

## **Consultation on the BBC's Fair Trading Guidelines**

### **1. Background**

- 1.1. RadioCentre is the industry body for Commercial Radio. Formed in July 2006 from the merger of the Radio Advertising Bureau (RAB) and the Commercial Radio Companies Association (CRCA), RadioCentre's membership comprises the overwhelming majority of UK Commercial Radio stations, who fund the organisation. RadioCentre is governed by a board of eight directors, representing a cross section of the industry and including all the major Commercial Radio groups.
- 1.2. The role of RadioCentre is to maintain and build a strong and successful Commercial Radio industry - in terms of both listening hours and revenues. RadioCentre operates in a number of areas including working with advertisers and their agencies, representing Commercial Radio companies to Government, Ofcom, copyright societies and other organisations concerned with radio. RadioCentre also provides a forum for industry discussion, is a source of advice to members on all aspects of radio, jointly owns Radio Joint Audience Research Ltd (RAJAR) with the BBC, and includes copy clearance services for the industry through the Radio Advertising Clearance Centre (RACC).

### **2. Overview**

- 2.1. RadioCentre welcomes the timing and objectives of this BBC consultation on its Fair Trading Guidelines, given that enough time has now passed since their adoption in 2007 for both the BBC and commercial operators to become accustomed to the new fair trading regime.
- 2.2. We recognise that this is not a consultation on the scope and content of the BBC's fair trading policies and note that there will be an opportunity to present more wide-reaching proposals in the course of a 2010 BBC Trust review.
- 2.3. The BBC constitutes a significant presence in the UK radio market, currently accounting for around 55% of all listening and 58% of industry revenues<sup>1</sup>. The scale of this intervention makes this consultation an important one for the Commercial Radio sector. This was reflected in the BBC Trust's July 2008 report on 'The economic impact of the BBC on the UK creative and broadcasting sector', which identified Commercial Radio as particularly at risk of negative market impacts at the hands of the BBC and concluded that this risk would be heightened in a structural or cyclical market downturn. The report found:

"The BBC's stable and non-cyclical spending, while advantageous to much of the creative economy, particularly upstream, may become a disadvantage to competitors experiencing a decline in revenues as it becomes increasingly difficult to compete with the BBC which has an increasing (in relative terms) revenue advantage."<sup>2</sup>
- 2.4. It is therefore important that the BBC avoids undertaking commercial activities through its public services, with exceptions made only in a small number of carefully defined cases. It is also vital that the BBC maintains high standards of good practice in areas in which it competes with Commercial Radio – such as procurement of programming inputs.
- 2.5. RadioCentre has gained direct experience of the BBC's fair trading regime since its introduction. In 2008 we submitted a complaint to the BBC regarding its practice of providing on-air references for sponsors of BBC events. This complaint was rejected by the BBC's Fair Trading department as well as the BBC Trust's Fair Trading Committee, although the editorial aspects of our complaint were upheld on appeal by the Trust's Editorial Standards Committee. In their findings, the BBC Trust nevertheless identified mistakes in the way the BBC had been

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<sup>1</sup> Listening data based on RAJAR Q3 2008; revenue share assumes BBC radio expenditure of £670m and Commercial Radio net advertising revenue of £490m in 2008.

<sup>2</sup> BBC Trust, 'The economic impact of the BBC on the UK creative and broadcasting sector', July 2008, p. 16.

applying the Competitive Impact Principle (CIP), and we note that this finding is reflected in one of the proposals in this consultation.

- 2.6. This response notes the important role that the BBC's Fair Trading Guidelines play and suggests further improvements which the BBC should consider making. We propose strengthening the CIP and also highlight three important types of activity for which the Guidelines do not set out a sufficiently clear policy:

- a) Procurement of paid-for programming inputs;
- b) Procurement of unpaid-for programming inputs; and
- c) References to BBC partners in editorial output.

