

Decision by the Ofcom Broadcasting Sanctions Committee

Satellite Entertainment Limited for breaches of Licence Condition 11

Consideration of Sanction against:

Satellite Entertainment Limited (“SEL” or “the Licensee”) in respect of its services Essex Babes, Northern Birds and Live XXX Babes (TLCS-525, TLCS-761 and TLCS-764 respectively)

For:

Breach of SEL’s Television Licensable Content Service Licences (as above) in respect of:

Condition 11:

“(1) The Licensee shall adopt procedures acceptable to Ofcom for the retention and production of recordings in sound and vision of any programme which is the subject matter of a Standards Complaint ...

(2) In particular, the Licensee shall: (a) make and retain or arrange for the retention of a recording in sound and vision of every programme included in the Licensed Service for a period of 60 days from the date of its inclusion therein; and

(b) at the request of Ofcom forthwith produce to Ofcom any such recording for examination or reproduction”

On¹:

8 September 2010

26/27 September 2010

21 September 2010

16 September 2010

27 September 2010

23 September 2010

24 September 2010

12 October 2010

13 October 2010

¹ These dates have been listed in the order the breach was recorded.

Decision:

To impose a financial penalty (payable to HM Paymaster General) of **£90,000**.

Background Summary

1. Satellite Entertainment Limited (“SEL”) owns and operates services called Live XXX Babes, Northern Birds, Essex Babes and Sport XXX Babes. These channels are on the Sky platform on channel numbers 950, 954, 955 and 967 respectively. These channels are each operated under a Television Licensable Content Service (“TLCS”) licence issued by Ofcom under section 13 of the Broadcasting Act 1990 (“the 1990 Act”).
2. Ofcom has referred breaches relating to three of SEL’s licences: Live XXX Babes, Northern Birds, and Essex Babes.
3. Live XXX Babes, Essex Babes and Northern Birds are channels located in the ‘adult’ section of the Sky electronic programme guide and are available freely without mandatory restricted access. They are broadcast on Sky channel numbers 950, 954 and 955. The channels broadcast programmes based on interactive chat services. Viewers are invited to contact onscreen female presenters via premium rate telephony services (“PRS”). The female presenters dress and behave in a flirtatious way during the day and in a more sexually provocative way after the watershed, while encouraging viewers to contact the PRS numbers.
4. In accordance with Ofcom’s Procedures for the consideration of statutory sanctions in broadcasting or other licence-related cases (“the Sanctions Procedures”) ⁹ Licence Condition 11 breaches were referred to the Broadcasting Sanctions Committee (“the Committee”).

Summary of Committee’s Decisions

5. The Committee held a hearing on 9 May 2011 at which representatives of the Licensee made oral representations.
6. After considering all of the evidence and representations made to it, the Committee decided that these Licence Condition 11 breaches were so serious and repeated that a financial penalty should be imposed. The Committee then also considered the level of the fine to be imposed, in accordance with Ofcom’s Penalty Guidelines².
7. In summary, the Committee considered that the Licensee’s refusal to supply Ofcom with recordings constituted a very serious licence contravention. The Committee noted that the Licensee’s behaviour served only to frustrate the regulatory process and that this was unacceptable.
8. The Committee further considered that for a six week period the Licensee had lost control of its own services. The Committee found this failure to maintain control of its service to fall far beneath the standards required of a Licence holder.
9. Having regard to the serious and repeated nature of the breaches, and having regard to the Licensee’s representations and Ofcom’s Penalty Guidelines, the Committee

² <http://www.ofcom.org.uk/about/policies-and-guidelines/superseded-guidelines/>. These Penalty Guidelines (published in December 2003) were replaced in June 2011 by new guidelines (available at <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>). The December 2003 Penalty Guidelines were in force at the time of the preliminary view upon which SEL made its subsequent representations and were therefore applied in this case.

decided that it was appropriate and proportionate in the circumstances to impose a financial penalty of **£90,000** on SEL.

