

# Ofcom Content Sanctions Committee

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<b>Consideration of sanctions against</b>	The British Broadcasting Corporation (“the BBC”) in respect of its services BBC 2 and CBBC
<b>For</b>	Breaches of the Ofcom Broadcasting Code (“the Code”) of:  <b>Rule 2.11:</b> <i>“Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.”</i>  Relating to the following conduct:  <b>Faking the winner of a viewer competition “Birthday Bingo”, in a live transmission of TMI, on BBC2 and CBBC</b>
<b>On</b>	16 September 2006 between 09:59 and 10:02
<b>Decision</b>	To impose a financial penalty (payable to HM Paymaster General) of <b>£50,000</b> and, in addition, to require the BBC to <b>broadcast a statement of Ofcom’s findings</b> on its services BBC2 and CBBC in a form to be determined by Ofcom on two specified occasions.

## Summary

- 1.1 For the reasons set out in full in the Decision, under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee (the "Committee"), the Committee decided to impose statutory sanctions on the BBC in light of the serious nature of its failure to ensure compliance with the Ofcom Broadcasting Code ("the Code").
- 1.2 This adjudication under the Code relates to the broadcast of *TMi* on BBC2 and CBBC on 16 September 2006 between 09:59 and 10:02.
- 1.3 *TMi* is a live Saturday morning entertainment programme for children. It is a two hour 45 minute magazine format programme, simulcast on BBC2 and CBBC, with a mix of guests, cartoons, comedy sketches, music videos, features and up to four phone-in competitions in each programme. The programme broadcast on 16 September 2006 was the launch programme and included a competition called *Birthday Bingo*. In this competition, viewers whose birthday day fell on a date randomly chosen by the presenters were invited to call the studio in the hope of being put on air and asked to identify a studio guest. The prizes, which consisted of *TMi* merchandise and toys to the value of approximately £140 were displayed in a large box in the studio. On this occasion, due to a problem contacting potential winners who had rung in, the Series Producer asked a Researcher to play the part of a contestant. The Researcher's voice was then heard on air answering the competition question and she was declared the winner. The Director of the programme was informed of the incident but the matter was not referred upwards to the programme's Executive Producer or BBC senior management.
- 1.4 The telephone data showed that there were 765 calls to the phone line for the competition, some of which appeared to have been made after the winner of the competition was announced. The prize was kept until the following programme when it was given away to a genuine winner.
- 1.5 The viewing figures for the programme showed that of the 389,000 individuals watching the programme on BBC2, 181,000 were children. A total of 37,000 individuals watched the programme on CBBC, the vast majority – 32,000 – being children.
- 1.6 The programme used the CBBC premium rate phone system<sup>1</sup>. The BBC premium rate telephony system in this case was designed to maintain call costs at the lowest practical levels for viewers (10p per call) and the BBC did not profit from the calls. However, calls made from mobiles will not have been charged at the capped flat rate.
- 1.7 Reacting to press interest in the mishandling of the use of premium rate services ("PRS") in competitions and voting by a number of broadcasters, including the BBC, the BBC carried out two separate "trawls" of its output. The first was launched on 7 March 2007 and looked into the BBC's use of PRS. The second, launched on 12 July 2007, was much wider in scope, to include any audience deception.

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<sup>1</sup> Premium rate services are services that offer some form of information or entertainment and which are charged to consumers' telephone bills. Premium rate calls cost between 10p and £1.50 per call, or per minute, from a BT landline (charges from other networks may vary).

- 1.8 The incident did not come to light after the BBC's first investigation of its output, or "trawl", in March 2007 even though it used a premium rate telephone number. However, on 20 June 2007, an independent producer told the Creative Director of CBBC that he had recognised that the voice of the winning contestant on the *Birthday Bingo* phone competition in the first episode of *TMi*. The voice was, in fact, that of the Researcher who worked on the programme. The Creative Director of CBBC informed the Executive Producer of the allegation that had been made. The Executive Producer telephoned the Series Producer. The Series Producer said his initial reaction was that it could not be true but that he would check. He then rang the Researcher who confirmed that it had indeed happened and that he had instructed her to do it. The Series Producer then rang the Executive Producer back to confirm that the allegation was true.
- 1.9 An Ofcom investigation was subsequently launched after the BBC issued a statement on 18 July 2007 admitting serious breaches of the BBC's editorial standards in a number of its programmes, including *TMi*.

### **Summary of the Committee's Findings**

- 1.10 The BBC exists to serve the public interest. As a consequence, the breach of the Code involved a significant breach in the trust between a public service broadcaster and its audience.
- 1.11 The trust that the audience places in a broadcaster is fundamental to their relationship and is particularly pertinent in the case of the most long standing broadcaster, the BBC, with a relationship of trust with its audience going back more than 80 years. In addition, this principle of trust between the broadcaster and its audience becomes even more important when it involves a children's programme aimed at young children. There is a higher expectation of trust in relation to programmes (and those programmes including competitions) broadcast on a dedicated children's service such as CBBC. This is demonstrated by the viewing figures for the CBBC broadcast which strongly suggest that the majority of children were watching the broadcast unaccompanied. This was therefore a competition that, on this occasion, was conducted without the proper safeguards and oversight which led to the decision to fake a winner live on air and to deliberately pretend that the winner was a child.
- 1.12 The breach occurred as a result of a technical problem and there was a deliberate decision to fake a "winner" in circumstances where the competition result could have been postponed until a legitimate winner was obtained. The decision to fake a "winner" was taken at a very senior level and a member of staff went on air acting the part of a child (including, adopting a child's tone of voice). The competition was not subject to proper compliance checks prior to transmission in that the use of PRS in the programme had not been referred to the Legal team despite a specific requirement to do so.
- 1.13 Ofcom considered that the harm to those viewers who entered the competition and the audience of *TMi* overall was significant. The audience was deceived and materially misled by the BBC's deliberate and unfair conduct of the *Birthday Bingo* competition. This was a substantial breach of the audience's trust made even more serious because it was conducted in a children's programme and where the prize was clearly aimed at children.

- 1.14 The BBC did not receive any money from the interaction with viewers of *TMi* and there had been no attempt to provide refunds to the 765 callers who attempted to enter the competition. The BBC stated that it was unable to compensate viewers who had entered the competition because telephone data was no longer available.
- 1.15 The BBC's senior management should have been aware that the breach of the Code could have, and did, occur and had sufficient oversight and training in place to ensure that staff were aware of what to do in the event of a problem. In the Committee's view the reputation of a children's programme on the BBC and the corresponding trust in it by the audience meant that the BBC should have taken the utmost care that appropriately trained staff and robust systems were in place. In Ofcom's view the fact that the breach was able to occur was of considerable concern and was indicative of the compliance and training mechanisms and procedures for the programme being inadequate and ineffective. Furthermore, the breach only came to light because an independent producer, who was aware of the BBC's first trawl, had recognised the researcher's voice, not because anyone who had worked on the programme disclosed it.
- 1.16 Ofcom welcomed the steps taken by the BBC to investigate, seek to address the breach and prevent recurrence of the same or similar failures, which included:
- Suspending all phone-in competitions and voting on 18 July 2007, while it implemented a comprehensive review of the relevant Editorial Guidelines and processes;
  - Carrying out wide-ranging investigations into PRS and instances involving "audience deception" in its programmes;
  - Enhancing training programmes on editorial compliance across the BBC and implementing a mandatory training programme for staff called "Safeguarding Trust" (which all BBC production staff and 2,000 freelancers had completed);
  - Issuing new guidance and creating a new Code of Conduct in relation to competitions;
  - Setting up a new "Interactive Advice and Compliance Unit";
  - Re-writing staff contracts and contracts with external suppliers;
  - Changing the BBC structure to include a senior manager on every divisional board with specific responsibility for editorial compliance and co-ordination; and
  - Taking significant and wide-ranging disciplinary action against a number of staff;
- 1.17 In this case, and notwithstanding the steps taken by the BBC to remedy the breach, the Committee took the view that the breach constituted a very serious breakdown in the fundamental relationship of trust between the most long-standing public service broadcaster and its viewers. The nature of the

programme, a children's programme transmitted on BBC2 and CBBC, brought with it the highest expectations of both trust and integrity which were ultimately misplaced.

