



# Legal framework and regulatory environment

Annex 7 to pay TV market investigation consultation

Publication date: 18 December 2007

## Section 1

# Introduction

- 1.1 This Annex summarises some of the key features of the regulatory framework relevant to the operation of the pay TV market. It explains:
- the relevant duties applicable to Ofcom’s regulation of the sector;
  - the other main elements of the regulatory framework, by reference to the different layers of the supply chain; and
  - Ofcom’s competition law powers.

## Section 2

# Ofcom's duties under the Communications Act

- 2.1 Under section 3(1) of the Communications Act 2003 ("CA03") it is Ofcom's principal duty in carrying out its functions to:
- further the interests of citizens in relation to communications matters; and
  - further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 2.2 Under section 3(2) Ofcom is further required to secure:
- the optimal use of the electro-magnetic spectrum;
  - the availability throughout the UK of a wide range of TV and radio services of high quality which appeal to a variety of tastes and interests; and
  - the maintenance of a sufficient plurality of providers of different TV and radio services.
- 2.3 Section 3(4) sets out certain other factors which Ofcom should have regard to in performing its principal duty of furthering the interests of citizens and consumers. The ones which are most likely to be relevant in this context are:
- the desirability of promoting the fulfilment of the purposes of public service television broadcasting (PSB) in the United Kingdom;
  - the desirability of promoting competition in relevant markets;
  - the desirability of encouraging investment and innovation in relevant markets;
  - the desirability of encouraging the availability and use of high speed data transfer services throughout the UK;
  - the different needs and interests of all users, both current and potential, of the spectrum used for television; and
  - the opinions of consumers and members of the public.
- 2.4 Under section 3(5) Ofcom must also, when performing the duty of furthering the interests of consumers, have regard to the particular interests of those consumers in respect of choice, price, quality of service and value for money.
- 2.5 In relation to the regulation of technical platform services Ofcom must also have regard to its duties to fulfil Community obligations under section 4 CA03.

## Section 3

# Provisions relating to content distribution

## FA Premier League

- 3.1 In March 2006, the European Commission adopted a decision to accept binding commitments from the FA Premier League (“FAPL”) concerning the sale of media rights for the FA Premier League competition. As a result the European Commission ceased its competition law proceedings under Article 81 of the EC Treaty into the FAPL collective selling arrangements.
- 3.2 In summary the commitments provide for:
- The offer for sale by FAPL of packages of: (i) live TV rights; (ii) near-live TV rights; (iii) mobile rights; and (iv) national radio rights.
  - All packages of rights are to be offered by means of a transparent and non-discriminatory tendering procedure. Packages are offered on a technology neutral basis and are neutral as to whether broadcasts are free or pay.
  - Rights are offered for a period of three seasons. The current arrangements therefore relate to the 2007/8, 2008/9 and 2009/10 seasons.
  - In relation to live TV rights, the FAPL makes available 6 packages of 23 matches each (a total of 138 matches per season). No one bidder is allowed to own all 6 packages (but it is therefore possible for one bidder to obtain 5 packages). Each package is structured on the basis of “picks” applicable to each round of FAPL matches (e.g. Package A contains 23 first picks, Package D contains 8 second picks and 15 fourth picks). For the current period Sky (Sky) owns 4 packages and Setanta owns 2 packages.
  - For near-live TV rights the FAPL makes available 2 packages of 121 matches each, comprising the 242 matches per season which are not broadcast live. For the current period these rights are held jointly by Sky and BT.
  - At least one package of mobile rights (clips from matches) is to be offered by FAPL. The commitments reduced the embargoes for mobile broadcasts. For the current period these rights are held by Sky.
  - Rights which are unsold or not exploited revert to the individual clubs. Individual clubs also have rights to delayed broadcasts of their matches on individual club channels and websites.
- 3.3 The decision of the European Commission to accept the commitments remains in force until 30 June 2013. The European Commission has also intervened in relation to the sale of rights to UEFA Champions League matches<sup>1</sup>.

