmes. The businesses in question

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3 Licence Condition 6(A)(3)(b) relates to a licensee’s use of a Controlled Premium Rate Service as defined under the PRS Condition in force at the time made under section 120 of the Communications Act. The breaches of the Licence Condition only apply to Biditis Limited’s use of PRS in the UK, not the international service.
were credited on air as sponsors of the series and therefore references to them during
the programmes were subject to the product placement rules. Ofcom considered these
sequences to have been purposefully designed to promote the businesses.
Furthermore, the inclusion of these segments in the programmes appeared significantly
to influence the content of the programme and called into question the editorial
independence of the broadcaster. Ofcom therefore recorded breaches of Rules 9.8 and
9.9 of the Code.

9. In addition, Ofcom did not consider there was sufficient editorial justification for the
extent to which two of the businesses were featured in the programmes and as such
concluded the references to them to be unduly prominent, in breach of Rule 9.10.

10. Ofcom found that the product placement signalling logo was not broadcast at any of the
required points, so the audience was not made aware that the references to the
sponsoring companies had been included in the programme in return for payment or
other valuable consideration to Al-Alamia TV who produced the programme. Ofcom
therefore found the programmes in breach of Rule 9.14 of the Code.

11. During the third episode, there were references to two further businesses which did not
appear in the programme in return for payment or other valuable consideration. However, Ofcom noted that the programme contained an interview with a
representative of each of these companies. In both cases, the presenter allowed the
representative an opportunity to provide information about the company and make
positive comments about the services the business offered which Ofcom found in
breach of Rule 9.4. Further, Ofcom did not consider there was sufficient editorial
justification to include either business in this manner, or to this extent. Consequently,
the material was also in breach of Rule 9.5 of the Code.

Summary of Ofcom’s sanction decision

12. Ofcom considered that the breaches were sufficiently serious as to warrant the
consideration of the imposition of a statutory sanction.

13. In accordance with Ofcom’s Procedures for the consideration of statutory sanctions in
breaches of broadcast licences (“the Sanctions Procedures”) and having considered all
the evidence and all the representations made to it by the Licensee, Ofcom decided for
the reasons set out in paragraphs 65 to 78 below that it would be appropriate to impose
a financial penalty.

14. Having regard to the serious nature of the Code breaches, the Licensee’s
representations and the Ofcom Penalty Guidelines (“the Penalty Guidelines”), Ofcom
decided it was appropriate and proportionate in the circumstances to impose a financial penalty of £30,000 on the Licensee in respect of the Code breaches (payable to HM Paymaster General).

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4 Ofcom’s Procedures for the consideration of statutory sanctions in breaches of broadcast licences. These procedures came into effect on 1 June 2011.

5 Ofcom’s Penalty Guidelines published 13 June 2011.
Legal framework

Communications Act 2003

15. 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)).

16. 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). They include that:

- generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material (section 319(2)(f));

- the product placement requirements are met in relation to programmes included in a television programme service (other than advertisements) (section 319(2)(fa)) of the Act (as amended); and

- the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with (section 319(2)(i)).

17. In performing its duties, Ofcom is required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, to have regard to a number of other considerations including the need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g)).

Human Rights Act 1998

18. Under section 6 of the Human Rights Act 1998, there is a duty on Ofcom (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention of Human Rights (“the Convention”).

19. Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster’s right to “impart information and ideas” and also the audience’s “right to receive information and ideas without interference by public authority” (Article 10(1) of the Convention). Such rights may only be restricted if the restrictions are: “prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary” (Article 10(2) of the Convention).

20. Ofcom must exercise its duties in light of these rights 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

21. Standards set by Ofcom in accordance with section 319 of the Act (as amended) are set out in the Code.

22. 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 Code.\(^6\)

23. The relevant Code rules in this case are set out in full on the first two pages of this Decision.

Licence requirement for the handling of communications from viewers

24. Following a series of serious breaches of the Code resulting from broadcasters’ use of PRS, Ofcom introduced a Licence Condition requiring broadcasters to implement a system of third party verification where PRS are used for competitions or voting schemes in programmes. The condition of the licence requiring third party verification (condition 6A(3)(b)) serves to secure the standards objective set out in Section 319(2)(f) of the Act relating to harm.

Remedial action and penalties

25. Under section 325 of the Act, every programme service licensed under the Broadcasting Act 1990 or 1996 (“a Broadcasting Act Licence”) includes conditions for securing that the standards set by Ofcom under section 319 are observed. If Ofcom is satisfied that the holder of a Broadcasting Act Licence has contravened a condition of the Licence, it may impose the sanctions set out below where the relevant licence is a Television Licensable Content Service (“TLCS”) licence.

26. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or statement of findings (or both) or not to repeat a programme on contravention of a Licence condition.

27. 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 Code or another Licence condition). Ofcom may therefore impose a financial penalty on each occasion that a programme has breached the Code.

28. 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


\(^6\) See: http://stakeholders.ofcom.org.uk/broadcasting/guidance/programme-guidance/bguidance/
30. The Finding related to four episodes of the programme *Miss Arab London 2011*, broadcast on 7, 14, 21 and 29 October 2011, which were broadcast in English and Arabic.

31. In October 2011, Al-Alamia TV held a beauty pageant entitled *Miss Arab London 2011*. The accompanying television series comprised three pre-recorded episodes and a final broadcast live on 29 October 2011 (“the Live Final”). The three episodes introduced the 22 contestants and contained footage of their preparation for the final.

**Voting**

32. Viewers in the UK were invited to vote for their favourite contestant via premium rate text (or “SMS”) message each costing £1.50 plus the standard network rate (normally between 10 and 12p). Viewers outside the UK were invited to vote via an international text message number, also charged at a premium rate.

