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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from the United Kingdom

-- Session II --

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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- United Kingdom --

1. The United Kingdom Office of Communications (Ofcom) is the independent national regulatory authority and competition authority for the UK communications industries. Ofcom has a number of roles and duties relating to identifying and responding to concerns which are unlawful, anti-competitive, or may otherwise harm consumer interests. Ofcom has regulatory powers in the television and broadcasting sector, and has concurrent powers with the Office of Fair Trading (OFT) to enforce UK and EU competition law prohibitions in relation to communications matters. UK merger control across all sectors is the responsibility of the OFT and Competition Commission (CC). In addition, the CC has responsibility for market investigations which enable it to take a broad, in-depth assessment of the complexities of a market and focus on the functioning of a market as a whole.

2. This paper provides an overview of the television broadcasting sector in the UK highlighting market developments and existing regulatory provisions particularly relevant to competition. It then identifies a number of current and future challenges for competition policy in television broadcasting. Finally, a list of significant relevant cases sets out the experience of the UK competition authorities in recent years, both in terms of competition law enforcement and regulatory cases.

1. Overview of the television broadcasting sector in the UK

3. The UK media landscape is changing rapidly. Consumers now have access to a greater range of communications and media services than ever before and convergence is changing the way in which we use communications services and consume content. For example, content that was previously only delivered on television, in a cinema, or in a newspaper can now be accessed on devices such as smartphones, tablets and internet-enabled TVs. Equally, traditional broadcast TV continues to have enduring popularity, with UK consumers watching on average over four hours per day.¹ While consumers are benefitting from this evolution and the proliferation of new services and devices is positive for competition, there are market developments which may also raise new content-related competition issues.

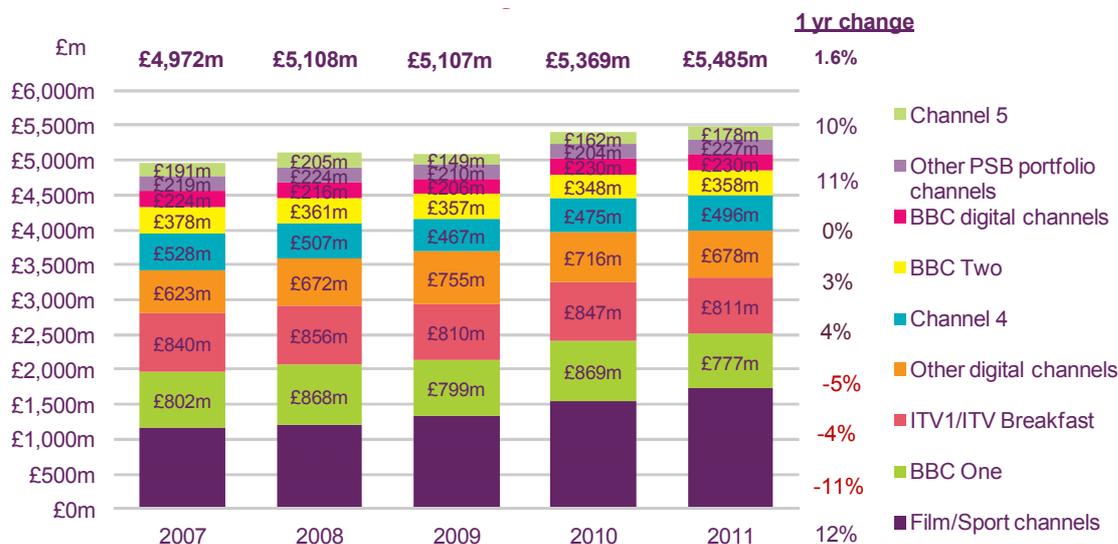
1.1 Content remains important to consumers

4. Spend on content by all UK TV channels in 2011 reached £5.5bn, up by 1.6% year on year in nominal terms.²

¹ Ofcom, 2012 CMR, page 21, Fast facts.
http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR_UK_2012.pdf

² Ofcom 2012 CMR, figure 2.29.

Spend on network TV programmes: 2007 - 2011



Source: Ofcom/broadcasters. Note: Figures expressed in nominal terms. Figures do not include spend on nations and regions output. BBC digital channels includes BBC Three, BBC Four, BBC News Channel, BBC Parliament, CBBC and CBeebies (but not BBC HD). ‘Other digital channels’ includes all genres (excluding Sports and Films). Programme spend comprises in-house commissions, productions, commissions from independents, spend on first-run acquired programmes, spend on rights and on repeats (originations or acquisitions).

5. Despite the growing number of channels available to consumers, the main public service broadcasting (PSB) channels (BBC 1 and 2, ITV, Channel 4 and Channel 5) still have the majority of audience share – 55.2% of viewing in 2011. Though this majority is falling – in 2001, channels other than the core PSB channels comprised just 19.6% of viewing – if the figures for the whole portfolio of channels offered by the PSBs are considered, their share of all viewing is 74% across the day, and 79% at peak times.³

6. The popularity of the main free-to-air PSB channels is also reflected in the significant proportion of households receiving broadcast TV on a free-to-air platform (see below) following completion of digital switchover in October 2012 and near-universal coverage of digital terrestrial TV.

7. Nevertheless pay TV is an important part of the TV landscape. The pay TV sector has delivered substantial benefits to consumers since its emergence in the early 1990s. By 2012, 57%⁴ of adults were paying to access a greater choice of content, at higher quality, and with a greater degree of control than has historically been available from free-to-air broadcasters. There has been strong innovation in the sector by firms such as Sky, who have also taken commercial risks in delivering these benefits. In general, UK consumers indicate a relatively high and stable level of satisfaction with 90% of digital TV consumers either ‘very’ or ‘fairly’ satisfied overall in 2012.⁵ However, competition concerns have also arisen as the UK pay TV sector has matured.

³ Ofcom 2012 PSB Annual Report: <http://stakeholders.ofcom.org.uk/broadcasting/reviews-investigations/public-service-broadcasting/annrep/psb12/>.

⁴ Ofcom 2012 Consumer Experience Report, page 6: http://stakeholders.ofcom.org.uk/binaries/research/consumer-experience/tce-12/Consumer_Experience_Research1.pdf.

