

**Leveson Inquiry into the culture, practices and ethics of the press**  
**Third written statement of Ed Richards, Chief Executive of Ofcom**

I, Ed Richards, make the following written statement in response to further questions received from the Inquiry team on 26 January 2012:

**A. USE OF SANCTIONS**

**The Inquiry understands that in the 2010 – 2011 financial year, Ofcom found:**

- a) a standards breach of the Broadcasting Code in 168 out of a total of 9031 published decisions and a total of 24,462 complaints.**
- b) a fairness and/or privacy breach of the Broadcasting Code in only 9 of 171 published decisions.**

**Why are so few complaints upheld? What does this say about public expectations of broadcasting standards compared to Ofcom's application of the Code?**

- 1.1 Before seeking to answer the Inquiry's questions, I think it would be useful to consider the complaints figures for standards and for fairness and privacy cases further.

Standards cases

- 1.2 As you will remember from my first statement, under the Communications Act 2003, Ofcom has general duties to ensure the application of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services<sup>1</sup>. Ofcom has a duty to set such standards for the content of programmes to be included in television and radio services as appear to it best to secure the "standards objectives" set out in section 319(2) Communications Act 2003.
- 1.3 It is worth noting at the outset that viewers often feel very strongly about the contents of television and radio programmes and Ofcom receives a large number of viewer complaints about broadcasting standards issues (covering such areas as harm, offence, accuracy, impartiality, commercial matters). It is important to bear in mind that on a particularly controversial or emotive issue, we can receive a large number of complaints about one programme.
- 1.4 In 2010-11, we received 24,462 complaints about broadcasting standards. After taking account of multiple complaints about the same programme, the number of standards decisions relating to programmes or series of programmes reduces to 9,031. In other words, many of the complaints relate to the same case.

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<sup>1</sup> Section 3(2)(e) Communications Act 2003

- 1.5 Of the 9,031 standards decisions in 2010-11, a significant proportion of the cases were considered not to raise substantive issues under the Broadcasting Code and were not investigated any further or were investigated and subsequently found to be “not in breach”. The remaining 168, after investigation, were found to be “in breach” of the Broadcasting Code and we published a reasoned decision for each.
- 1.6 A majority (58%) of the complaints Ofcom received in 2010-11 related to issues of “harm and offence”. The complaints about harm can range from relatively trivial (for example, we have received a complaint about a Tom and Jerry cartoon as the viewer was unhappy that the programme showed Jerry setting fire to Tom) to the very serious (for example about misleading and potentially dangerous medical claims which could result in serious harm).
- 1.7 In addition, it is worth noting that offence in particular is an area which generates a large volume of complaints. The Broadcasting Code does not prohibit potentially offensive material. Offensive material can be included in television and radio programmes as long as it is justified by the context (for example, the editorial content, the time of the programme and the likely expectation of the audience).
- 1.8 One recent example was the comments Frankie Boyle made in his Channel 4 show about Katie Price’s son. This resulted in approximately 500 complaints to Ofcom. We found the programme in breach of the Broadcasting Code as we did not consider that Channel 4 were able to justify the broadcast of the highly offensive comments about an eight year old disabled child.<sup>2</sup>
- 1.9 Another instance of where a lot of complaints were received but where we did *not* find a breach of the Broadcasting Code is a Dispatches programme on Channel 4 (Dispatches: Britain’s Islamic Republic, 1 March 2010). This programme generated 205 complaints under the following rules of the Broadcasting Code: 2.2 (factual programmes must not mislead); 2.3 (generally accepted standards); 3.1 (encourage commission of a crime) and 5.5 (due impartiality). After investigating we concluded that the programme had not breached any provisions of the Broadcasting Code.<sup>3</sup>

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<sup>2</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb179/obb179.pdf>

<sup>3</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb168/issue168.pdf>

- 1.10 We investigate standards complaints according to our published procedures. Our current procedures were updated on 1 June 2011<sup>4</sup> under which Ofcom will make an initial assessment as to whether a complaint raises potentially substantive issues under the Broadcasting Code which warrant further investigation. We do so by reference to the gravity and/or extent of the matter complained of, including for example, whether it involves ongoing harm, harm to minors and/or financial harm. The cases referred to in 2010-11 were considered under an earlier version of our procedures<sup>5</sup> which involved a similar triage filter on receipt of complaints.

