Decision by the Broadcasting Sanctions Committee

DM Digital Television Limited
for the broadcast of an advertisement found in breach of the CAP (Broadcast) TV Advertising Standards Code on 15 February 2009

Consideration of Sanction against:	DM Digital Television Limited ("the Licensee" or "DM Digital Ltd") in respect of its service DM Digital ("DM Digital" or "the Channel") TLCS 873
For:	Breaches of the CAP (Broadcast) TV Advertising Standards Code ("the BCAP Code") in respect of the advertisement: Professor Mohammed Zain - broadcast on 15 February 2009
Decision:	To recommend the imposition of a financial penalty (payable to the Office of Communications) of **£17,500** in respect of the BCAP Code breach by DM Digital in respect of the Professor Zain advertisement and that DM Digital should be directed to broadcast a statement of the decision by the Broadcasting Sanctions Committee

Executive Summary

1. For the reasons set out in full in the Decision, under the powers delegated from the Ofcom Board to Ofcom's Broadcasting Sanctions Committee ("the Committee"), the Committee has imposed a statutory sanction on DM Digital in relation to the broadcast of an advertisement for Professor Mohammad Zain transmitted on DM Digital on 15 February 2009.

2. DM Digital TV is a free-to-air general entertainment channel, available via cable and satellite in the UK, Europe, Middle East, Africa and Asia and broadcasts mainly in Urdu to the UK Asian community. DM Digital Television Limited ("DM Digital") holds the licence for DM Digital TV.

3. In September 2009 the ASA referred three breaches of the BCAP Code to Ofcom for consideration of a statutory sanction.

4. In accordance with Ofcom's Sanctions Procedures, the Ofcom Executive initially considered the ASA referral and made its recommendation to the Chair of the Broadcasting Sanctions Committee ("the Chair").

5. Ofcom recommended to the Chair that two of the breaches were sufficiently serious and repeated to be considered for a statutory sanction.

6. After considering all the evidence and the representations made by DM Digital the Broadcasting Sanctions Committee ("the Committee") decided that one of the two breaches of the BCAP Code, Professor Mohammed Zain, was sufficiently serious to attract a financial penalty.

7. The Committee considered that this breach in itself was serious as the broadcast resulted in actual financial harm to a vulnerable person. The Committee further concluded that the breach occurred as a result of repeated long-term and systemic compliance failures on the behalf of the broadcaster. DM Digital had demonstrated a repeated failure to keep up to date with ASA adjudications and guidance and had failed to respond to the deterrent of a financial penalty previously placed upon it by the Sanctions Committee in 2008 for failing to protect members of the public.

8. Having regard to the seriousness of the breach and repeated nature of the compliance failures and with regard to Ofcom's Penalty Guidelines, the Committee decided it was appropriate and proportionate in the circumstances to impose a financial penalty (payable to the Office of Communications) of **£17,500**; and in addition to require DM Digital to broadcast a statement of Ofcom's findings on its service DM Digital in a form to be determined.

Legal Framework

The Communications Act 2003

9. 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. By virtue of section 319(2)(h), one objective is "that the inclusion of advertising which may

be misleading, harmful or offensive in television and radio services is prevented".

Observance of the BCAP Code

10. By virtue of sections 321 and 325 of the Act, a condition is included in broadcasters' licences requiring the broadcaster to secure compliance with the BCAP Code in connection with the provision of their services and the advertising or sponsorship included in their services.

11. On contravention of a licence condition, Sections 236-8 of the Act provide Ofcom with the power to impose the following sanctions against a broadcaster:
    - issue a direction not to repeat a programme;
    - issue a direction to broadcast a correction or statement of Ofcom's finding;
    - impose a financial penalty (5% of qualifying revenue or up to £250,000 whichever is greater); and/or
    - revoke the licence.

Television Licensable Content Service (TLCS) Licence, Condition 8(4)

12. This states that the Licensee shall ensure that the provisions of the Ofcom Broadcasting Code and the BCAP Code, set to secure the objectives in Section 319(2)(a) and (g) to (j) of the Act and relating to standards and practice in advertising and sponsorship of programmes and any prohibitions of advertisements and forms and methods of advertising of sponsorship of programmes, are observed in the provision of the Licensed Service.