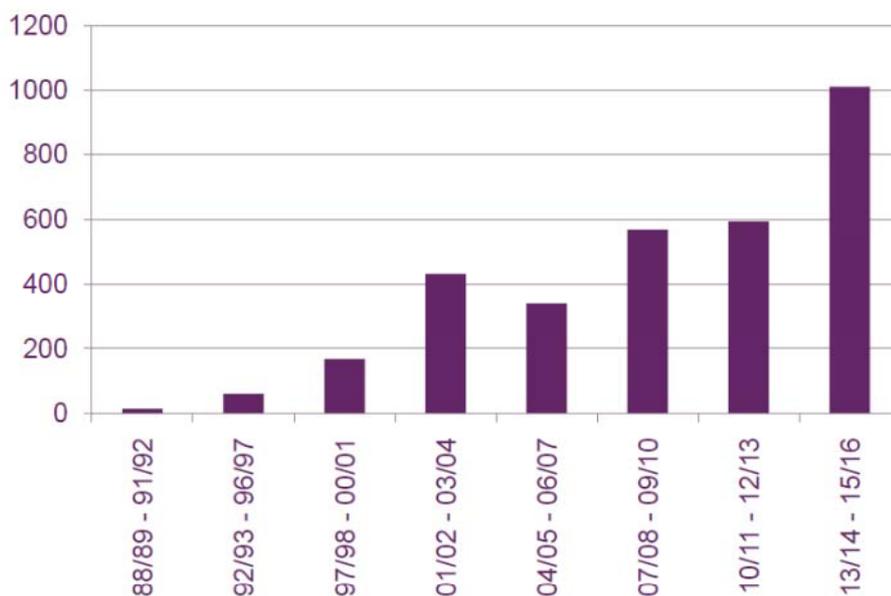
⁵ Ofcom 2012 Consumer Experience Report, page 118.

8. Notwithstanding differences in platforms and delivery, content remains of critical importance to pay TV consumers. Ofcom’s investigation into the pay TV market⁶ highlighted two key types of content that drive purchasing decisions, because they are both valued by consumers, and not available via free-to-air services – sports rights and premium film content. The research underpinning this review highlighted the importance to consumers of this content: 87% of consumers cited content as being a ‘must-have’ element of the TV choices; 25% of pay TV consumers cited sport as ‘must-have’ content. There are other forms of content which are important to consumers, but their widespread availability on free-to-air TV means that they cannot be used as a differentiator, and consumers are therefore likely to be less willing to pay for services based on this content. TV rights to critical content remains held by a small number of players.

9. The Ofcom Pay TV market review concluded that the pay TV market in the UK is not effectively competitive due to the restricted distribution by Sky of its premium sports and movies channels. Remedies imposed on Sky as a result of Ofcom’s findings were overturned on appeal, with the Competition Appeal Tribunal reaching a different conclusion in August 2012 as to Sky’s historic behaviour on the basis that Sky acted as a willing wholesaler. That decision may itself be the subject of further appeal.

10. Regarding sports rights, 59% of all consumers who regularly watch sport on TV cited football matches as ‘must-have’ content, with a particular focus on FA Premier League matches. In June 2012, together Sky and BT were reported to have paid more than £3.0bn over three years for live broadcast rights to 154 matches per season from 2013-14 – a 70% rise on the current deal. Since 1988, the cost of Premier League rights has risen from £15m per season to over £1bn.⁷

Total paid for Premier League rights per season (£m) since 1988



⁶ Ofcom 2010 Pay TV Statement: http://stakeholders.ofcom.org.uk/consultations/third_paytv/statement/

⁷ Data to 09/10 season drawn from Annex 10 to Ofcom’s first Pay TV consultation; later data from news sources.

11. In Ofcom's review of pay TV, premium film rights were defined as the rights from the main six Hollywood studios, in the period 12 months from their theatrical release. The research underlying this review revealed that premium film content was of significant value to consumers.

12. More recently, the CC completed its market investigation into movies on pay TV in August 2012, concluding that there was no adverse effect in the market in relation to movies, due in part to the launch of new subscription video on-demand (SVoD) services, delivered over the open internet, from LOVEFiLM and Netflix over the previous 12 months. It did however state its view that competition in the pay TV retail market as whole was ineffective.

13. As consumers' tastes change over time, we may see changes to the types of content that drive their purchasing decisions; new genres of content may emerge as highly valued. For example, UK costume drama *Downton Abbey* attracted between 8.5m and 10m viewers per episode in its first season; in 2010, Sky entered into an exclusive deal with HBO worth in the region of £150m over five years, including rights to HBO's back catalogue as well as new programming. In February 2011, Sky launched a new channel, Sky Atlantic, to be the 'home of HBO' in the UK and exclusive new UK programming.

1.2 Content delivery is diversifying – and increasingly includes online

14. Traditionally, broadcast services have been delivered via one-way platforms i.e. via satellite, a cable connection, digital terrestrial TV (DTT) or analogue TV.

15. Increasingly, as technology develops, those services are migrating towards delivery platforms which are hybrids of traditional broadcast and the internet – via internet protocol TV (IPTV), using a closed or proprietary internet connection, or the open internet. Ofcom's 2012 Communications Report noted that 37% of individuals in Q1 2012 claimed to watch catch-up TV distributed over the internet.⁸

16. Examples of hybrid platforms include BT Vision, Virgin Media's TiVo service and Sky's Anytime+ pull video-on-demand (VoD) service.

- BT Vision is a hybrid DTT/IPTV service, with broadcast services being received via DTT through a TV aerial while VoD and interactive services are delivered via the user's internet connection.
- Virgin Media offers a next generation set-top box, powered by TiVo, which, among other things, offers on-demand content and enables consumers to record, pause or rewind content and use web apps such as Facebook and Twitter.
- Sky Anytime+ offers movies and TV programmes on-demand and is available to all Sky subscribers with a Sky+ HD box and a broadband connection.

17. Some hybrid platforms provide access to on-demand content using 'managed services' – that is, where the delivery of the content is managed end-to-end enabling greater quality of service, as opposed to over the open internet. Such content services will typically be offered by service providers retailing internet services and audio-visual content services in a bundled package.

