

## MOVIES ON PAY TV: MARKET INVESTIGATION

### Terms of reference

1. The Office of Communications (Ofcom) has made a reference to the Competition Commission (CC) for an investigation into the supply and acquisition of certain pay-TV movie rights and into the wholesale supply and acquisition of pay-TV packages including certain movie channels. A copy of the terms of reference is available at: [http://www.competition-commission.org.uk/inquiries/ref2010/movies\\_on\\_pay\\_tv/index.htm](http://www.competition-commission.org.uk/inquiries/ref2010/movies_on_pay_tv/index.htm).
2. Ofcom's decision to refer is available at: [http://stakeholders.ofcom.org.uk/consultations/movies\\_reference/statement/](http://stakeholders.ofcom.org.uk/consultations/movies_reference/statement/).

### Preliminary remarks

3. The reference of this inquiry to the CC follows a three-year market study by Ofcom, the sectoral regulator, in which Ofcom has gathered and analysed a great deal of information. We do not wish to impose a greater burden on parties than necessary and our first steps will be not only to identify the questions we believe we need to answer, but also to review the information Ofcom has already gathered to see whether or to what extent it can help us in answering them. We expect this initial review to take about one month. After this exercise, we intend to publish an issues statement that will set out the issues we intend to consider, and highlight where we believe further information and evidence from parties is needed. We will be asking parties to provide us with detailed submissions, supported with the necessary evidence, in response to this issues statement. At that time, we might also issue detailed questionnaires and request specific off-the-shelf information to help us in our analysis.
4. Because of this approach, we do not intend to publish an administrative timetable at this stage, although we expect to do so around the time of the issues statement when we will be in a better position to decide on the process and timescale for our investigation.
5. Although we are not inviting parties to provide us with detailed submissions now, parties are welcome to send us a summary of their positions. If they wish to do so, they should provide them to us by **18 August 2010**.

### Relevant statutory questions

6. [Section 134\(1\)](#) of the Enterprise Act 2002 (the Act) requires us to decide whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK. If there is such a feature, then for the purposes of the Act, there is an adverse effect on competition. For the purposes of a market investigation, a feature of a market in the UK for goods or services shall be construed as:
  - (a) the structure of the market concerned or any aspect of that structure;

- (b) any conduct<sup>1</sup> (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or
- (c) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.
7. If we decide that there is an adverse effect on competition, [section 134\(4\)](#) of the Act requires us to decide the following additional questions:
- (a) whether we should take action for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect<sup>2</sup> on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;
- (b) whether we should recommend that others take action for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and
- (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.

## Relevant CC publications

8. More information about the statutory questions and our approach to investigations is contained in the following publications, which are available on our website ([www.competition-commission.org.uk/rep\\_pub/rules\\_and\\_guide/index.htm](http://www.competition-commission.org.uk/rep_pub/rules_and_guide/index.htm)), and can be supplied in hard copy if desired:
- [Competition Commission: Rules of Procedure \(CC1\)](#)
  - [Market Investigation References: Competition Commission Guidelines \(CC3\)](#)
  - [General Advice and Information \(CC4\)](#)
  - [Statement of Policy on Penalties \(CC5\)](#)
  - [Chairman's Guidance to Groups \(CC6\)](#)
  - [Chairman's Guidance on Disclosure of Information in Merger and Market Inquiries \(CC7\)](#)
  - [Disclosure of information by the Competition Commission to other public authorities \(CC12\)](#)

## Submissions to the CC and our contact details

9. Any submissions sent to us electronically or on disk should, wherever practicable, be in Microsoft Word or searchable PDF format. Spreadsheets, charts and all other digital source data files, as far as possible, should be in Microsoft Excel or their

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<sup>1</sup>'Conduct' includes any failure to act, whether intentional or not and any other unintentional conduct.

<sup>2</sup>[Section 134\(5\)](#) of the Act defines a detrimental effect on customers in this context as one taking the form of:

(a) higher prices, lower quality or less choice of goods or services in any market in the UK (whether or not the market to which the feature or features concerned relate); or

(b) less innovation in relation to such goods or services.

equivalent original format, to facilitate our internal analysis. Should spreadsheets be submitted without the underlying formulae, whether in hard copy or electronically, it is highly likely we will ask for such information.

10. Material sent electronically or on disk, should have a fully explanatory file title and not be grouped into folders and subfolders. Submissions should also be numbered. In the case of urgent material, checks should be made in advance that the recipient is available to receive it; and with bulky submissions (that is, documents longer than 100 pages), we would be grateful for 15 paper copies as well as an electronic version. 8MB is the limit for acceptance by our system of emailed material in any one message.
11. In addition, we normally publish non-confidential evidence on our website. So, when providing company submissions and views, non-sensitive versions suitable for publication should also be provided. Confidential text should be highlighted in yellow in the confidential versions of submissions.
12. The main point of contact throughout the investigation is the Inquiry Coordinator, John Doyle (telephone 020 7271 0325, email: [John.Doyle@cc.gsi.gov.uk](mailto:John.Doyle@cc.gsi.gov.uk)). He is a member of the team supporting the investigation which is led by Andrew Wright.

## The CC's procedures and powers to gather information and the handling and disclosure by the CC of information

1. Information about the CC's procedures and powers to gather and disclose information is contained in the series of publications listed in paragraph 8 of the covering document, in particular [Chairman's Guidance on Disclosure of Information in Merger and Market Inquiries \(CC7\)](#). This annex is only a summary.

