



**OFCOM CONSULTATION – COMPETITION ISSUES IN PREMIUM PAY TV MOVIES  
PROPOSED REFERENCE TO THE COMPETITION COMMISSION  
SKY RESPONSE**

**1. INTRODUCTION AND OVERVIEW**

***Introduction***

- 1.1 Ofcom’s proposal to make a market investigation reference to the Competition Commission (“CC”), the first time Ofcom has taken such a step, is unwarranted, inappropriate and regressive. This proposal relates to a market in which Ofcom accepts consumers are well served, and in relation to which it accepts that Sky has been central to developing innovative services. Yet, as a result of misdirecting itself as to its legal duties (in the context of exercising its discretion to make a market investigation reference), and based on concerns formulated as a result of its unduly narrow focus on a particular segment of a much wider market, Ofcom considers that a further, long, intrusive regulatory review is necessary. It is not.
- 1.2 A further, long, intrusive regulatory review in relation to pay TV movies services is not only regressive, given the dynamic and fast moving nature of the market concerned, but also perverse: consumers are being provided with increasingly novel and diverse ways to access and consume audiovisual content, including movies. These outcomes are being delivered by the market itself, without the need for regulatory intervention.
- 1.3 Ofcom recognises that long reviews of this nature risk stifling further innovation (yet disregards its own counsel) – this is a distinct possibility in this instance, given the focus and burden that a full CC investigation will require (both on industry and on public resources). There is no need for a reference; Ofcom’s basis for proposing a reference is inadequate: Ofcom should exercise its discretion appropriately and not make a reference to the CC.

***Overview of this response***

- 1.4 A reference to the CC of the alleged markets for the sale of premium movie rights and premium movie services would be inappropriate because:
  - consumers are well served, having a wide range of movie and non-movie content available to them;

- Ofcom’s analysis of the alleged features having an adverse effect on competition is insufficient, and inadequate to justify a market reference. It is apparent that Ofcom’s “key concern” of the wider availability of subscription Video on Demand (“SVoD”) movie services in the first pay TV window would alone be too narrow an issue to justify a market reference. The alleged wider features with which Ofcom seeks to bolster its case for such a reference are of no substance;
- Ofcom’s apparent concerns over the limited availability of SVoD movie services in the first pay TV window are unsubstantiated and essentially relate to the exclusivity granted to Sky over such movie rights for this narrow window;
- Ofcom has not even sought to establish the extent to which the wider availability of SVoD services containing movies in the first pay TV window is important to the UK audiovisual sector. Its predictions as to future market developments are speculative and this uncertainty should in itself warrant caution on Ofcom’s part;
- in any event, Sky and other providers are already exploiting their ability to provide Video on Demand (“VoD”) movie services to consumers and markets can be expected to continue to develop to address consumer demand for movies content via different technologies; as Ofcom itself identifies, any intervention carries the risk of stifling innovation;
- the analysis underpinning Ofcom’s reasoning for the reference is being challenged by Sky in its Appeal, in particular Ofcom’s findings in relation to the alleged restricted distribution of Sky’s premium channels (including the Sky Movies channels) and allegedly high wholesale prices for those channels; a successful outcome to those proceedings would undermine the basis of any market investigation reference;
- there is a real risk of inconsistent decisions and consequent unfairness if a reference is made before the Appeal is finally determined; and
- were Ofcom to make the reference proposed it would be acting disproportionately and misapplying its powers. In particular Ofcom’s erroneous view - evident in its Pay TV Review - that s.3(1)(b) Communications Act 2003 (“CA03”) gives it the power to seek to shape markets in pursuit of what it considers to be desirable policy objectives is also evident in the present consultation. Such an approach is plainly contrary to the requirements of s.370(11) CA03. Equally, it would be wholly inappropriate for industry and the public purse to be subjected to the burden and expense of a further lengthy inquiry generated by Ofcom’s erroneous and expansionist view of its powers and duties in the conduct of its own inquiries.

- 1.5 Ofcom should therefore exercise its discretion under s.370 CA03 appropriately and not make a market investigation reference to the CC.

**Scope of this response**

- 1.6 Ofcom issued the present consultation document on competition issues in premium pay TV movies (the "Movies Consultation Document") simultaneously with its decision to impose new conditions on Sky's TLCS licences in respect of Sky Sports 1 and Sky Sports 2.
- 1.7 As the new licence conditions took immediate effect, Sky had no option but to apply immediately to the Competition Appeal Tribunal (the "Tribunal") for interim measures to suspend the operation of the conditions, pending the outcome of its proposed appeal to the Tribunal against Ofcom's decision. Sky was obliged to devote substantial time and resources to its application for interim measures, and, since then, to its substantive appeal under s.317(6) CA03 which was filed at the Tribunal on 1 June 2010 (the "Appeal").
- 1.8 In these circumstances, it has not been practicable for Sky to prepare a detailed response to all the issues raised in the Movies Consultation Document. Instead, the present response is limited to dealing with general points of principle, and key errors or omissions in Ofcom's evidence and analysis.<sup>1</sup> Sky therefore reserves its right to make further submissions and raise further points in relation to the Movies Consultation Document.

**2. CONSUMERS ARE WELL SERVED**

- 2.1 Consumers of audiovisual services and in particular of movies in the UK are extremely well served. Ofcom has ample evidence that the UK audiovisual sector is delivering considerable innovation, unrivalled choice of content, high levels of penetration and satisfaction and competitive pricing. On any reasonable criterion pay TV delivers good outcomes for consumers in the UK. In summary, these positive outcomes include:<sup>2</sup>
- (a) high consumer satisfaction with pay TV services;
  - (b) penetration of digital pay TV in the UK which is amongst the highest in Europe;
  - (c) consumers being very well served in terms of content choice (both range of television channels and range and quality of content on those channels) - in particular, consumers having a choice of over 500 linear television channels (including nearly 50 HD channels);

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<sup>1</sup> In this response Sky refers to Ofcom's consultation documents issued as part of its Pay TV Review (in particular to the second and third pay TV consultation document) and to Sky's responses to those consultation documents, to submissions made to Ofcom by other parties and to Sky's response to those submissions, and to Ofcom's final Pay TV Statement issued simultaneously with the Movies Consultation Document.

<sup>2</sup> These were most recently outlined to Ofcom in Sky's response to the third pay TV consultation document, paragraph 8.6

- (d) innovation delivering strong benefits for consumers with the UK being one of the leading European countries in terms of the development and penetration of innovative products and services, including a large number of VoD services (including a number of rival SVoD services), HDTV, 3DTV and PVRs;
- (e) retail prices for pay TV services which, on a like-for-like basis, are not out of line with prices of pay TV providers in other European countries;
- (f) strong innovation on pricing and packaging of pay TV services; and
- (g) pay TV services including Sky's movies channels which have been increasing in quality while not significantly increasing in price in real terms.<sup>3</sup>

Such positive outcomes apply both to pay TV services in general, and pay TV services including movies in particular.