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<sup>1</sup> Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 —Joint selling of the commercial rights of the UEFA Champions League)

## Code on Listed Events

- 3.4 The Broadcasting Act 1996 (BA96), as amended by CA03, requires Ofcom to draw up a code and regulations dealing with sports listed events.
- 3.5 Listed events are sports events of national importance which have been “listed” by the Secretary of State for Culture Media and Sport in accordance with the BA96. The events are split into “Group A” and “Group B”. Group A events are those events which may not be covered live on an exclusive basis unless certain criteria are met. Group B events are those events that may not be broadcast live on an exclusive basis unless adequate provision has been made for secondary coverage. The events are<sup>2</sup>:

Group A	Group B
The Olympic Games	Cricket Test Matches played in England
The FIFA World Cup Finals Tournament	The Cricket World Cup - the Final, Semi-finals and Matches Involving Home Nations' Teams
The FA Cup Final	The Open Golf Championship
The Scottish FA Cup Final (in Scotland)	Six Nations Rugby Tournament Matches Involving Home Countries
The Grand National and The Derby	The Commonwealth Games
The Wimbledon Tennis Finals	Non-Finals play in the Wimbledon Tournament
The European Football Championship Finals Tournament	The Ryder Cup
The Rugby League Challenge Cup Final	The World Athletics Championship
The Rugby World Cup Final	All Other Matches in the Rugby World Cup Finals Tournament

- 3.6 The purpose of the listed events rules is to restrict the acquisition by television broadcasters of exclusive rights to these events and the broadcasting of television coverage of the events on an exclusive basis so as to ensure as far as possible that there is wide public access to them.

<sup>2</sup> The current listed events can be found at:  
[http://www.ofcom.org.uk/tv/ifi/codes/code\\_sprt\\_lstd\\_evts/appendix\\_one](http://www.ofcom.org.uk/tv/ifi/codes/code_sprt_lstd_evts/appendix_one)

## Section 4

# Provisions relating to wholesale channel provision

- 4.1 Operators of television channels must hold a licence under either the Broadcasting Act 1990 (“BA90”) (which covers licences for channels on cable / DTH) or BA96 (which covers licences for channels on DTT). All channel licences contain a standard “fair and effective competition” clause reflecting the wording of section 316 CA03 (see below).

## DGFT/OFT’s reviews of Sky’s activities in markets for channel provision

- 4.2 In 1996, the Director General of Fair Trading (the “Director”) conducted a review under the Fair Trading Act 1973 of the wholesale pay TV market following complaints raised by some cable operators. The Secretary of State for Trade and Industry had been requested to make a ministerial reference to the then Monopolies and Mergers Commission.
- 4.3 The Director concluded that premium programming rights gave Sky a powerful position in the wholesale pay TV market and that Sky’s acquisition of premium programming had created a barrier to entry into the market.
- 4.4 The Director also concluded that Sky was dominant in the supply of sports channels in the UK pay TV market. To meet the Director’s concerns, Sky gave the Director non-statutory undertakings (the ‘1996 Undertakings’) in July 1996 regarding the terms it offered to cable operators for supplying its channels and his requirement for accounting information regarding Sky’s business. The key elements of the 1996 Undertakings were as follows:
- In Part I, Sky undertook to supply certain channels separately, and to publish a ratecard showing its wholesale prices for cable companies, with a discount structure approved in advance by the Director. Absolute price levels were not approved.
  - Part II of the Undertakings related to Sky’s conduct as holder of proprietary rights in the UK industry-standard encryption technology for analogue satellite TV, by detailing the terms on which it undertook to grant broadcasters access to its analogue encryption services.
  - In Part III, Sky undertook to submit to the Director accounts separated between its wholesale and retail businesses (dubbed ‘BroadCo’ and ‘Disco’, respectively). In particular, Sky agreed to show in the accounts a notional charge for the supply of its channels to Disco, to allow the Director to determine if Disco made a reasonable profit when ‘purchasing’ channels on the terms of the ratecard.
- 4.5 These non-statutory undertakings did not prevent the Competition Act 1998 (“CA98”) applying to Sky in the ordinary way, in this case once it came into force on 1 March 2000.
- 4.6 The Director began a further review on 1 March 2000 with the publication of an issues paper inviting the views of interested parties on Sky’s activities in relevant markets (the ‘2000 Review’). This request was part of his general duties to review

commercial activities under section 2 of the Fair Trading Act 1973. He indicated that the review might lead to further investigation or action under Chapter II of the Act and that he would consider whether any agreements that came to light during the review might infringe Chapter I of the Act.