#### Fairness and privacy cases

- 1.11 The statutory framework underpinning our fairness and privacy work is different from that concerning our regulation of “generally accepted standards”.
- 1.12 Sections 107 -130 Broadcasting Act 1996 (“the 1996 Act”) (as amended) set out the general functions of Ofcom in relation to complaints of unjust or unfair treatment and complaints of unwarranted infringements of privacy<sup>6</sup>. Ofcom has a specific duty under section 107 of the 1996 Act to draw up a code giving guidance on the principles to be observed and the practices to be followed by broadcasters in connection with the avoidance of unjust or unfair treatment and unwarranted infringement of privacy in programmes (or in connection with the obtaining of material included in them). For the purposes of that duty, Ofcom applies the provisions in Section Seven (“Fairness”) and Eight (“Privacy”) of the Ofcom Broadcasting Code.
- 1.13 Under section 110 of the 1996 Act (and subject to other provisions of Part 5 of the 1996 Act), Ofcom has a specific duty to consider and adjudicate on complaints which relate to unjust or unfair treatment in programmes or to unwarranted infringements of privacy in programmes (or in connection with the obtaining of material included in them).
- 1.14 Sections 111, 114 and 130 of the 1996 Act set out the circumstances in which Ofcom has the power to consider and adjudicate upon a fairness and privacy complaint.
- 1.15 Section 111 states that Ofcom shall not entertain a complaint unless it is made by the “person affected” or by a person authorised by him to make the complaint. Section 130 defines the “person affected” as follows:
- (a) In relation to any such unjust or unfair treatment as mentioned in section 110(1), means a participant in the programme in question which was the subject of that treatment or a person who, whether such a participant or not, had a direct interest in the subject-matter of that treatment, and

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<sup>4</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/june2011/breaches-content-standards.pdf>

<sup>5</sup> We do not publish superseded versions of our procedures. Copies may be provided if the Inquiry wishes.

<sup>6</sup> Section 110(4) Broadcasting Act 1996 explains that all unjust, unfair and privacy complaints are collectively referred to as “fairness complaints”.

- (b) In relation to any such unwarranted infringement of privacy as is so mentioned, means a person whose privacy was infringed.
- 1.16 Section 111(2) says that if the person affected has died, a complaint may be made by his personal representative or by a family member. Section 111(4) says Ofcom shall not entertain or proceed with the consideration of a fairness or privacy complaint if it appears to us that the complaint relates to the broadcasting of a programme more than five years after the death of the person affected.
- 1.17 Section 111 of the 1996 Act also sets out when Ofcom has discretion to refuse to entertain a fairness or privacy complaint. For example, section 111(7) states that Ofcom may refuse to entertain a complaint if the person affected was not himself the subject of the treatment complained of and it appears to Ofcom that he did not have a sufficiently direct interest in the subject matter of that treatment to justify the making of a complaint with him as the person affected.
- 1.18 Section 114 of the 1996 Act states that Ofcom shall not entertain or proceed with the consideration of a fairness or privacy complaint if it appears to Ofcom that:
- (a) the matter complained of is the subject of proceedings in a court of law in the UK; or
  - (b) the matter complained of is a matter in respect of which the complainant or the person affected has a remedy by way of proceedings in a court of law in the UK, and that in the particular circumstances it is not appropriate for Ofcom to consider a complaint about it; or
  - (c) the complaint is frivolous; or
  - (d) for any other reason, it is inappropriate for Ofcom to entertain or proceed with the consideration of the complaint.
- 1.19 In addition to the framework set out in the 1996 Act, Ofcom has a general duty under section 3(2)(f) Communications Act 2003 to secure the application of standards that provide adequate protection to members of the public and all other persons from both (i) unfair treatment in programmes included in such services; and (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.
- 1.20 In our published procedures for investigating fairness and privacy complaints<sup>7</sup>, we explain at paragraph 1.5 that “*in exceptional circumstances, where Ofcom considers it necessary in order to fulfil its general duty...Ofcom may consider fairness or privacy issues in the absence of a complaint from “the person affected”*”. (See further at paragraphs 4.5-4.7 below).

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<sup>7</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/june2011/fairness-privacy-complaints.pdf>

- 1.21 In 2010-11, we received 171 fairness and privacy complaints. Of these a significant proportion (113) were not taken forward for investigation or were discontinued after initial consideration as they did not satisfy the statutory criteria as described above and as set out in the 1996 Act.
- 1.22 Of the remaining 58 cases: 36 were not upheld; 13 were resolved by the broadcaster; and 9 were upheld as a breach of the Broadcasting Code. A case can be “resolved” by the broadcaster offering the complainant a remedy such as a correction or an offer not to repeat the programme. In such circumstances, the complainant informs us that they are satisfied with the broadcaster’s offer and we would not proceed to adjudicate on the complaint. Therefore out of 58 cases taken forward for consideration, a total of 22 were found in breach or were resolved in the complainant’s favour by the broadcaster.
- 1.23 A large proportion of the complaints about fairness and privacy cases relate to programmes which come within investigative journalism, uncovering wrongdoing and consumer affairs. While the individual complainants feel strongly about the potential breaches of privacy or unfair treatment in the programme, it is quite often the case that there is a clear public interest in either making the programme or in its broadcast, in which case we find that either the infringement of privacy was warranted or the treatment was justified and did not result in any unfairness.
- 1.24 I should also add that broadcasters in general are familiar with the Broadcasting Code requirements relating to unwarranted infringements of privacy and will usually have considered the balancing exercise between an individual’s legitimate expectation of privacy and the public interest arguments prior to broadcast. That said there are a relatively small number of occasions when we find that broadcasters have unwarrantedly infringed an individual’s privacy resulting in a breach decision.
- 1.25 I trust that this explanation of our powers and the breakdown of the complaints figures is useful in considering your questions. In context, I do not think that the number of standards breach decisions and fairness and privacy adjudications is low, but rather represents the outcome of a careful but robust application of our powers.
- 1.26 Further, in my view the regulatory framework of a licensing regime together with effective powers to enforce and sanction has contributed to broadcasting having a reasonably strong culture of compliance and high levels of recognition of the relevant rules and guidance amongst programme-makers, commissioning and scheduling teams and legal and compliance departments. If the system works well, it is to some degree a virtuous circle.

