

BBC Executive Fair Trading Bulletin November 2007 – February 2008

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The complaints detailed below reflect investigation by BBC Executive in line with the BBC’s process for dealing with Fair Trading Complaints. Further details of this process can be found at: 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 14 November 2007 and 4 February 2008 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

The following investigation by Ofcom, as reported in previous Bulletins, continues:

- *Complaint about Red Bee Media’s 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 competition law. In July 2005 Ofcom opened a formal investigation into these allegations.

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 also infringed competition law.

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 was closed.

The allegations by IMS were therefore not upheld.

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

The BBC and Red Bee both made applications to intervene in the appeal process and these were granted by the CAT.

The CAT was asked to consider, as a preliminary issue, whether Ofcom's decision to close the case in respect of the BBC contract, was an appealable decision under the Competition Act. On 31 October 2007 the CAT concluded the case closure decision by Ofcom in relation to the BBC contract was not an appealable decision.

The CAT is considering the remaining aspects of IMS's appeal with the next hearing due to take place in April 2008.

Fair Trading Complaints to the BBC

The BBC has received four new complaints during this period and two have been carried forward from the previous period. The two complaints which were reported in the previous bulletin have since been the subject of adjudication by the Fair Trading Complaints Panel and four investigations are continuing.

Diamond Publishing and 'Who Do You Think You Are?'

On 13 September 2007 Diamond Publishing (publisher of 'Family History Monthly') wrote to the BBC Trust with regard to the launch of BBC Worldwide's new '*Who Do You Think You Are?*' magazine. The complainant made the following Fair Trading allegations:

1. Cross-subsidy/Fair Pricing: The complainant enquired as to whether BBC Worldwide acquired the magazine rights and related assets (such as video clips) at a fair market price "as required both by EU rules on State Aid and by the BBC's Royal Charter?", alleging that not to have done so would also constitute "cross-subsidy".
2. Separation: - the complainant enquired as to whether BBC executives were involved in the magazine rights negotiations between Wall To Wall Media (the rights owner and independent producer of the television series) and BBC Worldwide, and sought reassurance that there was no connection between BBC's decision to commission further television series from the independent producer and the independent producer's decision to licence magazine rights to BBC Worldwide.
3. Commercial efficiency: - the complainant provided a range of market analysis to support its argument that the value of advertising revenue and sales volumes of magazines in the genealogy sector are "very small and in decline", that the sector has reached saturation point, and that the launch of the *Who Do You Think You Are?* magazine by BBC Worldwide must be high risk with limited profit potential and thereby suggesting that it cannot be commercially efficient (as required by the Four Commercial Criteria).

The Fair Trading Complaints Panel adjudicated on 9 November 2007 and did not uphold the complaint. The response to the complainant communicated the following key findings:

- BML is paying fair market prices for all rights and benefits received from Wall to Wall.
- BBC's commissioning personnel had no knowledge of any discussions between BML and Wall to Wall, proper separation between public service and commercial discussions existed.
- The magazine launch is expected to be commercially efficient. It satisfies BBC Worldwide's internal performance requirements. BBC Worldwide and BML expect to generate an appropriate return on investment and have a track record of growing similar sectors.
- There was no breach of the BBC's Royal Charter, its Agreement with DCMS, UK/EC Competition Law, State Aid Law or the BBC's Fair Trading Guidelines.

ABM Publishing Ltd and 'Who Do You Think You Are?'

On 12 September 2007 ABM Publishing Ltd (publisher of, inter alia, *'Family Tree Magazine'*) wrote to the BBC Trust with regard to the launch of BBC Worldwide's new *'Who Do You Think You Are?'* magazine. The complainant made the following Fair Trading allegations:

1. The complainant appeared to allege that BBC Worldwide's new Who Do You Think You Are? (WDYTYA?) magazine cannot be commercially efficient (as required by the Four Commercial Criteria) because the market is shrinking and, the complainant "fail(s) to see how the BBC can possibly show a worthwhile return".
2. The complainant also alleged "unfair advantage" because the magazine launch coincided with the transmission of the new BBC television series.
3. The complainant questioned whether the BBC Trust should have been involved in the approval to launch the magazine.

