

MOVIES ON PAY TV MARKET INVESTIGATION

Notice of Further Possible Remedies under Rule 11 of the *Competition Commission Rules of Procedure*

Introduction

1. Our provisional findings, published on 19 August 2011, set out how we have provisionally found an adverse effect on competition (AEC) within the meaning of [section 134\(2\)](#) of the Act. Section 11 of the provisional findings identified those features which give rise to the AEC and the resulting detrimental effects on customers.
2. Our Notice of Possible Remedies (Notice),¹ published on 19 August 2011, set out and invited comments on possible actions which the CC might take in order to remedy, mitigate or prevent the AEC or any resulting detrimental effects on customers.
3. In response to this Notice, we received many comments including some alternative remedy proposals. This Notice of Further Possible Remedies (Further Notice) sets out two further remedy proposals about which we would like to gather evidence and views.
4. Prior to deciding what, if any, action should be taken and by whom, the CC will take into account all comments received in response to this Further Notice, which it will consider alongside the evidence and views it has gathered in response to the Notice. We are undertaking this additional consultation in order to consider fully all possible remedies and no decisions on remedies have yet been taken.
5. Parties to this investigation and any other interested persons are requested to provide any views in writing by 5 December 2011.

Alternative remedies on which we wish to consult

6. Each of the two remedies which have been proposed aim to lower barriers to the acquisition of FSPTW rights and thereby encourage competition with Sky in the acquisition and distribution of FSPTW movie content. The remedies are:
 - (a) requiring Sky to provide, to any qualifying over-the-top (OTT) movie service provider, access to its consumers who are currently able to receive its Anytime+ SVOD content (ie those consumers with a Sky Ethernet-enabled set-top box (STB)); and
 - (b) a supplementary remedy, requiring Sky to publish the expiry dates of its contracts relating to FSPTW rights with the six major studios, so as to increase the ability for rival bidders to engage in timely negotiations.
7. We discuss each of these possible remedies in turn.

¹ www.competition-commission.org.uk/inquiries/ref2010/movies_on_pay_tv/pdf/remedies_notice.pdf.

(a) *Online-access remedy*

8. In response to our Notice, some parties have told us that to enable Internet-distributed OTT movie service providers to compete more effectively with Sky Movies, the principles of the TPS² access control regime (which currently requires Sky to make available its satellite platform and electronic programme guide (EPG) to third parties) could be applied to Internet-distributed movie services. This remedy would allow those providers of Internet-distributed SVOD movie services which meet certain qualifying criteria to gain access, via Sky's Ethernet-enabled STBs, to Sky's Anytime+ customer base, to whom they could retail their services directly.
9. In our provisional findings, we recognized that a rival seeking to establish a new SVOD movie service would not face all the same barriers as a rival seeking to establish a new linear movie channel. Nevertheless, we judged that it would still face the same principal barrier, which is Sky's incumbency position, with 10 million pay-TV subscribers and over [X] million Sky Movies subscribers on its own platform. We said that being able to attract enough subscribers sufficiently quickly to be able to justify paying a price for the SVOD rights greater than Sky would represent a significant challenge and risk for any potential bidder for these rights.³
10. This remedy would mitigate the AEC which we have provisionally found by reducing the switching barriers for Sky's subscribers to a new SVOD movie service, such that the new service provider can more effectively generate value from any rights it licenses and can bid more effectively for movie rights.

Issues for comment on further remedy (a)

11. **Views are invited on the effectiveness and proportionality of this remedy and, in particular, on the following:**
 - (a) **Whether this remedy is appropriate, for example:**
 - (i) **whether access to Sky's Ethernet-enabled STBs would enable qualifying OTT movie service providers to compete more effectively with Sky's movies services; and**
 - (ii) **whether, in the foreseeable future, this remedy will be rendered superfluous through technical and market developments, in particular the adoption by consumers of Internet-enabled TVs and STBs, including YouView.**
 - (b) **What parameters it would be appropriate for the CC to set out for the commercial terms on which Sky must provide qualifying OTT movie service providers with access to its Ethernet-enabled STBs, for example:**
 - (i) **should Sky be required to publish a 'rate card' of the terms on which it will allow access to its Ethernet-enabled STBs;**
 - (ii) **should any such terms simply be required to be 'fair, reasonable and non-discriminatory' or would a more detailed specification be necessary and appropriate;**

² <http://stakeholders.ofcom.org.uk/consultations/tpsguidelines/statement/>.

³ Provisional findings, paragraph 8.112.

