



Orange Personal Communications Services Limited

Pay TV Investigation

Competition issues in premium pay TV movies:
proposed reference to the Competition
Commission, issued on 31 March 2010

May 2010

ABOUT ORANGE

Orange is one of the key brands of the joint venture between France Telecom Group and Deutsche Telekom Group in the UK. The Orange brand covers Internet, television and mobile services in the majority of countries where it operates. This response is submitted on behalf of the joint venture and France Telecom Group.

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INTRODUCTION

Orange supports Ofcom's proposal to refer the premium movies sector to the Competition Commission ("CC"). As Ofcom is aware, Orange has, for some time, been considering its options in terms of developing a digital retail service [...]

Orange, as a potential entrant in the market, is therefore ideally placed to respond to the Ofcom consultation document regarding a proposed reference to the CC in respect of pay TV movies.

[...]

Notwithstanding the above, Orange considers that there are clear hurdles in the UK pay TV market in respect of access to premium movie content, as identified by Ofcom. [...]

REFERENCE TO THE COMPETITION COMMISSION

Orange has fully participated in Ofcom's pay TV market investigation, responding to each of the three main consultations (going back to 2007). Orange has from the outset of the investigation fully supported a reference to the CC in order that the impact of BSkyB's market power upon the different layers of the digital television sector may be fully evaluated, as is clear for the reasons set out below and the finding by Ofcom in its Pay TV Statement of 31 March 2010 that competition is not effective in the market.

As Orange previously stated in its Response of 9 December 2008 to Ofcom's second Pay TV consultation, Ofcom should make a market investigation to the CC in view of: (i) the complexity of the failings in the pay TV sector in the UK; (ii) the long history of problems surrounding BSkyB's position of dominance; and (iii) the admitted complexity of determining an appropriate charging methodology. Only the CC has the sufficient resources and power to fully investigate the problems with the UK pay TV market and design a suitable wholesale remedy.

Orange has advocated a CC reference for a long time and notes that Ofcom now wishes to refer the premium movies sector due to issues about its legal powers. To the extent that Ofcom has doubts about the extent of its legal powers under Section 316 of the Communications Act 2003 to impose a remedy in respect of SVoD rights, Orange would very much support a decision by Ofcom to make a CC reference.

Ofcom's pay TV investigation has lasted well over 3 years. Orange notes that the CAT has stressed the connection in first phase investigations between the potential harm in delaying a reference decision and the need to reach that decision within a reasonable timescale, and that delay "may involve some risk of shutting the stable door after the horse has gone", and in so doing operate against the "general public interest [in this sector] which potentially affects every consumer in this country."¹

Although there may be concerns as to the length of time a CC reference would take, in view of the scale, complexity and longevity of the problems in the UK pay TV market, and the negative consequences for the industry and consumers if a suitable remedy is not imposed, Orange urges Ofcom to make a reference to the CC without delay. Orange hopes that, if Ofcom makes an immediate reference, the CC would be

¹ CAT judgment, Case 1052/6/1/05 *The Association of Convenience Stores and Friends of the Earth v OFT* at paras. 7 and 8.

able to resolve the identified competition concerns and implement an appropriate remedy by May 2011.

REMEDIES

Ofcom has identified two broad approaches that the CC could take in considering remedies: (i) intervention at the upstream level in the way premium movie rights are sold and (ii) a requirement on BSkyB to provide wholesale access to linear and SVoD premium movie content on regulated terms.

Orange strongly supports the imposition of a wholesale must offer remedy in respect of BSkyB's premium movie content, given BSkyB's entrenched, well-established market position and the barriers faced by competitors². Such a remedy would enable other operators to develop pay TV offers that can genuinely compete with BSkyB's offerings, thereby offering consumers enhanced choice. The wholesale offering should be available across all platforms i.e. DTT, IPTV and satellite [...]

Orange notes Ofcom's suggestion that the CC could attempt to remedy the competition concerns at source by changing the way in which premium movie rights are obtained from the Major Hollywood Studios. Orange is considering its position and will provide its views on this to the CC in the event of a market investigation reference.