### Information-gathering powers

2. Our information-gathering powers under [section 109](#) of the Act (which is applied to market investigations by [section 176](#)) include the power to require persons to give evidence to it, to produce specified or described documents that are within that person's custody or under their control and, in the case of a person carrying on a business, to supply estimates, forecasts, returns or other information as may be specified. In the event of late provision or non-provision of information required by notice under [section 109](#), the CC has the power to impose a penalty.
3. Usually requests for information are made without formally exercising our [section 109](#) powers. However, in the event of delay or failure to respond to our requests, we may decide to issue formal notices under [section 109](#).

### Disclosure of information

4. We aim to be open and transparent in our work while respecting the confidentiality of information that we obtain during inquiries.
5. The Act imposes a general restriction on the disclosure of specified information that we have obtained in connection with the exercise of our functions. (Specified information means information which relates to the affairs of an individual or to any business of an undertaking.) However, the Act also sets out the circumstances in which we may disclose such information, including when disclosure is made for the purpose of facilitating its functions or disclosure is made to and for the purpose of public authorities exercising certain defined statutory functions. Depending upon the circumstances of any disclosure by us, restrictions may apply to any further use or disclosure of the information. If information is disclosed for the purpose of facilitating our functions but is not made available to the public, the person to whom the disclosure is made may not further disclose the information other than with our agreement and for the purpose of facilitating the functions of the CC. For more information, see paragraphs [2.1 to 2.5](#) of [CC7](#). For more information about disclosure to other public authorities, see [Disclosure of information by the Competition Commission to other public authorities, CC12](#).
6. During the course of the investigation, we will publish a number of documents on our website. These will include a statement of issues, our emerging thinking (if appropriate), our provisional findings on the statutory competition questions and our report. As the covering letter indicates, we will also publish non-confidential evidence from you and other parties and, if the circumstances warrant, we will also be considering whether or not to disclose or publish other information to selected third parties, having regard to [CC7](#).
7. We are very sensitive to the need to protect commercially sensitive information we

receive from parties. Whenever we consider whether or not to disclose specified information we must have regard to three considerations set out in [section 244](#) of the Act:

- (a) the need to exclude from disclosure (so far as practicable) any information whose disclosure we think is contrary to the public interest;
- (b) the need to exclude from disclosure (so far as practicable):
  - (i) commercial information whose disclosure we think might significantly harm the legitimate business interests of the undertaking to which it relates; or
  - (ii) information relating to the private affairs of an individual whose disclosure we think might significantly harm the individual's interests.
- (c) The extent to which the disclosure of the information mentioned in paragraphs (i) or (ii) is necessary for the purpose for which the CC is permitted to make disclosure.

The following paragraphs deal with other aspects of sensitive information and the possibility of its exclusion from published material and our reports. It is not at all uncommon for our published reports to excise such sensitive information. We need to point out, however, that in cases where we decide to impose remedies in relation to a case referred to us, we will provide the OFT and Ofcom with an unexcised (and unpublished) version of the final report to enable the OFT and Ofcom to comply with their monitoring functions under the Act. The OFT and Ofcom are bound by restrictions under the Act in relation to any further disclosure of the information we make available to them (for further information, however, see [CC12](#)).

### **Non-sensitive version of submission**

- 8. When supplying us with non-confidential versions of evidence or submissions for publication on our website or for disclosure (see paragraph 9 in the covering document), please also show what material has been omitted and explain the reasons for the omission.
- 9. We aim to be constructive in response to requests for confidentiality. For example, it has often been possible for submissions to be made anonymous as far as published material is concerned or for the appropriate information to be given in a way that avoids confidentiality problems. Any concerns as to the possible disclosure of information should be discussed with John Doyle as soon as practicable. In the event of a disagreement on the matter with the Group of members undertaking the investigation, representations can be made to our Chief Executive.
- 10. For further information, please see paragraphs [4.1 to 4.6](#) of [CC7](#) and paragraphs [6.27 to 6.30](#) of [CC4](#).

### **Checking accuracy of information supplied**

- 11. For the purpose of preparing our reports, we normally send any material that we produce based upon the evidence received back to the sender so that its accuracy can be verified. When doing so, we ask that any matter to be excluded from the report is identified. When considering whether publication of the matter would be inappropriate, we will have regard to the considerations mentioned in [paragraph 7](#) above. For further information about exclusions, see [Part V](#) of [CC1](#) and paragraphs [6.27 to 6.30](#) of [CC4](#).

12. Please also note that it is a criminal offence to give us false or misleading information.

### **Freedom of Information Act 2000**

13. From 1 January 2005, the Freedom of Information Act 2000 (FOIA) has created an individual right of access, on request, to recorded information held by a public authority such as ourselves. However, the obligation on public authorities to disclose information under the FOIA is subject to a number of exemptions.
14. The FOIA is not expected to have a significant impact on the amount or type of information which is disclosed by us in the course of an investigation. We take the view that commercially sensitive information which we obtain from main and third parties in the course of conducting its investigation will be exempt from disclosure under the FOIA. This is because information contained in a document given to, or created by, the CC for the purpose of an investigation, and information the disclosure of which is prohibited by statute (such as Part 9 of the Act), are covered by absolute exemptions under the FOIA.