- (iii) whether, and if so what, rules should be specified by the CC as regards the degree of prominence and ease of access afforded to OTT movie service providers, including, for example, EPG (or equivalent) placement; and
 - (iv) whether there are any other contractual or commercial issues with this remedy.
- (c) What, if any, technical difficulties would need to be overcome in order to make this remedy effective, for example:
- (i) whether the way in which OTT movie service providers deliver content to their consumers is compatible with the way in which Sky provides SVOD content to its customers using its Ethernet-enabled STBs;
 - (ii) whether Sky would need to host the content of the OTT movie service provider on its servers, rather than enable its consumers to access this content from the servers of the movie service provider and, if so, whether any issues would arise with this arrangement;
 - (iii) whether the way in which Sky could supply content to consumers of the OTT movie service might degrade these consumers' viewing experience compared with their experience of viewing the same content through other devices (or would these technical issues apply only with regard to HD content); and, if so, how these technical issues might be overcome;
 - (iv) what technical difficulties might arise from the use by third party content providers of digital rights management (DRM) technology which is different from that employed by Sky; and whether OTT movie service providers would require access to Sky's DRM technology in order to deliver their services to consumers using Sky's Ethernet-enabled STBs; and
 - (v) how much investment would be needed to overcome these and other technology obstacles and how long this process would take.
- (d) What requirements should be specified in order for an OTT movie service provider to 'qualify' for the right to require access to Sky's Ethernet-enabled STBs, for example:
- (i) should it be confined to subscription OTT movie services (ie paid-for through a regular monthly fee); and
 - (ii) should the OTT movie service provider be required to have licensed the right to exhibit content in particular release windows from a particular number of studios and, if so, how should this be specified?
- (e) What costs would arise as a result of this remedy, for example:
- (i) are there costs associated with enabling access to Sky's Ethernet-enabled STBs; how do these costs vary depending on whether Sky is obliged to change its existing STBs or only to enable its future STBs to operate in this way; and

- (ii) **would pay-TV customers incur additional costs or suffer a loss of convenience?**
- (f) **Would this remedy pose any circumvention risks and, if so, how could these be mitigated?**
- (g) **Would this remedy give rise to distortions or be likely to have any other unintended consequences, for example:**
 - (i) **how would this remedy affect competition between linear movie services and VOD movie services?**

(b) A supplementary remedy requiring Sky to publish the expiry dates of its contracts relating to FSPTW rights with the six major studios

12. In our provisional findings we asked both the movie studios and possible bidders for information about recent FSPTW rights negotiations.⁴
13. Some parties commented in response to the provisional findings and the Notice that it could be difficult as a potential bidder for FSPTW rights to ascertain precisely when a studio's FSPTW content was going to become available because of confidentiality requirements covering the existing agreements with Sky. These parties told us that the lack of transparency regarding the precise expiry dates of Sky's existing contracts for FSPTW rights with the studios might enhance the other barriers inhibiting rival bidders from bidding effectively.
14. This remedy would require Sky to publish the expiry dates of its existing and future contracts relating to FSPTW rights with the six major studios. Although it would not address the AEC on its own, it would act as a supplement to other remedies by increasing rival bidders' awareness of when the contracts for the FSPTW rights that Sky currently holds are due for renewal, enabling these bidders to engage with the six major studios in negotiations on a timely basis.

Issues for comment on further remedy (b)

15. **Views are invited on the effectiveness and proportionality of this remedy and, in particular, on the following:**
 - (a) **Should any other aspects of contracts be made transparent and, if so, which ones and why?**
 - (b) **Would this remedy create any risks of coordination and, if so, how could these be mitigated?**
 - (c) **Should this remedy be extended to other parties which acquire FSPTW rights?**
 - (d) **Whether any confidentiality provisions in the contracts between Sky and the studios would affect the implementation of this remedy, and if so, how.**
 - (e) **Would this remedy pose any circumvention risks and, if so, how could these be mitigated?**

⁴ Provisional findings, Appendix 8.1.

(f) What costs would arise as a result of this remedy?

(g) Would this remedy give rise to distortions or be likely to have any other unintended consequences?

Next steps

16. The parties to this investigation and any other interested persons are requested to provide any views in writing by 5 December 2011 either by email to moviesonpaytv@cc.gsi.gov.uk or by writing to:

Inquiry Manager (Movies on Pay TV)
Competition Commission
Victoria House
Southampton Row
LONDON
WC1B 4AD

(signed) LAURA CARSTENSEN
Group Chairman
21 November 2011

Note: This Notice is given having regard to the CC's provisional findings, which were published on 19 August 2011. In the light of responses by the parties or by other interested persons to these provisional findings, the CC's findings may change and the CC may consider other possible remedies if appropriate.