Decision by the Ofcom Broadcasting Sanctions Committee

It is Ofcom policy to state the language used on air by broadcasters who are the subject of a sanction adjudicated on by the Broadcasting Sanctions Committee where it is relevant to the case. Some of the language used in this decision, or the Findings to which it refers, may therefore cause offence.

Bang Channels Limited and Bang Media (London) Limited

for the broadcast of programmes between June 2009 and November 2009, which are covered by the edition of Ofcom's Broadcasting Code which came into effect on 25 July 2005[1], and for breaches of Licence Conditions. All references to the Broadcasting Code and its Rules in this Decision are therefore to that edition of the Code. A new edition of Ofcom's Broadcasting Code took effect on 16 December 2009, but has not been considered for the purposes of this Decision.

Broadcasting Sanctions Committee's Decision of Sanction against:

Bang Channels Limited ("Bang Channels") in respect of its services Tease Me (TLCS-933), Tease Me 2 (TLCS-1015), Tease Me 3 (TLCS-1231)

Bang Media (London) Limited ("Bang Media") in respect of its service Tease Me TV, DTPS-078

(Bang Channels and Bang Media together: "the Licensees")

For:

Breaches of Ofcom's 2005 Broadcasting Code ("the Code") in respect of:

Rule 1.3: "Children must also be protected by appropriate scheduling from material that is unsuitable for them";

Rule 1.24: "Premium subscription services and pay per view/night services may broadcast 'adult-sex' material between 2200 and 0530 provided that in addition to other protections mentioned above:

- there is a mandatory PIN protected encryption system, or other equivalent protection, that seeks satisfactorily to restrict access solely to those authorised to view; and
- there are measures in place that ensure that the subscriber is an adult."

[1] With the exception of Rule 10.17 which came into effect on 1 July 2005. The 2005 Code can be found at http://www.ofcom.org.uk/tv/ifi/codes/bcode_2005/

Rule 1.25: "BBFC R18-rated films or their equivalent must not be broadcast."

Rule 2.1: "Generally accepted standards must be 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 harmful and/or offensive material"; and

Rule 2.3: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...Such material may include, but is not limited to, ...sex...".

On:

Bang Channels

20 June 2009: breach of rules 1.24, 2.1, 2.3
21 June 2009: breach of rules 1.24, 2.1, 2.3
22 June 2009: breach of rules 2.1, 2.3
20 August 2009: breach of rule 1.3
30/31 October 2009: breach of rules 1.24, 2.1, 2.3
6 November 2009: breach of rule 1.3
7 November 2009: breach of rules 2.1, 2.3
7 November 2009: breach of rules 1.24, 2.1, 2.3
13/14 November 2009: breach of rules 1.24, 2.1, 2.3
15 November 2009: breach of rules 1.24, 2.1, 2.3
24 November 2009: breach of rules 1.24, 2.1, 2.3
24 November 2009: breach of rules 1.24, 2.1, 2.3
25 November 2009: breach of rule 1.25

Bang Media

3 November 2009: breach of rules 2.1, 2.3

For:

Breach of Bang Channel's Television Licensable Content Service Licence, dated 16 June 2005[2] and its Television Licensable Content Service Licence dated 31 July 2007[3] in respect of:

Condition 11:

"(1) The Licensee shall adopt procedures acceptable to Ofcom for the retention and production of recordings in sound and vision of

[2] Tease Me
[3] Tease Me 3

any programme which is the subject matter of a Standards Complaint ...

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

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

On: 30/31 October 2009: breach of Licence Condition 11
31 October 2009: breach of Licence Condition 11
5 November 2009: breach of Licence Condition 11
15 November 2009: breach of Licence Condition 11

For: Breach of Bang Media's Digital Television Programme Service ("DTPS") Licence, dated 28 September 2009 in respect of:

Condition 11:

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

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

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

On: 23 November 2009: breach of Licence Condition 11

Decision:

Bang Channels:

To impose a financial penalty (payable to HM Paymaster General) of **£141,250** in respect of the Code breaches by Bang Channels Limited,

and **£6,000** in respect of the Licence Condition 11 breach by Bang Channels Limited.

Bang Media:

£4,000 in respect of the Code breaches by Bang Media (London) and **£6,000** in respect of the Licence Condition 11 breach by Bang Media (London).

Summary

1. For the reasons set out in paragraphs 72 to 171, under powers delegated from the Ofcom Board to Ofcom's Broadcasting Sanctions Committee ("the Committee"), the Committee has decided to impose statutory sanctions on Bang Channels and Bang Media (together, the "Licensees"). This is aggravated by the serious and repeated failure of the Licensees to ensure compliance with the Code of their services and the serious failure of the Licensees to ensure compliance with their licence requirements to provide recordings to Ofcom.

2. Having considered all facts and arguments put before it and deemed sanctions totalling **£157,250** to be appropriate, the Committee wishes to emphasise that it views the broadcast of inappropriate explicit material – such as that forming the basis of this Decision – with the utmost seriousness. In this instance, the Committee concluded that the Licensees had been operating a wholly inadequate compliance system. The Committee considered this inadequate compliance to amount to manifest recklessness. This recklessness therefore informed the Committee's judgment of appropriate sanctions. Licensees should be aware of the great importance the Committee attaches to the need for robust compliance procedures.

3. Bang Channels owns and operates services called Tease Me, Tease Me 2 and Tease Me 3. These channels are on the Sky platform on channel numbers 912, 948 and 959 respectively. Each of Tease Me, Tease Me 2 and Tease Me 3 is operated under a Television Licensable Content Service ("TLCS") licence issued by Ofcom under section 13 of the Broadcasting Act 1990 ("the 1990 Act").

4. Bang Media owns and operates a service called Tease Me TV, which is on the Freeview platform. Tease Me TV is operated under a Digital Television Programme Service ("DTPS") licence issued by Ofcom under section 13 of the 1990 Act.

5. The Licensees are sister companies under common ownership and control. All editorial compliance decisions regarding the companies are taken by a centralised compliance team headed by the same Compliance Officer.

6. All of these channels broadcast programmes based on televised daytime interactive chat programmes and, after the 9pm 'watershed', adult sex chat services. In all of these programmes viewers are invited to contact onscreen female presenters via premium rate telephony services ("PRS"). All of these programmes are broadcast without mandatory restricted access.

7. The Ofcom Executive investigated a number of programmes broadcast on the channels operated by the Licensees and found 13 programmes broadcast on channels operated by Bang Channels to have breached the Code ("the Bang Channels Code Breaches") and one programme broadcast on the channel operated by Bang Media to have breached the Code ("the Bang Media Code Breach"). The Ofcom Executive also found each of Bang Channels and Bang Media to have breached Licence Condition 11 of their respective licences by failing to provide "forthwith" full recordings of programmes upon request by Ofcom ("the Licence Condition 11 Breaches"). Full details of those breaches are recorded in Ofcom's Broadcast Bulletins 151[4], 152[5] and 153[6].

[4] http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb151/Issue151.pdf

8. In summary, the material found in breach related to unsuitable adult material, shown for the sole purpose of sexual stimulation. Some footage contained inappropriate explicit sexual imagery including intrusive images of, simulated masturbation and oral sex, genital and anal detail. In some cases, the material was considered to be of such strength that it was only suitable for transmission with mandatory restrictions (e.g. under PIN encryption). In one programme, in particular, the material was of such strength that it was considered to be equivalent of BBFC 'R18'[7].

9. There were further breaches relating to daytime chat. In these cases, the broadcaster transmitted material which was considered to be unsuitable for pre-watershed viewing in that the content was inappropriately and overtly sexual.

10. In accordance with Ofcom's *Procedures for the consideration of statutory sanctions in broadcasting or other licence-related cases* ("the Sanctions Procedures") **13** programmes found on the channels operated by Bang Channels that had been found to have contravened the Code were referred to the Committee. **1** breach of Licence Condition 11 that included 4 programmes for which Bang Channels was unable to provide recordings "forthwith" was also referred to the Committee for consideration.

11. In respect of Bang Media, **1** programme that had been found to have contravened the Code was referred to the Committee for consideration. **1** breach of Licence Condition 11 that included 1 programme for which Bang Media was unable to provide recordings "forthwith" was also referred to the Committee for consideration.

Summary of Committee's Decisions

12. The Committee decided that these cases were sufficiently serious and repeated to be considered for a statutory sanction. The Committee held a hearing on 12 July 2010 to consider its decision. Representatives of the Licensees attended the hearing to make oral representations on behalf of both companies.

13. After considering all the evidence and all the representations made to it, the Committee decided that the Bang Channels Code Breaches, the Bang Media Code Breach and each of the Licence Condition 11 Breaches were so serious and/or repeated that a financial penalty should be imposed. The Committee then also considered the level of the fine to be imposed, in accordance with Ofcom's *Penalty Guidelines*[8].

14. In summary, the Committee considered the contraventions committed by the Licensees to be of such a serious and repeated nature as to amount to recklessness. It considered that such recklessness was indicative of a wholly inadequate compliance system. In reaching this view it noted that the contraventions took place over a 5 month period, and that the Licensees had previously been found to have breached the Code on 5 occasions. It further noted that some of these contraventions occurred despite Ofcom providing the Licensees with clear guidance on a number of occasions.

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[5] http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb152/Issue152.pdf
[6] http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb153/Issue153.pdf
[7] R18 material is a special and legally restricted classification of film primarily for explicit sexual works and is restricted for sale in licensed sex shops or for viewing in licensed cinemas.
[8] http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/

This sexual material was clearly unacceptable and in breach of generally accepted standards for a licensed service which transmits without restrictions or safeguards.

