

FAIR TRADING: CODE OF PRACTICE FOR BW STAFF 2006

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1. INTRODUCTION

- 1.1. BW is a public corporation that is required by statute to operate on a commercial basis and like any other commercial organisation to operate fairly and within competition law. Its primary statutory powers and duties relate to its role as the UK's largest inland navigation authority. In that capacity it acts as both the sole operator of a network and as a competitor in the supply of services (including mooring facilities) on that network. The combination of these two activities could, unless correctly managed, give rise to behaviour which might distort the markets in which BW operates and be unfair to competitors.
- 1.2. To address this concern, BW has put in place structural arrangements, policies and operating procedures to help employees comply with fair trading principles and competition law. This code of practice explains the issues for employees and makes clear their responsibilities.

Managers **must** understand the content of this Code and make relevant parts of it, together with adequate explanation, available to their staff. If you are ever in any doubt about issues that arise you should ask your line manager or contact the Marketing & Customer Service Director, the Head of Boating Development or, the Legal Director.

Failure to comply with this Code, personally, or through staff for whom managers are responsible, is a serious matter and may lead to disciplinary action (see para 2.10)

There are independent checks and balances to make sure that our procedures are appropriate and that we apply them correctly. These are outlined in Section 2.

This Code of Practice is a public document, available to our customers so that they can understand our procedures and how we will work. It is published on our website at www.britishwaterways.co.uk/fairtrading

- 1.3. Part 1 of the document sets out general principles that would be applicable to any part of the inland marine sector where BW is engaged in commercial activity. Wherever there is potential for BW to realise significant unfair competitive advantage, it will add a specific additional part to this code. At present BW considers that a specific additional part is only required for the inland moorings market. However, BW is conscious that if it commences or expands other areas of commercial activity related to the Inland Leisure Marine market in the future, then competition issues could arise. In such circumstances BW will apply the principles set out in Part 1 of this Code and will (in consultation as necessary with BMF and others in the trade) review and adapt it to the new circumstances.
- 1.4. Part 2 of the Code addresses the competition and fair trading issues specific to the inland moorings market and explains the practical measures and advice that must be followed.
- 1.5. This Code supersedes the BW Protocol for marina business March 2004.

PART 1: BW COMMITMENT TO FAIR TRADING

2. CORE PRINCIPLES

- 2.1. Fair trading is not only a legal issue; it is good for BW, for our private sector partners and for the waterways as a whole.
- 2.2. The principles underlying BW's activity in competitive markets are:
 - (a) It must fit with or complement our core purpose¹.
 - (b) It must be aligned with BW's core values².
 - (c) Such activity must be commercially efficient and deliver acceptable investment returns. There must be no cross subsidy from statutory functions to commercial activities.
 - (d) Commercial activity should not lead to market distortion. Fair trading is essential. Particular care must be taken to ensure that where information held for statutory purposes is also used for commercial activities, the information is made available on equivalent terms to other members of the inland trade – e.g. requests by inland marine brokers for aggregate information about boat licence holders.
 - (e) Employees handling confidential information obtained for statutory purposes will not reveal the information to colleagues or stakeholders, unless it would be eligible for disclosure to the public under the Freedom of Information Act.
- 2.3. In making business decisions relating to our commercial activity, managers must always consider whether these principles have any bearing.
- 2.4. We undertake to educate our managers and staff about the risks that this activity could lead to unfair competitive advantage or market distortions or injustice arising from unfair treatment. Our organisational structures, roles & responsibilities are designed to minimise risk. These risks generally fall into one of the following categories:
 - (a) **potential to create unfair competitive advantage** – where a manager is required to make decisions concerning both competitive commercial activity and activity as the operator of the BW waterway network
 - (b) **potential for commercial returns to be exaggerated** due to cross subsidy from the waterway network function;
 - (c) **potential for commercial activity to benefit unfairly from commercially confidential information** gained from BW's network operator functions
 - (d) potential for abusing BW's role through **unfair pricing &/or unfair decisions as network operator**
- 2.5. Effective compliance with competition law requires sensible and proportionate measures to be taken to reduce the risks that any possible dominance is abused, and as far as reasonably possible, eliminate these risks. Competition law does not set out a prescriptive set of rules because each market situation is different. That means that BW has to make judgements about the manner in