- 4.7 The Director received substantial comments from 13 parties (including Sky) and reached conclusions on certain of the 1996 Undertakings. A number of undertakings were withdrawn:
- Firstly, the Independent Television Commission's ('ITC') decision to prohibit minimum carriage requirements on pay TV channels from 1 January 2000 meant that Sky need no longer observe the supply undertaking in Part I (see further below).
  - At the same time the Director noted that Part II would become redundant as soon as Sky ceased to broadcast in analogue and so would cease to have effect at that time.
- 4.8 On 2 April 2001, the Director notified Sky that it need not observe two further undertakings.
- First, Sky's basic channel, Sky One, was among the channels Sky undertook in Part I to place on the company's wholesale ratecard. The Director concluded that Sky One did not have or confer a dominant position and could therefore be removed from the ratecard.
  - Second, Part III was considered by the Director to be unnecessary as he could use his powers under CA98 to obtain relevant accounting information.
- 4.9 The response to the 2000 Review led the OFT to conduct an investigation into whether Sky had infringed the Chapter I or Chapter II prohibitions of CA98. The review led to an OFT clarification that the 1996 Undertakings were no longer legally enforceable (and therefore that Sky was subject to regulation under CA98).
- 4.10 In 2002, the OFT announced the conclusions of its investigations into specific allegations that Sky had a dominant position in a market (or markets) and that it had abused its position. The OFT concluded that Sky was dominant in the relevant markets for the wholesale and retail supply of (i) packages containing content unique to premium pay TV sports channels (identified as live FAPL football) and (ii) packages containing premium film channels (defined as including first run category A and B films). However, the OFT found insufficient evidence to conclude that Sky had abused its dominant position in these markets.

### **ITC bundling remedies<sup>3</sup>**

- 4.11 In 1998 the ITC issued a direction to channel licensees relating to channel bundling and the imposition of "minimum carriage requirements" (contractual provisions requiring a retailer to package a channel in a particular way).
- 4.12 In relation to bundling the direction aimed to ensure that subscribers could purchase premium channels without having to purchase the most expensive form of basic package. It was therefore required that subscribers be able to buy premium channels in combination with any package of basic channels offered by a distributor

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<sup>3</sup> [http://www.ofcom.org.uk/tv/ifi/guidance/bundling\\_remedies/itc\\_bundling\\_remedies.doc](http://www.ofcom.org.uk/tv/ifi/guidance/bundling_remedies/itc_bundling_remedies.doc)

(the direction did not therefore prohibit a buy-through approach). It was also required that premium channels (with the exception of premium bonus channels and rescheduled versions of premium channels) must be available on an a la carte basis (as well as through bundles).

## **Cross-promotion Code**

- 4.13 Under section 316 CA03 Ofcom has the power to include conditions which Ofcom considers appropriate for ensuring fair and effective competition (see below). The fair and effective competition licence condition requires licensees to comply with any code or guidance approved by Ofcom for the purpose of ensuring fair and effective competition.
- 4.14 The Cross-promotion Code<sup>4</sup> is an example of a code implemented pursuant to the section 316 fair and effective competition licence provisions. The latest version of the Cross-promotion Code became effective on 10 July 2006. It is designed to:
- ensure that cross-promotions on television are distinct from advertising and inform viewers of services that are likely to be of interest to them as viewers; and
  - ensure that promotions on television outside programmes do not prejudice fair and effective competition (and, in particular, ensuring that, as television broadcasting in the United Kingdom switches from analogue to digital transmission, consumers are made aware of the various platforms and digital retail TV services through which they can receive broadcasting services and that this is done in such a way that will avoid the distortion of fair and effective competition).
- 4.15 Subject to the Cross-promotion Code, television broadcasters are able to promote programmes, channels and other broadcasting-related services without such promotions being considered advertising and included in the calculation of advertising minutage as restricted by the Rules on Amount of Distribution of Advertising (see below).

