

Findings and Conclusions of the BBC Trust Finance and Compliance Committee

Fair Trading Appeal Investigation:

Appeal regarding the BBC's acquisition of the radio
broadcasting rights to the FA Cup for the period 2008/9 to
2011/12.

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A The Appeal

The Appellant, talkSPORT, is a commercial radio station owned by UTV Radio (GB) Limited, a wholly owned subsidiary of UTV Media plc. talkSPORT is one of the UK's three terrestrial analogue Independent National Radio broadcasters. It offers a commercial sports and talk radio service to the United Kingdom. Its content includes audience discussions and live sports commentary.

talkSPORT submitted a Fair Trading complaint to the BBC Executive on 3 December 2008. That complaint alleged that the BBC's actions in bidding for and acquiring the radio broadcast rights to the FA Cup matches (including rights to Senior England internationals) for the period 2008/9 to 2011/12 had breached:

- the Fair Trading Policy, specifically (i) the duty on the BBC to endeavour to minimise its negative competitive impacts on the wider market when carrying out its Public Service Activities, and (ii) the duty on the BBC to abide by competition law, including state aid law; and
- the Charter obligation upon the Executive to conduct the BBC's operational financial affairs in a manner best designed to ensure value for money for licence fee payers; and
- the Charter obligation upon the Trust to exercise rigorous stewardship of public money.

The BBC Executive Fair Trading Committee ("EFTC") dismissed all elements of these claims in its findings of 20 January 2009.

talkSPORT submitted an appeal to the Trust on 15 May 2009 against the EFTC's findings. This appeal request was outside the Trust's standard 20 day limit but an extension had been agreed to this period by the Trust to allow talkSPORT to wait for a Freedom of Information request to be processed by the BBC so that it had the required information to make an informed appeal. The Trust Unit met with the appellant on 11 June 2009 and requested further information to allow the Trust Unit to investigate the issues raised. This further information was received from talkSPORT on 12 June 2009 and 3 July 2009. The Trust Unit met talkSPORT again on 6 July 2009 to discuss the appeal. Following the Trust Unit's investigations talkSPORT was invited to submit any final comments on 16 September 2009.

B. Summary of the Finance and Compliance Committee's findings

The Committee considered this appeal on 30 September 2009. Having duly considered the appeal the Committee decided to partially uphold the appeal.

In summary, the decisions of the Committee are as follows:

- a) The Committee believes that in relation to this specific appeal there is no evidence that the Trust has failed to exercise rigorous stewardship of public money (as required by Article 23(d) of the Charter).
- b) The Committee is partially upholding the allegation that the BBC has not conducted its operational financial affairs in a manner designed to ensure value

for money. The Committee believes that there is insufficient evidence to support a determination that the successful bid made by the BBC was unreasonable in terms of value. However, in relation to that bid, the Committee believes that the BBC did not conduct its internal process for ensuring that the BBC's operational financial affairs were conducted in a manner best designed to ensure value for money, with the rigour which the Committee would expect for a bid of this nature. Accordingly, on that basis, the Committee considers that there has been a breach of Article 38 (1) (h) of the Charter.

- c) The Committee also noted that neither delivering the BBC's Public Purposes nor the achievement of value for money for the BBC necessarily require the securing of exclusive sports rights.
- d) The Committee believes that the BBC Executive failed to conduct a proper competitive impact assessment in relation to the acquisition of the FA Cup rights by the BBC and that such failure by the BBC Executive amounted to a breach of the Executive's duty to endeavour to minimise the BBC's negative competitive impacts on the wider market when carrying out its Public Service Activities, and accordingly the Committee upholds this part of the appeal.
- e) The Committee believes there is insufficient evidence to support a determination that the BBC has breached competition or state aid law and accordingly rejects this part of the appeal.
- f) The Committee believes that the handling of this complaint by the Executive could have been undertaken with more rigour. Rather than focusing on the issue of whether the BBC paid more for the FA Cup rights than they were worth to a commercial operator, the EFTC's investigation should also have included more questioning on the processes and the actions undertaken by the Executive to ensure value for money and also to ensure compliance with the Competitive Impact Principle.
- g) The Committee believes that the BBC Executive has been open and transparent to the extent that competition law will allow.