- 1.18 While recognising that any fine would be taken from monies paid by the public (the licence fee payer), the Committee noted that Parliament had decided that it was appropriate in certain circumstances for Ofcom to fine the BBC (though at a lower threshold to other Public Service Broadcasters, i.e. set at a maximum of £250,000 on any occasion).
- 1.19 Having considered the relevant facts as outlined above and all the representations made by the BBC, the Committee decided to impose a financial penalty on the BBC of **£50,000** (payable to HM Paymaster General), which it considered to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed the BBC to broadcast a statement of findings in relation to *TMi* on BBC2 and CBBC in a form determined by Ofcom on two specified occasions.

## Background

- 2.1 The issues in this case are set out at paragraphs 1.3 to 1.9 in the Summary above.
- 2.2 As set out at paragraph 1.7 and 1.8 above, the BBC carried out two “trawls” of its output in response to press interest in the mishandling of the use of PRS in competitions and voting by a number of broadcasters, including the BBC. On 18 July 2007, the BBC issued a statement admitting serious breaches of its editorial standards in a number of BBC programmes, including *TMi* and an Ofcom investigation into the matter was subsequently launched.
- 2.3 During Ofcom’s investigation, the BBC was given the opportunity to make written submissions on the case. In light of the evidence and the BBC’s responses, Ofcom concluded that the BBC’s conduct of the viewer competition in *TMi*, broadcast between 09:59 and 10:02 on 16 September 2006, was in breach of the Code.
- 2.4 In addition, Ofcom found the breach to be sufficiently serious to warrant the referral of the case for the consideration of the Content Sanctions Committee (“the Committee”). Throughout the consideration of the imposition of a statutory sanction, the BBC was given opportunities to make written and oral representations, which are summarised below.

## Legal Framework

### **The Communications Act 2003**

- 3.1 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.
- 3.2 The standards objectives are set out in section 319(2) of the Act. 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)).
- 3.3 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 including:
  - 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)).
- 3.4 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)).

3.5 Under section 198 of the Act, Ofcom is required to regulate the BBC's services as well as other activities connected to the provision of the BBC service. Ofcom's duties and powers in relation to the BBC are conferred on it under statute and the BBC Charter and Agreement. Clause 46 of the BBC Agreement which accompanies the BBC Charter states that the BBC must observe certain standards set by Ofcom under section 319 of the Act, including those relating to the application of generally accepted standards so as to provide adequate protection for the public from harmful or offensive material (s.319(2)(f)). Therefore it is in light of this Clause that the BBC is required to comply with the above Rule 2.11 of the Code, which is relevant to this finding.

3.6 Section 198(3) of the Act requires the BBC to pay penalties to Ofcom in respect of any contraventions of the conditions contained in these provisions. The BBC is in a unique position in comparison to other Public Service Broadcasters ("PSBs") with respect to the maximum fine that can be imposed on it. Commercial PSBs can be fined up to a maximum of 5% of their qualifying revenue. The BBC's maximum limit of £250,000 is due to the BBC being funded by the licence fee. Section 198(5) states that:

- "the maximum penalty that may be imposed on the BBC on any occasion by Ofcom in exercise of a power conferred by virtue of the BBC Charter and Agreement is £250,000".

### **The BBC Agreement**

3.7 Clauses 93 and 94 of the BBC Agreement set out the possible sanctions that Ofcom can impose against the BBC in relation to a breach of the Code. These are:

- a direction to broadcast a correction or statement of Ofcom's findings or both (Clause 93(1));
- a direction not to repeat a programme (Clause 93(5)); and
- the imposition of a financial penalty up to a maximum of £250,000 on any occasion (Clause 94).

## **The Ofcom Broadcasting Code**

- 3.8 Standards set by Ofcom in accordance with section 319 of the Act are set out in the Code which came into force on 25 July 2005.<sup>2</sup>
- 3.9 Guidance Notes accompanying each section of the Code are published, and from time to time updated, on the Ofcom website.<sup>3</sup> The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Code.
- 3.10 By virtue of section 198 of the Act and section 46 of the BBC Agreement, the BBC must observe relevant programme Code standards which include, but are not limited to, those relating to harm and offence.
- 3.11 The relevant provision of the Code is Rule 2.11, which states that:
- “Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.”

## **The Human Rights Act 1998**

- 3.12 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”).
- 3.13 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).
- 3.14 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.

## **Investigation**

- 4.1 In its investigation, Ofcom asked the BBC to address the following key points, among other issues, and to provide certain relevant material. This included details of:
- The nature of the item involving (or purporting to involve) participation by viewers or listeners e.g. a phone in competition;
  - What efforts were made to anticipate before broadcast any problems that might arise with the competition;

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<sup>2</sup> The Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

<sup>3</sup> Guidance Notes can be found at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/>

- What compliance processes, standard or otherwise, were in place regarding the management and running of interactive viewer competitions; and
- At what point were decisions made that effectively involved deception of the audience (e.g., a decision to “fake” winners).

### **The BBC’s response to Ofcom’s investigation**

4.2 The BBC responded by way of a general statement, which applied to this case and a number of other cases, and a specific statement in relation to *TMi*.

#### General statement

4.3 It stated that the conduct was “entirely unacceptable” and there was “no excuse for it”. It said that whilst there might be different factors in each of the cases that rendered the decisions made understandable and more or less serious, it did not seek to suggest that any of those decisions were acceptable. It took the view that each of the incidents, in varying degrees, involved production staff falling seriously short of the high standards of conduct it expected, and of misleading the audience and thereby breaching the Code.

4.4 The BBC said that the problems had not stemmed from an absence of clear BBC standards and guidelines. It said that in addition to promoting its own Editorial Guidelines, it made “strenuous efforts to ensure that the highest ethical standards of programme-making are observed by all involved in content production”.

4.5 It stated that whilst each case involved misleading the audience, none was profit-led and that each of the systems and methods used were designed to maintain caller costs at the lowest practical levels for the programme in question; no profit was made by the BBC. It also added that in those cases where there were prizes, nobody on the programmes had benefited, with all of the prizes either being reused shortly afterwards or returned to the BBC.

4.6 The BBC said that its Director General, Mark Thompson and other senior BBC managers had discussed the breaches and apologised for them in public and on various BBC services.

4.7 It added that although the number of incidents was of particular concern, “it was necessary to maintain perspective”. The incidents were relatively infrequent, compared to the number of hours of programmes that were broadcast during the relevant period.

4.8 The BBC described in considerable detail the process by which the incidents had been identified, the investigations that had been undertaken and the steps that had been and/or were being taken to address these problems and prevent recurrence. It also stated that given the failures that had occurred, the BBC was urgently examining what steps might need to be taken to ensure that the relevant Guidelines were clearly understood by programme-makers and staff; and that key principles, such as not misleading audiences in any circumstances, were driven home. As a first step, the BBC had announced, on 18 July, that all 16,500 programme and content staff would attend a new mandatory training programme called “Safeguarding Trust”.