18. In addition, audio-visual services can be delivered over the open internet – this delivery method is described as an 'over-the-top' (OTT) service (though it should be noted that not all audio-visual services provided via OTT offer users access to the open internet via set-top boxes, for example to browse the web).

⁸ Ofcom 2012 CMR, page 11.

19. There are a growing number of retail service providers distributing their content to consumers principally using the open internet. Some of these services are free-to-view (Google TV, films on YouTube), some use a subscription model (LOVEFiLM, Netflix, Sky's NOW TV) and some operate on a pay-per-view basis (Blinkbox, Dixon's 'KnowHow Movies', HMV, iTunes).

Figure 1. On-demand services and their UK launch dates

Service (involved parties)	UK launch date
iTunes (owned by Apple)	2001
LOVEFiLM (part of the Amazon group)	2004
Blinkbox (80% owned by Tesco)	2008
Films on YouTube (part of the Google group)	August 2010
HMV on demand	October 2010
Netflix	January 2012
KnowHow Movies (part of the Dixons group)	March 2012
YouView (JV between the BBC, ITV, Channel 4, Channel 5, BT, TalkTalk group and Arqiva)	July 2012
NOW TV (owned by SKY)	July 2012

20. Early in the life of many of these services, they would have been accessed by computer and viewed on a computer screen; relatively recent technology developments mean that increasingly, these services are being streamed to a TV set (for example, via Apple TV) or received and shown on TV sets connected to the internet ('smart TVs'). These developments are blurring the lines between video on demand and linear, licensed television services.

21. The UK's telecommunications infrastructure is already increasingly supporting these services, with 76% of all UK households having a broadband internet connection and over half of them having access to super-fast broadband services.⁹ Though the infrastructure is growing, the take-up of such super-fast services has been more modest to date – as of March 2012, 6.6% of households in the UK had taken up super-fast broadband services.¹⁰

22. In Ofcom's view it is too early to tell how OTT services will develop and how consumers will respond. Consumers now upgrade their TV sets more frequently than they used to and OTT services typically do not require an initial contractual commitment. This may enable new services to achieve a faster rate of penetration than past services have achieved. Conversely, these features may mean that it is more difficult for an OTT service provider to maintain viewer/subscriber numbers.

⁹ Ofcom 2012 CMR, page 4.

¹⁰ Ofcom 2012 CMR, figure 1.5, page 27.

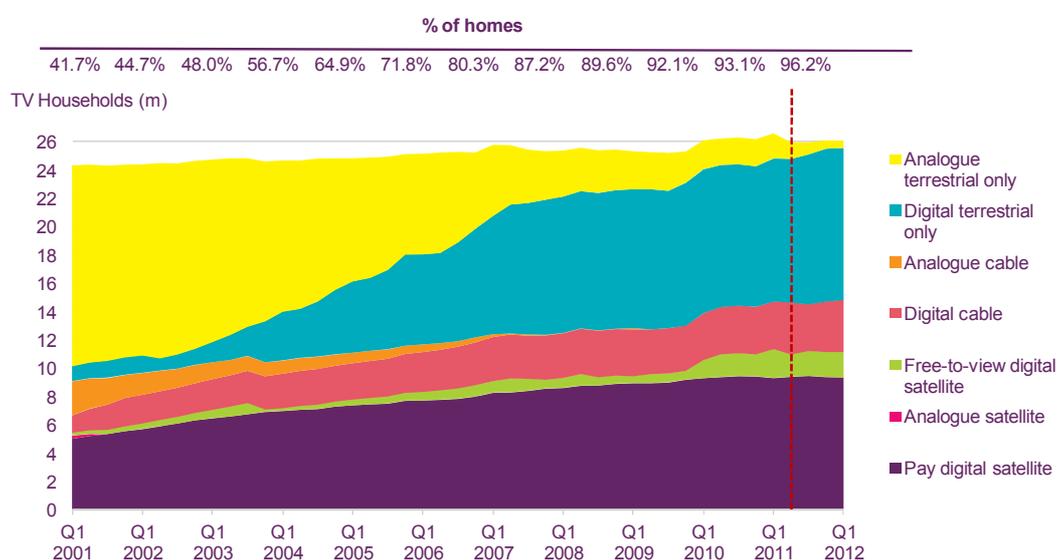
23. The emergence of new players using technology to innovate and bring new service propositions to the consumer clearly has the potential to deliver consumer benefits. However, network effects could increase the possibility of new bottlenecks emerging, potentially creating new sources of market power.

1.3 Consumers are using a range of devices to access content

24. Traditionally, consumers have accessed content over one platform, delivered to a television set or similar device. For example, with regard to pay TV content, this might be Sky's satellite platform or Virgin Media's cable platform, delivered to a television screen. However, technological change has been providing multiple routes for content into the home.

25. Since 2008, as the number of digital terrestrial-only homes remains broadly constant, the take-up of digital cable, free-to-view satellite and pay digital satellite has increased.¹¹

Multichannel take-up in UK households



Source: BARB Establishment Survey from Q2 2011, GfK NOP research from Q1 2007, previous quarters include subscriber data and Ofcom market estimates for DTT and free satellite. Note: Digital terrestrial relates to DTT-only homes.

26. Taking a hypothetical household in the UK in 2012, and how they might use this technology: they may have paid-for satellite services on their main TV— 9.6m homes in the UK take satellite pay TV services on their primary TV set.¹² They may have a second TV set, receiving digital TV via a Freeview box – 61% of second TV sets in UK households take DTT services, and one third of homes with at least one TV set take both DTT services, and either cable or satellite services.¹³ This household may also have a broadband connection fast enough to deliver a range of OTT content services (the average actual speed of broadband connections in the UK is 9.0 Mbit/s¹⁴), and via which they can watch films or TV content on demand, as well as streaming music and videos from sites such as YouTube.

¹¹ Ofcom 2012 CMR, figure 2.4.

¹² Screen Digest TV Annual Market Summary, May 2012. http://www.screendigest.com/intelligence/tv/uk/tv_intel_uk_1/view.html?start_ser=tj.

¹³ BARB Establishment Survey of TV Homes, annual, to March 2012.