- 2.2 Ofcom takes, in the Movies Consultation Document, an unduly narrow focus on the availability of movies in the first pay TV window, with particular regard to such movies being made available as part of a SVoD offering. Ofcom fails to recognise, however, that this represents only one way of delivering movies content to consumers, and that consumers already have access to a wide choice of content made available via a range of platforms. Content (including movies) is provided on a VOD basis (including on a SVoD basis) by a significant number of providers including Virgin Media, BT Vision, Talk Talk TV, Top Up TV, Sky, 4oD, Apple TV, iTunes, Microsoft Xbox Live Marketplace and Lovefilm (which is backed by Amazon). In relation to movie content, each operator will acquire content directly from movie studios or distributors in order to include it in their VoD/SVoD service. Some of the Major Hollywood Movie Studios (the "Studios") also offer their own standalone VoD services: Universal's PictureBox service is a SVoD service available to BT Vision, Virgin Media, Talk Talk TV and Top Up TV customers (representing over 4.5 million households between them); Sony and Disney's Filmflex service is a TVoD (transactional VoD) service available to Virgin Media customers (representing over 3.7 million households alone).
- 2.3 Virgin Media, BT Vision, iTunes and Microsoft Xbox Live Marketplace all offer recent movie titles before (and after) they are available on Sky's linear movie channels. Subscribers to pay TV services on all technologies<sup>4</sup> now have access to a range of movies on-demand via their set top boxes, and in most cases this includes a substantial offering of movies in earlier windows than the Sky Movies channels.
- 2.4 Other recent developments that relate to the availability of movies specifically include Universal, Warner Bros. and Fox all introducing 'day and date' on-demand

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<sup>3</sup> In fact the price of Sky's Dual Movies package (including Six Mix) has been falling in real terms, (See Sky Supplemental Submission February 2010, Table 6).

<sup>4</sup> Customers of Virgin Media, BT Vision and Talk Talk TV all have access to pull-VoD film offerings. Top Up TV and Sky offer a more limited range of movies using a push-VoD service (Sky will launch a pull VOD service in 2010). Ofcom notes in its Pay TV Statement "*there are various other SVoD services not owned by Sky that show films after the first pay TV subscription window, e.g. PictureBox*" (paragraph 6.40). See also Annex 2 of Sky's response to Ofcom's second pay TV consultation document.

content in the UK, available via Virgin Media, BT Vision and Sky, bringing forward the opportunity for viewers to access these titles to either level or close to the date of the DVD release.<sup>5</sup>

- 2.5 Further, in making comparisons between the UK and other countries, Ofcom has had insufficient regard to evidence provided by Sky which demonstrates that UK consumers are much better served by VoD services than those in many other countries. For example, Sky has submitted two substantial reports prepared by PwC that compare pay TV services available to consumers in the UK to those available to consumers in other countries in Europe. These show clearly that the UK consumers are among the best served – in terms of quality, choice, value for money and delivery of new innovative services – in Europe. In particular, the UK is not behind other countries in the development of SVoD movie services. Indeed, PwC identified that, in late 2008, only one main retailer in its sample of 42 main retailers across Europe offered a SVoD service with movies in the first pay TV window, and PwC did not consider this a “major” service.<sup>6</sup> Yet Ofcom has constantly sought to dismiss or downplay PwC’s findings – for wholly inadequate reasons.<sup>7</sup>
- 2.6 Ofcom’s unduly narrow focus on the availability of movies specifically on a SVoD basis within the first pay TV window ignores the reality that consumers are well served by numerous alternative options for viewing movies. The fact that some specific movies may, for a particular limited period of time, not be available as part of a SVoD service on some or all TV platforms at a particular point in time (i.e. during the first pay TV window) does not amount to real consumer detriment (especially since the same movies continue to be available on DVD throughout this period, and will become available again in a later window). As Sky has repeatedly submitted,<sup>8</sup> a multitude of other services show the very same movies that Sky broadcasts, both before and after the fifteen-month period during which they are available on Sky’s movie channels; and at any point in time a substantial number of titles (whether first-run or library) are available for inclusion in other SVoD services. As further discussed below, given the broad range of audiovisual content available to consumers, SVoD movie services in the first pay TV window could not be described as “important” in the manner adopted by Ofcom, i.e. as a justification for regulatory intervention.
- 2.7 On any rational assessment, therefore, the magnitude of the alleged harm that Ofcom is targeting is insufficient to justify the intrusive and burdensome intervention, in the form of a market investigation reference that Ofcom is proposing.

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<sup>5</sup> See Annex 2 of Sky’s response to Ofcom’s second pay TV consultation document.

<sup>6</sup> See Annex 1 Part 1 of Sky’s Response to Ofcom’s second pay TV consultation document, Figure 4 (page 39). PwC’s definition of a “major service” is on page 14 of the same document. See also Sky’s response to the third pay TV consultation document.

<sup>7</sup> See for example section 8 of the Pay TV Statement.

<sup>8</sup> For example, Sky’s response to Ofcom’s third pay TV consultation document.

### 3. OFCOM'S SPECIFIC FOCUS IS ON SVOV MOVIES

3.1 It is apparent that Ofcom's primary arguments that a reference to the CC is warranted are that, in its view, SVoD movies in the first pay TV window are "*important*", yet exploitation of such rights is limited due to Sky's exclusivity,<sup>9</sup> as Sky has restricted availability of its channels. Whilst Ofcom sets out, in Section 5 of the Movies Consultation Document, a range of market features the combination of which Ofcom suspects adversely affects competition, it is clear that its "*key concerns*" relate to the narrow issue of the availability of movies on an SVoD basis during the first pay TV window.<sup>10</sup>

3.2 As Ofcom is aware, Sky does not accept the market definitions put forward by Ofcom in the Pay TV Statement and the Movies Consultation Document and it follows that Sky also does not accept that it has market power in relation to the alleged markets identified by Ofcom. Sky notes that it has put forward extensive evidence to Ofcom in relation to market definition and market power throughout the Pay TV Review, in particular regarding the competitive constraint exercised on the Sky Movies channels by:

- pay-per-view ("PPV") movies including both linear and VoD services;
- SVoD movie services;
- DVD sales and rentals;
- movies on free-to-air and pay TV channels in "library" windows; and
- non-movie programming.

Sky does not intend to make further submissions on these issues in this response but reserves its position in relation to Ofcom's findings on market definition and market power.

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<sup>9</sup> This refers to Sky's exclusive rights for the television broadcast of first-run pay TV movies from the Studios. It is notable that the same movies are available at the same time on DVD, for sale or rental.