33. During the Live Final, the eight contestants with the most votes were announced and went before a panel of judges. After a series of questions, the judges then determined the winner. There were also prizes for two runners up, a “talent” prize and a “popularity” prize (i.e. the contestant with the most public votes).

34. As a result of a number of errors made by the Licensee in respect of its calculation of the votes and the timing and details of its on-air invitations to viewers to vote, Ofcom found that viewers had been materially misled and the vote had not been conducted fairly, in breach of Rules 2.13 and 2.14.

35. Moreover, the Licensee admitted to Ofcom that it had not had any third party verification arrangements in place for its use of PRS in this series. Ofcom therefore found the Licensee in breach of Licence Condition 6(A)(3)(b) (third party verification for PRS in voting).

**Commercial references**

36. The three pre-recorded programmes contained segments with verbal and visual references to the following four businesses: Crystal Palace Hair and Beauty Spa; Duo Gym; Fahkreldine; and Lycamobile. The businesses in question were credited on air as sponsors of the series and the Licensee indicated that they had either made a payment or provided another form of valuable consideration to the Licensee in return for being referred to in the series. Therefore, references to them during the programmes were subject to the product placement rules. Ofcom considered these sequences to have been purposefully designed to promote the businesses. Furthermore, the inclusion of these segments in the programmes appeared significantly to influence the content of the programme and called into question the editorial independence of the broadcaster. Ofcom therefore recorded breaches of Rules 9.8 and 9.9 of the Code.

37. In addition, Ofcom did not consider there was sufficient editorial justification for the extent to which Crystal Palace Hair and Beauty Spa and Lycamobile were featured in the programmes and as such concluded that the references to each company were unduly prominent, in breach of Rule 9.10.

38. Ofcom also found that the product placement signalling logo was not broadcast at any of the required points, so the audience was not made aware that the references to the sponsoring companies had been included in the programmes in return for payment or other valuable consideration to Al-Alamia TV who produced the programmes. Ofcom therefore found the programmes in breach of Rule 9.14 of the Code.
39. During the third episode, there were references to Queen’s Ice and Bowl and the London Dermatology Centre, which did not appear in the programme in return for payment or other valuable consideration. However, Ofcom noted that the programme contained an interview with a representative of each of these companies. In both cases, the presenter allowed the representative an opportunity to provide information about the company and make positive comments about the services the business offered.

40. Ofcom considered that by allowing these representatives to provide detailed and positive information about their services, the programme was effectively promoting these businesses; in both cases this constituted a breach of Rule 9.4.

41. While it could be argued that the London Dermatology Centre is clearly associated with the general theme of the programme (i.e. beauty), Ofcom did not consider there was sufficient editorial justification to include references to either business in this manner, or to this extent. Consequently, the material was also in breach of Rule 9.5 of the Code.

**Ofcom’s decision to impose a statutory sanction**

42. 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 financial penalty. 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 26 November 2012, at the same time giving the Licensee the opportunity to provide written and oral representations on the Preliminary View. The Licensee provided written representations ("Written Representations") to Ofcom on 17 December 2012, and attended a hearing at Ofcom on 15 January 2013 to provide oral representations ("Oral Representations") (together "the Representations"). The Representations are summarised below.

43. 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. Ofcom took account of all the evidence and the Representations from the Licensee on the Preliminary View and had regard to the Sanctions Procedures and to Ofcom's Penalty Guidelines in reaching its Decision (see further below).

**Licensee’s Representations**

44. The Licensee accepted that the programmes were in breach of the Code and of Licence Condition 6(A)(3)(b) and that the breaches were sufficiently serious to warrant the imposition of a financial penalty. However, the Licensee considered the proposed level of the penalty to be disproportionate. The Licensee provided a number of reasons for this as set out below.

45. Biditis Limited noted that Ofcom had accepted it had not breached the Code or Licence Condition 6(A)(3)(b) intentionally. The Licensee described the production of the programme as very pressured due to the low number of staff who were working on the project. Consequently, the Licensee admitted that at the time of the breaches it had no compliance arrangements in place and it had not read thoroughly its Ofcom licence or the relevant codes and rules because it “had to focus on the show”.

46. The Licensee submitted that the actual or potential harm to viewers was “very minimal”.

i) Miscalculation of vote percentages
With regard to the miscalculation of vote percentages which resulted in contestant 21 being taken forward to the final instead of contestant 14, Biditis Limited stated that it had agreed with the PRS operator that it should send the results of the vote in an Excel spreadsheet, but there was a misunderstanding as to the required format of the results, so that they were not provided as percentages and included contestants who had withdrawn from the competition.

The Licensee submitted that contestant 14 received 82 votes which is “a small number of viewers” and that its records indicated that those 82 votes were made by a small number of voters many of whom will have been members of the contestant’s family. The Licensee said that it offered the family of contestant 14 “financial compensation” which they declined. The Licensee also broadcast an apology and published an apology on its Facebook page.

ii) International voting number

The Licensee submitted that because the number had not been activated, no votes had been received. Biditis Limited submitted that any viewers who attempted to vote using the non-activated international number received a message stating “message failure” and were not charged either the premium rate charge or a standard network charge.

iii) Incorrect scrolling message

With regard to the voting numbers of the four contestants who had withdrawn from the contest appearing on screen in a scrolling message during the final, the Licensee stated that nobody voted for those contestants during the final, so there was no actual harm to viewers.

iv) Inviting viewers to vote after the lines had closed

The Licensee submitted that the last vote was submitted at 19:36 which was before the presenter had announced that the lines were closed, so no actual harm was caused to viewers.