- 1.27 In light of the above, I do not find the difference between the number of complaints and the number of breach decisions surprising; nor do I think it indicates that there is a problematic mismatch between public expectations of broadcasting and Ofcom's application of the Code. In my view, it is right that viewers and listeners should feel able to complain to Ofcom about broadcasts with which they are unhappy. However, we are then required, in light of our powers, and through careful and rigorous investigation, to decide whether these complaints reveal a breach of the Code.
- 1.28 I think it is interesting also that the latest Media Tracker research 2010 (research into public opinion which we carry out on a regular basis)<sup>8</sup> shows that when asked for their view on the amount of regulation on television, 72% of respondents thought it is "about right", with 14% considering there is too little and 4% believing there is too much regulation (10% said they don't know).

**The Inquiry understands that in the 2010 – 2011 financial year, Ofcom imposed financial sanctions on only three occasions. Is the 2010 – 2011 financial year representative in this respect? Does Ofcom consider that financial sanctions are imposed frequently enough to deter breaches of the Code more generally? If so, please explain why.**

- 2.1 In my first statement (paragraph 13.3), I set out that the sanctions available to Ofcom include a decision to: (i) issue a direction not to repeat a programme or advertisement; (ii) issue a direction to broadcast a correction or a statement of Ofcom's findings which may be required to be in such form, and to be included in programmes at such times as Ofcom may determine; (iii) impose a financial penalty; (iv) shorten or suspend a licence; and/or (v) revoke a licence.<sup>9</sup>
- 2.2 The question relates specifically to the imposition of financial sanctions. In paragraph 29.4 of my first statement, I noted that Ofcom considered three cases to be serious enough for the imposition of financial sanctions in 2010-11. This is not representative of other years as it does vary considerably year-to-year. In 2007/08, there were 11 financial sanctions imposed; 2008/09, 30 financial sanctions; and in 2009/10, 6 financial sanctions. In the current year (2011/12), we have already published 5 financial sanction decisions relating to television and are in the process of considering a number more.

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<sup>8</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/reviews-investigations/psb-review/psb2011/Perceptions-F.pdf>

<sup>9</sup> Revocation is not applicable to the BBC, S4C or Channel 4.

- 2.3 The imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if we consider that a broadcaster has seriously, deliberately, repeatedly, or recklessly breached a condition of its licence<sup>10</sup>. We do think that financial statutory sanctions (amongst other sanctions) are imposed frequently enough to deter breaches of the Broadcasting Code, as is evident from the relatively low number of recorded breaches (see answer to question 1 above).
- 2.4 On the whole, we find that the threat of financial penalties or ultimately of revocation of a licence acts as an effective deterrent against misconduct and contributes greatly to the culture of compliance in broadcasting. Broadcasters view compliance and responsible behaviour as important reputational factors.
- 2.5 A breach finding can attract a lot of publicity and is viewed very negatively by broadcasters (particularly the major ones) as it is often seen as indicative of failure, negligence or incompetence on the part of the broadcaster. We find that a breach finding is often sufficient to correct non-compliant behaviour and we only move to consideration of a financial sanction for the most serious cases and when it is proportionate to do so.

## B. PREMIUM PHONE LINES SCANDAL

**The Inquiry will be interested to discuss the premium phone rate scandal and Ofcom's response to it. When Ofcom took steps to investigate the problem under what statutory authority was the investigation launched? What form did the investigation take? How was evidence requested and submitted? To what extent were broadcasters compelled to submit evidence? How did Ofcom discover that unlawful and/or unethical practices were taking place? To what extent do you consider that the scandal was the result of a regulatory failure? What was the cause of that failure?**

### Introduction

- 3.1 The premium rate service ("PRS") issues related to various aspects of television broadcasters' use of premium rate telephone services in programmes. A premium rate telephone service is one for which the caller is typically charged a higher than normal rate. Call charges are split between the service provider and the network operator who leases the PRS telephone number to the provider. They were and are used for a variety of purposes in broadcasting: for example –
- (i) Quizzes: for example, a question may be broadcast and viewers ring a PRS with the answer (often from a menu), to win a prize.

