

# BBC Executive Fair Trading Bulletin

May 2008 to August 2008

SUMMARY OF COMPLAINTS .....	1
Complaints made to the Office of Fair Trading, Ofcom or the European Commission.....	2
BBC Broadcast (now Red Bee Media) Media Access Services contracts with Channel 4 and the BBC.....	2
Fair Trading Complaints to the BBC.....	3
Update on previously reported complaints .....	3
RadioCentre and the BBC's sponsorship activities.....	3
ITV plc.....	4
Outcome of the Radio Centre and ITV appeals .....	4
Shoot Limited and the BBC Gardening website.....	5
The BBC's operational relationships with its commercial subsidiaries.....	6
Open Source Consortium and BBC iPlayer .....	7
Mr A Press and iPlayer .....	8
British Sky Broadcasting ("BSkyB") and BBC promotions for BBC HD and BBC/ITV freesat.....	8

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/](http://www.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 April 2008 and August 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 papers 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, alleging that the agreement was in breach of competition law.

In July 2005 Ofcom opened a formal investigation into the allegations made and widened this in December 2005 to include Red Bee's media access services contract with the BBC.

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 would be closed.

The allegations by IMS were therefore not upheld.

IMS subsequently appealed to the Competition Appeals Tribunal (CAT) against Ofcom's decision. IMS argued that "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".

IMS invited the CAT to:

- order the alleged infringements to cease and for the relevant contracts to be re-tendered;
- confirm that Red Bee is dominant in the relevant market;
- in the event that CAT did not grant the above relief, to remit the matter back to Ofcom; and
- order the costs of the appeal (and any further relief considered appropriate) to be borne by Ofcom.

The BBC and Red Bee both applied for and were granted applications to intervene in the appeal process. The BBC made submissions in support of Ofcom and Red Bee's representations.

On 31 October 2007 the CAT concluded that the BBC case closure decision was not an appealable decision and therefore did not fall under its jurisdiction

for the purposes of the appeal. The CAT subsequently considered the appeal in relation to the Channel 4 contract. In the judgment dated 20 May 2008 the CAT dismissed the appeal in its entirety.

On 18 June 2008 IMS wrote to the CAT seeking leave to appeal against its decision. The CAT has dismissed this appeal and rejected IMS' application for leave to appeal against the decision. IMS' only remaining option is to appeal directly to the Court of Appeal.

## **Fair Trading Complaints to the BBC**

The BBC received one complaint during the period and four have been carried forward from the previous period. All of the complaints have been the subject of adjudication by the Executive Fair Trading Complaints Panel. Three of the complaints were the subject of an appeal to the BBC Trust.

## **Update on previously reported complaints**

### **RadioCentre and the BBC's sponsorship activities**

Following the Executive's rejection of the Fair Trading aspects of this complaint on 13 May 2008, the complainant appealed against both the editorial and Fair Trading aspects to the BBC Trust in a combined letter dated 16 June 2008. The Fair Trading aspects of the appeal focused on the following key issues:

- whether the BBC's offer of contractual on-screen and on-air credits to sponsors is consistent with the requirement of the Charter, the Agreement, Fair Trading Policy (and Competitive Impact Principle where applicable), competition law and other relevant guidelines;
- whether BBC event sponsorship activities are in fact commercial services that should be separate from the BBC's Public Service activities;
- whether BBC event sponsorship activities have a negative competitive impact and put the BBC in breach of Article 23(e) of the Royal Charter;.
- whether the BBC is using the allowance made for event sponsorship under Clause 75(5)(f) of the Agreement to justify its incursion into the commercial sponsorship arena;
- whether the BBC event sponsorship activities raise State aid issues;
- whether the Fair Trading Guidelines in relation to sponsorship are too vague and open to interpretation;
- whether the BBC event sponsorship revenue for Sports Personality of the Year 2007 ("SPOTY") fell significantly short of normal market expectations, thereby distorting the sponsorship market.

In addition, the complainant raised issues about the complaints process, namely that:

- It is unnecessarily bureaucratic with delay and confusion caused by compartmentalising issues between Fair Trading and editorial matters.
- In this instance, the initial investigation focused on the Fair Trading and editorial guidelines, rather than the more substantive issues around competitive impact for commercial radio and compliance with the Charter, Agreement, competition law and State aid rules.