47. The Licensee submitted that the contraventions occurred over a short period of time.

48. The Licensee stated that it made a minimal financial gain as a result of the breaches. It made £75.11 as a result of the miscalculation of votes for contestant 14. The money it received from the programme sponsor Lycamobile was received by the production company Miss Arab London Limited which is owned by the Licensee’s Executive Manager (who was responsible for compliance). The Licensee confirmed that the programme made a net loss.

49. The Licensee noted that this was the first contravention of the Code or its licence.

50. The Licensee stated that for the production of the programme it had employed a PR, Marketing and Advertising consultant who had arranged the sponsorship and barter deals for *Miss Arab London 2011*. He claimed to have extensive experience at several Middle Eastern broadcasters, one of which was licensed by Ofcom. Biditis Limited said that it trusted his assurances regarding his knowledge and experience and did not undertake any independent checks. Further, the Licensee said that its administrator had attended an Ofcom workshop dedicated to Ofcom’s revised rules on product placement and commercial references in July 2011 and that he had reported back to the Executive
Manager (who was responsible for compliance), in particular regarding the products which could not be product placed, and that the channel must broadcast the product placement signal around programmes which contain product placement.

51. Biditis Limited submitted that to remedy the breaches it contacted contestant 14, offered her an honorary runner-up prize, offered financial compensation to five members of her family who had voted for her, broadcast an apology and published an apology on its Facebook page. The Licensee confirmed that it did not broadcast an invitation to viewers to apply for a refund if they considered that they had been misled. The Licensee said that as it understood that viewers who attempted to vote using the non-activated international number were not charged, there was no question of being able to remedy this. More generally, the Licensee assured Ofcom that if Al-Alamia resumes broadcasting it will employ a compliance officer to ensure compliance with the Code.

52. The Licensee disagreed with Ofcom’s view that it had acted recklessly. It referred to a Court of Appeal case7 considered in a civil context, in which ‘recklessness’ was defined as referring to a situation in which “someone does something knowing that it is risky or not caring whether it is risky or not he is acting recklessly”. The Licensee argued that to be considered reckless, it is not enough to say that it ought to have known of the risk. The Licensee said that as it was not aware of the Code rules and Licence Condition 6(A)(3)(b), it could not be considered to be reckless, rather it had been negligent.

53. With regards to taking timely steps to end the contraventions, Biditis Limited submitted that it only knew about the contraventions some time after they had occurred. With respect to the international text message numbers, in particular, Biditis Limited accepted that it was aware in mid-October 2011 that these had not been activated, but did not remove the numbers from its broadcasts. However, Biditis Limited submitted that it understood that viewers who attempted to vote using the numbers would not have been charged either the premium rate charge or a standard network rate by their mobile network operators. The Licensee had arrived at this view because the Executive Manager (who was responsible for compliance), after finding out that the international text message service was inactive, had attempted to submit a text to it via her own international mobile phone and had not been charged for this. Further, the Licensee said that it did not know that it was breaching any rules by not removing the numbers from its broadcasts.

54. The Licensee stated that in order to demonstrate that a penalty is proportionate, “it needs to be shown that the level of the penalty goes no further than is necessary to achieve the legitimate aim of the scheme – in this case mainly deterrence. And that exercise requires consideration of a company’s means”. It submitted that it was an “extremely small broadcaster” which was now only broadcasting online. Biditis Limited had only ten permanent employees at the time of the breaches and “virtually non-existent revenues for its entire time in operation”. The Licensee explained that the channel had been privately funded by the company director. Biditis Limited stated that at the time of making its Oral Representations, it had only two employees and the individual who had been funding the channel was no longer doing so, although he remained employed by the channel.

55. The Licensee explained it had ceased broadcasting and that if it resumed broadcasting, the experience of having the breaches recorded against it, and of providing its Written and Oral Representations, would be “quite sufficient to make clear the importance of compliance”. The Licensee therefore suggested that “strictly on the grounds of deterrence”, no financial penalty was necessary.

7 CP (a child) v Royal London Mutual Insurance Society Ltd. [2006] EWCA Civ 421.
56. The Licensee referred to the Channel Television case which Ofcom had cited as a relevant precedent case, in which the Licensee had been fined £80,000.8 Biditis Limited argued that in the Channel Television case the facts were “in every respect more serious than the facts of this case” and that: i) they involved a licensee of considerably greater size than Biditis Limited; ii) they involved breaches over a period of two years9; iii) millions of viewers were affected; iv) the breaches were described as “serious, reckless and repeated”.

**Imposition of sanctions**

57. As mentioned in paragraphs 25 to 28 above, Ofcom’s powers to take action are set out in sections 236 to 238 of the Act insofar as relevant to the present case.

58. In view of the factors set out in paragraphs 65 to 78 below, Ofcom considered that the breaches are sufficiently serious to warrant the imposition of a statutory sanction. The following paragraphs set out the enforcement action we have considered and the sanctions to be imposed.

**Consideration of the imposition of sanctions other than a financial penalty**

59. 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.

60. Ofcom considered that in this case, revocation of the Licence would be a disproportionate sanction.

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. As the Licensee was only broadcasting on its website a two hour acquired documentary repeating on a loop, Ofcom decided it was not appropriate to direct the Licensee to broadcast a statement of Ofcom’s findings.

**Imposition of a financial penalty**

63. 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 in this case is up to £250,000 or 5 per cent of Biditis Limited’s qualifying revenue relating to its last accounting period, whichever is greater.

64. Ofcom’s Penalty Guidelines state that: “Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement.” In reaching its Decision, Ofcom has taken full account of the need to ensure that any penalty acts as a deterrent and has also taken account of the specific factors set out at paragraph 4 of the Penalty Guidelines.

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8 See: [http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/channel_tv_bca.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/channel_tv_bca.pdf)

9 The Licensee erroneously referred to the breaches having occurred over a period of three years.
Seriousness of the breaches

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

66. Ofcom considered that the number and severity of breaches found in these programmes were sufficiently serious to warrant the imposition of a statutory sanction for the reasons set out below.