¹⁴ Ofcom UK fixed-line broadband performance, May 2012.

27. At the device level, a range of television screens now incorporate an internet connection and an unprecedented degree of processing power – to Q1 2012, 2.9m smart TVs with internet connectivity had been sold in the UK.¹⁵ However, the number of consumers making use of this integrated connectivity on a regular basis is uncertain; many of these devices are likely to be used in conjunction with services that provide on-demand content in an integrated interface, (for example, households with Sky and Virgin Media pay TV services) which may be a preferable way to access the same content. There is also the interesting new potential for content to be delivered via 'apps' residing in a smart TV, in a manner that reduces the importance of traditional platform operators. This is analogous to the way smartphones have impacted mobile operators.

28. Beyond TV sets, consumers are using other devices to access content. By the end of 2010, 55% of UK households had access to a games console, about one-quarter of which used them to access audio-visual content.¹⁶

29. The use of smartphones is on the increase: 39% of the UK now have a smartphone device.¹⁷ In addition to smartphones, the last couple of years has seen the emergence and increase in popularity of tablet devices, such as the iPad. Tablet ownership has risen rapidly with take-up reaching 19% of UK internet users by September 2012.¹⁸

30. This migration by consumers from TV sets to using a variety of different devices on which to view audio-visual content has a number of potential implications: many of the producers of such hardware have their own proprietary systems for managing rights (i.e. music or film via iTunes, e-books via Kindle) which may create 'stickiness' and reduce customer switching; the line between content delivered via platforms traditionally licensed and regulated, and those which are not, is increasingly blurred. Alternatively, the take-up of devices other than TV sets to view audio-visual content has the potential to decrease the importance of, and control held by, any given individual platform.

1.4 A number of regulatory provisions are relevant to competition policy

31. Under the UK's general competition law framework, in relation to communications matters, Ofcom and the OFT have concurrent functions in relation to enforcement of the Chapter I and Chapter II prohibitions of the Competition Act 1998 and in relation to Articles 101 and 102 of the EU Treaty.¹⁹ Similarly, in relation to communications matters, Ofcom and the OFT have concurrent functions to make market investigation references to the CC under Part 4 of the Enterprise Act 2002.²⁰

32. In addition, Sections 316 to 318 of the Communications Act 2003 create a sector specific competition regime for broadcasting. Section 316 provides for Ofcom to include conditions in services licensed under the Broadcasting Act 1990 and Broadcasting Act 1996 for content services broadcast over satellite and/or cable, and over DTT respectively. In particular, Ofcom must insert into licences such conditions as it considers are appropriate for securing that a provider of a licensed service does not enter into agreements or engage in practices which Ofcom considers would be prejudicial to fair and effective

¹⁵ GFK sales data.

¹⁶ Ofcom 2012 CMR, page 177.

¹⁷ Ofcom 2012 CMR, page 4.

¹⁸ Ofcom 2012 ICMR, page 25. <http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/icmr/ICMR-2012.pdf>.

¹⁹ Communications Act, Section 371.

²⁰ Communications Act, Section 370.

competition. Before acting under s316 to ensure fair and effective competition Ofcom must consider whether it would be more appropriate to proceed under the Competition Act 1998.

33. At a European level, the Common Regulatory Framework (CRF) establishes a harmonised framework for the regulation of electronic communications networks (ECN) and electronic communications services (ECS) by EU Member States. The associated Directives establish a pan-European system of regulation with the aim of developing a better-functioning internal market for electronic communications networks and services. This covers all forms of transmissions networks, services and associated facilities, including fixed and wireless telecoms, data transmission and broadcasting. Notably, the CRF does not extend to the regulation of the content carried by such services. The following is an overview of the areas of Ofcom regulation affecting broadcasting that are derived from the CRF:

- Technical Platform Services²¹ (Obligations on Sky). The regulation of Technical Platform Services (TPS) is derived from the Access Directive (Articles 5(1)(b), 6(1), Annex I) and covers Conditional Access (CA), EPG Access, and Access Control services. Broadcasters and operators of interactive TV services who wish to gain access to viewers using Sky set top boxes can purchase TPS on regulated terms from Sky. Ofcom has published TPS Guidelines indicating its regulatory approach. Broadly speaking and collectively, the TPS regulations require Sky to ensure that its terms, conditions and charges for providing access to its TPS are fair, reasonable and non-discriminatory. In addition, Sky is required to publish charges or the method for determining charges and provide 90 days' notice prior to implementing amendments to terms, charges and conditions.
- Market review regime. The CRF and 2003 Act require Ofcom to conduct forward-looking market reviews in the communications sector, and to impose *ex ante* Significant Market Power Conditions where it determines that there will be, prospectively, a lack of effective competition in a relevant market. Under the Framework Directive, such obligations are to be imposed only where Ofcom is satisfied that the *ex post* remedies provided in national and EU competition law are not sufficient to address the problem. Ofcom completed a review of the market for Broadcast Transmission Services in 2005.
- Must carry obligations. Section 64 of the Communications Act enables Ofcom to secure the transmission of PSB channels on ECNs, where the ECN is used by a significant number of end-users as their principal means of receiving television programmes. To date, Ofcom has not exercised this power (on the basis that it has not been necessary).
- Dispute resolution powers. Ofcom has statutory powers under Sections 185-191 of the 2003 Act to resolve disputes relating to network access which cover (a) a dispute relating to the provision of network access (b) a dispute relating to the entitlements to network access that a communications provider is required to provide by or under a condition imposed on him under section 45 of the 2003 Act; and (c) a dispute (which is not an "excluded dispute") relating to rights or obligations conferred or imposed by or under a condition set under section 45 of the 2003 Act or any of the enactments relating to the management of the radio spectrum (section 185(2) of the 2003 Act). Following revisions to the CRF in 2009, these powers could include, for example, the power to resolve a dispute between a broadcaster and a distribution platform covered by the CRF.

