

# **BBC Executive Fair Trading Bulletin**

## **May 2007 – July 2007**

BBC Executive Fair Trading Bulletin .....	1
May 2007 – July 2007 .....	1
Summary of Complaints .....	1
Fair Trading Complaints made to the Office of Fair Trading, Ofcom or the European Commission .....	1
Fair Trading Complaints to the BBC .....	2
Television Licensing Trails.....	3
2 entertain and The Communications Practice .....	3
Complaint from The History Channel.....	4

The complaints detailed below reflect the outcome of investigation by BBC Executive in line with the BBC's process for dealing with Fair Trading Complaints. Further details can be found at [http://www.bbc.co.uk/info/contactus/fair\\_trading.shtml](http://www.bbc.co.uk/info/contactus/fair_trading.shtml) 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 21 April 2007 and 20 July 2007 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**

There have been developments in the following investigation by Ofcom, as reported in previous Bulletins.

### **Complaint about Red Bee Media's (formerly BBC Broadcast) 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 Chapter I of the Act because it prevents, restricts or distorts competition;
- in breach of Chapter II of the Act because it confers long-term exclusivity and has the potential to foreclose the market; and
- in breach of Chapter II of the Act as the price prevailing under the contract was predatory.

In July 2005 Ofcom opened a formal investigation into the allegations made and the BBC responded to a variety of information requests from Ofcom.

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 infringes Chapter I of the Act and/or Article 81 of the EC Treaty.

Following a long investigation Ofcom published, on 30 May 2007, the findings of its inquiry. It concluded that:

- the Channel 4 contract does not appreciably restrict competition and there are therefore no grounds for action in relation to the Chapter I/Article 81 allegation.
- In respect of the BBC contract, in light of a reduction in the duration of the contract, and in light of other priorities, Ofcom has decided not to commit further resources to this issue and has accordingly closed its file on this part of the case.

The allegations by IMS were therefore not upheld by Ofcom.

On 13 July 2007, the Competition Appeals Tribunal (CAT) gave notice of an appeal by IMS against Ofcom's decision. IMS is challenging 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 argues 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".

Interested parties who wish to intervene have three weeks from the date of the notice to make submissions.

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

The BBC has received one new complaint during this period. Investigations into two complaints reported in the previous Bulletin have been completed and updates are provided below.

## **Television Licensing Trails**

On 9 March 2007, the Director General received a letter from Nick Palmer MP raising an issue which had been brought to his attention by one of his constituents, Mr John Lloyd. In an email to Mr Palmer, Mr Lloyd suggested that the public service trails which inform television licence fee payers of changes to the way in which they can purchase their television licence was a breach of the BBC's Royal Charter. Mr Lloyd alleged that publicising Paypoint, and failing to mention other ways of purchasing a licence fee, fell outside the permitted forms of advertising, and was publicising a commercial company over other forms of supply.

Following investigation by the Controller, Fair Trading, the BBC's Fair Trading Complaints Panel concluded that the complaint could not be upheld for the following key reasons:

- The Charter contains no prohibition on the BBC making the public aware of the means through which TV licences can be purchased
- Making the public aware of Paypoint as a means of acquiring TV licences was appropriate given the BBC's decision to move its contract for the only 'over the counter' supplier of TV licences to Paypoint.
- the trails did include reference to other options that would enable direct purchase of a TV licence through alternative routes to Paypoint.

The Chair of the Complaints Panel wrote to the complainant on 11 May confirming its conclusions.

## **2 entertain and The Communications Practice**

On 27 March 2007, the Director General received a letter from Ben Woolley, Content Partners Ltd, complaining about the relationship between 2 entertain (2e) and his competitor, The Communications Practice (TCP).

Content Partners Ltd is a promotions business, working with newspapers and publishers to run "innovative promotions using top tier content and ... help enterprises with original content exploit their assets".

2e is a BBC joint venture company, involving Woolworths Group and BBC Video, a division of BBC Worldwide Ltd.