Voting

67. Section 319(2)(f) of the Act requires that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material. This objective is reflected in, among other rules, Rules 2.13 and 2.14, which serve to ensure voting exercises are conducted fairly and prevent them from misleading the audience in such a way as to cause material harm, such as financial loss. The objective is also reflected in Licence Condition 6(A)(3)(b) which serves to ensure that broadcasters have appropriate independent systems in place to check and verify the use of PRS for audience voting.

68. Cases where a broadcaster has materially misled its audience, whether knowingly or not, have always been considered by Ofcom (and its legacy regulators) to be amongst the most serious breaches of the Code.

69. In recent years, Ofcom has imposed a number of significant financial penalties on broadcasters and published several breach findings relating to the use of PRS in competitions and voting. Ofcom has made clear to broadcasters on numerous occasions that it expects them to exercise the utmost care in the conduct of audience competitions and voting schemes, in particular when viewers or listeners are invited to pay to do so. The above circumstances demonstrated clearly that the Licensee did not have sufficiently robust procedures in place to ensure that its viewers were not materially misled. Indeed, the Licensee did not provide Ofcom with any evidence to indicate that it had any form of procedures in place at all to ensure compliance with the relevant Code rules. Ofcom considers that the absence of any sufficient compliance procedures in such circumstances, where viewers are being invited to pay premium rates to interact with the broadcaster’s programmes, is wholly unacceptable. As such, Ofcom considered the breaches of Rules 2.13 and 2.14 in this case to be very serious and significant breaches of the Code.

70. At the time of the breaches, the licence requirement for a third party verification system for the use of PRS in viewer voting and competitions during programmes had been in force for over three years. Ofcom was very concerned that Biditis Limited claimed to have had no knowledge of the licence requirement. The Licensee said that, when receiving a copy of its TLCS licence, it was “not able to properly analyse and thoroughly read through” it. Ofcom considered the Licensee’s argument that it was unaware that the requirement regarding third party verification existed to be unacceptable. It is the responsibility of all Licensees to ensure that they understand their responsibilities as set out in their licence to broadcast. As such, Ofcom considered the breach of Licence Condition 6(A)(3)(b) in this case to be serious and significant.
71. Section 319(2)(i) requires that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with.

72. Article 19 of the EU Audiovisual Media Services (AVMS) Directive requires, among other things, that television advertising is kept visually and/or audibly distinct from programming.

73. The purpose of this is to prevent programmes becoming vehicles for advertising and to protect viewers from surreptitious advertising. Further, Article 23 of the AVMS Directive requires that television advertising is limited to a maximum of 12 minutes in any clock hour.

74. The above requirements are therefore reflected in, among other Code rules, Rules 9.4 and 9.5, which prohibit both the promotion and undue prominence of products, services or trade marks in programming.

75. Further, Section 319(2)(fa) of the Act requires that the product placement requirements are met in relation to programmes included in a television programme service (other than advertisements). This objective is reflected in Rules 9.8, 9.9, 9.10 and 9.14 which state that:

- Product placement must not influence the content and scheduling of programme in a way that affects the responsibility and editorial independence of the broadcaster (Rule 9.8);

- References to placed products, services and trade marks must not be promotional (Rule 9.9);

- References to placed products, services and trade marks must not be unduly prominent (Rule 9.10); and

- Product placement must be signalled clearly, by means of a universal neutral logo, as follows:
  a) at the beginning of the programme in which placement appears;
  b) when the programme recommences after commercial breaks; and
  c) at the end of the programme (Rule 9.14).

76. Ofcom was surprised at the Licensee’s explanation that it was in “complete ignorance” of the requirements regarding product placement and commercial references detailed in Section Nine of the Code, because an employee of Al-Alamia TV attended an Ofcom workshop dedicated to the revised rules on product placement and commercial references in July 2011. In this case, the Licensee allowed four sponsors to be featured within its programmes in a highly promotional and unduly prominent manner, and to such an extent that it allowed the commercial arrangements in place to influence the content of its programmes and affect its editorial independence. The requirement for a broadcaster to maintain its editorial independence is a fundamental part of its editorial control of the service. Furthermore, the Licensee failed to signal to its audience that product placement was included in the programmes. In addition, the Licensee promoted
and gave undue prominence to two other non-sponsoring businesses. As such, the numerous breaches of Section Nine rules in this case (Rules 9.4, 9.5, 9.8, 9.9, 9.10 and 9.14), which all directly derive from the requirements of EU and UK legislation, are particularly serious.

77. In summary, Ofcom's investigation into Miss Arab London 2011 identified multiple serious and significant breaches of rules of the Code with regard to audience voting, product placement and other commercial references. Additionally, in the course of the investigation, it became apparent that the Licensee had no third party verification arrangements for its use of PRS and as such did not fulfil Condition 6(A)(3)(b) of its TLCS licence.

78. The Licensee attributed each circumstance to a lack of knowledge or experience. It is a Licensee's responsibility to ensure it is fully aware of its obligations, and a lack of knowledge or experience is not, in any way, an acceptable explanation for non-compliance. It appeared that the Licensee had not considered it necessary to research its compliance obligations before embarking on the production of a series which involved extensive commercial arrangements, national and international premium rate service telephony and a live broadcast. As such, Ofcom was of the view that the Licensee had demonstrated a fundamental lack of due care not only in the conduct of its service in respect of these programmes, but also in respect of its obligations under its licence to broadcast.