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<sup>10</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/june2011/statutory-sanctions.pdf>

- (ii) Competitions: for example, a question may be broadcast and viewers ring a PRS with the answer, in order to be featured on the show answering further questions.
- (iii) Voting: for example, a show may be constructed so that viewers may vote for the outcome they want by ringing a PRS, as for example voting to eject or to keep a particular participant.
- (iv) Live conversation: for example, a show may feature live chat from viewers, who may ring a PRS with a view to becoming involved.

When Ofcom took steps to investigate the problem under what statutory authority was the investigation launched? What form did the investigation take? How was evidence requested and submitted? To what extent were broadcasters compelled to submit evidence?

- 3.2 My statement of 22 September 2011 noted that all television broadcasting services that Ofcom regulates must be provided under a licence issued by Ofcom. The licence holder is the “provider” of the service – the person “with general control over which programmes and other services and facilities are comprised in the service (whether or not he has control of the content of individual programmes or of the broadcasting or distribution of the service)”<sup>11</sup>.
- 3.3 As set out in paragraph 1.2 above, Ofcom is required to set standards for TV and radio programme content. Under section 325 of the Communication Act 2003, Ofcom must include in programme service licences a condition requiring the broadcaster to abide by those standards.
- 3.4 Section 319 requires the standards Ofcom sets to be calculated so as to secure objectives including “*that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material*”.<sup>12</sup>
- 3.5 The standards Ofcom sets must be included in one or more Codes<sup>13</sup>. Ofcom has set standards relating to harm and offence mainly in Section 2 of the Broadcasting Code. This sets out a broad principle (adequate protection for members of the public from ... harmful and/or offensive material) and a number of generally accepted standards which are rules of conduct.
- 3.6 The relevant provisions in Section 2 of the Broadcasting Code during the period July 2005 – October 2008 were<sup>14</sup>:

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<sup>11</sup> S.362(2) Communications Act 2003.

<sup>12</sup> S.319(2)(f)

<sup>13</sup> S.319(3)

<sup>14</sup> As set out in my statement of 22 September 2011, Ofcom was created by the merger of multiple regulators. We began exercising functions from 29 December 2003. For a transitional period, Ofcom treated our predecessor the ITC’s Code as the Broadcasting Code; this did not contain the rules described above but did require: “*The licensee must retain control of and responsibility for the service*”



*“Factual programmes or items or portrayals of factual matters must not materially mislead the audience”<sup>15</sup>.*

*“Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.”<sup>16</sup>*

- 3.7 Harm and offence is also a key basis for a rule in Section 10 of that version of the Code.

*“Any use of premium rate numbers must comply with the Code of Practice issued by ICSTIS.”<sup>17</sup>*

- 3.8 Our investigations considered whether there had been a failure to abide by these provisions, i.e. whether there had been a breach of a broadcast licence condition. The investigations were carried out in accordance with our procedures for investigating breaches of content standards for television and radio; and where relevant our procedures for the consideration of statutory sanctions in breaches of broadcast licences<sup>18</sup>.

- 3.9 It is a condition of each broadcaster’s licence, which is included by virtue of sections 4(1)(c) of each of the Broadcasting Act 1990 and the Broadcasting Act 1996, that the broadcaster provides Ofcom, in such manner and at such times as we may reasonably require, with such information as we may require for the purpose of exercising the functions assigned to us under either of the Broadcasting Acts or the Communications Act 2003. Failure to provide information requested, or provision of false or incomplete information, is a breach of a licence condition and may ultimately be grounds for revocation of a licence<sup>19</sup>.

- 3.10 In the investigations of potential breaches of the Code in relation to PRS, Ofcom used these powers to require the provision of a large volume of material, including for example: phone records, contractual data, statements from relevant production staff, audits, commercial information and voting data. Our impression for the most part was that broadcasters co-operated and gave full disclosure. Where this had not happened, we took this as an aggravating factor when we calculated the penalty for a breach<sup>20</sup>.

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*arrangements and the premium line messages (including all matters relating to their content)” Rule 8.2(b) (Use of Premium Rate Telephone Services in Programmes). Some of the conduct Ofcom investigated dated back to before July 2005, and was investigated under this rule; this did not have much impact in practice.*

<sup>15</sup> Rule 2.2

<sup>16</sup> Rule 2.11

<sup>17</sup> Rule 10.10.

<sup>18</sup> We do not publish superseded versions of our procedures. Copies may be provided if the Inquiry wishes.

<sup>19</sup> The power to revoke is derived from different statutory provisions depending on what sort of licence it is. See, for example, sections 42, 42B and 111 Broadcasting Act 1990; sections 17, 23, 59 Broadcasting Act 1996, etc.

<sup>20</sup> See <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/30GCapRadioStations.pdf> paragraph 10.27.