<sup>10</sup> See paragraph 6.9 of the Movies Consultation Document

- 3.3 We also do not propose to comment on each of the features identified by Ofcom in Section 5 of the Movies Consultation Document, not least because the nature of many of the supposed features has been already addressed in our previous submissions to the Pay TV Review. However, we note that Ofcom’s discussion of its alleged features is cursory and it is clear that its only concern is the supposed limited availability of SVoD movies in the first pay TV window.
- 3.4 A non-exhaustive list of examples helps demonstrate the insufficiency of Ofcom’s analysis:
- whilst acknowledging that the current release window structure adopted by the Studios in the exploitation of their rights “*may be economically efficient*”, Ofcom vaguely asserts, without further explanation or evidence, that “*we suspect that it has also contributed to the position whereby there is a single wholesale supplier of services based on rights sold in the first pay TV subscription window*”.<sup>11</sup> Rather than being a source of competitive concern, the release window structure is a rational basis on which the Studios exploit their rights with a view to maximising revenues and avoid over-exposing their titles.
  - Ofcom continues to make repeated references to “*the exclusive joint licensing of the two sets of rights*” when referring to the rights acquired by Sky to movies in the first pay TV window.<sup>12</sup> However, as Sky has submitted previously,<sup>13</sup> this is an incorrect characterisation of the rights that Sky has acquired. What Ofcom does not seem to appreciate is that these are not, in fact, two sets of rights; rather the Studios each licence exclusive rights to show movies on TV within the first pay TV window. It is therefore incorrect for Ofcom to suggest that the rights are two products currently sold as a bundle. This is an issue that we have previously addressed in our Pay TV Review submissions.
  - Ofcom does not provide cogent evidence in the Movies Consultation Document that there are reasonable grounds to suspect that the exclusive TV broadcast rights granted by the Studios prevent, restrict or distort competition. In fact, as Ofcom itself recognises, exclusivity “*enables wholesalers and pay TV retailers to differentiate their services and thereby attract and retain subscribers*”.<sup>14</sup>
- 3.5 Ofcom’s analysis of the alleged features having an adverse effect on competition is insufficient, and inadequate to justify a market reference. It is apparent that Ofcom’s “*key concern*” of the wider availability of SVoD movies in the first pay TV window would be too narrow an issue to justify a market reference. The alleged wider

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<sup>11</sup> Movies Consultation Document, paragraph 6.9

<sup>12</sup> For example Movies Consultation Document, paragraph 1.7

<sup>13</sup> Ofcom is referred, in particular, to Annex 6 of Sky’s response to the third pay TV consultation document and Section 3 of Sky’s Response to Further Submissions by the Complainants of September 2008 for a clear, and accurate, description of the rights that Sky has acquired. Virgin Media and BT have also sought, inappropriately, to characterise Sky’s behaviour in relation to the availability of SVoD movies content as amounting to “warehousing” or enforcing “holdbacks”: such allegations are entirely misplaced. Sky notes in this regard the following ‘Q&A’ on BT’s website: “Q: Will you be able to offer Sky Movies as part of this deal? A: We already have a strong movie offering as part of our existing BT Vision service”.

<sup>14</sup> Movies Consultation Document, paragraph 5.25

features with which Ofcom seeks to bolster its case for such a reference are of no substance.

#### **4. EXPLOITATION OF PREMIUM SVOD RIGHTS IS NOT LIMITED AS OFCOM ALLEGES**

##### ***Ofcom's basis of review***

- 4.1 Ofcom has not properly made out a case in relation to its “*key concern*” of the alleged limited exploitation by Sky of its rights. It is insufficiently substantiated, not least because Ofcom (a) has misunderstood (i) the nature of Sky’s rights; and (ii) the extent to which it has exploited them and sought to innovate in relation to their distribution; and (b) because Ofcom has failed to appreciate the dynamic, fast-moving nature of the sector and the fact that developments are at a relatively early stage in relation to the exploitation of, and demand for, non-linear services.
- 4.2 Ofcom argues that potential consequences of its theory that SVoD movies in the first pay TV window are particularly important are that their wider availability, in particular if exploited by operators other than Sky, would (i) unlock greater potential for non-DTH satellite platform innovation - notably in relation to IPTV platforms;<sup>15</sup> (ii) act as a spur to investment in superfast broadband networks and next generation access;<sup>16</sup> and (iii) give “*others the opportunity to develop an SVoD movie service which would compete effectively with Sky’s linear subscription movie offering*”.<sup>17</sup>
- 4.3 It is incumbent on Ofcom to ensure that its concerns (i) are appropriately founded and not speculative, and (ii) are not concerns which are either outdated or would become so without regulatory intervention. However, Ofcom has not established that access to SVoD movie rights for the first pay TV window is “*important*” for pay TV retailers, nor has Ofcom appreciated the speculative nature of its predictions given rapid market and technological developments, which in itself should indicate that a market investigation is unnecessary and unwarranted.

##### ***The “importance” of SVoD movies***

- 4.4 Ofcom states in the Movies Consultation Document that:

*“Movies content is particularly important for the growth of VoD, as a VoD service which provided instant access to a wide range of recent movies would be highly valued by consumers”.*<sup>18</sup>

- 4.5 In the course of the Pay TV Review, Ofcom has also argued that movies in the first pay TV window have a “*high strategic importance*” and that the rights to distribute movies via VoD provide the potential for “*disruptive change in the way movies are distributed*”.<sup>19</sup> But Ofcom’s views on the need to intervene specifically in relation to

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<sup>15</sup> Movies Consultation Document, paragraph 6.21

<sup>16</sup> Movies Consultation Document, paragraph 3.71

<sup>17</sup> Movies Consultation Document, paragraph 6.20

<sup>18</sup> Movies Consultation Document, paragraph 3.76

<sup>19</sup> Third Pay TV consultation document, paragraphs 6.142 and 12.17. It is noted that Ofcom’s reference to “*disruptive change*” here is in relation to VoD generally, rather than specifically to SVoD, which Ofcom asserts simply provides “*a*

SVoD are not consistent, for example: in its third pay TV consultation document, Ofcom's views were more circumspect:

*“Movies from the pay TV subscription window are not available on any SVoD service at present. As such we have seen no direct empirical evidence as to whether such a service would be a competitive constraint on linear premium movie channels. However, it seems reasonable to expect that if a similar range of premium movies (at a given time) were available over both a linear channel and an SVoD service, there would be scope for some customers to switch from the former to the latter”* (emphasis added).<sup>20</sup>