Remedial action and penalties

13. Section 236 of the Act gives Ofcom 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.

14. Section 237 of the Act gives Ofcom 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.

15. Section 238 of the Act gives Ofcom the power to revoke a TLCS licence.

Legal Context of the Memorandum of Understanding ("MOU")

16. The legal foundation for the co-regulatory system envisioned by the MOU is the Deregulation and Contracting Out Act 1994 ("DCOA"). Where a Minister or other public authority (like Ofcom) has been given specific functions or duties by legislation, DCOA allows the Minister or public authority to delegate or 'contract out' those functions to another person or organisation. Ofcom has been given the power to contract out its functions under DCOA by Section 1(7) of the Act.

17. Ofcom's duties and functions in the area of broadcast advertising regulation derive in the main from Sections 319 to 328 of the Act. Under DCOA and various related statutory instruments, Ofcom has contracted out some of its functions, including its functions relating to:

- the setting, reviewing and revising of the codes for broadcast advertising to the Broadcast Committee of Advertising Practice ("BCAP") (from section 319(1)); and
- the handling and resolving of complaints about the observance of broadcast advertising standards codes to the Advertising Standards Authority (Broadcast) ("the ASA") (from section 325(2)).

Functions to be delegated

18. Under DCOA, various related statutory instruments, the MOU and other documents, Ofcom agreed that the following broadcast advertising regulation functions should, subject to the appropriate constraints identified in the relevant documents, henceforth be carried out by the ASA and BCAP.
    (a) Handling and resolution of complaints about advertising content on radio and television;
    (b) BCAP Code setting, monitoring and enforcement;
    (c) Teleshopping and other non-spot advertising content;

Further action, including referral to Ofcom

19. Under the MOU, if, in the opinion of the Director General of ASA, a broadcaster:
    - fails to comply fully and promptly with a decision of ASA,
    - fails to co-operate fully and promptly with a reasonable request of BCAP, demonstrates a repeated disregard for decisions of ASA or the reasonable requests of BCAP, or
    - commits one or more code breaches of sufficient seriousness to warrant in ASA's opinion a statutory sanction

    the Director General of ASA shall, after ASA has reached any relevant decision(s), refer the matter, together with copies of all relevant evidence and submissions, to Ofcom for Ofcom to consider further action. Ofcom undertakes to consider any such referrals promptly and to impose any such proportionate sanctions as it deems appropriate in the circumstances in support of ASA, taking into account any representations from the broadcaster(s) concerned.

Summary of Breaches Referred to Ofcom by the ASA

Snober Heights
Broadcast: 7 September 2008
Adjudication: 22 April 2009

20. During this 30-minute advertisement viewers were invited to contact the company, Snober Heights, and invest in a range of properties in Turkey.

21. The programme-style presentation of the advertisement gave the impression that it was providing an impartial review of properties for sale abroad. The lengthy advertisement contained the following claims:

    - *"This message is for those looking for a short term investment, wanting to make quick money"*
    - *"By just paying a small deposit you can own them and when the company increases the value before that you can switch from one bedroom to two bedrooms, if the company increases values by l0%, you double your profit"*

- *". .. I can give you this inside information...you will have a 10% profit straight away . . ."*

22. The ASA found that there was insufficient separation between the style of the advertisement and the editorial style of programmes, and the advertisement was misleading because the broadcaster had been unable to provide objective evidence to substantiate the claims. The ASA found the advertisement breached the following BCAP Code rules:
    - 2.1, 2.1 .I and 2.1.2 (b) and 2.1.2 (c) (Separation of advertisements and programmes)
    - 5.1 (Misleading advertising);
    - 5.2.1 (Evidence);
    - 5.3.1 (Accurate pricing);
    - 9.5 (c) (Unacceptable categories); and
    - 5.4.2 (Superimposed text).

Professor Mohammad Zain
Broadcast: 15 February 2009;
Adjudication: 19 August 2009

23. On 17 April 2009, the ASA received a complaint from Manchester Trading Standards ("the MTS"). The MTS had been contacted by the social worker of a viewer who had approached Professor Zain, after seeing an advertisement for Professor Zain's services on DM Digital.

24. The MTS informed the ASA that the viewer had paid money to Professor Zain on two occasions for help in finding a partner. According to the viewer, Professor Zain told her to credit his account with £110 and to pray for one week and then to call him back. When she did this, he told her to credit his bank account with a further £1,400 and in return he would send her "a prince". The viewer proceeded to transfer the requested money.

