

Competitive impact and fair trading framework:

Public consultation by the BBC Trust

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Contents

	Page
1. Introduction	3
Purpose of the consultation	3
The role of fair trading in governing the BBC	3
2. Proposed Competitive Impact and Fair Trading Framework	4
Competitive impact policy statement	4
Statement of policy on fair trading	6
Competitive Impact Codes	8
4. Consultation questions	10
5. How to respond to this consultation	12
Useful information	12
How the Trust will use your response	12

I. Introduction

Purpose of the consultation

The BBC represents a deliberate intervention in the broadcasting market. However, this intervention also has the potential to impact on the wider market. The BBC's Charter therefore requires the Trust, when regulating the BBC Executive to have regard to the competitive impact of the BBC's activities on that wider market. To fulfil this duty the Trust is required by the Charter and Agreement¹ to adopt and publish a number of policies and codes:

- a statement of its policy on the competitive impact of the BBC's activities on the wider market (the "Competitive Impact Policy Statement");
- a statement of policy on fair trading (the "Fair Trading Policy"); and
- codes dealing with those aspects of the operation of the BBC's UK Public Services that, in its view, could raise significant issues regarding the competitive impact of the BBC's activities (the "Codes").

The Trust is required to consult publicly before adopting its Fair Trading Policy and any draft Codes. While not a specific requirement, the Trust also feels that it is appropriate to consult on the Competitive Impact Policy Statement alongside these other documents.

This consultation document therefore accompanies the Trust's proposed Competitive Impact Policy Statement, Fair Trading Policy and the first of its Competitive Impact Codes, covering Cross and Digital TV Promotion, which have now been published.

The Trust is seeking the views of interested parties, in particular Licence Fee Payers and industry, on the Trust's proposed approach and policy statements and codes. Details on how to respond to the consultation can be found at Section 5 of this document.

The role of fair trading in governing the BBC

The BBC is subject to competition law (including state aid law) and independent regulatory oversight by the competition authorities. However, the BBC has for a number of years also adopted its own 'Fair Trading regime', in recognition of its unique status. The Fair Trading regime is primarily designed to govern the way in which the BBC interacts with the market and conducts its commercial activities, by ensuring that the BBC 'trades fairly'. These principles are contained in the BBC's Fair Trading Commitment and Fair Trading Guidelines, which can be found at www.bbc.co.uk/info/policies/commercial_guides.

¹ Available at www.bbccharterreview.org.uk

The Government White Paper on the future of the BBC² raised a number of concerns regarding the operation of the current regime. In particular, it was felt by some that the regime was not sufficiently clear and that further controls were required to restrict potentially harmful behaviours.

As a result, the Charter and Agreement require the Trust to outline a new framework and documents in relation to the competitive impact of the BBC's activities on the wider market. The rest of this document outlines the key elements of this new framework.

The Trust will use feedback to this consultation when adopting final versions of the Competitive Impact and Fair Trading policies and codes. The Trust has agreed that the current Fair Trading regime should be maintained until the new framework and documents have been formally adopted and the BBC Executive is expected to comply with the current regime during this period. It should be noted that this consultation does not cover the process for handling fair trading complaints and appeals, which will be reviewed in the wider context of a complaints review to be undertaken by the Trust in due course.

2. Proposed Competitive Impact and Fair Trading Framework

Details on each of the three documents published by the Trust are outlined below, as well as possible consultation questions.

Competitive impact policy statement

The Competitive Impact Policy Statement outlines how the Trust intends to fulfil its duty to have regard to the competitive impact of the BBC's activities on the wider market. It also outlines the BBC's Competitive Impact Framework, which, while not a policy document, sets out the policies, codes, guidance and processes by which the Trust will ensure that its duty in relation to competitive impact is considered across all of the BBC activities.

Requirements on Public Service Activities

It is proposed that different requirements should apply to the BBC's Public Service and Commercial Activities (including those undertaken by the BBC's commercial subsidiaries).