- 4.6 Nonetheless, this issue of “importance” has pushed Ofcom towards seeking “*the possibility of greater competition using access to SVoD rights*”,<sup>21</sup> which it is now proposing to achieve by means of a broad market investigation reference. Yet Ofcom has not carried out any detailed exploration of whether or not such movies content is “important” for the growth of SVoD and does not provide any independent evidence to support this proposition (Ofcom has essentially not sought further evidence on this issue since the second pay TV consultation document). Nor does Ofcom provide any evidence to show that access to this content on an SVoD basis during the first pay TV window “*would be highly valued by consumers*”. This is simply conjecture on the part of Ofcom.
- 4.7 As for “evidence”, Ofcom's views appear to stem primarily from comments made by Virgin Media and BT in earlier rounds of the pay TV review. In paragraphs 3.76-3.78 of the Movies Consultation Document, Ofcom cites the views expressed by Virgin Media (in response to the second pay TV consultation document) and BT (in response to the third pay TV consultation document), both of whom provided support for Ofcom's “*high strategic importance*” argument. As we have indicated in previous responses to the Pay TV Review, the dangers of relying on a firm's claims as to what they ‘could’ offer if they were provided with regulatory assistance, and accepting at face value an endorsement of Ofcom's views that helps secure such an outcome, are all too obvious. Yet it appears that Ofcom's views on “importance” are essentially based on this endorsement provided by Virgin Media and BT.<sup>22</sup>
- 4.8 Ofcom refers to evidence provided by the Studios, for example it refers in the Movies Consultation Document to the views of Paramount Pictures (“Paramount”), who specifically indicated to Ofcom, in its response to the third pay TV consultation document, that “*SVoD first run movie rights are not essential to the development of IPTV*

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*payment mechanism which is likely to be particularly attractive to consumers”* (Movies Consultation Document, paragraph 6.19, footnote 259).

<sup>20</sup> Third Pay TV consultation document, Paragraph 4.323

<sup>21</sup> Movies Consultation Document, paragraph 1.13

<sup>22</sup> Sky has already specifically and fully addressed Virgin Media's comments (provided in response to Ofcom's second pay TV consultation document) in its submissions, including in Sky's Response to Further Submissions by the Complainants of September 2008 (see Section 3). Sky's comments in this Further Submission are equally applicable to BT's comments: whilst Ofcom cites, in paragraph 3.77 of the Movies Consultation Document, BT's response to the third pay TV consultation document, that response largely referred back to its previous submissions, in which BT's comments were very similar to those of Virgin Media. This is apparent from the similarity of their respective quoted statements, provided by Ofcom in paragraphs 3.76 and 3.77 of the Movies Consultation Document. See also the note in footnote 13 above concerning BT's website.

*platforms” and that “such platforms can grow based on the diverse and rich availability of other content”. This evidence has apparently been disregarded by Ofcom, which instead considers that “the importance of SVoD rights is emphasised” by the fact that Paramount (and other confidential stakeholders) had engaged with the pay TV review for the first time.<sup>23</sup>*

- 4.9 Other submissions from the Studios have been mostly redacted from the Movies Consultation Document, meaning that Sky is unable to comment on the views expressed. Sky notes however, that the unredacted view of an unnamed content provider states that on-demand will continue *“to proliferate and grow”* and *“the pay TV window will eventually be predominately SVoD-based”*.<sup>24</sup> No time frame is, however, set out for this proliferation scenario and it is difficult to assess, for example, the estimate of customer demand on which this is based. Due to the lack of detail available, Sky is unable to comment further, other than to note that this is a woefully inadequate justification for Ofcom to rely upon.
- 4.10 Ofcom’s views can be contrasted with statements it has made separately in relation to fibre developments (e.g. in relation to its reviews of wholesale local access and superfast broadband), where Ofcom admits that it is not yet clear what types of service will be demanded by consumers over next generation, or superfast, broadband - i.e. in that context, and in contrast to its approach in the present consultation, it accepts that the market (from the ISPs’ perspective) is relatively immature and that demand remains very uncertain.<sup>25</sup> These views are not consistent with Ofcom’s assertions, in the Movies Consultation Document, that investment in IPTV and superfast broadband is being hampered by the lack of Sky’s content.
- 4.11 It is also worth noting that, as an example, BT’s recent announcement of 13 May 2010 that it will be undertaking a major expansion in its fibre investment programme, investing over £1 billion to make fibre available to around two-thirds of UK homes by 2015 (a roll-out programme that was first announced in July 2008) did not appear to be contingent on the availability of movies on an SVoD basis in the first pay TV window.<sup>26</sup> It is noted that BT does refer in this press release to the fact that it already offers *“a huge choice of on demand programming”* generally; no mention is made of movies content in particular. Virgin Media has also completed the roll-out of 50 Mbps broadband to its entire network, and announced in February 2010 that it would begin the roll-out of a 100Mb broadband service by the end of 2010.<sup>27 28</sup>

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<sup>23</sup> Movies Consultation Document, paragraph 2.16. It is noted that Paramount would have been specifically contacted by Ofcom at this stage of the pay TV review so it is not surprising that it chose to provide a response to Ofcom (paragraph 1.7 of the third pay TV consultation document)

<sup>24</sup> Movies Consultation Document, paragraph 3.79

<sup>25</sup> In its Superfast Broadband Statement of 23 March 2010, Ofcom recognises the *“the ongoing uncertainty over consumer demand for and willingness to pay for super-fast broadband limiting interest in infrastructure investment”* (paragraph 2.30). In its recent Wholesale Local Access consultation document (March 2010), Ofcom notes the *“considerable uncertainty remains regarding the range of services that will be provided over super-fast broadband”* (paragraph 1.7).

<sup>26</sup> <http://www.btplc.com/news/Articles/ShowArticle.cfm?ArticleID=B6241B17-F6F9-43E1-954C-D88EFD2150FC>

<sup>27</sup> <http://pressoffice.virginmedia.com/phoenix.zhtml?c=205406&p=irol-newsArticle&ID=1395257>

<sup>28</sup> In paragraph 2.20 of its Superfast broadband statement of 23 March 2010, Ofcom notes that *“Availability of super-fast broadband in the UK (some 46% of homes) is now ahead of most large economies where deployments have been funded commercially.”*

4.12 Evidence of the alleged “*high strategic importance*” of SVoD movies in the first pay TV window has not been presented by Ofcom, which cannot therefore use it as a basis for a decision to subject industry and public resources to the burden of a market investigation. In any case, Ofcom’s concerns are a direct consequence of the overly narrow view it has taken of the relevant market in question.<sup>29</sup> Any question of “*importance*” is not sustainable when the multitude of alternative options for viewing movies (and other types of content) is properly taken into account. For example, Ofcom has previously articulated the benefits of being able to access content on-demand as being to “*offer consumers greater convenience and enhanced service flexibility*”.<sup>30</sup> Aside from the fact that the market is already delivering on these criteria, such concerns can hardly be considered to provide a sufficient basis for an extensive, two year, market investigation.

