

Wholesale supply of VOD services

1. Introduction

1. In this appendix we set out the evidence gathered on strategy and competition in the wholesale supply of VOD services. We set out the structure of the VOD market at the wholesale level, details of bargaining power and negotiation and possible alternative sources of VOD content.

2. The structure of the wholesale VOD market

Wholesale customers of the main parties

2. Table 1 summarizes the parties' customers. [REDACTED]

TABLE 1 VOD customers of the main parties, December 2008

	<i>Wholesaler</i>		
	<i>BBCW</i>	<i>ITV</i>	<i>C4C</i>
<i>TV platform customers</i>			
BT Vision	[REDACTED]	[REDACTED]	[REDACTED]
Virgin Media	[REDACTED]	[REDACTED]	[REDACTED]
Tiscali	[REDACTED]	[REDACTED]	[REDACTED]
Orange	[REDACTED]	[REDACTED]	[REDACTED]
Sky Anytime	[REDACTED]	[REDACTED]	[REDACTED]
<i>Online customers</i>			
iTunes	[REDACTED]	[REDACTED]	[REDACTED]
Sky Player	[REDACTED]	[REDACTED]	[REDACTED]
RDF—Comedy Demon	[REDACTED]	[REDACTED]	[REDACTED]
Filmon.com	[REDACTED]	[REDACTED]	[REDACTED]
Coolroom	[REDACTED]	[REDACTED]	[REDACTED]
<i>Mixed TV/online customers</i>			
BIBC	[REDACTED]	[REDACTED]	[REDACTED]
Go View!	[REDACTED]	[REDACTED]	[REDACTED]
<i>Distributing customers</i>			
Arts Alliance	[REDACTED]	[REDACTED]	[REDACTED]
Entertainment UK	[REDACTED]	[REDACTED]	[REDACTED]

Source: Main party submissions.

BBCW customers

3. [REDACTED]

FIGURE 1

BBCW: VOD hours supplied to customers

[REDACTED]

Source: BBCW.

ITV customers

4. [REDACTED]

FIGURE 2

ITV: VOD licences in 2008/09 (no of hours)

[REDACTED]

Source: ITV.

5. [REDACTED]

C4C customers

6. [REDACTED]

FIGURE 3

C4C: revenue on licences to customers

[REDACTED]

Source: C4C.

Note: Hours of content supplied by year were unavailable from C4C. As such, comparisons of Figures 1, 2 and 3 should be made with caution.

Perceived competitors

7. Table 2 contains a list of companies that the parties told us were their main competitors in the VOD wholesale market.

TABLE 2 **Perceived competitors**

Competitors in VOD wholesale	Wholesaler		
	BBCW*	ITV†	C4C
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: Initial information request

*[REDACTED]
†[REDACTED]

8. [REDACTED] UKVOD said that the parties competed at the wholesale level with US and film content providers and increasingly with independent distributors as well as with programmes recorded by viewers using PVRs.

3. Bargaining power and negotiations

Bargaining theory

9. We briefly describe the characteristics that bargaining theory has identified as important sources of a party's negotiation strength.

Outside options

10. The parties' wholesale customers may have the option to walk away from negotiations with an individual party and purchase their content elsewhere. In general, stronger outside options, in the form of substitutable wholesalers, correspond to increased bargaining strength for the customer and a larger share of the profit generated by the deal.¹

Discount factors

11. There will also be a difference in bargaining power depending on whether the parties involved are anxious to make a quick return on their investment. In general, parties that are prepared to take a long-term view are likely to obtain better terms than those that are impatient.

Outcomes

12. Where a party to the JV holds a strong bargaining position as a result of one or more of the factors discussed, we would expect that strength to manifest itself in terms of:
 - (a) larger total payments received relative to the total hours supplied;
 - (b) larger guaranteed payments;
 - (c) clauses for increased payment where content outperforms expectations;
 - (d) ability of the supplier to specify content purchased; and
 - (e) ability to specify a preferred contract length.

The parties' views on negotiation strength

13. The parties' views are outlined in paragraphs 4.92 and 4.93 of the main report.
14. BBCW considered its negotiation strength over a number of its existing deals to supply wholesale content. [REDACTED]^{2,3}
15. In contrast, however, BBCW considered [REDACTED].
16. C4C suggested that [REDACTED].
17. ITV [REDACTED].

¹However, we note that there is a minimum threshold beyond which outside options become irrelevant to the result of a negotiation.

²[REDACTED]

³[REDACTED]

18. The parties also told us that their wholesale customers were powerful media conglomerates, often with linear carriage deals with the parties. They said that these customers were able to control access to their viewers and therefore held a strong negotiating position.

