

BBC Executive Fair Trading Bulletin February 2008 – April 2008

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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:

http://www.bbc.co.uk/info/policies/fairtrading_complaints/.

Where complainants are dissatisfied with 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 4 February 2008 and 6 April 2008, including complaints that have been made directly to the BBC, to the Office of Fair Trading (OFT), to Ofcom and to the European Commission.

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.

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

The following complaint, now the subject of appeal to the Competition Appeal Tribunal, as reported in previous bulletins, continues:

- Complaint about Red Bee Media's contracts to supply media access services to Channel 4 and the BBC.

It has been reported in previous bulletins that IMS (a supplier of media access services) had submitted a formal complaint to Ofcom relating to an agreement for Red Bee to provide media access services to Channel 4.

Media access services are services, including subtitling, audio-description and signing, designed to meet the needs of individuals who are deaf or hard of hearing or blind or partially sighted. IMS had alleged that the agreement between Red Bee and Channel 4 was in breach of competition law. In July 2005 Ofcom opened a formal investigation into these allegations.

In December 2005 Ofcom added to the scope of its investigation the consideration of whether Red Bee's media access services contract with the BBC also infringed competition law.

On 30 May 2007, Ofcom published its findings. It concluded that:

- The Channel 4 contract does not appreciably restrict competition and there are therefore no grounds for action.
- In respect of the BBC contract, in light of a change to the duration of the contract, and in light of other priorities, no further resources were to be committed to this issue and the case was closed.

The allegations by IMS were therefore not upheld.

On 13 July 2007, the Competition Appeals Tribunal (CAT) gave notice of an appeal by IMS against Ofcom's decision. IMS challenged both Ofcom's non-infringement decision in relation to the Channel 4 contract (and its finding that Red Bee is not dominant in the relevant market) and the case closure in respect of the BBC contract.

IMS argued: *"Ofcom has committed errors of assessment in the application of the Chapter I and Chapter II prohibitions and Articles 81 and 82 of the EC Treaty in respect of BBC Broadcast's [Red Bee] contracts with channel 4 and the BBC respectively."*

The BBC and Red Bee both made applications to intervene in the appeal process and these were granted by the CAT.

The CAT was asked to consider, as a preliminary issue, whether Ofcom's decision to close the case in respect of the BBC contract was an appealable decision under the Competition Act. On 31 October 2007 the CAT concluded that the case closure decision by Ofcom in relation to the BBC contract was not an appealable decision.

The CAT is considering the remaining aspects of IMS's appeal, with the next hearing due to take place in April 2008.

Fair Trading Complaints to the BBC

The BBC has received two new complaints during this period and four have been carried forward from the previous period. Of the four complaints which were reported in the previous bulletin, three have since been the subject of

adjudication by the Executive Fair Trading Complaints Panel. The remaining investigations are continuing.

Update on previously reported complaints

Zattoo and content syndication

On 20 December 2007, Zattoo Europe Ltd, which operates a broadband television network in Europe, wrote to the Controller, Fair Trading. Zattoo enters into carriage agreements with broadcasters and other copyright owners and re-transmits linear television programmes to a closed user group.

The complainant alleged that the BBC's refusal to continue its negotiations with Zattoo for the syndication of BBC content to the Zattoo TV service directly contravened the regulatory framework governing the BBC, including the fulfillment of its Public Purposes arising from the Charter and its duties in respect of Fair Trading, competitive impact and third party syndications. In particular the complainant alleged that:

1. The BBC's actions would have an adverse effect on the establishment of an independent distribution service in the market since it restricted its ability to "bring a wider and more creative offering to consumers as quickly as we otherwise could via a new growing distribution platform in UK..."
2. The BBC actions may constitute a breach of competition law.
3. The BBC was acting contrary to (i) the BBC Trust's conclusions in the Public Value Test for on demand services and (ii) the BBC's published Syndication Policy Guidelines.

The Chairman of the Fair Trading Complaints Panel responded to the complainant on 22 February 2008 informing it that the complaint had not been upheld. The response to the complainant communicated the following findings:

- The BBC's decision not to syndicate content to Zattoo is objectively justifiable and its actions are consistent with the requirements of the On-Demand Syndication Guidelines and therefore the requirements of the Competitive Impact Principle.
- There has been no breach of the BBC Trust's conclusions in the Public Value Test for on-demand services, the BBC Trust's Syndication Policy or the BBC Executive's On-demand Syndication Guidelines.
- There has been no breach of the BBC's Royal Charter, its Agreement with the DCMS, UK/EC Competition Law or the BBC's Fair Trading Guidelines.

RadioCentre and the BBC's sponsorship activities

On 10 December 2007, RadioCentre, the trade body representing commercial radio companies in the UK, wrote to the BBC Trust regarding the BBC's sponsorship activities. The complainant made a number of editorial, legal and Fair Trading points. The Fair Trading allegations can be summarised as follows:

1. **Competitive impact:** the complainant alleged that by seeking sponsorship for live BBC Public Service events (e.g. Sports Personality of the Year) and offering contractual credits around BBC programming, the BBC reduced the ability of commercial operators to secure sponsorship, which is a principal source of their revenues.
2. **Appropriate commercial activities:** the complainant suggested that the BBC Public Service's sponsorship activities are 'Commercial Services' as defined by the BBC Agreement and not 'Commercial Trading Activities'. The BBC's Commercial Services must be provided through its commercial subsidiaries; Commercial Trading Activities may be provided through the BBC's Public Services.

