

BBC Executive Fair Trading Bulletin

February 2009 to April 2009

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The complaints detailed below reflect investigation by the BBC Executive in line with the BBC's process for dealing with Fair Trading Complaints. Further details of this process can be found at bbc.co.uk/info/policies/fairtrading_complaints.

Where complainants are dissatisfied with the BBC Executive's findings they have the right of appeal to the BBC Trust.

Summary of complaints

This is a summary of complaints made against the BBC on Fair Trading grounds between February and April 2009 including complaints that have been made to the Office of Fair Trading (OFT), Ofcom and European Commission and those made directly to the BBC.

Updates are provided regarding complaints recorded in previous Fair Trading Bulletins. Where complaints have been rejected by external competition authorities, this will also be reported.

Complaints made to the Office of Fair Trading, Ofcom or the European Commission

There are no matters to report in this period.

Fair Trading complaints to the BBC

During this period the BBC has received three new complaints, one of which requires further clarification before being formally accepted as a Fair Trading complaint. Two complaints have been carried forward from the previous period.

The Fair Trading complaints from UTV Radio (GB) Limited and RadioCentre have been the subject of adjudication by the Executive Fair Trading Complaints Panel.

Update on previously reported complaints

UTV Radio (GB) Limited and BBC Sport's tender for the Football Association ("FA") United Kingdom National Network Radio Rights, Seasons 2008/09-2011/12

On 2 December 2008 the Managing Director of UTV Radio (GB) Ltd wrote to the Controller, Fair Trading regarding the BBC's tender for the Football Association ("FA") United Kingdom National Network Radio Rights, Seasons 2008/09-2011/12. The complaint was copied to the Office of Fair Trading ("OFT"), the Office of Communications ("Ofcom") and the European Commission for information. The complainant reserved its right to make a formal complaint to these bodies in the absence of 'a satisfactory resolution'.

The complainant raised a number of Fair Trading concerns, which may be broadly summarised as follows:

Competitive Impact Principle: that the BBC breached its Competitive Impact Principle ("CIP") in that it "significantly over-paid" for the FA Cup rights at a price that did not reflect market practice.

Charter and Agreement: that the BBC has failed to comply with the requirements of its Charter to "exercise rigorous stewardship of public money"¹ and to "conduct the BBC's operational financial affairs in a manner best designed to ensure value for money."

UK/EU competition law and State aid rules: the complainant made a number of allegations:

- that the BBC had breached Articles 82 and 86 of the EC Treaty and Chapter II prohibition of the Competition Act 1998 "by ignoring the special responsibilities arising both from its dominance and its privileged position as a publicly funded organisation";
- that the BBC's "exclusive agreement" with the FA infringes the Article 81 and/or the Chapter I prohibition of the Competition Act 1998 in that "it

¹ Article 23(d)

- results in foreclosure of the market for radio broadcast of premium sports rights in the UK”;
- that the BBC’s conduct in respect of its valuation of the semi-final and final rights “is equivalent to a refusal to supply”; and
 - that the BBC had breached Article 87 of the Treaty because it “used public funds to outbid a private competitor and prevent it from acquiring any premium content rights.”

The Chairman of the Executive Fair Trading Complaints Panel responded to the complainant on 27 January 2009 and communicated the following findings:

- The BBC’s overall successful bid for the FA Cup and international rights was within the range of likely commercial bids from rivals for the packages offered and that its offer for each of the packages within its original bid was within the range of a likely commercial valuation for each bid.
- The allegations that the BBC breached competition and State Aid rules on the basis that they overpaid for the radio rights are unfounded. The complaint discloses no evidence that the BBC has otherwise breached the Competitive Impact Principle, the Fair Trading Guidelines, the Charter and Agreement, UK/EC competition rules or State aid rules.

The Controller, Fair Trading, notified the Office of Fair Trading (“OFT”), the Office of Communications (“Ofcom”) and the European Commission of the outcome of the investigation. The complainant has reserved its right, in the absence of “a satisfactory resolution”, to make a formal complaint to these bodies.

On 11 February 2009 the complainant wrote to the Chairman of the Complaints Panel expressing its disappointment with the Panel’s response and requesting additional information in order to consider, with its advisers, whether to appeal against the Panel’s decision. The complainant’s request is now being handled as a formal request under the Freedom of Information Act. The Trust has granted an extension to the complainant to its normal timescales for making an appeal, pending the complainant’s receipt of the information requested.