Comparison of deals

19. We examine the deals struck between the parties and their common customers. Table 3 shows the total wholesale revenue on archive content obtained from each customer in 2007, and summarizes, at a high level, the terms of the deals for archive content that have been agreed.⁴ We have not included details of catch-up rights, since only C4C provided these on commercial terms; [redacted] and the [redacted]. First, we describe the form of the contracts that the parties agreed with their customers.
20. The headline for each deal is generally a minimum guaranteed payment, which is a fixed fee that does not vary according to the success of the customer or the viewing figures for the content. This might be supported by a minimum hours commitment from either party.
21. There is also a variable element to the payment terms.⁵ This is determined by some form of rate card (or, in some cases, a revenue-sharing deal). However, the term 'rate card' is often used to define two different charging mechanisms:
- (a) a 'per subscriber per month' fee (eg catch-up content could be charged at £0.10 per hour for the first 300,000 subscribers to the customer's service and £0.05 per hour for the next 300,000 subscribers); and
 - (b) a fee per hour for different types of content (eg some of the different types of content specified are as follows: premium, standard, kids, classic, High Definition, Standard Definition, drama, entertainment, factual, lifestyle, less than a year old, 1 to 3 years old, 3 to 5 years old, 5+ years old).
- [redacted]
22. [redacted]
23. Minimum purchased hours as stated in Table 3 are those stated in the contract.⁶ However, customers can often choose content from a higher number of hours of available content. Furthermore many contracts do not preclude the possibility of the customer purchasing more hours of content than are initially defined in the contract.
24. [redacted]
25. The quality of content purchased may be specified in the contract (for example, a minimum number of hours of 'premium' or 'primetime' content). The contract may also specify whether it is the seller, the purchaser, or both, that selects the hours of content to be licensed.
26. The length of contract varies. [redacted] whilst [redacted] contracts.

⁴This does not include an analysis of ITV's deals with BT Vision and Virgin Media, which were signed in November and December 2008.

⁵This is not, however, a two-part tariff. The minimum payment provides a floor, ensuring that the variable payments reach at least a certain level.

⁶The number of hours purchased does not imply that this number of hours will be available on the customers' service at any one time.

27. We note that C4C sells catch-up content [redacted] to each of the retailers in Table 3. The BBC also sells catch-up content to third parties [redacted].
28. Finally, we note that the revenue in Table 3 refers to the total wholesale revenue received in 2007. In contrast, the contract details (minimum hours and minimum guarantees) relate to the parties' existing contracts which, in some cases, do not run for the whole of 2007. [redacted]
29. As a result of this complexity, care should be taken in comparing the deals represented in Table 3.

TABLE 3 Wholesale revenue from archive content in 2007 and selected terms of existing contracts

	Total revenue in 2007 £		Minimum purchased hours (as noted in existing contract)		Annual minimum revenue guarantee £	
	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Tiscali	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
BT Vision	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Virgin Media	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Source: CC analysis.

[redacted]
Note: [redacted].

30. The existence of strong countervailing buyer power (see paragraph 18) is, in our view, undermined to the extent that this claimed strength is located in a separate market which does not improve the ability of these parties to switch, or threaten to switch, away from the VOD content supplied by the parties. In addition, our analysis shows that, [redacted], there is no evidence to suggest that the parties do not hold an extremely strong negotiation position given their position as providers of the most popular UK linear TV channels. Similarly, we note that there are a wide range of DVD retailers. The parties therefore have considerable scope to switch, or threaten to switch, between retailers when negotiating the sale of successful DVD content if a retailer attempts to force concessions in the course of negotiations.
31. We were not persuaded of the existence of significant buyer power and so our analysis focuses on the details of bargaining power in VOD negotiations and possible alternative sources of VOD content.

Case studies

32. In this section we examine in more detail the negotiations between the parties and their customers. We look at each side's views of the negotiations, including the key aspects to each deal and where the bargaining power lay.