15. Broadcasters who operate in this area should be aware that the Committee treats the transmission of this content with the utmost seriousness and that such repeated compliance failures will not be tolerated. Licensees should be aware that Ofcom intends to continue to treat such breaches as extremely serious and will sanction those licensees accordingly.

16. Having regard to the serious and repeated nature of the breaches, and having regard to the Licensees' representations and Ofcom's Penalty Guidelines, the Committee decided it was appropriate and proportionate in the circumstances to impose:

- a financial penalty of **£141,250** on Bang Channels in respect of the Bang Channels Code Breaches (payable to HM Paymaster General);
- a financial penalty of **£6,000** on Bang Channels in respect of the Bang Channels Licence Condition 11 Breach (payable to HM Paymaster General),
- a financial penalty of **£4,000** on Bang Media in respect of the Bang Media Code Breach (payable to HM Paymaster General);
- a financial penalty on Bang Media of **£6,000** in respect of the Bang Media Condition 11 Breach (payable to HM Paymaster General).

Legal Framework

The Communications Act 2003

17. Ofcom has a duty under section 319 of the Communications Act 2003 ("the Act") to set standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives. The standards objectives are set out in section 319(2) of the Act. They include that: persons under eighteen are protected (section 319(2)(a)); and 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)).

18. In discharging its functions Ofcom's principal duties are to further the interests of citizens in relation to communications matters and the interests of consumers (section 3(1)) and to secure a number of other matters. These include the application in the case of all television and radio services of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services (section 3(2)(e)).

19. 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)).

20. Under section 325 of the Act, every programme service licensed under the Broadcasting Act 1990 or 1996 ("a Broadcasting Act Licence") includes conditions for securing that the standards set by Ofcom under section 319 are observed. If Ofcom is satisfied that the holder of a Broadcasting Act Licence has contravened a Condition of the Licence, it may impose the following sanctions:

- issue a Direction not to repeat a programme;
- issue a Direction to broadcast a correction or a statement of Ofcom's findings;
- impose a financial penalty; and/or
- revoke a Licence (not applicable to the BBC, S4C or Channel 4).

The Human Rights Act 1998

21. 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").

22. 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).

23. 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

24. Standards set by Ofcom in accordance with section 319 of the Act are set out in Ofcom's Broadcasting Code ("the Code") which came into force on 25 July 2005.

25. Accompanying Guidance Notes to each section of the Code are published, and from time to time updated, on the Ofcom website. The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Code.

Relevant provisions of the Ofcom Broadcasting Code

Rule 1.3: "Children must also be protected by appropriate scheduling from material that is unsuitable for them".

Rule 1.24: "Premium subscription services and pay per view/night services may broadcast 'adult-sex' material between 2200 and 0530 provided that in addition to other protections mentioned above:

- there is a mandatory PIN protected encryption system, or other equivalent protection, that seeks satisfactorily to restrict access solely to those authorised to view; and

- there are measures in place that ensure that the subscriber is an adult.

Rule 1.25: "BBFC R18-rated films or their equivalent must not be broadcast."

Rule 2.1: "Generally accepted standards must be 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 harmful and/or offensive material".

Rule 2.3: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context".

Relevant licence conditions

Condition 11 of each of Bang Channels' TLCS Licences and Bang Media's DTPS Licence states:

"(1) The Licensee shall adopt procedures acceptable to Ofcom for the retention and production of recordings in sound and vision of any programme which is the subject matter of a Standards Complaint ...
(2) In particular, the Licensee shall: (a) make and retain or arrange for the retention of a recording in sound and vision of every programme included in the Licensed Service for a period of 60 days from the date of its inclusion therein; and
(b) at the request of Ofcom forthwith produce to Ofcom any such recording for examination or reproduction"

Remedial action and penalties

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

27. Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence of a maximum of whichever is the greater of £250,000 and 5% of its qualifying revenue on each occasion that a breach of the Licence has occurred (whether as a result of a breach of the Broadcasting Code or another Licence Condition). Ofcom may therefore impose a financial penalty on each occasion that a programme has breached the Broadcasting Code.

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

29. In respect of a DTPS Licence, section 23 of the Broadcasting Act 1996 ("the 1996 Act") grants Ofcom the power to impose a penalty of whichever is the greater of £250,000 and 5% of its qualifying revenue on each occasion that a breach of the Licence has occurred.

Compliance background and history

Guidance from Ofcom

30. As part of its regulatory function, the Ofcom Executive had raised concerns about certain content broadcast by Bang Channels and Bang Media with the broadcasters and offered the Licensees compliance guidance. This included email correspondence in February and April 2009 and letters containing guidance sent in April and November 2009.

31. The guidance was therefore provided both before the transmission of the first recorded breach (20 June 2009) and variously prior to the transmission of later breaches.

32. The Ofcom Executive also provided guidance to all relevant broadcasters via two published notes in Ofcom's Broadcast Bulletin 137 and 144 and a letter to all broadcasters in August 2009.

Licensees' Compliance Procedures

33. Prior to this sanction, Bang Channels submitted details of its internal procedures for compliance with the Code during the course of the investigations. These included guidance for producers, and presenters and made reference to the Code provisions and to previous Ofcom guidance on issues relating to adult sex chat broadcasters. In particular, the guidance for producers and presenters contained the following list of unacceptable on-screen behaviour:

"Under no circumstances should a presenter use a sex toy on screen, or use anything as a substitute for a sex toy (telephone, bananas, lollipops etc).

Penetration with any object is an immediate breach of the Code.

Camera men should take care not to film prolonged, sustained or invasive shots of the vaginal and anal areas.

Full frontal nudity is never acceptable under any circumstances. This is an immediate breach of the Code.

Creams, oils and bodily fluids should not be used.

Depictions of masturbation, whether real or simulated, is not allowed."

Compliance History

Bang Channels

34. Five interventions had been recorded against Bang Channels. These were as follows:

Bang Babes, Tease Me 2, 17 March 2008; 21:00-22:00. Breaches: 2.1 and 2.3
Bang Babes, Tease Me, 18 March 2009, 21:00. Breaches 2.1 and 2.3
The Pad, Tease Me 2, 20 March 2009, 21:00. Breaches 1.3 and 2.3
Bang Babes, Tease Me 3, 20 June 2009, 01:45 to 02:30 approximately and *Bang Babes*, Tease Me, 23 June 2009, 01:00 to 03:00 approximately[9]. Breaches: 2.1 and 2.3

[9] These two programmes were considered together in Bulletin 144 published 26 October 2009

Bang Media

35. Bang Media had no breaches recorded against it before those referred to in this Decision.

Ofcom's Investigations

36. *Bang Babes* is adult sex chat programming, freely available without mandatory restricted access on the channels Tease Me, Tease Me 2 and Tease Me 3 (Sky channel numbers 912, 948 and 959). All the channels are situated in the 'adult' section of the Sky electronic programme guide ("EPG"). The licences for Tease Me, Tease Me 2 and Tease Me 3 are held by Bang Channels Limited ("Bang Channels"). These channels broadcast programmes based on interactive adult sex chat services: viewers are invited to contact onscreen female presenters via premium rate telephony services ("PRS").

37. *The Pad* is a televised daytime interactive chat programme broadcast without mandatory restricted access. It is broadcast on Tease Me 3. Viewers are invited to contact onscreen female presenters via PRS.

38. Tease Me TV (TMTV) (Freeview) is a channel that provides programming offering interactive daytime chat and, after the 9pm 'watershed', sex chat. All of the programmes are available without mandatory access restrictions and encourage viewers to call premium rate telephone services whose numbers are displayed on screen. The channel broadcasts the programme *Early Bird* between the hours of 05:30 and 09:00. After 03:00 TMTV broadcasts Bang Babes, programming based on sex chat services. The licence for Tease Me TV (Freeview) is held by Bang Media.

39. The Ofcom Executive investigated a number of programmes broadcast by Bang Channels and Bang Media for breaches of the Code. As part of its investigations, the Ofcom Executive sent formal requests to the Licensees for recordings of the programmes under investigation in accordance with Condition 11 of the relevant Licences and the Standards Procedures.

40. Due to the extensive nature of Ofcom's investigations involving multiple programmes, details of investigations into individual programmes are not recorded here (please refer to the links footnoted to paragraph 7).

41. The Ofcom Executive conducted its investigations in accordance with Ofcom's *Procedures for the handling of broadcasting standards or other licence-related cases*[10] ("the Standards Procedures") and provided an opportunity for the Licensees to make representations on the issues raised in relation to each of the programmes under investigation.