25. The ASA investigated Professor Zain's advertisement in accordance with its published procedures. The advertisement was broadcast in Urdu and the ASA sought two translations: one from DM Digital (provided on 8 May 2009) and one from a colleague at the MHRA (Medical and Health products Regulatory Agency) (provided on 12 May 2009).These translations were respectively:

    [DM Digital] *"Istakhara Centre. Spiritual healer Professor Mohammad Zain. All my brothers and sisters who have any kind of spiritual (religious) problem, can contact me on this number"*

    [MHRA] *"Seeking Goodness Centre. Spiritual scholar, Professor Mohammad Zain. All the ladies and gentlemen who are in any kind of problem should contact [me] urgently on this number X"*

26. The ASA found the advertisement was misleading and likely to exploit the vulnerable and that it represented advice to individuals, based on psychic or faith-based practices, for personal problems. It concluded that the advertisement was likely to exploit the hopes and fears of vulnerable viewers. The ASA found the advertisement breached the following BCAP Code rules:
    - 5.1.1, 5.1.2, 5.1.3 (Misleading advertising);
    - 3.1 (j) (Unacceptable categories);

- 10.3 (Religion, faith and systems of belief - The occult, psychic practices and exorcism); and
- 10.1 3 (Religion, faith and systems of belief - vulnerable viewers).

Dubai Heaven on Earth Advertisement
Broadcast: 16 July 2008
Adjudication: 21 January 2009

27. This third breach was referred to Ofcom by the ASA, but it was not referred to the Committee for consideration of sanction. Ofcom Executive stated that it was arguable that the 'repeated nature' of this breach (in terms of rules 5.2.1 and 5.3.1) was not a factor that would significantly add weight to the seriousness of the breach overall (i.e. the repeated nature did not make the breach more serious). And in the circumstances of the 'repeated nature' of the breach falling away, the Executive did not consider that the seriousness of the breach, alone, was such that it warranted the consideration of a statutory sanction.

28. The detail of this third breach is set out below for background information because the Committee considered the breach as part of DM Digital's compliance record only.

29. DM Digital broadcast two advertisements, in Urdu and English, for Dubai Heaven on Earth Developers. Both advertisements showed graphics of a skyscraper and claimed:

"Pay only 30K on a 60K apartment and let your tenants pay the rest. Easy customised payment plans. Earn rental returns of £24,000 pa. Guaranteed pre-approved loans. No documentation or credit checks required. Starting from only £25,000. "

30. The second advertisement additionally stated:
"Marketing exclusively by Heaven On Earth Real Estate Brokers. Licensed by the Government of Dubai and Registered with the Chamber of Commerce. Now relaunching Heaven Heights Tower. Become the owner from only £25,000. Luxury apartments, Preapproved finance, Freehold properties with tenancy schemes, Rental returns 12-15% p.a."

31. The ASA found the advertisements were misleading and the broadcaster had been unable to provide objective evidence to substantiate the claims. It also said the advertisements should have advised viewers that a 50% deposit was required to take part in the investment opportunity. In particular, the ASA found the following claims were misleading:
- investors could *"Earn Rental returns of 24,000 per annum";*
- suggestions that it was possible for investors to earn annual rents of £24,000 from apartments referred to in the advertisement as starting *"from only £25,000"*;
- that apartments were referred to as starting *"from only* £25,000", despite there being no apartments available to purchase for less than £50,000; and
- that rental returns of 12 - 15% were available.

32. The advertisements were found in breach of the following BCAP Code rules:
- 5.1 (Misleading advertising);
- 5.2.1 (Evidence); and
- 5.3.1 (Accurate pricing).

Compliance

33. In referring the breaches to Ofcom, the ASA also sent details of the steps it had taken to remind all licensees of the need to comply with the BCAP Code as well as details of DM Digital's compliance history as summarised below.

34. On 3 July 2008, the ASA issued a letter to all Ofcom licensees in response to numerous breaches by several broadcasters of the BCAP Code rules reminding them specifically of the following rules:
    - Rule 3.1 (Unacceptable categories);
    - Rule 3.2 (Indirect Promotion); and
    - Rule 10.3 (The Occult, psychic practices and exorcism).

35. The letter informed all licensees that any future breaches of these rules would be considered very seriously and could result in a referral to Ofcom.

36. Following this letter advising broadcasters of the seriousness of breaching these rules, DM Digital broadcast the advertisement for Professor Mohammad Zain on 15 February 2009 which breached Rules 3.2 and 10.3 (amongst other rules).