¹ See Vision Statement

² As published in our Plan for the Future and Annual Report

which it manages its business in order to comply with competition law. **This Code of Practice therefore comprises BW's instructions to its managers and other staff as to the conduct that it has decided it will expect of them in order that BW as a whole avoids acting anti-competitively or in a manner that would lead to injustice arising from unfair treatment.**

ROLES AND RESPONSIBILITIES FOR COMPLIANCE WITH THIS CODE

2.6. BW Board

The BW Board is a public interest board whose members are independent individuals appointed by the Secretary of State for Environment, Food and Rural Affairs

The Board has a duty to ensure that BW trades fairly. It receives regular reports from the Audit Committee and Fair Trading Committee which it has instructed to monitor compliance with competition law and performance in relation to fair trading.

2.7. Audit Committee of the BW Board

The Board's Audit Committee comprises five non-executive Board Members. The Committee has written ***Terms of Reference*** that are available on the BW website and meets at least three times a year to review the internal audit plan, progress against that plan and summary findings of the internal and external auditors.

In addition to reviewing the financial results and accounting policies, the Committee monitors the effectiveness of risk management and internal control systems for the Board.

2.8. Fair Trading Committee

The Fair Trading Committee of the Board comprises three non-executive Board Members with experience relevant to fair trading issues. Its main task is informed scrutiny and oversight of compliance by BW and its subsidiaries of their fair-trading commitments and obligations. Their work includes monitoring compliance with this Code of Conduct and ensuring that the Code remains relevant and up to date. The committee has the power to employ at BW's expense, the services of such advisers as it deems necessary to fulfil its responsibilities. For further information, see the Committee's Terms of Reference at <http://www.britishwaterways.co.uk/about-us/board-and-directors/board-committees>

2.9. Internal Audit

Internal Audit will carry out investigations into issues relating to fair trading either at the instigation of the Audit Committee, the Fair Trading Committee or the Executive. Internal Audit is independent of the Executive and reports to the Chair of the Audit Committee on all audit matters. It will also raise with the Audit Committee, the Fair Trading Committee or the Executive, any concerns it may have about compliance of BW and its subsidiaries with their fair trading commitments and obligations.

2.10. Breach of the Code

Individual breaches of the provisions of this Code of Practice will not necessarily amount to breaches of competition law— they will however be considered to be a serious breach of operating instructions and therefore may result in disciplinary action. Furthermore, failure by BW to follow its own policies and procedures may, even if not involving a strict breach of the law, amount to maladministration or unfair

treatment subject to investigation by the Waterways Ombudsman who can award recompense. BW has agreed that a marine trade operator complaining about a breach of the provisions of this Code will be an eligible complainant for the purposes of the Waterways Ombudsman Scheme even if the size of the complainants' business would otherwise disqualify that person from being an eligible complainant.

2.11. Ombudsman and Complaints Procedure

BW publicises its Complaints Procedure that allows anyone who believes that BW has not traded fairly to complain. See para 2.10 above for further detail.

If the complaint is not resolved satisfactorily in the first instance then the procedure provides for a Director outside the line management responsibility for the complaint to review what has happened. At this stage, any complaint that contains a fair trading issue will be flagged and reported to the Fair Trading Committee. Depending on its nature, it may be passed to internal audit for investigation.

If the complainant is still not satisfied with the outcome, a complaint can go to the independent Waterways Ombudsman. BW has agreed to abide by all decisions taken by the Waterways Ombudsman.