[10] http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/

Broadcasting Code Breaches in Respect of Content

Bang Channels

42. Having taken into account the representations of Bang Channels, on 8 February 2010, 22 February 2010 and 8 March 2010, the Ofcom Executive recorded breaches of the Code by Bang Channels, as follows:

Bang Babes; Tease Me
Broadcast: 20 June 2009, 01:15 to 02:25 approximately; 21 June 2009, 00:00 to 01:15 approximately; 21 June 2009, 01:15 and 22 June 2009, 01:00 to 02:00 approximately
Adjudication: 8 February 2010, Broadcast Bulletin 151

43. In this Ofcom adjudication published in Broadcast Bulletin 151 on 8 February 2010, the Ofcom Executive found the programmes (bar 22 June 2009 broadcast) breached the following Code Rules:

1.24: (mandatory access restrictions)
2.1: (generally accepted standards)
2.3: (offence must be justified by context)

44. Ofcom found the 22 June 2009 broadcast to have breached the following Code Rules:

2.1: (generally accepted standards)
2.3: (offence must be justified by context)

Bang Babes; Tease Me and Tease Me 3
Broadcast: Tease Me 3 – 30/31 October 2009, 23:20 to 00:20, 7 November 2009, 21:45 to 22:30. Tease Me – 13/14 November 2009, 23:45 to 00:30
Adjudication: 22 February 2010, Broadcast Bulletin 152

45. In this Ofcom adjudication published in Broadcast Bulletin 152 on 22 February 2010, the Ofcom Executive found the programmes (bar 7 November 2009 broadcast) breached the following Code Rules:

1.24: (mandatory access restrictions)
2.1: (generally accepted standards)
2.3: (offence must be justified by context)

46. Ofcom found the 7 November 2009 broadcast to have breached the following Code Rules:

2.1: (generally accepted standards)
2.3: (offence must be justified by context)

The Pad; Tease Me 3
Broadcast: 20 August 2009, 12:00
Adjudication: 22 February 2010, Broadcast Bulletin 152

47. In this Ofcom adjudication published in Broadcast Bulletin 152 on 22 February 2010, the Ofcom Executive found the programme breached the following Code Rules:

1.3: (children protected by appropriate scheduling)

The Pad; **Tease Me**
Broadcast: 6 November 2009, 12:00 to 13:00 and 14:00 to 15:00
Adjudication: 22 February 2010, Broadcast Bulletin 152

48. In this Ofcom adjudication published in Broadcast Bulletin 152 on 22 February 2010, the Ofcom Executive found the programme breached the following Code Rules:

1.3: (children protected by appropriate scheduling)

Bang Babes; **Tease Me**
Broadcast: 7 November 2009, 23:30; 13 November, 23:00, 24 November 2009, 22:00 to 23:59; 25 November 2009, 00:00-05:30
Adjudication: 8 March 2010, Broadcast Bulletin 153

49. In this Ofcom adjudication published in Broadcast Bulletin 153 on 8 March 2010, the Ofcom Executive found the programmes (bar 25 November 2009 broadcast) breached the following Code Rules:

1.24: (mandatory access restrictions)
2.1: (generally accepted standards)
2.3: (offence must be justified by context)

50. Ofcom found the 25 November 2009 broadcast to have breached the following Code Rules:

1.25: (R18-rated material must not be broadcast)

Bang Babes; **Tease Me, Tease Me 2 and Tease Me 3**
Broadcast: Tease Me – 31 October 2009, 00:00-05:30; 5 November 2009, 00:00-05:30; 15 November 2009, 00:00-05:30. Tease Me 2, 24 November 2009, 22:00-23:59. Tease Me 3, 31 October 2009, 00:00-05:30
Adjudication: 8 March 2010, Broadcast Bulletin 153

51. In this Ofcom adjudication published in Broadcast Bulletin 153 on 8 March 2010, the Ofcom Executive found the programmes broadcast on Tease Me, 15 November 2009 and on Tease Me 2, 24 November 2009 to have breached the following Code rules:

1.24: (mandatory access restrictions)
2.1: (generally accepted standards)
2.3: (offence must be justified by context)

Bang Media

52. Having taken into account the representations of Bang Media, Ofcom found the following programme to have breached the Code:

TMTV; **Tease Me TV (Freeview)**
Broadcast: 3 November 2009, 05:00
Adjudication: 22 February 2010, Broadcast Bulletin 152

53. In this Ofcom adjudication published in Broadcast Bulletin 152 on 22 February 2010, the Ofcom Executive found the programme breached the following Code Rules:

2.1: (generally accepted standards)
2.3: (offence must be justified by context)

Condition 11 Breaches

Bang Channels

54. Ofcom also recorded a breach of Licence Condition 11 by Bang Channels as follows:

Bang Babes; Tease Me, Tease Me 2 and Tease Me 3
Broadcast: Tease Me – 31 October 2009, 00:00-05:30; 5 November 2009, 00:00-05:30; 15 November 2009, 00:00-05:30. Tease Me 2, 24 November 2009, 22:00-23:59. Tease Me 3, 31 October 2009, 00:00-05:30
Adjudication: 8 March 2010, Broadcast Bulletin 153

55. Ofcom found that the Licensee, in respect of all programmes detailed, recorded as a single breach (bar *Bang Babes,* Tease Me 2, 24 November 2009, 22:00-23:59*)* breached Licence Condition 11: (retain recordings and produce forthwith).

Bang Media

56. Ofcom also recorded a breach of Licence Condition 11 by Bang Media as follows:

Bang Babes, _Early Bird_; Tease Me TV (Freeview)
Broadcast: 23 November 2009, 03:00 and 07:30 respectively
Adjudication: 22 February 2010, Broadcast Bulletin 152

57. In this Ofcom adjudication published in Broadcast Bulletin 152 on 22 February 2010, the Ofcom Executive found the programme breached Licence Condition 11: (retain recordings and produce forthwith).

Referral by the Ofcom Executive to the Chair of the Committee

58. As set out in the Sanctions Procedures (as revised with effect from 16 December 2009), the imposition of a statutory sanction on a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly or recklessly breached a Licence requirement.

59. The consideration for sanction follows a decision by the Ofcom Executive that a broadcaster has seriously, deliberately, repeatedly or recklessly breached a Licence requirement. A case is then referred to the Chair for the provisional consideration of the imposition of a statutory sanction. Before deciding to refer a case to the Committee, through the Chair, the Ofcom Executive may, at its discretion, invite a broadcaster to submit further representations on a case or any information required from the broadcaster to assist understanding and ensure the process is fair.

60. In March 2010 the Ofcom Executive informed the Chair of its recommendation that the breaches of the Code were sufficiently serious and repeated as to warrant a referral to the Committee. It asked the Chair for confirmation as to whether or not he agreed to this referral.

61. After considering all the material presented to him the Chair of the Committee informed the Executive that he did agree that the referral should be accepted for consideration of sanctions by the Committee.

Referral to the Broadcasting Sanctions Committee

62. The Chair of the Committee chose to refer the breaches to the Committee for consideration and prepared a Provisional Decision setting out his view on whether sanctions should be imposed and the level of those sanctions. The Provisional Decision was sent to the Licensee on 10 May 2010 and the Licensees were invited to make written representations on the Provisional Decision in advance of a hearing.

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

63. The Licensees, through their solicitors, mLaw, submitted written representations on the provisional decision reached by the Chair of the Committee. These representations included documentary 'exhibits' of, among other things, correspondence with the Ofcom Executive and an (un-agreed) note of a meeting with the Executive. In summary, the main points put forward by the Licensees were that:

- the Licensees accepted the referral and acceptance for consideration of sanction of the breaches relating to the programmes transmitted in October and November 2009;
- the number of programmes found in breach of the Broadcasting Code was smaller than the total indicated in the provisional decision;
- the number of programmes the Licensees had failed to supply, in breach of their Condition 11 obligations, was smaller than the number considered in the provisional decision;
- as no prior breaches of Condition 11 had been recorded by Ofcom against the Licensees, the breaches under consideration could not be treated as 'repeated';
- unusual weather conditions had led to problems in supplying material requested from Bang Media;
- the Springdoo Sanction precedent relied on in respect of Condition 11 was distinguishable from the instant case because of Springdoo's previous poor history of providing recordings;
- the Licensees were not aware of the R18-standard material accessible through its website: these advertisements were placed by a third party advertiser, were not known to the Licensees and were removed by the Licensees as soon as they became aware of them via Ofcom;
- the evidence of the R18-standard material that could be viewed without age protection on the Licensees' website was limited to images captured on a single day and that no evidence was before the Committee to demonstrate that such material had been present on the website on the previous occasions when the website's URL had been displayed, as had been suggested in the provisional decision;
- the breach of 3 November 2009 (concerning the broadcast of sexually explicit and offensive language) was unintentional, as had been argued at the time of the original investigation; various mitigating factors – such as the time of transmissions, lack of intention on the Licensees' part, the relatively short spans of days over which certain of the breaches occurred, the preponderance of prior guidance from Ofcom relating to standards for daytime (rather than night time) broadcasts, evidence of internal training and guidance and prompt and open co-

operation by the Licensees – were not reflected in the provisional decision, should be considered by the Committee and should serve to lessen or annul sanctions, as appropriate;

- the precedents relied on in the provisional decision could be distinguished from the present case by reference to factors including, variously, the compliance history of the Licensees concerned, the strength of the material sanctioned and the circumstances of the transmissions;
- before reaching its conclusions the Committee should have regard to the extent to which any contravention was caused by a third party, audience expectations and scheduling.

The Hearing

64. The Committee held a hearing to consider this case on 12 July 2010. The Compliance Officer for the Licensees attended, with a legal advisor. The legal advisor made oral representations to the Committee before the Committee put questions to the two attendees. The attendees also made available further brief documentation; this was accepted by the Committee, at its discretion, for consideration.

