

ANNEX 8

COMPULSORY LICENSING OF PREMIUM PAY TV CHANNELS IN OTHER COUNTRIES

1. Introduction

- 1.1 Ofcom has sought to portray its proposals to compel Sky to license its premium pay TV channels to other operators as relatively uncontroversial on a number of grounds including that the proposals are a ‘normal’ form of regulation in other countries. For example, Ofcom has stated:

“wholesale must-offer obligations have been imposed in a number of other countries, in response to similar concerns to those that we have set out”¹

and

“This is not a revolutionary approach... this kind of wholesale must offer has existed in the States for years.”²

- 1.2 Ofcom’s views on this matter appear impressionistic, rather than being based on a thorough understanding of (a) the nature of compulsory licensing obligations in other countries; or (b) the reasons for those obligations.³ A proper understanding of such matters is required in order to rely on the existence of regulation in other countries as lending support to Ofcom’s own proposals to impose wide-ranging, deterministic and highly intrusive regulation on Sky.
- 1.3 In this Annex, Sky considers the compulsory licensing obligations that exist in relation to pay TV channels in the countries cited by Ofcom as relevant comparators, namely France, Italy, Spain and the United States.⁴ We show that the regulation that exists in those countries has little in common either in form or rationale with that which Ofcom proposes. In particular, in spite of the fact that obligations were introduced in France, Italy and Spain in order to remedy demonstrable reductions in competition arising from mergers between pay TV operators, Ofcom’s proposals go far beyond the remedies that were adopted in those countries. Similarly, Ofcom’s proposals go far beyond the regulation that exists in the US.
- 1.4 Ofcom’s proposals go far beyond compulsory licensing regulation that exists in the countries it cites in four key respects:
- (a) wholesale charges for pay TV channels are not set *ex ante* by regulators in any of the countries cited by Ofcom;

¹ Paragraph 8.41 of the Consultation Document.

² Ed Richards, speaking at Ofcom’s briefing to City media analysts on 22 October 2008.

³ Indeed, we understand that subsequent to the publication of its Consultation Document, Ofcom has commissioned research on such matters from consultants.

⁴ Paragraphs 1.41 and 8.41 of the Consultation Document.

- (b) none of the other countries cited by Ofcom require licensing of pay TV channels on extended retail-minus terms;
- (c) no other country imposes cost-based price control on the suppliers of pay TV channels; and
- (d) no other country's regulation is deterministic in relation to such a broad range of matters relating to supply of pay TV channels as the regulation contemplated by Ofcom.

1.5 Given the focus of Ofcom's analysis on Sky's premium sports and film channels, in the following sections we focus on obligations relating to compulsory licensing of such channels. We have excluded consideration of obligations in relation to pay per view/ VoD services.

2. France

2.1 Channel supply obligations were introduced in France as conditions attached to the approval of two mergers between pay TV operators – TPS/Canal Satellite (CanalSat) in 2006⁵, and SFR/Tele2 in 2007⁶. The TPS/CanalSat merger was approved by the French competition authorities, while the SFR/Tele2 merger was approved by the European Commission.

TPS/CanalSat

2.2 The TPS/Canal Satellite undertakings required the merged company to wholesale seven TPS channels⁷ on a non-exclusive and unbundled basis. Save for one mixed-genre channel (TPS Star), these are essentially basic pay TV channels (including two children's channels). They do not include the key premium sports and film channels available in France – the Canal+ Le Bouquet channels. In relation to the Le Bouquet channels, Canal+ is required only to make them available on all platforms, with Canal+ permitted to be the retailer of those channels, subject to the requirement that arrangements with other platform operators must be “*transparent, objective and non-discriminatory*”. Canal+ is prevented from specifying conditional access technology to be used by other platforms, but is able to set conditions relating to service quality, security and anti-piracy. Canal+ is required to make Le Bouquet channels available on other platforms without buy-through from other services. As noted in PwC's first report, Canal+ retails the Le Bouquet package of channels in France via DTH satellite, and cable and IPTV networks, and retails selected Le Bouquet channels via digital and analogue terrestrial platforms.⁸ It is under no obligation to license these channels to any other retailer.

⁵ <http://www.conseil-concurrence.fr/pdf/avis/06a13.pdf>

⁶ Case No COMP/M.4504 – *SFR/Tele 2 France*, Commission Decision of 18 July 2007.

⁷ TPS Star, Cinestar, Cineculte, Cinetoile, Sport+ and two children's channels (Piwi and Teletoon).

⁸ See page 2 of the Country Annex on France.