3. TRAINING

- BW will maintain this Code of Practice and keep it up to date. It is published at www.britishwaterways.co.uk/fairtrading.
- Induction procedures will make all staff aware of the potential for BW to trade unfairly.
- All senior managers will be given a copy of this Code of Practice and will have it explained to them by their line manager.
- All BW employees, including those in relevant subsidiary companies, in posts where there is potential to trade unfairly will be given a copy and will have it explained to them by their line manager. As a minimum, this must apply to staff in the following areas:
 - service teams (all)
 - estates teams (all)
 - operations where dealing with marina construction or safety issues
 - reception and call handling staff
 - craft licensing staff
 - New Marinas Unit staff

The Legal Director will maintain an appropriate programme of management briefing to ensure that BW staff remain up to date and able to comply with competition law

PART 2: CODE OF PRACTICE FOR ACTIVITY IN THE MARINAS AND MOORINGS BUSINESS

This part of the Fair Trading Code of Practice **MUST** be read in conjunction with Part 1 (Fair Trading Commitment), without which it is incomplete.

4. BW'S RELATIONSHIP WITH THE INLAND MARINE TRADE

4.1. BW is responsible for approximately 2,000 miles of inland waterways that are currently (2006) host to nearly 29,000 boats, of which approximately 27,000 require a long term mooring. The Environment Agency and Broads Authority are also significant providers of inland navigation. We estimate that between 50% and 60% of all powered boats based on inland waterways have long term moorings on our network.

4.2. As network owner and navigation authority, BW's primary objectives relating to boating are:

- To provide waterways which are safe and deliver an excellent experience for boaters.
- To raise income from boaters to contribute to the very substantial costs associated with the above. We do this in the following ways:

Direct fees from boaters:

- (i) boat licences
- (ii) mooring permits (where BW owns the mooring rights)

Indirectly from the inland marine trade

- (iii) leases of land and water space to marinas and boatyards for various purposes, including moorings. These include leases to BW's subsidiary, BWML.

- (iv) network access fees for mooring sites located on 3rd party freehold land

(Note that the boat licence does not give a right to moor a boat long term on BW water)

4.3. BW's involvement in the inland marinas and moorings market is usefully summarised under two headings:

4.3.1 Network operator and navigation authority

In this capacity, we control access to most of the BW network for anyone who wants to operate moorings or a marina. This role and the influence it brings means that we could be seen as 'dominant' in some parts of the market. Dominance is not in itself illegal, but competition law requires that no company which may be dominant abuses the dominance it may have.

4.3.2 Mooring operator

We are suppliers of moorings to consumers through our own online business and through our wholly owned subsidiary BWML. BW and BWML together supply mooring services to just under 25% of all boats

requiring long term moorings on our waterways (BW: 17%, BWML: 7.5%)³. BWML is the largest marina operator on the inland waterway network. BW transferred all its former marinas of over 50 berths into BWML where they are now operated at arms length from BW. BW currently continues to operate on-line moorings and some off-line sites with less than 50 berths.

We recognise that our activity in both of these sectors – ‘upstream’ network access and ‘downstream’ consumer market gives rise to the *potential* for infringement of competition law or unfair competitive advantage. It is the purpose of this code of practice to identify these risks and provide direction to staff to ensure that market distortion or unfairness does not arise. Our overarching aim is to ensure that the moorings market works well so that it attracts the investment in the moorings and facilities that boating customers want.

4.4. Marketing strategy for boating:

We undertake generic activity to promote boating on our waterways. These include our comprehensive waterways leisure website, boat shows, PR activity to promote boating holidays, customer service telephone and email services and a ‘getting started’ booklet for people interested in buying a boat’. All of these activities are designed to benefit members of the marine trade. Where we include advertisements or listings as part of our marketing activity, we offer the service to all on equal terms.

5. CODE RELATING TO OUR NETWORK OPERATOR ROLE

5.1. Principles for ensuring that network access arrangements are fair

- BW decisions on granting network access are made on the basis of its responsibilities as network operator and navigation authority. Decisions must not be influenced by BW’s commercial interests in the moorings market.
- BW encourages the development of new offline marinas and offline mooring facilities
- BW will treat all parties interested in developing new marinas or mooring sites on our network consistently and fairly.
- Where water resources or other infrastructure reasons limit development opportunities, BW will treat development proposals on a ‘first come, first served’ basis.
- BW will treat BWML in exactly the same way as all other parties.