The BBC's specific statement regarding *TMi*

- 4.9 The BBC described how the programme's complicated format required rigorous planning. Rehearsals in the week before transmission revealed that the programme was over-running by 15 minutes and consequently a decision was made to cut some of the programme items between the launch of the *Birthday Bingo* competition and the announcement of a winner. This meant that the running order for the competition was extremely tight.
- 4.10 The BBC described *Birthday Bingo* as a light-hearted game, played in three parts: first the presenters would randomly choose a birthday month; then the presenters would then randomly choose a birthday day then give out the number to call; finally callers who were put on air would be then be asked to identify a studio guest. The prizes, which consisted of *TMi* merchandise and toys to the value of approximately £140 were displayed in a large box in the studio.
- 4.11 The BBC described the selection system put in place for the competition. The Researcher would call into the telephone system using a special number, and then, after entering pin codes, she would have been able to access the recordings of the children who had called in for *Birthday Bingo*. The system uses six servers to record and randomise the callers. The BBC stated that the Researcher would have written down the names and numbers of "some children" to call back.
- 4.12 The BBC reported that there was an intense and excited atmosphere on the day of broadcast and the team felt under considerable pressure to succeed. The programme went on air on BBC2 and CBBC at 09:00. The *Birthday Bingo* competition commenced about 43 minutes into the programme. One of the presenters chose the birthday month and a music video followed. The presenters with the help of the guest then randomly decided the date. At 09:51:45 viewers were invited to call and the phone number appeared on screen.
- 4.13 The Researcher waited for calls to come in for *Birthday Bingo* and then listened to the messages, selecting between three and six callers and noted their telephone numbers. However, she managed to get just one child and its parent on the telephone, and asked them to wait on the line until the appropriate time. About two minutes before the selected caller was due to go on air, the line went dead. The Researcher rang back repeatedly, but the phone was not answered.
- 4.14 The BBC said that there were clear lines of referral set up, with the Executive Producer available as the ultimate referral in gallery. As was standard practice, the Series Producer went to the production office to check calls were coming in. The Researcher, who was still attempting to get the child back on the line, told the Series Producer what had happened. The Series Producer then asked the presenters to fill in and made the decision to play the standby music video to gain extra time during which they tried to get the child back on the line.
- 4.15 The Researcher recalled that when she told the Series Producer that there was no caller available, there was not enough time to go back into the telephone system (which had to be accessed through a security system because of child protection issues) and retrieve the contact details of more

callers and then go through the necessary process of calling and speaking to parents (which took approximately three to four minutes).

- 4.16 The Researcher also recalled that at the point when there were about 30 seconds left, the Series Producer asked her to “play the part” of a contestant. The Researcher agreed. The Series Producer stayed with the Researcher while she made the call. Her voice was then heard on air giving the name “*Emily Swann*” and she went on to answer a question posed by the programme’s presenter and was declared the winner.
- 4.17 The BBC said that the Series Producer has stated that there was an element of panic involved on his part. He felt that the first show had to go smoothly. The tight running order meant that a significant delay would have had knock-on effects on the timing for the rest of the programme and caused real difficulties for the crew and presenters. There were further competitions coming up, and he considered that a delay in closing this one would mean that it could “bump up” against the next, creating a confusing situation where calls would be coming in for both
- 4.18 There was no formal de-brief following the programme. However, the Director remembered being told briefly about the incident by the Researcher shortly after transmission. In addition, the Researcher spoke only briefly to the Series Producer about the incident. During the following week, the Series Producer advised the Executive Producer that he was changing *Birthday Bingo* to encourage more children to compete, and to try to prevent similar problems recurring. In future editions only a month was selected, rather than an exact date. The Executive Producer was not told about the incident in these discussions.
- 4.19 The *Birthday Bingo* prize was kept until the following programme when it was given away to a genuine winner.
- 4.20 The BBC said that following the revelation of the *Blue Peter* competition incident in March 2007, the Series Producer, who had left the BBC, was sent an email asking him to provide details of telephone interactivity. He replied to the BBC’s Children’s Interactivity Producer confirming the competitions which had taken place on *TMi*. He did not recall the incident in question.
- 4.21 The Researcher had also left the BBC by March 2007. Although she was aware of the *Blue Peter* incident she did not at any time relate what had happened to the incident in question as it did not involve a child and no one was promised a prize they did not receive or had received the wrong prize. She was not contacted by the BBC in its March 2007 “trawl” of programmes.
- 4.22 On 20 June 2007, an independent producer told the Creative Director of CBBC that he had recognised that the voice of the winning contestant on the *Birthday Bingo* phone competition in the first episode of *TMi* was in fact the voice of the Researcher who worked on the programme.
- 4.23 The BBC confirmed that on the evening of the 20 June 2007, the Creative Director of CBBC informed the Executive Producer of the allegation that had been made. The Executive Producer telephoned the Series Producer. The Series Producer said his initial reaction was that it could not be true but that he would check. He then rang the Researcher who confirmed that it had

indeed happened and that he had instructed her to do it. The Series Producer then rang the Executive Producer back to confirm that the allegation was true.

- 4.24 It continued that the incident was the result of poor judgement in an extremely pressurized environment and was therefore not a predetermined decision to deceive the audience. The staff were motivated by the importance of keeping the programme on air and maintaining momentum. Further, no child was involved in the deception and the prize was ultimately given away to *TMi* viewers.
- 4.25 The BBC said that there had been a contingency plan in place on the day to ask the presenters to fill in and to insert a video into the running order if necessary. However the changes to the programme running order to avoid overrunning were not properly considered.
- 4.26 The BBC confirmed that whilst PRS was employed, it was not used for the purpose of raising money. PRS was used because it was the best system the BBC had been able to establish for providing telephony services for children's programmes.
- 4.27 The BBC said that the incident happened without the knowledge of the Executive Producer and it was not reported up. The incident was not recalled by the Series Producer when he received the emails requesting information. However he took full responsibility for the incident when reminded. The BBC said that it appeared that the incident was a one off for the *TMi* team. It was one of 20 programmes and nothing had come to light during the BBC's enquiries with respect to other programmes in the series.
- 4.28 The BBC stated that a number of specific lessons had been learned from the incident:
- Adequate time is needed for any live turnaround of a competition and eight minutes and 15 seconds was not sufficient to manage incoming calls, particularly for a new show with a new competition, both of unproven appeal, and with a format which severely restricted the number of children eligible to take part.
  - Programme teams running competitions need to develop proper risk management for their broadcast. Sources of expertise do already exist within the BBC, but are not always accessed or used effectively. Mitigations for the risks around competitions going wrong during broadcast need to be developed, understood and used by production teams running competitions.
- 4.29 It went on to outline the further action it had taken in response to the incident, including:
- communicating with in-house staff, independent producers and presenters, including extensive face-to-face briefings, to emphasise the need for openness and honesty with audiences, and the need to refer up.
  - extending mandatory training in areas including editorial policy, legal, child protection and working with children;

- introducing a seminar on deception examining real case studies; and
  - introducing a mandatory briefing for each new production by Editorial Policy for all staff on relevant editorial issues.
- 4.30 In addition, it stated that additional emphasis was needed – through training and other routes – on upward referral for issues of concern and on the absolute impermissibility of misleading the audience. All production staff would be taking part in the BBC’s new mandatory training programme “Safeguarding Trust”, to be delivered in the autumn by the College of Journalism. In addition, staff across the BBC had been warned of the seriousness of these issues and of the vital importance of maintaining trust with the audience. They were also aware that further instances of audience deception would not be tolerated.
- 4.31 The BBC submitted that it had taken and continued to take all reasonable steps to drive forward the process of ensuring that lessons were learned, and outlined a number of ways in which it had sought or was seeking to address the issues that had occurred in this and other cases. These were outlined more fully in the BBC’s later representations, summarised at paragraphs 6.2 to 6.18 below.
- 4.32 Ofcom queried whether the BBC had broadcast an apology regarding *TMi*. The BBC responded that it had not broadcast a specific apology for what had occurred but did detail the apology broadcast on various BBC services, given by the Director General, Mark Thompson and the numerous other occasions in which senior BBC managers had discussed the breaches in public. In those appearances, it continued, the BBC had consistently described the breaches as unacceptable and had left the public in no doubt that it deeply regretted what had happened and was determined to “put its house in order”. It requested that Ofcom give due weight to this point when considering whether the BBC had apologised sufficiently for what had occurred.