### **3. RadioCentre responses to the consultation questions**

#### **General observations**

#### **3.1. Question 1: Overall, how effective do you consider the Guidelines to be in implementing the BBC Trust's fair trading policies?**

- 3.1.1. The Fair Trading Guidelines play an important role in ensuring that there is an effective link between the BBC's fair trading policies and the actions of individual BBC staff. They do much to ensure that the BBC does not misuse public funds or contravene its responsibilities with regard to the wider market.
- 3.1.2. We have identified important ways in which the Guidelines could be strengthened. For instance, our answer to question 2 proposes that the CIP should be enhanced to create an objective test for market impact. Before that, we identify three important types of activity which have fair trading implications but which are not offered sufficient attention in the Guidelines. These issues span a number of the questions which the BBC asks in its consultation and we therefore discuss them in response to this first question.
- 3.1.3. The three areas which would merit clearer attention in the Guidelines are as follows:
  - a) Procurement of paid-for programming inputs (such as sports and events coverage rights and talent);
  - b) Procurement of unpaid-for programming inputs (such as access to artists, music and events); and
  - c) References to BBC partners (such as events sponsors) in editorial output.
- 3.1.4. As well as outlining clear policies for each of these areas in the Guidelines, RadioCentre believes that they may merit attention in specific Competitive Impact Codes. The introduction of new Competitive Impact Codes is a matter for the BBC Trust, although we suggest that the BBC could raise this with the Trust in the context of this review.
- 3.1.5. **Procurement of paid-for programming inputs:** The Guidelines are largely silent on the BBC's approach to securing third party content rights or talent, despite the significant impact that the BBC's procurement of programming inputs has on the wider radio market. At present, the most direct reference to this area comes in Clause 2.10, which appears to suggest that the BBC should not acquire rights on an exclusive basis unless this is absolutely necessary and that the BBC should not acquire a quantity of rights which it cannot realistically hope to utilise.
- 3.1.6. The context to this concern is that the BBC currently has a dominant position in the market for the acquisition of third party content within radio, which is primarily a consequence of its relative spending power, access to national FM spectrum and cross-platform service offering. This includes rights to offer live sports commentaries on Premier League, FA Cup, European and International football fixtures, as well as broadcast coverage rights for events such as Glastonbury, Reading and Leeds Festivals. We also retain ongoing concerns about the BBC's impact on the market for radio talent. The BBC Trust's May 2008 report, 'On-Screen and On-Air Talent' found that "The fees paid by the

BBC to a small number of top talent working in network radio are much higher than those offered on commercial radio”<sup>3</sup>.

- 3.1.7. One response to the BBC’s dominant role in these areas would be to prevent the BBC from bidding for appealing content rights or hiring leading presenters. However, this solution is not necessarily practical or desirable.
- 3.1.8. RadioCentre believes that a more effective remedy would be for the Fair Trading Guidelines to explicitly state that the BBC will not procure third-party content rights (including sports commentary rights) or other programming inputs (such as talent) in any of the following ways, unless this is unavoidable:
  - a) at above-market prices;
  - b) in quantities which go beyond those which are necessary to fulfil the public purposes; and / or,
  - c) on an exclusive basis.
- 3.1.9. Enshrining these principles within the Guidelines would generate a number of benefits for the BBC, the wider radio market and, most importantly, listeners themselves. These include:
  - a) Allowing Commercial Radio stations to carry appealing content without preventing the BBC from acquiring rights for the same or similar content. Very often, there is potential for the BBC and Commercial Radio to offer complementary coverage of a given event or sporting fixture. For instance, a Commercial Radio station could offer national coverage of one FA Cup or Premier League match at the same time as the BBC offered coverage of a second fixture, or a Commercial Radio station could offer coverage of one stage at Glastonbury Festival whilst the BBC broadcast from another stage.
  - b) Broadening the potential reach for coverage of sporting or music events and catering to a wider range of listeners than those catered for by the BBC. In the case of sports rights, this could enable coverage to reach a wider audience than that which is served by BBC Radio Five Live and BBC Local Radio, as outlined in their service licences (primarily men and over 50s respectively).
  - c) Reducing the cost of rights, and so improving value for money for licence fee payers. Offering rights or other programming inputs on an exclusive basis allows a rights holder to play off rival bidders against each other and so maximise income. This has the effect of driving up the cost of programming for Licence Fee payers. Refusing to procure rights on an exclusive basis would address this without impairing the BBC’s ability to secure those rights.
  - d) Increasing the overall quality of radio output for listeners. Competition between BBC and Commercial Radio inevitably stimulates improvements in the standard of radio output across all radio stations. Shared access to events is also likely to lead to improvements in the plurality and diversity of editorial perspectives within radio output.
- 3.1.10. **Procurement of unpaid-for programming inputs:** RadioCentre has recently submitted a complaint to the BBC’s Editorial Complaints Unit about the level of promotion afforded to third party artists, music and events in the context of the BBC acquiring opportunities to broadcast live performances, interviews with artists and other exclusive content. Details are provided confidentially at Appendix A. We argue that the promotion offered to artists and third party ticket agents lacks editorial justification and constitutes undue prominence, in direct contravention of the BBC’s editorial Guidelines<sup>4</sup>.