Factors taken into account in determining the amount of a penalty

79. In considering the appropriate amount of a financial penalty for the breach, Ofcom took account of relevant factors in accordance with the Penalty Guidelines, as set out below:

Deterrence

80. Ofcom considered that a financial penalty was necessary to ensure that the Licensee fully understands the serious nature of the Code and Licence Condition breaches recorded against and implements all necessary improvements to ensure compliance with the relevant requirements in the future should it resume broadcasting fully. Ofcom also considered that a financial penalty was necessary to send a message to other licensees underlining the need to understand and comply with the Code and Licence Conditions.

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

81. During the series, UK viewers were invited to vote for their favourite contestant via premium rate text message each costing £1.50 plus the standard network rate (normally between 10 and 12p). The Licensee provided Ofcom with voting statistics which indicated that 950 votes were received from UK viewers.

82. Ofcom noted that there were three fundamental errors made by the Licensee with regard to the operation and promotion of the voting which would have affected those viewers who voted or attempted to vote:

i) After the voting lines had closed, the Licensee determined which eight contestants had gained sufficient votes to progress to the next stage. The Licensee mis-read two contestants' scores from the list that was prepared following the manual calculation of each contestant's share of the vote.
Contestant 14’s score of 8.6% was recorded by the Licensee as 2.6% and contestant 22’s score of 2.6% was recorded as 8.6%. As all votes for contestant 22 were counted, there was no direct financial impact on viewers who had voted for this contestant. However, if recorded correctly, contestant 14 would have progressed to the next stage. Since viewers’ votes for this contestant were not properly counted, their votes had been effectively disregarded and each vote would have resulted in a financial loss of £1.50 plus the standard network rate (normally between 10 and 12p) to the viewer in question. The Licensee said that out of the 950 votes it received, 82 were for contestant 14. It said that those 82 votes were made by a small number of the contestant’s family and friends.

ii) During the broadcast of the Live Final, the scrolling message at the bottom of the screen contained the relevant voting numbers for each contestant. However, this also included the details of four contestants who had previously withdrawn from the contest.

Displaying voting numbers for withdrawn contestants presented the possibility of viewers paying £1.50 (plus their standard network rate) for a vote that ultimately would not have been counted. It was fortunate that no votes were cast for these contestants during the final, but there was the potential for viewers to have suffered financial harm as a result of this error. Ofcom considered the Licensee’s argument that viewers would have known which contestants were participating and which had withdrawn to be unacceptable. Irrespective of the composition of the audience, the presence of the scrolling message inviting viewers to vote for non-participants was a serious error as it would have resulted in detriment to any viewer who responded.

iii) During the broadcast of the Live Final, the presenter announced that lines had closed and later in the programme revealed the result of the public vote. However, viewers were still invited to vote in the subsequent highlights section and also, by the scrolling message which remained on screen until the end of the broadcast.

Ofcom noted the Licensee’s submission that the last vote to be received was at 19:36 which was “well before” the presenter announced that the lines had closed. Ofcom also noted the Licensee’s submission that since lines had closed, SMS votes made after the presenter’s announcement would have been rejected and not charged. However, there are two stages when applying charges to PRS text messages – the premium rate element (in this case £1.50) and the standard network element. Although the premium rate charge may not have applied, any viewer responding to these calls to action after lines had closed may still have been charged their standard network rate. Despite the Licensee’s submissions, it is, in Ofcom’s view, not possible to determine how many viewers were affected in this way. Even if the last vote was received by the PRS provider well before the lines were closed, viewers may still have attempted to vote after this time but these text messages would not be recorded by the PRS provider. In any case, even if, by chance, no viewers actually attempted to vote after the lines had closed, the broadcaster’s calls to action after this time still created the potential for viewer harm.

83. These three fundamental errors in the operation and promotion of the voting caused, or could have caused, viewers to be materially misled which resulted, or could have resulted, in a breach of trust between viewers and the broadcaster.

84. Viewers outside the UK were invited to vote via an international text message number, also charged at a premium rate. However, this service was not activated and as such, the PRS operator did not record that any votes were received. Biditis Limited submitted
that it understood that, viewers who attempted to vote using the international numbers would not have been charged either the premium rate charge or a standard network rate by their mobile network operators. Ofcom understands that mobile operators outside the UK may take different approaches to applying carriage charges if a consumer attempts to use an inactive PRS SMS service. Therefore, Ofcom did not consider that the Licensee’s Executive Manager’s experience of not incurring a charge when attempting to use the international service via her own international mobile phone could be taken as conclusive proof of what other viewers may have experienced. Ofcom could not determine with any certainty whether viewers who attempted to vote via this international PRS SMS incurred a carriage charge. This presented the possibility that viewers may have been charged when attempting to use the inactive international PRS SMS service in this case.

85. Ofcom could therefore not determine with any certainty the extent or degree of actual harm resulting from these errors, beyond the actual financial harm resulting from the failure to count the 82 votes for contestant 14. However, in all of the above practices, there was the potential for viewer harm. We considered that the failure of the Licensee to ensure that its viewers were not materially misled in each of the ways detailed above, involved a significant risk of harm in the form of potential financial loss to any viewers who chose to vote during the programmes. In addition, because viewers were, or could have been, materially misled in this way, there was a breach of trust between viewers and the broadcaster.

The duration of the contraventions

86. The recorded breaches were in relation to material broadcast on 7, 14, 21 and 29 October 2011. Ofcom noted that the breaches did not take place over a particularly lengthy period, but they nevertheless occurred repeatedly over that period.

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

87. The Licensee confirmed to Ofcom that the total revenue generated by SMS voting was £1,425 of which the Licensee received £844.23 once other costs had been deducted. The Licensee calculated that it received £75.11 from votes for contestant 14 who should have progressed to the next stage (see paragraph 48).

