

Ofcom Content Sanctions Committee

Consideration of sanction against

Channel Four Television Corporation (“the Licensee” or “Channel Four”), in respect of its service, Channel 4;

For

Two types of conduct in the viewer competitions *You Say We Pay* (“YSWP”) in the *Richard and Judy* programme, as follows:

1) ‘Early selection’ of competition finalists:

Resulting in breaches of Ofcom’s Broadcasting Code (“the Ofcom Code”) of **Rule 2.11**: *“Competitions should be conducted fairly, prizes should be described accurately, and rules should be clear and appropriately made known”*;

in **series 3, 4 & 5** (5 September 2005 to 15 February 2007); and

Breaches of **Rule 10.10**: *“Any use of premium rate numbers must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS)”* (now re-named as PhonepayPlus¹);

in **series 5** (29 January 2007 to 15 February 2007);

Breaches of the ITC Programme Code 2002 in force from January 2002 until 24 July 2005 of **Rule 8.2(b)** Use of Premium Rate Telephone Services in Programmes: *“The licensee must retain control of and responsibility for the service arrangements and the premium line messages (including all matters relating to their content)”*; and

in **series 2 and 3** (6 September 2004 to 20 July 2005).

2) ‘Staggered selection’ of competition finalists:

Breaches of the Ofcom Code of **Rule 2.11**: *“Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known”*;

in **series 3, 4 and 5** (5 September 2005 to 15 February 2007); and

Breaches of the ITC Programme Code 2001 (in force from Spring 2001 to January 2002) and the ITC

¹ ICSTIS was re-named PhonepayPlus on 15 October 2007.

Programme Code 2002 (in force from January 2002 until 24 July 2005) of **Rule 8.2(b)** Use of Premium Rate Telephone Services in Programmes: *“The licensee must retain control of and responsibility for the service arrangements and the premium line messages (including all matters relating to their content)”*;

in **series 1, 2 and 3** (26 November 2001 to 20 July 2005).

Decision

To impose a financial penalty (payable to HM Paymaster General) of **£1,000,000**, and in addition, to require Channel Four to **broadcast a statement of Ofcom’s findings** on its service Channel 4 in a form to be determined by Ofcom on three 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 a statutory sanction on Channel Four in light of the serious nature of its failure to ensure compliance with Ofcom's Broadcasting Code ("the Ofcom Code") and the ITC Programme Codes 2001 and 2002.
- 1.2 This adjudication under the relevant Codes relates to the broadcast of the *You Say We Pay* ("YSWP") competitions during the programme *Richard and Judy* between 26 November 2001 and 15 February 2007.
- 1.3 Channel 4 is the fourth national public service channel. *Richard and Judy* was a 'live' daily light entertainment series transmitted between 17:00 and 18:00 on weekdays. *You Say We Pay* ("YSWP") was a premium rate service ("PRS") viewer competition transmitted during the programme. Viewers were solicited by the programme's presenters, Richard Madeley and Judy Finnigan, to call a premium rate telephone number shown on screen to take part in the 'live' daily competition which was conducted towards the end of the programme. The cost of a call to enter the competition varied during the period, but most recently cost £1 per call. Once a contestant had been selected, they would play a further competition with the presenters, 'live' on air. Pictures would appear behind the presenters and the contestant would have to describe the subjects without referring to them by name. The contestant would win money for each subject the presenters named correctly.
- 1.4 On 18 February 2007, the *Mail on Sunday* published an article which alleged that earlier that month, many viewers who had entered *Richard and Judy's* YSWP via a premium rate telephone call, in fact had no chance of winning. It was claimed that the final shortlist of potential winners produced by the service provider, Eckoh UK Ltd ("Eckoh"), had been sent to the independent production company producing the programme, Cactus TV ("Cactus"), before the telephone lines closed.
- 1.5 On learning of the allegations on 16 February 2007, Channel Four took the competition off air immediately and launched an internal inquiry. This established that there were two types of misconduct in *Richard and Judy's* YSWP competitions between 26 November 2001 and 15 February 2007²: (1) early selection of competition finalists and (2) staggered selection of competition finalists.

'Early Selection' of competition finalists:
In series 2 and 3 (6 September 2004 to 20 July 2005); and
In series 3, 4 and 5 (5 September 2005 to 15 February 2007)
- 1.6 Under the agreed procedures, the presenters solicited viewers to enter the competition at approximately 17:05, 17:20 and 17:35. Telephone lines then officially closed on average a few minutes after 17:35. The terms and conditions of the competition stated that a shortlist of finalists was to be submitted to Cactus by Eckoh after telephone lines closed, and then a contestant was to be selected randomly to take part in the competition.

² For full details of the series transmission dates, see paragraph 2.2 below.

However, from September 2004, Eckoh staff were submitting the shortlist of finalists to staff at Cactus on average as early as 17:20 (but times varied), while the telephone lines were still open and the programme was still soliciting viewers to call and enter the competition.

- 1.7 This practice meant that those viewers who called to enter the competitions on the basis that they had a fair and equal chance of winning, in fact, had no chance of becoming a finalist after early selection had taken place.
- 1.8 Channel Four said that its staff had no knowledge of these irregularities in the winner selection process. However, it admitted that the practice of early selection being used in *Richard and Judy's YSWP* competitions was in breach of the relevant Codes.

'Early Selection' of competition finalists:

In series 5 (29 January 2007 to 15 February 2007).

- 1.9 ICSTIS (now PhonepayPlus) imposed a fine of £150,000 on *Richard and Judy's YSWP* service provider Eckoh on 6 July 2007 for the early selection in operation between 29 January 2007 and 15 February 2007. PhonepayPlus found that viewers had been seriously misled and actively encouraged to enter the competition after the shortlist of finalists had been selected. It also found clear evidence of fundamental failings in the winner selection process. This was in breach of Rule 10.10 of the Ofcom Code.

'Staggered Selection' of competition finalists:

In series 1, 2 and 3 (November 2001 to 20 July 2005);

In series 3, 4 and 5 (5 September 2005 to 15 February 2007).

- 1.10 The Licensee also admitted that another flawed aspect of the winner selection process for *Richard and Judy's YSWP* competitions was a staggered method of selection. During the programme, Eckoh submitted several shortlists of finalists to Cactus, while telephone lines were still open.
- 1.11 This selection process created unfair odds which meant that viewers entering the competitions were not given a fair and equal opportunity to win. Because of this selection process, those viewers who called to enter the competition later in the programme had a statistically lesser chance of being selected to be on the shortlist of finalists than those calling to enter earlier in the programme. This was unfair.
- 1.12 The Licensee was aware that this staggered selection process was in operation. The Licensee was, however, unaware that this systematic procedure was unfair and therefore contrary to the relevant Codes until it instigated its internal investigation in 2007. Between November 2001 and 20 July 2005, this unfair practice was in breach of the relevant Codes.

