

BBC Executive Fair Trading Bulletin

September 2008 to November 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 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 September 2008 and November 2008 including complaints that have been made directly to the BBC, to the Office of Fair Trading (OFT), and to Ofcom.

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

BBC Broadcast (now Red Bee Media) Media Access Services contracts with 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 in 2005 relating to contracts for Red Bee to provide media access services to the BBC and Channel 4, alleging that the agreements were in breach of competition law.

On 30 May 2007, Ofcom published its findings, rejecting IMS' complaints in their entirety. IMS subsequently appealed to the Competition Appeals Tribunal (CAT) against Ofcom's decision. On 31 October 2007 the CAT concluded that Ofcom's case closure decision in relation to the BBC contract did not fall under its jurisdiction for the purposes of the appeal. It subsequently decided on 20 May 2008, that IMS' appeal in relation to the Channel 4 contract should be dismissed. On 18 June 2008 IMS wrote to the CAT seeking leave to appeal against its decision. The CAT dismissed the appeal. IMS' has now appealed directly to the Court of Appeal. A decision is pending.

Lonely Planet

On 13 May 2008 the Chairman of the Time Out Group wrote to the Office of Fair Trading in relation to the acquisition by BBC Worldwide of a controlling interest in Lonely Planet. The letter was copied to the BBC's Executive Board, the Trust and the Controller, Fair Trading. The complainant alleged that in acquiring a controlling interest in Lonely Planet (and based on the assumption that the acquisition had received formal approval):

- The BBC Trust had failed to have regard to the competitive impact of the BBC's activities on the wider market;
- The BBC Trust and the BBC Executive Board failed to abide by the BBC's Trading Guidelines or abide by its commitment to Fair Trading; and
- The BBC Trust and BBC Executive Board have disregarded Competition Law by permitting state resources to favour Lonely Planet and its travel publications.

The complainant further alleges that the BBC Trust, BBC Executive and BBC Worldwide have failed to disclose material to demonstrate what was available to and/or considered by the Trust prior to and in the course of approving the purchase of Lonely Planet. The complainant requested that the Office of Fair Trading should undertake a review of the transaction and its effect upon the travel guides and website markets.

Separately, and in addition to the complaint received from Wanderlust Publications outlined below, the OFT also received a complaint from Create Publishing, dated 26 August 2008, which was copied to the CEO of BBC Worldwide for information. Create Publishing alleges that the launch of the Lonely Planet magazine does not fit with the BBC's Public Purposes, is anti-competitive and is a distortion of the market.

At the time of writing the Executive has received no direct communication from the TimeOut Group or Create Publishing.

Fair Trading complaints to the BBC

During this period the BBC has received two new complaints and one complaint has been carried forward from the previous period. In addition, the BBC Trust has published its Findings and Conclusions regarding the Fair Trading Appeals by ITV, RadioCentre and Shoot.

Updates on previously reported complaints

RadioCentre/ITV and the BBC's sponsorship activities

Following the Executive Complaint Panel's consideration of the Fair Trading aspects of these complaints, ITV appealed to the Trust on 14 May 2008 and RadioCentre appealed against both the editorial and Fair Trading issues in a combined letter dated 16 June 2008.

The Trust's Public Value and Fair Trading Committee ("PVFTC") considered the Radio Centre and ITV appeals. PVFTC noted that the BBC's sponsorship activity constitutes a Non-Commercial Trading Activity and hence the CIP is applicable. This finding was contrary to the position taken by the Executive in handling the original complaints. PVFTC stated that the Fair Trading Guidelines should be updated to confirm that the CIP applies to all sponsorship activities.

However PVFTC agreed with the Complaints Panel's view that 'there was no breach of the fair trading guidelines or the CIP'.

The PVFTC also noted that the complaints handling and complaints procedures in this case raised issues that required investigation and review to provide a more rigorous and effective approach to complaints handling in the future.

The editorial aspects of the respective appeals were considered separately by the Editorial Standards Committee ("ESC"). These appeals were upheld in part. Full details of these appeal findings are available on request or can be viewed at bbc.co.uk/bbctrust/appeals/editorial_appeal_findings.html.

Shoot Limited and the BBC Gardening website

As previously reported, the Fair Trading Complaints Panel did not uphold a Fair Trading complaint made by Shoot Limited on 4 January 2008. Shoot alleged that the

BBC's Interactive Gardeners Calendar directly copied its main subscription based service and the BBC's actions were in breach of the Competitive Impact Principle.

On 21 April 2008 the complainant appealed to the BBC Trust against the Panel's decision citing the following grounds:

- The BBC is offering a service which is available in the private sector and has conducted an inadequate Public Purposes assessment.
- The service has been given an unfair advantage in contravention of the Competitive Impact Principle.
- There is clear evidence that BBC personnel involved in the creation of the service made efforts to fully inform themselves of the features of the Shoot private sector offering, to model their service on this, and have continued to do so.

The Trust concluded that there were no elements of the appeal that should be upheld. In relation to the specific allegations made it found that:

- The BBC's gardening website and, in particular, the gardeners' calendar function, sits within the bbc.co.uk service licence and is consistent with the Public Purposes of that service.
- The BBC Executive's approach to the launch of the gardeners' calendar service minimised its competitive impact and that there was no evidence to support the allegation that the BBC intended to cause a chilling effect on Shoot's business.
- There is no evidence of the BBC intending to directly compete with other services in the marketplace and the promotion of the BBC's gardeners' calendar function on bbc.co.uk has not been given an unfair advantage in contravention of the Competitive Impact Principle.
- The BBC gardeners' calendar was conceived and developed independently of Shoot's calendar.
- The BBC had due regard to the distinctiveness of its gardening website, in particular its gardener's calendar function, before launching this function on bbc.co.uk. There is sufficient distinctiveness between the BBC's service and Shoot's service and the BBC is not providing a service that is already in the private sector.
- There was no prima facie evidence that the BBC's planned enhancements to the site would in future inhibit Shoot's ability to innovate and provide products and services to its consumers.