² 'A public service for all: the BBC in the digital age'; published 14 March 2006. Available at www.bbccharterreview.org.uk

The Trust feels that, in addition to competition law, Public Service Activities should meet additional requirements, reflecting the privileged funding status of the BBC.

The Trust has considered what form these should take. One option considered was a requirement for the BBC to adhere to the competition law rules applicable to dominant companies in all the markets in which it operates, irrespective of whether the BBC might be dominant or not. However, while this could have the effect of potentially reducing the BBC's competitive impact, such a requirement would not be appropriate, in the Trust's view, as it could unduly fetter the ability of the BBC to fulfil its Public Purposes³. It could also compromise the Trust's ability to take proper account of its other duties as set out in the Charter and the Agreement⁴ and to fulfil its primary role as the guardian of the licence fee revenue and the public interest in the BBC.

The Trust therefore proposes that Public Service Activities should be subject to a 'Competitive Impact Principle'. This is a similar concept as that applied by the Trust when undertaking a Public Value Test and requires the BBC:

"...whilst always ensuring the fulfilment of its Public Purposes and taking into account its other obligations in the Charter and Agreement, to endeavour to minimise its negative competitive impacts on the wider market"

The Trust believes that this principle is the most appropriate method of balancing the BBC's requirement to fulfil the Public Purposes with the need to have regard to the competitive impact. The BBC must act in the interests of the Licence Fee Payers, and the ultimate consideration in this context will therefore be the impact on consumers.

Consultation questions

1. Is the Competitive Impact Principle an appropriate requirement to impose on the BBC's Public Service Activities? If not, what alternative requirement do you suggest?

Requirements on Commercial Activities

The Trust does not believe that it is appropriate to apply the Competitive Impact Principle to the BBC's Commercial Activities, which are not publicly funded or directly required to deliver the BBC's Public Purposes.

Commercial Activities will be required to comply with the requirements of the Charter and the Agreement. In particular, they must fit with the BBC's Public Purpose activities, exhibit commercial efficiency, maintain the BBC's reputation and brand and comply with the Fair Trading Policy and Fair Trading Guidelines, and in particular, avoid distorting the market.

³ The BBC's Public Purposes are set out in Article 4 of the Charter.

⁴ See in particular the general duties set out in the Charter, Article 23

The Trust's view is that Commercial Activities will not be regarded as distorting the market if they comply with competition law and do not benefit from any unfair commercial advantage which could unduly and negatively influence the market. The Trust's main concern is ensuring that Commercial Activities compete on the same basis as their competitors, and feels that this is adequately addressed through application of the criteria outlined above and in particular through appropriate and effective separation of the BBC's Commercial Activities from the BBC's Public Services and the requirement on the BBC to charge fair prices for Public Service Inputs.

Consultation questions

2. Do you agree that the Competitive Impact Principle should not apply to the BBC's Commercial Activities?
3. Is the proposed approach to the BBC's Commercial Activities and in particular to "distorting the market" appropriate? If not, what alternative approach might be adopted in relation to these requirements?

The Competitive Impact Framework

The Competitive Impact Framework describes how competitive impact will be taken into account across the BBC. It covers a range of policies, codes and processes in relation to: the approval of new services; the conduct of existing services (through the Fair Trading Policy and Codes); and enforcing and monitoring compliance.

Consultation questions

4. Does the Competitive Impact Framework address the main BBC activities where the Competitive Impact Policy Statement should be taken into account?

Statement of policy on fair trading

Fair Trading Principles

The proposed Fair Trading Policy sets out key principles for the conduct of trading activity by the BBC. The policy applies to all trading activity undertaken by the BBC, although some parts apply to Public Service or Commercial Activity only as discussed above. The proposed fair trading principles are:

- a) The BBC must comply with the requirements of competition law, including state aid law, when carrying out both its Public Service Activities and Commercial Activities.