Committee's Findings

- 1.13 These breaches involved systematic failures in the conduct of *Richard and Judy's YSWP* competitions and constituted a serious breakdown in trust between a public service broadcaster and its audience.
- 1.14 The trust that the audience places in a broadcaster is fundamental to their relationship. This is particularly pertinent in the case of a public service broadcaster like Channel Four whose service is available to such a wide of audience. This relationship of trust becomes even more important when it involves one of the broadcaster's most popular programmes.
- 1.15 In this case, Ofcom was concerned by the lack of appropriate oversight by Channel Four, the scale of the harm caused by the breaches, as well as their duration and repeated nature. The Committee was very concerned that the early selection procedure was unfair to those entering the competition after the shortlists had been compiled. These entrants had no chance of winning. It was also concerned that the staggered selection procedure resulted in viewers' chances of winning being dependent on the time they entered the competition.
- 1.16 The breaches resulted in significant consumer harm involving a substantial audience. The gross revenue raised by the Licensee from *Richard and Judy's YSWP* competitions between 2001 and 2007 was £10,241,001 from a total of 16,817,926 viewers' calls. It was clear that a substantial number of viewers made calls in the belief that they had a fair and equal chance of winning, even though finalists had already been selected. It is estimated that between September 2004 and February 2007 when early selection took place, 2.9 million callers who paid a total of approximately £2.2 million to enter the competitions were disenfranchised (representing 42 per cent of the total number of entries during that period).
- 1.17 It was clear that the programme was of considerable importance to Channel Four. The competition and its associated interactive relationship with its audience played an integral role within the programme format. Ofcom was therefore seriously concerned by the Licensee's admission that it had not undertaken any kind of audit procedure or instigated any checks or processes at any time to ensure that the competition was being conducted according to its terms and conditions. More specifically, at no time throughout the duration that the competition was being conducted had any employee of Channel Four visited the telephone room to undertake a 'live' audit of what was going on. If such action had been taken, then it is likely that these failings would have been discovered at a much earlier stage.
- 1.18 Whilst Ofcom understood that Channel Four felt that it had been let down by Eckoh and Cactus, it was nevertheless firmly of the view that the conduct of Channel Four's own competitions and the management of its service providers were plainly within its control.
- 1.19 Ofcom was concerned to note that the sole focus of the training Channel Four had provided to Cactus was on-air compliance issues such as presentation, content and calls to action. There was no training or advice provided (at any point during the time that the programme was on air) on a fundamental element of the conduct of a competition (winner selection).

- 1.20 Channel Four admitted that its training of Cactus staff was inadequate and, as a result, the staff at Cactus who were receiving the shortlists of finalists before lines closed, either did not recognise the unfairness of this or understood that it was unfair but did not recognise the significance and failed to refer the issue upwards to more senior staff. This was despite the fact that members of the production team were consistently receiving the shortlist of finalists for the competition some twenty minutes before the lines were announced on air as being closed. Channel Four also failed to recognise that the staggered selection process was at odds with the published terms and conditions of the competition which clearly stated that a shortlist of winners would be chosen from all correct entries “after entries close”.
- 1.21 The process of staggered selection was part of a formalised and systematic procedure and Channel Four’s failure to understand the inherent unfairness of the use of this system demonstrated a lack of due care that could only be described as negligent.
- 1.22 Despite the absolute paramount importance of trust and honesty to Channel Four’s relationship with its audience, the Licensee misled its audience by omitting details of the winner selection process from the programme’s on-air presentation and by explicitly misrepresenting this key element of the competition’s conduct to the public through the competition’s published terms and competitions.
- 1.23 The Committee noted that Channel Four did not intend for its competitions to be conducted in a way that was not compliant with the relevant Codes.
- 1.24 The Committee considered that the steps Channel Four had taken to remedy the consequences of the breaches in this case were wide-ranging. These included:
- putting in place an extensive refund scheme for those disenfranchised by early selection;
 - pledging to donate to the Great Ormond Street Hospital Children’s Charity any money made which was not claimed and refunded to viewers due to calls improperly handled as a result of early selection (having already made donations to the charity totalling £250,000 in respect of all PRS issues);
 - putting in place an ‘inspection’ function to audit the performance of third parties in fulfilling contractual obligations; and
 - because of the damage to viewer trust these problems have created, Channel Four had now withdrawn from operating premium rate competitions altogether and from operating votes on a for-profit basis.
- 1.25 The Committee wished to make it clear that the financial penalty would have been higher had Channel Four not taken such wide ranging action.
- 1.26 Cases where the broadcaster has materially deceived its audience, whether knowingly or not, have always been considered to be amongst the most serious breaches of the Code by the regulator (and its predecessor).
- 1.27 Millions of viewers purchased the right to enter these competitions and invested trust in the Licensee. This trust was ultimately misplaced. This case involved the widespread and systematic deception of all those viewers who

paid to enter in the belief that they had a fair chance of winning when in fact their chances of winning were diminished or non-existent.

- 1.28 Ultimately, Channel Four failed to place appropriate emphasis on the fair treatment of its viewers. Ofcom was strongly of the view that Channel Four's handling of its relationship with Eckoh and Cactus and its failure to take even the most basic of steps to ensure that contractual obligations were being met was negligent.
- 1.29 Having considered the relevant facts as outlined above and all the representations made by Channel Four, the Committee decided to impose a financial penalty on Channel Four of **£1,000,000** (payable to HM Paymaster General) which it considered to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed Channel Four to broadcast a statement of its findings on its service in a form determined by Ofcom on three specified occasions.