²¹ Full description of legal basis and framework in Annex 2 of the 2006 TPS Statement <http://stakeholders.ofcom.org.uk/binaries/consultations/tpsguidelines/statement/statement.pdf>

34. With respect to media ownership, Ofcom has a statutory duty to review the media ownership rules regularly and make recommendations for any change to the Secretary of State. It last reviewed the rules in November 2012 and recommended no changes²². The current rules have a number of provisions:

- National cross-media ownership rules. The current rule prohibits a newspaper group with more than 20% of national newspaper share from holding a Channel 3 licence or a stake in a Channel 3 licensee that is greater than 20%.
- Restrictions on broadcast licences. The current rules disqualify certain persons from holding broadcast licences generally, others from holding certain kinds of broadcast licences, and still others from holding broadcast licences unless Ofcom has determined that it is appropriate for them to do so.
- Appointed news provider rule. Ofcom is required to ensure that regional Channel 3 licensees broadcast nationally news programmes which are able to compete effectively with other national television news, by requiring them to appoint a single news provider between them. Persons who would be disqualified from holding a Channel 3 licence are also disqualified from being the Channel 3 appointed news provider.
- The media public interest test. The Secretary of State may issue an intervention notice in relation to mergers which meet jurisdictional thresholds, which triggers a review of whether the merger may be expected to operate against the public interest.

2. Challenges for competition policy in television broadcasting

2.1 Access to content and pay TV markets have been the focus of recent competition reviews

35. Content remains of critical importance to consumers. This is particularly the case for competition in pay TV where certain types of exclusive premium content drive purchasing decisions. Exclusive rights to premium sports content, such as broadcast rights for live FA Premier League games, remains an area of interest for competition policy.

36. Traditionally, access to first-release movies has also been a key driver of pay TV subscriptions. In the market investigation into Movies on pay TV, the CC concluded in August 2012 that the evidence suggested that the availability of Sky Movies was significant to the pay TV subscription decisions of only a relatively small minority of pay TV subscribers and that many of these consumers placed weight on factors other than seeing the most recent movies. It found that although not close substitutes for Sky Movies, the new and improved OTT services of LOVEFiLM and Netflix provide consumers with more alternatives, and have resulted in considerably more content licensed in a second subscription pay TV window. This window provides alternative providers such as LOVEFiLM and Netflix with access to major studio movie rights, on an exclusive basis, at a point in time about 15 months after those same movie rights have already been exploited on an exclusive basis by Sky. In Ofcom's view this development is interesting, but it may merely result in segmentation of the market, rather than effective competition, depending on the extent to which subscribers to premium movie services regard older films as a close substitute for recent films.

37. In the course of its inquiry into Movies on pay TV, the CC identified a pay TV retail market lacking in effective competition, due to (a) estimates for Sky's market share that had been consistently over 60% for several years, with the overall market structure for retail pay TV in the UK staying broadly the same since pay TV started to be offered on a significant scale in the early 1990s; (b) evidence consistent with there being barriers to subscribers switching their traditional pay TV retailer, though the barriers to

²²

<http://stakeholders.ofcom.org.uk/market-data-research/other/media-ownership-research/rulesreport2012/>.

switching were likely to be lower in the context of switching between OTT pay TV retailers; and (c) significant barriers to large-scale entry and expansion into traditional pay TV retailing, including substantial sunk costs both in setting up a new platform and in marketing to acquire subscribers, costs of acquiring attractive content, and the threat of a competitive response from existing players. It also appeared to the CC that Sky had persistently earned profits substantially in excess of its cost of capital, consistent with other evidence showing a lack of effective competition, and while there had been a significant level of innovation in the UK in pay TV, it observed that this had historically focused on innovations which had favoured satellite technology. However, for reasons explained at paragraph 48, the CC did not find an adverse effect on competition in relation to movies on pay TV.

2.2 Content navigation and greater integration and bundling may raise new challenges

38. Looking forward, in terms of content distribution, it is possible that, as an increasing number of households are ‘multi-homed’ with access to multiple content platforms and service providers at the same time, these market developments may strengthen competitive pressures, potentially easing some of the concerns that have been traditional features of these markets. Conversely, market developments may raise new challenges.

39. Electronic programme guides (EPGs) provide users of television, radio, and other media applications with continuously updated menus displaying broadcast programming or scheduling information for current and upcoming programming. For the three most popular platforms on satellite, cable and DTT, Sky, Virgin Media and Digital UK respectively are responsible for the allocation of EPG numbers. Concerns have been raised about EPG numbers being allocated in ways that are advantageous to a vertically integrated platform operator, to the detriment of third party channels. Such complaints are currently usually assessed under the fair, reasonable and non-discriminatory (FRND) elements of Ofcom’s EPG Code. New technologies and innovations are changing the linear EPG world and creating more sophisticated user interfaces. In a move away from the traditional ‘now-and-next’ model for finding and choosing content, consumers are able to scroll backwards through their EPG to access past programmes on the Virgin Media TiVo and YouView platforms, and online on-demand services from traditional broadcasters (e.g. BBC iPlayer, 4oD) allow users to search for content from recent TV schedules. Responding to concerns about FRND treatment in the context of more complex user interfaces, whether in a two-dimensional format typical of Smart TVs or of another fundamentally different navigation approach, could be significantly more challenging.

40. Increasing integration may raise issues. There are several ways in which broadcast platforms have typically been integrated:

- vertical integration of content businesses (e.g. Sky is a TV channel broadcaster and a retailer of packages of channels);
- horizontal integration of adjacent elements of the value chain, such as bundling network services with content (e.g. Sky, BT, Virgin Media).

41. We are now seeing communications players increasing their presence to multiple points of the value chain. For example, Apple is using its operating system to integrate content from iTunes and the Apple store, making content accessible across Apple devices through the cloud, or via devices such as Apple TV, enabling users to combine and stream content from their own content libraries or direct from the internet; Amazon is using its Kindle e-readers and tablets to build a wider ecosystem integrating its content retail services.

42. With regard to the retail of such services, consumers continue to buy TV and communications services in bundles for convenience and to take advantage of discounts. Although the growth of buying in

bundles seems to be stabilising, such packages remain popular with consumers: 57% of homes took a bundle of communications services in Q1 2012, increasing by four percentage points from 2011.²³

43. Most pay TV retailers offer communications as well as pay TV products and may offer a ‘triple play’ product (i.e. TV, broadband and fixed line telephony, including line rental) at below the price of the constituent TV and communications products, either via a lower list price or by offering greater discounts to new subscribers. In Q1 2012, triple play accounted for 19% of all consumers.