RadioCentre and BBC promotion of artists and third party ticket agents

On 22 December 2008, RadioCentre, the industry body for commercial radio, wrote to BBC Information to complain that the BBC had breached its Editorial and Online Services Guidelines in relation to BBC Radio 1’s promotion of the Coldplay Viva la Vida tour; a breach it considers as “symptomatic of a widespread editorial failing”.

Separately, RadioCentre attached a copy of its editorial complaint to its response to the Fair Trading Guidelines consultation, received by the Controller, Fair Trading on 16 January 2009. Having reviewed the Complaint, the Controller identified the

following elements of the complaint that relate to alleged breaches of the Fair Trading Guidelines:

Use of BBC Brands: RadioCentre alleged that the BBC's promotional material for Coldplay's Viva la Vida Tour is in breach of BBC Guidelines requiring that such activities avoid the perception that the BBC is endorsing the third party's trading activities.

Following an investigation the Chairman of the Fair Trading Complaints Panel wrote to the complainant on 12 March 2009 to communicate the following findings:

- The use of the BBC logo in these types of circumstances is complex, and in some cases, relies on the judgment of the individuals involved. As a result, notwithstanding the processes that exist to ensure decisions are properly informed and individuals are fully trained, there inevitably remains a degree of subjectivity when assessing whether the use of a BBC brand complies with the Fair Trading Guidelines.
- In this case, although the investigation understood the basis on which the decision to use the logo in this particular promotion was taken, it was in the judgment of the Panel likely to lead to the perception of endorsement.
- The Panel believed that the risk of such a perception could have been mitigated by providing context of Radio 1's involvement. As a result the Panel recommended that the guidance in this area should be updated to require some form of context when using the Radio 1 logo, even where the precise details of the transmission are not available.
- In this case, although the Panel accepted that the decision to include the logo was taken in good faith, that there was no intent to imply endorsement; and that the appropriate processes were followed, the Panel believed that on balance the complaint should be upheld.

New complaints since the last Bulletin

IP Vision and Syndication of On-Demand Content

On 13 February 2009, IP Vision wrote to the Controller, Fair Trading to complain about the BBC's withdrawal of support for IP Vision's fully operating implementation of iPlayer.

IP Vision, formed in 2007, has developed and launched a fully integrated television entertainment platform. Its primary product is an HD-ready hybrid set top box platform that operates as a direct to consumer service, or a white label platform offering third parties a fully managed service solution. The complainant alleges that the commercial launch of its next generation Smart Box will be materially

compromised should the BBC continue to withhold the iPlayer functionality and has raised a number of concerns in relation to the BBC's behaviour.

The complainant has indicated that it is considering making representations to the Office of Fair Trading and the Office of Communications.

The complainant raised a number of Fair Trading concerns, which may be broadly summarised as follows:

Competitive Impact Principle: The complainant alleges that by not supporting the launch of IP Vision's service, whilst allegedly preferring other platforms (including, but not limited to Virgin Media, Tiscali TV, BT Vision, Nintendo Wii and Sony PS3), the BBC has materially compromised the complainant's planned commercial launch of its next generation SmartBox.

UK/EU Competition Law: The complainant alleges a possible infringement of:

- o Chapter I of the Competition Act 1998 and/or Article 81 of the EC Treaty in that the BBC has placed restrictions on the complainant's behaviour that could affect competition in the market place; and
- o Chapter II of the Act and/or Article 82 of the EC Treaty, (abuse of dominant position) in that the BBC has applied discriminatory terms and conditions between comparable categories of customers without an objective and proportionate reason.

Public Value Test: The complainant further alleges that the BBC's actions are contrary to the BBC Trust's conclusions in its Public Value Test for on-demand services and to the BBC's Syndication Policy.

The complaint is currently being investigated.

Child's Eye Media and CBEEBIES

On 16 March 2008 the Managing Director, Child's Eye Media, wrote to the Controller, Fair Trading to raise concerns about the CBEEBIES' recently commissioned series 'Let's Celebrate.' The complainant alleges that if the commission goes ahead, it will cause "irreparable damage" to the complainant's own digital venture and its existing business. The complainant has asked the Controller to investigate the following Fair Trading concerns:

Competitive Impact: The complainant alleges that the commission of the Let's Celebrate series will have a negative competitive impact on its business and may prevent it from competing in the marketplace or having to exit the marketplace.

The complaint is currently being investigated.