Introduction

- 2.1 Channel 4 is the fourth national public service channel. *Richard and Judy* was a 'live' daily light entertainment series transmitted between 17:00 and 18:00 on weekdays. *You Say We Pay* ("YSWP") was a premium rate service ("PRS") viewer competition transmitted during the programme. Viewers were solicited by the programme's presenters, Richard Madeley and Judy Finnigan, to call a premium rate telephone number shown on screen to take part in the 'live' daily competition which was conducted towards the end of the programme. The cost of a call to enter the competition varied during the period, but most recently cost £1 per call. Once a contestant had been selected, they would play a further competition with the presenters, 'live' on air. Pictures would appear behind the presenters and the contestant would have to describe the subjects without referring to them by name. The contestant would win money for each subject the presenters named correctly.
- 2.2 A total of 975 episodes of *Richard and Judy* were transmitted between November 2001 and February 2007. *Richard and Judy* was on air for the following time periods from 2001:
- Series 1: 26 November 2001 – 21 December 2001
14 January 2002 – 28 June 2002
16 September 2002 – 20 December 2002
6 January 2003 – 23 July 2003
15 September 2003 – 19 December 2003
- Series 2: 5 January 2004 – 21 July 2004
6 September 2004 – 22 December 2004
- Series 3: 4 January 2005 – 20 July 2005
5 September 2005 – 21 December 2005
- Series 4: 9 January 2006 – 24 March 2006
19 June 2006 – 01 September 2006
- Series 5: 29 January 2007 – 30 March 2007
- 2.3 In 2001, when *Richard and Judy* was first broadcast by Channel Four, the Licensee employed a telecommunications service provider, VoiceMedia, to operate the competition lines for YSWP. VoiceMedia became part of Trinity Mirror Technologies in 2003 and was subsequently renamed Arrow. In July 2004, Eckoh bought Arrow and took over responsibility for the YSWP contract.
- 2.4 Under the terms and conditions of *Richard and Judy's* YSWP competitions, all finalists were to be randomly selected after the closure of telephone entry lines. However, the agreed procedures for winner selection, designed by VoiceMedia in 2001, were that the selection of finalists would be staggered, with the service provider submitting finalists' details to the independent production company Cactus in four batches of six names (24 in total). However, the final list of 24 finalists was only to be submitted to Cactus after telephone entry lines had closed, when the contestants were then to be randomly selected to take part in the 'live' competition.

- 2.5 On 18 February 2007, the *Mail on Sunday* published an article which alleged that earlier that month, many viewers who had entered the *Richard and Judy's YSWP* competitions via a premium rate telephone call, in fact had no chance of winning. It was claimed that the final shortlist of finalists produced by the service provider, Eckoh, was sent to Cactus before the telephone lines had closed.
- 2.6 On learning of the allegations on 16 February 2007, Channel Four took the competition off air immediately and launched an internal inquiry, with legal assistance from external specialist media lawyers, Wiggin LLP ("Wiggin"). The inquiry concluded that some of the procedures for the competition that Channel Four had put in place in 2001, when *Richard and Judy* was first broadcast on the channel, had not been adhered to from September 2004 by the service provider, Eckoh.

'Early Selection'

- 2.7 In each episode of *Richard and Judy*, Richard Madeley and Judy Finnigan solicited viewers to enter *YSWP* at, on average, 17:05, 17:20 and 17:35. Telephone lines then officially closed on average a few minutes after 17:35. Competition finalists were to be submitted to Cactus by Eckoh after telephone lines closed, and then randomly selected to take part in the competition.
- 2.8 However, Channel Four admitted that from September 2004, Eckoh had been submitting the final shortlist of finalists to staff at Cactus on average at 17:20 while telephone lines were still open. This practice meant that those viewers who called and paid to enter the competitions after the early selection of finalists had taken place had no chance of becoming a finalist. Channel Four said that its staff had no knowledge of these irregularities in the winner selection process.

'Staggered Selection'

- 2.9 Another element of the selection process ('staggered selection') involved the service provider sending finalists' details to Cactus in four batches of six names throughout the programme (24 in total). Staggered selection contravened the competition's terms and conditions, which stated that finalists would not be selected until after lines closed.
- 2.10 This selection process created unfair odds which meant that viewers entering the competitions were not given a fair and equal opportunity to win. Because of the selection process, those viewers who called to enter the competition later in the programme had a statistically lesser chance of being selected to be on the shortlist of finalists than those calling to enter earlier in the programme. The odds of being selected continued to decrease after each selection, as the pool became cumulatively larger. This was unfair.
- 2.11 Therefore between November 2001 and February 2007, viewers who called to enter at different stages did not have a fair and equal opportunity of winning because their chances of winning were dependent on the time they entered the competition.

Effect of the unfair conduct

- 2.12 There was no evidence to suggest that early selection had taken place prior to September 2004 when Eckoh took over as the service provider. However, between September 2004 and February 2007, 2.9 million calls to the competition had no chance of winning due to early selection, representing 42 per cent of the total calls. Approximately £2.2m of revenue was generated by calls that were disenfranchised by the unfair conduct.
- 2.13 Further, from 2001 to 2007, a significant number of viewers were disadvantaged by staggered selection, but the Licensee submitted that the data relating to these entries was not available and therefore it was not possible to confirm the total number of those affected.

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)).

The Human Rights Act 1998

- 3.5 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”).
- 3.6 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).
- 3.7 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.

Ofcom Broadcasting Code

- 3.8 Standards set by Ofcom in accordance with section 319 of the 2003 Act are set out in Ofcom’s Broadcasting Code (“the Ofcom Code”) which came into force on 25 July 2005³.
- 3.9 Accompanying Guidance Notes⁴ to each section of the Ofcom Code are published and from time to time updated, on the Ofcom website. The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Ofcom Code.

ITC Programme Code

- 3.10 Prior to the publication of the Ofcom Code, Ofcom was responsible for enforcing the Code of its legacy regulator, the ITC, as if it were an Ofcom Code⁵.

Licence Condition

- 3.11 Under section 325 of the Act, every programme service licensed by a Broadcasting Act licence includes conditions for securing that the standards set by Ofcom under section 319 are observed. If Ofcom is satisfied that the holder of a licence has contravened a condition of the licence, it may impose one or more of a number of penalties.

Remedies

- 3.12 Section 40 of the Broadcasting Act 1990 (as amended) (“the 1990 Act”) provides that Ofcom has the power to direct Channel 4 to broadcast a

³ The Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

⁴ Guidance Notes can be found at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/>

⁵ See Paragraph 43 (1) of Schedule 18 of the Communications Act 2003.

correction or statement of findings or not to repeat a programme in respect of a contravention of a licence condition.

- 3.13 Section 41 of the 1990 Act provides Ofcom with the power to impose a financial penalty on the licence holder of Channel 4 of a maximum of 5% of its qualifying revenue. This applies in relation to a failure to comply with a licence condition or direction on or after 29 December 2003.

Relevant Provisions of the Ofcom Broadcasting Code

- 3.14 Rule 2.11 of the Ofcom Code states that “Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known”.
- 3.15 Rule 10.10 of the Ofcom Code states that “Any use of premium rate numbers must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of Telephone Information Services (PhonepayPlus)”.