5.2. Measures in place to ensure that these principles are applied

5.2.1 Structural arrangements

The New Marinas Unit has been established to ensure that all businesses with an interest in developing off-line marinas on the BW network are treated equally. Detail is contained within www.britishwaterways.co.uk/marinadevelopment.

There is a need within these procedures for BW’s regional business units to have a specified involvement at each stage of the marina application

³ 2005/6 data

process. Local expertise is required to assess technical and similar implications of specific schemes for the local waterway. The criteria for these assessments are published on the marina development web site. Local business unit decisions and advice must be objectively justifiable, based on these criteria only. It is the role of the New Marinas Unit to ensure consistent and fair practice in these areas.

The New Marinas Unit is a function within the Regeneration Directorate. It works independently of the directorates responsible for BW commercial activity in respect of both online and offline moorings.

5.2.2 Measures to avoid unfair competitive advantage arising

The circumstances in which unfair competitive advantage could potentially arise if proper procedures are not followed include any of the following activities on the BW network:-

- BW (with or without a partner) proposes to develop or acquire a new marina on land it owns.
- A BW joint venture company (JVC) proposes to develop or acquire a marina
- BWML proposes to develop or acquire a marina
- BW has to respond to a pre-application consultation or a registered planning consultation on one of these schemes.

To avoid unfair competitive advantage arising in these circumstances BW will

- require those in BW who are promoting the scheme to go through the same marina application process as any other applicant. Once initial approval under the marina application process has been given, and the marina is for 50 berths or more, the development or operating opportunity will be put to the market
- require the JVC to go through the marina application process.
- require BWML to go through the application process.
- Applications from all parties will be treated on the same 'first come first served' basis as all other applicants.
- BW will assess and respond to any statutory planning consultations on all such schemes on a transparent and objectively justifiable basis.
- In the case of acquisition avoid any potential for misuse of commercially confidential information (see 2.4 (c))

The marina development website sets out the relevant objective criteria and where applicable, the fee structure to be applied in relation to all these decisions.

5.2.3 Measures to ensure confidentiality of commercially sensitive Information

- (i) Information about the nature and level of potential investor interest in specific sites or areas of the network has potential value to all

commercial investors. If an investor knows that a particular site or area is being considered by a competitor or competitors, it may have a bearing on their own decision to engage in the market. The more detailed the information – such as size, construction plans or proposed market positioning - the more likely it is to have value.

(ii) As a statutory consultee for planning applications, BW is consulted by Local Planning Authorities on any proposed development within 150 metres either side from the centre line of the waterway (whether natural or artificial), feeder or 150 meters from the edge of a reservoir owned by BW. Such consultations are primarily directed at issues such as:

- structural integrity of the waterway
- safety of users or neighbours
- water resourcing and management, land drainage and flood alleviation
- heritage, natural environment, landscape, character, amenity public access to and recreation use of inland canal, river navigations, docks and reservoirs

In order to help potential developers, BW publishes on its website the list of registered planning application consultations received from Local Planning Authorities. The information is updated weekly. As stated above, BW's response to such consultations must be objectively justifiable on technical grounds or by reference to published BW policy.

(iii) BW as network operator and navigation authority may receive early information about mooring scheme proposals in two different ways before it comes into the public domain through the statutory planning system. It may be received direct from the developer at the beginning of BW's marina application process and/or from the local planning authority in the form of a pre-application consultation. In both of these cases, the information is confidential until such time as the planning application is lodged. It must be restricted within BW to those people required to process it. These people are:

- Those working within the New Marinas Unit.
- Those within waterway business units whose job it is formulate or contribute to the substantive response to the planning authority in accordance with ODPM Circular 2005 and to process any application to BW.

NMU and Business Unit staff must treat all information received about speculative or proposed mooring or marina developments in strictest confidence and not share it with colleagues involved in competitive commercial activity in the moorings market or with any other stakeholders.

5.2.4 Measures to ensure that network access pricing is fair

Section 43 Transport Act 1962 gives BW the power to charge for 'services and facilities'. It is BW policy to charge, through a Network Access Agreement, all those who operate offline moorings connected to the BW network. Our objective is to set consistent and fair charges that are reasonable and will not discourage investment.