Legal Framework

The Communications Act 2003

10. Ofcom has a duty under section 319 of the Communications Act 2003 (“the Act”) to set standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives. The standards objectives are set out in section 319(2) of the Act. They include that: persons under eighteen are protected (section 319(2)(a)); 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)).
11. In discharging its functions, Ofcom’s principal duties are to further the interests of citizens in relation to communications matters and the interests of consumers (section 3(1)) and to secure a number of other matters. 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)).
12. In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, a number of other considerations including:
 - the need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g)); and
 - the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection (section 3(4)(h)).
13. Under sections 236, 237 and 238 of the Act, if Ofcom is satisfied that the holder of a TLCS Licence has contravened a Condition of the Licence, it may impose the following sanctions:
 - issue a Direction to broadcast a correction or a statement of Ofcom’s findings;
 - issue a Direction not to repeat a programme;
 - impose a financial penalty; and/or
 - revoke a Licence (not applicable to the BBC, S4C or Channel 4).

The Human Rights Act 1998

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

15. Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster's right to "impart information and ideas" and also the audience's "right to receive information and ideas without interference by public authority". Such rights may only be restricted if the restrictions are: "prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary" (Article 10(2) of the Convention).
16. Ofcom must exercise its duty in light of these rights and not interfere with the exercise of these rights in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

Relevant licence conditions

17. Condition 11 of each of SEL's TLCS licences states:

"(1) The Licensee shall adopt procedures acceptable to Ofcom for the retention and production of recordings in sound and vision of any programme which is the subject matter of a Standards Complaint ...

(2) In particular, the Licensee shall: (a) make and retain or arrange for the retention of a recording in sound and vision of every programme included in the Licensed Service for a period of 60 days from the date of its inclusion therein; and

(b) at the request of Ofcom forthwith produce to Ofcom any such recording for examination or reproduction"

Remedial action and penalties

18. 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 in contravention of a Licence Condition.

19. 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 or 5% of its qualifying revenue, on each occasion that a breach of the Licence has occurred (whether as a result of a breach of the Broadcasting Code or another Licence Condition). Ofcom may therefore impose a financial penalty on each occasion that a programme has breached the Broadcasting Code.

20. Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence.

Compliance background and history

Compliance History

21. In respect of its Sports XXX Babes service (not a service referred to the Committee in the instant case), SEL has been sanctioned once previously. A fine of £20,000 was imposed for breaches of the Code. This finding was published on 26 August 2008³.

³ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/sportxxxbabes.pdf>

22. SEL has been found to have breached Licence Condition 11 once before. The Finding was published in Bulletin 169 on 8 November 2010, and concerned material transmitted by Sport XXX Girls, 10 September 2010, 00:00 to 00:30⁴.
23. SEL has had ten breaches of the Code recorded against it in respect of content standards. The first four of these Code breaches occurred between 17 April 2007 and 8 June 2008⁵. The further six Code breaches, occurred between 31 March 2010 and 19 May 2010⁶.

Licence Condition Breaches

Condition 11 Breaches

24. Having taken into account the representations of SEL, the Ofcom Executive recorded Licence Condition 11 breaches as follows:

Bluebird

Northern Birds, 8 September 2010, 15:05 to 15:35 and 26/27 September 2010, 23:40 to 00:35

Essex Babes, 21 September 2010, 00:45 to 01:15

Published in Broadcast Bulletin 170 on 22 November 2010⁷

25. The Executive recorded 3 breaches of Licence Condition 11 relating to the 3 programmes set out above for which the Licensee did not provide recordings "forthwith".

Bluebird

Essex Babes, 16 September 2010, 17:45 to 18:15

Bluebird

Essex Babes, 27 September 2010, 22:30 to 23:10

40 Plus Reader's Wives

Essex Babes, 27 September 2010, 23:10 to 24:00

Published in Broadcast Bulletin 171 on 6 December 2010⁸

26. The Executive recorded 2 breaches of Licence Condition 11 relating to the 3 programmes set out above for which the Licensee did not provide recordings "forthwith".

