

# **BBC Executive Fair Trading Bulletin**

## **November 2008 to January 2009**

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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](http://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 November 2008 and January 2009 including complaints that have been made to the Office of Fair Trading (OFT), Ofcom and European Commission (Section A) and those made directly to the BBC.

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.

## Section A - 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. On 15 October 2008 the CAT ruled that IMS should be liable for Ofcom's costs and for 35% of Red Bee's costs. However, on the basis that the BBC was not a primary intervener and played a more limited role in the tribunal, the CAT decided it should bear its own costs. This is in line with precedent.

On 16 October 2008, the CAT refused IMS's application for permission to appeal against a decision of the Tribunal of 20 May 2008 on the papers. On 25 November the CAT heard and refused a renewed application by IMS for permission to appeal.

### Lonely Planet

As reported in previous Bulletins, the BBC is aware of three separate complaints sent to the Office of Fair Trading following the BBC's acquisition of Lonely Planet.

- Time Out Group (May 2008), which was copied to the BBC's Executive Board, the Trust and the BBC Controller, Fair Trading.
- Create Publishing, (August 2008), which was copied to the CEO of BBC Worldwide for information.
- Wanderlust Publications (September 2008) sent to the Controller, Fair Trading and simultaneously to the Office of Fair Trading requesting that it should undertake its own investigation.

The OFT informed the Controller, Fair Trading that it would not be opening competition investigations of the complaints and that it had written to each of the complainants informing them of its decision.

## Section B - 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.

During this period, the BBC Executive has received a Fair Trading complaint from UTV Radio. The Fair Trading complaint from Wanderlust Magazines has been the subject of adjudication by the Executive Fair Trading Complaints Panel.

### Updates on previously reported complaints

#### 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 made 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 Chairman of the Executive Fair Trading Complaints Panel responded to the complainant on 13 November 2008 to advise that the complaint had not been upheld. The response to the complainant communicated the following findings:

- The acquisition of Lonely Planet and the launch of a Lonely Planet magazine are permitted activities under the BBC Charter.
- The acquisition of Lonely Planet by BBCW is in accordance with the BBC Trust's approval of its 5 year plan and framework for future merger and acquisition activity.

- The BBC’s Public Service activities have not been and will not be used to support BBCW’s commercial activities.
- There is no recourse to the BBC in connection with the funding facility of the acquisition through BBC Commercial Holdings Limited, nor any funds drawn down under it. In these circumstances there is no State aid arising from the existence of the loan facility.
- There has been no breach of the BBC’s Royal Charter, its Agreement with the DCMS, or the BBC’s Fair Trading Guidelines.

The response also confirmed that following notification during the investigation that the OFT would not be investigating Wanderlust’s complaint (due to administrative priorities), the Complaints Panel had also considered the allegations in relation to potential breach of competition law and concluded these should not be upheld. The complaint was therefore rejected in its entirety and the complainant did not submit an appeal to the Trust (the deadline for which has now passed).

## New complaints since the last Bulletin

### UTV Radio (GB) Limited and BBC Sport’s tender for the Football Association (“FA”) United Kingdom National Network Radio Rights, Seasons 2008/09-2011/12

On 2 December 2008 the Managing Director of UTV Radio (GB) Ltd wrote to the Controller, Fair Trading concerning the BBC’s tender for the Football Association (“FA”) United Kingdom National Network Radio Rights, Seasons 2008/09-2011/12. The complaint was copied to the Office of Fair Trading (“OFT”), the Office of Communications (“Ofcom”) and the European Commission for information. The complainant reserved its right, in the absence of “a satisfactory resolution”, to make a formal complaint to these bodies.

The complainant raised a number of Fair Trading concerns, which may be broadly summarised as follows:

**Competitive impact:** that the BBC breached its Competitive Impact Principle (“CIP”) in that it “significantly over-paid” for the FA Cup rights at a price that did not reflect market practice.

**Breach of Charter and Agreement:** that the BBC has failed to comply with the requirements of its Charter to “exercise rigorous stewardship of public money”<sup>1</sup> and to “conduct the BBC’s operational financial affairs in a manner best designed to ensure value for money.”

**Breach of UK/EU competition law and State aid rules:** the complainant made a number of allegations:

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<sup>1</sup> Article 23(d)

- that the BBC has breached Articles 82 and 86 of the EC Treaty and Chapter II prohibition of the Competition Act 1998 “by ignoring the special responsibilities arising both from its dominance and its privileged position as a publicly funded organisation”;
- that the BBC’s “exclusive agreement” with the FA infringes the Article 81 and/or the Chapter I prohibition of the Competition Act 1998 in that “it results in foreclosure of the market for radio broadcast of premium sports rights in the UK”;
- that the BBC’s conduct in respect of its valuation of the semi-final and final rights “is equivalent to a refusal to supply”; and
- that the BBC has breached Article 87 of the Treaty because it “used public funds to outbid a private competitor and prevent it from acquiring any premium content rights.”

The Controller, Fair Trading was appointed to investigate this complaint.

Having considered the allegations, the Chairman of the Executive Fair Trading Complaints Panel wrote to the complainant on 27 January 2009 to advise that the complaint had not been upheld and communicated the following findings:

- The BBC’s overall successful bid for the FA Cup and international rights was within the range of likely commercial bids from rivals for the packages offered and that its offer for each of the packages within its original bid was within the range of a likely commercial valuation for each bid.
- The allegations that the BBC breached competition and State Aid rules on the basis that they overpaid for the radio rights are unfounded. The complaint discloses no evidence that the BBC has otherwise breached the Competitive Impact Principle, the Fair Trading Guidelines, the Charter and Agreement, UK/EC competition rules or State aid rules

## RadioCentre and BBC promotion of artists and third party ticket agents

On 22 December 2008, RadioCentre, the industry body for commercial radio, wrote to BBC Information to complain that it had breached its Editorial and Online Services Guidelines in relation to BBC Radio 1’s promotion of the Coldplay *Viva la Vida* tour; a breach it considers as “*symptomatic of a widespread editorial failing*”.

Separately, RadioCentre attached a copy of its editorial complaint to its response to the Fair Trading Guidelines consultation, received by the Controller, Fair Trading on 16 January 2009. Having reviewed the Complaint, the Controller identified the following elements of the complaint that relate to alleged breaches of the Fair Trading guidelines:

**Use of BBC Brands:** The BBC's promotional material for Coldplay's Viva la Vida Tour is in breach of BBC guidelines requiring that such activities avoid the perception that the BBC is endorsing the third party's trading activities.

The Controller is investigating the Fair Trading aspects of the complaint.