## **Rules on Amount of Distribution of Advertising (“RADA”)**

- 4.16 Section 322 CA03 gives Ofcom the power to give directions to its licensees in relation to the use of advertising. Ofcom has therefore published a set of rules which require television broadcasters licensed by it to observe conditions on the amount, scheduling and presentation of advertising<sup>5</sup>. Standards for the content of television advertising are administered by the Advertising Standards Authority (ASA).

## **Airtime sales rules**

- 4.17 The Contracts Rights Renewal (CRR) remedy has been put in place to address any potential detriments to competition arising as a result of Carlton and Granada merging their sales operations<sup>6</sup>. This remedy led to a decision by the ITC and Ofcom in December 2003 to amend the ex ante competition rules governing airtime sales<sup>7</sup>.

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<sup>4</sup> For the code, see: <http://www.ofcom.org.uk/tv/ifi/codes/crosspromotioncode/>

<sup>5</sup> The Rules on the Amount and Distribution of Advertising are available at: <http://www.ofcom.org.uk/tv/ifi/codes/advertising/?a=87101>

<sup>6</sup> [http://www.ofcom.org.uk/tv/ifi/guidance/ITV\\_airtime\\_sales/crr\\_summary/crr\\_summary\\_pdf.pdf](http://www.ofcom.org.uk/tv/ifi/guidance/ITV_airtime_sales/crr_summary/crr_summary_pdf.pdf)

<sup>7</sup> [http://www.ofcom.org.uk/tv/ifi/guidance/ITV\\_airtime\\_sales/Airtime\\_sales\\_rules/](http://www.ofcom.org.uk/tv/ifi/guidance/ITV_airtime_sales/Airtime_sales_rules/)



As a result of these changes the following are still prohibited pursuant to the fair and effective competition provisions in channel licences:

- “Conditional Selling” - which occurs when a broadcaster requires that an advertiser/buyer who wishes to purchase airtime on one channel buy another of the broadcaster’s products as a pre-condition of the sale; and
- any failure by the terrestrial broadcasters to sell advertising time to the maximum extent.

## Section 5

# Wholesale platform service provision

## Technical Platform Services (TPS)

- 5.1 Broadcasters and operators of interactive TV services who wish to make their content available on the set top boxes of platform operators (such as Sky's platform on DSat) can make use of a number of different technical platform services (TPS) relating to encryption, electronic programming guides, and interactive technology and systems. Some of the key services that broadcasters and operators currently make use of are set out below

### Conditional Access

- 5.2 A conditional access ("CA") service enables a broadcaster to restrict access to content that it has made available on a digital platform only to those customers that have been authorised to access it. CA systems typically employ content scrambling and encryption technologies along with an end user authorisation system and decryption technologies operating within the digital receiver (a digital receiver could be a digital set top box with an active viewing card).
- 5.3 On digital TV platforms, CA services are primarily used to enable subscription and pay per view pay TV services ("pay TV CA" services). Access to specific encrypted channels and content is only provided to those users who have paid (or have committed to pay) for the content.

### Geographic Masking

- 5.4 Geographic masking is where purchasers of CA services are able to restrict access to content to defined geographic territories by implementing technologies and procedures which seek to restrict and/or record the geographic locations in which each of its digital receivers is installed and used. This technique is used to minimise the number of digital receivers that are able to access specific encrypted channels outside of specific geographic territories, such as the UK.

