

BBC Executive Fair Trading Bulletin

July to October 2009 inc.

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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 July to October 2009 inc. 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 one new complaint from ITN. Five complaints have been carried forward from the previous period:

- The Fair Trading complaint from Time Out has been the subject of adjudication by the Executive Fair Trading Complaints Panel.
- UTV Radio (GB) Limited, and RadioCentre have lodged formal appeals with the BBC Trust.
- IP Vision has lodged a formal appeal with the Trust.
- Child's Eye Media requested further information in relation to clarifying the application of recommendations made as part of the investigation of their complaint.

Updates on previously reported complaints

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

As reported previously, following consideration of the Fair Trading allegations raised by the Director of UTV Radio (GB) Ltd in relation to the BBC's tender for the Football Association UK National Network Radio Rights, the Fair Trading Complaints Panel concluded that the complaint should not be upheld.

The complainant wrote to the Controller, Fair Trading on 8 April 2009 to request full disclosure of the report, further information pertaining to the bid, and details pertaining to the figure quoted in relation to the cost of a sub-licence. The request was subsequently handled as a formal Freedom of Information request. The BBC responded on 11 May 2009 to advise that the request fell outwith the scope of the Act. The complainant has subsequently submitted an appeal to the Trust.

RadioCentre

BBC promotion of artists and third party ticket agents

As previously advised, following the investigation of a complaint from RadioCentre regarding the use of the Radio1 logo in promotional material for Coldplay's *Viva la Vida* tour, 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. 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 understands the basis on which the decision to use the logo in this particular promotion was taken, it is in the judgment of the Panel likely to lead to the perception of endorsement.
- The Panel believes that the risk of such a perception could have been mitigated (even in the absence of certainty about Radio 1's exact involvement) by providing further context. As a result the Panel recommends 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 accepts 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 believes that on balance the complaint should be upheld.

RadioCentre has subsequently lodged an appeal with the BBC Trust on the grounds that it is dissatisfied with the remedies applied. In its appeal, RadioCentre has asked the Trust to take into account its concerns, not raised in its original complaint, about the competitive impact of Radio 1's decision to promote the Coldplay Viva la Vida tour and to secure exclusive broadcast rights.

U2=BBC

On 7 May 2009 the Chief Executive, RadioCentre wrote to the Controller, Fair Trading to complain that the recent U2=BBC feature, which ran across a number of the BBC's television and radio services and on bbc.co.uk constitutes a breach of the Fair Trading Guidelines on the use of BBC brand and the BBC's Competitive Impact Principle.

Separately, RadioCentre submitted an editorial complaint regarding the BBC's promotion of the launch of the new U2 album, alleging undue prominence, endorsement of a commercial product and inappropriate use of the BBC brand. This is being handled separately under the Editorial complaints process.

The Trust has agreed with RadioCentre that the Controller, Fair Trading should extend his investigation to include consideration of RadioCentre's concerns regarding the competitive impact of the BBC's promotion of the Coldplay tour. The Trust has deferred consideration of RadioCentre's appeal, pending the outcome of the current investigation.

Following a request by RadioCentre, a meeting was held on 22 June 2009 between the Chief Executive, RadioCentre, the Group Executive Director and Director of Broadcasting, Global Radio, the Chairman of the Executive Fair Trading Complaints Committee and Controller, Fair Trading to provide context to the concerns raised.

Following the meeting, RadioCentre wrote to the Controller, Fair Trading to confirm its intention to submit an updated complaint including a consolidated paper drawing together all of RadioCentre's concerns regarding breaches of the Competitive Impact Principle and guidelines on use of BBC brands by the BBC's network radio services. Pending the submission of that paper, RadioCentre has confirmed it is content for the deadline for the completion of the investigation to be extended.

RadioCentre has now provided additional information and the formal investigation is being progressed.

IP Vision and Syndication of On-Demand Content

IP Vision wrote to the Controller, Fair Trading to complain about the BBC's withdrawal of support for IP Vision's implementation of iPlayer. The complainant raised a number of Fair Trading concerns, including potential breach of the Competitive Impact Principle, UK/EU Competition Law and the BBC's Syndication Policy.

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 that operates as a direct to consumer service, or a white label platform offering third parties a fully managed service solution. The complainant alleged that the commercial launch of its next generation Smartbox would be materially compromised should the BBC continue to withhold the iPlayer functionality and raised a number of concerns in relation to the BBC's behaviour.