65. The legal advisor set out 6 areas of oral submission. These were, in summary, that:

- the Licensee reserved its position in respect of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (right to a fair trial) on the propriety of the Committee's composition and process;
- the need for the Committee to reach a conclusion unfettered by the Chair's provisional decision and with regard to the Licensee's submissions, all of which were made after the provisional decision;
- certain of the matters should not have been accepted for consideration by the Committee at all – the breaches of Condition 11, the presence of R18-standard material on the Licensees' website and the transmission of the explicit language on 3 November 2009 – and that as they had been accepted for consideration they should attract no sanction;
- in respect of the breaches of the Code accepted by the Licensee to be justifiable referrals for sanction, the Committee should be mindful of various details, including: the confined periods in which they were broadcast; that they were unintentional; the late transmission of the more sexually explicit material; the lack of clarity provided by Ofcom as to acceptable standards; the efforts made by the Licensee to achieve compliance; that no evidence was before the Committee to indicate financial benefit to the Licensee from the breaches; that the Licensee had been the attention of "focused" complaints from a competitor; that the Licensee had taken prompt and severe disciplinary action in relation to the breach of Rule 1.25; that the Licensee had produced and disseminated internal compliance material for use by employees;
- various mitigating factors were present, including: the internal compliance guidance produced by the Licensee, the warning to viewers broadcast each evening at 2100 that includes instructions on how to block the channel, and the steps taken by the Licensee to end contraventions;
- the precedent cases and levels of sanction put before the Committee by the Executive were distinguishable from the circumstances of the breaches recorded against the Licensee in significant respects and indicated that the level of

material sanction reached in the provisional decision should be reduced. These distinguishing details included: the relative strength of the material in the precedent cases, the times of the transmission of certain of the programmes within the precedent cases, the compliance histories of the precedent licensees, the fact of delay in complying with an Ofcom finding in one of the precedents, and the level of fines applied in cases concerning sexually explicit material and other matters.

66. In accordance with procedures for the Sanctions Hearing, the Committee posed questions to the Compliance Officer and the legal advisor.

67. The Committee sought information about the Licensee's compliance processes and training, including by reference to the documentation supplied by the Licensee on the day of the meeting. The Compliance Officer said that the internal documents were updated from time to time, incorporated Ofcom published findings and that the internal guidance effectively instructs the staff about techniques and portrayals that are not acceptable. No particular explanation could be given for the use of techniques in some of the programmes against which breaches had been recorded, apparently contrary to the internal guidelines.

68. In respect of the operation of the compliance function itself, the Compliance Officer informed the Committee that producers refer issues to him via nightly reports. Where compliance problems are identified disciplinary processes exist for enforcement of compliance guidelines internally. However, the Compliance Officer submitted that it is not possible "to police everything" since it operates a number of live channels and cannot therefore view material as would be possible with recorded material.

69. The Committee asked about incentives that may apply to producers and presenters. Presenters can, the Compliance Officer said, "on occasion" earn bonuses; producers' incentives are to meet monthly targets in the course of job performance.

70. The Committee asked about the technical measures used to make recordings. The Compliance Officer explained that a company in Ireland makes recordings from the broadcast signal and lodges the data on a server. To make these recordings available to Ofcom via a link requires that 'rendering' – essentially assembly – is performed. After early teething troubles the Licensees believed the arrangements now to be a very effective system.

71. The Committee asked about the website and what information might have been sought about the website and the appearance of R18-standard material on it. The Compliance Officer confirmed that the website belongs to the Licensees. No steps had been taken to check records to see if the third party advertising had been available prior to the date at which Ofcom captured images from the site.

The Committee's Deliberations

An imposition of a financial penalty

Bang Channels and Bang Media

General Criteria

72. Having viewed the material, in considering whether or not to impose a financial penalty in this case the Committee took into account all the evidence presented by the Executive and all of the representations made by the Licensees. The Committee also had regard to the Sanctions Procedures and to Ofcom's Penalty Guidelines[11].

73. The Committee began by considering whether, if it were appropriate to impose a sanction in respect of each of the Code breaches, it might be possible to impose a sanction other than a financial penalty, given the nature of the breaches identified. The Committee recognised that it would not be appropriate to direct the Licensees not to repeat the broadcasts which were the subject of the breaches since these were live broadcasts and would not be shown again in any event. The Committee further considered that, given the nature of the breaches, a direction to publish Ofcom's findings would be unlikely to provide a sufficient deterrent to licensees not to commit breaches of the kind identified in respect of the Licensees' broadcasts. The Committee did not consider, at this stage, that there were reasons to consider whether the licences of the Licensees should be revoked.

74. Before going on to consider in detail whether or not each individual breach should attract a financial penalty, the Committee considered the maximum level of penalty which might be imposed in respect of each breach. Under section 237 of the Act, the maximum level of financial penalty that can be imposed on the holder of a TLCS licence in respect of each breach of a TLCS Licence in this case is up to £250,000 or 5 per cent of Bang Channels' qualifying revenue relating to its last accounting period. Under section 23 of the 1996 Act, the maximum level of financial penalty that can be imposed on the holder of a DTPS licence in respect of each breach of a DTPS Licence in this case is up to £250,000 or 5 per cent of Bang Media's qualifying revenue relating to its last accounting period, whichever is greater.

75. Qualifying revenue is calculated by adding together revenue gained from advertising, sponsorship and subscription. It does not include revenue gained from interactive services, such as premium rate phone calls. In the calendar year 2008, Bang Channels recorded no qualifying revenue, as it had reported interactive services as the sole source of its income. Similarly, Bang Media recorded no qualifying revenue for the calendar year 2008, as it had also reported interactive services as the sole source of its income.

76. The Committee considered any financial penalty up to £250,000 in respect of each breach of the relevant licences as set out under section 237 of the Act and section 23 of the 1996 Act.

General Considerations

77. The Committee first noted that it has stated previously that it takes the broadcast of inappropriate explicit material, such as that being considered, very seriously. It also

[11] These documents are available at http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/procedures-statutory-sanctions/

noted that the role of Compliance Officers for such broadcasters should keep abreast of relevant Ofcom adjudications and if unclear, it is incumbent on them to contact Ofcom and ask for guidance. The Committee noted that, after receiving the written and oral representations of the Licensees, it was clear that the Licensees' compliance procedures had proved inadequate and that this amounted to recklessness. Whilst the guidance issued by the Licensees to producers contained explicit requirements not to broadcast certain material, this had not prevented multiple breaches from occurring. Furthermore, it appeared that breaches of the guidance were not reported to compliance officers since there was little incentive for producers to do so.

Precedent

78. The Committee considered that there were three relevant precedents. These cases all involved adult or adult sex chat channels broadcasting graphic sexual material. These precedents were:

- **Springdoo**[12] – sanction of a total £24,000. This figure was the total of £6,000 for a breach of rules 1.6, 2.1 and 2.3 of the Code and £6,000 and £12,000 for two breaches of Licence Condition 11 respectively.
- **RHF Portland**[13] – sanction of £52,500 for breaches of the Code. This figure was the total of £25,000 in respect of breaches of rules 1.2, 1.3, 2.1 and 2.3 of the Code by RHF and £27,500 in respect of the breach of rule 1.25 of the Code by Portland Enterprises.
- **SportxxxBabes**[14] - sanction of £20,000 for breaches of rules 1.24, 2.1 and 2.3 of the Code.

79. In all these cases, the previous Committees had considered that the breaches were sufficiently serious and/or repeated as to warrant the imposition of a financial penalty. The Committee noted that each of these cases was decided on its particular facts, which differed in certain respects from those of the current case. For example, the Springdoo case concerned breaches of rule 1.6 of the Code and did not find breaches of rule 1.24. Furthermore, as regards the breaches of Licence Condition 11, Springdoo had previously been found to have breached that Condition. The Committee further noted that the SportxxxBabes case concerned material which was more graphic in nature to that found in the majority of the breaches recorded against the Licensees.

80. However, in the Committee's opinion, the precedents were sufficiently similar to the present case that they should suggest to the Committee that any financial penalty imposed on Bang Channels for the Code Breaches should not be minimal. Certain of the breaches before the Committee were as, if not more, serious than those in the precedents.

81. The Committee recognised that there were no apparent precedents for the Bang Media Code Breach.

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[12] http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/springdoo.pdf
[13] http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/rhfportland.pdf
[14] http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/sportxxxbabes.pdf

Code Breaches

82. The Committee worked through each programme found in breach by the Executive chronologically. In each case, the Committee began by considering whether the breach was of a serious and/or repeated nature such as to warrant the imposition of a sanction. Where this was the case, the Committee took into account the following in deciding upon the appropriate level of sanction:

- Ofcom's Penalty Guidelines;
- previous breaches of the Code by the Licensees;
- the effect of any guidance provided to the Licensees by Ofcom; and
- the extent to which the Licensees had taken action to prevent any breaches from occurring.

83. The Committee considered as a preliminary matter the extent to which the breaches recorded in Broadcast Bulletins 152 and 153 in respect of broadcasts on 13/14 November 2009 and 13 November 2009 respectively should be considered as a single breach for the purposes of sanction. Those breaches related to programming at 23.20 on 13 November 2009 (Bulletin 153) and 23.45 to 00.30 on 13/14 November 2009 (Bulletin 152). The Committee considered that, in this case, due to the proximity in scheduling and the fact that the same presenter was present on screen in respect of each breach finding, these breaches should be considered as a single breach for the purposes of sanction. The total number of programmes considered for sanction for breaches of content standards (as distinct from Licence Condition 11 'supply' obligations) was **13**.