Relevant Provisions of the ITC Programme Code

- 3.16 The ITC Programme Codes (2001 and 2002) (“the ITC Codes”) stated:

Rule 8.2(b): Use of Premium Rate Telephone Services in Programmes: “The licensee must retain control of and responsibility for the service arrangements...(including all matters relating to their content)”.

Regulation of Premium Rate Services (“PRS”)

- 3.17 Providers of PRS are separately regulated by PhonepayPlus, the industry-funded regulatory body for all premium rate charged telecommunications services. It regulates in respect of the content, promotion and operation of PRS. In particular, PhonepayPlus’ Code of Practice requires: clear and accurate pricing information and honest advertising and service content. PhonepayPlus has the power to impose sanctions for any breach of its Code by the person/body operating PRS.

Background

- 4.1 Ofcom carried out an investigation of *Richard and Judy’s YSWP* competitions broadcast between 26 November 2001 and 15 February 2007, as summarised below. During that investigation, Channel Four was given the opportunity to make written submissions on the case. In light of the evidence and Channel Four’s responses, Ofcom concluded that Channel Four’s operation of the *YSWP* competition during the period under investigation was in breach of the relevant Codes, as outlined above and explained further below.
- 4.2 In addition, Ofcom found the breaches 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, Channel Four was given opportunities to make written and oral representations. A summary of these is set out below.

Ofcom's Investigation

- 4.3 In its investigation, Ofcom asked Channel Four to address the following key points, among other issues, and to provide certain relevant material. This included details of:
- the times at which shortlists of finalists were provided by Eckoh to Cactus from September 2004 to February 2007;
 - the contract between Channel Four and Cactus;
 - the revenue generated for Channel Four by *YSWP* from September 2004 to February 2007;
 - the extent of Channel Four's investigation of Cactus;
 - the precise chain of command and responsibility in terms of *YSWP* and the process by which the shortlist of finalists was sent by Eckoh, received by Cactus and progressed along this chain in the course of the production; and
 - why it was common practice for the programme's presenters not to state on air precisely when lines were to close and instead make the statement that the competition was "drawing to a close" as a means of signalling to viewers that lines were closing.

Channel Four's response to Ofcom's Investigation

- 4.4 The Licensee stated that when Channel Four started broadcasting the *Richard and Judy* programme in 2001, the viewer competition was an important and integral part of its editorial specification and as such, the Licensee wanted to ensure that the series complied with the relevant Codes.
- 4.5 The initial contracted service provider, VoiceMedia, had advised on the way in which the viewer competition needed to work in order for it to be compliant with the ICSTIS Code then in force. Channel Four said that VoiceMedia was therefore responsible to its regulator (then ICSTIS) and - through its contract with Channel Four - to the Licensee, for ensuring that the competition was run in accordance with its regulator's Code.
- 4.6 Although the original service provider, Voicemedia, was subsequently renamed Arrow, the same staff, processes and contracts remained in place. Eckoh bought Arrow in July 2004 and took over responsibility for the ongoing performance of the contract for *Richard and Judy's YSWP* competitions. Eckoh was well known to Channel Four and it had no reason to doubt Eckoh's ability to be the programme's service provider.
- 4.7 The winner selection process was devised by the original service provider, VoiceMedia, at the request of Channel Four and Cactus. *Richard and Judy's YSWP* competitions operated on the basis of viewers calling a premium rate telephone number to answer a question which was promoted in the programme on two occasions - at approximately five minutes and again at 20 minutes into the programme. A third statement by the presenters immediately before the second commercial break (at or around 17:35) usually confirmed to

viewers that the *YSWP* game would be played at the start of the next part of the programme. This also acted as a warning to viewers that telephone lines would soon be closing and the competition was coming to an end.

- 4.8 Channel Four stated that junior staff at Cactus had received the shortlists of finalists from Eckoh before lines closed. The role of the junior staff in the telephone room was to call those on the shortlist to ensure they were available, and were not under the influence of drugs or alcohol, or likely to use offensive language on air. Staff also checked each finalist against the electoral roll. The details of those who had passed the vetting process would then be put into a hat. Two or three people (a winner and one or two substitutes) were then selected to be put on standby, and their names taken to the gallery during the advertising break ready for the game to be played on air immediately at the start of the final part of the programme. This was the first time (at or around 17:38) at which anyone in the gallery or on the studio floor would have had of any knowledge of the selection process.

‘Early Selection’

- 4.9 The Licensee stated that, on the evidence available, the provisional conclusion of the internal inquiry conducted on behalf of the Licensee by Wiggin was that the practice of early selection commenced in September 2004. The Licensee submitted records to show that the series started in accordance with the original processes but quickly became “volatile”, with the timing of the submission of the final shortlist varying widely. From late 2005 onwards, a pattern was developing so that it became a frequent practice for the final shortlist to be submitted by Eckoh to Cactus a significant amount of time before telephone lines closed (on average 20 minutes), therefore denying viewers who called to enter after that point, any chance of winning.
- 4.10 According to Channel Four, this problem had arisen from the failure of Eckoh to adhere to the procedures which had been agreed. It noted that it was regrettable that the junior staff at Cactus who received the shortlists failed to realise the significance of the times at which they received them and that they did not refer the matter to senior management.

‘Staggered Selection’

- 4.11 The Licensee conceded that this was an aspect of the winner selection process which arose from “an initial conceptual or design flaw” in the process suggested and adopted at the outset by the service provider VoiceMedia. Whilst it said that it was not an issue that gave rise to callers being excluded from the competition, it was the case that early callers to *Richard and Judy’s YSWP* competitions had a statistically greater chance of being included in one of the shortlists of finalists than later callers, because earlier callers would have been in the pool of entrants from an earlier stage than later callers. Similarly, later callers would have been in a larger pool than earlier callers and would therefore have had a reduced chance of being selected as a finalist.

Remedies and reparations

- 4.12 Channel Four made clear that there was never any intent on its part to deceive or mislead viewers and its internal inquiry found no evidence of any such intention. The Licensee said that there had clearly been considerable

consumer harm, which as the broadcaster, with its responsibility to its audience and to Ofcom, it regretted enormously. It stated it was in the process of remedying that harm to individuals as quickly and as completely as possible. Although it did not believe it should be criticised for having carefully selected and contracted the service providers to fulfil the role of running the technical aspects of *Richard and Judy's YSWP* competitions and ensuring compliance with the relevant Codes. The Licensee had processes in place to properly assess the ability of service providers and the companies appointed were of excellent repute and had the necessary resources to perform the role.