Bluebird TV

Live XXX Babes, 23 September 2010, 23:20 to 00:00

Northern Birds, 24 September 2010, 00:25 to 02:15

Live XXX Babes, 12 October 2010, 21:30 to 22:30

Live XXX Babes, 13 October 2010, 21:30 to 23:00

⁴ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb169/issue169.pdf>

⁵ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb95/issue95.pdf>;
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb114/issue114.pdf>;
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb118/issue118.pdf>;
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb119/issue119.pdf>
respectively

⁶ <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb164/>

⁷ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb170/issue170.pdf>

⁸ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb171/issue171.pdf>

Published in Broadcast Bulletin 174 on 24 January 2011⁹

27. The Executive recorded 4 breaches of Licence Condition 11 relating to the 4 programmes set out above for which the Licensee did not provide recordings “forthwith”.

Referral by the Ofcom Executive to the Chair of the Committee

28. As set out in the Sanctions Procedures (as revised with effect from 16 December 2009), the imposition of a statutory sanction on 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 Licence requirement¹⁰.
29. The consideration for sanction follows a decision by the Ofcom Executive that a broadcaster has seriously, deliberately, repeatedly or recklessly breached a Licence requirement. A case is then referred to the Chair for the provisional consideration of the imposition of a statutory sanction. Before deciding to refer a case to the Committee, the Ofcom Executive may, at its discretion, invite a broadcaster to submit further representations on a case or any information required from the broadcaster to assist understanding and ensure the process is fair.
30. In February 2011, the Ofcom Executive informed the Chair of its recommendation that these Licence Condition breaches were sufficiently serious and repeated as to warrant a referral to the Committee. It asked the Chair for confirmation as to whether or not he agreed to this referral.
31. After considering all the material presented to him the Chair of the Committee informed the Executive that he did agree that the referral should be accepted for consideration of sanctions by the Committee.

Referral to the Broadcasting Sanctions Committee

32. The Chair of the Committee chose to refer the breaches to the Committee for consideration and prepared a Provisional Decision setting out his view on whether sanctions should be imposed and the level of those sanctions. The Provisional Decision was sent to the Licensee on 24 March 2011 and the Licensee was invited to make written representations on the Provisional Decision in advance of the hearing.

The Licensee’s written representations in respect of the provisional decision

33. The Licensees, through their solicitors MLaw, submitted written representations on the provisional decision reached by the Chair of the Committee.
34. The Licensee explained that it had entered into an agreement with a third party company by which it had “rented” its channels, including all compliance activity, to that company. Prior to agreeing a contract for that purpose, SEL’s solicitors had conducted due diligence; SEL had been assured that the company had a “robust framework in place for compliance”. The contract became effective on 1 July 2010.

⁹<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb174/issue174.pdf>

¹⁰ <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/procedures-statutory-sanctions/>

35. During the period of the contract SEL had also sought to transfer the licences it held to the third party. Paperwork had been submitted to Ofcom for that purpose. The company had supplied SEL with a draft agreement for the transfer of the licences and assured SEL's solicitors "that they were engaging with Ofcom in respect of its investigations and the requirement to deliver recordings."
36. SEL submitted that in September 2010 it became aware of problems with the company's compliance of the "rented" channels and subsequently terminated the contract.
37. In respect of SEL's compliance history, the Licensee said that for the first four years of transmission it had an exemplary compliance record but fell into difficulties during the period February – April 2007 when its output was considered on four occasions to have breached the Code and was fined £20,000. Other than two, less serious, contraventions in February and June 2008 SEL had achieved compliance until spring 2010. None of the breaches that led to sanctions concerned a failure to supply recordings.
38. SEL said that the representations made to Ofcom in the course of the investigations were supplied by the contracted company, not by SEL. In that respect SEL commented that, "For the avoidance of doubt, our client accepts that [the company's] failures were serious and repeated but would like the Committee to take into account [the] fact that, in this case, culpability lies with a third party. Our client's own dealings with Ofcom show a history of cooperation and a clear intention to achieve compliance. Specifically, SEL has never failed to provide recordings of its own output."