<sup>3</sup> BBC Trust / Oliver & Ohlbaum, ‘On-Screen and On-Air Talent’, May 2008, p. 5.

<sup>4</sup> BBC, ‘Editorial Guidelines: 13 – Editorial Integrity and Independence’, June 2005, <http://www.bbc.co.uk/Guidelines/editorialGuidelines/edguide/editorial/>.

- 3.1.11. This activity is distinguished from the procurement of programming inputs outlined above because it does not involve (we assume) any direct monetary payment by the BBC or the artists, record labels or event organisers in question. Yet it can still raise fair trading implications, given the scale of the BBC's cross-platform service offering and its privileged access to national FM spectrum. In light of this, we propose that the Guidelines should apply the same principles regarding procurement to unpaid-for programming inputs as is does to paid-for programming inputs. In other words, the BBC should avoid acquiring opportunities to broadcast live performances, interviews with artists and other programming inputs:
- a) in quantities which go beyond those which are necessary to fulfil the public purposes; and / or,
  - b) on an exclusive basis.
- 3.1.12. **References to BBC partners in editorial output:** Building upon its discussion of both paid-for and unpaid-for procurement, we believe that the Guidelines should outline a clear policy restricting the BBC's opportunity to provide editorial references to its partners. Our primary concern relates to radio, and we propose that the Guidelines should prohibit verbal references to BBC partners, given that such references are relatively easy for BBC editorial staff to control. We appreciate the complexities of excluding visual references to third party BBC partners (such as the sponsors of events), as third party brands could appear incidentally in a camera shot (such as shots of a visually branded event). However, we suggest that this issue could be at least partially addressed through an overarching prohibition on the BBC guaranteeing on-air visual or verbal references to its partners.
- 3.1.13. We have two examples of the type of partner which these amendments should prevent from receiving on-air references. Each example carries a significant risk of market distortion if it is not properly addressed in the Guidelines.
- 3.1.14. Our first example is sponsors of BBC events. In the event that a third party was unwilling to sponsor an event because they knew that the BBC is prohibited from providing any on-air reference event sponsors, this would imply that the potential for on-air exposure was a factor in their sponsorship of the event. The commercial premium which could be placed on exposure in unbranded BBC airtime means that even a small amount of exposure for any brand, product or service offers a significant commercial value to a brand, which inevitably reduces its need to spend money marketing itself via commercial broadcast media.
- 3.1.15. RadioCentre submitted market data to the BBC Trust in the context of its events sponsorship fair trading appeal to demonstrate that several of the BBC's past events sponsors are also important clients for Commercial Radio stations. We therefore believe that this section of the Guidelines leaves the BBC at risk of trading unfairly. We discuss events sponsorship further in response to question 7b.
- 3.1.16. A second example of BBC partners which should not receive on-air verbal or visual references is third parties associated with artists, music and live performances. We believe that the BBC should be prohibited from providing references to third party ticket agents or from broadcasting any exhortation to purchase concert tickets or other music-related products or services. The editorial complaint recently submitted by RadioCentre and discussed in paragraphs 3.1.10 to 3.1.11 highlights our concern about the BBC's promotion of ticket agents such as Ticketmaster and Seetickets through its radio stations and website.
- 3.1.17. RadioCentre believes that the current ambiguity about this type of promotion in the Guidelines is allowing the BBC to promote third parties in ways which Commercial Radio stations are prohibited from doing. This places the BBC at an unfair trading advantage compared with Commercial Radio in securing access to third party events or staging events of its own. The Guidelines refer to the BBC's provision of "programme support material (e.g. booklets) or tickets for events" but do not stipulate that programme support