- 4.13 However, Channel Four said it readily understood that what had occurred constituted a serious breach of trust with its audience.

Ofcom's Finding on the breaches

- 5.1 Ofcom took all Channel Four's submissions in its response into account when carrying out its investigation and reaching its conclusions on the question of Code breaches. It noted Channel Four had admitted that the conduct of the *Richard and Judy's YSWP* competitions between 26 November 2001 and 15 February 2007 was unfair and that Channel Four had accepted that the conduct was in breach of the relevant Codes.
- 5.2 Ofcom considered these matters under the following rules from both the ITC Programme Codes 2001 and 2002 and the Ofcom Code, as appropriate:

The Ofcom Code:

- **Rule 2.11** of the Code states that: "...competitions should be conducted fairly"; and
- **Rule 10.10** of the Code states that: "Any use of premium rate numbers must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of Telephone Information Services (*PhonepayPlus*)".

The ITC Programme Codes 2001 and 2002:

- **Rule 8.2(b)** Use of Premium Rate Telephone Services in Programmes: "The licensee must retain control of and responsibility for the service arrangements and the premium line messages (including all matters relating to their content)".
- 5.3 Ofcom concluded that there were serious breaches of the relevant Codes in *Richard and Judy's YSWP* competitions broadcast between 26 November 2001 and 15 February 2007. Specifically:

'Early Selection' of competition finalists:

*In series 2 and 3 (6 September 2004 to 20 July 2005); and
In series 3, 4 and 5 (5 September 2005 to 15 February 2007).*

- 5.4 Under the agreed procedures, the presenters solicited viewers to enter the competition at approximately 17:05, 17:20 and 17:35. Telephone lines then officially closed on average a few minutes after 17:35. The terms and conditions stated that a shortlist of competition finalists was to be submitted to

Cactus by Eckoh after telephone lines closed, and then a contestant was to be randomly selected to take part in the competition. However, from September 2004, Eckoh staff were submitting the shortlist of finalists to staff at Cactus on average as early as 17:20 (but times varied), while the telephone lines were still open and the programme was still soliciting viewers to call and enter the competition.

- 5.5 This practice meant that those viewers who called to enter the competitions on the basis that they had a fair and equal chance of winning, in fact had no chance of becoming a finalist after early selection had taken place. Therefore these competitions were not conducted fairly.
- 5.6 Channel Four said that its staff had no knowledge of these irregularities in the winner selection process. Nevertheless, Channel Four admitted that between 6 September 2004 and 20 July 2005, the practice was in breach of Rule 8.2(b) of the ITC Programme Code 2002; and between 5 September 2005 and 15 February 2007, it was in breach of Rule 2.11 of the Code.
- 5.7 Ofcom considered that the Licensee failed to have adequate oversight and control of the management and operation of the premium rate competition YSWP in *Richard and Judy* and that it is, and always has been, its responsibility to ensure that viewers are protected from unfair practices with regard to both the conduct of competitions and the use of premium rate services in its programmes.

'Early Selection' of competition finalists;

In series 5 (29 January 2007 to 15 February 2007).

- 5.8 PhonepayPlus imposed a fine of £150,000 on *You Say We Pay* service provider Eckoh on 6 July 2007 for the early selection in operation between 29 January 2007 and 15 February 2007. PhonepayPlus found that viewers had been seriously misled and actively encouraged to enter the competition after the shortlist of finalists had been selected. It also found clear evidence of fundamental failings in the winner selection process. This was in breach of Rule 10.10 of the Code.

'Staggered Selection' of competition finalists:

In series 1, 2 and 3 (November 2001 to 20 July 2005);

In series 3, 4 and 5 (5 September 2005 to 15 February 2007).

- 5.9 The Licensee also admitted that another flawed aspect of the winner selection process for *Richard and Judy's* YSWP competitions was a staggered method of selection in which several shortlists of finalists were submitted by Eckoh to Cactus during the programme, while telephone lines were still open.
- 5.10 This selection process created unfair odds which meant that viewers entering the competitions were not given a fair and equal opportunity to win. Because of the selection process, those viewers who called to enter the competition later in the programme had a statistically lesser chance of being selected to be on the shortlist of finalists than those calling to enter earlier in the programme. This was unfair.
- 5.11 The Licensee was aware that this staggered selection process was in operation. However, this selection process directly contravened its own terms and conditions, as posted on its website. These stated that finalists would be

selected after lines closed. The Licensee was, however, unaware that this systematic procedure was unfair until it instigated its internal investigation in 2007.

- 5.12 Staggered selection was unfair to callers who entered the competitions later in the programme believing they had a fair and equal chance of being selected as a finalist when their odds of winning were, in fact, diminished. Between 5 September 2005 and 15 February 2007, this was in breach of Rule 2.11 of the Code.
- 5.13 The Licensee should have been aware of this unfair practice, not least because it contravened the competition's terms and conditions, as posted on its website. Notwithstanding the practice of early selection which began in September 2004, the Licensee was unaware that an unfair selection system was in place as a systematic procedure, until it instigated its internal investigation in 2007. Between November 2001 and 20 July 2005 this was in breach of Rule 8.2 (b) of the ITC Programme Codes 2001 and 2002.
- 5.14 Ofcom considered that it was not sufficient for a Licensee with clear obligations and duties under the relevant Codes to say it knew nothing about a matter of such importance that related intrinsically to the overall fairness of a competition, the conduct of which directly resulted in significant numbers of viewers being financially harmed.

Referral to the Content Sanctions Committee

- 6.1 It was considered that, taking all the circumstances into account, and in particular: the severity and scale of the breaches and the resulting harm caused to significant numbers of participants and to the audience overall, the breaches were sufficiently serious to warrant the consideration of the imposition of a statutory sanction.
- 6.2 Therefore, in accordance with Ofcom's Outline Procedure for Consideration of Statutory Sanctions in Content Cases, the case was referred to the Committee.

Channel Four's written representations on the imposition of a sanction

- 7.1 Channel Four stated that it accepted the Code breaches and understood the reasons why they were considered to be serious enough for the case to be referred for consideration of a sanction.
- 7.2 The Licensee stated that close daily liaison between Channel Four and Cactus had been in operation from the outset on all aspects of *Richard and Judy* because all those involved fully recognised the priority of ensuring the editorial and legal/compliance integrity of the series. In addition, the Licensee had conducted training on legal and compliance issues for all relevant production staff at Cactus.
- 7.3 Channel Four submitted that the junior staff at Cactus who received the shortlists before lines closed would not have been expected to be aware of the intricacies of how the competition procedures operated and therefore did not recognise the serious implications of early selection. Cactus admitted that its staff should not have relied in the way that they did on Eckoh, and that

there were operational failings with regards to training and supervision. Channel Four said that it did not blame the individual junior members of staff. The Licensee did state, however, that if matters had been referred upwards, the problem would not have persisted. This regrettably had not happened.

