

**BBC Governors' conclusions on  
a revised Fair Trading complaints  
and appeals process**

**16 DECEMBER 2005**

## Executive Summary

This document presents the BBC Board of Governors' conclusions on a revised Fair Trading complaints and appeals process.

The BBC's Fair Trading regime is the framework designed to govern the BBC's commercial activity. It covers all commercial activity undertaken by the BBC, either by public service divisions or the BBC's commercial subsidiaries. In its May 2005 response to the Government Green Paper on the Review of the BBC's Royal Charter, the Board of Governors announced that they were reviewing the Fair Trading complaints system.

This document presents the conclusions of this review. In response to issues raised, Governors intend to introduce a range of new measures to strengthen the complaints and appeals process. The key features of this new process are outlined below:

- **Clear separation of complaints and appeals**  
BBC Management will handle all initial complaints, independent of Governors. However, any subsequent appeals will be investigated and handled by the Governors with the assistance of the Governance Unit (an independent team within the BBC reporting solely to the Governors). This will ensure the effective separation of complaints from subsequent appeals.
- **Published process for handling complaints and appeals**  
For the first time, separate procedures for handling complaints and appeals will be published, including target timescales. This will greatly improve transparency for external parties and allow the Governors to report publicly on the performance of both systems.
- **Governors and Management will rely on separate independent advice**  
Both Governors and BBC Management will call on external independent advice as necessary. However, Governors will not rely on advisers who have previously advised on the same complaint on behalf of Management. This will strengthen the objectivity of the appeals process.
- **External parties and BBC Management will both be treated as parties to the appeal**  
During appeals, the status of appellants and BBC Management will be as separate parties to the complaint. This will ensure impartiality in the appeals process.
- **A formal system of sanctions**  
Governors will have a range of sanctions and remedies in the event of Fair Trading breaches. Decisions will also be published to strengthen the credibility of the process.

Having announced these conclusions, measures are now being taken to implement the new system, which will be introduced from February 2006. Progress will be updated in the next Annual Report.

While these reforms relate to the existing Fair Trading system, the Governors also hope that these reforms would provide a useful basis for any future regime, in light of the outcome of the Government White Paper.

## 1. Introduction

The BBC engages in a wide range of commercial activities, at home and abroad. These make an important contribution to the BBC's overall programming and public purpose. Like other organisations the BBC is fully subject to both domestic and European Competition Law. However, in recognition of its special position as a publicly-funded organisation, the BBC also voluntarily embraces other requirements to ensure that it acts fairly in all commercial markets that it operates.

The framework designed to govern commercial activity to achieve these important obligations is referred to as the BBC's Fair Trading regime. This covers all commercial activity undertaken by the BBC, either by public service divisions or the BBC's commercial subsidiaries.

In its May 2005 response to the Government Green Paper on the Review of the BBC's Royal Charter<sup>1</sup>, the BBC's Board of Governors announced that they were reviewing the Fair Trading systems, including a revised complaints process. Independent consultants (Spectrum Strategy Consultants) were commissioned to prepare advice for the Governors. This review was designed to address previous criticisms of the system and to consider ways in which the complaints process could be strengthened, in the context of the wider reforms of governance that the BBC is embracing to demonstrate objectivity, increase transparency and improve accountability.

Section 4 of this paper sets out in detail the Board of Governors' conclusions on a revised complaints and appeals process. Having announced these reforms the Governors are now working with BBC Management to implement the revised complaints process, which will be introduced from February 2006. Progress on the new system will also be reported in the next Annual Report.

The reforms relate to the existing Fair Trading processes and will be implemented within the current Charter period, which expires at the end of 2006. Future arrangements during the next Charter period will be determined in the Government White Paper. However, the Governors hope that these reforms would still provide a useful basis for any future regime, in light of the outcome of the White Paper.

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<sup>1</sup> Available at [www.bbc.co.uk/thefuture/green\\_paper/green\\_paper.shtml](http://www.bbc.co.uk/thefuture/green_paper/green_paper.shtml)

## 2. The BBC's current Fair Trading regime

The BBC is established by Royal Charter to provide a public broadcasting service which is available to all and funded by all. It has a responsibility to provide services of high quality, integrity and distinctiveness to its audiences and to maintain high standards in the broadcasting industry. Everyone who comes into contact with the BBC has a right to expect it to conduct its operations with integrity and competence.