37. On 2 March 2009, DM Digital was called to attend a meeting with the ASA and Ofcom because of serious concerns about its failure to comply with the BCAP Code. At this meeting the ASA outlined its concerns about DM Digital's compliance record which included several advertisements which had been both informally followed up and formally investigated. These were noted:

Darulshafa Shirqia (informal)	October 2007
Shop 24 Seven Astrostones (informal)	November 2007
Roopamrit (formal)	April 2008
UK Mortgages (informal)	October 2008
AZ Homeopathic Clinic (formal)	December 2008
Dubai Heaven on Earth (formal)	January 2009
Snober Heights	(not concluded at the time of the meeting)

38. Representatives from Ofcom attending the same meeting in March 2009 also explained to DM Digital that if breaches of the BCAP Code continued, BCAP may refer the case to Ofcom for referral to the Sanctions Committee and if so it would be treated seriously by Ofcom. It was also noted that DM Digital had already received a fine from Ofcom in October 2008 for breaches of the Broadcasting Code of £15,000 and that the financial penalty imposed by Ofcom against Venus TV for £35,000 in December 2008 for broadcasting misleading advertising in breach of the BCAP Code should also be noted.

Ofcom's Decision that DM Digital was in breach of Condition 8(4) of its licence for DM Digital

39. This licence condition requires broadcasters to ensure that the provisions of the standards code (in this case the TV Advertising Code) are observed. The Ofcom Executive considered that the information submitted by the ASA demonstrated that the licensee had repeatedly failed to comply with various rules in the TV Advertising Code.

40. In Ofcom's view, the number of breaches recorded by the ASA was evidence of systematic compliance failure and raised serious concerns about the Licensee's ability to comply with the conditions stipulated in its Ofcom licence.

Referral by the Ofcom Executive to the Chair of the Committee

41. 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.

42. Under the procedures 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.

43. In this case the Ofcom Executive considered the ASA referral and all relevant material in the case and informed the Chair of its recommendation that the breaches of the BCAP Code in respect of Professor Zain and Snober Heights were, in its view, sufficiently serious and repeated so as to warrant a consideration of a statutory sanction by the Committee.

Consideration of a Statutory Sanction

Seriousness of behaviour

44. This section of the paper provides details of the Committee's consideration of the seriousness of the breaches.

Professor Zain

45. The Committee considered that the broadcast of this advertisement amounted to a serious breach of the BCAP Code in terms of:

- serious harm (both actual and potential);
- DM Digital's failure to take account of previous published adjudications, informal guidance, and the All Licensee alert from BCAP (which all indicated that DM Digital's compliance procedures were inadequate)

Each of these factors is explained, below.

46. *Harm:* The broadcast of the advertisement resulted in significant actual financial harm to a viewer (who paid Professor Zain a total of £1510 to find her a partner, and on the promise of delivery of "a prince") and had the potential to cause significant potential harm to vulnerable viewers. The broadcast of this advertisement by DM Digital therefore represents a serious breach of the BCAP Code.

47. *Failure to take account of relevant adjudications, guidance and alerts issued by the ASA:* The information provided by the ASA demonstrates that DM Digital did not apply the reasoning established, and guidance contained, in earlier ASA

adjudications. In particular, DM Digital did not have sufficient regard to the six adjudications concerning astrologers that the ASA had issued since October 2007, three of which specifically related to services offering advice on personal problems

Pandith Sri Guru Poojya Vijay Sharmaji,
Broadcast: 9 August 2007 by Venus TV
***Adjudicatio*n: 3 October 2007**
http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_43284.htm
Pandit Bharathraj Shastri
Broadcast: 3 March 2008 by DD India
Adjudication: 23 April 2008
http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_44324.htm
Professor Mohammed
Broadcast: 28 March 2008 by Prime TV
Adjudication: 4 June 2008
http://www.bcap.org.uk/asa/adjudications/Public/TF_ADJ_44509.htm

48. In addition, DM Digital did not apply the clear and direct advice provided specifically to it by BCAP, following the guidance set out on the Shop 24 SevenAstrostones and Nazar Evil Eye Pendant infomercial.

49. DM Digital also failed to take proper account of an "All Licensee Alert" issued by BCAP on 3 July 2008. This Alert explained that any future breaches of rules 3.1 (Unacceptable categories), 3.2 (Indirect Promotion) and 10.3 (The Occult, psychic practices and exorcism) of the BCAP Code could result in a referral to Ofcom for consideration of statutory sanctions.

Snober Heights advertisement

50. The Committee considered that the broadcast of this advertisement amounted to a serious breach of the BCAP Code in terms of:

- the serious potential harm; and
- disregard by DM Digital of relevant adjudications.

Each of these factors is explained, below.