### Electronic Programming Guide listing services

- 5.5 Viewers of digital TV use Electronic Programme Guides ("EPGs") primarily to navigate between channels, access channels by unique channel numbers, and browse through programming schedules and related data.
- 5.6 Some EPG listings do not contain as much programme schedule information as others, for example on Sky DSat EPG viewers have access to less schedule information on radio channels than is available for TV channels.
- 5.7 The EPG listing service involves assigning an EPG channel number to each broadcaster's channel and providing a technical interface by which the broadcaster can deliver and amend programme schedules and related data. Without an EPG listing, very few viewers would be aware that a channel was available and they would find it hard to navigate to it.

## Regionalisation

- 5.8 A broadcaster may want to associate different broadcast channels with the same EPG channel number in different geographic regions. For example, DSat viewers in London receive a different version of ITV1 on channel 103 to viewers in Manchester. Different broadcasters may require different regions to be defined, for example the geographic boundaries of the ITV regions do not necessarily correspond with the geographic boundaries of the BBC regions.

## Access Control Services

- 5.9 Access Control (“AC”) services involve access to certain application programming interfaces (APIs) and access to the digital broadcaster’s remote computer hardware and software systems. Such services allow broadcasters to develop software applications such as interactive TV applications, which can be loaded and executed on the digital receiver. These applications may then establish an on-line connection with the broadcaster’s network infrastructure to create a “client server” computing environment.
- 5.10 Other AC services also enable the broadcaster to provide viewers with the ability to identify and access interactive applications. For example, on DSat, viewers might access interactive applications by “pressing the red button” whilst watching a TV channel or selecting the service from the “Interactive Main Menu”.

## Current TPS regulation

- 5.11 The regulation of TPS has been harmonised at EU level by the Access Directive<sup>8</sup> and implemented in UK under Part 2 CA03. In the UK obligations relating to TPS under Part 2 CA03 currently apply to Sky Subscriber Services Limited (“SSSL”).

## Conditional Access

- 5.12 In relation to CA, Article 6(1) of the Access Directive specifically requires Member States to ensure certain conditions apply in relation to conditional access to digital television broadcast to viewers<sup>9</sup>. One of these conditions is an obligation on operators of CA to provide services on fair, reasonable and non-discriminatory basis.
- 5.13 These provisions of the Access Directive have been implemented in the UK under CA03<sup>10</sup>. In particular, section 73(5) CA03 provides that an access related condition may be one which is set under section 75(2) of the Act. In order to fulfil the duty imposed by section 75 CA03, the Director General of Telecommunications determined in his conditional access conditions notification that various conditional access conditions applied to SSSL<sup>11</sup>. In summary these conditions require SSSL:
- to provide access to CA services on fair and reasonable terms;

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<sup>8</sup> Directive 2002/19/EC.

<sup>9</sup> The conditions are laid down in Annex I, Part I of that Directive

<sup>10</sup> Section 45 CA03 generally allows Ofcom to set ex ante conditions on various persons, including ‘access-related’ conditions, which, pursuant to subsection (5), are conditions authorised by section 73

<sup>11</sup> The regulation of conditional access: setting of regulatory conditions, explanatory statement and formal notification pursuant Section 48 (1) of the Communications Act 2003 published by Ofcom on 24 July 2003, [www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/condac0703.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/condac0703.pdf).

- not to unduly discriminate in matters connected with the provision of CA services to broadcasters;
- to publish its charges or the method for determining its charges, terms and conditions; and
- to keep separate financial accounts regarding its activities as a provider of CA services.

## EPG and Access Control

5.14 Article 5 of the Access Directive makes specific provision for the regulation of EPG and AC services. Article 5(1)(b) of the Access Directive is implemented in the UK by Sections 73(2) and 74(2) CA03<sup>12</sup>.

5.15 As a result of these provisions the Director General of Telecommunications imposed on SSSL a number of regulatory conditions relating to the provision of EPG (the 'EPG Conditions') and AC (the 'AC Conditions') services, which were carried over by means of "continuation notices" from the regulatory regime that was in place until 24 July 2003<sup>13</sup>.

5.16 In summary the EPG Conditions require SSSL:

- to provide an EPG service to third parties in respect of decoders administered by it on a fair reasonable and non-discriminatory basis;
- not to show undue preference or discrimination in the provision of EPG services to third parties; and
- to publish its charges or the method for determining its charges, terms and conditions.