The outcome of the Fair Trading aspects of the appeal is summarised below.

### **ITV plc**

Following the Executive's decision not to uphold ITV's original Fair Trading complaint dated 16 April 2008 and a separate editorial complaint, ITV plc appealed to the BBC Trust on 16 April 2008. The Fair Trading aspects of the appeal focused on the complainant's concerns regarding the broadcast of the BBC's Sports Personality of the Year awards ("SPOTY") in December 2007 and the on-air coverage given to third parties sponsoring BBC events. Specifically the appeal considered the following key issues:

- The complainant's dissatisfaction with the original complaint handling and the BBC procedures.
- The complainant's allegation that the sponsorship of SPOTY in return for on-screen and on-air credits was in breach of the Charter and Agreement.
- The sponsorship of SPOTY also constituted a breach of the Fair Trading Guidelines.

In considering the Fair Trading aspects of the appeal, the Trust's Public Value and Fair Trading Committee ("PVFTC") took into account the legal advice and information acquired as part of investigation of the appeal by RadioCentre, as outlined above. The outcome of the Fair Trading aspects of the appeal is summarised below.

### **Outcome of the Radio Centre and ITV appeals**

The Trust's Public Value and Fair Trading Committee ("PVFTC") considered the Radio Centre and ITV appeals individually, sharing legal advice and information acquired through the appeals investigation process where appropriate. The Trust upheld both of the appeals in part, reaching the same conclusions, namely that:

- There had been no breach of the requirement of Article 23(e) Charter obligation placed on the Trust with regard to competitive impact.
- Contrary to the position taken by the Executive, the sponsorship of events constitutes a non-commercial trading activity, which falls within the BBC's

Public Service Activities to which the Competitive Impact Principle (“CIP”) applies.

- The PVFTC was satisfied that the BBC had obtained sponsorship at market rates and therefore there had been no market distortion nor breach of the Fair Trading Guidelines nor the CIP. Further, the non-adherence to the Editorial Guidelines identified by the Editorial Standards Committee (“ESC”) did not constitute a breach of the CIP nor the Fair Trading Guidelines.
- Based on independent legal advice and considering its relatively small scale, the BBC’s sponsorship activities raise no competition law or State aid issues.
- The Fair Trading Guidelines should be amended to reflect the issues raised by the appeal in order to confirm that the CIP applies to all sponsorship activities.
- No further Fair Trading aspects of the RadioCentre and ITV cases required further investigation.

The PVFTC 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.

A full account of the outcome of the Fair Trading aspects of the appeal has been published on the BBC Trust website: <http://www.bbc.co.uk/bbctrust/assets/files/pdf/appeals/sp07/itv.pdf> and <http://www.bbc.co.uk/bbctrust/assets/files/pdf/appeals/sp07/radiocentre.pdf>

The editorial aspects of the respective appeals were considered separately by the Editorial Standards Committee (“ESC”). The findings of the editorial appeals are also published on the BBC Trust website. ([http://www.bbc.co.uk/bbctrust/assets/files/pdf/appeals/sp07/editorial\\_standards/pdf](http://www.bbc.co.uk/bbctrust/assets/files/pdf/appeals/sp07/editorial_standards/pdf))

### **Shoot Limited and the BBC Gardening website**

As previously reported, the Executive Fair Trading Committee 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.

The Chairman of the Complaints Panel wrote to the complainant on 21 February 2008 and 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 Competitive Impact Principle.

- 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 subsequently wrote to the Chairman of the Complaints Panel requesting full disclosure of all relevant documentation "in order to appeal and in the interests of due process." (Separately, the complainant submitted two requests for information under the Freedom of Information Act.) The Controller, Fair Trading, responded on 11 April 2008, providing further clarification of the BBC Executive's position and offering to meet the complainant to explain its reasoning. The complainant did not take up the offer.

On 21 April 2008 the complainant appealed against the Panel's decision to the BBC Trust. The Trust is currently considering the appeal and is expected to conclude its findings shortly.