It should be noted that the non-Fair Trading issues were handled separately in correspondence with the Director-General's office. In respect of the Fair Trading aspects of the complaint, the Chairman of the Fair Trading Complaints Panel responded to the complainant on 21 February 2008 informing it that the complaint had not been upheld. The response to the complainant communicated the following findings:

- The BBC Public Service's sponsorship activities are 'Commercial Trading Activities' as defined by the BBC Agreement and may therefore be undertaken directly through the BBC's Public Services.
- The principle of supporting some BBC activities, including BBC events, through sponsorship is established within the Fair Trading Guidelines.
- The current level of the BBC's sponsorship activities is unlikely to have a negative competitive impact on commercial operators.
- There has been no breach of the BBC's Royal Charter, its Agreement with the DCMS, UK/EC Competition Law or the BBC's Fair Trading Guidelines.

RadioCentre has since appealed to the Trust.

Shoot Limited and the BBC Gardening website

On 4 January 2008, Shoot Limited, owner of a gardening website, Shootgardening.co.uk, wrote to the BBC Gardening Website Editor, copied to the Controller, Fair Trading.

Shoot alleged that the BBC's interactive Gardeners' Calendar, launched in March 2007, directly copied its main subscription-based service, launched the

previous year and press-released to the BBC Gardening Website Editor. The complainant suggested that the BBC's actions were in breach of the BBC's Competitive Impact Principle (CIP) since, inter alia, they were restricting the complainant's ability to develop its own website which was unable to compete with the "vast resources of the BBC".

The Chairman of the Fair Trading Complaints Panel responded to the complainant on 21 February 2008 informing it that the complaint had not been upheld. The response to the complainant communicated the following findings:

- There is no evidence that the BBC deliberately replicated the main services provided by the Shoot website to launch a directly competing service.
- The BBC's actions are not in breach of the CIP.
- There are no grounds under the Fair Trading Guidelines for the BBC to be required to cease to provide the interactive calendar.
- There has been no breach of the BBC's Royal Charter, its Agreement with the DCMS, UK/EC Competition Law or the BBC's Fair Trading Guidelines.

The complainant has subsequently written to the BBC seeking disclosure of further information in relation to the investigation.

The BBC's operational relationships with its commercial subsidiaries

As reported previously, a formal complaint made jointly by three separate companies from the same group – AOL UK, IPC Media Ltd and Turner Broadcasting Systems – regarding the BBC's operational relationships with its commercial subsidiaries, was sent to the Controller, Fair Trading on 7 January 2008. The complainants allege that:

1. The BBC has the incentive and ability to engage in discriminatory behaviour in favour of BBC Worldwide vis-a-vis third parties;
2. The arrangements create sufficient conditions for BBC Worldwide to acquire publicly funded assets at less than fair market value and hence receive a subsidy from the BBC;
3. The BBC is willing to forgo revenues, thereby risking overcompensation;
4. Difficulties in the detection of non-price discrimination undermine the effectiveness of ex-ante prohibitions and traditional ex-post tools;
5. The arrangements deny licence fee payers the benefits of a competitive sales process for assets created using their investments; and
6. The BBC should abandon the current arrangements and move to full functional separation.

The complainants also refer to current regulatory policy that they argue support their view that the BBC's current arrangements are deficient.

The complaint raises a number of significant issues and, in order to ensure a full and rigorous investigation, the standard timetable for investigating complaints has been extended in this case and the matter remains under investigation.

New complaints since last bulletin

Open Source Consortium and BBC iPlayer

On 18 January 2008 the Open Source Consortium (“OSC”) wrote to the BBC Trust with regard to the BBC iPlayer. The complainant makes the following Fair Trading allegations:

1. **Competitive impact:** the complainant alleges that the BBC’s failure to adopt technology neutral platforms and the advantage it has given to Microsoft has distorted the market for computer operating systems.
2. **UK/EU competition law:** the complainant alleges a multiplicity of behaviours indicating potential anti-competitive behaviour.
3. **State Aid:** the complainant alleges that in promoting the iPlayer the BBC has passively promoted Microsoft in a manner that constitutes product placement, which it alleges is a breach of State Aid rules.

The Controller, Fair Trading, acting as Case Officer, is investigating the complaint and will present a report of his investigation to the Fair Trading Complaints Panel for its adjudication.

ITV plc and the BBC’s public service sponsorship activities

On 12 February 2008 ITV’s Managing Director, Brand and Commercial, wrote to the Controller, Fair Trading, with regard to the BBC’s public service sponsorship activities. The complainant makes the following Fair Trading allegations:

1. **Commercial trading activities:** the complainant alleges that “the BBC framework governing the Commercial Trading Activities does not appear to contain any meaningful guidance as to how activities such as sponsorship should be properly conducted and whether they are lawful”.
2. **Competitive impact:** the complainant alleges that the “burgeoning incidence of commercial sponsorship at well below market rate seriously risks distorting competition”.
3. **State Aid:** the complainant alleges that the “current arrangements for Commercial Trading Activity result in the granting of State Aid to the BBC’s commercial sponsors or at best that the BBC has no way of showing that no aid has been granted”.

The Controller, Fair Trading, acting as Case Officer, is investigating the complaint and will present a report of his investigation to the Fair Trading Complaints Panel for its adjudication.

Mr A Press and BBC iPlayer

On 18 March 2008, the Controller, Fair Trading, received a complaint from a Mr A Press in relation to the BBC iPlayer, specifically the HTTP MP4 streaming service. The complainant makes the following Fair Trading allegations:

1. Competitive impact: the complainant alleges that by using technical methods to block access to iPlayer through any device other than an Apple iPhone, the BBC is treating different organisations differently in otherwise comparable situations.
2. State Aid: the complainant alleges that the BBC's actions may constitute illegal State Aid under European law (but is seeking further advice before pursuing any action in this regard).

The Controller, Fair Trading, acting as Case Officer, is investigating the complaint and will present a report of his investigation to the Fair Trading Complaints Panel for its adjudication.