88. The Licensee also stated that the revenue generated through sponsorship deals went directly to the production company which is owned by the Licensee’s Executive Manager (who was responsible for compliance). Other valuable considerations gained through commercial arrangements with the businesses in the programme were used to offset production costs. For example, the contestants received free or discounted products and services in return for featuring the businesses in the programme.

89. However, the Licensee informed Ofcom that overall, it made a substantial loss from this series.

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

90. The Licensee has no history of contraventions.
Any steps taken for remedying the consequences of the contraventions

91. Upon discovering that it had miscalculated the percentages of the public vote, the Licensee contacted contestant 14 to explain the error and awarded her an honorary prize as compensation. An apology was broadcast on Al Alamia TV and published on Miss Arab London website and Facebook page.

92. The Licensee also said it offered a full refund to the family members of contestant 14 who had voted for her.

93. However, whilst Ofcom acknowledged that voting numbers were low, it noted that the Licensee did not broadcast a refund invitation for:

i) other voters for contestant 14 – apart from her family members – whose votes might not have been taken into account because the votes for this contestant were not properly counted; or

ii) viewers that might have voted in response to a scrolling message which remained on-screen after the lines had closed and could have been charged their standard network rate (as explained in paragraph 82 above).

94. The Licensee has advised Ofcom that since 7 July 2012 the channel has only been available via the internet and it has broadcast a repetitive loop of a two hour programme. It also has stated that if and when it decides to recommence broadcasting new material, it will most likely bring in a specific compliance officer to oversee its processes.

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

95. With regard to third party verification of the voting process, Ofcom was very concerned that Biditis Limited said that it had no knowledge of an important licence requirement that at the time of the breaches, had been in force for over three years, and when receiving a copy of its TLCS licence “was not able to properly analyse it and thoroughly read through” it.

96. Ofcom also noted the Licensee’s explanation that this was its first use of PRS voting and these mistakes were largely caused by inexperience and production pressures. However, this does not, in Ofcom’s view absolve the Licensee of its responsibility in this area. Ofcom’s published guidance to Rules 2.13 to 2.16 of the Code states, “It is evident that some competitions have been operated improperly because production and editorial values have been placed before obligations of fairness: some broadcasters have regarded the maxim ‘the show must go on’ as trumping their regulatory (and ethical) duties. One key consideration in the production planning for competitions is time. In live programming this concern is especially acute. Broadcasters will wish to consider carefully whether shorter live programmes are capable at all of providing sufficient time for the proper administration of competitions, mindful that some extra time may be necessary because of technical or other problems. Similar considerations apply to voting schemes.” Ofcom has therefore made it clear to broadcasters that production pressures are not an excuse for poor compliance in this area.

97. In this case, Ofcom was particularly concerned that:

- the Licensee did not sufficiently confirm the required format in which votes should have been delivered with the PRS operator before the event and make the necessary
arrangements to ensure the results were calculated accurately and not subject to human error;

- fundamental details such as the final list of names and voting numbers of the remaining contestants were not communicated to the director of the live event. Ofcom was also concerned by the fact that the names and voting numbers of withdrawn contestants were displayed for the entire programme and that this was not identified by the broadcaster or any of the production staff;

- the Licensee prepared a highlights section containing invitations to vote. It broadcast this highlights section after lines had closed and did not recognise that this may have prompted viewers to vote outside the voting window; and

- the Licensee did not follow up the instruction it gave to the Master Control Room Operator to remove the scrolling message after voting had closed. Furthermore, the message, which was prominently displayed at the bottom of screen for the remainder of the programme (125 minutes), went undetected. It appeared to Ofcom that the Licensee’s assertion that it did not become aware of the error until viewing a recording after the event, indicated that the live feed had not been sufficiently monitored. Ofcom had serious concerns that such a fundamental error was not identified during this time.

98. The Licensee attributed the circumstances for each recorded breach of the Licence Condition and Code to a lack of knowledge or experience. It is a Licensee’s responsibility to ensure it is fully aware of its obligations, and a lack of knowledge or experience, or production pressures, are not, in any way, an acceptable explanation for non-compliance. It appeared that the Licensee did not consider it necessary to research its compliance obligations before embarking on the production of a series which involved extensive commercial arrangements, national and international premium rate service telephony and a live broadcast. As such, Ofcom considered that the Licensee had failed to take any steps to prevent the contraventions or to meet the obligations of its licence to broadcast.

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

99. Ofcom acknowledged in this case that the breaches were not intentional. The breaches in this case occurred because the Licensee had acted recklessly by failing to put in place adequate compliance arrangements to ensure compliance with the Code and the obligations under its licence to broadcast.

100. The Licensee in its Representations:

- said that it did not have sufficient funds to have a dedicated compliance department or lawyer, although at the time of the breaches it had employed a PR, Marketing and Advertising consultant who had arranged the sponsorship and barter deals for Miss Arab London 2011. He had claimed to have extensive experience at several Middle Eastern broadcasters, one of which was licensed by Ofcom. Biditis Limited said that it trusted his assurances regarding his knowledge and experience and did not undertake any independent checks;

- admitted that it was not sufficiently prepared or equipped for using PRS in programmes;
• “plead[ed] ignorance” of the requirement to have a third party verifier for the use of PRS;

• claimed during the original investigation that it was in “complete ignorance” of the requirements regarding product placement and commercial references detailed in Section Nine of the Code, despite an administrator employed by Al-Alamia TV attending a workshop dedicated to Ofcom’s revised rules on product placement and commercial references in July 2011. However, in its Representations, the Licensee said that the administrator had reported back to the Executive Manager (who was responsible for compliance), in particular regarding the products which could not be product placed, and that the channel must broadcast the product placement signal around programmes which contain product placement; and

• said that it had read its licence before the series was broadcast but did not go through the various code and rules, although the Executive Manager knew that there were regulations in place.

