



Complaint from Independent Media Support Limited about BBC Broadcast's provision of television access services to the BBC

Case CW/00842/06/05

**This is the non-confidential
version. Confidential
information and data have been
redacted. Redactions are
indicated by “[X]”**

Case Closure

Issued:

30 May 2007

The Investigation

- 1.1 On 15 December 2005 Ofcom opened an investigation following a complaint that BBC Broadcast Limited ("BBC Broadcast") (which until 1 August 2005 was a wholly owned subsidiary of the British Broadcasting Corporation (the "BBC")) had infringed the prohibition in section 2 of Chapter I of the Competition Act 1998 (the "Chapter I prohibition") and/or Article 81(1) of the EC Treaty ("Article 81"). The complaint related to the duration and exclusive nature of an agreement between BBC Broadcast and the BBC for the supply of television access services¹ (the "Access Services SLA"), and was submitted to Ofcom by Independent Media Support Group plc ("IMS"), a competitor of BBC Broadcast.
- 1.2 At the time it opened its investigation into the Access Services SLA, Ofcom was already investigating BBC Broadcast's agreement with Channel 4 (the "Channel 4 Contract") to provide access services. The investigation into that contract, which provided for exclusive purchase of five years, raised competition concerns. Ofcom is today issuing a non-infringement decision (the "Channel 4 Decision") in respect of that investigation, which can be found on Ofcom's website.²
- 1.3 The Access Services SLA is part of a broader Framework Agreement between the BBC and BBC Broadcast which governs the provision of various broadcasting services.³ The original Framework Agreement, which was put in place when BBC Broadcast was still a subsidiary of the BBC, began on 1 April 2002 and was due to expire on 31 December 2006. On 11 May 2005 this agreement was replaced with a further Framework Agreement with a longer term to 31 December 2012. On 31 July 2005, the duration of the Framework Agreement was extended, to 31 December 2015.⁴
- 1.4 In June 2005 the BBC announced that BBC Broadcast was to be sold to Creative Broadcast Services Limited ("CBSL"). As the sale, which included the transfer of the Framework Agreement including the Access Services SLA, was to be scrutinised by the Office of Fair Trading ("OFT"), Ofcom initially did not investigate IMS's complaint about the Access Services SLA. As part of its consideration of the merger, the OFT considered whether the broader Framework Agreement, was an ancillary restraint directly related and necessary to implement the merger of BBC Broadcast and CBSL.
- 1.5 On 11 November 2005 the OFT published its decision on the merger, clearing the transaction but not the Framework Agreement, finding that it was not an ancillary restraint.
- 1.6 Subsequent to the publication of the OFT's decision, on 15 December 2005, Ofcom opened its investigation into the Access Services SLA, adding it to the scope of its investigation into the Channel 4 Contract. Ofcom's Competition Bulletin entry for these investigations can be viewed on Ofcom's website.⁵
- 1.7 During Ofcom's investigation, BBC Broadcast and the BBC amended the term of the Access Services SLA from its end date of 31 December 2015, a duration of ten years and five months, to 31 December 2012, a duration of seven years and five months. In

¹ Namely subtitling for the deaf and hard of hearing ("SDH"), audio description and signing ("access services").

² http://www.ofcom.org.uk/bulletins/comp_bull_index/

³ Within the Framework Agreement are thirteen Service Level Agreements ("SLAs"), including the Access Services SLA.

⁴ Framework (revised and restated) Amendment Agreement dated 31 July 2005. CBSL acquired sole control of BBC Broadcast on 1 August 2005.

⁵ http://www.ofcom.org.uk/bulletins/comp_bull_index/

light of that amendment, and based on Ofcom's findings on the structure of competition in the relevant market as set out in the Channel 4 Decision, Ofcom considers that it is no longer an appropriate use of Ofcom's resources to engage in further investigation into this matter.

- 1.8 On 4 December 2006, Ofcom issued a non-confidential draft case closure document to IMS, BBC Broadcast and the BBC. Ofcom received comments from each of these parties on 19 January 2007.