### **Ofcom’s Finding on the breach**

- 5.1 Ofcom took the BBC’s submission into account when reaching its conclusions on the question of a Code breach. It noted that 765 viewers, the majority of whom it can be safely assumed were children, had called to enter the *Birthday Bingo* competition on the understanding that they had a fair and equal chance to win. However, no adequate or effective contingency was put in place to take account of potential problems and failures with the competition which ultimately led to the deliberate faking of a competition where a Researcher was asked to go on air and participate in the competition and who ultimately was declared the winner. The (predominantly child) audience for this programme was therefore deceived as to the fair conclusion of the competition.
- 5.2 Ofcom concluded that a serious breach of Rule 2.11 of the Code had occurred in *TMi*, broadcast on 16 September 2006. Ofcom considered the breach to be sufficiently serious to warrant the consideration of the imposition of a statutory sanction.

## **The BBC's written representations on the imposition of a sanction**

- 6.1 The BBC stated that it did not dispute the imposition of a financial penalty and accepted that, at least in principle, it would be appropriate for the BBC to broadcast a statement of Ofcom's findings.
- 6.2 The BBC said that from the outset it had recognised that the issue of breaches of editorial standards in its output were symptoms of a serious problem that needed to be urgently addressed. It continued that it had made the most strenuous efforts to identify and deal with the individual irregularities and had sought to be open and transparent throughout with Ofcom and the BBC Trust. The BBC said it had focused on the lessons learned and applied them across the BBC's output. The BBC said that in addressing the issues, it had taken numerous, costly and complex steps to examine its internal processes and revise them where necessary. This had involved:

### Editorial compliance

- 6.3 The BBC said that a review of its editorial compliance systems had found that overall the systems and processes had been effective and fit for purpose, but that there had been insufficient awareness of them among content producers. The BBC said that it had identified failures by individual producers to submit compliance forms when they should have done so. Its review had recommended that training programmes should be enhanced and that a new editorial compliance forum should be created to co-ordinate and spread best practice around the entire organisation. In addition, efforts would be made to ensure that independent production companies understood the BBC's compliance procedures. The BBC said that it had undertaken to implement all the proposals of its compliance review.
- 6.4 The BBC said that it was making strenuous efforts to ensure that this commitment was followed up. It said there was now a senior manager responsible for editorial standards in compliance on each of the production division's boards. A new editorial compliance forum (chaired by the Director of Editorial Policy & Standards) met monthly, which, in turn, reported to the Editorial Standards Board.
- 6.5 The BBC said that the steps it had taken were designed to ensure that there was no repetition of similar breaches to those in the cases under consideration for the referral to the Committee for the imposition of a statutory sanction.

### Review of competitions

- 6.6 The BBC said that it had suspended all phone-related and interactive competitions on 18 July 2007 and that it had instituted a comprehensive review of the relevant Editorial Guidelines and processes. It said that new guidance had been issued to content producers and a new Code of Conduct had been created. This had been published and was available on the BBC's website. Further, the BBC said that it had not begun the phased return of competitions until 21 January 2008, over six months after they had been suspended.

- 6.7 The BBC said that it would run far fewer competitions in future and that its internal procedures had been extensively revised, as follows:
- The decision whether to include a competition in a programme now had to be referred to a designated senior manager within the relevant production department. A senior editorial figure would then be made responsible for overseeing the running of the competition;
  - Where telephony was involved, there was a separate approval procedure, requiring authorisation by a senior manager;
  - All content production staff involved with competitions were now required to complete an on-line training module. There was a second, higher level training module for all those responsible for approving or managing any aspect of competitions;
  - Clear rules on publishing the terms and conditions, stating the start and end of the competition period, ensuring all entrants have a fair chance of winning, contingency plans for failures, turnaround times for announcing winners and the selection of winners had been promulgated; and
- 6.8 The BBC said that it had undertaken a publicity campaign to ensure that its audience was aware of these changes. The changes were designed to embed in the BBC's culture the overriding principle that competitions had to be run fairly, and that, where there was a tension between fairness and any other consideration whatsoever, fairness had to prevail. It said that the changes would significantly change the character of large parts of BBC output, particularly in radio.

#### Telephony

- 6.9 The BBC said that it was clear that a key factor leading to the crisis around interactivity had been a lack of understanding between production teams and the technical teams involved in the design, implementation and delivery of telephony and text services. It continued that although the BBC Trust, not Ofcom, regulated the BBC's use of PRS, the Trust had requested that BBC management addressed Ofcom's requirements and identified where the BBC intended to comply or diverge, to ensure that the controls implemented by the BBC were at least as effective as those proposed by Ofcom.
- 6.10 The BBC said that its telephony review had recommended the creation of an in-house centre of expertise (provisionally entitled the Interactive Advice and Compliance Unit). The BBC said that using the services of the Unit would be a mandatory part of the commissioning process for interactive services together with being an integral step in the new BBC approvals process for competitions. The BBC said that this was a large commitment: estimated set-up costs were over £1 million and it expected the annual running costs to be around £1.3 million.

#### Staff contracts

- 6.11 As the BBC had noted in its earlier submissions, all staff in a role which could have an effect on BBC output were required to sign a contract and an Editorial Policy compliance form confirming their agreement to comply with

the BBC's editorial standards. In order to address previous shortcomings in this area, the BBC said that line managers were now required to ensure that contracts and, where relevant, the Editorial Policy compliance form, were signed and returned prior to any employee, freelancer or casual member of staff starting work at the BBC. To ensure compliance, no payments would be processed by the BBC for any individual until it had been confirmed that the relevant paperwork had been received. Any individual who refused to sign the contract and/or the Editorial Policy compliance form would be likely to have his/her employment terminated.

- 6.12 The BBC said that newly contracted staff in content areas would also have to complete an interactive online course as part of their induction. In addition, all current staff would be required to sign a new Editorial Policy compliance form stating they agreed to comply with the BBC's Editorial Guidelines. This exercise would be completed by Autumn 2008.

#### Disciplinary action

- 6.13 The BBC said that it had taken disciplinary action against a number of individuals over the breaches notified to Ofcom and that it had made plain to all its employees that any further breaches of editorial standards might be considered as disciplinary matters<sup>4</sup>.