Bang Channels

Bang Babes, Tease Me, 20 June 2009, 01:15 to 02:45 approximately; 21 June 2009, 00:00 to 01:15 approximately; 21 June 2009, 01:15 and 22 June 2009, 01:00 to 02:00 approximately

84. The Committee first examined programmes broadcast in June 2009 that had been found to have breached Rules 1.24, 2.1 and 2.3. Namely: *Bang Babes*, Tease Me, 20 June 2009, 01:15 to 02:45 approximately; 21 June 2009, 00:00 to 01:15 approximately; 21 June 2009, 01:15. The Committee took the view that these programmes were clearly serious contraventions given their length and level of inappropriate explicitness such as to warrant the imposition of a financial sanction.

85. First, the material was of a strong sexual nature and on occasions showed explicit images of genital and anal detail. The Committee considered the primary purpose of the broadcasts to be sexual arousal or stimulation and that a reasonable person would regard this material as inappropriate to be broadcast unencrypted. Secondly, the Committee was concerned about the significant harm and offence caused to viewers in general. It was important to protect those who may come across this unrestricted content unawares.

86. The Committee noted the Licensees' representations that the breaches occurred after midnight and that the breaches were unintentional, resulting from a misunderstanding as to the strength of content permitted. Whilst the Committee recognised that viewers might expect stronger sexual material late at night, the Committee considered that the fact that material is broadcast after midnight does not permit that service to broadcast 'adult-sex' material, or other unjustified explicit sexual imagery, without mandatory

access restrictions. Nor does it provide a sufficient editorial or other justification for doing so. Furthermore, the fact that the licensee may have misunderstood the Code rules does not affect the offence which may be caused to viewers by explicit material. In any event, had the Licensees kept abreast of Ofcom's findings in the Broadcast Bulletins and published decisions of the Committee[15], it would have been clear to the Licensees what constituted "adult sex material".

87. The Committee therefore considered the level of financial penalty to be applied. In doing so, it considered the precedents of SportxxxBabes and Springdoo. The Committee took the view that the breaches relevant to this sanction were not as serious as those detailed in the SportxxxBabes case. This was because the SportxxxBabes contained stronger material and was broadcast earlier in the watershed period. The Committee then turned to examine the Springdoo precedent. It considered that the breaches identified in respect of Bang Channels contravened rule 1.24, as well as rules 2.1 and 2.3 and were clearly of a much stronger and explicit nature. It also found however that the time of broadcast was generally comparable.

88. The Committee considered that a sanction of **£5,000** was appropriate in respect of each of the Code breaches of 20 and 21 June 2009.

89. The Committee then turned to the broadcast of Bang Babes, Tease Me, 22 June 2009, 01:00 to 02:00 approximately, that was found to have breached Rules 2.1 and 2.3. The Committee considered that the content of this programming was sufficiently explicit to be regarded as a serious breach of the Code warranting the imposition of a financial sanction. The Committee noted that this programme was found not to have breached Rule 1.24, and therefore that the content was not as explicit as those above, but that this was finely balanced. However, the material did constitute material of a strong sexual nature including scenes of simulated masturbation and close up shots of the presenter touching her genital and anal areas. Whilst recognising the late hour at which the programme was broadcast, the Committee did not consider that the time of the broadcast was sufficient to justify its broadcast on editorial grounds. The material broadcast, whilst of a lesser seriousness than that broadcast on 20 and 21 June 2009 was nevertheless so strongly sexual that it would have exceeded the likely expectation of the majority of viewers. The Committee therefore considered that this justified the imposition of a financial penalty in light of the seriousness of the breach.

90. The Committee then considered the Springdoo precedent as regards the level of sanction to be applied. The Committee recognised that the breach under consideration had not attracted a breach finding in respect of rule 1.6[16], as had been the case in

[15] Sanctions decision against Square 1 Management Limited concerning its channel Smile TV, dated 10 July 2008, http://www.ofcom.org.uk/tv/obb/ocsc_adjud/SmileTV.pdf; Breach Finding on SportxxxBabes, Ofcom Broadcast Bulletin 115, dated 11 August 2008; http://www.ofcom.org.uk/tv/obb/prog_cb/obb115/; Breach Finding on SportxxxBabes, Ofcom Broadcast Bulletin 119, dated 13 October 2008; http://www.ofcom.org.uk/tv/obb/prog_cb/obb119/; Sanctions decision against Satellite Entertainment Limited concerning its channel SportxxxBabes, dated 26 August 2008, http://www.ofcom.org.uk/tv/obb/ocsc_adjud/sportxxxbabes.pdf; and Sanctions decision against Satellite Entertainment Limited concerning its channel SportxxxBabes, dated 26 August 2008, http://www.ofcom.org.uk/tv/obb/ocsc_adjud/sportxxxbabes.pdf.

[16] Rule 1.6: The transition to more adult material must not be unduly abrupt at the watershed or after the time when children are particularly likely to be listening. For television, the strongest material should appear later in the schedule.

Springdoo. The Committee therefore reduced the level of penalty accordingly to take this into account.

91. The Committee therefore considered that a sanction of **£4,000** was appropriate in respect of this Code breach.

***The Pad*; Tease Me 3, 20 August 2009, 12:00**

92. The Committee noted that this programme was found to have breached Rule 1.3 and concerned the broadcast of unsuitable daytime content. It then noted that there is currently no directly relevant precedent for the level of financial penalty to be applied in such cases. The Committee were therefore left to consider how seriously it regards such contraventions. The Committee noted that daytime content represents programming accessible to children. It considered that the protection of minors is a key statutory duty for Ofcom. In light of this, the Committee considered that adult programming, if accessible to children should be viewed with the utmost seriousness and should be punished accordingly.

93. The Committee considered that, in this instance, the risk of harm to children and offence to viewers in general was significant. The presenter of the programme had adopted clearly sexual positions for relatively prolonged periods of time and her nipples were clearly visible at various times. The material had no editorial context other than sexual stimulation and such material should not be broadcast at a time when children would be able to view it. The Committee therefore considered that the breach identified was sufficiently serious so as to warrant the imposition of a financial penalty.

94. The Committee noted the Licensees' representations that the Licensee had taken steps to ensure compliance with Ofcom's guidance on daytime programming and had invited Ofcom employees to comment on their footage. The Committee noted in this regard that it is not for Ofcom employees to vet footage supplied by a licensee. Whilst Ofcom will endeavour to assist licensees in meeting their licence obligations, compliance is a matter for the licensee. Ofcom employees had provided Bang Channels with written guidance as to acceptable material during daytime programming on two separate occasions prior to the breach. The Licensee accepted that "this particular live broadcast exceeded the acceptable boundaries" and sought to present this breach as a one-off; however, further breaches of Rule 1.3 were recorded against the Licensee in November 2009. The Committee therefore did not consider that these representations should affect the seriousness of the breach.

95. For these reasons, the Committee considered that a sanction of **£8,000** was appropriate in respect of this Code breach.

Subsequent breaches – General considerations

96. As regards subsequent breaches, the Committee noted the Licensees' representations that all programmes found to have breached rule 1.24 of the Code were transmitted late in the evening. Whilst the Committee recognised that viewers might expect stronger sexual material later in the evening/night, it did not accept that this affected the consideration of seriousness in relation to breaches of rule 1.24 for the reasons set out at paragraph 86 above.

97. The Committee further noted the Licensees' representations to the effect that guidance previously given related only to daytime programming and that the guidance was not therefore relevant to the breaches under consideration during this period. However, whilst written guidance provided to the Licensees in February 2009 and April 2009

may have dealt specifically with daytime programming, subsequent guidance dealt both with daytime programming and adult sex chat services. In particular, Ofcom issued guidance to daytime and adult sex chat service broadcasters in Broadcast Bulletin 137 on 6 July 2009[17], provided further guidance on daytime and sex chat material in a letter from the Director of Standards to licensees on 3 August 2009 and cautioned against anatomical explicitness in sex chat broadcasts in Broadcast Bulletin 144 on 26 October 2009[18]. That guidance was clear in the requirements which Ofcom expected of adult sex chat broadcasters and could not be construed as relating purely to daytime broadcasts.

Bang Babes, Tease Me 3 – 30/31 October 2009, 23:20 to 00:20

98. The Committee first noted that this programme concerned a breach of Rules 1.24, 2.1 and 2.3 and was therefore similar in nature to those identified on 20 and 21 June 2009. It therefore noted the relevant precedents (as applied in paragraph 87) and assessed its comparative seriousness. Whilst similar in nature, the Committee considered that the seriousness of the breach in this case was greater than that identified in respect of the 20 and 21 June 2009 breaches. The presenter in this programme repeatedly simulated masturbation in a realistic way, spat saliva over her genital area and rubbed saliva and lotion over her genital area. The Committee considered that such material was clearly capable of causing offence to viewers irrespective of the time at which it was broadcast. For these reasons, the Committee considered the material broadcast to be more explicit and therefore of a greater level of seriousness than that broadcast on 20 and 21 June 2009 and that a higher financial penalty should apply.

99. It therefore assessed the initial figure of £5,000 for the breach of rules 1.24, 2.1 and 2.3 found in respect of the 20 and 21 June 2009 broadcasts. It then added a further fine of £2,000 to reflect the greater seriousness of the content. The Committee therefore considered that a sanction of **£7,000** was appropriate in respect of this Code breach.

***The Pad*; Tease Me, 6 November 2009, 12:00 to 13:00 and 14:00 to 15:00**

100. The Committee noted that this was a repetition of a daytime content breach (namely Rule 1.3). The Committee considered that the content of the programming was similar in nature to that broadcast on 20 August 2009 in that the presenter adopted various clearly sexual positions for prolonged periods of time including miming intercourse while stroking her body in a provocative manner. The Committee therefore considered that the risk of harm to viewers and of offence to viewers more generally was significant for the same reasons.