51. *Serious potential harm*: The manner and degree to which viewers were misled about the benefits of the investment opportunities promoted in this advertisement was significant and capable of causing serious financial harm. The Committee considered that the potential for financial harm was increased by the exceptional length of the advertisement (30 minutes) and because it's promotional nature was not made clear (i.e. viewers were likely to believe they were receiving impartial property advice, and there was therefore more potential for viewers to be influenced by the misleading information given).

Failure to take account of a relevant adjudication: The information provided by the ASA demonstrated that DM Digital did not apply the reasoning established, and guidance contained, in an ASA adjudication for a similar property investment advertisement published in August 2008 (see *The Pure Real Estate Consultancy* referenced below) which raised similar issues as those raised in the Snober Heights case. This adjudication was published in August 2008 one

month before the Snober Heights advertisement was broadcast in September 2008.

The Pure Real Estate Consultancy
Adjudication: 6 August 2008
http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2008/8/Pure-Real-Estate-Consultancy-Fze/TF_ADJ_44826.aspx

52. The Committee held a hearing on 26 April 2010 to consider the imposition of a statutory sanction. DM Digital did not attend the hearing, but sent written representations on the day of the meeting.

DM Digital's representations

53. With reference to the Snober Heights advertisement, DM Digital stated that it had been under the understanding that as the ASA adjudication had been published in April 2009 that the matter was now closed. There had been no expectation on behalf of DM Digital, following publication, that any further regulatory action would be likely in the future.

54. DM Digital also cited that prior to the publication of the Snober Heights adjudication in April 2009 it met Ofcom and the ASA for a Code Review Meeting on 2 March 2009. During this meeting the current investigation into Snober Heights was discussed and neither regulator had suggested to DM Digital that further action was likely to follow and this had been a legitimate expectation. DM Digital understood that this had been agreed because it had taken immediate action to remove the advert and dismissed those responsible for it.

55. Further, DM Digital stated that if the matter was likely to have resulted in further regulatory action there was an expectation that this should have followed without delay. DM Digital argued it was now almost two years on from the date of the original breach (September 2008) and to ensure fairness any such action should have been taken without delay.

56. With reference to the advertisement for Professor Zain, DM Digital stated that it had provided accurate information to BCAP when it had first been informed about concerns regarding this advertisement in February 2008. Following this the case was closed and no further action was taken. In April 2009 Manchester Trading Standards (MTS) contacted BCAP regarding the same advertisement and a new investigation was launched. DM Digital stated it had supplied an accurate translation at the start of the first investigation into this case in 2008 and denied that any inaccurate information was ever supplied. It also stated that if Ofcom required it would be content for a further translation to be undertaken.

57. Therefore the Licensee argued that their legitimate expectation was that the matter should have been concluded in 2008 when the first investigation was closed down. Further the Licensee has stated that despite the fact that BCAP disputed the translation in 2009, following the complaint from MTS, it co-operated with the regulator and withdrew the advertisement immediately upon receipt of the letter from BCAP.

58. In conclusion DM Digital stated that the financial penalty proposed in the Chair's Provisional Decision was "extremely excessive", particularly in light of the current financial health of the business. Any financial penalty would have a detrimental effect on the business leading to the closure of the channel, the loss of jobs and the loss of a channel for the British Asian community. The Licensee stated the maximum penalty it could afford to pay was £500 per month.

Decision by the Committee

Snober Heights

59. The Committee noted that there had been a significant time lapse since Snober Heights had been broadcast in September 2008 and the ASA adjudication in April 2009. The Committee also considered the fact that DM Digital had met the ASA and Ofcom a month prior to the publication of the ASA Adjudication in March 2009 to discuss the Licensee's compliance record including Snober Heights and no reference was made to the seriousness of this particular breach or that the ASA would be taking further action in respect of this breach. On this basis, the Committee decided not to consider the advertisement for Snober Heights as part of the sanction but to include it as part of its considerations regarding DM Digital's overall compliance record.

Professor Zain

The Committee went on to consider the imposition of a statutory sanction against DM Digital in respect of the Professor Zain advertisement.

An Imposition of a financial penalty

60. In considering whether or not to impose a financial penalty in the Professor Zain case, the Committee took into account all the evidence and factors outlined in the Chair's Provisional Decision and the written representations made by DM Digital.

61. The Committee also had regard to the Sanctions Procedures and to Ofcom's Penalty Guidelines.

62. Under section 237 of the Act, the maximum level of financial penalty that can be imposed in respect of the relevant Code breaches in this case is up to £250,000 or 5 per cent of DM Digital's qualifying revenue relating to its last accounting period, whichever is greater.