#### 'Safeguarding Trust'

- 6.14 In relation to its mandatory training programme, 'Safeguarding Trust', the BBC said that by the end of March 2008 the total number of its staff and freelancers who had completed the course was 19,350. It said that only a few dozen of its staff who had been required to complete the course had failed to do so. It continued that all future recruits to the content production areas of the BBC would be required to complete the course.
- 6.15 The BBC said that independent production companies would be required to certify that all of their staff working on BBC commissions had completed the web-based 'Safeguarding Trust' course, available on the BBC's website at [www.bbc.co.uk/safeguardingtrust](http://www.bbc.co.uk/safeguardingtrust). It said that contracts with such companies now contained clauses requiring them to represent and warrant that their staff had completed the course and detailing the sanctions the BBC might impose if they breached this requirement.
- 6.16 The BBC said that the exercise had been costly. It had already spent over £500,000 on creating the course and training its staff and there would be ongoing costs in operating and maintaining its internal and public websites.

#### External Efforts

- 6.17 The BBC said that it had undertaken a programme of inquiry into the nature of public trust in broadcasting and the Director General had summarised the findings in a speech delivered on 15 January 2008<sup>5</sup>. The BBC had also taken part in a joint Ofcom/ BBC Trust seminar on 26 November 2007, at which it

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<sup>4</sup> The BBC provided further information on the disciplinary action it had taken when it addressed the Committee at a hearing on 17 June 2008. See paragraph 8.13 below

<sup>5</sup> [http://www.bbc.co.uk/pressoffice/pressreleases/stories/2008/01\\_january/15/trust.html](http://www.bbc.co.uk/pressoffice/pressreleases/stories/2008/01_january/15/trust.html)

had been represented by the Director General. Other BBC Executive Board members and senior managers had also been present.

### The BBC Trust

6.18 The BBC submitted that it was also regulated by the BBC Trust, which had exercised its powers in respect of the breaches. The BBC Trust had requested a number of actions by the BBC Executive and had endorsed the approach taken in the Director General's Action Plan. Later, the BBC Trust had commissioned an independent evaluation of the Action Plan. The BBC said that the findings of this evaluation, which took account of the Trust's requests and the BBC's extensive actions, had been published on 9 May 2008<sup>6</sup>. It submitted that its conduct had been subject to the regulatory oversight and requirements of the BBC Trust and that the Trust's evaluation amounted to a regulator's approval of the BBC's response to the editorial breaches.

### Sanctions

6.19 The BBC submitted that it had at all times co-operated with Ofcom's investigation.

6.20 The BBC reiterated that it had suspended all competitions across all networks on 18 July 2007, thereby ensuring that no further breaches of Rule 2.11 of the Code could take place.

6.21 The BBC said that it wished to make a number of general comments on the issue of compensation:

- The BBC reiterated that in all but one (*TMi*) of the cases, PRS had not been used and it had not received any revenue from the affected competitions. Whilst PRS was used in *TMi*, the BBC made no revenue from it;
- It continued that with regard to the matter of compensation for those viewers affected, that it had been unable to offer compensation to viewers of *TMi* because the actual messages left by children and records of the phone data were deleted within 21 days as part of the standard process. The BBC had therefore been unable to contact the children who participated.
- The BBC said that it could have offered general compensation to anyone who had approached the BBC, but that it would have had no way of verifying that these individuals had entered the affected competitions. It said that this would have potentially exposed the BBC and licence fee payers' money to claims which might not be warranted or might be fraudulent;
- The BBC noted from published sanctions decisions that where commercial broadcasters had had a similar lack of data or where they had received few responses to offers of compensation, they had made donations to charity. The BBC stated that any payment it made to charity

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<sup>6</sup> [http://www.bbc.co.uk/bbctrust/research/editorial\\_standards.html](http://www.bbc.co.uk/bbctrust/research/editorial_standards.html)

would have to be funded from the licence fee and, under its Agreement with the Secretary of State for the Department of Culture, Media and Sport, it had no ability to make charitable donations. Furthermore, the BBC said that any donation to charity would not, in fact, be compensating those audience members who had been harmed financially. It said that the purpose of a charitable donation for commercial broadcasters had been to divest themselves of profits where restitution could not be made to the relevant viewers.

### **Referral to the Content Sanctions Committee**

- 7.1 It was considered that, taking all the circumstances into account and, in particular, the severity of the breach and the resulting harm caused to the audience overall, the breach was sufficiently serious to warrant the consideration of the imposition of a statutory sanction.
- 7.2 Therefore, in accordance with Ofcom's outline procedures for consideration of statutory sanctions in content and content-related cases, the case was referred to the Committee.

### **Sanctions Hearing**

- 8.1 Ofcom's Content Sanctions Committee ("the Committee") held a hearing on 17 June 2008, at which the BBC was given the opportunity to make oral representations before the Committee decided whether the breach warranted the imposition of a statutory sanction and, if so, of what type(s) and at what level(s).
- 8.2 The Committee was addressed by Mark Byford (BBC Deputy Director General) and James Eadie QC (Counsel), with evidence supplied by Richard Deverell (Controller, BBC Children), David Jordan (Director of Editorial Policy and Standards), Philip Abrams (Complaints Director, Editorial Complaints Unit) and Alexis Hawkes (BBC Legal Advisor).

#### The BBC's general representations on the cases

- 8.3 The BBC re-stated that what had happened in these programmes was completely unacceptable and it recognised that the BBC had let down its audience, "got it wrong" and that trust with the audience had been broken. It continued that these cases went to the absolute fundamental values of the BBC, which were integrity, trust and being straight with the audience. It said that its audiences were entitled to be able to trust what they saw or heard and to receive programmes that were made with integrity and that did not deceive them. The BBC said that whenever the audience entered competitions even if it was as "a bit of fun for small prizes or as a chance of a bit of a bonus for giving money to a charity", the competition had to be run absolutely fairly. In addition it said that all the entries had to count, the winner(s) had to be picked fairly and the prize(s) had to go to a real viewer or listener. It acknowledged that in the programmes under consideration by the Committee this did not happen.
- 8.4 The BBC said that, to some extent, it had been caught out by the speed of change in the industry. Within BBC programmes, the use of competitions using phones, texts and emails had grown rapidly in recent years, as

technology allowed the BBC to connect with its audiences in new ways. It said that interactivity and, especially, interactive competitions were an area of particular risk and that when a competition was conducted there were a number of serious and important editorial issues to be considered. In production terms, competitions could go wrong very quickly. Production staff who had not thought a competition through beforehand might have to deal with problems very quickly, in circumstances where problems needed to be addressed with clarity of thought and the right decisions taken straight away.

- 8.5 It said that in the programmes under consideration by the Committee, those involved had not understood or properly focused on either the true nature of the risks or the seriousness of the decisions that they were taking. The relevant individuals had thought that they were doing the right things or, at least, acceptable things, such as “keeping the show on the road” and providing entertainment. They had failed to understand that by putting production values first, they were actually breaching the audience’s trust. The BBC said that although it now appreciated the editorial challenges in competitions “in the round”, it had failed to do so and had not done enough to make sure that all those involved with competitions knew how to avoid the risks and what to do when those risks turned into reality.
- 8.6 The BBC re-emphasised that it was completely unacceptable “always and without exception” to solve a broadcasting problem by breaching the fundamental, unalterable principle of straight-dealing with the audience and telling them the truth. The BBC continued that it had had policies in place during the relevant period, and that it was not saying that the relevant Producers had not been aware of the rules, its Editorial Guidelines and the Code. However, given the scale of the problems that had been uncovered, it believed the key message, (that it was never acceptable to breach trust with the audience, whatever the circumstances) had not got through to all areas. With hindsight, it said that it had not done enough to train everyone in how to use interactivity properly and to apply the guidelines properly, which was why, as a first step it had put 20,000 people (all its creative programming staff and freelancers) through its “Safeguarding Trust” course, because trust was absolutely crucial.
- 8.7 The BBC said that it did not believe that anyone working within the BBC had an appetite for deliberate deception. However, it accepted that the programme-makers in the cases before the Committee, who made wrong decisions, albeit sometimes under pressure, should have told their managers, and that those managers should have escalated the matter further.
- 8.8 The BBC did not wish to leave Ofcom in any doubt regarding the seriousness with which it had taken these matters and said that it believed the steps it had taken and the standards that it demanded from everyone at the BBC made that clear. The BBC reiterated that it accepted each of the cases in question were serious contraventions of the Code and its own Editorial Guidelines. It accepted the imposition of financial penalties in all eight cases before the Committee and that it should broadcast a statement of Ofcom’s findings in seven of the eight cases. It continued that the cases before the Committee were “a heavy hammer blow”, damaging to the reputation of the BBC as the most trusted public service broadcaster in the United Kingdom, which it said was a damning punishment in itself. The BBC said that it had spent a great deal of time, energy and effort over the past year reviewing, examining and reflecting on what to do about the breaches. It had put new mechanisms in