This is equally important when the BBC participates in commercial markets. The BBC engages in a wide range of commercial activities, at home and abroad. These make an important contribution to the BBC's overall programming and public purpose by delivering a range of important benefits. In particular, commercial activities can:

- Generate extra funds, increase efficiency in the use of BBC resources and build long-term asset value to support its core public service output<sup>2</sup>;
- Complement the BBC's public purposes by extending audience appreciation of BBC content through offering a range of products linked to BBC output, such as books, videos and multimedia products, while BBC commercial channels offer further chances to see BBC programmes, both at home and abroad;
- Help to raise awareness around the world of the UK's cultural values;
- Build international audiences for UK content, creating a cultural bridgehead for UK talent around the world and raising awareness of the BBC brand; and
- Enhance the BBC's position as a global media player, supporting the UK's reputation for quality and impartiality around the world.

In pursuing commercial activities, the BBC is, like other organisations, fully subject to both domestic and European competition law. In addition to ensuring compliance with European and UK Competition Law and European Law on State Aid, and in recognition of its special position as a publicly-funded organisation, the BBC also voluntarily embraces other requirements.

Because of its special position as a publicly funded institution, the BBC must ensure that all of its commercial activities reflect the principal editorial and public service values of the BBC, that it makes maximum use of its programme and other assets on behalf of the licence fee payer, and that it does not exploit its position as a publicly funded body to secure a special advantage in commercial markets. All its commercial activities should supplement and support the BBC's public purposes.

The framework designed to govern the BBC's commercial activity to achieve these important obligations is known as the BBC's Fair Trading regime. The Fair Trading

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<sup>2</sup> Successive Governments have tasked the BBC to exploit its assets commercially as effectively as possible. For example, following the introduction of the current Charter in 1996, the then Secretary of State for National Heritage, Virginia Bottomley wrote to the then BBC Chairman, Marmaduke Hussey, to say "*The BBC must take full advantage of the new commercial opportunities which are now available ... I hope that the BBC will exploit overseas markets to the full, building on its strengths and global reputation and playing its part in enhancing UK competitiveness.*" This challenge was repeated by Chris Smith in 2000 and again by Tessa Jowell in November 2003 in their capacity as Secretary of State for Culture, Media and Sport.

regime extends to all commercial activity undertaken by the BBC, whether conducted by its public service divisions or commercial subsidiaries.

The BBC's key principles in relation to commercial activity are currently enshrined in the Governors' Fair Trading Commitment. This document forms the basis for more detailed Fair Trading Guidelines issued by BBC Management.

Within the BBC, the Head of Fair Trading (a senior member of Management) is responsible for ensuring day to day compliance with the Fair Trading Commitment and Fair Trading Guidelines, advising Management and the Governors. Overall compliance with the Fair Trading Commitment is monitored by the Fair Trading Compliance Committee (FTCC). This is a sub-committee of the full Board of Governors, chaired by the Vice Chairman of the BBC. The FTCC also commissions an annual independent audit of the Fair Trading regime, providing assurance of compliance with the Fair Trading Commitment, and requires the BBC Management to achieve and maintain ISO 9001:2000 accreditation, which requires six monthly assessments by the British Standards Institute of the BBC's fair trading systems and procedures.

#### The current Fair Trading complaints and appeals process

Currently the BBC deals with each external Fair Trading challenge individually on a case-by-case basis. Complaints may be received by the BBC's Head of Fair Trading, the Director General, the FTCC or the BBC Chairman. In all cases, an initial investigation is made by the Head of Fair Trading. Depending on the seriousness of the complaint, the Head of Fair Trading may make a decision on the complaint or may refer it to the FTCC. In the latter case, the Head of Fair Trading will present a report on his analysis of the complaint and make recommendations to the FTCC. Decisions on appeals are normally considered by the FTCC, although there is no standard requirement for it to do so. Within this process, the Head of Fair Trading is involved in advising on both complaints and appeals, making initial decisions on some complaints, and advising the FTCC in relation to appeals, where they may have handled the original complaint.

Because of the individual way in which each case is handled, there are no formal deadlines for a response and there is no clearly defined redress available to complainants.

Although this approach allows the BBC to adopt processes and procedures relevant to each individual complaint made to it, it does mean that there is no one standard approach that can be readily understood by external complainants. The regime also makes no clear distinction between Fair Trading complaints and appeals.