- 7.4 Channel Four submitted that it would not profit from mishandled calls and that concerns about the principles of staggered selection were identified by itself and brought to the attention of PhonepayPlus and Ofcom at the outset.
- 7.5 The Licensee stated that viewers had now been provided with the full details of the refund scheme arranged by Channel Four for all of the series from September 2004.
- 7.6 In relation to remedies, Channel Four stated that on 19 and 22 February 2007, announcements were made in the *Richard and Judy* programme, apologising to viewers and explaining the refund arrangements. Several further announcements were also broadcast on Channel 4 reminding viewers of the refund process and stating the number of an information helpline.
- 7.7 The Licensee explained that it had obtained the necessary call data from Eckoh in order for the refund process to be as simple as possible for viewers. This required viewers disenfranchised by early selection to send a copy of a phone bill and the amount due to them would be calculated from the records held by the channel. If they did not have copies of phone bills or had moved house and incurred costs in obtaining copies of bills, then those costs would be reimbursed to them. Channel Four stated that the refund process for those disenfranchised by early selection was ongoing and it did not intend to close the refund offer, and would deal with refund requests received at any time.
- 7.8 Any money Channel Four had made which was not claimed would be donated to the Great Ormond Street Hospital Children's Charity. The Licensee stated that after prize money and administrative costs had been deducted, its share of the profits made from improperly entered calls through early selection was £300,000, which it intended to donate to the charity.
- 7.9 In recognition of staggered selection, the Licensee stated it would donate a further £250,000 to the Great Ormond Street Hospital Children's Charity.
- 7.10 In August 2007, Channel Four closed down all its PRS competitions. It intended to continue using telephone voting for *Big Brother* but would operate that service only to cover costs and to make a charitable donation.
- 7.11 The Licensee stated that it would explain to the public the reason for the donations in respect of *Richard and Judy's YSWP* competitions at the time the donations were made. It was awaiting the conclusion of the Ofcom investigation before disclosing the issue of staggered selection to the public.
- 7.12 Channel Four submitted that the total revenue raised by *Richard and Judy's YSWP* competitions across the period between 2001 and 2007 was £10,241,001. However, it argued that it was important to take into consideration that approximately 50 per cent of the total revenue was paid out by Channel Four in prize costs. The Licensee also stated that its actual profit from *YSWP* across this period was £1,173,982. In addition to reiterating its charity donations, and the refunds for early selection, the Licensee also

pointed out that it had incurred external costs of at least £300,000 in carrying out its internal inquiry and implementing the refund process.

- 7.13 Channel Four submitted that the protection of viewers was of paramount importance to it. It had carefully vetted the service provider before appointing it, to ensure that it was a reputable company with proven expertise in the PRS field. It also put in place clear contractual obligations in relation to compliance with the PhonepayPlus Code. However, Channel Four argued that, with the benefit of hindsight and despite the contractual obligations that it had put in place, it should have monitored the activities of the service provider more closely, but that it sincerely believed at the time that the steps it took were responsible and reasonable.

Sanctions Hearing

- 8.1 Ofcom's Content Sanctions Committee ("the Committee") held an oral hearing on 14 December 2007 at which Channel Four was given the opportunity to make oral representations before the Committee decided whether the breaches warranted the imposition of a statutory sanction, and if so, at what level.
- 8.2 The Committee was addressed by Kevin Lygo, Channel Four's Director of Television and Content, and Anne Bulford, Channel Four's Group Finance Director, with evidence supplied by Neil Pepin, Deputy Head of Legal and Compliance at Channel Four. A representative of Wiggin LLP was also in attendance.
- 8.3 Channel Four fully accepted that the competitions had not complied with the relevant Codes. It had no doubt that the breaches were serious and repeated and had resulted in a substantial breach of trust with its audience which it profoundly regretted. However, it stated that there had never been any intention on its part to deceive its audience, and at the time, it had genuinely believed that its actions were sufficient to protect viewers from harm.
- 8.4 The Licensee submitted that its failures in this respect were wholly untypical of its fundamental values and its approach to compliance. It fully accepted that, with the benefit of hindsight, it had placed an inappropriate reliance on the third parties involved. It also accepted that its monitoring of these third parties was inadequate, and its trust in them to ensure compliance was misplaced.
- 8.5 Channel Four considered it to be of the utmost priority to resolve the issues in a prompt and appropriate manner. It believed it had done so by instigating a comprehensive refunds and charity donation scheme, and by putting new extensive safeguards in place, such as an inspection function to audit its third party relationships.
- 8.6 With regard to its relationship with Cactus, Channel Four stated that there was close liaison between its legal and commissioning teams and the programme's producers at Cactus. This had included thorough training and advice given to Cactus staff on compliance and regulatory issues. The focus of this, however, was on-air compliance issues such as presentation, content and calls to action. There was no training or advice provided on what the Licensee perceived at the time to be technical issues, such as winner selection.

- 8.7 Channel Four stated that compliance relating to off-screen issues such as the operation of the telephone lines and the winner selection procedure was the contractual responsibility of the service provider, on which the Licensee placed full reliance in these respects. Channel Four stated that it had not provided any training or advice on compliance to the service provider's staff. It submitted that VoiceMedia was an established and reputable service provider and at the time, it had believed it had been entirely reasonable for it to rely on such a third party in this way.
- 8.8 The Licensee stated that at the time it had no knowledge that early selection was taking place. Its internal inquiry found no evidence of the practice of early selection occurring before September 2004 when Eckoh took over as the service provider for *Richard and Judy's YSWP* competitions.
- 8.9 Channel Four stated that it had not undertaken any kind of audit procedure or instigated any checks or processes at the time to ensure that the competition was being conducted according to the terms and conditions. More specifically, at no time throughout the duration that the competition was being conducted had any employee of Channel Four visited the telephone room to undertake a 'live' audit of what was going on. It had relied entirely on the contractual obligations it had placed on Eckoh to ensure compliance, notify it of, and rectify, any compliance issues. Channel Four considered that there had been a disregard amongst Eckoh staff of its contractual obligations to the Licensee. However, it accepted that it had been inappropriate and insufficient for Channel Four to rely on the service provider to the extent that it did.
- 8.10 In Channel Four's view, the reason that early selection had been put into practice, without its knowledge, had not been financial gain, but expediency in the conduct of the competition.
- 8.11 As part of the Licensee's consideration of on-screen compliance issues, its legal team had instigated the detailed vetting process that junior staff at Cactus were responsible for carrying out on receipt of the shortlists of finalists. It had been Channel Four's understanding that the process of staggered selection allowed enough time for Cactus' staff to carry out these agreed vetting procedures and that therefore, the very short amount of time between the final 'solicit' (made by the presenters to viewers) and the closure of lines was not problematic.
- 8.12 Channel Four acknowledged and accepted that the process of staggered selection, by which finalists' names were submitted by Eckoh to Cactus in batches during the course of the competition, directly contravened the competition's terms and conditions, which stated that finalists would only be selected after lines closed.
- 8.13 The Licensee stated that the staggered selection process had been devised and set up by the original service provider, VoiceMedia. It had advised Channel Four that this was an acceptable and compliant selection process that was being used widely in the industry at that time. When Eckoh took over as the service provider for *Richard and Judy's YSWP* competitions, Channel Four had made an assumption that what it referred to as the existing technical procedures of the competition, including the winner selection process, were compliant and fair, and therefore did not audit or review them.