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

Following an investigation, the Fair Trading Complaints Panel concluded that:

- The BBC had complied with its Syndication Policy and Syndication Guidelines.
- There had been no breach of the Fair Trading Guidelines, the Charter or Agreement.
- There had been no breach of UK/EU competition law.

The Panel made a number of recommendations intended to improve the BBC's approach in relation to third party requests for access to iPlayer:

- The Director, FM&T was asked to ensure that the BBC maintains a clear, agreed approach on its on-demand syndication strategy as technology develops and that this is communicated clearly to potential partners. An up to date strategy should always be available on request.

- The BBC should establish a single body with responsibility for ensuring a common and consistent approach across the BBC in relation to on-demand syndication, including appropriate training for relevant staff. Its remit should extend to all platforms, prioritisation, delivery and partnering. The body should be chaired by a BBC Executive with sufficient seniority to ensure BBC strategy is implemented in line with relevant policies and guidance.
- This body should be tasked with developing and implementing a robust process for considering 3rd party requests for access to BBC iPlayer, with input from the Fair Trading department, including adequate documentation to support decisions in relation to such requests.
- The BBC should ensure that it continues to maintain open channels of communication with the complainant in relation to its plans for the iPlayer trial and the launch of its HTML/Java version of the iPlayer interface and ensure that the complainant is treated fairly.
- The Director, FM&T should be asked to report to the next EFTC meeting of 6 July with an update on progress against the actions outlined above.

The Chairman of the Fair Trading Complaints Panel wrote to the complainant on 15 May 2009 to communicate the Panel's findings.

IP Vision has since appealed the decision to the BBC Trust which is investigating.

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 alleged that the BBC's commission of the series would have a negative competitive impact on its business and might prevent it from competing in the marketplace or result in it having to exit the marketplace.

Following an investigation of the complaint, the Chairman of the Fair Trading Complaints Panel wrote to the complainant on 28 May 2009 stating that, inter alia, the CBeebies series fulfils the CBeebies' specific public purposes objectives, does not impact negatively on competition as a whole, and provides value for money to licence fee payers. The Panel therefore concluded that the CIP has not been breached. However, in order to endeavour to minimise any potential negative impact, the Panel required CBeebies to comply with the following recommendations:

- Following transmission of the 'Let's Celebrate' series in 2010, CBeebies should not exploit the series commercially, either through DVDs, magazine sales, or other means.
- An assessment of the potential competitive impact of any material that CBeebies wishes to publish on-line to support the 'Let's Celebrate' series

should be undertaken to ensure it complies with relevant Fair Trading obligations.

- CBeebies should consider the appropriateness of including links from the 'Lets Celebrate' material to other external websites containing additional sources of information, source material or informed relevant material, provided those links are editorially justified and are non-discriminatory.

The complainant responded to the Chairman of the Fair Trading Complaints Panel on 12 June 2009 to seek further clarification in relation to the application of those recommendations. The Chairman of the Panel responded on 13 July 2009:

- Confirming that CBeebies would not release any DVDs commercially in the UK to accompany the series;
- Inviting Child's Eye Media to submit any relevant information to support the competitive impact assessment of 'Let's Celebrate' material on the CBeebies website;
- Explaining in more detail the process by which the BBC considers requests for links from bbc.co.uk to external websites.

Time Out Guides and Lonely Planet

On 13 May, 2009 the Managing Director, Time Out Guides, wrote to the Controller, Fair Trading regarding its concerns about the purchase by BBC Worldwide of Lonely Planet and the detrimental impact this has had on travel guide publishers. In its letter of 23 February 2009 and the accompanying e-mail to the Chief Strategy and Policy Adviser to the BBC Trust, the complainant raised a number of allegations regarding BBC Worldwide's acquisition of Lonely Planet, which may be broadly summarised as follows:

- That the acquisition by BBC Worldwide of Lonely Planet breached the 4 Commercial Criteria and distorted the market.
- That the activities of BBC Worldwide post acquisition, including the launch of the Lonely Planet magazine, the re-launch of the Lonely Planet website, and the sponsorship of the new travel channel, Eden TV are currently distorting the market.
- That the DCMS Committee's decision not to enforce a sale of Lonely Planet and therefore BBC Worldwide's continued ownership of it, is continuing to adversely affect the ability of Lonely Planet's competitors to compete. The implication being that BBC Worldwide should be required to divest itself of Lonely Planet

The complainant refers to its submission to the House of Commons DCMS Committee and the Committee's conclusions that were critical of *the acquisition of*

the Lonely Planet brand, its exploitation through the recent launch of the Lonely Planet magazine and the market-distorting effects of those initiative.'