44. While these trends towards diversification along the value chain and the provision of multiple retail services may create a better consumer experience, they could also lead to increased customer lock-in. Whether there is sufficient competition from a number of well-resourced players across the communications value chain converging from different directions is too early to say, as is whether these are likely to lead to enduring problems and potential harm to consumers. It is worth noting the separate competition regimes for electronic communications and broadcasting which may raise issues; for example in this context, for the telephony/broadband elements of triple play packages on the one hand, and the pay TV element on the other.

3. Experience in competition law enforcement relating to television and broadcasting

45. A significant number of relevant cases have been considered in the UK in recent years.

3.1 *Ex-post competition law enforcement*

46. Merger assessments including a number of referrals by the OFT to the CC²⁴:

- News Corporation / BSkyB (2010). Audio-visual, newspaper publishing, advertising. Withdrawn. In December 2010 the European Commission approved under the EU Merger Regulation the proposed acquisition of pay TV operator BSkyB by News Corporation. The Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area or any substantial part of it. The European Commission's findings concerned solely the competition aspects of the proposed transaction. In separate proceedings, the UK Secretary of State for culture, media and sport considered whether to refer the transaction to the CC on public interest grounds, in particular media plurality considerations. On 13 July 2011 News Corporation announced that it would be withdrawing its proposal to take complete ownership of BSkyB following allegations of phone hacking at UK newspapers published by News International.
- Northern & Shell / CLT Holdings (Channel 5) (2010). Television broadcasting, advertising and provision of news. Cleared by the OFT. Northern & Shell is active in newspaper publishing, magazine publishing and pay television broadcasting and acquired the television broadcasting business operating the free-to-air Channel 5 and associated channels in July 2010. The OFT determined that there was limited overlap in television broadcasting given the distinction between pay TV and free-to-air channels, limited overlap in the provision of television advertising, and limited overlap in the provision of news given the distinction between television and printed news. In any event, the OFT did not consider that the transaction gave rise to competition concerns.

²³ Ofcom 2012 CMR, figure 1.10.

²⁴ The UK merger regime involves two stages: the OFT is the first phase body; and if a merger is found to have a realistic prospect of a substantial lessening of competition, the OFT refers the merger to the second phase body, the CC, for an in-depth investigation.

- BSkyB / Virgin Media Television (2010). Television Channels. Cleared by the OFT. BSKyB acquired the basic pay TV channel business VMTV from Virgin Media in July 2010. The transaction gave rise to a horizontal overlap in the wholesale supply of television channels and television advertising. The OFT conservatively analysed a wholesale market for the supply of basic pay TV and concluded there were no competition concerns. The OFT noted that the transaction resulted in a minimal increment in Sky's market share for the sale of television advertising but did not consider that significant competition concerns arose.
- Project Canvas: BBC / BT / Channel 4 / Channel 5 / ITV / Talk Talk / Arqiva (2010). Broadcasting. Found not to qualify by the OFT. On 19 May 2010, the OFT concluded that Project Canvas, the proposed joint venture to build an open internet-connected television platform with common technical standards, did not qualify for investigation under the merger provisions of the Enterprise Act 2002. The OFT decided that none of the JV partners (including the BBC) was contributing a pre-existing business ('enterprise') to the Canvas JV. In addition, the OFT concluded that, even if it were the case that the contribution of any of the JV partners did in fact constitute an enterprise, none of the JV partners would individually acquire material influence over the JV or could be considered as having collective control over the JV.
- Arqiva / Digital One (2009). Multiplex operators. Cleared by the OFT. The OFT considered there to be limited horizontal overlap between the parties in the ownership of operational local DAB licences. The OFT was of the view that the transaction was unlikely to lead to the foreclosure of multiplex license holders or of multiplexing services. In particular, the OFT noted that Arqiva's interest in the downstream levels of the supply chain would give it the incentive to increase multiplex capacity utilisation by reducing access prices in order to increase the number of customers (radio stations) requiring these downstream services. In comparison, Global (the existing majority shareholder of Digital One) would have had a reduced incentive to increase DAB capacity utilisation as new stations may have been potential competitors with its own stations.
- Project Kangaroo - BBC Worldwide / Channel 4 / ITV (2008). Video on demand. On 4 February 2009 the CC decided to prohibit the proposed video on demand (VOD) joint venture known as 'Project Kangaroo'. The proposed joint venture was an arrangement between BBC Worldwide, Channel 4, and ITV to provide a 'one-stop shop' for consumers to view catch-up and archive content from each broadcaster. The CC found that the joint venture was likely to result in a substantial lessening of competition (SLC) in the supply of UK TV VOD content at the wholesale and retail levels. The CC observed that the case was essentially about the control of UK-originated TV content with the parties together controlling the vast majority of this material. US and other non-UK material was not found to be a strong substitute for UK-originated programming. The CC considered alternative remedies including a remedy package that simultaneously limited the joint venture's ability to wholesale both catch-up and archive content and preserved separate retail selling points. However, none of these alternatives was considered adequate to address the SLC and its adverse effects. The joint venture was prohibited.
- Macquarie UK Broadcast / National Grid Wireless (2007). Terrestrial broadcast transmission services. Allowed by the CC subject to measures. On 11 March 2008 the CC allowed the completed acquisition by Macquarie UK Broadcast of National Grid Wireless, subject to a package of measures required by the CC to protect the interests of their customers. The CC found that the merger would lead to a SLC in the provision of broadcast transmission services to television and radio broadcasters, as National Grid Wireless and Arqiva (owned by Macquarie UK Broadcast), were the only UK suppliers of terrestrial broadcast transmission services. The CC concluded that this loss of competition could be expected to lead to higher prices and/or

lower service quality under existing, new and renewed contracts. However, when considering what remedial action was appropriate, the CC also took account of the fact that customers could also be the beneficiaries of the cost savings and synergies generated by the merger. The CC considered a range of structural remedies (many of which it thought would require behavioural remedies also) as well as a behavioural package of remedies alone. The CC designed a package of measures which included an immediate 17% price reduction to all radio customers, an immediate 3.25% price reduction to all pre-digital switchover (DSO) television customers and price reductions worth £44 million to 2020 (net present value) for all post-DSO television customers. Arqiva was also required to provide various service quality guarantees and to pay for an adjudicator to resolve disputes. The CC decided that these measures would be effective in addressing the adverse effects of the acquisition, whilst preserving the benefits that could also arise, including reducing the risks associated with DSO.

