

**Representing:**

Self

**What do you want Ofcom to keep confidential?:**

None

**If you want part of your response kept confidential, which parts?:**

Not applicable

**Ofcom may publish a response summary:**

Yes

**I confirm that I have read the declaration:**

Yes

**Ofcom should only publish this response after the consultation has ended:**

You may publish my response upon receipt

Thank you for the opportunity to comment upon the 'Pay TV Phase Three Document - Proposed Remedies' consultation document.

It is difficult to respond to set questions in the precise manner Ofcom would like because that potentially limits the scope of the responses. More seriously, the quality of this consultation document and the annexes has been significantly degraded because of the amount of censorship (redaction) that has been going on.

In particular, Oxera's crucially important 'BSkyB's profitability in the context of the Ofcom market investigation' report has effectively been rendered useless by the removal of so much essential data. How on earth can Ofcom expect informed responses when so much necessary material has been removed? I have therefore had to provide a response grouped about a few main themes.

**Competition, Film & Sports Rights**

In the UK, the pay television system has evolved such that one main operator has emerged on each of the main platforms, e.g. Sky on satellite, Virgin Media on cable, Top Up TV on digital terrestrial and BT Vision on IPTV. As Sky was one of the first operators in pay television, its growth has now meant it is in a pre-eminent position now to obtain premium film and sports rights.

That means that other pay television suppliers could be disadvantaged by that strong position and those concerns were made clear when BT, Virgin Media, Setanta (now defunct) and Top

Up TV submitted their concerns to Ofcom in 2007. There is clearly a balance to be struck here in that the content supplier should, quite rightly, be allowed a reasonable return for the supply of premium content that does not prejudice the ability to acquire or renew rights while other operators should be allowed fair and reasonable access to that content subject to certain other considerations (see the section on piracy). It is worth noting though that other operators are, if they so wish, able to bid themselves for rights and BT Vision and Virgin Media already operate on-demand premium films.

The consultation document itself does not show the way forward. Continued micro-management and interference by Ofcom will not result in a balanced, satisfactory or fair solution. In particular, it would be unfair for Ofcom to be able to instantly impose a solution and thus potentially deprive a content supplier of due legal redress. However, the types of regulatory framework that could solve this issue is illustrated in Annex 11 to the consultation where Value Partners looked at regulatory systems abroad.

The experience of both Italy and Australia would appear to offer a remedy to the broadcasting rights issue here in the United Kingdom. It is clear that the regulatory set up in Italy is a robust one (see Annex 11) that functions to regulate the various parties involved in the Italian pay television scene. That framework could be adapted to the UK situation and could be administered here by a competent authority such as the Office of Fair Trading or the Competition Commission which have histories of, and experience in, the examination of commercial competition matters (it should certainly not be Ofcom).

At the same time, a more informal primary negotiating framework could be set up between the UK's pay television operators along the lines of Australia's Content Supply Agreement. Where agreement could not be reached then any matters of dispute could be dealt with the statutory regulatory system as that outlined in the previous paragraph. The existence of a strong formal statutory system to back up a consensual primary framework should encourage the various parties to reach agreement between themselves without undue recourse to the more formal statutory system. Such a two-system system could be workable and it would almost certainly be infinitely preferable to more injudicious and ill-informed meddling by Ofcom. If only one system is to be deployed in the UK then the model of Italy should suffice.

### **Encryption Systems & the Protection of Sports & Other Rights**

There is one issue in this consultation report that Ofcom has clearly neglected and that is the issue of pay television piracy. This issue is of importance to primary rights' holders such as film studios and sports associations and secondary rights' holders such as content suppliers like Sky, ESPN and British Eurosport. In its efforts to try to force a settlement in the potentially unfair premium content issue, Ofcom has failed to adequately consider pay television piracy.

These days television encryption systems are broadly divided into two types:

Key-based systems that operates with keys at the operator's and consumer's end with the decoding message being transmitted and decoded at the consumer's end;

Algorithm based systems operate with complementary algorithms at the operator's and consumer's end and the decoding message is generated via the algorithm at the consumer's end without being transmitted.

The advantage of the algorithm-based encryption system is that keys and decoding messages are not directly transmitted and are thus not capable of being intercepted by hackers. Indeed, it only takes about six to nine months before any new variant version of a key-based

encryption system is thoroughly comprised by piracy. This is illustrated by the use and lawful sale (in the UK) of decrypting conditional access modules such as the Diablo and T-Rex which boast of the number of key-based systems that they can effectively crack.

A further relevant issue is that of the return path whereby the consumer's pay television box is connected to the operator via the likes of a standard copper line or fibre optic cable. This allows the operator to potentially identify households where piracy is going on and interrogate the relevant set top boxes and disable them. There is one platform, namely digital terrestrial, where an old-style compromised key-based system is in use and where there is no return path thus making it doubly vulnerable to piracy.