63. In the past, a fine has generally been imposed in circumstances where the nature of the breach(es) and/or the reasons for the compliance failure(s) were serious, and/or where they were persistent, repeated, deliberate, reckless, or negligent, that is to say where a licensee has failed to exercise reasonable care. As the Committee considered that the Professor Zain breach was serious this was a case where a financial penalty was deemed appropriate.

64. In accordance with the Penalty Guidelines, in order to determine the starting point for a financial penalty for this breach, the Committee considered the "General Criteria", that is: the seriousness of the contravention, any precedents set by previous cases, and, the need to ensure that the threat of penalties will

act as a sufficient incentive to comply. The Committee also considered any specific criteria which may be relevant, and any factors tending to increase or decrease the level of the penalty, before proposing a final amount of penalty for the breach.

General Criteria

Seriousness

65. Having viewed the material, and taken account of all the evidence and the representations of the Licensee, the Committee considered that the breach of the TV Advertising Code with respect to Professor Zain was particularly serious.

66. The Professor Zain advertisement involved evidence of actual financial harm to a viewer resulting from the broadcast on the Licensee's service. In addition the Committee was concerned that this particular type of unacceptable advertising, that represented advice to individuals based on faith based practices for personal problems, was likely to exploit vulnerable viewers.

67. The breach also demonstrated a systemic and repeated failure on behalf of the Licensee to ensure adequate compliance. Prior to the broadcast of the Professor Zain advertisement in February 2009, the ASA published an extensive list of adjudications and guidance. The Committee took the view that had DM Digital paid due regard to this guidance and published adjudications, the Professor Zain advertisement would not have been considered suitable for broadcast. The guidance and adjudications issued included:

- the publication of six adjudications concerning astrologers since October 2007, three of which had specifically related to services offering advice on personal problems,
- specific guidance to the Licensee in January 2008 from BCAP regarding the protection of vulnerable viewers and unacceptable categories of advertising (products and services offering personal advice) relating to another advertisement; and
- an All Licensee Alert to Licensees in July 2008 regarding relevant adjudications regarding unacceptable categories of advertising and this was not applied.

68. In the Committee's view, the seriousness of this compliance failure was increased significantly by the fact that DM Digital had recently been sanctioned by the Committee in October 2008 for breaches of the Broadcasting Code. This sanction had resulted in a fine of £15,000. The Committee highlighted in particular that this sanction was also concerned with broadcast material where there was significant potential harm to vulnerable viewers and demonstrated the Licensee's *"failure to understand and comply with its fundamental responsibilities under the Code"*. (Please see http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/dmdigital.pdf)

Precedent

69. The Committee took account of three precedents, in reaching its decision:

- **Venus TV** – sanction of £35,000 following a referral by the ASA for the broadcast of five advertisements that breached the BCAP Code, published 4 December 2008;

- **DM Digital** – sanction of £15,000 for breaches of the Broadcasting Code related to the broadcast of the programme "Health is Wealth", published 28 October 2008; and

- **ARY Digital** - sanction of £15,000 for breaches of the Broadcasting Code related to the broadcast of the programme the Weekend Show, published 1 November 2007.

Venus TV

70. The ASA referred the licensee to Ofcom for broadcasting five separate advertisements that breached the BCAP Code in serious ways and which when taken together were repeated failures to comply with the BCAP Code. Venus TV was fined £35,000 for breaches concerning misleading health claims relating to serious and minor conditions/ problems (e.g. infertility, impotency and depression through to excess weight and pimples), and the promotion of occult or psychic practices. The manner in which these products/services were promoted raised serious concerns of consumer protection.

71. The Committee considered that the Professor Zain case was more serious than any of the Venus TV breaches in that it concerned actual harm (both financial and likely emotional) to a viewer as a result of the broadcast of the advertisement for an occult service. In terms of the repeated nature of the breaches, the Venus TV case involved five separate breaches while here in Professor Zain there was one breach by DM Digital.

DM Digital - Health is Wealth

72. This DM Digital case related to the broadcast of a programme called "Health is Wealth" in which the services of the sponsor were promoted (this case will be referred to as the "Health is Wealth case"). The programme contained claims by the sponsor that he was able to successfully treat serious medical conditions such as cancer, diabetes and hepatitis. DM Digital was fined £15,000 for breaches of Ofcom's Broadcasting Code in relation to this programme which raised serious concerns about viewer harm.

73. The Health is Wealth case differs from the Professor Zain breach in that it relates to breaches of the Broadcasting Code rather than breaches of the BCAP Code. However, there are, nonetheless, similarities between the cases as both raise issues of consumer and viewer protection due to the unsubstantiated promotion of products and services that have the potential to cause harm.