The complainant wrote separately to the Chairman to request a meeting, which the Trust has declined at this point, pending the outcome of the Fair Trading investigation.

Following an investigation, the Chairman of the Fair Trading Complaints Panel wrote to Time Out on 3 August 2009 to communicate the following findings:

- Based on the documentation reviewed and evidence provided, the allegation that the acquisition of Lonely Planet and its subsequent activities have breached the 4 Commercial Criteria and distorted the market is not proven. The launch of the Lonely Planet magazine and the re-launch of the lonelyplanet.com website have been reviewed by the Trust in BBC Worldwide's annual 4 Commercial Criteria Compliance Report 2008/09, in which BBC Worldwide demonstrates that it has made good progress against the objectives set for it by the Trust when it granted its approval of the acquisition in September 2007.
- As the Lonely Planet sponsorship of Eden TV is a purely commercial transaction between two of BBC Worldwide's businesses, the issue of unfair commercial advantage does not arise and therefore the allegation of market distortion is unfounded.
- The acquisition of Lonely Planet, the launch of the Lonely Planet magazine and the re-launch of the lonely planet.com website raise no issues in relation to UK/EU competition laws or State aid rules.
- The DCMS Committee, although critical of the acquisition, did not recommend a forced sale of the Lonely Planet business, given that this might lead to a substantial loss to BBC Worldwide and hence to the licence fee payer. The complainant's specific implication that BBC Worldwide should be required to divest itself of Lonely Planet falls outwith the Fair Trading complaints investigation process. However the 4 Commercial Criteria, which are reviewed by the Trust, require that any commercial activity must exhibit commercial efficiency.

and that in summary, the Panel had concluded that:

- The acquisition of Lonely Planet by BBC Worldwide and its subsequent activities are in accordance with the BBC Trust's approval of its 5 year plan and framework for future merger and acquisition activity.
- There has been no breach of the BBC's Royal Charter, its Agreement with the DCMS, or the BBC's Fair Trading Guidelines.
- There has been no breach of UK/EU competition laws or State aid rules.

New Complaints since last Bulletin

ITN and News A/V Syndication

On 31 July 2009 the CEO of ITN wrote to the Chairman of the Trust to raise its concerns about the BBC's plans for sharing online video news content with UK newspaper websites. Broadly the complainant alleges that the BBC's initiative will have a negative competitive impact on the business-to-business market for video news content and that it represents a breach of the Fair Trading Guidelines, the BBC On-demand Syndication Guidelines, UK/EU Competition law and State aid rules. The complainant further alleges that the BBC Trust failed to undertake sufficient examination of the market impact of the proposals to provide news content to local newspapers free of charge. This aspect of the complaint is being considered by the Trust directly.

The Head of Strategy, BBC Trust Unit replied to the complainant on 7 August 2009 to advise that the complaint should be investigated in the first instance under the BBC Fair Trading complaints procedures. On 10 August 2009 the Controller, Fair Trading wrote to the complainant to formally acknowledge that a Fair Trading investigation would be undertaken.

Following an investigation, the Chairman of the Complaints Panel wrote to ITN on 21 September 2009 to advise that the complaint had not been upheld and to communicate the following findings:

- There is no evidence to suggest that the BBC initiative to share on-line video content with third party websites will have a significant negative impact on the commercial providers of online content to news related websites. The CIP analysis undertaken demonstrates that the content syndicated by the BBC is complementary to, rather than a substitute for, that provided by commercial providers, including the complainant. This is further demonstrated by an analysis of usage of the content following launch in July 2009.
- In accordance with the Trust's requirements in relation to the syndication of content, there has been due diligence on the part of the Executive to ensure that the online sharing of A/V content initiative satisfies the Trust's requirements with regard to syndication such that it is provided on a fair, reasonable and non-discriminatory basis. In addition, the BBC Executive has put in place measures to ensure it minimises the negative competitive impact on the wider market.
- In relation to plurality, the BBC has publicly stated its position that in relation to regional news it will "stop short of reducing plurality," with safeguards in place to mitigate such a risk.

- Independent legal advice has confirmed that the news content sharing initiative is compliant with both UK/EU competition law and State aid rules.