- b) The BBC must not use the Licence Fee or Grant-In Aid to fund its Commercial Services. Amongst other matters, this requires operational and financial separation of the BBC's Public Service Activities and its Commercial Services.
- c) When carrying out its Public Service Activities, whilst always ensuring the fulfilment of its Public Purposes and taking into account its other obligations in the Charter and the Agreement, the BBC must endeavour to minimise its negative competitive impacts on the wider market.
- d) Any Commercial Activities carried out by the BBC must fit with the BBC's Public Purpose activities, exhibit commercial efficiency and comply with the Fair Trading Guidelines, in particular, by avoiding distorting the market⁵ They must also take into account the BBC's other obligations in the Charter and Agreement.
- e) The BBC should ensure that it preserves the brand and reputation of the BBC, both in the UK and overseas, in such a way that it appropriately maximises the value of the BBC to the Licence Fee Payer. An important aspect of this relates to how the BBC deals with other companies and individuals in connection with its brand. The BBC must consider carefully the identity of its trading partners, its use of its brand and the appropriate pricing for its brand.

Consultation questions

- 5. Are the fair trading principles appropriate and will they be sufficient to ensure that the BBC 'trades fairly'?

Implementation of the Fair Trading Policy

The Fair Trading Policy sets out minimum measures that the Trust expects the BBC Executive to put in place to ensure compliance. These include "structural" requirements (relating primarily to the separation of the BBC's Public Service Activities and its Commercial Services); "compliance" requirements, including putting appropriate monitoring and implementation procedures in place, and "governance" measures.

Consultation questions

- 6. Are the measures that the Trust requires the BBC Executive to implement appropriate to ensure compliance? If not, what other measures should be considered?

⁵ This is discussed under the Competitive impact policy statement above

Competitive Impact Codes

The purpose of the Codes is to provide clear principles and guidance to the BBC Executive on those aspects of the BBC's UK Public Services which could raise significant issues regarding their competitive impact. The Trust has proposed one code as outlined below. Further Codes may be presented during a separate future consultation.

Consultation questions

7. Are there any other areas that you feel could raise significant issues regarding their competitive impact where the Trust might consider implementing further Competitive Impact Codes?

Code on cross and digital TV promotion

The Trust believes that trailing can play an important role in extending the public value of BBC output. But, as noted in the White Paper, this is an area which could also raise competitive impact concerns, given that trails could direct audiences towards particular goods or services over others. The Code covers three main types of trailing by the UK Public Services:

The Trailing of BBC Programme-Related Materials

The Code proposes that the following principles summarised below should be applied when trailing goods and services produced in conjunction with BBC programmes:

- trailing must comply with the terms of any undertakings granted to regulatory authorities.
- trailing must be for clear editorial or Public Purpose reasons.
- Any reference to availability of BBC Programme-Related Materials should take an entirely non discriminatory approach or, where this is not possible, the least discriminatory approach practicable.

BBC Executive must provide detailed guidelines (to be approved by the Trust) to apply these principles and ensure that the nature and extent of trailing is appropriate.

In relation to the first principle above, the BBC has an undertaking with the Office of Fair Trading (OFT) in relation to trails of BBC magazines. However, as the current Fair Trading Guidelines state, the BBC voluntarily has agreed to extend this undertaking to all trails of BBC Programme related Materials; *“Although, the OFT undertaking only covers BBC magazines, the BBC has chosen to go further than the OFT undertaking and to apply the letter and the spirit of the undertaking to all trails of commercial products on all our publicly-funded television services”* (Paragraph 3.38). The Trust considers that it may no longer be appropriate to voluntarily

apply this undertaking to all trails of BBC Programme Related Material (although it will obviously still apply to BBC magazines). The Trust considers the undertaking to be overly restrictive in relation to current industry practice. For example, the undertaking prevents the BBC from using formats such as 'split-screen' trailing of products during end-credits, which is a feature commonly employed by other broadcasters. The Trust therefore proposes that it is licence fee users interests to remove the voluntary restrictions that the BBC has placed upon itself in relation to non-magazine trailing, and replace these with updated detailed guidelines to be approved by the Trust.