C Conduct of the appeal investigation

talkSPORT submitted its appeal to the Trust on 15 May 2009. The handling of this appeal was in accordance with the BBC's published statement on the BBC Fair Trading Complaints and Appeals Process. An appeal investigation was conducted for the Committee by the BBC Trust Unit. The BBC Trust Unit is separate and independent from the BBC Executive and accounts directly to the BBC Trust.

Documentation relating to the complaint was submitted to the BBC Trust investigation team by talkSPORT and the BBC Fair Trading team. Following an initial review, telephone and face-to-face interviews with all relevant parties were conducted during the period from June

to August 2009. Additionally, the BBC Trust Unit team commissioned its own independent legal and economic advice on specific issues relevant to the appeal.

D Context

The BBC's role in broadcasting sporting events on radio

BBC Radio 5 Live and Sports Extra are listed as BBC public services at Clause 11 (3) (f) of the BBC's Framework Agreement, and the Trust governs these services through two service licences issued in April 2008 and July 2008 respectively.¹

BBC Radio 5 Live and Sports Extra offer a mix of news and UK and international sports coverage over a variety of platforms. The BBC Radio 5 Live service is the main distribution channel whereby the FA Cup radio rights in question are normally used by the BBC.

The BBC Radio 5 Live service licence sets out the station's remit as "the home of continuous news and live sports coverage."² The service should aim to bring its audience major news stories and sports events as they happen and appeal to news and sports fans of all ages and from all ethnic backgrounds and all areas across the UK. A condition of the Trust's service licence for BBC Radio 5 Live is that news should cover around three quarters of its output each year. Additionally, section 5 of the licence provides that BBC Radio 5 Live should reflect the UK's nations, regions and communities through seeking to unite people around the big sporting occasions that form a key part of UK culture; the station should cover sports not widely accessible on UK radio; and BBC Radio 5 live should bring the UK to the world and the world to the UK through offering live coverage, where possible, from overseas sports events.

The Sports Extra service licence sets the remit of this service as bringing a greater choice of live action to sports fans by offering a "part-time extension" to the BBC Radio 5 Live service. Its output should consist of live sports coverage only, and it should not act as an additional competitor for sports rights against commercial broadcasters.³

The Football Association (the "FA")

Founded in 1863, the FA is the governing body for football in the UK and is responsible for all aspects of the regulation of the game. The FA's website lists amongst its key activities: Promoting the development of the game amongst all ages, backgrounds and abilities in terms of participation and quality. This also involves promoting the availability of the sport to the greatest possible number of people.⁴

¹ BBC Radio 5 Live Service Licence can be found at http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/service_licences/radio/2008/five_live_Apr08.pdf and the Sports Extra service licence can be found at http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/service_licences/radio/2008/five_live_sports_extra_jul08.pdf

² BBC Radio 5 Live Service Licence, issued 7 April 2008, section 1 - Remit

³ BBC Five Live Sports Extra Service Licence issued 10 July 2008, sections 1 – Remit and 4 – Overview of aims and objectives

⁴ <http://www.thefa.com/TheFA/WhoWeAre.aspx>

In order to raise money and promote the game of football, the FA sells certain rights to broadcast its football games, and its annual report for 2007 states that in March of that year, Setanta and ITV bought the exclusive television broadcast rights to the FA Cup matches covering the four year period 2008/9 to 2011/12 for £425m, an increase of £125m over the previous contract.⁵

The BBC's acquisition of radio broadcasting rights for the FA cup

In June 2008, the FA issued an Invitation to Tender ("ITT") for the radio broadcast rights to the FA Cup and England international matches over the period from 2008/9 to 2011/12 (the "FA Cup Rights"). These are the rights at the centre of talkSPORT's appeal to the Trust.

The matches on offer were split into a number of specific packages by the FA. The ITT specified a closing bid approach, in which the FA reserved its discretion to alter the packages it made available, invite additional rounds of bidding or make an award at any point. In determining the winning bid the FA noted that it was under no obligation to award the package rights to the highest bidder, but would make its awards based on the overall nature of each bid received and its fit with the FA's overarching objectives.