material must be provided directly by the BBC itself<sup>5</sup>. The Broadcasting Code rules which Commercial Radio stations are subject to require all programme-related materials to be directly provided by the broadcaster<sup>6</sup>.

### **Competitive Impact Principle ("CIP")**

#### **3.2. Question 2: Do the Guidelines adequately explain how the BBC implements the CIP (i.e. how it endeavours to minimise its potential negative competitive impacts)?**

- 3.2.1. Implementing the CIP is not straightforward because, in our view, the requirement for the BBC to "endeavour to minimise its potential negative competitive impacts" places too much emphasis on subjective analysis of the BBC's actions by the BBC itself.
- 3.2.2. In our May 2007 response to the BBC Trust's Fair Trading and Competitive Impact consultation, RadioCentre argued that the CIP should be revised to create an objective test for anti-competitive conduct. As currently drafted, the CIP suffers from a lack of objectivity; there are no objective tests on the degree of "endeavour" or a definition of "minimise" such that it is possible to say with certainty when the BBC could be said to have minimised the effect on the market.
- 3.2.3. The CIP's reliance on subjective judgements by the BBC itself is reflected in the Guidelines, which outline a '3 step' test which incorporates a public value assessment, market impact assessment and consideration of means of minimising any negative outcomes. The Guidelines state that "The BBC adopts a proportionate approach ... taking into account the size and scale of the activity concerned and the particular circumstances". They also contain useful examples in Tables 1 and 2 of how the BBC can harm the market, and how this can be remedied. Yet what the Guidelines do not outline is the BBC ensures that it will implement the CIP consistently and fairly in each case<sup>7</sup>.
- 3.2.4. We believe that this should be addressed in due course by the BBC Trust rephrasing the CIP as an objective undertaking stating that the BBC must not act in a manner which restricts, distorts or prevents competition on relevant markets to an appreciable extent or create negative competitive effects on the market unless it cannot carry out its public purposes in any other way.
- 3.2.5. Alongside this, we propose that the Guidelines should encourage the BBC to seek external assistance in assessing the likely competitive impact of areas of BBC activity which are particularly likely to raise competition concerns. The Public Value Test process has demonstrated that the BBC Trust can be better placed than the BBC to make qualitative judgements about the BBC's competitive impact, given its functional separation from the BBC's public and commercial services. External consultants or Ofcom are also likely to be helpful sources of information and analysis.
- 3.2.6. We propose one final amendment to the section of the Guidelines which discusses the CIP. At present, it contains a helpful recognition that the terms of the BBC's relationships with third parties are of crucial importance. The second row of Table 1 on page 11 outlines instances in which the BBC as a rights holder contracts with third party platform providers, using the example of the BBC's on-demand services. We suggest that a further row should be added to the table, discussing the potential impact of the BBC obtaining third party content rights (such as sports commentary or talent) on an exclusive basis, in quantities which go beyond those which are necessary to fulfil the public purposes or at above-market rates.

<sup>5</sup> BBC, 'Fair Trading Guidelines – Draft for Consultation', October 2008, p. 19, clause 2.10.

<sup>6</sup> See: Ofcom, 'Broadcasting Code: Section 10 – Commercial references and other matters', October 2008, <http://www.ofcom.org.uk/tv/ifi/codes/bcode/commercial/>

<sup>7</sup> BBC, 'Fair Trading Guidelines – Draft for Consultation', October 2008, p. 8, clause 1.16.