BT Vision—closed platform

33. BT Vision told us that the parties' VOD content was substitutable to an important extent.

Versus BBCW

34. BBCW [redacted].

- 35. [REDACTED]
- 36. [REDACTED]
- 37. [REDACTED]
- 38. In regard to these negotiations, BBCW said that: [REDACTED].⁷
- 39. [REDACTED]

Versus ITV

- 40. [REDACTED]
- 41. [REDACTED]
- 42. [REDACTED]

Versus C4C

- 43. [REDACTED]
- 44. [REDACTED]

Tiscali—closed platform

- 45. BBCW submitted that [REDACTED].
- 46. [REDACTED]⁸
- 47. [REDACTED]

iTunes—open platform

- 48. [REDACTED]
- 49. [REDACTED]
- 50. [REDACTED]

Virgin Media (previously NTL and Telewest)—closed platform

Versus BBCW

- 51. [REDACTED]
- 52. [REDACTED]⁹
- 53. [REDACTED]

⁷[REDACTED]
⁸[REDACTED]
⁹[REDACTED]

54. [REDACTED]

55. [REDACTED]

Versus C4C

56. [REDACTED]

57. [REDACTED]

Versus ITV

58. [REDACTED]

59. [REDACTED]

Other deals

Orange—closed platform

60. [REDACTED]¹⁰

Sony Computer Entertainment Europe Ltd ('Go!View' service)—closed platform

61. [REDACTED]

62. [REDACTED]

63. The parties said that [REDACTED]. We note that it is the availability of the option to switch which informs bargaining strength, not the number of deals already in place. We also note that Sky acts as the aggregator of content for Go!View. [REDACTED]

Babelgum—open platform

64. Babelgum provides an Internet-delivered VOD service which offers consumers the ability to watch programming on a free, advertising-supported basis.

65. Babelgum has acquired content [REDACTED].

66. [REDACTED]

Non-customers

Sky—open and closed platform

67. Sky Player is available online. Sky Anytime is a push-VOD service that has a capacity of 30 hours of content. [REDACTED]

- *BBCW*

68. [REDACTED]

¹⁰[REDACTED]

69. [REDACTED]

- *ITV*

70. [REDACTED]

71. [REDACTED]

- *C4C*

72. [REDACTED]

73. [REDACTED]

Tesco

74. Tesco plans to launch a new open VOD website in which viewers could rent or purchase TV content in 2009 (Tesco tested a beta version of the site in December 2008).

75. Tesco [REDACTED]. Tesco [REDACTED]. Tesco [REDACTED].

Arts Alliance

76. BBCW [REDACTED].

Blinkbox

77. [REDACTED]

78. [REDACTED]

Joost

79. Joost reported in September 2008 that [REDACTED] but that none of the parties had agreed to provide content to it.

80. [REDACTED]

81. [REDACTED]

82. [REDACTED]

Entertainment UK

83. [REDACTED]

4. Alternative sources of wholesale VOD content

84. In this section, we discuss the existence of additional outside options beyond the parties.

Non-UK content providers

85. In addition to the evidence that non-UK content is not a good substitute for UK content at the retail level, we note that the parties' wholesale customers do not consider non-UK content to be a good substitute for UK content.
86. Virgin Media told us that whilst US content added variety to its offer, the overwhelming demand was for UK content ([redacted] per cent of views on Virgin Media in June 2008) and the parties to the JV controlled the vast majority of such content. [redacted] told us that no provider of TV shows by VOD would have a credible offer without access to the content of the parties. [redacted], [redacted] and [redacted] all told us that a retailer offering mainly US content would offer little or no competitive constraint on the ability of the JV to set prices. The parties told us that they strongly disagreed with these suggestions and pointed to the popularity of US content on iTunes as evidence that there is not an overwhelming demand for UK content.
87. [redacted]
88. Virgin Media also noted that there was not a sufficient quantity of US TV VOD content to replace the UK TV VOD content that it acquired from the parties.
89. [redacted] told us that it was unable to use the terms it agreed for UK content in its negotiations over the terms it agreed with [redacted] US suppliers. [redacted] said that this was because UK and US content were not substitutable.
90. This evidence is supported by a US content provider [redacted] which submitted that although its wholesale customers were concerned to ensure a broad selection of content from all sources, they nevertheless considered UK-produced content as the cornerstone of that selection in so far as content for TV was concerned. Similar concerns were expressed by [redacted], in particular that retailers might accept any wholesale price increase for 'must have' content rather than switching to alternative content providers.
91. UKVOD said that the experience of iTunes, Sky, Virgin Media and Joost showed that a VOD service did not require UK content to be successful. We note that a successful VOD service will not necessarily offer a competitive constraint on UKVOD's ability to set price (eg a VOD service carrying only adult content, or only sport, might be successful without constraining UKVOD).
92. Moreover, UKVOD's examples of successful VOD operators not offering UK content are less clear than UKVOD suggests:
- (a) Virgin Media's VOD service was launched in 2005 and offered UK VOD content from the start of the service. This UK content made up [redacted] per cent of views on the Virgin Media platform in June 2008.
 - (b) iTunes [redacted].
 - (c) UKVOD said that Joost's CEO had said: 'Today we have 7,500 hours—one of the largest portfolios out there. We'd love to have more, but our success or failure will not be dictated by signing another deal.'¹¹ However, Joost said that this related to the total content it had available for its viewers in all territories, only a proportion of which was available to UK viewers. Furthermore the reference was to Joost's

¹¹[www.alleyinsider.com/2008/6/Joost CEO: We've Figured It Out This Time](http://www.alleyinsider.com/2008/6/Joost%20CEO%3A%20We've%20Figured%20It%20Out%20This%20Time).

success or failure overall, not its success or failure in individual markets such as the UK. In the UK [REDACTED].