- 3.11 Ofcom only had (and only has) powers to require the provision of information from our licensees. We cannot require third parties, such as production companies and telephony providers, to provide information for the purpose of investigating a broadcast licence breach<sup>21</sup>. Consequently, it was not possible to determine precisely what had happened in all cases<sup>22</sup>.
- 3.12 However, I consider that overall Ofcom was able to investigate effectively, to determine whether there had been breaches and to impose penalties, with a view to creating a deterrent across the sector. We investigated and found breaches which led to regulatory sanctions in a large number of cases:

**Ofcom sanctions imposed in broadcasting cases of PRS used in audience competitions and voting**

Broad-caster	Programme	Summary of issue	Rule(s) in breach	Sanction	Publication date & link to adjudication
Five	<i>Brainteaser</i>	Faking competition winners and misleading its audience on five separate occasions in its programme <i>Brainteaser</i> .	2.11	£300,000	26 June 2007 <a href="#">Full adjudication</a>
BBC	<i>Blue Peter</i>	Using a studio guest to pose as the winner of a viewer competition in a 'live' broadcast of <i>Blue Peter</i> on BBC1 and for repeating the programme, including the falsified competition, on CBBC.	2.11, 1.26	£50,000	9 July 2007 <a href="#">Full adjudication</a>
GMTV	Viewer competitions	Repeated misconduct in viewer competitions between August 2003 and February 2007.	2.11, ITC 8.2(b)	£2,000,000	26 September 2007 <a href="#">Full adjudication</a>

<sup>21</sup> This contrasts with the position where, for example, we investigate a breach of a regulatory condition imposed under Part 2 of the Communications Act 2003, where our information gathering powers arise in relation to any person and failure to provide accurate and complete information in response to a formal request may lead to a penalty imposed by Ofcom or a prosecution (s.135-140 and s.144 Communications Act 2003).

<sup>22</sup> See, for example, [http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/channel\\_tv\\_bca.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/channel_tv_bca.pdf) at paragraph 1.11.

Broadcaster	Programme	Summary of issue	Rule(s) in breach	Sanction	Publication date & link to adjudication
Channel 4	<i>Deal or No Deal</i>	Staggered unfair selection of competition entrants in viewer competitions.	2.11, 10.10	£500,000	20 December 2007 <a href="#">Full adjudication</a>
Channel 4	<i>Richard &amp; Judy</i>	Early and staggered unfair selection of competition entrants in <i>You Say We Pay</i> viewer competitions	2.11, 10.10, ITC 8.2(b)	£1,000,000	20 December 2007 <a href="#">Full adjudication</a>
ITV plc	<i>Ant &amp; Dec's Saturday Night Takeaway</i>	Repeated unfair conduct of viewer competitions <i>Jiggy Bank</i> , <i>Win the Ads</i> and <i>Grab the Ads</i> .	2.11, ITC 8.2(b)	£3,000,000	8 May 2008 <a href="#">Full adjudication</a>
ITV plc	<i>Ant &amp; Dec's Gameshow Marathon</i>	Repeated unfair conduct of viewer competition <i>Prize Mountain</i> .	2.11	£1,200,000	8 May 2008 <a href="#">Full adjudication</a>
ITV plc	<i>Soapstar Superstar</i>	Misleading the ITV1 audience as to the outcome of viewer votes on a number of occasions.	2.2	£1,200,000	8 May 2008 <a href="#">Full adjudication</a>
ITV plc	Various programmes	Repeatedly failing to inform viewers that repeated competitions or other interactive programmes were no longer open or live.	2.2, 2.11	£275,000	8 May 2008 <a href="#">Full adjudication</a>
GCAP Radio	Networked competition across 30 local stations	Unfair conduct in a listener competition, <i>Secret Sound</i> .	2.11, 10.10	£1,110,000	27 June 2008 <a href="#">Full adjudication</a>

Broad-caster	Programme	Summary of issue	Rule(s) in breach	Sanction	Publication date & link to adjudication
BBC	<i>Comic Relief;</i> <i>Sport Relief;</i> <i>Children in Need;</i> and various radio shows	Faking winners and misleading the audience in viewer and listener competitions in eight BBC programmes.	2.11	£400,000	30 July 2008 <a href="#">Full adjudications</a>
Mercury 96.6FM	Listener competition	Broadcast of an unfairly conducted listener competition, <i>Secret Sound</i> (as broadcast on the GCAP network).	2.11, 10.10	£20,000	17 December 2008 <a href="#">Full adjudication</a>
BBC	<i>Dermot O'Leary</i> radio show	Eight broadcasts of pre-recorded competitions 'as live' which listeners had no chance to enter.	2.11	£70,000	18 December 2008 <a href="#">Full adjudication</a>
BBC	<i>Tony Blackburn</i> radio show	Five broadcasts of pre-recorded competitions 'as live' which listeners had no chance to enter.	2.11	£25,000	18 December 2008 <a href="#">Full adjudication</a>
Lakeland Radio	Listener competitions	Unfair conduct of three listener competitions called <i>Suss the Celeb</i> .	2.11	£15,000	29 May 2009 <a href="#">Full adjudication</a>
Channel Television (ITV1)	<i>British Comedy Awards</i>	Early finalising of the viewer vote in the programme in both 2004 and 2005, and overriding of the viewer vote in the 2005 programme.	2.2, ITC 8.2(b)	£80,000	2 October 2009 <a href="#">Full adjudication</a>
			<b>TOTAL</b>	<b>£11,245,000</b>	

How did Ofcom discover that unlawful and/or unethical practices were taking place?