5.17 In summary the AC Conditions require SSSL:

- to provide access to AC services on fair and reasonable terms;
- not to show undue preference or discrimination in the provision of EPG services to third parties;
- to publish its charges or the method for determining its charges, terms and conditions; and
- to keep separate financial accounts regarding its operation of AC services.

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<sup>12</sup> Section 45 of the Act allows Ofcom to set different types of conditions, including access-related conditions. Section 45(5) provides that an access-related condition is one that is authorised by Section 73, and Section 74(2) states that the conditions that may be set under Section 73(2) includes those conditions set out in Section 74(2) of the Act.

<sup>13</sup> Continuation Notice to a class of persons defined as the licensee for the purposes of the provision of electronic programme guide services under paragraph 9 of schedule 18 to the Communications Act 2003, 23 July 2003.

[http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/cont\\_notices/index.htm](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/cont_notices/index.htm).

Continuation Notice to a class of persons defined as the licensee for the purposes of the provision of access control services under paragraph 9 of schedule 18 to the Communications Act 2003, 23 July 2003.

[http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/cont\\_notices/acs\\_class.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/cont_notices/acs_class.pdf).

## **SSSL Guidelines**

- 5.18 On 21 September 2006, Ofcom adopted new Guidelines setting out its approach to considering, in the event of a dispute or complaint, whether SSSL has complied with the conditions requiring it to provide access to TPS on fair, reasonable and non-discriminatory terms, as summarised above<sup>14</sup>. The Guidelines only apply to SSSL in respect of its provision of services in relation to DSat. The Guidelines noted that if other operators were to be designated as regulated suppliers of TPS in the future, Ofcom would need to consider the appropriate guidelines to apply given the specific circumstances of the designated provider.
- 5.19 The 2006 Guidelines are formed of two parts. The first part sets out the general principles that Ofcom would apply in assessing whether SSSL has complied with its TPS conditions. The second part provides more detail on Ofcom's normal approach to particular aspects of cost recovery and assessment of benefits received in assessing whether SSSL has complied with its TPS conditions. The Guidelines came into effect on 1 January 2007.

## **The setting of access-related conditions on Top Up TV Limited**

- 5.20 In February 2007, Ofcom consulted on its proposal to set access-related conditions on Top Up TV Limited, pursuant to section 75(2) CA03, requiring Top Up TV to provide, amongst other things, fair, reasonable and non-discriminatory access to its conditional access services on regulated terms.

## **Review of Wholesale Digital Television Broadcasting Platform Markets<sup>15</sup>**

- 5.21 In October 2006, Ofcom announced it was in the process of conducting a review of wholesale digital television platform markets. This review will, among other things, include a determination of which persons, if any, have significant market power in relation to access to digital television platforms. Under the CA03, conditional access obligations may only be modified or revoked once a market review has established that the CA operator does not have significant market power<sup>16</sup>.
- 5.22 Ofcom expects to restart the platform review once there is greater clarity as to the likely range of outcomes of the market investigation. It may be that issues arise from the market investigation which relate to the regulation of TV platforms, and the platform review is the appropriate vehicle for addressing any such issues.

## **Code on electronic programming guides<sup>17</sup>**

- 5.23 In addition to the EPG Conditions and guidelines which apply to SSSL (as described above), under the CA03 Ofcom is also under a general duty to draw up a code of practice on the use of EPGs (the "Code of Practice")<sup>18</sup>. The standard form licences for television programme services include provisions requiring any EPG providers to comply with the Code of Practice<sup>19</sup>.
- 5.24 The Code of Practice sets out the practices to be followed by EPG providers:

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<sup>14</sup> See: <http://www.ofcom.org.uk/consult/condocs/tpsguidelines/statement/statement.pdf>

<sup>15</sup> See: <http://www.ofcom.org.uk/tv/ifi/marketreviews/wholesaledtvb/>

<sup>16</sup> See Section 76

<sup>17</sup> For more details, see: <http://www.ofcom.org.uk/tv/ifi/codes/EPGcode/>

<sup>18</sup> See Section 310

<sup>19</sup> See Section 311

- to give appropriate prominence to public service channels;
- to provide the features and information needed to enable EPGs to be used by people with disabilities affecting their sight or hearing or both; and
- to secure fair and effective competition.