The Trust considers that specific issues are raised by trailing in the on-line environment. Overall the Trust believes that licence fee payers may benefit from the provision of direct links from bbc.co.uk to external sites which allow purchases of BBC Programme-Related Materials. This is because users may benefit from the easier access to material which extends the public value of content. In line with general market practice, this may also include links to sites which form part of the BBC's Commercial Services, which the Trust recognises by the nature of their content may appear more regularly than other external links. However in doing so, the BBC will be required to endeavour to minimise potential negative competitive impacts on the wider market by also linking to other sites which offer on-line purchase of the same materials on a non-discriminatory basis, where appropriate and possible.

Consultation questions

8. Do you support the proposed principles in relation to trailing of BBC Programme-Related material?
9. Do you agree that the OFT magazine undertaking should no longer be applied to non-magazine BBC Programme-Related Materials?
10. Do you agree that the BBC should include links from its Public Service website to sites where BBC Programme-Related Material may be purchased, where editorially justified? If so, is the proposal to provide other links on a non-discriminatory basis the best way to reduce potential competitive impact?

The Trailing of the BBC's Other Commercial Services

The Code states that the BBC should not promote its other commercial services on the UK Public Services unless there is a clear editorial justification for doing so. The BBC Executive will be expected to implement guidelines as to when there is such a justification.

Consultation questions

11. Do you agree that the BBC's Other Commercial Services should only be promoted if there is clear editorial justification?

Digital TV promotion

The BBC has a specific Public Purpose to take a leading role in the switchover to digital TV and that trails can have an important role to play in this area. For this reason, the Trust

considers that trailing needs to be as effective as possible, whilst minimising the potential negative competitive impact on the market.

The Trust proposes that any promotion that refers to a specific digital platform, or service, must also name all other major digital TV platforms, or services, on which the BBC's UK Public Services are available. A 'major' platform or service is considered to be one which attracts a customer base of over 500,000 users.

The Trust also considers that it may be appropriate for trails to refer to "Freeview", rather than the more technical 'Digital Terrestrial Television' term, even when referring to other platforms. This is because the Trust regards the term Freeview as more likely to be readily understood by licence-fee payers and permitting its use to describe Digital Terrestrial Television therefore provides a clearer message. However, the Trust is keen to receive views on the appropriateness of this approach.

Consultation questions

12. Do you agree that the proposed approach to trailing of digital platforms and services is the most appropriate way of delivering the BBC's Public Purposes, while also minimising potential competitive impacts on the wider market? If not, what alternative principles might be adopted?

4. Consultation questions

The Trust welcomes your views on the draft competitive impact and fair trading framework. In particular, it seeks feedback on the questions listed in this document.

The Trust also welcomes constructive suggestions related to these questions, taking into account the scope of this consultation and the role of the Trust in governing the BBC's activity.

Full list of consultation questions

Competitive Impact Policy Statement

1. Is the Competitive Impact Principle an appropriate requirement to impose on the BBC's Public Service Activities? If not, what alternative requirement do you suggest?
2. Do you agree that the Competitive Impact Principle should not apply to the BBC's Commercial Activities?
3. Is the proposed approach to the BBC's Commercial Activities and in particular to "distorting the market" appropriate? If not, what alternative approach might be adopted in relation to these requirements?
4. Does the Competitive Impact Framework address the main BBC activities where the Competitive Impact Policy Statement should be taken into account?

Fair Trading Policy

5. Are the fair trading principles appropriate and will they be sufficient to ensure that the BBC 'trades fairly'?
6. Are the measures that the Trust requires the BBC Executive to implement appropriate to ensure compliance? If not, what other measures should be considered?