place and believed that it had done a very substantial amount to minimise the risks of recurrence of similar breaches.

- 8.9 The BBC asked the Committee to bear in mind that none of the incidents was profit-led and that it had not made money from any of them. In addition, the programme-makers had not made any money for the BBC or for themselves from the affected competitions and had not taken home any prizes. Some of them had thought they were doing the right thing, such as making better programmes or helping charities. The BBC said that whilst these were not excuses, it made it harder to criticise the motives of someone who genuinely considered they were doing the best for a charity. Whilst this did not make what occurred right, the BBC considered that it deserved some understanding.
- 8.10 The BBC stated that its senior management had taken the issues it had identified extremely seriously. It accepted that the failures included serious management failures: (i) a failure to ensure that the fundamental principle of straight dealing with the audience got through to all those involved in production with sufficient clarity; (ii) a failure to appreciate that interactive competitions, in particular, carried very significant risks of things going wrong; and (iii) a failure to have systems in place that would have ensured escalation of problems of the kind that had occurred to more senior levels of management. It said that it had realised it needed to take a “very careful look” at all its programming across all its services. As a consequence, the two trawls of its programming had been thorough and wide-ranging. Under the leadership of the BBC’s Editorial Standards Board, the BBC had gone over all its compliance procedures, created a new Competition Code of Conduct, developed detailed additional guidance on competitions and launched a new in-house centre of expertise for telephony. The BBC submitted that all and each of these actions demonstrated that it had known it was not dealing with a small failure; it was a big problem that needed major review and reform.
- 8.11 In summarising what had occurred as a consequence of the matters coming to light, the BBC stated that:
- senior managers had investigated the problem programmes;
  - there had been disciplinary action against a number of staff;
  - all phone and interactive competitions had been suspended while procedures were rethought, reconsidered and rewritten and staff were retrained;
  - every member of staff and 2,000 freelancers who were working in the creative programming area were put through the “Safeguarding Trust” workshops (the biggest training programme ever undertaken by the BBC);
  - staff contracts and contracts with external suppliers were rewritten; and
  - the BBC structure had been changed so that there was a senior manager on every divisional board with specific responsibility for editorial compliance and co-ordination.
- 8.12 The BBC said that it had told every member of staff that the kind of lapses it had seen were absolutely unacceptable and that it would not tolerate them. It continued that everyone who was responsible for its output knew now, and better than they used to, that breaching trust with the audience would not be tolerated.

- 8.13 The BBC confirmed that it had taken disciplinary action in relation to every case before the Committee and that the matters had been taken seriously. It said that a range of disciplinary procedures had taken place within the BBC and that the “punishments” ranged from a verbal warning, a written warning, a final written warning and to what the BBC described as “left employment. However, for reasons of confidentiality it was unable to provide more specific details to the Committee.
- 8.14 In relation to a number of the cases before the Committee, the BBC submitted that the relevant programme-makers had not appreciated that they were running a competition. It said that there was now a definition of a “competition” within its guidelines and that alertness to competitions and the issues they raised had been heightened as a result of the steps it had taken.
- 8.15 Although it accepted, in principle, the imposition of a financial penalty in each of the cases before the Committee, the BBC submitted that the appropriate level of financial penalty was important. The reasons for imposing a financial penalty were, in its submission, two-fold. First, to incentivise the person on whom the financial penalty was imposed to seek to ensure that the breach was not repeated and, secondly, to act as a deterrent for others. The BBC submitted that there was no suggestion that it was any part of Ofcom’s function to punish. The BBC believed it had demonstrated in a concrete way to Ofcom that it needed no further incentive to “put its house in order.” It submitted that acting as a deterrent for others “should be very much a lesser purpose”. Furthermore, that it was hard to see how any fine imposed on the BBC would impact on any other organisations, given the BBC’s particular circumstances. Finally, the BBC said that because it was funded by the licence fee and not by commercial motivation, it was driven (and those who worked within it were driven) by reputation. Therefore, whilst it had accepted, in principle, that directions to broadcast statements of Ofcom’s findings were appropriate in seven of the eight cases before the Committee, such directions were the most serious punishments that could be imposed on the BBC.
- 8.16 The BBC concluded its general representations to the Committee by stating that its senior managers (the Director General, the Deputy Director General (as Chair of the Editorial Standards Board), all the divisional directors and the channel controllers) had to continue to ask questions, be open to discussion, run proper compliance systems and review them regularly, think carefully about the implications of what their teams were doing and ensure their staff were properly trained and had the right principles. It said that every single person who made a BBC programme had to be absolutely sure that it was produced with “impeccable integrity” because otherwise its audiences, the licence-fee payers, understandably would not give the BBC their trust.

The BBC’s specific representations regarding *TMI*

- 8.17 The BBC said that in addition to the actions it had already outlined to the Committee (see Paragraph 8.11 above), a number of other specific actions have been undertaken within BBC Children because of the additional responsibility that comes with broadcasting to children. It continued that at the start of the production process for every new commission, whether via an independent production company or in-house, the relevant compliance and editorial policy issues for each programme are highlighted in a briefing. It said that it has also almost entirely removed phone-ins and competitions from its portfolio of programmes and, since the problems came to light in 2007, only

two competitions have been conducted in children's programmes. In addition, BBC Children has ended the use of premium rate telephony with one notable exception: where it is used when the BBC considers that standard telephony cannot cope with the volume of calls.