***Ofcom’s market predictions are speculative***

4.13 In the second pay TV consultation document, Ofcom speculated that:

*“it is in the nature of innovation that it is not possible for us to predict accurately what new types of service might emerge, or to quantify what benefits consumers might realise as a result. However, benefits could include newly flexible services such as subscription VoD, the on-the-go benefits of mobile TV, or innovative interactive features on IPTV, or more widespread on-demand services via IPTV” (emphasis added).*<sup>31</sup>

4.14 Yet Ofcom’s views appear to have hardened by the third pay TV consultation document where it considered that Sky’s incentives to innovate:

*“will tend to inhibit the development of other services and platforms which could otherwise use Core Premium content to drive demand, such as next generation networks, and mobile TV services”.*<sup>32</sup>

4.15 This is despite the fact that Ofcom remarked, in the third pay TV consultation document, that:

*“we are at a point in the development of the pay TV sector when new platforms using new distribution technologies, such as IPTV and mobile TV, could offer significant benefits to consumers. The types of innovation which these new platforms might deliver to consumers are of course difficult to predict qualitatively, and even more difficult to quantify” (emphasis added).*<sup>33</sup>

4.16 This difficulty in prediction should therefore engender much more caution on Ofcom’s part, particularly since Ofcom recognises that “*the record of innovation in the*

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<sup>29</sup> Sky has provided multiple submissions to Ofcom on this issue over the course of the pay TV review – for example Annex 6 of Sky’s response to the second pay TV consultation document.

<sup>30</sup> Second pay TV consultation document, paragraph 1.46

<sup>31</sup> Second pay TV consultation document, paragraph 7.101

<sup>32</sup> Third pay TV consultation document, paragraph 7.102

<sup>33</sup> Third pay TV consultation document, paragraph 1.46

*UK is strong and Sky has played a central role in developing innovative services*".<sup>34</sup> It is also notable, however, that Ofcom's view that "*innovation in platform enhancement has been strong in the UK, but that it has been stronger in developments that favour satellite platforms, and less strong in those that favour non-satellite platforms*" (emphasis added) is comparative, rather than absolute – i.e. Ofcom is not saying that innovation on non-DTH satellite platforms is poor or lacking in any absolute sense, or is unlikely to happen absent the availability of particular content.<sup>35</sup> On the contrary, Ofcom indicates in the Pay TV Statement that a number of technological developments such as NGA, advanced TV/receivers, VoD, content mobility and provision are "*happening already*".<sup>36</sup>

- 4.17 If Ofcom accepts that there is innovation in the UK, without a credible theory as to why this pace of innovation and development can be expected to decline without the features it has identified being investigated and addressed (which Ofcom has not advanced), it should resist interfering with the operation of a dynamic and developing market. Ofcom itself has acknowledged this point previously in the Pay TV Review:

*"as a general rule competition authorities and regulators should be very cautious about intervening to change how firms exploit content rights, due to the risk that such interventions could stifle innovation"*.<sup>37</sup>

- 4.18 Again, it is clear that Ofcom's view about the need for regulatory intervention by means of a market investigation reference, in contrast to allowing the market to develop without such interference, is being clouded by its unduly narrow views about the importance of SVoD movies in the first pay TV window. This is in disregard of the strong evidence of the large number of platforms and technologies that are already offering consumers a wide range of non-linear content, including SVoD movies. As a result, Ofcom is disregarding its own counsel that regulatory intervention itself could stifle innovation.

- 4.19 A decision to make a market reference is a significant decision for Ofcom to make. A market investigation is a material burden to industry and to public resources. Long regulatory investigations are also likely to create uncertainty for industry as well as increase costs and potentially have a chilling effect on commercial decision-making, negatively affecting innovation and ultimately consumers. It is therefore incumbent on Ofcom to consider all evidence available and ensure that it has a strong and compelling evidence base in support of its decision (and to reach a decision appropriately on the basis of its legal powers and duties). As further discussed below, Ofcom has misdirected itself as to its legal powers, acting in pursuit of what it considers to be desirable policy objectives it is acting contrary to the requirements of s. 370(11) CA03.<sup>38</sup> As set out below, and as Sky has explained in previous

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<sup>34</sup> Pay TV Statement, paragraph 8.182

<sup>35</sup> Third pay TV consultation document, paragraph 7.84

<sup>36</sup> Pay TV Statement, Figure 24

<sup>37</sup> Third pay TV consultation document, paragraph 1.32

<sup>38</sup> This is evident at various points in the Movies Consultation Document, for example at paragraph 6.20 Ofcom states that the "wider availability of premium SVoD movie rights would give others the opportunity to develop a SVoD movie service which would compete effectively with Sky's linear subscription movie offering"

submissions to the Pay TV Review, Sky's policy of seeking wide distribution of its channels means that it is at the forefront of innovation and is continually exploring new opportunities to distribute its channels through different and innovative means. It is apparent that Ofcom's concerns are speculative and are not supported by market developments.

***Sky is innovating and exploiting movies on a SVoD basis***

- 4.20 Sky has submitted to Ofcom, through the course of the Pay TV Review, a wide range of evidence of Sky's wide distribution of rights and its extensive innovation generally. Ofcom sets out, for example, in Figure 23 of the Pay TV Statement a selection of hybrid devices available in the UK. It is notable that Sky has sought to make its content available via most of these devices. Where an opportunity arises, Sky is keen to explore options and to engage in dialogue with operators around the possibility of making its content available (on a linear and on-demand basis) via their platforms. Where demand materialises, Sky is likely to have explored the opportunity.
- 4.21 We summarise below a non-exhaustive list of examples of Sky's innovative services and distribution of rights in relation to non-linear services.

***Sky Anytime developments:***

Sky Anytime: content has been provided via Sky's Anytime 'push' VoD service since 2007. This service uses broadcast technology to 'push' programming to the set top box, which is then saved on the hard drive, ready for selection at the convenience of the viewer. Sky Anytime is available to Sky subscribers who have a Sky+ or Sky+HD box – this currently amounts to over 6 million homes in the UK. A wide range of content, across different genres, including Sky Movies content (across different windows) is made available via the Sky Anytime service.

- 4.22 Technological developments have meant that the storage capacity of Sky's PVRs has increased significantly in the last 3 years: for example, the current generation of the Sky+HD set top box has a hard drive capacity of 500GB, providing storage for over 56 hours of on-demand HD content as part of the Sky Anytime service (which can usually be expected to comprise around 10 movies at any one time). Sky has also recently launched a Sky+HD set top box with a hard drive capacity of 1 terabyte (TB) which will enable up to 100 hours of on-demand HD content to be available for viewing as part of the Sky Anytime service; this can usually be expected to comprise over 20 individual films at any time.

***Sky Anytime+ developments:***

- 4.23 Sky Anytime+: Sky will be launching its Sky Anytime+ 'pull' VoD service later in 2010 (the service is currently in final test phase). This service involves programming being progressively downloaded to the set top box hard drive, using the customer's broadband connection to the set top box, in response to a viewer's individual

selection.<sup>39</sup> **[CONFIDENTIAL]** The Sky Anytime+ service will make available over 2000 hours of content on an on-demand basis. Content across a wide range of genres will be available on-demand, including a range of more than 500 movies (across different movie windows, including the first pay TV window).

- 4.24 It is intended that consumers' viewing experiences should not differ between a 'pushed' (Anytime) or 'pulled' (Anytime+) programme, with all content being accessed via the same menu in the Sky EPG.