- 2.3 In relation to the seven TPS channels required to be wholesaled to third parties, no price regulation was imposed.⁹ Terms and conditions of supply are required to be formalised in a ratecard, but are required only to be “*transparent, objective and non-discriminatory*” (the conditions notably omit reference both to “*fair*” and “*reasonable*” terms¹⁰).
- 2.4 These conditions expire in 2012.
- 2.5 Accordingly, it is clear that Ofcom’s proposals are radically different to those adopted by the French competition authorities in relation to the TPS/CanalSat merger with regard to compulsory licensing obligations for pay TV channels: they do not relate to the main premium channels available in France; they do not involve deterministic price control; and there is light touch regulation of the terms and conditions associated with those channels that are required to be licensed to other retailers (which are mainly basic pay TV channels).

SFR/Tele2

- 2.6 The European Commission cleared the acquisition of IPTV operator Tele2 by SFR (a subsidiary of Vivendi), subject to a number of conditions. The conditions imposed involved, inter alia, an obligation on Vivendi that, if it distributes a Vivendi-produced channel via SFR/Tele2, it must offer this channel “*to all Internet service providers using xDSL technologies on **normal market conditions which are not less favourable** than those provided to SFR*”.¹¹ (Emphasis added) The Commission decision noted explicitly that this did not mean that common terms must be offered to all DSL operators. The Commission stated:

“this commitment to non-discrimination does not mean that Vivendi must grant identical conditions to all DSL operators.... This commitment only provides that DSL operators may not be granted less favourable conditions than those granted by Vivendi to SFR/Tele 2; this does not eliminate the possibility of differential treatment between DSL operators and preserves competition incentives.”¹²

- 2.7 These commitments also expire in 2012. Other than obligations relating to accounting separation (required in order to ensure compliance with this undertaking) there are no detailed, prescriptive rules associated with the terms and conditions of supply of Vivendi’s channels to other DSL operators.

⁹ See the presentation by the Chief Economist at the Conseil de la concurrence on the undertakings, available at: <http://www.crai.com/ecp/assets/Chone.pdf>.

¹⁰ It would appear that these omissions are conscious ones. For example, the presentation by the Chief Economist at the Conseil de la concurrence on the undertakings referred to above states:

“No price regulation [no “retail minus” principle]

- Just says: “in [sic] transparent, objective and non-discriminatory terms”
- does not say: “reasonable” nor “fair” (Emphasis in the original)

¹¹ SFR/Tele2 at paragraph 117.

¹² SFR/Tele 2 at paragraph 121.

2.8 Again, therefore, the channel supply commitments entered into by Vivendi as part of the clearance of this merger are in no way similar to the panoply of detailed prescriptive regulation that Ofcom proposes to impose on Sky.

3. Italy

3.1 Wholesale channel supply obligations were introduced in Italy in 2003 as part of the clearance conditions agreed with the European Commission in relation to the merger between Telepiu Spa and Stream Spa – the two main providers of pay TV services (at both the wholesale and retail levels), both of which operated DTH satellite platforms.¹³ The merger resulted in the creation of Sky Italia. One of the requirements placed on Sky Italia as part of the merger clearance process was an obligation to offer third parties the right to distribute, on platforms other than Sky Italia’s on an unbundled and non-exclusive basis, premium channels (and basic channels carrying premium content) distributed by Sky Italia to its own customers.

3.2 In relation to determination of wholesale charges for such channels, the commitments specified that wholesale charges should be determined by Sky Italia on a ‘retail-minus’ basis, with the ‘minus’ determined by Sky Italia’s own retail costs, i.e. in accord with standard margin squeeze principles established in competition law. The commitments do not include detailed prescriptive conditions in regard to how Sky Italia must comply with this requirement.

3.3 In relation to other terms and conditions of supply, the commitments state only that supply:

“shall be made on reasonable terms and conditions (including, without limitation, reasonable provision as to notice periods) and shall be in line with international best practices in (sic) pay-TV industry taking account of differences in operating and market conditions in different markets.”¹⁴

3.4 These commitments expire at the end of 2011, although provisions exist to remove them earlier if market conditions change appreciably.

3.5 Accordingly, notwithstanding the fact that compulsory licensing of Sky Italia’s channels was introduced in order to counteract the impact of a merger to effective single retailer of pay TV services in Italy – a situation which is in stark contrast to that found in the UK – the approach adopted in relation to compulsory licensing of Sky Italia’s premium channels was significantly less intrusive than that proposed by Ofcom in relation to Sky’s pay TV channels in the UK. It does not involve deterministic price control and the overall approach is relatively light touch in nature.

¹³ Case No COMP/M.2876 – *NewsCorp/Telepiu*, Commission Decision of 2 April 2003.

¹⁴ Paragraph 10.4 of the *NewsCorp/Telepiu* commitments.