The Hearing

39. The Committee held a hearing to consider this case on 9 May 2011. The Managing Director of the Licensee attended, with legal counsel, Tristan Jones. Counsel made oral representations to the Committee before the Committee put questions to the two attendees. The attendees also made available further brief documentation; this was accepted by the Committee, at its discretion, for consideration.
40. Counsel made submissions on four grounds: (i) the reasonable steps it said had been taken to prevent breaches; (ii) SEL's compliance history; (iii) the nature and detail of the precedents cited in the Chair's Provisional Decision; and (iv) what the Licensee considered to be the disproportionate and unfair uplifts applied in the method of calculation of the total fine.
41. In respect of ground (i), Counsel drew attention to the arrangements it had entered into with a third party company to operate its services, including operational compliance of the services. SEL accepted that it was responsible to Ofcom as the Licensee. However, SEL submitted that factors listed in Ofcom's sanctions guidance as decreasing the level of penalty were present in this case: steps taken in advance to identify and mitigate the external factors that might result in a contravention; the extent and timeliness of steps taken to end the contravention and of steps taken to remedy any consequences of the contravention; and co-operation with Ofcom's investigation.
42. Mr Jones re-iterated the points made in the written representations about the efforts made before entering into the contract to establish the ability of the third party company to comply with the terms of the licence. However, shortly after the company

took over the operation of the channel, problems emerged with the person controlling the third party company. SEL then asked this person to hand over control of the SEL services to another individual; failing that the contract would be terminated. The controlling person offered to take full responsibility for the services and an application to transfer the licences to the third party was made to Ofcom. The third party company also assured SEL's solicitors that it was engaging with Ofcom in respect of Ofcom's investigations, and in particular the requirement to deliver recordings.

43. SEL said that it terminated the contract with the third party company when it became clear that the transfer of the licences was not going ahead. However, because of threats of legal action made against it and others involved in the transmission of the services, SEL could not regain control of the channels straightaway and eventually had to agree a new and costly agreement with a different transmission company.
44. SEL stressed the steps it had taken prior to the contract to ensure compliance, and the steps taken after problems came to light. The Licensee however emphasised that the legal threats made by the third party had made SEL, on the advice of its lawyers, unwilling to contact Ofcom and had obstructed a speedier end to the non-compliant operation of the licensed services concerned.
45. In respect of SEL's compliance history, ground (ii), the Licensee pointed out that although it had had Code breaches recorded against it and sanctions imposed for content standards breaches in 2007/2008, it had not understood that it was exceeding acceptable standards but had promptly stopped broadcasting material of that sort. Further, there had been a period between 2008 and 2010 when no breaches had been recorded against it and finally, and most significantly, until the third party company took control under the contract it had never breached Condition 11.
46. As to ground (iii), the Licensee argued that the Chair's comparison with precedent cases had been wrongly calculated and should have been lower than described.
47. In addition, in respect of ground (iv), the method of calculating repeated breaches was flawed in principle and the related question of how Ofcom recorded breaches was inconsistent. Generally, Ofcom's power to fine must, SEL said, be applied consistently and offer foreseeability.
48. SEL stressed the severe legal threats made against it by the third party company, and asserted that the level of fine indicated in the Provisional Decision would pose a threat to the continuation of the company and the jobs of its employees.

The Committee's Deliberations

An imposition of a financial penalty

General Criteria

49. In considering whether or not to impose a financial penalty in this case the Committee took into account all the evidence presented by the Executive and all of the representations made by the Licensee. The Committee also had regard to the Sanctions Procedures and to Ofcom's Penalty Guidelines.