- 8.18 The BBC continued that in July, August and September 2007 a number of mandatory seminars for senior staff within BBC Children (approximately 70 staff) were held which looked at a series of case studies around the issue of deception and what constitutes open, honest and straightforward dealing with audiences.
- 8.19 The BBC stated that with regard to TMI, BBC Children dropped all competitions and phone-ins from subsequent series of TMI. In addition, there was a very prominent display of the relevant policy guidelines in the studio and the production office for that production. There were weekly compliance meetings within the team and every member of staff was physically handed a copy of the BBC's editorial policy guidelines.
- 8.20 Whilst the Committee noted the significant amount of work the BBC had undertaken to try to address the problems that occurred, it questioned why, when the programme used PRS for a viewer competition, that the competition was not referred to BBC Legal as was required. The BBC confirmed the fundamental problem was that the production team did not recognise that what they were doing was a competition. Instead, they had thought of *Birthday Bingo* as a brief, light-hearted interaction with the audience where a child phones in and there's a brief conversation. It said however that of course it was a competition and that this was the genesis of their mistake; because they did not think it was a competition they did not seek the legal advice that the BBC's own editorial guidelines make clear they needed to do.
- 8.21 The Committee asked how it was possible that one child could receive £140 worth of goods for participating in *Birthday Bingo* – which is a considerable amount – and yet it was not considered by those involved to be a competition. The BBC responded that it was in fact a prize and that it was a mistake for it not to have been seen as such.
- 8.22 The Committee then enquired as to why, for a PRS viewer competition that had been developed in-house by the most experienced children's broadcaster in the United Kingdom, there were so many difficulties at rehearsal with timing problems leading to such an experienced and sophisticated department getting it so wrong. The BBC responded by reiterating that the fundamental mistake was that staff did not consider *Birthday Bingo* a competition; they thought it was a light-hearted interaction with a member of the public that resulted in a prize being awarded. In addition, it said that *TMI* is a long, complex and multi-ithemed show with a whole series of elements within it which involved audience interaction and the breach occurred in the first episode of what was a new commission. It continued that the competition item was, in subsequent editions of the programme, increased from 8 minutes to 20 minutes to ensure that the running order was more sensible in order to, as paperwork demonstrated, 'prevent these problems recurring'.
- 8.23 The Committee questioned why when the paperwork for subsequent programmes made it clear that the time of the *Birthday Bingo* item had been extended to prevent problems occurring, that no one actually appeared to have reported up what the actual problem was that had occurred. The BBC

responded that this was a misjudgement. It said that the individuals involved recognised that what had happened was wrong and took a number of actions to ensure it did not happen again but they did not recognise the seriousness of what had happened and therefore did not refer it up.

- 8.24 In response to the Committee's concerns relating to the call system used for CBBC programmes which was set up in 2003 and why there was such difficulty on this occasion where there was only one caller and no back-up position, the BBC acknowledged that there had been a problem. They explained that one of the subsequent changes that was made was to allow more time and have a back-up potential winner ready to go if the first caller drops out. It confirmed that this was not the case in the first programme in question admitting that in retrospect it was not planned as rigorously and carefully as it should have been.
- 8.25 The BBC also acknowledged that whilst there was a debrief after the programme had ended where changes were discussed in terms of subsequent programmes, there was not a point at which the seriousness of this particular problem was discussed and assessed and where remedial action, which should have included referring the matter up, was discussed.
- 8.26 In response to whether any specific apology had been issue in relation to this matter, the BBC said no. It confirmed that it did discuss the issue of an apology when the matter came to light in July 2007 but it decided not to issue a broadcast apology for a number of reasons. Firstly, it said that by that time the Director General had already issued a very clear series of apologies about the breaches that had so far come to light. Secondly, it said that *TMi* was not on the air at the time and had, at that point, not been re-commissioned. Whilst it was subsequently re-commissioned it did not go back on air until the autumn which was a year since the breach had occurred and the BBC took the decision that an apology would not be particularly meaningful to children given the amount of time that had passed.
- 8.27 The BBC confirmed that the Series Producer had made the decision that the winner should be presented convincingly on air as a child in a moment of panic and that this decision was a mistake.

## **Sanctions Decision**

- 9.1 In reaching its decision, the Committee considered carefully all the written and oral submissions made by the BBC. The Committee decided, for the reasons set out below, to impose a financial penalty and to issue a direction requiring the BBC to broadcast a statement of Ofcom's findings on BBC2 and CBBC in relation to *TMi* in a form to be determined by Ofcom on two specified occasions. In deciding on an appropriate and proportionate level of financial penalty in this case, the Committee had regard to Ofcom's Penalty Guidelines<sup>7</sup>.

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<sup>7</sup> Ofcom's Penalty Guidelines are available at <http://www.ofcom.org.uk/about/account/pg/>. Section 392 of the Act requires Ofcom to prepare and publish a statement containing guidelines it proposes to follow in determining the amount of any penalties imposed by Ofcom, which Ofcom must have regard to in setting any penalty.

## The seriousness of the breach

- 9.2 Having considered all the evidence and the BBC's representations, the Committee found that the breach in this case was serious and deliberate, as set out at paragraphs 9.3 to 9.7 below:
- 9.3 The BBC exists to serve the public interest<sup>8</sup> and consequently the breach of the Code involved a significant breach in trust between a public service broadcaster and its audience. Breaches of the Code that result in viewers being deceived or materially misled have always been considered by Ofcom (and Ofcom's predecessor regulators) to be amongst the most serious breaches that can be committed by a broadcaster.
- 9.4 The trust that the audience places in a broadcaster is fundamental to their relationship and is particularly pertinent in the case of the most long standing broadcaster, the BBC, with a relationship of trust with its audience going back more than 80 years. In addition, this principle of trust between the broadcaster and its audience becomes even more important when it involves a children's programme aimed at young children. There is a higher expectation of trust in relation to programmes (and those programmes including competitions) broadcast on a dedicated children's service such as CBBC. This is demonstrated by the viewing figures for the CBBC broadcast which strongly suggest that the majority of children were watching the broadcast unaccompanied. This was therefore a competition that, on this occasion, was conducted without the proper safeguards and oversight which led to the decision to fake a winner live on air and to deliberately pretend that the winner was a child.
- 9.5 Staff working on the programme should have been in no doubt as to the highest of expectations regarding the programme's integrity given that it had a predominantly child audience. By its own admission, the BBC breached its fundamental principle of straight dealing with its audience and admitted that it had let its audience down.
- 9.6 The Committee noted that the breach occurred as a result of a technical problem and there was a deliberate decision to fake a "winner" in circumstances where the competition result could have been postponed until a legitimate winner was obtained. In addition, it was clear that the decision to fake a "winner" was taken at a senior level i.e. by the Series Producer, and a member of staff went on air posing as a child. In addition, the decision to fake a "winner" in *TMi* occurred because there was not enough time to find another caller to participate and for which no contingency had been planned. The competition had also not been properly subjected to compliance checks prior to transmission in that the use of PRS in the programme had not been referred to the Legal team despite a specific requirement to do so.
- 9.7 Unlike other broadcasters, the BBC is funded directly by the public through the licence fee and it is not a commercial organisation. Whilst the BBC did not receive any money from the interaction with viewers of *TMi*, there had been no attempt to provide refunds to the 765 callers who attempted to enter the competition. Whilst the BBC had stated that it was unable to compensate

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<sup>8</sup> Clause 3(1) of the Royal Charter. The Royal Charter, together with the Agreement between the BBC and the Secretary of State for Culture, Media & Sport, provides the constitutional basis for the BBC.

viewers who had entered the competition because telephone data was no longer available, no alternative reparation system had been put in place. Furthermore, no specific apology was made with regard to the breach and the Committee considered it unlikely that the Director General's interviews in the news media would have been heard by TMI's target audience (i.e. young children).

- 9.8 The Committee was therefore of the view that due to the serious and deliberate nature of the breach and compliance failures and the resulting harm caused to those viewers who entered the competition in *TMI* and the audience overall, this was a very serious case, involving a fundamental breach of the audience's trust which involved a substantial child audience. The contravention was considered very serious because it involved a breakdown in trust between the UK's most long-standing and trusted broadcaster and its child audience by faking the winner of a viewer competition in a children's programme. Therefore, the Committee considered that the imposition of a significant financial penalty was warranted.

### **Precedent**

- 9.9 In considering the appropriate level of financial penalty, the Committee took account of its previous decisions in cases relating to the unfair conduct of viewer interactive competitions, as well as the specific representations made by the BBC. The Committee was satisfied that its decision as to the appropriate and proportionate level of financial penalty to be imposed in this case was consistent with previous cases, and reflected the particular circumstances of this case.