5.25 The Code of Practice obliges EPG providers to give the degree of prominence that Ofcom considers appropriate to the listing and promotion of public service channels (which currently comprises the digital versions of BBC and ITV services, as well as the digital services of Channels 3, 4 and 5, Teletext and S4C Digital). The Code of Practice is also to ensure that members of the intended audience for services provided for a particular area or locality are able use the EPG to select the programmes included in that service.

5.26 In addition, EPG providers are required to comply with provisions in the Code of Practice to secure fair and effective competition in the provision of television services. These include provisions such as ensuring any agreements made with broadcasters for an EPG service are made on a fair, reasonable and non-discriminatory basis, and to publish and comply with a justifiable method of allocating listings.

## Section 6

# Ofcom's competition law powers

## General Competition powers - Ofcom's concurrent competition law powers under the Competition Act 1998 and Articles 81 and 82 of the EC Treaty

- 6.1 Ofcom has concurrent jurisdiction with the OFT to exercise CA98 powers in relation to agreements or conduct connected with communications matters<sup>20</sup>. The general duties of Ofcom under s3 CA do not apply to the carrying out of these concurrent functions<sup>21</sup>.
- 6.2 Under CA98 the Chapter I prohibition prohibits agreements/concerted practices between undertakings that have as their object or effect the preventing, restricting or distorting of competition and which may affect trade within the UK. The Chapter II prohibition prohibits abusive conduct by dominant undertakings if it may affect trade within the UK.
- 6.3 Ofcom also has the power under the CA98 to apply Articles 81 and 82 of the EC Treaty, in addition to the Chapter I and II prohibitions, to agreements or conduct relating to communications matters. In order for Articles 81 and 82 to apply, the agreement or conduct must be capable of having an effect on trade between Member States of the EU.
- 6.4 Under CA98, Ofcom may issue such directions as Ofcom considers appropriate to bring an infringement to an end, under section 32 (in relation to an anti-competitive agreement) or section 33 (in relation to an abuse of a dominant position).
- 6.5 Ofcom may also accept commitments (where offered) to address competition concerns before a decision is taken<sup>22</sup>. The OFT has published guidelines on the circumstances when it may be appropriate to accept commitments which have been offered as a means of resolving a case<sup>23</sup>. Ofcom must have regard to these guidelines. It must also follow the procedural requirements set out in CA98 Schedule 6A.
- 6.6 Ofcom has the power to impose a fine of up to 10% of worldwide turnover in relation to an infringement of CA98. If Ofcom imposes a fine under competition law, it will have regard to the fining guidelines published by the OFT.

## Market investigation references under the Enterprise Act 2002

- 6.7 Ofcom also has concurrent jurisdiction with the OFT to make market investigation references to the Competition Commission under the Enterprise Act 2002 ("EA02")<sup>24</sup>.

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<sup>20</sup> s371 CA03

<sup>21</sup> s371(11). Ofcom may however have regard to the duties at s3(1) to s3(4) CA03 if the OFT would be entitled to have regard to such matters in the carrying out of its functions.

<sup>22</sup> Section 31A CA98

<sup>23</sup> [http://www.ofcom.gov.uk/shared\\_ofcom/business\\_leaflets/ca98\\_guidelines/ofcom407.pdf](http://www.ofcom.gov.uk/shared_ofcom/business_leaflets/ca98_guidelines/ofcom407.pdf)

<sup>24</sup> s370

The general duties of Ofcom under s3 CA do not apply to the carrying out of these concurrent functions<sup>25</sup>.

6.8 If, following a reference, the Competition Commission finds that there are features of a market which prevent, restrict or distort competition in the UK it is under a duty to remedy the problem and has a wide range of remedial powers.