**3.3. Question 3: Is the distinction between a Public Value Test and the CIP clear?**

- 3.3.1. We believe that clauses 1.2 – 1.13 of the Guidelines are not currently clear enough in outlining the distinction between a Public Value Test and the CIP. Reading the Guidelines, the main difference appears to be that the latter is applied on an ongoing basis to the BBC's public service activities by the BBC itself, whilst the former is triggered on a one-off basis when services are developed or amended and involves ex-ante evaluation by the BBC Trust, with potential market impact being independently assessed by Ofcom. We suggest that this should be spelt out, although we suggest in paragraph 3.2.5 that the BBC should seek external assistance in applying the CIP to particularly complex issues, given the difficulty for any organisation in making subjective judgements about its own actions.

**The 4 Commercial Criteria ("4CC")****3.4. Question 4a: Do the Guidelines adequately explain the distinction between those activities that are subject to the 4CC and those that are subject to the CIP?**

- 3.4.1. Our impression is that they do. We also welcome the changes to the Guidelines to reflect the classification of events sponsorship as a non-commercial trading activity which is subject to the CIP rather than the 4 commercial criteria, following RadioCentre's complaint to the BBC about its practice of providing on-air references to sponsors of BBC events<sup>8</sup>. We believe that the BBC's proposed changes accurately reflect the judgement by the BBC Trust that the BBC's sponsorship activity is subject to the CIP.

**3.5. Question 4b: Do the Guidelines adequately explain how each of the 4CC applies to the BBC's Commercial Services and Commercial Trading Activities?**

- 3.5.1. In general they do, subject to the points raised elsewhere in this response about issues such as procurement. This is partly helped by the clarity of the language used to describe each of the commercial criteria, which means that they form a more objective test than the CIP, albeit at a lower level.

**3.6. Question 4c: Do the Guidelines adequately explain the test for market distortion?**

- 3.6.1. We agree that judgements about whether services distort the market should be made on the basis of whether they comply with the Fair Trading Guidelines and relevant competition law. This underscores the importance of ensuring that the Guidelines are clear on all significant points, including those highlighted in this response as meriting greater attention.

**Separation/Pricing****3.7. Question 5: Do you have any comments about the guidance provided to ensure an appropriate degree of separation between the BBC's licence fee-funded, commercially funded and grant-in-aid-funded activities?**

- 3.7.1. The Guidelines appear likely to deliver a degree of separation between the BBC's licence fee-funded, commercially funded and grant-in-aid-funded activities, which would be extended if the BBC's commercial subsidiaries developed their strategies with full independence from BBC management. This would require clear board separation, although we note that the BBC's governance arrangements and structure are out of scope for this consultation.

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<sup>8</sup> See for instance: BBC, 'Fair Trading Bulletin September 2008 to November 2008', November 2008, [http://www.bbc.co.uk/info/policies/fairtrading\\_complaints/pdf/ftb\\_sepnov2008.pdf](http://www.bbc.co.uk/info/policies/fairtrading_complaints/pdf/ftb_sepnov2008.pdf)

### **3.8. Question 6: Do the Guidelines provide a clear explanation of the BBC's approach to transfer pricing and benchmarking?**

- 3.8.1. We have no comments to add in this area, save to suggest that the BBC could adopt a broader policy of benchmarking its expenditure across both Public and Commercial Services, seeking external assistance if need be, with a view to ensuring that it operates in step with the market in areas such as procurement of programming inputs.