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² Clearly, the remedy is directly related to BSkyB's position and would not be appropriate for a new entrant that had obtained rights in order to try and compete against BSkyB and others.

RESPONSE TO THE CONSULTATION QUESTIONS

1. Do you agree with our analysis of the market for the sale of Movie Rights from Major Hollywood Studios in the first pay TV subscription window in the United Kingdom? Please provide any relevant evidence you have to support your view.

Orange agrees that there is a distinct market for the sale of Movie Rights from the Major Hollywood Studios in the first pay TV subscription window in the UK. There are few substitutes for the content of Core Premium Movies channels from a consumer perspective, as consumers generally prefer a wide range of up-to-date quality movies on television.³ It would therefore be difficult for a broadcaster to profitably switch from using premium movies from the Major Hollywood Studios in the first pay TV subscription window to other content (non-movies) or less popular movies (from alternative movie studios) which would not be as attractive to consumers. Orange agrees with Ofcom's view that there are unlikely to be strong constraints to a small but significant increase in the price of movie rights from Major Hollywood Studios in the first pay TV window.

Orange broadly agrees with Ofcom's analysis of this market. At present, BSkyB has exclusive access to the SVoD rights in the first pay TV subscription window as part of its contracts with the Major Hollywood Studios, because they are sold exclusively together with the linear channel rights. It is therefore difficult for other platforms to launch a competing premium linear channel or SVoD bundle because they do not have access to premium movie rights in the first pay TV window.

Orange agrees with Ofcom's description of the characteristics of the movies sector, in particular that premium movies will be important in driving the take-up of IPTV services.

2. Do you agree with our analysis of the features of the markets identified?

Yes. Ofcom correctly notes in sections 3 and 4 of the consultation document⁴ the importance of premium movies for driving platform choice and hence entry into the market for the supply of packages including Core Premium Movies channels. Orange supports Ofcom's conclusion that a potential entrant at the wholesale level would have to acquire a broad selection of the premium movie rights to assemble an appealing package for consumers.⁵

Orange has some comments on certain of the features of the market identified by Ofcom:

Limited pool of premium content

Orange considers that consumers are not selecting operators by comparing technical elements but rather because of the content that a particular operator is able to offer. As Ofcom points out, BSkyB is required by the Major Hollywood Studios to purchase a certain maximum number of releases from each studio per year. A competitor at the wholesale level would need to acquire a broad enough selection of the premium rights to assemble an attractive package for consumers – the ability to do this is

³ Pay TV Statement at Section 6.

⁴ Ofcom, *Competition issues in premium pay TV movies – proposed reference to the Competition Commission*, 31 March 2010.

⁵ Ibid. at para. 5.8

constrained by the limited pool of content produced by the Major Hollywood Studios. This, coupled with the staggered availability of contents rights and duration of contracts, amounts to a barrier to entry for competitors. BSkyB's contract end dates are staggered, which means that a new entrant could face delay before it could acquire additional rights. A wholesaler wishing to launch a new service would need to acquire rights from more than one studio in order to create an appealing package for consumers. However, this cannot be achieved simultaneously because of the staggered availability of rights.

The joint sale of linear and SVoD rights

Sky is the only platform able to bundle movies in the first pay window into a movies channel or SVoD service because of its exclusive agreements with the Major Hollywood Studios. The effect of the exclusivity is to exclude other platforms from bundling the content into attractive SVoD packages. This is despite the fact that BSkyB does not have the platform capability to fully exploit its SVoD rights, whereas a number of its competitors have the capability to deliver SVoD services.

As Orange has previously pointed out to Ofcom,⁶ BSkyB makes it very difficult for its competitors to secure its Sky movie channels. There has generally been either a *de facto* refusal or the terms on which these are made available have contributed to a poor subscription rate in non-satellite homes. This is because the margins set by BSkyB leave little room for competing platforms to set pricing that attracts customers and leaves the platform with an unacceptable distribution margin of its own. The result is that BSkyB has exclusive access to SVoD rights which it is not capable of fully utilising, but yet is not willing to provide these rights to other operators on commercially viable terms.