The BBC considers itself subject to the full rigour of competition law. In the event that a complaint is made against the BBC to an external competition authority (e.g. Ofcom or the Office of Fair Trading), whilst also being investigated by the BBC's own complaints and appeals process, standard practice is for the BBC to suspend its own investigations pending the outcome of the competition authority's investigation.

### **3. Review of the Fair Trading complaints and appeals regime**

In 2004 the BBC conducted an internal review of its commercial activities (the Commercial Review). During this review a number of external parties raised concerns about the process for making complaints under the Fair Trading regime. Specific criticisms of the regime included:

- Lack of transparency and clear processes for handling complaints and any subsequent appeals.
- Lack of clarity as to how aggrieved parties can complain, or the grounds for making a complaint.
- Lack of a clear process for challenging initial decisions taken by the BBC in response to a complaint. The appeals process itself varies, with some appeals being investigated by the FTCC, while others are not.
- Perception of bias in favour of the BBC, and the view that the BBC Management has privileged access to the FTCC in order to make its case.
- No standard timescale in which the BBC is required to respond, and some criticism over the length of time taken to handle specific complaints.
- Lack of clarity on the sanctions that may be imposed if the BBC was found to be in breach of the Fair Trading Commitment or Fair Trading Guidelines.

The role of the Fair Trading regime was also discussed in the Government Green Paper, in the context of governing the BBC's commercial services.

The Governors take the criticisms above very seriously, and are aware that public expectations of transparency and accountability have gradually increased since the regime was introduced.

As announced in the response to the Green Paper, the Governors therefore commissioned the Governance Unit<sup>3</sup> and external advisers, Spectrum Strategy Consultants, to highlight options to amend the Fair Trading processes. This review was also undertaken in the context of the wider governance reforms proposed in the Green Paper. As a result of this review, the Governors have reached a number of conclusions in relation to the current arrangements. These are set out in the following section.

Having announced these reforms, Governors intend to introduce the new complaints and appeals process from February 2006.

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<sup>3</sup> The Governance Unit is an independent team within the BBC reporting solely to the Governors

#### **4. Conclusions on a revised Fair Trading complaints and appeals process**

Governors have reached a number of conclusions to strengthen the current Fair Trading complaints and appeals process. These proposals are described in detail below.

##### Separation of complaints and appeals

While the current system provides flexibility to handle individual complaints in the most appropriate way, the Governors believe that a fundamental change is required to separate the current single process into two independent and standardised processes.

It is therefore proposed that the Governors – through the Fair Trading Compliance Committee (FTCC), and assisted by the Governance Unit – assume responsibility for handling all appeals, while the Management of the BBC independently handle all complaints. The Governors believe that this structural separation will significantly enhance the credibility of the process by:

- providing a clear and transparent process for the separate handling of both complaints and appeals;
- ensuring independence of the Governors from Management in handling appeals, thus ensuring that appeals are evaluated objectively and impartially, and providing an alternative source of redress for complainants; and
- Separating the dual role, and perceived conflict of interest, of the Head of Fair Trading as adviser on both initial complaints and subsequent appeals.

The FTCC will continue to be responsible for overseeing compliance with the Fair Trading Commitment. This will include continuing to commission the independent audit of the regime, which will be reported in the Annual Report.

BBC Management will be responsible for handling all Fair Trading complaints. It is proposed that the Head of Fair Trading will report to a member of the BBC Executive. But, to ensure effective oversight, details of all substantive complaints received by Management, and outcomes, will be periodically reviewed by the FTCC.

Details of how these separate processes might work in practice are set out below.

##### *The revised complaints process in practice*

Details of how external parties may complain will be clearly presented, as described below. All new challenges will be directed to the Head of Fair Trading. Management will be responsible for the complaints process and, unless there is an exceptional reason, Governors would not be directly informed of individual complaints at this stage. Instead, details of complaints received and outcomes will be periodically reviewed by the FTCC.

Management will also aim to handle complaints within set timescales. The Head of Fair Trading will analyse all complaints, seeking information and advice as necessary. Under current proposals, the aim will be to acknowledge complaints within 10 working days of receipt. Acknowledgement will also include clarification of the process to be followed, and where complaints pertain primarily to competition law, will make clear that the complaint could be made directly to a relevant competition authority. From the date that all necessary information from the complainant has been received, Management currently propose that a decision will be made, based on the evidence, within an additional 30 working days. In more complex cases timescales may need to be extended to ensure full and proper analysis; if so this will be explained to complainants.