### **The BBC's operational relationships with its commercial subsidiaries**

On 7 January 2008, AOL UK, IPC Media Ltd and Turner Broadcasting Systems, acting jointly, complained to the BBC making the following key Fair Trading allegations:

- the BBC has the incentive and ability to engage in discriminatory behaviour;
- the preferred partnership arrangement creates sufficient conditions for BBCWW to acquire publicly funded assets at less than fair market value;
- the preferred partnership arrangement creates sufficient conditions for BBCWW to receive a subsidy from the BBC;
- that the BBC is willing to forego revenue raises questions as to whether the BBC itself is overcompensated;
- difficulties in detecting non-price discrimination undermine the effectiveness of ex-ante prohibitions and traditional ex-post tools; and
- the preferred partnership arrangement denies licence fee payers the benefits of a competitive sales process for assets created using their investments.

Following an investigation the Executive Fair Trading Complaints' Panel concluded that the allegations were unfounded and that the complaint could not be upheld. The Chairman of the Panel wrote to the complainant on 15 April 2008 to advise of the following findings:

- **Commercial Criteria:** The licensing and sub-licensing of rights is a commercial trading activity. The BBC's approach is likely to deliver best value for money overall and is not likely to lead to its rights being sold at below market value. The BBC is satisfied that the first look arrangement does not distort the market.
- **Separation:** In the absence of evidence of market power in the upstream or downstream markets, and the lack of evidence that prices being achieved for BBC rights are not consistent with the market value, the investigation concluded that the allegation of cross subsidy is unfounded.
- **Competition/State aid law:** On the basis of external legal advice the BBC is satisfied that the BBC/BBC Worldwide relationship is consistent with the requirements of competition and state aid law.

The complainant has subsequently written to the Chairman of the Executive Fair Trading Committee to confirm that it does not intend to pursue its complaint further.

### **Open Source Consortium and BBC iPlayer**

On 18 January 2008, the Open Source Consortium (“OSC”) wrote to the BBC Trust to make the following Fair Trading allegations in relation to BBC iPlayer:

- **Competitive impact:** The complainant alleged 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.
- **Breach of UK/EU competition law:** The complainant alleged a multiplicity of behaviours indicating potential breaches of competition law.
- **Breach of EU Law on State Aid:** The complainant alleged that in its promotion of iPlayer the BBC has directly or indirectly promoted the economic undertaking, Microsoft, in television, radio, new media and print. The complainant alleges that this practice constitutes product placement and is a breach of Article 87.

Having considered the allegations, the Executive Fair Trading Complaints Panel concluded that the complaint should not be upheld. The Chairman of the Complaints Panel responded to the complainant on 15 April 2008 and communicated the following findings:

- The BBC’s actions in relation to BBC iPlayer are objectively justifiable, based on considerations of, inter alia, audience reach, the demands of BBC’s rights holders, viability of alternative technological solutions and value for money for licence fee payers. The BBC’s actions are consistent with the Competitive Impact Principle.
- There is no evidence of collusive anti-competitive behaviour by the BBC in relation to its dealings with Microsoft.

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

### **Mr A Press and 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, alleging negative competitive impact.

The complainant alleged 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. In addition, the complainant raised the issue of the possibility that the BBC's actions may constitute illegal State aid under European law.

Following an investigation the EFTC Complaints Panel did not uphold the complaint and concluded that:

- The BBC's actions in relation to the iPhone/iTouch are objectively justifiable, based on consideration of, inter alia, value for money for licence fee payers, technical viability and the demands of BBC's rights holders. The BBC has endeavoured to minimise its negative competitive impacts on the wider market when carrying out Public Service Activities.
- There has been no breach of the BBC's Royal Charter, its Agreement with the DCMS, UK/EC Competition Law, State aid, or the BBC's Fair Trading Guidelines.

The Panel's decision and further details of the investigation were communicated to the complainant on 16 May 2008.

### **British Sky Broadcasting ("BSkyB") and BBC promotions for BBC HD and BBC/ITV freesat**

On 16 May 2008, the complainant wrote to the Chairman to express its concerns regarding the launch of the BBC/ITV 'freesat' proposition. The Director, BBC Trust, responded to the complainant on 28 May 2008, advising that he would refer the matter to the Executive for consideration.

BSkyB subsequently wrote to the Controller, Fair Trading on 6 June 2008 regarding the BBC promotions for BBC HD and BBC/ITV freesat. The investigation analysed the complaint and identified the following Fair Trading allegations:

- The BBC HD promotions misled 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 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.

The BBC Executive will be reviewing its future HD promotions to ensure the findings of the Complaints Panel are properly reflected.