4. Spain

4.1 Wholesale channel supply obligations were introduced in Spain in 2002 as part of the clearance conditions imposed by the Spanish Council of Ministers in relation to the merger between Sogecable and Via Digital, two of Spain's main pay TV operators, each of which operated a DTH satellite platform. Again, the prospective loss in competition among two key providers of pay TV services in Spain at this time is in stark contrast to the situation that currently exists in the UK. These conditions expired in November 2007 so there are now no requirements on pay TV broadcasters to wholesale channels to other operators in Spain.

4.2 The precise terms of the obligations are less readily available than other examples cited by Ofcom. Ofcom's own summary of the relevant conditions states:

“Sogecable was required to offer at least one channel including premium first-run movie content for wholesale to third parties. This wholesale offer must be on fair, transparent and non-discriminatory terms.”¹⁵

4.3 The conditions did not apply to the key premium pay TV channels in Spain, namely the “Canal+” bouquet of channels.

4.4 In light of the facts that: (a) these conditions have now expired, (b) there is relatively little detail about them readily available, and (c) to the extent that information is available it again points to a conclusion that the conditions that previously existed in Spain were in no way similar to those proposed by Ofcom, we consider that the Spanish example provides no support for Ofcom's proposition that its own proposals are a standard approach to regulation.

5. United States

5.1 Obligations to license pay TV channels to third parties were introduced in the United States via section 628 of the Cable Television Consumer Protection and Competition Act (1992). These requirements are known in the US as the “Program Access Rules”.

5.2 In spite of sharing the same objectives as Ofcom's proposals – to ensure that entry at the platform/retail level is not inhibited by access to television channels owned by vertically integrated broadcasters¹⁶ – the Program Access Rules have almost nothing in common with Ofcom's proposed regulation. In particular:

¹⁵ Paragraph 5.10 of Annex 16 to Ofcom's First Consultation Document. Sky's understanding is that Sogecable was required to license one premium movie channel, and other basic pay TV channels.

¹⁶ The circumstances in which the concern arose in the US, however, are readily distinguishable from those that prevail in the UK today, In the early 1990s there was a real concern that vertically integrated cable operators, which had been the only retailers of pay TV services in most US communities for decades, would stifle the emergence of DTH satellite-based competition (which at that time was emerging in the US, as in the UK) by refusing to supply satellite-based operators with pay TV channels.

- the US rules apply on a non-discriminatory basis to all television channels provided by every vertically integrated broadcaster;
- the US rules do not involve *ex ante* setting of charges for pay TV channels by a regulator – let alone rules that are based on what a regulator considers third party retailers are able to ‘afford’ to pay to carry channels. Instead, the key constraint on pricing is that charges must be non-discriminatory, and it is the task of operators themselves to ensure that the terms offered to third parties comply with this broadly-framed obligation; and
- the US approach is not a deterministic approach to regulation of the terms and conditions of supply, including charges, allowing maximal scope for normal commercial resolution of such matters. Administration of the US rules is undertaken by way of investigation by the FCC of complaints of discrimination in relation to terms offered to third parties. Complaints are assessed on a case by case basis. The regulatory approach is designed to encourage private resolution of disputes, for example by (a) placing a significant burden is placed on complainants to establish their case; (b) including the potential to impose damages in relation to successful complaints; and (c) a requirement that third parties notify channel suppliers ten days before they file a complaint of their intention to do so, with a clear statement of their case. Regulatory determination of disputes – potentially including determination of prices, terms and conditions of supply by the FCC on an *ex post* basis - is clearly intended as something of a last resort.

6. Conclusion

- 6.1 This Annex demonstrates that there is no merit in Ofcom’s argument that the regulation that it is proposing to impose on Sky is commonly found in other countries, and motivated by similar concerns. Compulsory licensing of pay TV channels was introduced in France, Italy and Spain as part of packages of remedies in response to prospective significant losses in competition among pay TV operators – in the case of Italy, effectively a merger to create a single national supplier of pay TV services. Yet in spite of this, the approaches adopted by regulators in each case were significantly less wide-ranging, prescriptive and intrusive than those proposed by Ofcom in its Consultation Document. Compulsory channel supply obligations in Spain, which in any case, in relation to premium channels, appear to have applied to a single premium movie channel, have now expired.
- 6.2 In relation to the US, Ofcom is incorrect to claim that the type of approach it is proposing to implement in the UK has existed there “*for years*”.¹⁷ In stark contrast to Ofcom’s proposals to adopt a wide-ranging, *ex ante*, prescriptive approach to regulation, regulatory intervention in the US is positioned very much as a last resort, providing maximal scope for resolution of private resolution of the terms of supply. There is no *ex ante* determination of charges

¹⁷ *Op cit.* (See footnote 2 above.)

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for pay TV channels covered by the US regulation and, in particular, no concept that charges should be set which are 'affordable' to those requesting supply. The key pricing constraint in the US rules is that charges to third parties should be non-discriminatory.