101. The breach was therefore of sufficient seriousness to warrant the imposition of a similar level of financial sanction and the Committee considered that a sanction of **£8,000** was appropriate in respect of this Code breach.

***Bang Babes*; Tease Me 3, 7 November 2009, 21:45 to 22:30.**

102. The Committee noted that this programme represented a repeated breach of Rules 2.1 and 2.3 and, as a result, the breach was similar in nature to that recorded in respect of the broadcast of 22 June 2009. The Committee noted that the material broadcast

[17] http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb137/Issue137.pdf
[18] http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb144/Issue144.pdf

contained strong sexual images which were capable of causing offence. The presenter appeared to simulate masturbation and, on occasion, her anus and labial areas were shown in detail. The Committee further noted that no editorial justification was present for the strong sexual imagery. However, the Committee considered that the breach was more serious than that of 22 June 2009 due to the proximity of the programme to the 21.00 watershed. The breach recorded in respect of the 22 June 2009 programming was shown at 01.00 when the Committee recognised that viewers may have an expectation of stronger sexual content. However, where strong sexual content is shown shortly after the 21.00 watershed, the degree of offence caused to viewers that may come across such material unawares is increased. The Committee therefore considered that a higher level of financial sanction should apply in respect of this breach due to the greater degree of seriousness of the breach.

103. It therefore considered the initial figure of £4,000 for the breach of rules 2.1 and 2.3. It then added a further £2,000 to reflect the greater seriousness of the breach resulting from the earlier scheduling of the material. The Committee therefore considered that a sanction of **£6,000** was appropriate in respect of this Code breach.

***Bang Babes*; Tease Me, 7 November 2009, 23:30**

104. The Committee noted that this programme concerned a further breach of Rules 1.24, 2.1 and 2.3 and was therefore similar in nature to those identified on 20 and 21 June 2009. It therefore noted the relevant precedent (as applied in paragraph 87) and assessed its comparative seriousness. The Committee considered that the breach was of a similar level of seriousness to that recorded in respect of the 20 and 21 June 2009 breaches. During the broadcasts, the material included scenes of the presenters apparently performing masturbation and oral sex on each other in a manner in which a viewer could reasonably have perceived these acts as real. As with the 20 and 21 June 2009 broadcasts, the clear purpose of the programming was sexual arousal and was of a strong sexual nature. However, the Committee did not consider the programme to have demonstrated the additional level of seriousness it had attributed to the 31 October 2009 breach.

105. Taking into account precedent, as set out at paragraph 87 above, the Committee therefore considered that a sanction of **£5,000** was appropriate in respect of this Code breach.

***Bang Babes*; Tease Me, 13 November 2009, 23:00 and 13/14 November 2009, 23:45 to 00:30**

106. As set out at paragraph 83 above, in light of the representations made by the Licensees, the Committee considered that, in the particular circumstances of this case, it was appropriate to consider the two breach findings as a single breach for the purposes of sanction.

107. The Committee noted that this contravention represented a further breach of Rules 1.24, 2.1 and 2.3. The Committee considered that the material broadcast was of a very strong sexual nature, showing apparent masturbation and the presenter rubbing saliva on her genitals. That material could have led a reasonable viewer to conclude that those acts were real. The Committee noted that the sequences were several minutes in duration and were repeated. The Committee considered that the clear purpose of this material was sexual arousal. The Committee considered that such material was clearly capable of causing offence to viewers irrespective of the time at which it was broadcast. The Committee considered the material broadcast to be more explicit and

therefore of a greater level of seriousness than that broadcast on 20 and 21 June 2009 and that a higher financial penalty should apply.

108. It therefore assessed the initial figure of £5,000 for the breach of rules 1.24, 2.1 and 2.3 found in respect of the 20 and 21 June 2009 broadcasts. It then added a further fine of £2,000 to reflect the greater seriousness of the content. The Committee therefore considered that a sanction of **£7,000** was appropriate in respect of this Code breach.

***Bang Babes*; Tease Me, 15 November 2009, 22:29 to 23:35**

109. The Committee noted that this programme concerned a further breach of Rules 1.24, 2.1 and 2.3 and was therefore similar in nature to those identified on 20 and 21 June 2009. It therefore noted the relevant precedent (as noted in paragraph 87) and assessed its comparative seriousness. The Committee considered that the breach was of a similar level of seriousness to that recorded in respect of the 20 and 21 June 2009 breaches. During the broadcasts, the content included scenes of simulated masturbation in a manner in which a viewer could reasonably have perceived these acts as real. As with the 20 and 21 June 2009 broadcasts, the clear purpose of the programming was sexual arousal and was of a strong sexual nature. However, the Committee did not consider the programme to have demonstrated the additional level of seriousness it had attributed to the 31 October 2009 and 13 November 2009 breaches.

110. Taking into account precedent, as set out at paragraph 87 above, the Committee therefore considered that a sanction of **£5,000** was appropriate in respect of this Code breach.

***Bang Babes*; Tease Me, 24 November 2009, 22:00 to 23:59 AND: *Bang Babes*; Tease Me 2, 24 November 2009, 23:24 - 23:59.**

111. The Committee considered that, despite occurring on the same evening, these programmes should be treated as separate and that separate fines should be applied to each since they were broadcast on different channels and could not therefore be treated as a single breach. However, because the programmes were of a similar nature and broadcast on the same evening, the Committee applied the same penalty considerations to each.

112. The Committee noted that each programme concerned a further breach of Rules 1.24, 2.1 and 2.3 and was therefore similar in nature to those identified on 20 and 21 June 2009. It therefore noted the relevant precedent (as applied in paragraph 87) and assessed its comparative seriousness in relation to each breach. The Committee considered that the breach was of a similar level of seriousness to that recorded in respect of the 20 and 21 June 2009 breaches.

113. During the Tease Me broadcast, presenters were shown simulating masturbation and oral sex in a realistic manner. Some of the sequences were of several minutes in duration, repeated and shot in close up. The Tease Me 2 broadcast included similar material showing the presenters apparently licking each other's genital and anal areas in a realistic way. The presenters were also shown miming the insertion of an object into their anus or vagina. These sequences were repeated throughout the broadcast. As with the 20 and 21 June 2009 broadcasts, the clear purpose of the programming was sexual arousal and was of a strong sexual nature. The Committee considered that

the material broadcast in each programme was be more explicit and therefore of a greater level of seriousness than that broadcast on 20 and 21 June 2009 and that a higher financial penalty should apply.

114. It therefore assessed the initial figure of £5,000 for the breach of rules 1.24, 2.1 and 2.3 found in respect of the 20 and 21 June 2009 broadcasts in respect of each of the programmes. It then added a further fine of £2,000 to reflect the greater seriousness of the content. The Committee therefore considered that a sanction of **£7,000** was appropriate in respect of each of the Code breaches recorded in respect of programmes on Tease Me and Tease Me 2 on 24 November 2009.

***Bang Babes*; Tease Me, 25 November 2009, 00:00-05:30**

115. The Committee noted that this programme was found to have breached Rule 1.25. It further noted that the material broadcast had been of a particularly strong nature involving the insertion of a lollipop by one presenter into the vagina of another. This amounted to a breach of the Code rule preventing the broadcast of R18 rated material. That rule was introduced to address the broadcast of content particularly susceptible to causing offence to viewers. The Committee therefore considered that the breach was clearly of a sufficient seriousness such as to warrant the imposition of a financial sanction.

116. The Committee considered the Portland precedent (detailed in paragraph 78) in order to assess the appropriate level of financial penalty which should be applied. The Committee noted that the Portland precedent regarded stronger material that was broadcast over a much greater period of time than in the present case. The Committee noted that the material which led to the finding of a breach of rule 1.25 was of relatively short duration, however, the Committee also noted that, in the case of the Portland sanction, the programme was protected by PIN encryption whereas Tease Me was broadcast without access restrictions on 25 November 2009.

117. Taking into account the Portland precedent, and considering the limited duration of the rule 1.25 breach, the Committee considered that a starting figure for sanction of £14,000 was appropriate in respect of the breach. However, in light of the fact that the programme was broadcast without access restrictions, the Committee considered that the breach should be treated as more serious than this initial figure which was based upon a precedent relating to material broadcast under PIN encryption. The Committee considered that this additional level of seriousness resulted from the fact that viewers risked coming across such material unawares, despite the presence of the Tease Me Channel within the Adult section of the Code. Given the extremely serious risk of offence caused by breaches of rule 1.25, the Committee therefore considered that the financial penalty should be increased by £7,000 to reflect this additional level of seriousness and considered that a penalty of **£21,000** was appropriate in respect of this breach of the Code.

Website Promotion

118. The Committee noted that the Executive had also found the Licensee to have been promoting a website which contained R18 material during its programming. It noted that the evidence provided by the Executive were screen grabs taken from the relevant website on 10 December 2009.

119. The Committee noted that no separate breach had been found with respect of the promotion of websites which contained R18 material which was available without adequate protections. Instead, it appeared to be a contributory consideration for other Code breaches against Bang Channels. The Committee did not therefore consider further the extent to which any sanction should be imposed for the inclusion of references to websites containing unrestricted R18 related material.

Bang Media

***TMTV*; Tease Me TV (Freeview), 3 November 2009, 05:00**

120. The Committee noted that this programme was found to have breached Rules 2.1 and 2.3 and constituted a further breach of those rules by the Licensees since the Licensees were under common control and the same compliance team and system applied to both. The Committee further noted that this programme was broadcast on the Freeview platform which is more accessible than its Cable/Satellite counterpart.