***Sky Player developments:***

- 4.25 Sky Player (including Sky Player TV): Sky Player is a service that allows Sky subscribers and non-subscribers to watch a variety of programmes, including movies, sport and entertainment via their PC, and internet connected devices. Sky Player therefore provides Sky's DTH satellite subscribers with greater choice about how and where they can consume the content they purchase from Sky (e.g. in addition to accessing Sky Movies content via their set top box on a linear or on-demand basis, they can also access it on an on-demand basis via Sky Player on their PC). It also makes Sky content available to non-DTH satellite customers via a large number of third party devices, on both a linear and on-demand basis, in order to provide a primary alternative to satellite. Sky Player generally provides over 1000 programme episodes, and over 500 movies (including current and library titles on a SVoD basis, as well as other titles on a TVoD basis), available on-demand at any time.
- 4.26 In addition to Sky's entire DTH subscriber base, which has access to Sky Player as part of their DTH subscription, Sky has grown its stand-alone Sky Player subscriber base (i.e. subscribers who do not have a DTH subscription) **[CONFIDENTIAL]**
- 4.27 Sky has also proactively sought to syndicate its Sky Player service across many platforms and devices, taking a leading role in making content available to third party connected devices. To date, Sky has reached agreement with a number of operators to make the Sky Player service available to consumers via the following devices:
- **Games consoles:** Microsoft X-box 360 (the UK addressable base of Xbox 360s is nearly 5 million devices);
  - **Computers:** PC (including a specific Windows Media Centre implementation available on Windows 7 devices) and Apple Mac (the addressable base is extensive, given that it is estimated that 72% of UK households have a computer, and at least 65% of UK households have a broadband connection;<sup>40</sup>

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<sup>39</sup> The service has been designed to download content to the viewer's set top box 'progressively', meaning that it will become available once a short 'buffer' of content has been stored on the set top box hard drive; this buffer will take into account the download speed and consistency of speed of the consumer's broadband connection, to ensure a continuous viewing experience.

<sup>40</sup> Ofcom Communications Market Report 2009, page 234

- **IP enabled DTT set top boxes:** IP Vision's Fetch TV; Humax IP-enabled HD digital Freeview boxes; 3View hybrid IPTV/DTT set top boxes providing a new, additional means of distributing content to consumers;
- **Connected TVs:** Cello's iViewer internet connected TV (internet connected TVs represent a growing proportion of all TV sales in the UK) providing a new, additional means of distributing content to consumers.

4.28 [CONFIDENTIAL]

4.29 [CONFIDENTIAL]

#### ***Agreement with Virgin Media***

4.30 Sky has recently concluded agreements for the supply of channels, including the Sky Movies channels to Virgin Media. Under these agreements Sky will supply to Virgin Media a range of on-demand content, from its basic and premium channels, in addition to its linear channels, for Virgin Media to distribute to its subscribers as part of its retail offering (given that Virgin Media is the sole retailer on its platform). Virgin Media will therefore be able to supplement the large quantity of on-demand content (including movies) that it already provides on an SVoD basis with an extensive range of Sky content.<sup>41</sup>

#### ***Other recent developments***

4.31 In addition, as is apparent from the evidence provided by Ofcom in the Pay TV Statement and this response to the Movies Consultation Document, there are also examples of other operators innovating to enhance existing on-demand services or provide new on-demand services, many of which make movies content available on a SVoD basis (as a result of agreements directly with the Studios).<sup>42</sup> For example,

- Picturebox is an on-demand movies service provided by NBC Universal with an extensive catalogue of over 600 films provided on a SVoD basis. It is available via the BT Vision, Talk Talk TV, Top Up TV and Virgin Media platforms.<sup>43</sup>
- In May 2010 BT announced that launch of a new and bigger on-demand film subscription service available to BT Vision subscribers, the BT Vision Film Club. It stated that this service would bring together a range of film services from the Studios, providing over 60 films every month, with 14 films refreshed each week. The service brings together the existing Picturebox service with additional titles provided by Warner Films, Sony Pictures, and Film 4. BT indicated that a range of

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<sup>41</sup> In May 2010, Virgin Media announced that over 2.6 million movies were watched on-demand during Q1 2010 by its subscribers through its subscription VoD service Picturebox. In February 2010 alone, subscribers watched almost 150,000 films.

<sup>42</sup> For example, Ofcom describes a number of SVoD movie services in Annex 5 to the Pay TV Statement.

<sup>43</sup> In May 2010 Picturebox announced a deal with Icon Film Distribution for the rights to more than 30 Icon films. A Picturebox representative is quoted as saying "this marks the first in a series of strategic acquisitions for the PictureBox lineup, further broadening its appeal as the must-have SVOD service in the UK" (<http://www.screendaily.com/news/uk-ireland/picturebox-vod-service-strikes-deal-with-icon-in-uk/5013612.article>)

subscription options would be available for accessing this on-demand content (as well as films being available during other movie windows).

- Lovefilm (which is backed by Amazon) has launched a movies films streaming service on Samsung and Sony Bravia internet-connected TVs and devices (such as Blu-ray players). As part of this Lovefilm Player service, over 3,300 films are available on a subscription basis; over 500 on a PPV basis, and around 60 free, all available to watch on an on-demand basis online. Lovefilm also proposes to offer the service through Project Canvas and other set-top boxes as well as games consoles.<sup>44</sup>

4.32 There is also an increasing number of providers offering movies on other bases. Many of these providers are significant operators in the wider communications and media marketplace. For example, Apple iTunes offers a range of movies and TV content from the Studios that can be viewed on a TV using the Apple TV digital media adaptor (which launched in the UK in 2007), on a computer and on mobile Apple devices including the iPhone, iPod touch and the iPad. Television series were first added to the UK iTunes store in August 2007. Since launch content has been made available from Fox, HBO, NBC Universal, the BBC, ITV and Channel 4 on a download to own basis with over 1,000 shows now available. From June 2008, the UK iTunes Store has offered PPV movies to rent and movies to purchase on an electronic sell-through basis (EST). Over 1,000 titles are available in standard definition and some in high definition from Fox, Warner Bros. Disney, Sony, Universal and Paramount. New titles are available for purchase on the same day as their DVD release (i.e. prior to being available in the pay TV window on Sky Movies. At the end of February 2010, the US store catalogue made available over 8,500 movies (over 2,500 in HD).

4.33 These examples demonstrate that there are significant developments already taking place specifically in relation to VoD services (including the provision of movies as part of subscription services). These developments are happening without regulatory intervention, with consumer demand being addressed by commercial solutions and technological developments enabling the provision of new and innovative services. Ofcom's unduly narrow focus on a particular period of availability of movies content, combined with its apparent misdirection as to its legal duties and powers under s.370 CA03, have led it propose an unwarranted, unnecessary and regressive proposal for a burdensome market investigation reference.