50. The Committee began by considering which penalties were available to them, namely, to issue a direction to broadcast a correction or statement of Ofcom's findings, issue a direction not to repeat a programme, impose a financial penalty or to revoke the relevant SEL licences. The Committee took the view that because this case related to failures to provide recordings (and not broadcast content), that the first two options open to the Committee were not appropriate. The Committee considered that given the serious and repeated nature of the breaches, the imposition of a financial penalty was an appropriate and proportionate sanction in these circumstances. The Committee did not consider that the revocation of the relevant SEL licences was a proportionate sanction in this case.
51. Before going on to consider in detail whether or not each individual breach should attract a financial penalty, the Committee considered the maximum level of penalty which might be imposed in respect of each breach. Under 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 SEL's qualifying revenue relating to its last accounting period.
52. 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. In the calendar year 2010, SEL recorded no qualifying revenue, as it had reported interactive services as the sole source of its income.
53. The Committee considered any financial penalty up to £250,000 in respect of each breach of the relevant licences as set out under section 237 of the Act.

General Considerations

54. The Committee first noted that it has stated in two previous sanction decisions (see paragraph 55 below) which also concerned breaches of Licence Condition 11, that it considers such breaches to be very serious. Having considered the Licensee's written and oral representations, the Committee found that the Licensee had, by its own admission, lost control of its services.

Precedent

55. The Committee considered that there were two relevant precedents. Both of these cases included breaches of Licence Condition 11. These cases were:
- **Springdoo Media Limited ("Springdoo") and User Generated Broadcasting Limited¹¹ ("User Generated"), dated 26 February 2010** – sanction of a total £24,000. This figure was the total of £6,000 for a breach of the Code and £6,000 imposed on Springdoo for two Licence Condition 11 breaches (each relating to one broadcast) and £12,000 for two breaches of Licence Condition 11 (each relating to one broadcast) by User Generated.

¹¹ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/springdoo.pdf>

- **Bang Channels Limited (“Bang Channels”) and Bang Media (London) Limited¹² (“Bang Media”), dated 29 July 2010** – sanction of a total £157,250. This figure was the total of £141,250 for Code breaches and £6,000 for one Licence Condition 11 breach (relating to four broadcasts) imposed against Bang Channels and £4,000 for Code breaches and £6,000 for one Licence Condition 11 breach (relating to two broadcasts) against Bang Media.

56. In both cases, the previous Committees considered that the breaches were sufficiently serious and/or repeated as to warrant the imposition of a financial penalty. The Committee noted that there were differences between the facts of these cases and the current case. For example, it noted that in both precedent cases the Licensee had had technical problems with its recording equipment which led to the failure to supply Ofcom with recordings. By contrast, in the current case the Licensee simply refused to provide recordings upon request.
57. The Committee also compared how many broadcasts each of the precedent Licence Condition 11 breaches related to. For example, each of the two Condition 11 breaches recorded against Springdoo and each of the two Condition 11 breaches recorded against User Generated related to one broadcast (i.e. four broadcasts in all). In the case of Bang Channels and Bang Media, each Licensee had one breach of Licence Condition 11 recorded against it, but the breaches related to four broadcasts and two broadcasts respectively. The Committee noted that the Condition 11 breaches recorded against SEL in the present case relate to one broadcast each, bar one Condition 11 breach which related to two broadcasts on 27 September 2010¹³.
58. The Committee decided that the precedents were sufficiently similar to the present case to provide a guide as to the appropriate level of financial penalty. Whilst at the same time noting the different underlying facts, the Committee generally considered SEL’s breaches to be more serious than the precedent cases because they involved refusing to supply recordings as opposed to not being able to supply recordings due to technical failures.

SEL’s Breaches

59. The Committee considered SEL’s breaches individually and reached the view that each of the breaches were identical in nature and that all of them came about in identical circumstances, namely the Licensee refused to supply recordings. For these reasons, the Committee considered the appropriate sanction for all of the **9** breaches together.
60. Having taken account of all the evidence and the Licensee’s representations, the Committee considered that the breaches of Licence Condition 11 were serious and repeated. In particular, the Committee considered the following.
61. The Committee noted, as it had in previous sanctions, that all holders of TLCS licences are required by Condition 11 of their licences to make and retain, or arrange the retention of, a recording in sound and vision of every programme included service for a period of 60 days and to provide a copy “forthwith” on request by Ofcom. The

¹² <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/bangchannels.pdf>

¹³ <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb171/>

Committee referred to the finding of Bang Channels and Bang Media, which stated that:

“this is a fundamental requirement of holding a TLCS licence and is at the heart of Ofcom’s ability to regulate broadcasters. Without a recording of the output Ofcom has no evidence upon which it can base a decision about compliance with the Code and therefore no investigation can proceed”.