- 8.14 Channel Four stated that it had identified that 2.9 million calls had been disenfranchised by the practice of early selection. It had instigated a refund scheme for these viewers, which it had publicised in detail in on-air announcements on several occasions. If all those eligible to receive a refund applied, Channel Four would pay a maximum of £2.1 million. It was prepared to issue such refunds on an ongoing basis with no time limit.
- 8.15 The Licensee submitted that due to the lack of robust data, it was not possible to estimate the number of viewers who had been disadvantaged by the process of staggered selection in use between 2001 and 2007. In light of this, it would make charitable donations of £250,000 to the Great Ormond Street Hospital Children's Charity.
- 8.16 Channel Four submitted that the share of the profits it made from improperly entered calls through early selection was £300,000, which it also intended to donate to the charity. Channel Four stated that it had made payments totalling £250,000 to the charity in respect of all PRS issues, and the balance of its outstanding pledges would be paid on the conclusion of Ofcom's investigation.
- 8.17 The Licensee made submissions as to the appropriateness and proportionality of the proposed financial penalty given what it considered to be the extensive nature of its remedies and reparations.
- 8.18 In conclusion, Channel Four stressed the paramount importance it placed on viewer trust. It stated that it believed it had done everything it could have done to rectify what it described as a "huge breach of trust" with its viewers. Notably, as of August 2007, it had taken a policy decision that it would no longer profit from PRS in its programmes and was no longer running any PRS competitions. It asked the Committee to take this action - which had caused a significant fall in its revenue - into account.

Sanctions Decision

- 9.1 In reaching its decision, the Committee considered carefully all the written and oral submissions provided by Channel Four. The Committee decided, for the reasons set out below, to impose a financial penalty on Channel Four and issue a direction requiring Channel Four to broadcast a statement of Ofcom's finding on three occasions determined by Ofcom. In deciding on an appropriate and proportionate level of financial penalty in this case, the Committee had regard to Ofcom's Penalty Guidelines⁶.

The seriousness of the breaches

- 9.2 Having considered all the evidence and Channel Four's representations, the Committee found that the breaches in this case were extremely serious for the following reasons.
- 9.3 The breaches involved systematic failures in the conduct of this competition and constituted a serious breakdown in trust between a public service

⁶ Ofcom's Penalty Guidelines are available at <http://www.ofcom.org.uk/about/accoun/pg/>. Section 392 of the Communications Act 2003 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.

broadcaster and its audience. Materially misleading an audience has always been considered to be amongst the most serious breaches that can be committed by a broadcaster under the Codes.

- 9.4 The trust that the audience places in a broadcaster is fundamental to their relationship. This is particularly pertinent in the case of a public service broadcaster like Channel Four whose service is available to such a wide audience. This relationship of trust becomes even more important when it involves one of the broadcaster's most popular programmes. Viewers are entitled to believe when entering into a relationship of trust with such an organisation that their trust is not misplaced.
- 9.5 In addition, the Committee was concerned by the scale of harm caused by the breaches, as well as their duration and repeated nature. The breaches resulted in significant consumer harm involving a substantial audience. The gross revenue raised by the Licensee from *Richard and Judy's YSWP* competitions between 2001 and 2007 was £10,241,001 from a total of 16,817,926 viewers' calls. It was clear that a substantial number of viewers made calls in the belief that they could fairly enter competitions even though finalists had already been selected. It is estimated that between September 2004 and February 2007, when early selection took place, 2.9 million callers who paid a total of approximately £2.2 million to enter the competitions were disenfranchised (representing 42 per cent of the total number of entries during that period).
- 9.6 The Committee was concerned that early selection occurred for a period of nearly three years before it was discovered and it only came to light as a result of allegations published in the *Mail on Sunday*. It was reasonable to assume that this unfair conduct (and the resulting harm to the consumer) may well have continued were it not for that publication. The Committee noted that Channel Four thought that staggered selection was fair until the internal inquiry of March 2007. It nonetheless was concerned that this had taken place for a period of over five years.
- 9.7 It was clear that the programme was of considerable importance to Channel Four. The competition and its associated interactive relationship with its audience played an integral role within the programme format. The Committee was therefore seriously concerned by the Licensee's admission that it had not undertaken any kind of audit procedure or instigated any checks or processes at any time to ensure that the competition was being conducted according to its terms and conditions. More specifically, at no time throughout the duration that the competition was being conducted had any employee of Channel Four visited the telephone room to undertake a 'live' audit of what was going on. If such action had been taken, then it is likely that these failings would have been discovered at a much earlier stage.
- 9.8 Whilst the Committee understood that Channel Four felt that it had been let down by Eckoh and Cactus, it was nevertheless firmly of the view that the conduct of Channel Four's own competitions and the management of its service providers were plainly within the control of the Licensee. Given its obligations under the Codes, it should have taken much greater responsibility for them. Further, the Committee considered that whilst it was the case that Channel Four had in place contractual arrangements with Eckoh which stipulated how the competition should be conducted and that it should be

conducted in accordance with the requirements of the PhonepayPlus Code this, in itself, was not sufficient.