The Fair Trading Complaints Panel adjudicated on 9 November 2007 and did not uphold the complaint. The response to the complainant communicated the following key findings:

- The magazine launch is expected to be commercially efficient. BBC Worldwide and BML expect to generate an appropriate return on investment and have a track record of growing similar sectors.
- BML was not in receipt of any "unfair advantage" from the BBC's Public Services.
- There was no requirement upon BML or BBC Worldwide to seek the approval of the BBC Trust prior to launch of the magazine.
- There was no breach of the BBC's Royal Charter, its Agreement with DCMS, UK/EC Competition Law, State Aid Law or the BBC's Fair Trading Guidelines.

Zattoo and content syndication

On 2 January 2008 the Controller, Fair Trading received a complaint from Zattoo Europe Ltd, which operates a broadband television network in Europe. Zattoo enters into carriage agreements with broadcasters and other copyright owners and re-transmits linear television programmes directly to a closed user group.

The complainant states that the BBC's refusal to continue negotiations with Zattoo for the syndication of BBC content to the Zattoo TV service directly contravenes the regulatory framework governing the BBC including its public purpose arising from the Charter and its duties to in respect of Fair Trading, competitive impact and third party syndications. In particular:

1. The complainant alleges that the BBC's actions will have an adverse effect on the establishment of an independent distribution service in the market since it restricts their ability to *"bring a wider and more creative offering to consumers as quickly as we otherwise could via a new growing distribution platform in UK..."*
2. The complainant alleges that the BBC actions may constitute a breach of competition law.
3. The complainant appears to allege that the BBC is acting contrary to (i) the BBC Trust's conclusions in the recent Public Value Test for on demand services and (ii) the BBC's published, Syndication Policy Guidelines.

The Controller, Fair Trading, is investigating the complaint and will present a report of his investigation to the Fair Trading Complaints Panel for its adjudication.

RadioCentre and the BBC's sponsorship activities

On 10 December 2007, RadioCentre, the trade body representing commercial radio companies in the UK, wrote to the BBC Trust regarding the BBC's sponsorship activities. The complainant makes a number of editorial, regulatory legal and Fair Trading points. The Fair Trading allegations can be summarised as follows:

1. The complainant alleges that by seeking sponsorship for BBC Public Service events (e.g. Sports Personality of the Year) and offering contractual credits around BBC programming, the BBC reduces the ability of commercial operators to secure sponsorship, which is a principal source of their revenues.
2. The complainant suggests that the BBC Public Service's sponsorship activities are 'Commercial Services' as defined by the BBC Agreement and not 'Commercial Trading Activities'. The BBC's Commercial Services must be provided through its commercial subsidiaries; Commercial Trading Activities may be provided through the BBC's Public Services.

The Controller, Fair Trading, is investigating the Fair Trading aspects of the complaint and will present a report of his investigation to the Fair Trading Complaints Panel for its adjudication.

Shoot Limited and the BBC Gardening website

On 4th January 2008, Shoot Limited, owner of the gardening website, Shootgardening.co.uk, wrote to the BBC Gardening Website Editor, copied to the Controller, Fair Trading.

Shoot alleges that the BBC's interactive Gardeners' Calendar, launched in March 2007, directly copied its main subscription based service, launched the previous year and press released to the BBC Gardening Website Editor. The complainant suggests that the BBC's actions are in breach of the BBC's

Competitive Impact Principle since, inter alia, they are restricting the complainant's ability to develop its own website.

The Controller, Fair Trading, is investigating the complaint and will present a report of his investigation to the Fair Trading Complaints Panel for its adjudication.

The BBC's operational relationships with its commercial subsidiaries

A formal complaint made jointly by three separate companies from the same group – AOL UK, IPC Media Ltd and Turner Broadcasting Systems - regarding the BBC's operational relationships with its commercial subsidiaries was sent to the Controller, Fair Trading on 7 January 2008. The complainants allege that:

- the BBC has the incentive and ability to engage in discriminatory behaviour in favour of BBC Worldwide vis-a-vis third parties;
- the arrangements create sufficient conditions for BBC Worldwide to acquire publicly-funded assets at less than fair market value and hence receive a subsidy from the BBC;
- the BBC is willing to forgo revenues thereby risking overcompensation;
- difficulties in the detection of non-price discrimination undermine the effectiveness of ex-ante prohibitions and traditional ex-post tools;
- the arrangements deny licence fee payers the benefits of a competitive sales process for assets created using their investments; and
- the BBC should abandon the current arrangements and move to full functional separation.

Following investigation of the complaint a report will be presented to the Fair Trading Complaints Panel for its adjudication.