### **Incentive**

- 9.10 The Committee took into account in setting the level of financial penalty the fact that the BBC had taken wide-ranging steps to investigate the breaches and learned lessons from what had occurred. In addition BBC Children had almost entirely removed phone-ins and competitions from its programmes and ended the use of PRS (unless large numbers of calls are anticipated). BBC Children staff had also attended mandatory seminars on the issues surrounding deception. However, the Committee also noted that a purpose of the imposition of a financial penalty was to deter both the party involved and third parties from committing future breaches. In this case, the Committee considered that a significant financial penalty would represent an appropriate incentive to ensure compliance in the future.

### **Other specific criteria**

- 9.11 The Committee considered that the following specific criteria, as set out in Ofcom's Penalty Guidelines, were relevant to adjust the starting figure of any financial penalty:
- 9.12 The Committee noted that the BBC did not receive any revenue or profit from the conduct of the competition. Similarly, no member of staff profited.
- 9.13 The Committee noted that the BBC is not a commercial broadcaster but is nonetheless a substantial organisation with significant resources available to it.

- 9.14 The Committee noted that the breach of the Code was not caused by any third party or any circumstances beyond the control of the BBC. The Committee also noted that no penalty in respect of the same conduct had been imposed already by Ofcom or another body.
- 9.15 The Committee considered that the harm to those viewers who entered the competition and the audience of *TMi* overall was significant. The audience was deceived and materially misled by the BBC's deliberate and unfair conduct of the *Birthday Bingo* competition. This was a substantial breach of the audience's trust made even more serious because it was conducted in a children's programme and where the prize was clearly aimed at children.
- 9.16 The Committee considered that because of the nature of *TMi*, which is a children's programme, that audience expectations in relation to the programme would have been exceptionally high, if not the highest.

### **Level of penalty**

- 9.17 Taking all these factors into account (and in light of the severity and deliberate nature of the breach), the Committee considered that the 'starting figure' for any financial penalty should be significant. In considering the level of penalty, the Committee took into account that the maximum financial penalty that could be imposed on the BBC on any occasion was £250,000.

### **Factors tending to increase the level of penalty**

- 9.18 The Committee then considered whether any of the factors set out in the Penalty Guidelines (or any other relevant factors) aggravated or tended to increase the level of any financial penalty it might impose.
- 9.19 The use of PRS in a children's programme, even where the cost of entry is capped for calls from landlines, should have been extremely closely monitored by the broadcaster. Legal advice on the use of PRS had not been obtained by the production team in breach of the BBC's own Editorial Guidelines.
- 9.20 The programme's Series Producer knew what had occurred but made a decision not to report it upwards.
- 9.21 Furthermore, the deception was all the more elaborate because the Researcher deliberately 'acted the part' of a child which served to validate the genuine nature of the call when in fact it was entirely faked.
- 9.22 The breach only came to light because an independent producer, who was aware of the BBC's first trawl, had recognised the researcher's voice, not because anyone who had worked on the programme disclosed it. Whilst the BBC had sought to argue that the staff responsible for the breach had considered *Birthday Bingo* to be a light-hearted entertainment feature as opposed to a competition, the Committee considered that a feature using PRS and offering £140 worth of toys to a caller was a competition (which the BBC accepted) and, regardless of this fact, it nonetheless featured a deliberate deception of the audience where PRS was employed. It therefore should have been identified to BBC management during the first trawl.

- 9.22 In addition, the BBC did and does have compliance systems in place which should have been at the forefront of any decisions regarding the conduct of PRS viewer competitions.
- 9.23 The Committee considered that the BBC's senior management should have been aware that the breach of the Code could have, and did, occur and had sufficient oversight and training in place to ensure that staff were aware of what to do in the event of a problem. In the Committee's view the reputation of a children's programme on the BBC and the corresponding trust in it by the audience meant that the BBC should have taken the utmost care that appropriately trained staff and robust systems were in place. In the Committee's view the fact that the breach was able to occur was of considerable concern and was indicative of the compliance and training mechanisms and procedures for the programme being inadequate and ineffective.

### **Factors tending to decrease the level of penalty**

- 9.24 The Committee then considered whether any of the factors set out in the Penalty Guidelines (or any other relevant factors) in its view might limit or decrease the level of any financial penalty it might impose.
- 9.25 The Committee considered that the steps the BBC had taken to remedy the consequences of the breach were wide-ranging and timely. It had put in place compliance training for its entire staff, created a new Competition Code of Conduct, developed detailed additional guidance on competitions and launched a new in-house centre of expertise for telephony. The range and nature of the BBC's reaction to the breach included:
- Instigating a full corporation-wide investigation into PRS and instances involving 'audience deception' in its programmes';
  - Significant and wide-ranging disciplinary action against a number of staff including penalising those freelancers involved in the range of breaches who are unable to work for the BBC for a period of two years;
  - all phone and interactive competitions had been suspended while procedures were rethought, reconsidered and rewritten and staff were retrained;
  - every member of staff and 2,000 freelancers who were working in the creative programming area were put through the "Safeguarding Trust" workshops (the biggest training programme ever undertaken by the BBC);
  - With regard to BBC Children specifically, it also almost entirely removed phone-ins and competitions from its portfolio of programmes and has ended the use of premium rate telephony with one notable exception where it is used when the BBC considers that standard telephony cannot cope with the volume of calls;
  - staff contracts and contracts with external suppliers were rewritten; and

- the BBC structure had been changed so that there was a senior manager on every divisional board with specific responsibility for editorial compliance and co-ordination.
- 9.26 In addition the Committee noted that the BBC had made itself publicly accountable for the breaches by publicising the results of its own internal audits (the two trawls).
- 9.27 The Committee acknowledged that the BBC had co-operated in a full and frank manner with Ofcom's investigation.

## Conclusion

- 9.28 Cases where a broadcaster deliberately deceives or materially misleads its audience have always been considered to be amongst the most serious breaches of the Code by Ofcom (and its predecessor regulators).
- 9.29 The Committee took the view that the breach constituted an extremely serious breakdown in the fundamental relationship of trust between the most long-standing public service broadcaster and its viewers. The nature of the programme, a children's programme transmitted on BBC2 and CBBC, brought with it the highest expectations of both trust and integrity which were ultimately misplaced.
- 9.30 The competition was for children and had used PRS. The BBC should therefore have ensured that it was conducted with the utmost diligence and care. Instead the BBC had failed to have any adequate management oversight or proper regard for the necessity to operate effective compliance and training procedures for the conduct of the viewer competition in *TMi*.
- 9.31 As set out above, the Committee had regard to the extensive and wide-ranging steps taken by the BBC to prevent a recurrence and the BBC's public apology. The financial penalty could have been higher had the BBC not taken such wide-ranging action.
- 9.32 While recognising that any fine would be taken from monies paid by the public (the licence fee payer), the Committee noted that Parliament had decided that it was appropriate in certain circumstances for Ofcom to fine the BBC (though at a lower threshold to other Public Service Broadcasters, i.e. set at a maximum of £250,000 on any occasion).
- 9.33 Having considered the relevant facts as outlined above and all the representations made by the BBC, the Committee decided to impose a financial penalty on the BBC of **£50,000** (payable to HM Paymaster General) which it considered to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed the BBC to broadcast a statement of its findings in relation to this case on BBC2 and CBBC in a form to be determined by Ofcom on two specified occasions.

## Content Sanctions Committee

Philip Graf  
 Millie Banerjee  
 Joyce Taylor  
 Kath Worrall

30 July 2008