- 9.9 Channel Four's trust in Eckoh was evidently misplaced and misjudged in this case. The Committee was strongly of the view that Channel Four's handling of its relationship with Eckoh and its failure to take even the most basic of steps to ensure that contractual obligations were being met was negligent. Channel Four appeared to take no account of the possibility that Eckoh, as a third party, might fail to act in an appropriate manner when handling such substantial sums of money from Channel Four's audience.
- 9.10 It was the view of the Committee that due to the severity, scale and repeated nature of the breaches and the resulting substantial harm caused to significant numbers of participants and to Channel Four's audience overall, this was a particularly serious case and therefore warranted the imposition of a significant financial penalty.

Precedent

- 9.11 In considering the appropriate level of financial penalty, the Committee took account of its previous decisions in such cases as well as the specific representations Channel Four had made regarding the relevance of those decisions in this case. 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 specific scale, severity and repeated nature of the breaches in the circumstances of this particular case.

Incentive

- 9.12 The Committee took into account in setting the level of penalty, the fact that Channel Four had taken steps to rectify the breaches (including its decision that it would no longer profit from PRS in its programmes and was no longer running any PRS competitions). However, the Committee also noted that the purpose of the imposition of a penalty was to provide a deterrent both to the party involved and to third parties. In this case it considered that a significant financial penalty would represent an appropriate incentive to ensure compliance in the future.

Level of Penalty

- 9.13 Taking all these factors into account (and in light of the scale and severity of the breaches), the Committee considered that the 'starting figure' for any financial penalty should be significant.

Factors tending to increase the level of penalty

- 9.14 The Committee then considered whether there were any factors which aggravated or tended to increase the appropriate level of any financial penalty it might impose.
- 9.15 The Committee noted that there was close liaison between the programme's producers at Cactus and Channel Four's legal and commissioning teams, which included training on certain areas of Code compliance. However, and importantly, this did not include what the Licensee described as "technical

issues”, such as winner selection and the behind-the-scenes conduct of the competition. The Committee did not accept that these, and in particular early selection, could be reasonably described as “technical issues” but in fact went to the very heart of the fairness of a competition – a competition which the Committee noted raised considerable sums of money from its audience.

- 9.16 Channel Four admitted that its training of Cactus staff was inadequate and that it had undertaken no training of the staff at Eckoh responsible for handling the competition despite the fact that Channel Four had a direct contractual relationship with Eckoh and, more importantly, despite the substantial sums of money people were paying to enter the competition.
- 9.17 The total inadequacy of the training provided was demonstrated by the fact that, with regard to early selection, the staff at Cactus who were receiving the shortlists of finalists before lines closed, either did not recognise the unfairness of this or understood that it was unfair but did not recognise the significance and failed to refer the issue upwards to more senior staff. This was despite the fact that members of the production team were consistently receiving the final shortlist for the competition some twenty minutes before the lines were announced on air as being closed.
- 9.18 Staggered selection was part of a formalised and systematic procedure and Channel Four’s repeated failure to understand the inherent unfairness of this system demonstrated a lack of due care that could only be described as negligent.
- 9.19 The Committee was particularly concerned that, even though Channel Four believed the staggered selection process to be fair, at no point was the audience informed of this particular element of the selection process. In fact, the process was directly at odds with the published terms and conditions of the competition which clearly stated that a shortlist of winners would be chosen from all correct entries “after entries close”. Given that staggered selection directly contravened the competition’s terms and conditions, the Committee found Channel Four’s approach in this respect to be reckless.
- 9.20 Despite the absolute paramount importance of trust and honesty to Channel Four’s relationship with its audience, the Licensee misled its audience by omitting details of the winner selection process from the programme’s on-air presentation and by misrepresenting this key element of the competition’s conduct to the public through the competition’s published terms and competitions.

Mitigating Factors

- 9.21 The Committee then considered whether there were any factors which in its view might limit or decrease the appropriate level of the financial penalty.
- 9.22 The Committee noted Channel Four’s representations that it did not intend its competitions to be conducted in a way that was not compliant with the relevant Codes.
- 9.23 The Licensee had had procedures in place designed to ensure that it chose a suitable service provider to run the competition and exercised care in the selection of that service provider.

- 9.24 As soon as the allegations on early selection appeared in the *Mail on Sunday* Channel Four stopped the competition.
- 9.25 Additionally, Channel Four engaged the assistance of external specialist media lawyers, Wiggin, to ensure a thorough internal inquiry. It also instigated a review by Wiggin of all its other PRS activity, and put in place 'live' monitoring of all its PRS activity by Wiggin and other specialists on an ongoing basis.
- 9.26 The Committee considered that the steps Channel Four had taken to remedy the consequences of the breaches in this case were wide-ranging. These included:
- putting in place a refund scheme for those disenfranchised by early selection;
 - pledging to donate to the Great Ormond Street Hospital Children's Charity any money which was not claimed and refunded to viewers due to calls improperly handled as a result of early selection (having already made donations to the charity totalling £250,000 in respect of all PRS issues);
 - putting in place an 'inspection' function to audit the performance of third parties in fulfilling contractual obligations; and
 - because of the damage in viewer trust these problems have created, Channel Four had now withdrawn from operating premium rate competitions altogether and from operating votes on a for-profit basis.
- 9.27 The Committee wished to make it clear that the financial penalty would have been higher had Channel Four not taken such wide-ranging action.

Conclusion

- 9.28 Cases where the broadcaster has materially misled its audience, whether knowingly or not, have always been considered to be amongst the most serious breaches of the Code by the regulator (and its predecessor).
- 9.29 The Committee accepted that Channel Four had no intention to mislead its audience. However, the Committee nonetheless took the view that the breaches constituted a substantial breakdown in the fundamental relationship of trust between a public service broadcaster and its viewers. Millions of viewers purchased the right to enter these competitions and invested trust in the Licensee. This trust was ultimately misplaced. This case involved the widespread and systematic deception of all those viewers who paid to enter in the belief that they had a fair chance of winning when in fact their chances of winning were diminished or non-existent.
- 9.30 Despite the considerable importance of the programme and the competitions to Channel Four, it failed to have any proper regard for the necessity to operate any effective form of compliance procedures for the operation of the competition; it failed to adequately manage or oversee fundamental elements of the conduct of the competition (winner selection procedures).
- 9.31 Ultimately, Channel Four failed to place appropriate emphasis on the fair treatment of its viewers.

9.32 Having considered the relevant facts as outlined above and all the representations made by Channel Four, the Committee decided to impose a financial penalty on Channel Four of **£1,000,000** (payable to HM Paymaster General) which it considered to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed Channel Four to broadcast a statement of its findings on its service in a form determined by Ofcom on three specified occasions.

Content Sanctions Committee

Philip Graf
Joyce Taylor
Kath Worrall

20 December 2007