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Ofcom consultation into premium pay-TV content

Ofcom recently published its second consultation document concerning its investigation into the way that Premier League football is distributed to consumers in the UK. Daniel Geey and Victoria Ross, in the competition and EU regulatory team at Field Fisher Waterhouse LLP, examine Ofcom's main concerns that Sky could have an interest in limiting the distribution of premium content, and that it could set its prices at a level as to make carrying the content uneconomical for its competitors.

In December 2007, Ofcom launched an investigation into the pay TV market in the UK. Ofcom had competition concerns about the way premium content is distributed by BSkyB (Sky). On 30 September 2008, it published its second consultation document. While it has stopped short of declaring Sky's dominant behaviour abusive, it is asking for comments on a proposed remedy based on its duty under the Communications Act 2003 to ensure 'fair and effective competition in the provision of licensed services'.

The consultation, whilst dealing with the effect on consumers, focuses on the supply of live Premier League (PL) football and first run Hollywood blockbuster movies. This article focuses on the concerns Ofcom has for the distribution of live PL matches. Ofcom is of the opinion that these products both form their own wholesale product market and that Sky, as the largest provider of these products, has a substantial degree of market power in both retail and the wholesale distribution of these two key products.

Market definition and auction competition

Ofcom has conceded that it continues to be difficult to precisely define the live premium football market. It considered whether the market should also include, for example, all matches featuring PL teams, the FA Cup, UEFA Champions League and UEFA Cup matches - including those on free-to-air (FTA) TV. However, in analysing the previous season's matches, Ofcom found that there were only 48 matches featuring a PL team on FTA TV, compared with 174 on premium sports channels. As such, they felt that this was one of the reasons why matches on FTA TV were not sufficiently substitutable and were likely to lie outside its relevant market definition[1]. Ofcom did, nonetheless, believe that the UEFA Champions League in particular, could fall within its market definition. However, even by extending the market definition in that way, Sky would still hold a high market share.

As an indication of how important live PL football is to subscribers, Ofcom found that 71% of subscribers considered it important in their decision to subscribe to a pay-TV channel. It also found that 75% of premium sports channel subscribers with an interest in sport considered it 'very important'.

Ofcom also commented that it appears unlikely that Sky will fail to win the majority of the PL rights in the near future. Sky had held a monopoly over the PL rights for 15 years before Setanta got a share in the last PL rights auction. This has allowed Sky to build an established subscriber base. This client base, coupled with the lateral nature of its integrated operations between its platform and retail businesses (because of economies of scale and efficiency gains), means that it has, and continues to, bid far greater sums for the rights than other providers.

Competition concerns

Ofcom's main concerns are that:

- Sky has an interest in limiting distribution of premium content, so marginalising other downstream broadcast retailers as would-be competitors, possibly as a result of a 'desire to limit the growth of potential competitors'[2]; and
- Sky could, in theory, set their wholesale prices at a level above the competitive framework making it uneconomical for other broadcast retailers to compete with Sky.

Ofcom considers that Sky's

limited distribution of such content reduces competition and adversely affects consumer choice, innovation and prices for premium content.

Ofcom does admit that assessing Sky's wholesale margin rates to conclusively ascertain whether they really are above a competitive level is extremely difficult. Virgin is currently the principle wholesale purchaser of Sky's premium content and commented in their confidential submissions to Ofcom that 'it is unprofitable for Virgin Media to sell premium channels to existing basic subscribers[3]'. Virgin remark that they only sell the premium package where it is absolutely necessary in order to retain a subscriber. This illustrates that Virgin's margins, given Sky's wholesale price, render it uneconomical for Virgin. Sky argue that this simply shows Sky to be more efficient than Virgin. However, there are obviously market failure issues if a company cannot make a profit because the wholesale price it is paying proves too costly. The consequence, according to Ofcom, is that 'Sky's content is not as widely available as it might be'[4].

Ofcom is of the opinion that, at present:

- the choice of platform unduly restricts consumers' ability to view premium content; and
- there needs to be greater options open to consumers including, for example, the ability to buy premium content on a one-off-basis, rather than solely being able to buy it as part of a larger packaged product. The choice of a wider raft of packages should be made available to the consumer.

The remedy that Ofcom considers appropriate is based on the supply-side premise of measures intended to free up premium content for new and existing platforms to use as drivers for their channels. Ofcom's outline remedy proposal is to require Sky to give access to the PL and blockbuster movies to other Pay-TV broadcast retailers on specific terms. This liberalisation of two premium market products will, according to Ofcom, have the benefit of highly valuable products being made available to a much wider range of retail providers. This will, in turn, afford customers much greater choice of broadcast retailer and will promote competition between broadcast retailers.

Ofcom's outline remedy proposal is to require Sky to give access to the PL

Impact

This should be good news for broadcast retailers who are in need of high quality premium content. Their contention over the last few years is that as they cannot afford to take on Sky at the auction level (and in the latest PL auction, Setanta as well), they are effectively excluded from any downstream retail competition for PL and blockbuster movies. Many have felt, as Setanta obviously did, that the only way to ensure high-quality content was to become a rights holder, like Sky, and then distribute the same product at wholesale to a number of pay-TV platforms.

Sky will feel aggrieved that it is being punished for - in their eyes - being a large, efficient integrated buyer, wholesaler and retailer of premium pay-TV programming. They would point to big companies with deep pockets complaining of Sky's intransigence to deal with them at a wholesale level. In effect, they want to benefit from the rights without taking any risk in acquiring them in the first place.

There is certainly an argument that Sky should be able to sell its wholesale products to whomever it wishes. From a competition law perspective, a dominant company can abuse its position in the market by refusing to supply a potential competitor, although Ofcom concluded that, while Sky may be dominant[5], Sky's refusal may not constitute abusive behaviour[6]. Ofcom is ultimately trying to remedy the apparent failure of free competition on the wholesale premium broadcasting market in the UK so that more companies have the opportunity to compete with Sky on price for the same product.

Such a mechanism to remedy Ofcom's concerns may be fine in principle, but will be extremely hard to put into practice. Ofcom admitted in its consultation that it was difficult to conclude whether the price charged by Sky to Virgin Media for the products was inflated. This consultation document marks the beginning of the process as to how Ofcom would set the prices and conditions on which Sky must make the products available. If, as seems likely, a must-offer remedy is constructed, an appeal to the Competition Appeal Tribunal by Sky seems likely. As Sky seem to be fire fighting on numerous UK regulatory fronts at present, this new issue can be added to the growing pile.

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1. http://www.ofcom.org.uk/consult/condocs/second_paytv/annex6.pdf
2. Ofcom Consultation 1.29 p8.
3. Ofcom Consultation 1.29 p8.
4. Ofcom Consultation 1.29 p8.
5. Ofcom Consultation 5.47 p103, 'a strong indication of it possessing a dominant position'.
6. Ofcom Consultation 1.45 p12.

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