74. The Professor Zain case, when considered individually, cannot be considered as serious as the Health is Wealth case in terms of seriousness of threat to consumer/viewer welfare. The potential for harm as a result of the promotion of

services that claim to cure serious medical conditions such as cancer, diabetes and hepatitis (as broadcast in the Health is Wealth case) is more serious than the financial and emotional harm that did, and could have, resulted from the broadcast of the Professor Zain advertisement.

ARY Digital

75. This case concerned the broadcast by ARY Digital of an edition of the programme *"The Weekend Show"* which promoted the services of Dr Surjeet Kaur. Dr Kaur claimed to be able to treat successfully serious medical conditions such as cancer, sterility, sciatica, psoriasis and leprosy, with herbal medicine. ARY Digital was fined £15,000 for the broadcast which raised serious concerns about viewer harm.

76. The ARY Digital case differs from the current Professor Zain case in that it relates to breaches of the Broadcasting Code rather than breaches of the BCAP Code. However, there are, nonetheless, similarities between the cases as both raise issues of consumer and viewer protection due to the unsubstantiated promotion of products and services that have the potential to cause harm.

77. The Committee considered that the Professor Zain case, when considered individually, was not as serious (in terms of seriousness of threat to consumer/viewer welfare) as the ARY Digital case. The potential for harm as a result of the promotion of services that claim to cure serious medical conditions such as cancer, sterility, sciatica, psoriasis and leprosy (as broadcast in the ARY Digital case) was more serious than the financial and emotional harm that did and could have resulted from the broadcast of the Professor Zain advertisement.

Incentive to comply

78. In deciding on the appropriate size of the financial penalty in relation to BCAP Code breaches by DM Digital in the Professor Zain advertisement, the Committee considered that the penalty should be sufficiently significant to act as a deterrent against a repeat of these or similar Code breaches (given the seriousness and harm caused) by DM Digital. It should act as an incentive to other broadcasters not to mislead viewers with unsubstantiated claims and not to exploit the vulnerable by broadcasting advertisements based on psychic or faith based practices.

Other specific factors

79. In considering the appropriate size of a financial penalty for the Professor Zain case, the Committee took account of other criteria in accordance with Ofcom's Penalty Guidelines.

Any gain (financial or otherwise) made by the regulated body in breach (or any connected body)

- There is no evidence that the regulated body made any financial gain regarding any of the Professor Zain advertisement.

The degree of harm caused

- In the case of the Professor Zain advertisement (broadcast 15 February 2009) the ASA had been contacted by Manchester Trading Standards (MTS) who presented evidence that actual financial harm to a vulnerable individual had occurred as a result of the advertisement. Further, when the ASA investigated the case they were satisfied that as it represented advice based on faith based practices for personal problems that the advertisement was likely to exploit vulnerable viewers.

The size and turnover of the regulated body

- The last recorded transmission and revenue return to Ofcom from DM Digital was for the calendar year 2007. This return recorded that DM Digital's annual revenue return was relatively modest. In its written representations sent to Ofcom on the day of the Sanction Committee hearing the Licensee argued that any financial penalty would have a detrimental impact upon the business and its ability to pay the fine would be restricted.
- It is noted that when DM Digital was previously sanctioned and required to pay a financial penalty of £15,000 for the Health is Wealth case the Licensee requested flexible repayment terms due to financial pressures on the business.

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

- There is no evidence to suggest the contravention was caused by a third party or that there were any relevant circumstances beyond the control of DM Digital.

The duration of the contravention

- With reference to the Professor Zain case the CAP Monitoring Team were aware of the advertisement in February 2008 and sought information from DM Digital about its content. On the basis of the information and translation received from DM Digital, indicating that the advertisement dealt with spiritual guidance based on scriptures only, the Cap Monitoring Team closed the case.
- In April 2009 Manchester Trading Standards ("MTS") contacted the BCAP Monitoring Team about the same advertisement and following an independent translation it became clear that Professor Zain was offering help with "any problem" not just advice based on scriptures.
- In the time between the first investigation (February 2008) and the contact from MTS (April 2009), a period of 14 months, the advertisement had been broadcast by DM Digital and had resulted in real harm to one viewer and had the potential to cause significant harm to other vulnerable viewers.

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

- A penalty in respect of the breaches of the BCAP Code under consideration here has not already been imposed by Ofcom or any other regulatory body.