- Arqiva / BT (2007). Satellite broadcasting services. Cleared by the OFT. The OFT considered the main area of overlap between the merging parties to be the supply to broadcasters of satellite distribution services for television broadcasting to UK viewers. The OFT noted that post-merger, Globecast would remain an active competitor and that potential competitors had the ability and incentive to enter should Arqiva raise prices by a significant amount. The OFT found that sufficient terrestrial teleport and satellite transponder capacity made entry feasible on bundled service offerings and in relation to stand-alone up-linking services, customers felt they had countervailing buyer power in the form of sponsored entry or self provision with evidence of entry from competitors located outside the UK.
- BSkyB / ITV (2007). Broadcasting. Adverse public interest²⁵ finding on basis of SLC, but not on media plurality grounds, by Secretary of State (upheld on appeal²⁶). On 14 December 2007 the CC reported to the Secretary of State for Business, Enterprise and Regulatory Reform on BSkyB's acquisition of 17.9% of the shares in ITV. It assessed the competitive effects of the acquisition in the UK market for television as a whole (all-TV), including both free-to-air (FTA) and pay TV services. The CC concluded that as a result of the acquisition, there was likely to be a SLC arising from a loss of rivalry between ITV and BSkyB in the all-TV market. This was expected to result in a reduction in the quality of the offer, a reduction in innovation, or an increase in the price of audiovisual services in the all-TV market. The CC therefore recommended that the Secretary of State require BSkyB to reduce its stake to below 7.5%. The CC also considered the acquisition's effect on the plurality of news and concluded that it may not be expected to operate against the public interest in this respect given regulatory mechanisms combined with a strong culture of editorial independence. The Secretary of State noted the CC's findings on SLC (which were binding upon him), endorsed the CC's media plurality decision, and accepted the CC's recommendation of divestiture.

²⁵ Procedure for public interest cases is set out in Part 2 of the Enterprise Act 2002. In public interest cases, the judgment of the Competition Commission is determinative on the issue of SLC, but not determinative on public interest grounds. The CC reports to the Secretary of State, who makes the final determination as to public interest grounds, but who is bound to accept the CC's findings regarding SLC. <http://www.legislation.gov.uk/ukpga/2002/40/part/3/chapter/2>

²⁶ *British Sky Broadcasting Group v Competition Commission* [2010] EWCA Civ 2 <http://www.catribunal.org.uk/238-656/1095-4-8-08-British-Sky-Broadcasting-Group-plc.html>

- NTL / Telewest (2005). Pay TV, telecommunications services (multi-media). Cleared by the OFT. The OFT concluded that while Telewest and NTL were the only two cable operators, as their local networks did not overlap, they did not compete in providing services over cable and the potential for them to do so was minimal. Where they did overlap (in wholesale telecommunications services and narrowband internet) outside their local cable networks they would still face a number of other significant competitors.
- BSkyB Broadband Services / Easynet (2005). Telecommunications, internet and pay-TV. Cleared by the OFT. The OFT considered that Sky's acquisition of Easynet would enable it to offer triple-play services (voice telephony, broadband and pay TV), in which it had no offering to date, in competition with other providers. It noted that consumers may be expected to benefit from this. The OFT considered that the merger raised no horizontal issues and that the merger did not materially heighten Sky's incentive to foreclose its rivals.
- ITV / SDN (2005). Digital TV multiplex. Cleared by the OFT. The parties overlapped in the ownership of DTT multiplex licences and the supply of multiplex capacity and related technical services. The merger did not raise horizontal issues but a foreclosure concern was raised: that ITV would use capacity for its own channels or for channels that do not carry advertising. The OFT considered that the merger did not materially affect ITV's incentives to engage in a foreclosure strategy for a number of reasons and also observed that advertisers who buy airtime on ITV channels did not share concerns about foreclosure.
- Carlton Communications / Granada (2003). Television broadcasting. Allowed by the Secretary of State subject to measures. The CC's investigation and subsequent report to the Secretary of State for Trade and Industry²⁷ considered a number of areas of concern including the future competition for ITV licenses, the independent production of television programmes, and the impact on the other ITV regional licensees. The major focus of the investigation, however, was on the sale of Carlton's and Granada's advertising airtime and, in particular, the share for discount deals struck with advertisers and media buyers. The CC found that other channels were not yet sufficiently close substitutes to prevent an increase in the advertising budget commitment that ITV could demand for a given level of discount, following the removal of competition between Granada and Carlton. The CC ultimately decided, by a 4-1 majority that the most appropriate remedy would be the adoption of the contracts rights renewal (CRR) remedy which provides ITV advertisers with a fall-back option, enabling them to renew the terms of their 2003 contracts. The Secretary of State accepted the CC's conclusions and took undertakings from the parties to alleviate those competition concerns identified.

47. Competition Act investigations:

- Project Canvas (2010). Complaint – no investigation. Project Canvas (now known as YouView) is a partnership between the BBC, ITV, Channel 4, Channel 5, BT, TalkTalk and Arqiva which offers digital terrestrial channels and internet-delivered TV services via a set-top box connected to viewers' TV sets. On 19 October 2010, Ofcom announced that it was not opening an investigation into Project Canvas under the Competition Act following complaints made by Virgin Media and IPVision. At that stage of YouView's development, Ofcom's view was that it would be premature to open an investigation. However Ofcom committed to continue monitoring developments, particularly in relation to YouView's approach to sharing standards and its effects on content syndication.

²⁷

The reference was made under the Fair Trading Act 1973, and under this earlier regime, the judgment of the Secretary of State was determinative.