Case closure summary

- 1.9 This case closure document deals solely with Ofcom's consideration of the Access Services SLA, and not the broader Framework Agreement, which was not the subject of the Ofcom investigation. Ofcom's assessment of relevant market definition, assessment of market shares and dominance in the relevant market is set out in the Channel 4 Decision.

The undertakings

BBC Broadcast

- 1.10 BBC Broadcast, company number 04257461, was incorporated on 1 April 2002 as a wholly-owned subsidiary of the BBC and was accountable to the BBC's Commercial Board and the BBC Fair Trading Department.⁶ Prior to incorporation it operated as a division of the BBC known as "Broadcast and Presentation". On 1 August 2005 BBC Broadcast was sold to CBSL, wholly owned by Macquarie Capital Alliance Group and Macquarie Bank Limited. On 1 November 2005 BBC Broadcast was renamed as Red Bee Media Limited ("Red Bee") but for consistency is referred to as BBC Broadcast throughout this document.
- 1.11 BBC Broadcast provides a range of broadcasting services, including access services and is the sole provider of access services to certain BBC channels (BBC One, BBC Two, BBC Three, BBC Four, CBBC, CBeebies, BBC Parliament and BBC News 24). BBC Broadcast is an undertaking for the purposes of the Chapter I prohibition and Article 81.

The BBC

- 1.12 The BBC, company number RC000057, was incorporated in 1926 by Royal Charter (the "Charter"). The BBC is headed by the BBC Trust, members of which are appointed by the Queen on advice from ministers. Its principal source of funding is the licence fee, which is paid by viewers. However the Charter also permits it to generate other sources of income, provided they are approved by the Secretary of State. The BBC's commercial businesses, BBC Worldwide and BBC Resources, generate commercial revenues for the BBC.
- 1.13 The BBC is a Public Service Broadcaster as defined in section 264 (12) of the Communications Act 2003. Its principal activities are national and regional television and radio in the UK. It has two UK terrestrial television channels, BBC1 and BBC2, and several UK digital channels: BBC3, BBC4, BBC News 24, BBC Parliament, CBBC and CBeebies.

⁶ The Commercial Board scrutinises all significant (in terms of revenue and capital expenditure) transactions and commercial decisions. The Commercial Board reviewed and 'signed off' BBC Broadcast's Channel 4 bid.

- 1.14 The BBC is required to provide access services pursuant to the Code on Television Access Services published by Ofcom under section 303 of the Communications Act.
- 1.15 In relation to this investigation, the BBC is an undertaking for the purposes of the Chapter I prohibition and Article 81.

IMS

- 1.16 The complainant in this case, IMS, company number 02425634, has been a provider of media access services since 1989. It provides these services to the broadcasting industry, as well as to other sectors such as DVD, film and advertising.

Overview of the access services industry and regulation of access services

- 1.17 Ofcom has set out its consideration of the access services industry in paragraphs 2.7 to 2.16 of the Channel 4 Decision.
- 1.18 Ofcom has also considered the regulatory framework for the provision of access services to UK television broadcasters. This is set out at paragraphs 2.17 to 2.27 of the Channel 4 Decision.

The Access Services SLA (as part of the Framework Agreement)

- 1.19 Under the Framework Agreement access services are purchased by the BBC from BBC Broadcast for certain BBC channels on an exclusive basis.
- 1.20 As stated in paragraph 1.3, the original Framework Agreement for the in-house supply of services began on 1 April 2002 and was due to expire on 31 December 2006. This agreement was replaced with a further Framework Agreement on 11 May 2005, when the term was extended to 31 December 2012. On 31 July 2005 BBC Broadcast was sold to CBSL and, as part of the sale agreement to CBSL, the Framework Agreement was extended further, by a Framework Amendment Agreement, to 31 December 2015 i.e. to a duration of ten years and five months.
- 1.21 Clause 3.3 of the Framework Agreement, in conjunction with Schedule 2 to the Framework Agreement as amended by clause 3.1 of the Framework Amendment Agreement, provides for an expiry date of 31 December 2015 for the Access Services SLA.