(d) Sky Player has not attracted high levels of viewing; it receives [REDACTED]. According to our analysis of the data, nearly half of the viewing of TV content on Sky Anytime is of UK content. [REDACTED]

(e) UKVOD also suggested that Sky's failure to bid for ITV content illustrated that UK content was not required for success. ITV strategy papers [REDACTED].¹²

93. An important aspect to the availability of content from US providers is that the US content that is more substitutable for UK content in the eyes of viewers is the US content that has achieved success on UK linear TV channels. This is supported by information provided to us by HBO, which told us that content on its HBO-branded VOD channels had usually already appeared on linear TV in the UK. This would appear to give the parties, through their linear TV channels (or the channels of their parent companies in the case of BBC/BBCW), a key role in controlling which non-UK content, and how much non-UK content, is best able to compete with their own content in the wholesale VOD market.¹³

94. [REDACTED]^{14,15}

95. [REDACTED]

96. Warner Bros told us that at present it typically licensed catch-up VOD rights to the broadcasters that purchased the linear TV rights to the show or series in question. [REDACTED] and the US content provider HBO both told us that they often licensed VOD rights to broadcasters that had also licensed exclusive rights to linear TV broadcast of the series. [REDACTED] This means that the VOD rights to the bulk of US content that gains popularity through airing on UK linear TV is unlikely to be available.

97. As such, it would appear that, if a retailer were to switch away from UK content to a US content supplier, this would significantly reduce the competitive constraint that the retailer would impose upon the JV.

98. The parties submitted an analysis of archive content on existing VOD services. The parties believed that this showed that current VOD services in the UK were not dependent on a high proportion of archive content that was currently supplied by the parties. The figures on which the analysis relies include film, US content, music videos and adult film content. We have examined the same data in our market share analysis but have limited the analysis to UK TV VOD content. On this basis, the number of hours of archive content from other sources is substantially less than the figures quoted in the parties' analysis.

UK content providers

99. The parties have said that one alternative for wholesale customers is to purchase content directly from third-party production companies. Indeed, [REDACTED] and others reported that they had held talks with a group of production companies to explore the possibility of doing so.

¹²[REDACTED]
¹³[REDACTED]
¹⁴[REDACTED]
¹⁵[REDACTED]

100. However, [X] told us (and other parties corroborated this) that, although a group of [X] UK production companies (including [X]) met [X] to discuss the possibility of offering aggregated VOD content to retailers, they swiftly concluded that between them they did not own enough content to make such a plan feasible:¹⁶
- (a) [X];
 - (b) [X];
 - (c) [X];
 - (d) [X];
 - (e) [X]; and
 - (f) [X] has recently agreed deals to provide approximately [X] hours of content to Blinkbox and [X] Joost. However, [X] also explained that it had met with Joost, Babelgum, Blinkbox, BT Vision, Top Up TV and Virgin Media but had been unable to offer them content of significant value because of 'holdbacks' imposed by the broadcasters.
101. This would appear to leave Sky and Five as the alternative options for supplying a sufficient range of valuable UK VOD content. However, [X] said that it was rare that Sky and Five were able to compete for the more successful shows. [X]
102. [X] submitted that there were:
- shows which are of such potential success that 2 or more may be interested—e.g. entertainment shows. BBC2, BBC3 and C4C are more likely to be interested in the same types of programmes, and BBC1 and ITV may be looking for similar shows. Five is often in competition with the digital channels such as Sky or ITV2, but can sometimes be looking for similar output to C4C.
103. The parties submitted that Sky and Five were subsidiaries of two of the largest media groups in Europe and therefore had more than sufficient resources to secure additional VOD rights from the £3 billion TV production market (£1.5 billion of which was attributable to BBC and ITV).
104. Hulu told us that [X].
105. [X] This would appear to indicate again that the production companies do not offer retailers a credible substitute for the content that is currently provided in the wholesale market by the parties.

¹⁶[X] and PACT suggested that this was due to the extensive rights to content that linear broadcasters acquired when they purchased from production companies.