BSkyB's market power in the distribution of wholesale premium movies

Orange supports Ofcom's assessment that BSkyB has market power in the wholesale supply of packages including Core Premium Movies, as set out in Section 6 of the Pay TV Statement. This stems in particular from the ability of BSkyB to exclusively jointly purchase linear and SVoD premium rights.

It is only on the pay-per-view, video-on-demand and new media markets that premium movie content is offered to operators on a non-exclusive basis, and even then BSkyB has secured contracts for exclusive direct-to-home rights, and is seeking to secure most-favoured-nation arrangements that reduce the appeal (in volume and in terms of quality) of the movie titles available on other platforms in the same window.⁷

As a result, it is difficult for another platform to launch a competing service for movies with a premium linear channel or SVoD bundle as long as BSkyB has exclusive licensing agreements with the Major Hollywood Studios.

3. Are there any other features that we are missing and might be relevant to this assessment of competition in the identified markets?

⁶ Orange's Response of 9 December 2008 to Ofcom's second pay TV consultation, section 5.

⁷ Orange's Response of 9 December 2008 to Ofcom's second pay TV consultation, section 5.

Yes – Orange refers to its comments at paragraph 6.2 of its Response of 9 December 2008 to Ofcom’s second pay TV consultation. Orange considers that the consumer harm is greater than that identified by Ofcom. BSkyB is using bundled services to leverage its market power into the residential retail broadband market. BSkyB’s exclusive control over premium pay TV content allows it to “give away” broadband to pay TV subscribers, thereby weakening the position of competitors such as Virgin Media.

4. Do you agree with our analysis of the prevention, distortion and restriction of competition caused by the features we have described?

Orange agrees with the competition concerns identified by Ofcom (see Orange’s Response to 9 December 2008 to Ofcom’s second pay TV consultation, section 6). In particular, Orange agrees with Ofcom’s finding that lack of access to SVoD content could affect IPTV prospects in the UK in the future.⁸ Orange also shares Ofcom’s concern that there is a real risk that having exclusive access to linear and SVoD rights will allow BSkyB to maintain and/or extend its market power once it is in a position to deliver a true SVoD service.

Orange also agrees that BSkyB distributes its Core Premium Movie channels in a way that favours its own platform. As a vertically integrated operator with market power in a key upstream market, BSkyB is encouraged to favour its own retail business and its own platform, either by refusing to supply premium content on fair and reasonable terms, or by supplying it at prices that competitors cannot afford. This leads to reduced competition at the retail level, with the result that consumers are faced with higher prices and less choice.

5. Do you agree with our analysis of the impact on consumers regarding choice, innovation and pricing?

Yes. BSkyB’s control over access to premium movie content makes it difficult for competitors to offer attractive alternatives to consumers. As a result, consumers have less choice in terms of the platform over which they can receive pay TV services. They are also forced to pay high retail prices (controlled by BSkyB) for packages that include premium content.

6. Do you agree with our analysis of the likely effects of the limited exploitation of SVoD services on competition?

Yes – as a result of the exclusive arrangements between BSkyB and the Major Hollywood studios, competitors and potential entrants in the developing pay TV sector, such as Orange, are prevented or artificially hindered from accessing premium movie content. This seriously hampers their ability to offer consumers a choice of alternative platforms to that of Sky. Orange supports Ofcom’s finding that “limited exploitation of premium SVoD movie rights is likely to hold back innovation to the detriment of consumers. The premium SVoD movie service could have been an innovative new service introduced several years ago. However, this has been and continues to be held back by the way in which the rights are sold, in particular the joint sale of SVoD linear rights within the first pay TV subscription window.”⁹

Orange submits that premium SVoD movie services are interchangeable with the Core Premium Movies channels. At present, BSkyB acquires exclusive rights over

⁸ Pay TV Statement at Section 4.