Factors tending to increase the level of penalty

80. The Committee 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.

Repeated contraventions by the same regulated body

- The Committee noted that two breaches of the BCAP Code by the Licensee (Professor Zain and Snober Heights) occurred in a 5 month period.
- The Snober Heights advertisement was broadcast in September 2008 one month after the ASA had published the adjudication for a similar property advertisement *The Pure Real Estate Consultancy* in August 2008. This demonstrated that DM Digital had failed to keep up to date and apply the reasoning established, and guidance contained, in a relevant ASA adjudication.
- DM Digital was called to a Code Review meeting with BCAP and Ofcom on 2 March 2009 because of concerns about the Licensee's repeated compliance failures. In the period from October 2007 to January 2009 DM Digital were:
  - sanctioned and required to pay £15,000 by the Content Sanctions Committee for breaches of the Broadcasting Code;
  - subject to 3 formal investigations by BCAP: Roopamrit, April 2008; AZ Homeopathic Clinic, January 2009; and Dubai Heaven on Earth, January 2009; and
  - subject to 3 informal decisions: Darulshafa Shirqia, October 2007; Shop 24 Seven Astrostones, November 2007; and UK Mortgages, October 2008.
- In addition, at the time of the meeting the Snober Heights case was currently being investigated and the Professor Zain case was investigated after the meeting in April 2009.
- At the same meeting on 2 March 2009, DM Digital was alerted to the regulators' serious concerns about its repeated failure to comply with the BCAP Code, particularly in light of its previous sanction for breaches of the Broadcasting Code in October 2008. It was also advised that if such repeated breaches of the BCAP Code continued BCAP could refer the case to Ofcom for referral to the Sanctions Committee and this would be treated seriously. DM Digital were advised to note the £35,000 financial penalty imposed on Venus TV for such breaches.

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

- The ASA issued a letter to all Ofcom licensees in July 2008 which was six months **before** the Professor Zain breach occurred. The reason for the ASA issuing the all Licensee alert was a response to numerous breaches by several other broadcasters of the BCAP Code and to remind all

licensees specifically of the unacceptable categories for broadcast advertisements. This letter informed licensees that any future breaches of these rules would be taken seriously and could result in referral to Ofcom.

- In addition there were several published ASA adjudications relating to similar services which the Licensee should have paid due regard to as part of its compliance procedures and several cases of which the Licensee received informal guidance from BCAP (see above).
- DM Digital had previously been sanctioned in October 2008 for breaches of the Broadcasting Code by failing to provide adequate protection for members of the public from the inclusion of harmful material. In addition Venus TV had been sanctioned in December 2008 for similar breaches of the BCAP Code.

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

- The detail of DM Digital's compliance history as detailed above in the period indicated to the Committee that DM Digital did not have effective compliance procedures in place.

Mitigating Factors tending to decrease the level of financial penalty

81. The Committee reviewed whether there were any factors which in its view might limit or decrease the level of financial penalty:

- DM Digital TV is a free-to-air community channel with limited income aimed at the British Asian community living in the UK. The Licensee has stated any financial penalty will lead to the closure of the service and job losses.
- DM Digital has stated it has adopted new procedures since the adjudications were published by the ASA (Snober Heights adjudication published April 2009 and Professor Zain adjudication published in August 2009). Further it has stated that it co-operated with BCAP providing relevant material and removing the Snober Height and Professor Zain advertising swiftly when alerted to the concerns.
- DM Digital has argued that the Professor Zain breach occurred some time ago, that it had a legitimate expectation that this case was spent and that it was "an abuse of processes" for the ASA to refer the case to Ofcom. Further, DM Digital has maintained that as the original translation supplied to the ASA in 2008 was accurate, they therefore considered the case "should have been dealt with in 2008".

Level of financial penalty

82. In conclusion it was the Committee's view that the breach of the BCAP Code with respect to the Professor Zain advertisement was particularly serious for two reasons. Firstly, the Committee placed weight upon the fact that there was evidence that the Professor Zain advertisement led to actual financial harm to a vulnerable person. Secondly, the Committee placed weight upon the fact that this breach occurred as a result of the broadcaster's serious ongoing and inadequate compliance exemplified by its failure to act upon published findings, guidance and the financial penalty which arose from the previous sanction placed upon DM Digital in 2008.

83. Having regard to all the factors referred to above and all the representations from DM Digital, the Committee's decision is that an appropriate and proportionate financial penalty would be:

- in respect of the Professor Zain breach by DM Digital of the BCAP Code, **£17,500**

Ofcom Broadcasting Sanctions Committee
20 July 2010