## **5. A REFERENCE IS INAPPROPRIATE**

### ***Inappropriate concurrently with the Appeal***

5.1 Ofcom's consultation follows Ofcom's long-running Pay TV Review which has lasted over three years. Throughout the Pay TV Review Ofcom has analysed competition in relation to premium movie channels alongside premium sports channels. Ofcom now proposes to make a reference to the CC for a two year investigation, whilst

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<sup>44</sup> <http://paidcontent.co.uk/article/419-bbc-viewers-dont-want-canvas-lovefilm-does-sony-not-invited/>

imposing a wholesale must-offer remedy in relation to certain of Sky's sports channels.

5.2 It is thoroughly unsatisfactory for Ofcom to propose an immediate CC reference in respect of movies, when (as it now knows), Sky and other parties have appealed against Ofcom's decision in respect of Sky's sports channels.<sup>45</sup> The two cases are closely related, with the result that it would be wholly inappropriate to launch a CC reference in respect of the movies sector now, for reasons including:

- Ofcom's findings in its Movies Consultation Document rely heavily on the evidence and findings set out in the Pay TV Statement: the two documents are inextricably linked. For example, Ofcom explicitly acknowledges that its findings on market power and restricted distribution extend to the Sky Movies channels. Similarly, the Movies Consultation Document is explicit as to its reliance on the findings set out in the Pay TV Review (including on market definition) as a basis for the proposed reference; and
- Sky is, in its Appeal, challenging certain aspects of Ofcom's decision in respect of its sports channels. The Tribunal's judgment on the Appeal will have consequences not only for the decision directly under challenge but is bound also to contain findings and reasoning which will be of relevance to the movies sector.

5.3 In particular, there is overlap between the competition "issues" identified by Ofcom and the matters under Appeal, notably:

- i) limited exploitation of premium SVoD rights;
- ii) restricted distribution of the Sky Movies Channels; and
- iii) high wholesale prices for the Sky Movies Channels.

5.4 Of these three issues, the second two are founded on the same findings as in the Pay TV Statement. For example, Ofcom merely summarises in the Movies Consultation Document (paragraphs 6.23-6.25) the findings set out in Section 7 of the Pay TV Statement in relation to the allegedly restricted availability of the Sky Movies channels, which analysed the incentives in relation to Sky's premium channels i.e. both Sky's sports and movies channels. It is clear that the arguments underpinning Ofcom's finding that there is an adverse effect on competition arising from the restricted distribution of Sky's movies channels rest on the same findings as are set out in the Pay TV Statement.

5.5 Furthermore, one of the grounds of the appeal by Virgin Media is that Ofcom has failed to impose any price control on wholesale prices for Sky Sports 1 and/or Sky Sports 2 where these are "bundled" with Sky Sports 3 and/or Sky Sports 4 and/or any of the Sky Movies channels. This is likely to involve consideration of evidence

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<sup>45</sup> In addition to the Appeal by Sky, appeals have been filed by Virgin Media Inc, British Telecommunications Plc and the Football Association Premier League

relating to Sky's movies channels and a decision which may impact on the pricing of those channels.<sup>46</sup>

- 5.6 The separate consideration of the Tribunal and the CC of these same issues will therefore lead to a real risk of inconsistent decisions. If Sky is wholly successful in its Appeal then the Tribunal may reject large parts of Ofcom's evidence and analysis in respect of the wholesale supply of its premium channels. If Sky is only partially successful, that might well entail a decision as to whether wholesale must offer remedies are proportionate in the circumstances of the TV sector generally, or as to efficient costs of wholesaling and retailing pay TV channels. If Sky was unsuccessful in its Appeal, the Tribunal might, nonetheless, find merit in much of Sky's evidence and arguments and make findings which contradict those contemplated in the Movies Consultation Document. In any event, it is inefficient and inappropriate to ask the CC to examine the movies sector, and reach formal findings and conclusions, before Sky's Appeal is determined.

***A successful Appeal would undermine the basis of the proposed reference***

- 5.7 In order to avoid the risk that the CC ends up investigating many of the same issues as are raised in the Appeal to the Tribunal, with the consequential risk of inconsistent outcomes, and the waste of private and public resources in pursuing two parallel investigations/proceedings, Ofcom should exercise its discretion not to refer the movies sector to the CC. Ofcom would always have the ability to reconsider the appropriateness (or not) of a reference in due course, after the Appeal has been finally determined.

***Ofcom's reference powers are discretionary***

- 5.8 The power to make a market investigation reference under section 131 Enterprise Act 2002 ("EA02") in accordance with Ofcom's functions as set out in s.370 CA03, is a discretionary power which Ofcom must exercise in accordance with its obligations, including acting fairly and in accordance with the rules of natural justice, including procedural fairness.
- 5.9 In general, it would be unfair for Ofcom to base any decision to make a market investigation reference on findings (or even suspicions of findings) which are already under challenge before the Tribunal. Final resolution of the Appeal would inform Ofcom as to whether its findings are in fact correct, and so whether its concerns are sufficiently well-founded to justify a CC reference (as the outcome of the Appeal could be such that the CC is left to deal with a wholly inappropriate reference).

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<sup>46</sup> Sky is challenging in the Appeal the finding that Sky's discussions with existing and potential retailers demonstrate that it is acting on a strategic incentive to restrict supply of these channels which outweighs its static incentives (Pay TV Statement, paragraph 7.199). [CONFIDENTIAL] Sky is challenging Ofcom's finding that withholding supply would strengthen its position in bidding for content rights. Sky is also challenging Ofcom's economic analysis of Sky's incentives. Ofcom has, in Sky's view, both misunderstood the incentives facing Sky and misconstrued the relevant evidence.

- 5.10 In addition, whilst the CC will reach its own conclusions on whether or not there is any consumer detriment, it is recognised that Ofcom's views will *"provide the natural starting point"*<sup>47</sup> for the CC's investigation. The OFT's own Guidance states that the OFT *"will not attempt to make more than a preliminary analysis ... in its statement of reasons* [published with a consultation on whether to make a CC reference]. *It will be for the CC to produce a definitive analysis if a reference is made"*<sup>48</sup> (presumably for fear of the referring regulator's developed views inadvertently or unduly influencing the direction of the CC's subsequent investigation). In the present case, the sectoral regulator is proposing a market investigation reference on the back of having undertaken extensive analysis over a three year period. Most of the views expressed in the Movies Consultation Document are derived from Ofcom's definitive views contained in the Pay TV Statement, i.e. from a final decision rather than from preliminary analysis. There is therefore a real risk that the CC's investigation will result in the expenditure of inappropriate time and resource for all parties concerned, as well as result in differing conclusions on similar issues to the Tribunal.<sup>49</sup> This outcome would be unsatisfactory and potentially unfair for all the parties involved.
- 5.11 Further, as Sky notes in its Appeal, negotiations between it and other pay TV platforms over the last few years for the supply of Sky's premium sports channels took place in a climate of regulatory uncertainty. In addition other platforms have engaged in regulatory gaming in their negotiations with Sky, in particular in pressing for wholesale supply in a way which, it appeared to Sky, they believed shored up their case with Ofcom, rather than pursuant to a genuine desire to reach a commercial solution. A market investigation reference risks creating the same situation over the course of the CC's investigation, in respect of negotiations over the supply of movie rights, which would ultimately be to the detriment of consumers.
- 5.12 To eliminate this risk, a fairer and more efficient way of proceeding would be for Ofcom to consider whether a reference remains appropriate (which Sky considers is not the case), following further consultation only upon final determination of the Appeal. Whilst Sky recognises that there would be a delay, it does not consider that there is any urgency to refer the matter to the CC immediately, in circumstances where Ofcom has already taken over three years to reach a stage where it is ready to consult on its proposed decision to refer matters to the CC, and given that (as indicated above) it recognises that consumers are well served and that there are numerous examples of innovation in this fast moving and dynamic market. Any inconvenience caused by such delay would be outweighed by the inefficiencies, the unfairness of having the two investigations/proceedings running concurrently, and