- IMS Media / BBC Broadcast (2007). Complaint – no infringement decision (upheld on appeal). Ofcom concluded that BBC Broadcast (renamed Red Bee Media) was not dominant in the market for the supply of access services to UK television broadcasters. On that basis, Ofcom concluded that there were no grounds for action in relation to the Chapter II/Article 82 allegations that BBC Broadcast abused a dominant position by means of predatory pricing in relation to the Channel 4 contract and that it abused a dominant position by foreclosure in the relevant market as a result of the length and exclusive nature of the Channel 4 contract. Ofcom also concluded that the Channel 4 contract did not appreciably restrict competition and therefore there were no grounds for action in relation to the Chapter I/Article 81 allegation.

48. Market Investigations:

- TV advertising trading (2011). No market investigation reference. During 2011 Ofcom conducted a review of TV advertising trading, which examined the way TV advertising is bought and sold. In December 2011, Ofcom decided not to refer the TV advertising market to the CC having found no clear evidence of harm to consumers – whether TV viewers, advertising or end users of products advertised on TV – and in light of the costs associated with a reference.
- Movies on pay TV (2010). Market investigation – no adverse effect on competition finding. The CC concluded that Sky Movies, which currently offers the first pay movies of all the big Hollywood studios, is not a sufficient driver of subscribers' choice of pay TV provider to give Sky such an advantage over its rivals when competing for pay TV subscribers as to harm competition. The CC found that: more consumers attach importance to other service attributes, like having access to a broad range of content and to price, than they do to seeing recent movie content; the launch of new and improved movie services by Netflix and LOVEFiLM, which reflects an increasing trend of audio-visual content being delivered over the Internet, has increased competition and consumer choice; and the recent launch of Sky Movies on NOW TV gives consumers for the first time a choice of subscribing to Sky Movies separately from their subscription to other pay TV content (from whichever provider).

3.2 *Ex-ante competition and regulatory provisions*

49. Section 316 of the Communications Act (Ofcom):

- Sky Sports wholesale must-offer. On 31 March 2010 Ofcom issued a decision inserting conditions into the licences for Sky Sports 1, Sky Sports 2, Sky Sports HD 1 and Sky Sports HD 2. The conditions require Sky to offer to wholesale these channels to retailers on non-Sky platforms. The conditions relating to the SD channels also set a regulated price for offers of the channels (or combinations of the channels). This decision was overturned on appeal, with the Competition Appeal Tribunal reaching a different conclusion in August 2012 as to Sky's historic behaviour on the basis that Sky acted as a willing wholesaler. That decision may itself be the subject of further appeal.
- General licence conditions in broadcasting licences. Ofcom's standard form licences for Television Licensable Content Services and Digital Television Programme Services contain a general licence condition derived from the drafting of s316 of the Communications Act. The DTT multiplex licences contain an equivalent condition, as well as some more specific conditions relating to fair and effective competition, for example in relation to the allocation of multiplex capacity.

- The EPG Code²⁸. The EPG code applies to the provision of Electronic Programme Guides, as defined under s310 of the Communications Act. Pursuant to s310 the EPG Code regulates the prominence afforded to public service broadcasting channels on EPGs. The EPG Code also contains requirements based on s316 which includes provisions to ensure that any agreement with broadcasters for the provision of an EPG service is made on fair, reasonable and non-discriminatory terms.
- The Cross-promotion Code²⁹. Television broadcasters are left with remaining airtime between advertising and programmes which they use for promotions. The current code has two rules: a requirement on all television broadcasting licensees and S4C to limit the subject of cross-promotions to broadcasting-related services; and a requirement on Channels 3, 4 and 5 to maintain neutrality between digital retail TV services and digital platforms.
- The Airtime Sales Rules. The Airtime Sales Rules took effect as a fair and effective competition code issued pursuant to s316(3)(a). The last set of rules in place consisted of: the ‘withholding rule’ which required that all advertising airtime available on ITV1, Channel 4 and Channel 5 must be sold; and the ‘conditional selling rule’ applied to all broadcasters, prohibiting them from forcing advertisers and media buyers, who want to buy airtime on one channel, to purchase airtime on additional channels. Following a review, in July 2010 Ofcom issued a statement containing a decision to remove the rules with effect from 1 September 2010. In deciding to remove the rules Ofcom considered: the changing market landscape; broadcasters’ incentive to breach the rules; and the ability to deal with issues concerning conditional selling on a case-by-case basis.³⁰

50. European Common Regulatory Framework (Ofcom):

- Rapture TV / BSkyB (2006). Dispute – no infringement decision (upheld on appeal). Rapture asked Ofcom to resolve a dispute under Section 185(1) of the Communications Act 2003 between Rapture and Sky concerning the charges for Electronic Programme Guide (“EPG”) services that Sky provides to Rapture. On 9 March 2007 Ofcom issued a determination under sections 188 and 190 of the Communications Act 2003 resolving this dispute finding that Sky’s charges were fair, reasonable and non-discriminatory.
- Teachers TV (EDML) / BSkyB (2005). Complaint – no infringement decision. EDML alleged a breach of Sky's obligations regarding the provision of EPG services. Ofcom completed its investigation into EDML's complaint, and concluded that Sky had complied with paragraph 15 of the EPG Code in its repositioning of Teachers' TV in Sky's EPG.
- ITV / BSkyB (2005). Complaint – withdrawn. ITV alleged a breach of Sky's obligations regarding the provision of EPG services. In light of the fact that ITV and Sky resumed negotiations, ITV withdrew its complaint and Ofcom closed the case.

²⁸ <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/epgcode.pdf>.

²⁹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/crosspromo.pdf>.

³⁰ Ofcom’s statement can be found here: <http://stakeholders.ofcom.org.uk/binaries/consultations/asr/statement/statement.pdf>.

- Broadcast Transmission Services market review (2005). Market review decision. Ofcom concluded its review of broadcast transmission services in April 2005. Ofcom identified markets for the provision of access to the mast and site network and antenna systems in place for providing terrestrial broadcasting transmission services, determining that Crown Castle and ntl:broadcast both held a position of Significant Market Power in their relevant geographies. SMP conditions imposed were a requirement: to provide network access on reasonable request; not to unduly discriminate in that provision of network access; to provide network access on cost orientated terms; and to publish a Reference Offer for network access.