6.9 Ofcom has the discretion to make a market investigation reference (“MIR”) to the Competition Commission where it has reasonable grounds for suspecting that:

“any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts, or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom”<sup>26</sup>.

6.10 Under the EA02 a “feature of a market” is to be construed as a reference to:

- “(a) the structure of the market concerned or any aspect of that structure;
- (b) any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned, or
- (c) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services”<sup>27</sup>.

6.11 The OFT has published guidelines on MIRs under the EA02 (the “Guidelines”)<sup>28</sup>. Ofcom is required to take account of the Guidelines in exercising its EA02 functions. The Guidelines set out four key matters to be examined in deciding whether to exercise a discretion to make an MIR<sup>29</sup>.

- Whether it would be more appropriate to deal with the problem identified by applying other competition law powers. Ofcom may also exercise its discretion to deal with the problem through sector specific rules if that is more appropriate.
- Whether it would be more appropriate to address the problem identified by means of undertakings in lieu of a reference.
- The scale of the suspected problem, in terms of its adverse effect on competition, is such that a reference would be an appropriate response to it. This would include an assessment of whether the problem identified leads to detrimental effects for consumers.
- Whether there is a reasonable chance that appropriate remedies will be available to the Competition Commission.

<sup>25</sup> s370(11). Ofcom may however have regard to the duties at s3(1) to s3(4) CA03 if the OFT would be entitled to have regard to such matters in the carrying out of its functions.

<sup>26</sup> Section 131(1) EA02,

<sup>27</sup> Section 131(2) EA02,

<sup>28</sup> [http://www.oft.gov.uk/shared\\_of/business\\_leaflets/enterprise\\_act/oft511.pdf](http://www.oft.gov.uk/shared_of/business_leaflets/enterprise_act/oft511.pdf)

<sup>29</sup> Paragraph 2.1



## Ofcom's sectoral broadcasting competition powers

6.12 As described above, Ofcom has general duties to promote competition in communications markets. Sections 316 to 318 CA03 create a separate framework for the regulation by Ofcom of competition issues in the broadcasting sector ("sectoral competition powers"). Section 316 provides that:

"(1) The regulatory regime for every licensed service includes the conditions (if any) that OFCOM consider appropriate for ensuring fair and effective competition in the provision of licensed services or of connected services.

(2) Those conditions must include the conditions (if any) that OFCOM consider appropriate for securing that the provider of the service does not—

- (a) enter into or maintain any arrangements, or
- (b) engage in any practice,

which OFCOM consider, or would consider, to be prejudicial to fair and effective competition in the provision of licensed services or of connected services.

(3) A condition imposed under this section may require a licence holder to comply with one or both of the following—

- (a) code for the time being approved by OFCOM for the purposes of the conditions; and
- (b) directions given to him by OFCOM for those purposes."

(4) In this section—

"connected services", in relation to licensed services, means the provision of programmes for inclusion in licensed services and any other services provided for purposes connected with, or with the provision of, licensed services; and

"licensed service" means a service licensed by a Broadcasting Act licence."

6.13 Under s 317 CA03 where Ofcom is considering competition issues it must determine whether it is more appropriate to act under sectoral competition powers or under CA98. In particular, section 317 provides that:

- before exercising sectoral competition powers Ofcom must consider whether it would be more appropriate to act under CA98<sup>30</sup>;
- if Ofcom determines that it is more appropriate to proceed under CA98, it must not use sectoral competition powers<sup>31</sup>;

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<sup>30</sup> s317(2) CA03

<sup>31</sup> s317(3) CA03

- if Ofcom determines that it is more appropriate to proceed under sectoral competition powers it must, before or on doing so, provide a notification of that decision<sup>32</sup>.

6.14 There are a number of existing instruments based on sectoral competition powers, including the “fair and effective competition” clauses contained within licences issued under BA90 and BA96. This includes Digital Television Programme Service licences and licences for television multiplexes.

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<sup>32</sup> s317(4) CA03