6. CODE RELATING TO OUR CRAFT LICENSING FUNCTION

Principles and practice for ensuring that BW's mooring business does not gain unfair competitive advantage from its craft licensing activity

- 6.1. BW holds a range of aggregated statistical data such as research reports, craft licensing customer and boat data and useful consumer data e.g. details of marinas, facilities, telephone numbers etc. BW has made a decision in principle not to sell individual records for marketing purposes. Should we ever change this decision, such sales would be subject to the Data Protection Act. The service would then be made available to all on a consistent basis.
- 6.2. BW will not use this information to gain any unfair competitive advantage for itself. To the extent that any such information is used for competitive commercial purposes, it will also be made available at the same time to other moorings operators on terms that are fair, reasonable and non-discriminatory⁴.
- 6.3. We make our research and market analysis relating to our craft licensing business publicly available via our website at no cost to users.

7. CODE RELATING TO BWML

7.1. Principles for ensuring that BWML does not gain an unfair advantage

- BWML, although a wholly owned subsidiary of BW, is a separate legal entity, and must be treated in the same way as private moorings and marina operators
- BWML must not receive from BW, any special help, information, services or privileges that are not also made available on the same terms to other operators on our network.

7.2. Measures in place to ensure that these principles are applied

7.2.1 Structural arrangements

Marinas owned by BW that have 50 or more berths have been transferred to BWML, in accordance with the criteria listed in Appendix 1.

BWML operates as a separate company at arm's length from BW and filing separate accounts. Its structure, operations and procedures are designed to ensure that it gains no unfair advantage over competitors arising from its ownership.

BWML staff shall not have access to any information held by BW (via its computer systems or otherwise) that could give it any unfair competitive advantage.

If BWML seeks investment capital or other funding from BW, authorisation is required by the BW board, and the proposal must be justified on a commercial basis and/or funding provided on commercial terms.

7.2.2 Measures to avoid operational unfair competitive advantage

⁴ E.g. the database could be reasonably segmented according to need rather than requiring the operator to purchase more information than needed.

The transfer of BWML into a separate company is designed to ensure that management of BWML is properly separated from BW. Para 6.2.2 above explains that there can be no beneficial treatment in relation to any plans by BWML to expand.

7.2.3 Information flows

- (i) BW maintains a database of craft licences. Subject to complying with the requirements of the Data Protection Act, 1998, BW makes information and reports from this database available on identical terms to all marina operators who request it, including BWML as detailed in para 6. BWML shall not have any other access to this data.
- (ii) Any BW employee who is a member of the BWML board must be conscious at all times of the risk that in that capacity they might afford BWML an unfair commercial advantage. They must not have access to any commercially confidential information held within BW about BWML's current or potential future competitors. This includes some of the data held by the New Marinas Unit on applications and by business units on moorings lease or licence holders.
- (iii) For these purposes 'commercially confidential information' is defined to mean any information that, were it the subject of a disclosure request under the Freedom of Information Act 2000 or the Freedom of Information (Scotland) Act 2002, would be exempt from such disclosure on the grounds that the commercial interests of any person would be prejudiced.⁵
- (iv) From time to time, BW employees may respond to BWML job advertisements. Where they are successful and transfer to the subsidiary company, it is a condition of the transfer that they do not utilise commercially valuable information gained while working for BW in their new role. Examples of such information include names and addresses of people seeking a mooring and competitor data. In practice, BW already informs people on its own mooring waiting lists of vacancies at privately operated mooring sites, where it is advised of the operator that there are vacancies.

7.2.4 Measures to ensure that there is no cross subsidy

- (i) Where BWML leases its sites from BW, it does so on open market rental rates. BW shall deal with BWML on a commercial basis when negotiating any other arrangements. Network access arrangements are equivalent to those offered to other marina operators.
- (ii) All goods and services provided by BW to BWML are on terms that are available to other marina operators or, where no equivalent service is offered to other operators, on terms that reflect their full economic cost including apportionment of overhead.
- (iii) Similarly, any service provided by BWML to BW shall be on commercial terms.