If Management decides that a complaint should not be upheld, the justification for this decision will be clearly communicated to complainants. If a complaint is upheld, Management will advise the complainant of any consequential actions to be taken. Details of all substantive complaints received and subsequent outcomes will be published in the quarterly 'Fair Trading Bulletin'.

#### *The revised appeals process in practice*

Public guidance will make the process for appealing any decision clear. The grounds for appeal are likely to include: disagreement with the decision made; disagreement with the remedy/ sanctions imposed; or concern that the correct process was not followed.

Appeals will be handled on behalf of the FTCC by the Governance Unit, which will replace the support role currently undertaken by the Head of Fair Trading. Upon receipt of an appeal, the Head of Compliance and Value for Money (part of the Governance Unit) will make an initial assessment based on the appeal criteria. Under current proposals, the Governance Unit will aim to acknowledge receipt of an appeal and decide whether to proceed with the appeal within 10 working days.

Having compiled the available evidence, the Governance Unit will assess whether any further investigation or advice is required. If so, the Governance Unit will request information or commission any analysis on behalf of the FTCC – either internally, from BBC Management, or from external advisers.

The Governors will retain the right to decline to hear an appeal. This is normally expected to occur in two cases. First, as they are not a competition authority, the Governors are unable to consider appeals which primarily concern an alleged breach of UK or European competition law. In this case the Governance Unit will make complainants aware of alternative authorities (for example the Office of Fair Trading, Ofcom, or the European Commission) who may be better suited to handle the complaint. Second, vexatious or repeated complaints may be declined.

The analysis will be independently reviewed by the Governance Unit, which will form its own recommendations for the FTCC. The FTCC will then review the material and make its decision. Where necessary, it may defer an appeal and request further information. The FTCC may need to meet on an ad hoc basis to hear appeals, or if appeals are time-critical responsibility may be delegated to the Chairman of the FTCC, who will provide a full report on his decision at the next meeting.

In most cases the FTCC will consider appeals without an oral hearing. A hearing will only be called if the Chairman of the Committee believes that it is necessary. In this event appellants will be given advance warning to prepare, and hearings will be held in private. Full details on the process and case for oral hearings will be published in due course.

The Committee will be the final stage of the BBC's fair trading complaints process. When an appeal is upheld by the FTCC, appellants and BBC Management will be informed, alongside details of any actions proposed. Details on the potential remedies and sanctions available to Governors are outlined in this paper. Appeal findings will be published, although it should be noted that fair trading appeals may have a degree of commercial sensitivity, and full disclosure of information may not be appropriate in every case.

### Published process for handling complaints and appeals

At present, there is no formal requirement to communicate the process for handling complaints to external parties. The individual way each complaint is handled has made it difficult to publish a standard process. However, this has affected the transparency and accessibility of the regime to external parties.

Governors propose to publish the new procedures for handling complaints and appeals. Details, including information on how to make a complaint, will be provided on the BBC's website and the Governors' separate website. The guidance will also make clear that complaints which primarily pertain to breaches of competition law could instead be made to the relevant competition authority (e.g. Ofcom, the OFT, or the European Commission). As outlined above, both processes will also be managed within target timescales, which will allow Governors to report publicly on the performance of both systems against key targets.

The published guidelines will include:

- a clear explanation of the grounds for making a complaint or appeal;
- details of how to complain/ appeal, and to whom;
- alternative bodies or sources of redress in competition law cases;
- the likely process and actions that will be taken during the BBC's investigative process; and
- expected timescales for each stage of the process.

At each stage this will allow complainants to see the next step in the process. If target timescales are unlikely to be met, this will be clearly communicated, together with reasons for the delay. The public guidelines will make clear that following a final decision by Management in relation to a complaint, the decision may be appealed to Governors.

Clear guidelines will also allow the Governors to report publicly on the performance of the system. This could include details of the percentage of complaints upheld and

appealed, and performance against timescales. These targets will help communicate the remit and performance of the regime.

An example of the separate processes is attached at Annex A.

#### Governors and Management will rely on separate independent advice

At present, advisers to the FTCC may also on occasion provide advice to BBC Management on both complaints and subsequent appeals. This is most likely to be the case in relation to the Fair Trading auditors, or the BBC Legal team, and raises the potential for conflicts of interests.