## **Branding**

### **3.9. Question 7a: Is there sufficient clarity as to how and when third parties may be able to use, or associate themselves with, BBC brands?**

- 3.9.1. We have two observations on Chapter 4 of the Guidelines, in addition to more detailed comments on the new section regarding sponsorship, which we deal with in our response to question 7b.
- 3.9.2. **Use of BBC branding in third party marketing materials:** Clause 4.46, concerning 'Partnership arrangements', states that "all off-air promotional activities by the BBC and its partner organisations should avoid the perception that the BBC is endorsing the third party's trading activities"<sup>9</sup>. Despite this, Radio 1 has recently supplied its logo to a promotional campaign for a live tour by the rock band Coldplay. Further details are outlined in RadioCentre's recent editorial complaint about the BBC's practice of providing promotional support for artists, tickets and live performances – which we have enclosed alongside this submission and discussed elsewhere. We believe that this bullet point should be expanded to clarify that activity of this kind is not permitted.
- 3.9.3. **References to BBC partners in editorial output:** 4.64 states that "The value of the BBC brand may be damaged if any part of the BBC is seen to be associated with inappropriate third parties (e.g. purchasing goods or rights from them) or where they are licensed to use BBC content or brands (e.g. clips, programmes)."<sup>10</sup> We suggest that this clause could be expanded to outline the risk of damage to the BBC's brand arising when BBC partners (such as sponsors or events organisers) are featured in BBC output.

### **3.10. Question 7b: Is there sufficient clarity as to how Fair Trading applies to the sponsorship of BBC Public Service events?**

- 3.10.1. RadioCentre recognises that sponsorship of BBC events can help the BBC to defray the cost of mounting such events to the Licence Fee payer. We also recognise that there are legitimate opportunities for the BBC to help deliver its public purposes by broadcasting coverage of events which it stages itself.
- 3.10.2. The proposed changes to the Guidelines will go a long way towards ensuring that the BBC will not trade unfairly in this important area. Clauses 4.50 – 4.57 of the Guidelines ('Sponsorship') provide useful clarification of the BBC's policy with regard to sponsorship. For instance, they state that the BBC must not give guarantees on the extent of BBC promotional activities to a sponsor and acknowledge and events sponsorship can trigger editorial as well as fair trading policy issues.
- 3.10.3. Elsewhere, the Guidelines include the useful clarification that the BBC may recover "only a share of the costs of mounting Public Service events from third party sponsors (hence there is no possibility of a sponsor ever paying the BBC more than the cost of mounting an event)". However, the Guidelines are then silent on how the BBC would avoid price distortion in the event that the market rate for events sponsorship exceeded the cost of mounting an event. Should this occur, it could place the BBC in a difficult and contradictory position in relation to the Guidelines.
- 3.10.4. As outlined in paragraphs 3.1.12 to 3.1.17 our primary concern with this section of the Guidelines is that it stops short of prohibiting on-air references to a third party sponsor of

<sup>9</sup> BBC, 'Fair Trading Guidelines – Draft for Consultation', October 2008, p. 37, clause 4.46.

<sup>10</sup> BBC, 'Fair Trading Guidelines – Draft for Consultation', October 2008, p. 40, clause 4.64.

a BBC event which is also broadcast. Instead, the Guidelines state that "Any use of the sponsor's name or logo should normally be accompanied by appropriate wording to explain its presence e.g. "supported by"."<sup>11</sup> We believe that this omission is unwarranted and places the BBC at risk of trading unfairly.

### **Compliance**

#### **3.11. Question 8: Does the description of the compliance and reporting controls which the BBC has in place adequately explain how the BBC delivers on its Fair Trading obligations?**

- 3.11.1. The success of the BBC's fair trading regime is heavily dependent on the way in which it is implemented within public service departments, and particularly within those departments (such as radio stations' music and events departments) which present specific fair trading risks for the BBC. We suggest that the Guidelines should be expanded at A1.3 to give greater transparency about who is responsible for implementing fair trading policies for individual services. This information should be published on the BBC website and within individual BBC service licences and Statements of Programming Policy (SoPPs).

RadioCentre, January 2009

## **RadioCentre**

**77 Shaftesbury Avenue, London W1D 5DU**

**t: +44 (0) 20 7306 2603 f: +44 (0) 20 7470 0062 [www.radiocentre.org](http://www.radiocentre.org)**

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<sup>11</sup> BBC, 'Fair Trading Guidelines – Draft for Consultation', October 2008, p. 39, clause 4.56.