Cross and Digital TV Promotion Code

7. Are there any other areas that you feel could raise significant issues regarding their competitive impact where the Trust might consider implementing further Competitive Impact Codes?
8. Do you support the proposed principles in relation to trailing of BBC Programme-Related material?
9. Do you agree that the OFT magazine undertaking should no longer be applied to non-magazine BBC Programme-Related Materials?
10. Do you agree that the BBC should include links from its Public Service website to sites where BBC Programme-Related Material may be purchased, where editorially justified? If so, is the proposal to provide other links on a non-discriminatory basis the best way to reduce potential competitive impact?
11. Do you agree that the BBC's Other Commercial Services should only be promoted if there is clear editorial justification?
12. Do you agree that the proposed approach to trailing of digital platforms and services is the most appropriate way of delivering the BBC's Public Purposes, while also minimising potential competitive impacts on the wider market? If not, what alternative principles might be adopted?

5. How to respond to this consultation

Useful information

The BBC Trust is inviting responses to this consultation between 20 February 2007 and 22 May 2007. If you wish to respond to this consultation, you can send your response to:

Michael Hedley
BBC Trust
Room 211
35 Marylebone High Street
London W1U 4AA

Or by email to: ftconsultation@bbc.co.uk

Please complete the Confidentiality statement, shown overleaf, when you make your response.

The Trust aims to close this public consultation at 5pm on 22 May 2007.

Audio and Braille translations of this document are available upon request by calling BBC Information on 0800 068 0116.

How the Trust will use your response

Responses to this consultation will be published on the BBC Trust website www.bbc.co.uk/bbctrust after the consultation has closed. Feedback to this consultation will be used by the Trust when adopting final versions of the Competitive Impact and Fair Trading policies and codes.

Names and/or addresses of individual respondents will not be published on the Trust website. The Trust will publish details of organisational responses. Please copy or sign the declaration overleaf to signal that you are prepared for some or all of your response to be made public. If you would prefer that all or part of your response is treated as confidential, please make this clear in your submission.

PLEASE PRINT AND SIGN THIS DECLARATION IF YOU ARE SENDING A HARD COPY OF YOUR RESPONSE. IF YOU ARE SENDING AN ELECTRONIC RESPONSE, PLEASE COPY THIS STATEMENT INTO THE RESPONSE AND COMPLETE IT.

If you would prefer that all or part of your response is treated as confidential, please complete the confidentiality section below.

What do you want the BBC Trust to keep confidential?

Nothing	
Whole response	
Part of it	
Which part?	[please indicate]

Name
Position/job title
Organisation
Address
Other contact details (telephone, email)

The BBC Trust will retain and use your name, address, email address and organisation you work for (if applicable) for the purposes of administering the online public consultations held on this website. You will have the option of deciding whether you want your response and name displayed on this website (all other personal information will be withheld from display). Your personal details will not be passed to any third parties for marketing purposes. The BBC complies with the Data Protection Act 1998. For more information on BBC's Privacy Policy please refer to <http://www.bbc.co.uk/privacy/>.

The BBC is listed as a public body in Part VI of Schedule 1 to the Freedom of Information Act 2000; this means that, subject to certain restrictions, the BBC may be required to disclose information it holds to individuals and organisations making a valid request to be supplied with that information under the Act.

If you have requested that all or part of your response should be kept confidential, the BBC will take reasonable steps to maintain confidentiality of that information if a request for its disclosure is received under the Act. Please note, however, that in the event the BBC is able to withhold information under the Act, this decision may be overturned by the Information Commissioner, the Information Tribunal or the courts.

Please note that we may still refer to the contents of responses in general terms, without disclosing specific information that is confidential. We will exercise due regard to the confidentiality of information supplied.

DECLARATION

I confirm that the information I have submitted is a formal consultation response. It can be published in full on the BBC Trust's website, unless otherwise specified, and I authorise the BBC Trust to make use of the information in this response to meet its legal requirements. If I have sent my response by email, the BBC can disregard any standard e-mail text about not disclosing email contents and attachments.

Name

Signed (if hard copy)

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