101. In Ofcom’s view, it was clear from the above that the Licensee’s Executive Manager knew that Biditis Limited had obligations under its licence and the Code, even though it did not take the necessary steps to confirm precisely what they entailed. It therefore appeared that by failing to take appropriate steps to ensure that it understood and met its obligations, the Licensee willingly undertook the risk of breaching the relevant rules and causing harm to viewers.

102. In any case, even on the assumption that the Licensee did not have any knowledge of its obligations under its licence, it was Ofcom’s view that such lack of knowledge was due to the Licensee’s disregard as to the consequences of its actions. Such disregard transpired from the fact that the Licensee admitted not to have read thoroughly its broadcasting licence or any of the applicable rules and to have relied instead on the assurances of its PR, Marketing and Advertising consultant regarding its compliance with the applicable rules. It was also Ofcom’s view that Biditis Limited showed such disregard even though it ought to have known that broadcasting a series of programmes involving extensive commercial arrangements, national and international premium rate service telephony and a live broadcast raised significant risks of financial and non-financial detriment to viewers.

103. Ofcom noted the Licensee’s argument relating to the definition of ‘recklessness’ as a situation in which “someone does something knowing that it is risky” by the Court of Appeal (see paragraph 52 above). The Licensee argued that to be considered reckless, it is not enough to say that it ought to have known of the risks raised by its actions. The Licensee argued that, given that it had not been aware of the Code rules and Licence Condition 6(A)(3)(b), its behaviour should have been characterised as negligent. In this regard, Ofcom noted that the judgment referred to by the Licensee also held that someone acts recklessly when he does something “not caring whether it is risky or not”. The Court went on to say that “put more precisely for present purposes if the insured is aware that what he is about to do risks damage of the kind which gives rise to the claim or does not care whether there is such a risk or not, he will act recklessly if he goes ahead and does it.” In Ofcom’s view the Licensee willingly chose to run the risk of breaching the rules, and that in any case, it was indifferent as to the risk of breaching them.

104. Ofcom therefore considered the breaches in this case to be evidence of reckless conduct on the part of the Licensee.
Whether the contraventions in question continued, or timely and effective steps were taken to end them, once the regulated body became aware of them

105. As detailed in paragraph 84 above, Ofcom could not determine with any certainty if viewers who attempted to vote via an international PRS SMS incurred a charge of any kind. However, given this presented the possibility that viewers may have been charged for sending a SMS, it was of concern to Ofcom that the Licensee had admitted that it became aware of some of the errors concerning the conduct of the vote during the broadcast period but did not ensure that these errors were corrected. In particular, the Licensee said that it became aware in mid-October 2011 that its premium rate operator for international text message votes had failed to activate the service. However, the Licensee said that there was insufficient time for the international numbers to be edited out for the final programme on 29 October 2011. The Licensee therefore broadcast the 29 October 2011 programme in the full knowledge that the international text message numbers it was promoting to viewers were inactive. It was only after the numbers had been broadcast that the Executive Manager (who was responsible for compliance) sent a text message to one of the numbers from her own international mobile phone to check that no charge was applied. Ofcom did not consider the Licensee to have taken sufficient, timely or effective steps to end the contravention once it became aware of it.

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

106. Ofcom noted that the channel was a small operation, however, at the time of the breaches the Licensee was receiving significant funding from its director. While at the time of the oral hearing the Licensee submitted that it had no funding and was in a difficult financial position, Ofcom noted that the Licensee said that it may re-launch the channel which Ofcom took to indicate that it expected to acquire new funding. Ofcom considered therefore that the financial penalty of £30,000 was proportionate.

Precedent

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

108. In this instance, there are no direct sanction precedents for the breaches in this case. However, three previous sanctions cases relating to audience voting and/or interaction via PRS involved breaches of Rule 2.2 (Factual programmes or items or portrayals of factual matters must not materially mislead the audience) and therefore have some relevance to the present case.10

109. 8 May 2008, Granada Television Limited (ITV1)11 – Sanction of £1,200,000 and a direction to broadcast a statement of Ofcom’s findings on two occasions, for breaches of Rule 2.2.12 This case concerned: i) the early finalising of a vote two minutes before

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10 These breaches were recorded before the television broadcast licences were amended to require licensees to have third party verification system in place for the use of PRS for viewer voting and competition during programmes.

11 See: http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/granada.pdf

12 On 16 December 2009, Rule 2.14 (Broadcasters must ensure that viewers and listeners are not materially misled about any broadcast competition or voting) was inserted into the Code to deal with
voting lines were closed ii) disregarding viewers’ votes as to which contestants should be put forward for the overnight eviction; and iii) on a number of occasions (estimated by the Licensee to be 8 out of 44), the production team overrode the song choices voted for by viewers. Ofcom concluded that these breaches of Rule 2.2 were a very significant breakdown in the fundamental relationship of trust between a long-established public service broadcaster and its viewers. This case involved the Licensee seriously and repeatedly materially misleading its audience as a result of deliberate actions taken by the most senior and experienced members of the production team. The Licensee failed to have any proper regard for the necessity to operate effective compliance, reporting, risk management and management procedures to ensure that viewers’ votes were taken properly and fairly into account and that they were not materially misled.