Although no sanctions were appropriate in this case, the Trust nevertheless required a number of actions to be implemented by the BBC management to improve its record keeping and handling of Fair Trading complaints. These included the need to

maintain clear records of Public Purposes, Competitive Impact Principle and distinctiveness when developing and launching new functionality on bbc.co.uk.

British Sky Broadcasting (“BSkyB”) and BBC promotions for BBC HD and BBC/ITV freesat

As reported previously, the complainant initially wrote to the Chairman to express its concerns regarding the launch of the BBC/ITV ‘freesat’ proposition. A formal Fair Trading complaint was made to the Controller, Fair Trading on 6 June 2008.

The Controller, Fair Trading investigated the complaint and identified the following Fair Trading allegations:

- The BBC HD promotions mislead viewers into thinking that it would not be possible to receive the BBC HD service from a supplier other than BBC/ITV freesat (e.g. Sky), without paying a subscription.
- The promotions breach the Competitive Impact Principle and the Competitive Impact Code on Cross and Digital TV promotion, specifically the requirement that BBC promotions “must treat digital retail television services and/or digital platforms equally in respect of all aspects mentioned, such as pricing, brand names, availability and packages.”
- Misleading statements were made at the launch of BBC/ITV freesat demonstrating a failure by the BBC Executive to exercise sufficient control over BBC/ITV freesat, in which the BBC is a significant shareholder, in order to ensure that the BBC’s public services are not undermined. This constitutes a breach of the Competitive Impact Principle.

The Chairman of the Executive Fair Trading Complaints Panel responded to the complainant on 21 July 2008 to advise that the complaint had been partially upheld. The response to the complainant communicated the following findings:

- In relation to the specific sentence used in the BBC HD infomercial, which distinguishes between subscription and non-subscription services, and insofar as this distinction was repeated within the supporting consumer information and implies that BBC HD was available free of charge only and for the first time from BBC/ITV freesat, the statements were not complete. This did not comply with one aspect of the Code on Cross and Digital Promotion.
- There has been a breach of the Competitive Impact Code on Cross and Digital Promotion and the Competitive Impact Principle.
- In relation to the allegations made regarding the BBC/ITV freesat launch, the investigation found no evidence of any “campaign by the BBC Executive, including the Director-General, to mislead consumers as to the apparent advantages of the BBC/ITV freesat.”

- There has been no breach of the BBC's Royal Charter, its Agreement with the DCMS or UK/EC Competition Law.

BBC Worldwide's refusal to deal

On 4 June 2008, the Controller, Fair Trading received a complaint regarding BBC Worldwide's alleged refusal to deal with a broadcaster, the details of which the complainant has requested should be kept confidential. The complainant alleged that the refusal to deal constituted an infringement of Article 81(1) EC competition law. As the issues raised by the complainant related to enquiries being undertaken by a regulatory authority the Controller, Fair Trading declined to investigate the complainant's allegations at that time. The Controller considered that an investigation would run the risk of prejudicing the BBC's ability to claim privilege in relation to those findings.

The Controller, Fair Trading wrote to the complainant on 24 June to advise of the BBC's Executive's position. The complainant responded on 11 July querying the basis on which the BBC had declined to investigate its complaint. The Controller wrote again on 17 July 2008, providing further explanation and reiterating the BBC's concerns that to undertake a full review of the Fair Trading complaint at this time could jeopardise its right to claim privilege against self-incrimination and would be contrary to principles of procedural fairness.

The Complainant appealed to the Trust on 31 July 2008. The PVFTC did not uphold the appeal and agreed with the BBC's decision to defer investigation. The Committee clarified that the BBC should pursue the investigation of the fair trading complaint subject to the resolution of the regulatory authority's investigation.

New complaints since the last Bulletin

Wanderlust and BBC Worldwide's acquisition of Lonely Planet/planned launch of Lonely Planet-branded magazine

On 18 September 2008, Wanderlust Publications Ltd., an independent publishing company, wrote to the Controller, Fair Trading concerning BBC Worldwide's acquisition of a major shareholding in Lonely Planet and the planned launch of a Lonely Planet branded magazine. The complainant included a copy of a letter to the Office of Fair Trading ("OFT"), requesting that it should undertake its own investigation of this complaint.

The complainant makes a number of allegations, which may be broadly summarised as follows:

- that the launch of the Lonely Planet magazine does not fit within the requirement that the BBC may only engage in commercial activities that are in support of BBC programming;

- that to create a programming/magazine link, the BBC would have to launch Lonely Planet or other adventure travel programmes, which would entail employing public funds in support of a commercial activity; and
- that the launch of the magazine will distort the market and give the BBC an unfair advantage over other magazine publishers.

The third allegation raises potential issues of compliance by the BBC with the Competition Act and falls within the remit of the OFT's investigation. The complainant was advised that pending the outcome of the OFT's decision as to what action, if any, it proposes to take, this aspect of the complaint would not be investigated by the BBC Executive.