These are not merely academic issues. Sky Italia suffered greatly from piracy until they changed to a secure algorithm-based encryption system. Where there are grounds for concern over the efficacy of any one platform's or delivery system's vulnerability to piracy the primary and secondary sports rights' holders should not be forced to place their content on a vulnerable platform at the whim of Ofcom. Those rights' holders should have the primary decision making power in such instances as it is their content that will be pirated and they should not be overridden by Ofcom. Failure to give due consideration to this issue could mean Ofcom being on the receiving end of a successful legal challenge.

### **The Proposed Management of the Digital Terrestrial (Freeview) Platform**

There is a consistent desire by Ofcom to force pay television channels at the expense of free-to-air channels on the Freeview digital terrestrial platform even when that is not necessarily desired by the viewing public themselves. Those desires are illustrated in this consultation document as well as previous ones such as the 'Pay TV channels on multiplexes B, C and D' consultation in 2005 and the 'Proposed BSkyB digital terrestrial television services' consultation in 2007.

This illustrates that Ofcom is out of touch with the general public mood in respect of Freeview and that it is obsessively persisting with its own ideological and dogmatic attempts to foist pay television on Freeview. Ofcom is even willing to be mendacious and misrepresent statistics in order to try and get its way.

As an example, the current consultation states that most people thought that sufficient restraining conditions could be put on Sky were it to operate a pay service on the Freeview platform. However, the vast majority of respondents to the 'Proposed BSkyB digital terrestrial television services' were against Sky operating any form of pay service alongside Freeview.

Similarly, this consultation document spuriously emphasises some report that purports to say that 2 million people would consider pay television services on the Freeview platform. However, there is a far more objective popularity test and that is the performance of the current pay television operator Top Up TV. They offer premium sports such as the Premier League (ESPN), films (Picturebox) and many additional entertainment programmes (TV Favourites) and yet they have only managed between 100,000 and 400,000 subscribers on a platform that is in 18 million homes (Ofcom Digital Progress Report, 1st Quarter 2009). Indeed, according to that very same report, the subscriber number for pay television on the Freeview platform stands at 200,000. That is a more accurate reflection of the potential popularity of pay television on this platform. These wilful distortions show a complete lack of professionalism and objectivity by Ofcom on this issue.

Ofcom has shown every sign of trying to promote Sky's proposed Picnic service and it has abandoned its impartiality in order to force more pay television on Freeview. Allowing Sky to operate a pay service on this platform would be profoundly anti-competitive and would enhance Sky's already dominant position in the UK. This move would give Sky effective control over two delivery platforms - satellite and digital terrestrial - and would give it even more spending power to acquire more rights. Under no circumstances whatsoever should Sky be allowed to operate any form of pay service on the Freeview platform. Indeed, it is instructive to note that under Italy's robust regulatory system such a concentration of media power is prohibited and that should apply here too.

It is the completely subscription-free Freeview with its broad range of free-to-air channels that has been a significant driver in the switchover to digital television. Ofcom risks jeopardising that in its ideological quest to privatise Freeview. More pay channels means fewer and less varied channels and that will decrease the attraction of Freeview and reduce the desire to change over to digital. As the replacement for the completely free analogue television service, the Freeview platform should also be a predominantly free service. Ofcom is trying to fix something that isn't broken.

Furthermore, people who have already changed to Freeview will start seeing many of their favourite channels become encrypted pay channels if Ofcom gets its way (Sky would almost certainly try and convert a good many of the existing free channel to pay ones). That effectively means viewers will have been switched over to digital television under false pretences. That is likely to generate an outcry that will dwarf the controversy over the scam quiz channels which is itself another example of the failure of Ofcom to recognise the threat and to protect viewers.

In the event of the failure of Top Up TV, other new providers could be allowed to try to offer a pay television service on the Freeview platform subject to certain criteria:

1. That on the grounds of preserving competition that none of the existing large pay television operators, namely Sky, Virgin Media or British Telecom should be allowed to offer, or be involved in, that service;
2. That the existing range of free-to-air Freeview channels should be preserved and that no new pay television operator should be allowed to convert existing free-to-air channels to subscription ones.

### **Summary**

Ofcom should set up a robust mechanism for intervention and dispute resolution overseen by a competent regulatory authority and it should cease trying to micro-manage everything.

Ofcom should take due account of the problem of pay television piracy and the need to protect the property of sports rights' holders.

Ofcom should cease trying to turn Freeview into a predominantly pay television platform at viewers' expense and it should not allow Sky or any other major existing pay TV provider to run a pay TV service on the Freeview platform.

### **Final Comment**

I have been appalled by the inept way that Ofcom has conducted this consultation, by the way it has neglected the issue of piracy and by the way it wishes to effectively push the privatisation of Freeview to the benefit of Sky with all that entails.

I have therefore copied these comments to both the House of Commons Select Committee on Culture, Media and Sport and to the Office of the European Union Competition Commissioner. I have also sent them a copy of Ofcom's original consultation document, some of the annexes and copies of documents from independent sources in respect of pay television piracy issue.