Where necessary, both the Governance Unit and Management will continue to use external advisers to support the complaints and appeals process. However, when handling appeals the Governors will continue to have access to advice commissioned by Management, but will not rely on advisers (or their advice) who have previously been involved in the specific case under investigation. This will strengthen the objectivity of the appeals process.

Governors also propose that in future the Fair Trading auditors should only provide specific advice to the FTCC and Governance Unit on appeals, although Management may continue to seek general guidance from the auditors where appropriate. The Governors are also considering ways in which the auditors can play a greater role in ensuring compliance, for instance by conducting specific reviews at the request of the FTCC, and undertaking 'enforcement reviews' to monitor behavioural undertakings imposed on Management.

The separation of advisers will also apply to cases where the internal BBC legal team (through the BBC's General Counsel) has previously advised Management on a specific case. Currently the General Counsel is responsible for providing advice to both the Head of Fair Trading and the FTCC on compliance with the legal and regulatory framework, and the BBC's own wider 'Governance' policies in relation to Fair Trading. In cases where the General Counsel (or his team) has previously advised Management on a particular complaint, the FTCC will access separate, independent legal advice at its discretion when investigating any appeal. These changes are designed to enforce the Governors' separation from Management.

#### External parties and BBC Management will both be treated as parties to the appeal

At present, there is a perception that the complaints process is not fair or objective to external parties. The Governors themselves are not considered sufficiently independent from Management when deciding on complaints and appeals. This is compounded by the current dual role of the Head of Fair Trading who may provide support to both the Management and the FTCC, which overall creates a perception of bias and compromises the credibility of the system.

In future, the status of the appellant and BBC Management will be as separate parties to the complaint. For example:

- If further advice is commissioned by the Governance Unit, material from the investigation will normally be shared with both BBC Management and complainants for comment, within set timescales.

In some cases however (as has occurred in the past) complainants may wish to share certain confidential information with the Governors in support of an appeal. Given its independent status, the Governance Unit and FTCC will be able to consider confidential information that external parties may have been unwilling to share with BBC Management, or vice-versa, during the complaints stage. In such cases it may not be appropriate to share confidential information with other parties.

- If the FTCC decides that an oral hearing is necessary, Management would attend as a 'party' to the hearing alongside external complainants.

#### A formal system of sanctions

The Governors propose to establish a clear and transparent system for determining sanctions on BBC Management if challenges are upheld.

There is currently no standard public procedure on how remedies or sanctions will be applied. This has led to scepticism over what action the FTCC would take if Management were found to be in breach of the Fair Trading Commitment.

The Governors consider that the availability of appropriate tailored sanctions is vital to show that the regime is credible and has the necessary 'teeth' to make a difference. It is proposed that both the complaints and appeals stages will have clear and transparent systems for the determination and imposition of sanctions or remedies.

Management will impose its own sanctions or remedies following complaints. The FTCC will also be able to ensure that appropriate action is taken following an appeal. Remedies and sanctions available to the Governors will include:

- Governors, or Management instructed by Governors, will issue an apology to parties whose appeals have been upheld. This could range from private correspondence to a public acknowledgement of fault in more severe cases.
- Governors may instruct BBC Management to cease, or alter, certain activities, or to amend guidelines, to prevent a recurrence of a breach. Compliance with undertakings will be monitored by the Fair Trading auditors.
- The Committee could also refer concerns about the conduct of specific staff to the Director General of the BBC. The Director General would be asked to consider investigation and potential disciplinary proceedings against such individuals, in accordance with usual procedures and following normal employment law.

To demonstrate the effectiveness of the scheme, appropriate details of appeals and any resultant proposed actions (other than internal disciplinary matters) will be published by Governors.

## **5. Implications for future governance arrangements**

The Government will publish its White Paper on the review of the future Royal Charter. While the future implications for the current Fair Trading system are unknown, the Governors hope that elements of the reforms presented here could prove useful in any future arrangements following the White Paper.

## **6. Next steps**

Having announced these conclusions, the Governors are now working to implement the necessary reforms. The new complaints and appeals process will be introduced from February 2006. Details will appear on the BBC's website and separate Governors' website in due course. The 2005/06 Annual Report will also update on progress made in implementing the revised system and details of the complaints and appeals handled.

**ANNEX A: Proposed Fair Trading complaints and appeals processes**