⁹ Ibid. at para. 6.41.

both SVoD rights and linear rights. If premium SVoD rights were available separately, both services would compete with each other and lead to price competition between linear channels and SVoD services. SVoD is a key feature of IPTV services. A requirement to make SVoD rights available separately from linear channel rights may be sensible. These are rights [...] are currently “warehoused” by BSkyB because it cannot exploit them well yet does not want other providers to do so, as they could gain a competition advantage.

7. Do you consider that the threshold for making a market investigation reference to the Competition Commission is met?

Yes. Orange refers to its Response of 9 December 2008 to Ofcom’s second pay TV consultation.

Ofcom has an obligation to consider whether the competition problems that it has identified may involve an infringement of the Competition Act 1998 (“CA98”) and, if so, should only consider a Competition Commission reference in one of two circumstances:

- When it has reasonable grounds for suspecting that there are market features which prevent, restrict or distort competition, but are not a breach of the CA98 prohibitions; or
- When action under the CA98 has been or is likely to be ineffective for dealing with the competition issue identified.¹⁰

It is clear from Ofcom’s findings that there are competition problems in the pay TV market whereby competitors of BSkyB are prevented from competing effectively as a result of BSkyB’s market power. The current structure of the market provides BSkyB with incentives to exploit its dominant position in the wholesale supply and retail markets for premium movies, and thereby foreclose or marginalise competition both upstream and downstream. Orange is of the view that a wholesale must-offer remedy allowing access to linear and SVoD premium content on regulated terms is necessary in order to eliminate these incentives. Such a remedy would resolve the competition issues related to the current restricted supply of premium movies content and would enable other operators to develop attractive pay TV packages, leading to improved choice for consumers.¹¹

Orange agrees that a remedy in respect of linear rights only would not address the problems around limited exploitation of SVoD rights and high prices for premium movie channels, given that SVoD is likely to increase in importance compared to linear channels.

Given the length of Ofcom’s investigation into the pay TV sector (3 years) and the relatively low threshold for making a CC reference, Orange believes that sufficient evidence has been submitted during the investigation for Ofcom to establish that “there are reasonable grounds to suspect that features of the market prevent, restrict or distort competition.”

The CC is therefore best placed to assess and remedy the anti-competitive features identified by Ofcom.

¹⁰ The OFT’s Guidance: *Market Investigation References* at para. 2.3.

¹¹ See Orange’s Response of 9 December 2008 to Ofcom’s second pay TV consultation, section 8.

8. Do you consider that we should exercise our discretion to make a market investigation reference to the Competition Commission?

Yes. The Competition Commission has the ability to investigate in detail and remedy the industry-wide competition problems identified by Ofcom. As the OFT observes, in situations where the competitive process is not working effectively at the different levels of the supply chain, the market investigation route may be better suited to dealing with the problem.¹² The Competition Commission has the expertise and resources to investigate an industry as complex and constantly evolving as the pay TV sector. A reference decision would also be in line with the comments of the House of Lords Select Committee on Regulators:

“Where possible, utility regulators should look to bring more cases to the competition authorities...and the regulators should work to ensure that the cases most likely to establish useful precedents are brought to the CC.”¹³

Orange reiterates the point that it has previously made, that a reference is likely to be the most efficient in terms of regulatory measures. The CC would be able to consider the issues in the round; its decision would only be reviewable on judicial review grounds and could be implemented by Ofcom, after all parties have had the opportunity to make submissions to the CC in an investigational process, rather than challenge the decision of Ofcom before the CAT in an adversarial process (which is what is now happening in respect of Ofcom’s imposition of a wholesale remedy for premium sports content).

9. Do you have any comments on the draft wording of the proposed terms of the market investigation reference as set out in Annex 1?

Orange agrees with Ofcom’s proposed terms of reference.

¹² Ibid at para. 2.2.

¹³ *First Report of the House of Lords Select Committee on Regulators*, 23 October 2007 at para. 6.26.