121. The Committee recognised, however, that the breach found was different in nature to the breaches of rules 2.1 and 2.3 which had been found in respect of the programmes broadcast on 22 June 2009 and 7 November 2009. Tease Me TV (Freeview) had been found to have breached those rules as a result of a presenter's on screen microphone having been left on. Typically, presenters' audio is masked by a music track when taking calls from viewers due to the explicit sexual nature of those conversations. In this case, the Licensee indicated that there had been a genuine mistake in turning off the presenter's microphone resulting in the broadcast of unsuitable explicit sexual language.

122. The Committee considered that the broadcast of sexually explicit audio was capable of causing offence to viewers and is unacceptable at any time of day when unrestricted and in the context of sexual arousal. The Committee further noted that the telephone conversation was audible for over thirty minutes and was broadcast on Freeview which was more accessible than Cable/Satellite counterparts and therefore risked causing offence to a greater number of viewers. It therefore considered that the breach was of a sufficient level of seriousness so as to warrant the imposition of a financial sanction. The Committee, whilst recognising that in this instance the broadcast resulted from a genuine mistake, considered that a responsible broadcaster would have in place sufficient procedures to ensure that, in the event of such material being broadcast, it would only be momentary.

123. For these reasons, the Committee considered that a financial penalty of **£4,000** was appropriate in respect of this breach.

Licence Condition 11 Breaches

Bang Channels

***Bang Babes*; Tease Me – 31 October 2009, 00:00-05:30; 5 November 2009, 00:00-05:30; 15 November 2009, 00:00-05:30. Tease Me 3, 31 October 2009, 00:00-05:30**

Bang Media

***Bang Babes, Early Bird*; Tease Me TV (Freeview), 23 November 2009, 03:00 and 07:30 respectively**

124. Having taken account of all the evidence and the Licensees' representations, the Committee considered that the breaches of Licence Condition 11 by Bang Channels and Bang Media were serious and repeated. This was for the following reasons.

125. The Committee noted that all holders of TLCS licences are required by condition 11 of their licence to make and retain, or arrange for the retention of, a recording in sound and vision of every programme included in the licensed service for a period of 60 days and to provide a copy "forthwith" on request by Ofcom. The Committee considered that this is a fundamental requirement of holding a TLCS licence and is at the heart of Ofcom's ability to regulate broadcasters. Without a recording of the output Ofcom has no evidence upon which it can base a decision about compliance with the Code and therefore no investigation can proceed. The Committee therefore regards contraventions of licence condition 11 very seriously. Breaches are always published in the Broadcast Bulletin and held on record.

126. Bang Channels failed to provide recordings of four programmes forthwith and in broadcast format. Bang Media failed to provide recordings of two programmes forthwith and in broadcast quality.

127. The Committee noted the concerns raised by the Licensee in respect of two programmes which it claimed it had already provided parts of to Ofcom during different investigations. However, the Committee considered that the programming provided in respect of those two programmes was only partial in respect of the request itself and that, even if it were to accept that material provided in relation to a different request for recordings was sufficient to comply with a subsequent request, it could not be said that the Licensee had complied in full with the request for recordings of programming on 31 October 2009. It therefore took the view that as none of the programmes detailed were provided in full or in the appropriate format that all four programmes must be considered as part of the Condition breach.

128. The Committee also noted the representations of the Licensees that the recording and reproduction of programming resulted in significant cost being incurred. The Committee recognised the fact that the requirements of Condition 11 imposed a cost burden on licensees. However, this was an essential part of Ofcom's ability to properly investigate standards related matters and was therefore a necessary cost for all licensees.

129. The Committee further noted the Licensees' representations that, in this case, technical issues with recording affected the quality of the output supplied to Ofcom. However, it is for the licensee to ensure that broadcasts are of sufficient quality to enable Ofcom to carry out its functions in investigating standards related matters. The Committee did not accept that the technical issues identified were insurmountable had the Licensees put in place a suitable system of recording broadcast material.

130. The Committee considered that these were serious breaches of Condition 11 because, as a result of the Licensees' failure to provide recordings, Ofcom was unable to investigate complaints about output on these dates.

131. The Committee took into account the Springdoo precedent when assessing the basic level of fine for a condition breach of this nature, and noted the £6,000 applied to the Licensee in respect of the first Licence Condition breach found against them. The Committee further noted that the Licensee had had no previous findings against them concerning such a breach as had been the case in respect of the second finding against Springdoo, resulting in the imposition of a penalty of £12,000 for a second breach finding.

132. In deciding on the appropriate size of a financial penalty in relation to each of the Licence Condition 11 breaches, the Committee considered that the penalty should be sufficiently significant to act as a deterrent against similar Code breaches by all licensees. As noted above, the Committee was clear that it is essential that Ofcom has access to material about which complaints are made, in order to investigate potential breaches of the Code or other broadcasting requirements. Condition 11 and compliance with this condition by all licence holders is therefore central to Ofcom's ability to regulate broadcasters. The Committee therefore wished to make it clear to all broadcasters that their failure to observe Condition 11 could lead to the imposition of a statutory sanction. The Committee therefore considered a significant financial penalty to be merited.

133. For these reasons, the Committee decided to impose a fine of **£6,000** in respect of each breach of Licence Condition 11 by Bang Channels and Bang Media.

Other specific factors

134. In considering the appropriate size of a financial penalty for each of Bang Channels and Bang Media, the Committee also took account of the following specific criteria which may be relevant to adjust the starting figures set out above, as set out in Ofcom's Penalty Guidelines at paragraph 5:

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

135. There was insufficient evidence to show that either of the Licensees made any financial gain from repeated breaches of the Code or from the Licence Condition 11 breaches.

The degree of harm caused

136. The Code breaches by the Licensees concerned breaches of Section One of the Code which is aimed at protecting children, and Section Two of the Code, which is aimed at protecting members of the public from harmful and/or offensive material. The Committee considered that the contraventions had the potential to cause considerable harm or offence. In particular, the breaches of Rule 1.3 risked causing particular offence to children, because highly inappropriate material was broadcast without access restrictions when children are likely to be available to view.

137. The Committee also considered that all the Code Breaches which breached Section Two of the Code which is aimed at protecting members of the public from harmful and/or offensive material also had the potential to cause offence to viewers.

138. As noted above, the failure by the Licensees to provide recordings to Ofcom on two separate occasions each, meant that Ofcom was not able to investigate complaints about potential Code breaches and so fulfil its statutory duty to enforce standards.

Size and turnover of the regulated body

139. The Committee was informed of the Licensees' declared turnover (which was not derived from advertising, sponsorship or subscription and therefore did not have the status of 'qualifying revenue' for the purposes of the Act: see paragraphs 27 and 75).

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

140. The Committee received no evidence that any of the Code breaches resulted from the actions of a third party.

141. As regards the Licence Condition 11 Breaches, the Committee noted that a third party company may have been responsible for making recordings on behalf of the Licensees over some periods. However, the Committee considered that ultimate responsibility for compliance remained with Licensees at all times

The duration of the contravention

142. The Code breaches continued over a 5 month period, certain of which occurred after Bang Channels had been found to have breached the Code in relation to similar material.

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

143. The Committee noted that no penalty in respect of the same conduct has already been imposed by Ofcom or another body.

Audience expectations and scheduling

144. The Committee considered that audiences do not expect strong sexual material to be broadcast very soon after the watershed on channels without access restrictions. Whilst the Committee recognised that viewers may expect stronger sexual content to be broadcast later in the evening/night, it noted the very strong sexual content of many of the programmes found to have been in breach of the Code.

Initial Findings on Level of Sanction

145. In consequence of the above, the Committee considered that the following sanctions were appropriate as an initial finding as to the level of sanction to be imposed before going on to consider whether any aggravating or mitigating factors were present:

Bang Channels

- £5,000 for the programme broadcast on 20 June 2009;
- £5,000 for the programme broadcast on 21 June 2009;
- £4,000 for the programme broadcast on 22 June 2009;
- £8,000 for the programme broadcast on 20 August 2009;
- £7,000 for the programme broadcast on 31 October 2009;

- £8,000 for the programme broadcast on 6 November 2009;
- £5,000 for the programme broadcast on Tease Me on 7 November 2009;
- £6,000 for the programme broadcast on Tease Me 3 on 7 November 2009;
- £7,000 for the programme broadcast on 13 November 2009;
- £5,000 for the programme broadcast on 15 November 2009;
- £7,000 for the programme broadcast on Tease Me on 24 November 2009;
- £7,000 for the programme broadcast on Tease Me 2 on 24 November 2009;
- £21,000 for the programme broadcast on 25 November 2009; and
- £6,000 in respect of the breach of Licence Condition 11

Bang Media

- £4,000 in respect of the programme broadcast on 3 November 2009; and
- £6,000 in respect of the breach of Licence Condition 11.

Factors tending to increase the level of penalty

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

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

147. The Committee noted that many of the Code breaches by the Licensees occurred after warnings and guidance from Ofcom to the industry in respect of adult sex chat on 6 July 2009, 3 August 2009 and 26 October 2009. In addition, Bang Channels received specific written guidance in relation to its programming on 6 November 2009 indicating concerns with the Licensees' compliance issues and reminding them of their obligations under the Code.