Ofcom's preliminary concerns regarding the Access Services SLA

- 1.22 Having considered the characteristics of the relevant market for the purpose of its investigation into the Channel 4 Contract, Ofcom was concerned that the Access Services SLA entered into between BBC Broadcast and the BBC might have the effect of foreclosing access to the market for the supply of access services to UK television broadcasters. In reaching this preliminary view Ofcom noted that:
- 1.22.1 the relevant market is that for the supply of access services to UK television broadcasters;⁷
- 1.22.2 BBC Broadcast's share of that market at the time of the alleged infringement was approximately [60-70]% excluding in-house supply, and [30-40]% including in-house supply;⁸

⁷ For Ofcom's assessment of the relevant market see section 5 of the Channel 4 Decision.

- 1.22.3 the Access Services SLA did not obtain the benefit of the Vertical Agreement Block Exemption⁹ (the “Block Exemption”) because BBC Broadcast’s market share as supplier exceeded the 30% ceiling specified in the Block Exemption;¹⁰
 - 1.22.4 the combined effect of clauses 15.1.2 and 3.3 of the Framework Agreement amounted to a non-compete obligation within the meaning of Article 1(b) of the Block Exemption;
 - 1.22.5 the duration of the non-compete obligation was more than ten years;
 - 1.22.6 the non-compete obligation did not appear to be justified by reference to the specific requirements of the BBC nor any investments made by BBC Broadcast for the purpose of fulfilling its obligations under the Access Services SLA, and therefore should be assessed for compatibility with Article 81(1); and
 - 1.22.7 given that the BBC contract represents around half of the available market for access services (i.e. excluding in-house supply), and that contracts for access services come onto the market infrequently,¹¹ Ofcom investigated whether the non-compete obligation could have the effect of restricting competition by foreclosing access to, or expansion in, the market for the supply of access services to UK television broadcasters.
- 1.23 Ofcom put IMS's complaint to BBC Broadcast and the BBC in the course of its investigation.

BBC Broadcast’s submissions

- 1.24 During the course of Ofcom’s investigation BBC Broadcast submitted to Ofcom its views on why it did not consider that the Access Services SLA infringed the Chapter I prohibition and/or Article 81(1). Specifically, BBC Broadcast stated that:
- 1.24.1 the conferral of rights on BBC Broadcast (i.e. at its sale) amounts to an outsourcing of the BBC’s requirements which is pro-competitive when compared with the situation of self-supply which prevailed prior to the sale of BBC Broadcast;
 - 1.24.2 the BBC business pursuant to the Access Services SLA represents only 20% of the total volume of output hours for broadcasters in the UK and, in any event, the access services market is a bidding market in which market shares are not a meaningful measure of the level of competition;

⁸ For Ofcom’s approach to calculating market shares see section 6 of the Channel 4 Decision. In arriving at a figure of [60-70]% for BBC Broadcast’s share of the relevant market excluding in-house supply, Ofcom included in its market share calculations the origination hours attributable to the BBC contract as this no longer amounted to the provision of in-house services upon the sale of BBC Broadcast to CBSL, but continued to exclude those shares attributable to other self-supply (for example ITFC to ITV). Accordingly the calculation uses a different denominator to those figures set out in Table 5 of the Channel 4 Decision and so can not be directly compared to them. In BBC Broadcast’s view, Ofcom’s market share calculation of [60-70%] is very high and overstates BBC Broadcast’s position in the market; it is their view that the Access Services SLA represents only 20% of the volume of output hours for television broadcasters in the UK.

⁹ Regulation 2790/99/EC of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

¹⁰ See paragraphs 4.6 to 4.17 of the Channel 4 Decision for an outline of the applicable legal framework including the Block Exemption.

¹¹ See paragraph 5.17 of the Channel 4 Decision for Ofcom’s assessment of the characteristics of the relevant market.