62. The Committee reiterated that it regards breaches of this nature very seriously. The Committee noted that SEL had refused to provide recordings of 10 programmes on request and that this resulted in 9 licence condition breaches being recorded.
63. The Committee noted that all of these breaches occurred during a six week period in which SEL did not have control of its services. It took into account the Licensee’s submission that it had rented out its services to a third party and that all breaches had been committed by the third party. The Committee further noted that the Licensee submitted that during this period it could not contact Ofcom as it was advised by its lawyers that to do so would have breached its contract with the third party. The Committee took into account that because of these reasons, the Licensee said it was an “unwitting victim” of the third party and that this period was a “six week blip”.
64. The Committee considered that these were serious breaches of Condition 11 because as a result of the Licensee’s failure to provide recordings, Ofcom was unable to investigate complaints about output on these dates. These breaches were made even more serious by the fact that the Licensee simply refused to supply recordings.
65. The Committee took into account the precedents set out above when assessing the basic level of fine for a Condition 11 breach of this nature. It noted that in both cases £6,000 had been applied to the first Licence Condition breach found against them. The Committee took into account the Licensees submission that some of these breaches related to several broadcasts as opposed to one, but considered that the Executive counted the number of breaches in relation to the requests that are made for recordings, not the number of programmes they related to. It further noted that against each of User Generated and Bang Media a fine of £6,000 was applied in relation to one Licence Condition breach concerning one programme.
66. In deciding on the appropriate size of a financial penalty in relation to each of the Licence Condition 11 breaches, the Committee considered that the penalty should be sufficiently significant to act as a deterrent against similar licence condition breaches by all licensees. As noted above, the Committee has been clear on several occasions that it is essential that Ofcom has access to broadcast material, in order to investigate potential breaches of the Code or other broadcasting requirements. The Committee also considered that these breaches were very serious because the Licensee simply refused to supply recordings to Ofcom during the six week period in question rather than being unable to supply recordings because of technical or administrative reasons. For these reasons, the Committee considered a significant financial penalty to be merited.

Other specific factors

67. In considering the appropriate size of a financial penalty for each of the breaches, the Committee also took account of the following specific criteria from Ofcom's Penalty Guidelines at paragraph 5, as follows:

Any gain (financial or otherwise) made by the regulated body in connection with the breach

68. The Committee noted that there was no direct evidence that the regulated body made any financial gain regarding the Licence Condition breaches.

Degree of harm caused

69. The failure by the Licensee to provide recordings to Ofcom meant that Ofcom was not able to investigate complaints about potential code breaches and so fulfil its statutory duty to secure the standards objectives.

The size and turnover of the regulated body

70. The Committee noted the last recorded transmission and revenue return to Ofcom from SEL. This revenue figure was for the calendar year 2009. None of this figure can be accounted as Qualifying Revenue for the purposes of calculating the maximum financial penalty that can be imposed.

The extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the regulated body

71. The Committee noted the Licensee's representations that all of the breaches had been committed by a third party, that it had no reason to believe that the third party would behave in this manner when SEL entered into the contract with them and that as soon as SEL became aware of the issues with the third party, it acted promptly.

72. However, the Committee noted the fundamental principle that SEL, as the Licensee, has the ultimate responsibility for compliance. In this context, the Committee was concerned that SEL had lost control of its services to a third party.

The duration of the contravention

73. The Committee noted that the breaches recorded against SEL span the period from 8 September 2010 to 13 October 2010, and considered this to be a relatively short length of time.

Whether a penalty in respect of the same conduct has already been imposed by Ofcom or another body

74. The Committee noted that there has been no previous penalty imposed on SEL in relation to Licence Condition 11 breaches. SEL has been fined before by Ofcom, in relation to content breaches (see paragraph 21).