⁵ Freedom of Information Act 2000, s.43(1) and (2); Freedom of Information (Scotland) Act 2002, s.33(1)

- (iv) All transactions between BW and BWML must be agreed between the two parties and appropriately documented. Transactions include staff transfers.

7.3. Use of the BW brand by BWML

BWML is a relatively large and relatively well-funded participant in the moorings and marinas market. Further BWML is thought by many in the inland marine trade to benefit from a perception among potential customers that they can have greater confidence when doing business with a publicly owned body. If these are advantages then they arise inescapably from BWML's position and structure. In BW's view this Code of Conduct seeks to produce the fairest possible conditions for competition within the industry against the constraints of that background.

8. CODE RELATING TO BW'S DIRECTLY MANAGED MOORINGS

8.1. Principles

- 8.1.1 Our primary objective is to ensure that total supply of moorings for boaters is adequate and located in the best interests of boating customers generally. The best way of achieving this is to foster competition.
- 8.1.2 Our Moorings Management Manual sets the procedures for all critical management decisions. The detail it contains has been carefully constructed to minimise risks of BW's activities in the sector causing distortion in the marketplace and unfair competition.
- 8.1.3 We are publicly committed to reducing the number of linear moorings in order to improve the amenity of the waterways for all boaters and attract the investment we need in off-line moorings.

8.2. Measures in place to ensure that these principles are applied

8.2.1 Potential for market distortion

The key concerns are as follows: (they are detailed more fully in the moorings management manual)

- a) Setting prices that are below the market clearing rate – this is the rate at which demand equals current supply. If you have robust information about excess demand – for example an active waiting list of customers or evidence of boats being sold on the mooring for a premium above its asset value - these mean that the price is probably too low.
- b) Charging excess prices to consumers: where we are the dominant supplier of moorings in a particular area, consumers will have little opportunity to purchase provision elsewhere. If you are unable to fill the mooring site and have vacancies, the price is probably too high.

The annual price review process is directed and moderated by the Marketing and Customer Service Director to ensure that the procedures have been correctly applied. The process is also subject to detailed internal audit checks on a sampling basis.

- c) Restricting supply of moorings: it could be argued that we should increase our supply of moorings to meet the current excess demand. However, this would run counter to our primary objective above (9.1.1).

Customer research indicates that the majority of boaters would prefer to moor off the main line of the waterway.

Our priority is to attract greater private investment in offline moorings. We must do this by following the procedures published on www.britishwaterways.co.uk/marinadevelopment for all new mooring or marina developments and ensure that our mooring sites are priced correctly: under-pricing of BW sites risks depressing prices generally in the market, therefore making it less attractive to investors.

- d) Providing moorings that would not be commercially viable if operated by private companies. It is unacceptable to cross-subsidise long term moorings from our activities as navigation authority. A site should not be operated if it does not show an adequate rate of return, having taken account of all overhead costs and of the rent that BW would earn if it were to lease the site to a private operator.

8.2.2 Information flows

There is a risk here that BW could gain advantage in its marketing and pricing of mooring sites by using information about customers and boats contained within the craft licensing system. This code prohibits such use of boat licence data.

APPENDIX 1

The following criteria defined “marina” for the purpose of transfer of assets from British Waterways (BW) to British Waterways Marinas Limited (BWML) between 2002 and 2005. Under item 6, the transfer of Diglis Basin is expected in 2006, once the surrounding site development is complete.

1. A body of water whose primary purpose is the provision of termed moorings for boats;
2. A minimum of 50 berths
3. Asset owned or managed by BW and not wholly sublet to a third party operator;
4. Asset could be readily transferred to a third party without adversely affecting BW’s ability to operate its waterway network or docks;
5. Asset boundary can be readily established and distinguished from the waterway network;
6. Asset is part not of “work in progress” i.e. part of a development agreement site;
7. BW’s existing tenure does not preclude transfer.

Sites of any water or land owned by BW having potential for development into a marina will be offered on the open market at the appropriate time.