148. Although not of direct relevance to all Code breaches identified, the Committee also noted that written guidance had been provided to the Licensees in respect of daytime programming on 19 February 2009, 23 April 2009 and 28 April 2009.

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

149. The Committee noted that the Licensee was responsible for the day to day management of and compliance at each of the Licensees since at least July 2009. In his capacity as Ofcom's primary contact for the Licensees, he was fully aware of the need to comply with the Code. He ought to have been fully aware that the material broadcast breached the Code, and that breaches would occur again in future without sufficient remedial action.

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

150. The Committee noted that the Licensees had in place a compliance document which provided guidance to producers and presenters during the period in question. That document contained examples of specific actions which should not be broadcast under any circumstances. Nevertheless, the Committee noted that strong sexual material

was broadcast throughout the period in direct contravention of the Code and those compliance documents. The Committee considered that this pointed to the complete ineffectiveness of the Licensees' compliance procedures and, as noted above, the management of the Licensees should have been aware of such compliance failures.

151. As set out at paragraph 163 below, the Committee noted the prompt action which the Licensee indicated had taken place in respect the breach of rule 1.25 by Bang Channels and has taken this into account in determining the final level of the penalty.

152. In addition, the Committee noted that there was no process in place to monitor content as it was broadcast. The material was predominantly broadcast live so this meant that there was no system in place to prevent the broadcast of live material which breached the Code. There was a process in place to review the previous day's output but this was not sufficient to stop any potential breaches as they occurred.

Repeated contraventions by the same regulated body

153. The Code breaches by Bang Channels identified as appropriate for sanction by the Committee numbered 13 in total. Furthermore, the Committee noted that Bang Channels had been found in breach of the Code in respect of 5 additional breaches which had not been referred for consideration of a sanction (as detailed in paragraph 34).

154. As set out in the Sanctions Procedures, a repeated breach includes repetition of the same or similar conduct as that which earlier contravened a licence condition. In this case, the Committee considered that Bang Channels' conduct concerned identical or similar conduct in respect of 3 different categories of Code breach, as follows:

- Breaches of Rules 1.24, 2.1 and 2.3;
- Breaches of Rules 2.1 and 2.3; and
- Breaches of Rule 1.3.

155. The Committee noted that the breach of rule 1.25 occurred on only one occasion and it was not therefore appropriate to consider this as repeated. No additional amount was therefore applied to the level of sanction for this breach on the basis of its repeated nature.

156. The Bang Channels Code Breaches in respect of the categories set out at paragraph 145 can therefore be considered to be repeated, and this was taken into account by the Committee in determining whether to increase the level of penalty. The Committee considered that, taking into account the guidance which had been issued to the Licensees either directly or to industry as a whole during the period and the apparent lack of any effective compliance procedures, it was appropriate to increase the level of the penalty for each repeated contravention in each category.

157. In deciding upon the appropriate level of increase in respect of each breach, the Committee took into account the number of breaches already identified and the need to ensure that the threat of penalties would act as a sufficient incentive for licensees to ensure that repeated breaches did not occur. As a result, the Committee applied an increasing multiplier to breaches within each category.

158. The Committee therefore considered that, in respect of the breaches of Rules 1.24, 2.1 and 2.3 of the Code by Bang Channels:

- the penalty for the programme broadcast on 20 June 2009 should not be increased and should remain at £5,000;
- the penalty for the programme broadcast on 21 June 2009 should not be increased and should remain at £5,000;
- the penalty for the programme broadcast on 31 October 2009 should be increased by a factor of 50% to £10,500;
- the penalty for the programme broadcast on 7 November 2009 by Tease Me should be increased by a factor of 75% to £8,500;
- the penalty for the programme broadcast on 13 November 2009 should be increased by a factor of 100% to £14,000;
- the penalty for the programme broadcast on 15 November 2009 should be increased by a factor of 125% to £11,250;
- the penalty for the programme broadcast on 24 November 2009 by Tease Me should be increased by a factor of 150% to £17,500;
- the penalty for the programme broadcast on 24 November by Tease Me 2 on 24 November 2009 should be increased by a factor of 150% to £17,500

159. The Committee further considered that, in respect of the breaches of Rules 2.1 and 2.3 of the Code by Bang Channels:

- the penalty for the programme broadcast on 22 June 2009 should not be increased and should remain at £4,000;
- the penalty for the programme broadcast on 7 November 2009 by Tease Me 3 should be increased by a factor of 50% to £9,000;

160. In addition, the Committee considered that, in respect of the breaches of Rule 1.3 of the Code by Bang Channels:

- the penalty for the programme broadcast on 20 August 2009 should not be increased and should remain at £8,000;
- the penalty for the programme broadcast on 6 November 2009 should be increased by a factor of 50% to £12,000;

161. In respect of the Bang Media Code Breach, the Committee recognised that this appeared to result from a genuine mistake on the part of the Licensee. Whilst, as noted at paragraph 122 above, the Committee does not accept that the Licensee put in place sufficient procedures to ensure that inappropriate material was not broadcast, it did not consider that it was appropriate to treat this breach as repeated and did not increase the level of the penalty from £4,000.

Factors tending to decrease the level of penalty

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

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

- following the Code breach of 25 November 2009, the Licensee indicated that it had initiated disciplinary procedures resulting in the dismissal of the producer involved and temporary suspension of the presenters;
- the Licensees' indication that internal training and compliance documentation had been put in place to ensure that further breaches of the Code did not occur; and

- co-operation with Ofcom's investigations; and
- reviewing and amending daytime formats at the request of Ofcom and immediately removing references to websites containing R18-rated material.

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

164. The Committee noted that no evidence was provided to suggest that the Licensees had taken steps to identify and mitigate *external* factors which might result in a contravention. As set out at paragraphs 150 and 152 above, the *internal* training and compliance procedures put in place by the Licensees were inadequate to prevent repeated breaches occurring and the Committee considered that this should not lead to a reduction in the level of the fine.

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

165. The Committee noted the Licensees' indication that, following the programme on 25 November 2009 resulting in a finding of breach of Rule 1.25 of the Code, disciplinary proceedings has been issued against the presenters and producer which had resulted in the temporary suspension of the former and dismissal of the latter. The Committee considered that this represented a timely response to the actions leading to the breach finding and reduced the fine by £2,000 to reflect this. The final figure for the financial sanction imposed in respect of the 25 November 2009 breach was therefore £19,000.

166. The Committee further noted the indication that, upon becoming aware of the references to websites containing R18-rated material, the Licensee took immediate steps to remove the offending material. As noted above at paragraphs 118 and 119, the Committee did not consider the website references for a statutory sanction since there was no specific finding of breach in this respect. Furthermore, the Committee had not considered the website references to be an aggravating factor in determining the level of the fine. The Committee did not therefore consider it appropriate to reduce the level of the overall fine on this basis.

Co-operation with Ofcom's investigation

167. The Committee noted the Licensees' representations to the effect that it had co-operated fully with Ofcom's investigations and that this should be taken into account in determining the final level of the sanction imposed. However, the Committee did not consider that the Licensees had demonstrated any particular level of co-operation which would justify the reduction of the sanction imposed. The Committee noted in this respect that the Licensees had failed to produce recordings which prevented Ofcom from conducting investigations in respect of additional potential breaches.

Conclusion

168. In summary, the Committee considered the contraventions committed by the Licensees to be of such a serious and repeated nature as to amount to recklessness. It considered that such recklessness was indicative of a wholly inadequate compliance system. In reaching this view it noted that the contraventions took place over a 5 month period, and that the Licensees had previously been found to have breached the Code on five occasions. It further noted that some of these contraventions occurred despite Ofcom providing the Licensees with clear guidance on a number of occasions.

This sexual material was clearly unacceptable and in breach of generally accepted standards for a licensed service which transmits without restrictions or safeguards.

Bang Channels

169. For the reasons set out above, the Committee decided to impose a financial penalty on Bang Channels of £147,250 in respect of the breaches of the Code and Licence Condition 11, as follows:

- £5,000 for the programme broadcast on 20 June 2009;
- £5,000 for the programme broadcast on 21 June 2009;
- £4,000 for the programme broadcast on 22 June 2009;
- £8,000 for the programme broadcast on 20 August 2009;
- £10,500 for the programme broadcast on 31 October 2009;
- £12,000 for the programme broadcast on 6 November 2009;
- £8,500 for the programme broadcast on Tease Me on 7 November 2009;
- £9,000 for the programme broadcast on Tease Me 3 on 7 November 2009;
- £14,000 for the programme broadcast on 13 November 2009;
- £11,250 for the programme broadcast on 15 November 2009;
- £17,500 for the programme broadcast on Tease Me on 24 November 2009;
- £17,500 for the programme broadcast on Tease Me 2 on 24 November 2009;
- £19,000 for the programme broadcast on 25 November 2009; and
- £6,000 in respect the breach of Licence Condition 11.

Bang Media

170. For the reasons set out above, the Committee decided to impose a financial penalty on Bang Media of £10,000 in respect of the breach of the Code and Licence Condition 11, as follows:

- £4,000 for the programme broadcast on 3 November 2009; and
- £6,000 in respect the breach of Licence Condition 11.

171. The Committee noted that the total amount payable by the Licensees represented over 5% of the Licensees' aggregate annual revenue and was therefore a significant penalty for the Licensees. However, in view of the seriousness of the breaches found, the repeated nature of the breaches and the need to ensure that any penalty imposed acted as a sufficient incentive to comply the Committee considered that this was an appropriate level.

Ofcom Broadcasting Sanctions Committee

29 July 2010