Factors tending to increase the level of penalty

75. The Committee then considered whether there were any factors which aggravated or tended to increase the level of any financial penalty it might impose, in accordance with Ofcom's Penalty Guidelines:

Continuation of the contravention after either becoming aware of the contravention or being notified of a contravention by Ofcom

76. The Committee noted that throughout the six week period in question Ofcom made SEL aware of the ongoing compliance issues it was having with the third party. The Committee took into account the Licensee's submission that it felt unable to communicate with its regulator having been advised that to do so would have constituted a breach of its contract with the third party.

Extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur

77. The Committee again noted that senior management at SEL were copied in to almost all correspondence relating to the ongoing compliance issues with the third party.

The absence, ineffectiveness or repeated failure of internal mechanisms or procedures intended to prevent contravention by the regulated body concerned, or other bodies in the same group

78. The Committee considered that of greatest concern was the Licensee had voluntarily entered into an agreement in which it divested itself of all control over its services, despite its ultimate responsibility to ensure compliance.

Repeated contraventions by the same regulated body

79. The Committee noted that the Licensee had been found to have breached Licence Condition 11 once before¹⁴. It noted that this also occurred during the period that the third party had control of SEL's licensed services.

Factors tending to decrease the level of financial penalty

80. The Committee then considered whether there were any facts which in its view might limit or decrease the level of financial penalty.

81. The Committee noted all the submissions as to mitigation made by the Licensee. In particular, the Committee took account of the following:

- All breaches were committed by a third party
- The Licensee carried out due diligence before entering into its agreement with the third party
- These breaches were all within a relatively short six week period.

The extent to which the regulated body has taken steps in advance to identify and mitigate external factors that might result in a contravention

82. The Committee noted the Licensee's submission that it had retained solicitors who conducted due diligence on the third party and that the Licensee saw no reason why the third party would behave in the manner it ultimately did.

¹⁴ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb169/issue169.pdf>

The extent and timeliness of any steps taken to end the contravention in question, and any steps taken for remedying the consequences of the contravention

83. The Committee noted that since these breaches were recorded, the Licensee has resumed control of its services.

Co-operation with Ofcom's investigation

84. The Committee noted that during the investigation process the Licensee (albeit via a third party) was obstructive and refused to comply with Ofcom's investigations.

Conclusion

85. In summary, the Committee considered that the Licensee's refusal to supply Ofcom with recordings constituted a licence contravention of very great seriousness. The Committee noted that the Licensee's behaviour served only to frustrate the regulatory process and that this was unacceptable.
86. The Committee further considered that for a 6 week period the Licensee had lost control of its own services. The Committee found this failure to maintain control of its services to fall far beneath the standards required of a Licence holder.
87. In deciding on how to deal appropriately with the repeated nature of the breaches, the Committee considered that, in this case, all of the breaches were identical in nature and substance and that all aggravating and mitigating factors applied equally to each of them. The Committee felt that it was not therefore appropriate to apply increasing penalty levels in sequence with how the breaches were recorded. Instead, the Committee took the view that the same figure, £10,000 should be applied to each breach.
88. For the reasons set out above, the Committee decided to impose a financial penalty on SEL of £10,000 per breach giving a total of £90,000 which can be broken down as follows:

Broadcast Bulletin 170 breaches, published on 22 November 2010, listed here by transmission date

8 September 2010 – £10,000

26/27 September 2010 – £10,000

21 September 2010 – £10,000

Broadcast Bulletin 171 breaches, published on 6 December 2010, listed here by transmission date

16 September 2010 – £10,000

27 September 2010 – £10,000

Broadcast Bulletin 174 breaches, published on 24 January 2011, listed here by transmission date

23 September 2010 – £10,000

24 September 2010 – £10,000

12 October 2010 – £10,000

13 October 2010 – £10,000

89. The Committee noted that **£90,000** is a significant penalty against SEL but took the view that because of the seriousness of the breaches together with the manner in which they occurred that the penalty was appropriate and proportionate in these circumstances.

Ofcom Broadcasting Sanctions Committee

24 June 2011