110. 8 May 2008, ITV2 Limited (ITV2+1)13 – Sanction of £275,000 for breaches of Rule 2.2 and Rule 2.11 (Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known).14 This case concerned: i) failure to inform viewers on 28 occasions that interactive competitions had concluded in repeat broadcasts of four interactive quiz show programmes; and ii) failure to inform viewers of three repeat broadcasts of an interactive dating programme that the programme was not live and interactivity was no longer available. Ofcom found that on the basis of the Licensee’s estimates, approximately 2,400 viewers had called or sent SMS or MMS (picture text) messages in response to the repeat broadcasts of the affected programmes, without any chance of winning or interacting. In this case, the Licensee’s failure to take sufficient steps to ensure that viewers would not call and seek to participate in the affected programmes using PRS demonstrated a lack of proper regard by the Licensee for the potential for significant financial detriment to the viewers who participated. Ofcom was also concerned by inadequacies in the Licensee’s compliance and risk management procedures and its reporting lines. They were, in Ofcom’s view, ineffective to ensure compliance with the Code in this area and the Licensee was reckless as to the consequences. Ofcom considered that the steps the Licensee had taken to remedy the issues (including the consequences of the breaches in this case) were wide-ranging and timely.

111. 2 October 2009, Channel Television Limited (ITV1)15 – Sanction of £80,000 and a direction to broadcast a statement of Ofcom’s findings on one occasion, for breaches of Rule 8.2(b) of the ITC Programme Code (“the ITC Code”) (Use of Premium Rate Telephone Services in Programmes), and Rule 2.2 of Ofcom’s Code. This case concerned: i) the early finalising of the vote for the ‘People’s Choice Award’ in the British Comedy Awards 2004, resulting in a breach of the ITC Code Rule 8.2(b) (The licensee must retain control of and responsibility for the service arrangements and the premium line messages (including all matters relating to their content)); ii) the early finalising of the vote for the ‘People’s Choice Award’ in the British Comedy Awards 2005, resulting in a breach Rule 2.2 of the Code; and iii) overriding the viewers’ vote for

issues of material misleadingness in broadcast votes and competitions. Prior to this, the more general Rule 2.2 (Factual programmes or items or portrayals of factual matters must not materially mislead the audience) applied in such cases.

13 See: http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/itv2.pdf

14 Rule 2.11 of the Broadcasting Code, October 2008, was replaced by the current Rules 2.11, 2.12 and 2.13.

15 See: http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/channel_tv_bca.pdf
the ‘People’s Choice Award’ and substituting a different winner in the British Comedy Awards 2005, resulting in a breach of Rule 2.2 of the Code. The financial penalty comprised of £45,000 in respect of the early finalising of the vote in both programmes, and £35,000 in respect of overriding viewers votes in one of the programmes. Ofcom found that the breaches represented a grave breach of the trust between a long-established public service broadcaster and its viewers. The breaches of Rule 2.2 were serious, reckless and repeated over two years. The Licensee’s compliance procedures were absent and/or insufficient and ineffective in preventing all three breaches from occurring. Ofcom considered that the Licensee’s approach to the PRS aspects of the programmes contributed to the breaches.

112. Ofcom noted the Licensee’s argument in its Representations that in the Channel Television case the facts were “in every respect more serious than the facts of this case” and that i) they involved a licensee of considerably greater size than Biditis Limited; ii) they involved breaches over a period of two years; iii) millions of viewers were affected; and iv) it was described as “serious, reckless and repeated”. However, in the present case, Ofcom had not only imposed the sanction with respect to the two contraventions relating to the fair conduct of voting, but had also recorded breaches of Licence Condition 6(A)(3)(b) for failing to have PRS verification arrangements in place, (a requirement which had not existed at the time of the Channel Television breaches), and breaches of six other rules relating to the inclusion of commercial references in the series. Further, Biditis Limited admitted to having no compliance arrangements in place. In addition, the breaches in the present case were also found to be serious and reckless and to have continued during the course of four consecutive programmes.

113. Another previous sanction case related to breaches of the rules around the inclusion of commercial references in programmes, Rules 10.1 (Broadcasters must maintain the independence of editorial control over programme content), 10.2 (Broadcasters must ensure that the advertising and programme elements of a service are kept separate), 10.3 (Programmes and services must not be promoted in programmes), 10.4 (No undue prominence may be given in any programme to a product or service) and 10.5 (Product placement is prohibited).

114. 20 April 2007, Life TV Media Limited (Life TV) – Sanction of £100,000, for breaches of Rules 10.1, 10.2, 10.3, 10.4 and 10.5. This case concerned businesses which paid the programme producer to appear in the programme. There was no transparency to viewers who would have been unaware that the businesses had paid to feature in the programme. Ofcom found that: the Licensee had not maintained independence of editorial control over the content; many of the features about the businesses appeared to be advertising rather than editorial content, in that they were excessively detailed and favourable; the manner in which the majority of businesses were featured within the programme was unduly prominent, even where the reference did not go so far as to be considered promotional; and there was clear evidence that businesses had paid the

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16 The Licensee erroneously referred to the breaches having occurred over a period of three years.

17 The breaches in this case were recorded under the Broadcasting Code 2005 when product placement was prohibited. Product placement has been permissible in programming since 28 February 2011 and therefore these rules have changed. However, Section Nine of the current Broadcasting Code contains similar rules about the inclusion of commercial references in programming (i.e. no promotion or undue prominence) whether or not the references are subject to a product placement arrangement.

18 See: http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/lifetv0407.pdf
programme producer to be featured in the programme (i.e. product placement had occurred).

115. Ofcom is satisfied that a financial penalty of £30,000 in the current case is consistent with the relevant precedent cases, taking due account of the factors outlined in the Penalty Guidelines and the seriousness of the breaches in this case.

Conclusion

116. Ofcom concluded that the Code and Licence Condition breaches by the Licensee were serious for the reasons set out earlier in this Decision. Ofcom was particularly concerned by that the Licensee had failed to have any compliance procedures in place at the time of the breaches to ensure compliance with the Code and its Licence Conditions.

117. Having regard to all the factors referred to above and the Representations from the Licensee, Ofcom’s Decision was that an appropriate and proportionate sanction was a financial penalty of **£30,000**.

22 February 2013