

Ofcom's Consultation on Competition Issues in Premium Pay TV Movies

Response of Top Up TV Europe Limited

1. Top Up TV Europe Limited ("TUTV") has seen redacted near final drafts of the submissions by BT and Virgin Media in response to Ofcom's Pay TV Movies Consultation Document. TUTV broadly supports the points made by BT and Virgin Media in their submissions and would highlight the following issues.
2. It is clear, from the material collated and reviewed by Ofcom to date and the analysis undertaken in Ofcom's Pay TV Statement and Pay TV Movies Consultation Document ("Consultation"), that Ofcom has more than sufficient evidence to refer to the Competition Commission ("CC") the markets for the upstream sale of movie rights from Major Hollywood Studios in the first pay TV subscription window, and the wholesale supply of packages including Core Premium Movies channels.
3. In order to make a reference, Ofcom needs only "*reasonable grounds to suspect*" that a feature, or combination of features, prevents, restricts or distorts competition in a market in the UK for goods and services. This threshold is recognised as being a low one, reflecting Ofcom's role as first phase investigator, and is clearly met in the present case. Ofcom has found that:
 - (a) Sky has market power in the wholesale supply of premium movies channels;
 - (b) Sky has market power in the retailing of packages containing premium movies channels;
 - (c) barriers to entry in each of the above markets are high;
 - (d) Sky, as a vertically integrated operator with wholesale market power, has the ability and incentive to restrict wholesale supply of packages including premium movies channels; and
 - (e) there exist a range of factors which point to Sky's behaviour having had the effect of foreclosing, or marginalising, other market participants at all levels of the pay TV supply chain.
4. It should also be noted that Ofcom, in its Third Pay TV Consultation Document of 26 June 2009, identified specific competition concerns and evidence of consumer detriment in relation to the wholesale supply of premium movies channels which were sufficient to support its view, at the time, that Sky's premium movies channels should fall within the scope of its proposed WMO remedy. Ofcom's subsequent decision to exclude movies from the wholesale must-offer ("WMO") remedy is not based on any reconsideration of this position (indeed, in the Pay TV Statement Ofcom reaffirms its view that its findings on market power and restricted distribution extend to Sky's premium movies channels) but rather reflects the view that a solution encompassing competition concerns at both the upstream and wholesale levels of the market would be

preferable. This alone is sufficient to require Ofcom to make the proposed reference to the CC.

5. TUTV considers that the absence of movies from the WMO remedy makes it absolutely vital that a reference is made to the CC in order to address the competition concerns identified in the various movies markets (upstream rights procurement, wholesale and retail). The longer the current market features and Sky's conduct are allowed to persist, the greater the detriment suffered by consumers.

6. With regard to the proposed terms of the market investigation set out in Annex 1 of the Pay TV Movies Consultation Document, TUTV assumes that it was not Ofcom's intention to exclude a consideration of retail markets by the Competition Commission. In practice, any such exclusion would impose an impractical constraint on the Competition Commission and would not allow the Competition Commission properly to evaluate the interaction between wholesale and retail markets. To address this ambiguity, TUTV agrees with Virgin Media's suggestion that:

(a) paragraph A1.5 is amended as follows (with amendments identified **in bold**):

*“Ofcom has reasonable ground for suspecting that a feature or a combination of features of the wholesale **and retail** market or markets in which packages including Core Premium Movie channels are supplied or acquired prevents, restricts or distorts competition in connection with the **wholesale and retail** supply **in the UK** of Movie Rights and packages including Core Premium Movie channels in the UK.”*

(b) the first line of Paragraph A1.12 is amended as follows (with amendments identified **in bold**):

*“Packages including Core Premium Movie channels” are **wholesale and/or retail** packages including ...”*

7. Over three years have passed since BT, NTL (as it then was), Setanta (now in administration) and TUTV initially made a submission to Ofcom calling for a market investigation reference to the Competition Commission of, among other things, these pay TV movies markets. It is also more than three years since Ofcom began its pay TV investigation, during which time ample evidence of continuing consumer detriment has been revealed. Any further delay will simply perpetuate the features of the market which are preventing, restricting or distorting competition.