- 1.24.3 there is no evidence of foreclosure as there is vigorous competition and plenty of opportunities for access services contracts with a sufficient number of credible bidders participating in any such process and no significant barriers to entry or expansion;
- 1.24.4 the market is characterised by significant and readily foreseeable market growth, and it is extremely difficult to foreclose competing suppliers in a rapidly expanding market;¹²
- 1.24.5 the product market is wider than that suggested by Ofcom in that it includes supply to audiovisual content providers as well as television broadcasters and the geographic market is broader than the UK;
- 1.24.6 the duration of the Access Services SLA is necessary to achieve the legitimate commercial objectives of both the BBC and BBC Broadcast, as against the background of the complexity of the BBC's service requirements; and
- 1.24.7 the duration of the Access Services SLA is justified in the light of the additional capital investment in new facilities and equipment BBC Broadcast would be making in order to ensure that the BBC could meet its commitment to achieve 100% subtitling by 2008. BBC Broadcast submitted that this investment would be depreciated over the period [3<].¹³

The BBC's submissions

- 1.25 Prior to Ofcom opening an investigation into this matter the BBC submitted to Ofcom that the contract with BBC Broadcast was pro-competitive because:
 - 1.25.1 it freed up BBC Broadcast's captive business with the BBC, which will be on the open market when the contract expires;
 - 1.25.2 lengthy exclusive contracts are standard practice in the market;
 - 1.25.3 the merger was the result of a highly competitive auction process, that IMS could have participated in, for example by forming a consortium to purchase BBC Broadcast; and
 - 1.25.4 the sale of BBC Broadcast by the BBC for £166 million was beneficial to consumers as the proceeds could be used to provide consumers with a better service.
- 1.26 The BBC also submitted that there was no evidence that the Access Services SLA was likely to result in an appreciable foreclosure effect in the relevant market given that the BBC's access service requirements do not represent a significant part of the market. Moreover, the BBC felt that the focus of an assessment of effects should be on the competitive process for awarding contracts, rather than on market shares in a bidding market such as that for access services. The BBC further submitted that the duration of the Access Services SLA was appropriate in the light of the complexity of the BBC's access services requirements, specifically, the need to minimise the administrative burden and operational complexities of dealing with multiple suppliers

¹² In its letter of 19 January 2007, BBC Broadcast noted that these comments were made only in the context of the assumption that market shares should be taken into account in assessing foreclosure, which it submits is incorrect.

¹³ Letter from BBC Broadcast to Ofcom of 4 April 2006.

and the desire to create the necessary commercial incentives to ensure that a supplier was able to generate an adequate return given the BBC's highly complex and demanding service requirements.¹⁴

IMS's submissions

- 1.27 In its complaint, IMS submitted that the length and exclusivity of the Access Services SLA infringed the Chapter I prohibition.¹⁵ Specifically, it stated that:
- 1.27.1 During the period of the exclusivity "companies such as IMS and potential market entrants will be deprived of the opportunity to bid for even a share of the 40% plus of the relevant market that is accounted for by the BBC's requirements" raising barriers to expansion and entry which is "bad" for broadcasters, and by extension consumers;
 - 1.27.2 The most the case law permits Ofcom to sanction BBC Broadcast to have the benefit of such an agreement is for two years and that any new business incremental to the current agreement should be put out to tender immediately;
 - 1.27.3 If the terms of the Access Services SLA are not amended, the resulting foreclosure would be such that BBC Broadcast would be able to attack new business opportunities at very low pricing levels from an unassailable position and that this situation will quickly lead from dominance to "total monopoly" as BBC Broadcast "will be able to raise the cost of the acquisition of a service for which there are no substitutes having eliminated IMS and deterred any new entry."
- 1.28 IMS also made a number of submissions in response to the draft case closure (set out further below).

Second Framework Amendment Agreement dated 7 July 2006

- 1.29 During the investigation, Ofcom was advised by the BBC and BBC Broadcast that they had entered into a Second Framework Amendment Agreement (the "Second Amendment"). A copy of the Second Amendment was provided to Ofcom.
- 1.30 The Second Amendment replaces those clauses of the Framework Amendment Agreement (see footnote 4) which provide for the exclusive purchase of access services by BBC Broadcast to the BBC (for certain channels –see paragraph 1.11) until 31 December 2015. The Second Amendment provides for the expiry of the Access Services SLA on 31 December 2012. As a result of the amendment the duration of the non-compete obligation has been reduced from ten years and five months to seven years and five months, effectively to the previous duration of the existing Access Services SLA provided in-house prior to the sale.¹⁶

¹⁴ Letter from the BBC to Ofcom of 3 April 2006.

¹⁵ Revised IMS complaint of 24 June 2005.