- 3.13 From Ofcom's point of view, PRS-related complaints were initially associated with TV quizzes – for example where questions were seen as too easy or conversely impossible; or call charges were seen as too high. Based on our records, these began to appear in around 2005 but the volumes were far higher in 2006. Call TV quiz shows were the subject of an investigation by the CMS Select Committee towards the end of that year, to which Ofcom gave evidence<sup>23</sup>.
- 3.14 However, from early 2007 serious allegations about the conduct of PRS-based games and votes from mainstream programming began to appear in the media, including accusations of fakery in viewer prize competitions. Ofcom was first alerted by a report in the press in February 2007. Subsequently, further media coverage, including an investigation by Panorama<sup>24</sup>, together with internal reviews carried out by the broadcasters themselves, made it clear that there may be a systemic problem, rather than unrelated individual failures.
- 3.15 The media reports, the complaints which followed them, and the broadcasters themselves triggered investigations by Ofcom of multiple individual cases. In other cases, whistleblowers approached Ofcom.

To what extent do you consider that the scandal was the result of a regulatory failure? What was the cause of that failure? To what extent does the scandal, and Ofcom's response to it, demonstrate the strengths and/or weaknesses of the Ofcom regulatory model?

- 3.16 I do not consider that the issues themselves were a result of regulatory failure, but I do consider that the regulatory response could have been faster and more effective.
- 3.17 The very rapid take up of PRS by production companies and broadcasters was driven partly by a squeeze in advertising revenues. Broadcasters often lacked a technical understanding of the PRS services they were using and were not always able to assess the risks they posed. Contractual relationships were unclear about compliance responsibilities.
- 3.18 Broadcasters also failed to recognize that the use of PRS created a different relationship with the viewer, since viewers who rang PRS lines had rights essentially as customers rather than viewers. In particular, broadcasters continued to operate under a 'show must go on' mentality. In order to maintain control of what appeared on screen production staff would try to find alternative solutions if PRS failed (e.g. finding a competition 'winner' themselves) or would seek to engineer outcomes (e.g. selecting individuals who would present well on television).

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<sup>23</sup> The Select Committee reported on 25 January 2007: <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcomeds/72/72.pdf>. Ofcom's response was issued on 29 March 2007.

<sup>24</sup> 23 April 2007 "TV's Dirty Secrets".

- 3.19 The challenge in these cases was to apply an existing regulatory model to a new form of compliance failure relating to a new business model. There was no specific provision in the Broadcasting Code to address this particular conduct.
- 3.20 PRS, which most broadcasters buy as a service from a third party, is subject to regulation in its own right. This meant that Ofcom was involved, but a co-regulatory body the Independent Committee for the Supervision of Standards of Telephone Information Services ("ICSTIS") also had a role. ICSTIS was a pre-existing body with responsibility for regulating PRS, prior to the Communications Act 2003. It maintained a Code of Practice for PRS use.
- 3.21 When the Communications Act 2003 was passed, it gave Ofcom a power to set regulatory conditions requiring compliance with an approved code for the purposes of regulating the provision, content, promotion and marketing of premium rate services<sup>25</sup>. Ofcom approved ICSTIS's Code of Practice<sup>26</sup>. ICSTIS remained principally responsible for enforcement. It had powers under its Code to give directions to, and in some cases impose sanctions on, certain categories of person involved in the provision of PRS, targeted primarily at the parties with direct responsibility for the content and promotion of PRS.
- 3.22 Our records indicate that we received few if any complaints about PRS in 2004. The services became popular rapidly from 2005 onwards. Because much of the conduct concerned took place behind the scenes, viewers were unaware of it and as a consequence, Ofcom did not receive the volume of complaints which would ordinarily be associated with a matter of such public concern. Initially, of the complaints Ofcom received about PRS, many related to the promotion and/or operation of the premium rate phone lines for quizzes and are likely to have been referred to ICSTIS. It is in my view fair to say that Ofcom initially regarded PRS issues as a matter principally for ICSTIS.
- 3.23 There was a degree of lack of clarity over who was principally responsible between Ofcom or ICSTIS, because it was not clear whether broadcasters or premium rate service providers were responsible for the failings. Related to this, there was a lack of clarity for licensees on what their duty was in respect of these practices.
- 3.24 In addition to carrying out a number of investigations, in March 2007, once we had realized the scale of the issue and in particular the lack of clarity as to the various powers and responsibilities of Ofcom and the co-regulator ICSTIS, the Ofcom Board commissioned an independent report into television broadcasters' use of premium rate telephone services in programmes<sup>27</sup>. As Richard Ayre says in his report, he was asked:

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<sup>25</sup> Sections 120 and 121 Communications Act 2003.