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<sup>47</sup> Competition Commission, *Market Investigation References: Guidelines* (CC3), paragraph 1.10

<sup>48</sup> OFT Guidance for Market Investigation References, paragraph 3.8

<sup>49</sup> Since the CC's statutory timetable of 24 months (plus an additional eight weeks in exceptional circumstances) starts to run as soon as a reference is made, it is not possible for the CC itself to delay its investigation in order to await the outcome of the Appeal.

the distinct possibility that the outcome of the Appeal would intensify the inappropriateness of any reference.<sup>50</sup>

### ***A reference would be disproportionate***

5.13 Ofcom has also erred in its decision as to whether a reference would be proportionate. As Ofcom states in Section 7 of the Movies Consultation Document, a reference should only be made where it is a proportionate response to the concerns identified. Ofcom sets out three criteria by which this is to be assessed: size of sector, the proportion of the market affected by the feature giving rise to adverse effects on competition, the persistence of that feature and the detriment to consumers. Ofcom's assessment in relation to proportionality is flawed for (*inter alia*) the following reasons:

- Ofcom judges the size of the 'market' by reference to "*the pay TV market*"; it also refers to the amount paid by Sky for "*premium movies content*" and Sky's retail and wholesale revenues from Sky's movie channels. This is inconsistent with Ofcom's statement that its "*key concern*" is around SVoD movies services in the first pay TV window – which is of much narrower scope. As stated above, Ofcom has not established the "*importance*" of SVoD movie services to consumers or pay TV suppliers and therefore the size of the "*pay TV market*" is irrelevant to Ofcom's proportionality assessment;<sup>51</sup>
- further, it is clear from the dynamic nature of the sector that an assumption of persistence cannot be made: even the limited number of developments set out in this response indicates that this is not a case of a sector with an enduring problem, but one properly characterised as being dynamic and still developing. Ofcom's assessment that the alleged problems it has identified are persistent is also incorrect as it ignores the fast-moving nature of this market; and
- Ofcom has also drawn the wrong conclusions in relation to consumer detriment. It wrongly concludes that the market is not functioning competitively. Ofcom underestimates the benefits to consumers and overstates any detriment, again relying on erroneous conclusions reached and unsubstantiated arguments.

5.14 In light of these flaws, a reference would be disproportionate. In addition, the fact that Ofcom has already spent three years undertaking the Pay TV Review and has not found conclusive evidence of a competition problem specific to SVoD movies means that a further two year review would be disproportionate.

### ***Misapplication of Ofcom's duties***

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<sup>50</sup> It would be unsatisfactory for Ofcom to rely on an argument that the CC will be able to take into account any decision made by the Tribunal before issuing its Final Report, not least because even if the CC were to take account of the Appeal judgment part way through its investigation, this would reduce the amount of time the CC would have to deliberate and parties to respond to affected issues.

<sup>51</sup> Movies Consultation Document, paragraphs 7.24-7.31

5.15 Ofcom states, at paragraph 7.45 of the Movies Consultation Document, that:

*“We believe that the central objective of any remedy considered should be to promote long-term competition by reducing the ability of firms to benefit from market power in a way which is detrimental to consumers, for example by reducing barriers to entry for new firms” (emphasis added).*

5.16 And at paragraph 7.49:

*“The CC could seek to address the identified concerns at source, by intervening to change the way in which key premium movie rights are bought and sold. ... Depending on the precise form of a remedy, it could facilitate new players in entering the market, but also promote innovation around new platforms and / or increase competitive pressure on wholesale margins” (emphasis added).*

5.17 It is evident from these statements that Ofcom assumes that it is able to use regulatory intervention, in the form of a CC reference, as a means of shaping the development of the market in the manner it would like, in light of the views it has reached as part of the Pay TV Review. A market investigation reference is not, however, a tool for a referring regulator to employ in this way.

5.18 Ofcom's erroneous view - evident in its Pay TV Review - that s.3(1)(b) CA03 gives it the power to seek to shape markets in pursuit of what it considers to be desirable policy objectives is also evident in the present consultation. Such an approach is plainly contrary to the requirements of s. 370(11) CA03. It is also inappropriate for Ofcom to influence the direction of the CC's subsequent investigation; the statements in paragraphs 7.45 and 7.49 of the Movies Consultation Document are clearly inappropriate in that regard

5.19 Equally plainly, it would be wholly inappropriate for industry and the public purse to be subjected to the burden and expense of a further lengthy inquiry generated by Ofcom's erroneous and expansionist view of its powers and duties in the conduct of its own inquiries. Ofcom's role, as a referring regulator, is simply and neutrally to assess whether there are features of the market which prevent, restrict or distort competition and to exercise its discretion to make a reference, where appropriate. To act otherwise, or to reach a decision on the need for a market investigation on any other basis, would be a misuse of its powers.

## **6. CONCLUSION**

6.1 The UK audiovisual sector is not one that can be characterised as having an enduring problem, but one in which consumers are well served and which is dynamic and innovative. It is still at the relatively early stages of development of, in particular, on-demand services, with a wide range of different operators launching and expanding new, different on-demand services.

6.2 Ofcom's concerns are unduly narrowly focused on the availability of movies on an SVoD basis in a particular and relatively short window (during which movies are also available for purchase and rental on DVD); its proposal to make an extensive

reference to the CC is reliant on those narrow concerns and its apparent desire to see the market develop in a particular manner. Assessed in the proper, broader, context, and with proper regard to Ofcom's legal function as a referring regulator, it would be perverse for Ofcom to make a market investigation reference in relation to these issues. In addition, given that the concerns are heavily based, or related to, issues that are concurrently under appeal, a reference is inappropriate.

- 6.3 Ofcom recognises the stifling effect that intervention can have on innovation. The form of intervention being proposed is a further two year investigation, following a three year review, meaning that there must be a significant risk of regulatory paralysis affecting commercial discussions and investment decisions. The market can be expected to continue to develop, to continue to serve consumers and to deliver new, innovative means of accessing and consuming content, without the need for a market investigation. A market investigation reference is unwarranted.

**Sky**

**June 2010**