The BBC was eventually awarded all the packages and talkSPORT has claimed that the BBC paid significantly more for the FA Cup rights than they were worth to a commercial operator.

E Relevant BBC Guidelines

The Royal Charter

talkSPORT alleges that the BBC is in breach of its duties under Article 38 of the Royal Charter. This clause states that it is a function of the Executive Board to be responsible for the conduct of the BBC's operational financial affairs in a manner best designed to ensure value for money.

talkSPORT also alleges that the Trust has failed to exercise rigorous stewardship of public money as required by Article 23(d) of the Charter by allowing the BBC to pay significantly more for the FA Cup rights than they were worth to a commercial operator.

Fair Trading

The BBC Trust has adopted a Competitive Impact Policy Statement which sets out its policy on the competitive impact of the BBC's activities on the wider market. The Trust has also adopted a Fair Trading Policy that applies to all trading activities of the BBC, although separate requirements will apply to Public Services and Commercial Activities in certain circumstances. The BBC Executive has implemented a Fair Trading Policy through adopting the Fair Trading Guidelines. In handling appeals from Fair Trading complaints, the Trust determines whether there has been a breach of the Competitive Impact Policy Statement and Fair Trading Policy, in accordance with the guidance set out in the Fair Trading Guidelines.

⁵ FA Report and Financial Statements for 2007, page 5 at http://www.thefa.com/TheFA/-/media/Files/PDF/TheFA/FARreport_FinancialStatements2007.ashx

The Competitive Impact Policy Statement and Fair Trading Policy require that, when carrying out its Public Service Activities, the BBC must endeavour to minimise its negative competitive impacts on the wider market.

Under the Fair Trading Policy, the Executive must also comply with competition law, including that relating to state aid.

F Detailed findings

Value for money – Trust duties

The Committee considered the allegation that the Trust had failed to exercise rigorous stewardship of public money. In this respect the Committee noted that the Trust's duties are at a strategic level with the Executive being responsible for day to day running of the BBC's operations.

The Committee considers that the Trust fulfils its oversight duties through:

- approval of BBC budgets on an annual basis
- setting of individual service licence budgets
- annual value for money programme
- other ad hoc value for money investigations

Under the protocols which govern the respective actions of the Trust and the Executive, it is an Executive responsibility to approve spend on content - including sports rights - within the confines of the Service Licence Agreements.

The Committee believes that in relation to this specific appeal there is no evidence that the Trust has failed to exercise rigorous stewardship of public money (as required by Article 23(d) of the Charter

Value for money – Executive duties

The Committee considered the allegation that the BBC had not exercised its affairs in a manner best designed to ensure value for money by submitting a bid which valued the rights at significantly more than they were worth to a commercial operator.

The Committee examined the process undertaken by the BBC in determining the value of its bid for the rights in question. The Committee also considered the evidence as to whether the BBC paid significantly more for the FA Cup rights than they were worth to a commercial operator. In this respect the Committee considered independent economic advice which had been commissioned by the Trust Unit investigation team.

The Committee decided there was insufficient evidence to support a conclusion that the range of bids made by the BBC was unreasonable.

The Committee also noted that there was a process in place for proper scrutiny of high value bids for sporting rights that was designed to ensure value for money was secured. However in this specific case the Committee felt that the process in place had not been followed with sufficient rigour by the BBC in determining its bid.

The Committee is partially upholding the allegation that the BBC has not conducted its operational financial affairs in a manner designed to ensure value for money. The Committee believes that there is insufficient evidence to support a determination that the successful bid made by the BBC was unreasonable in terms of value. However, in relation to that bid, the Committee believes that the BBC did not conduct its internal process for ensuring that the BBC's operational financial affairs were conducted in a manner best designed to ensure value for money, with the rigour which the Committee would expect for a bid of this nature. Accordingly, on that basis, the Committee considers that there has been a breach of Article 38 (1) (h) of the Charter.

The Committee also noted that neither delivering the BBC's Public Purposes nor the achievement of value for money for the BBC necessarily require the securing of exclusive sports rights.