<sup>26</sup> The 10th edition was approved by Ofcom from 29 December 2003; there was an emergency code amendment on 4 August 2005 and the 10<sup>th</sup> edition was replaced by the 11th edition on 9 November 2006. This lasted until 30 March 2011, when the 12<sup>th</sup> edition was approved.

<sup>27</sup> Published 18 July 2007: <http://stakeholders.ofcom.org.uk/broadcasting/reviews-investigations/premium-rate/ayrereport/>.

*“to consider whether there were any systematic reasons behind the large number of apparent failures of compliance in the use of premium rate services (PRS) on television programmes. My terms of reference required me to consider:*

- *Consumer protection issues and audiences’ attitudes to the use of PRS in television programmes;*
- *The benefits and risks to broadcasters in the use of PRS in programmes;*
- *The respective compliance and editorial responsibilities of broadcasters, producers, telecoms network operators and others involved in those programmes;*
- *The effectiveness of broadcasters’ and telecoms operators’ internal compliance procedures, guidelines and arrangements to ensure compliance with Ofcom and ICSTIS codes;*

*The inquiry was charged with making recommendations on actions needed to restore public confidence in the use of premium rate telephone services by television broadcasters.”*

- 3.25 Following that report, Ofcom made amendments to the conditions in broadcast licences and also made a number of changes to the Broadcasting Code and our guidance to address the issues identified.
- 3.26 In particular, Ofcom and ICSTIS entered into a new Framework Agreement in December 2007, which formally set out the responsibilities of the two organisations<sup>28</sup>. Among other matters, Ofcom established:
- Closer arrangements for agreeing objectives and strategy, and clearer reporting of policy issues and market trends;
  - A single senior Ofcom official to become the sponsor for the relationship with PhonepayPlus;
  - Ofcom to have the ability to give PhonepayPlus direction on issues which it considers of particular importance or where clarity of responsibility needed to be explicit; and
  - All appointments and re-appointments on the PhonepayPlus Board and the Chief Executive were made subject to Ofcom approval.
- 3.27 The new framework we put in place at that time is still working well and both organisations find it to be a productive relationship.
- 3.28 Ofcom introduced new broadcast service licence conditions<sup>29</sup> requiring broadcasters to:

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<http://stakeholders.ofcom.org.uk/binaries/consultations/phonepayplus/summary/formalframework.pdf>

<sup>29</sup> [http://licensing.ofcom.org.uk/binaries/tv/tlcs\\_licence.pdf](http://licensing.ofcom.org.uk/binaries/tv/tlcs_licence.pdf).

- Assume direct responsibility for all arrangements for the management of communications from viewers, where such communication is publicised in programmes
- Obtain independent third-party verification of all PRS systems
- Submit to unannounced spot-checks to check compliance (which Ofcom has carried out ever since).

3.29 Ofcom amended the Broadcasting Code to introduce more specific rules governing the conduct of broadcast competitions and voting<sup>30</sup>.

**More generally, to what extent are Ofcom able to launch an investigation into unethical practices without the receipt of complaints? How often has it done so?**

4.1 Ofcom is able to initiate an investigation in the absence of a complaint in order to fulfill its general duties under section 3 Communications Act 2003. The position is slightly different for standards and for fairness/privacy issues so I will explain each separately.

Standards

- 4.2 Under section 3(2)(d), Ofcom has a general duty to secure “*the application, in case of all television and radio services, of standards that provide adequate protection to the members of the public from the inclusion of offensive and harmful material in such services*”.
- 4.3 As explained earlier, in fulfilling this duty regarding “generally accepted standards”, Ofcom has published procedures for investigating breaches of content standards.<sup>31</sup> Paragraph 1.6 of the procedures states that “Ofcom may launch investigations on its own initiative as well as investigate complaints.” In this regard, Ofcom continually carries out targeted monitoring of broadcast services. We regularly initiate investigations into potential standards breaches in the absence of complaints.
- 4.4 Two recent examples of investigations and breach findings which arose from our own monitoring and initiation are:
- i) Live XXX Babes (March – May 2010)<sup>32</sup> – this concerned adult sex chat programmes which breached the Broadcasting Code on generally accepted standards.

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<sup>30</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/code09/bcode09.pdf>.

<sup>31</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/june2011/breaches-content-standards.pdf>

<sup>32</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb164/issue164.pdf>



- ii) Advertisement for the Jatiya Party (August 2011)<sup>33</sup> – this related to an advertisement broadcast on Channel S which breached the statutory prohibition on political advertising as set out in section 321(2) Communications Act 2003.