The Communications Practice is a third party organisation, specialising in marketing and creative services, working with video and DVD labels, record companies, media owners and retailers to create licensing and marketing initiatives with audio and visual content.

Mr Woolley alleged that 2e had an unofficial, exclusive licensing agreement with TCP, for the covermounting of BBC DVDs, as free gifts on newspapers and associated token redemption promotions for BBC. This exclusive

agreement, he alleged, gave TCP exclusive access to BBC archive material, resulting in TCP benefiting from an 80% share of this market. Mr Woolley alleged that this arrangement also made it difficult for him to put together promotional packages where BBC content formed part of the themed package. Mr Woolley alleged that the BBC archive should be “open- to-everyone”, and operate on a level playing field.

Following investigation by the Controller, Fair Trading, the BBC’s Fair Trading Complaints Panel concluded that the complaint could not be upheld for the following key reasons:

- Neither the Charter, Agreement nor Fair Trading Guidelines prohibit exclusive agreements per se.
- In any event there is no exclusive agreement between 2e and TCP.
- There is evidence that 2e selects its partners for such deals on the basis of objective criteria, including relevant commercial terms.
- There is no evidence that 2e could not (or indeed would not) deal with third parties other than TCP if the terms of the deal were acceptable.
- Based on the evidence there is no breach of Competition Law, Charter, Agreement or Fair Trading Guidelines.

The Chair of the Complaints Panel wrote to the complainant on 18 May 2007 confirming its conclusions.

## **Complaint from The History Channel**

On 17 April 2007 The History Channel wrote to the BBC Trust regarding a complaint previously made by The History Channel in 2004 (the ‘original complaint’) relating, inter-alia, to the acquisition by the BBC of the World at War series where it was alleged the BBC had breached its Fair Trading Guidelines. The original complaint was investigated by the Governors’ Fair Trading Compliance Committee (FTCC) and this aspect of it was not upheld.

In the latest complaint The History Channel alleged that matters have arisen which called into question the original decision and asked that the issue be re-considered. In particular The History Channel alleged that:

- the subsequent conduct of the BBC in sub-licensing the series to UKTV undermines the BBC’s argument that it needed exclusivity for its publicly funded channels; and,
- the arguments put forward by the BBC’s Programme Acquisitions Unit (which was responsible for acquiring the World At War series in 2004) in support of the purchase and use of the rights appear at best incorrect or at worst fraudulent.

The History Channel argued that the latest complaint should be treated as an appeal under the BBC’s Fair Trading Complaints process as the original complaint had been through the full complaints process.

The Trust Unit responded on 30 April 2007 confirming that in its view this should be treated as a new complaint as the original complaint was considered by FTCC based on the information presented to it at the time while the latest complaint relates primarily to substantial new information not available to FTCC at the time. BBC Management was therefore asked to investigate the latest complaint as a new complaint in line with its complaints process.

As the original complaint had been investigated by the Controller, Fair Trading, an alternative investigating officer (in this case the Controller, Legal & Rights, Global News Division) was appointed to avoid any potential conflict.

The investigating officer's report was considered by the Complaints Panel which concluded, based on the evidence presented to it, that the BBC was not in breach of its Fair Trading Guidelines for the following reasons:-

- 1) The only means of obtaining the level of exclusivity required by the BBC was to acquire all rights. The investigation found no evidence that the rights were acquired with the intention of advantaging UKTV. PricewaterhouseCoopers (PwC) was commissioned by FTCC at the time of the original complaint to consider the price paid by UKTV for the pay TV rights – PwC considered the price to be fair.
- 2) The series was scheduled for transmission on the BBC's public service channels in 2006, but due to its length and content issues a suitable slot could not be found. The BBC is only in the early stages of its contract term. The number of transmissions on UKTV is not unusual for a pay TV environment.
- 3) Although there appeared to be a lack of consistency in arguments submitted to the FTCC in 2004, the Complaints Panel did not consider these inconsistencies to be in any way material and they do not alter the findings of the FTCC in its report into the original complaint.

The Chair of the Complaints Panel responded to The History Channel on 6 July 2007 to confirm its findings.