Competitive Impact Principle

The Committee considered the allegation that the BBC had breached the Competitive Impact Principle by paying significantly more for the FA cup rights than they were worth to a commercial operator. Compliance with this principle requires that, when carrying out its Public Service Activities, the BBC must endeavour to minimise its competitive impacts on the wider market. This does not mean that the BBC must eradicate all potential negative impacts but that the BBC must endeavour to minimise its negative competitive impacts in a manner proportionate to the size and scale of the activity concerned.

The Committee examined the process which was undertaken by the BBC in determining the level of its bid for the FA Cup rights. The Committee considers that the issue of compliance with the Competitive Impact Principle goes beyond a consideration of the value bid for the rights, but requires the BBC Executive to (i) consider how the activity fulfils the BBC's Public Purposes; (ii) consider the impact on competition in the markets in which the activity operates; and (iii) consider whether any negative impact on competition can be reduced without significantly compromising the Public Purposes. The Committee found no evidence that the BBC Executive had undertaken a clear process to assess and endeavour to minimise negative competitive impact in the manner outlined. The Committee considered that this process failure amounted to a breach of the Competitive Impact Principle by the BBC Executive.

Despite this process failure by the BBC Executive, the Committee does not consider that there is sufficient evidence to support a conclusion that the range of bids made by the BBC was unreasonable. Therefore, the Committee cannot conclude that the outcome of the bidding process would have been any different had the BBC adopted a process that complied with the Competitive Impact Principle.

The Committee believes that the BBC Executive failed to conduct a proper Competitive Impact Assessment in relation to the acquisition of the FA Cup rights by

the BBC and that such failure by the Executive amounted to a breach of the Executive's duty to endeavour to minimise the BBC's negative competitive impacts on the wider market when carrying out its Public Service Activities, and accordingly the Committee upholds this part of the appeal.

Competition and state aid

The Committee considered the various allegations by the appellant that the BBC had breached Articles 81/82 EC or Chapter I/II Prohibitions and the law on state aid. The Committee relied on independent legal advice to examine each of the issues raised.

The Committee believes there is insufficient evidence to support a determination that the BBC has breached competition or state aid law and accordingly rejects this part of the appeal.

The Executive's Fair Trading complaint investigation

The Committee considered why it had reached a different conclusion on aspects of the appeal compared with the EFTC. The EFTC findings focused on the merits of the BBC's valuation of the rights. Having reached a conclusion that the BBC did not pay significantly more for the rights than they were worth to a commercial operator, the EFTC did not consider in detail the underlying processes that were followed in reaching that valuation and whether those processes in themselves were sufficient to ensure compliance with the duties placed on the BBC.

The Committee believes that the handling of this complaint by the Executive could have been undertaken with more rigour. Rather than focusing on the issue of whether the BBC paid more for the FA Cup rights than they were worth to a commercial operator, the EFTC's investigation should also have included more questioning on the processes and the actions undertaken by the Executive to ensure value for money and also to ensure compliance with the Competitive Impact Principle.

Lack of transparency

The Committee examined the manner in which the Executive had dealt with talkSPORT's original complaint in response to the allegation that the Executive had failed to respond to talkSPORT in an open and transparent manner. The Committee took independent legal advice on the extent to which competition law would permit the sharing of pricing inputs.

The Committee believes that the BBC Executive has been open and transparent to the extent that competition law will allow.

G Sanctions

The Committee had upheld aspects of this fair trading appeal. It has determined the following sanctions to be appropriate:

- a) The Committee requires the Executive to bring forward to the Trust by January 2010 formal recommendations to strengthen the operation of its process designed to ensure that the BBC best ensures value for money when bidding for sports rights.
- b) The Committee requires the Executive to comply fully with the existing process designed to ensure that any potential negative competitive impacts of the BBC's activities are assessed and, where identified, steps are taken to minimise these (where possible) in relation to the BBC's acquisition of sports rights. In respect of such compliance the Committee will direct the BBC's Fair Trading external auditors to report back to it in June 2010.
- c) The Committee reminds the Executive that the achievement of value for money does not necessarily require the securing of exclusive sports rights, and that where service licence and other requirements and obligations can be met without securing exclusive rights, then proper consideration ought to be given to this option.

Finance and Compliance Committee

BBC Trust

October 2009