#### Fairness and privacy

- 4.5 The statutory framework concerning issues of fairness and privacy in broadcasting services is slightly different. We have a general duty under section 3(2)(f) Communications Act 2003 to secure the application of standards that provide adequate protection to members of the public and all other persons from both (i) unfair treatment in programmes and (ii) unwarranted infringements of privacy. There are also specific statutory provisions in the Broadcasting Act 1996 which set out when Ofcom can and cannot entertain complaints of unfair treatment and infringements of privacy, see paragraphs 1.11 – 1.20 above.
- 4.6 In light of the statutory scheme, we generally expect the “person affected” or somebody authorised on their behalf to bring a complaint. However, we will, in exceptional circumstances, investigate unfair treatment and unwarranted infringements of privacy in the absence of a complaint from the person affected<sup>34</sup>. Essentially, we will do this where we think it is appropriate to ensure that we are meeting our general duty to provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringements of privacy.
- 4.7 We did this in relation to the *Russell Brand Show* on BBC Radio 2, when the “persons affected” (i.e. Andrew Sachs and Georgina Baillie) did not complain to Ofcom but Ofcom nonetheless found that their privacy had been unwarrantedly infringed and imposed a financial penalty against the BBC in this respect.<sup>35</sup>

### C. THE “FIT AND PROPER” TEST

**Is there any published guidance on the application of the ‘fit and proper’ test? If not, why not? How frequently does Ofcom assess or reassess whether holders of broadcast licences are ‘fit and proper’? Is there a systematic process for such reassessment?**

- 5.1 The “fit and proper” test, in full, is in section 3(3) of each of the Broadcasting Act 1990 and the Broadcasting Act 1996. Ofcom:
  - (a) shall not grant a licence to any person unless satisfied that the person is “a fit and proper person to hold it”; and

<sup>33</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb197/obb197.pdf>

<sup>34</sup> <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>, 1 June 2011.

<sup>35</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/BBCRadio2TheRussellBrandShow.pdf>

(b) “shall do all that they can to secure that, if they cease to be so satisfied in the case of any person holding a licence, that person does not remain the holder of the licence”.

- 5.2 This means that we must be satisfied on grant of a licence and on an ongoing basis thereafter, that the licensee is fit and proper.
- 5.3 In order to carry out this duty, we require applicants for licences to provide certain information to us, and to update that information if it changes. Application forms for our licences are available from our website. Although we have not issued formal guidance on the application of the “fit and proper” test, in effect, the information we ask for acts as guidance.
- 5.4 Broadcast licensees are normally incorporated companies. We are therefore concerned about the fitness and propriety of those who control them. We ask for details of their directors and shareholders, and the directors of their shareholders. We require information to be provided, in particular in relation to criminal convictions and previous regulatory breaches relating to broadcasting matters. However, in order not to fetter our discretion we also require them to declare more generally all information which might influence Ofcom’s decision about whether the entities and individuals are fit and proper to hold a broadcast licence.
- 5.5 The information a licence applicant provides is checked against various public sources, for example, the insolvency register. Should these checks give rise to any concerns we put those concerns to the applicant. A decision is made depending on whether the applicant responds (in applications for a licence our experience is that some do not, in which case the application lapses) and, if so, what it says. For example, if a particular name has caused Ofcom concerns, an application may be granted if the applicant can demonstrate that the individual is no longer involved with the applicant.
- 5.6 In addition, we monitor the market generally including media reports and other public sources of information – this inquiry being one recent example. If we identify sufficient reason to be concerned about a licensee’s continuing fitness and propriety, we will approach the licensee for an explanation or seeking further information. The onus is on the licensee to satisfy us.

#### **D. UPDATE OPERATION MOTORMAN AND BROADCASTERS**

- 6.1 In my first statement to the Inquiry (paragraphs 34.4, 34.5), I explained that the Information Commissioner had recently informed us that the records of the Operation Motorman investigation into the private investigator Steve Whittamore disclosed that a small number of broadcasters and television production companies had instructed the private investigator on a number of occasions in the period 2000-2003. I said I would update the Inquiry if we found that any broadcasters had breached in the Broadcasting Code in this regard.

- 6.2 In light of the information provided to us by the ICO, Ofcom wrote to the BBC, Channel 4 and ITV to request specific information on the particular transactions identified through Operation Motorman and the programmes they may relate to.
- 6.3 On the basis of the information provided by the ICO, all three broadcasters carried out comprehensive internal reviews. In light of those reviews, we consider that the broadcasters have taken reasonable steps to investigate that information, and that those investigations have shown on the available evidence that in relation to the instruction of a private investigator, those instructions were justified by the public interest.
- 6.4 We also consider in light of these reviews and more generally, that all three broadcasters have clear and appropriate compliance measures in place to prevent serious malpractices from occurring in the future.

**31 January 2012**