¹⁶ In its letter of 19 January 2007, BBC Broadcast argues that as, had the BBC not decided to "outsource" its requirements [for access services and other services] through the sale of BBC Broadcast to CBSL the Access Services SLA would have remained being supplied in-house to at least the same date as the term of the Second Amendment and not been subject to competition, the Second Amendment "eliminates" any possibility of market foreclosure. In Ofcom's view the correct counterfactual situation is that of a shorter contract duration, not the contract remaining in-house, and so to the extent that market foreclosure may have existed, it is reduced as a result of the Second Amendment.

- 1.31 In light of this, Ofcom proposed to close its file in this investigation taking account of its resources and its other priorities. On 4 December 2006 Ofcom issued a non-confidential draft case closure document to IMS, BBC Broadcast and the BBC. Ofcom received comments from each of these parties on 19 January 2007.

Comments on the draft case closure document

- 1.32 BBC Broadcast and the BBC welcomed Ofcom's draft conclusions.
- 1.33 IMS maintained its allegation that the conduct is an infringement of competition law and argues that Ofcom should proceed towards a Statement of Objections in respect the allegation. In making this case, IMS argued that the BBC contract must logically and by necessary implication involve an identical finding to the Channel 4 contract as the market share thresholds are exceeded and "an exemption is required for the BBC contract too".¹⁷ IMS added that in addition the restrictions in the Framework Agreement are potentially ancillary restraints which were not authorised by the OFT in its clearance of the sale of BBC Broadcast to CBSL. In IMS's view this means that there is no objective justification for the duration of the contract and that Ofcom should grant an exemption before the contract can have any legal validity.¹⁸
- 1.34 IMS also made a number of comments on the BBC and BBC Broadcast submissions set out in the draft case closure, in particular:
- 1.34.1 IMS disputes that lengthy and exclusive contracts are standard practice in the market [<]¹⁹;
- 1.34.2 IMS considers that the sale of BBC Broadcast was not beneficial to consumers and that, in terms of relevant services alone, consumers (the licence fee payers) will have lost approximately £100 million;
- 1.34.3 IMS questioned whether an exclusive provider was genuinely essential for the BBC since IMS understood that [BBC Broadcast] has approached companies to sub-contract certain access services.²⁰

Ofcom's conclusions

- 1.35 As noted in section 4 of the Channel 4 Decision, since the Modernisation Regulation (Regulation 1/2003) and the consequent amendments to the Competition Act 1998, the system of individual exemption no longer applies. Therefore, there is no question of Ofcom "exempting" this agreement. Rather, the provisions of Article 81(3) will apply directly to remove the prohibition in 81(1) where the conditions set out in Article 81(3) are made out (see Article 1 Modernisation Regulation). Ofcom's views on the application of the Block Exemption and market shares are set out in sections 4 and 8 of the Channel 4 Decision.
- 1.36 Ofcom notes that the non-compete obligation is longer than the period usually considered acceptable under the Block Exemption and the Commission's Guidelines on the application of the Block Exemption.²¹ Ofcom also notes that there does not appear to be a clear industry average practice for the duration of exclusive agreements. Ofcom would have considered carefully whether the length of the non-

¹⁷ IMS letter of 19 January 2007, paragraph 3.1.

¹⁸ IMS letter of 19 January 2007, paragraphs 3.2 to 3.4.

¹⁹ IMS letter of 19 January 2007, paragraph 1.7.

²⁰ IMS letter of 19 January 2007, paragraph 1.6.

²¹ Commission Notice Guidelines on Vertical Restraints, 2000/C291/01, OJ C291.

compete obligation for the BBC contract appreciably foreclosed the relevant market. In making this assessment, Ofcom would have considered the structure of the market and competition in that market, in particular given its conclusions set out in the Channel 4 Decision including on the features of a bidding market and countervailing buyer power. However, given the reduction by the parties in the non-compete obligation from ten years and five months to seven years and five months, in the light of other priorities, Ofcom has decided not to commit further resources to conclude its analysis of the reduced non-compete obligation under Chapter 1 of the Act /Article 81.

- 1.37 Having considered all the responses of the parties, Ofcom has closed its file on this matter.