

**ANTICIPATED JOINT VENTURE BETWEEN THE BBC THROUGH  
BBC WORLDWIDE LIMITED, CHANNEL 4 TELEVISION CORPORATION AND  
ITV PLC RELATING TO THE VIDEO ON DEMAND SECTOR**

**Statement of issues**

**8 August 2008**

**Background to the reference**

1. On 30 June 2008 the Office of Fair Trading referred the anticipated joint venture (the JV) between the BBC through BBC Worldwide Limited (BBCW), Channel 4 Television Corporation (Channel 4) and ITV plc (ITV) to the Competition Commission (CC) for investigation and report. The CC is required to decide:
  - (a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and, if so
  - (b) whether the creation of that situation may be expected to result in a substantial lessening of competition (SLC) within any market or markets in the UK.

**Jurisdiction**

2. The CC must decide whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation in that two or more enterprises will cease to be distinct within the meaning of section 23 of the Enterprise Act 2002 (the Act). It must also decide whether the turnover test or the share of supply test is satisfied. We will therefore explore, in particular, which assets and operations will be transferred to the JV and the terms under which that will happen. We need to understand this in order to conduct our investigation, in particular to establish whether there is jurisdiction and to understand the scope and effect of any relevant merger situation.

**Market definition**

3. In order to inform our assessment of the competitive effects of the transaction, we will explore as appropriate the definition of the economic market or markets affected (the relevant market(s)). We will focus on four possible markets: retail supply of Video on Demand (VoD) services, wholesale supply of VoD services, the acquisition of VoD content rights, and advertising. In (a) to (d) below we discuss the issues associated with these markets in no particular order. We will consider whether:
  - (a) the market for the retail supply of VoD services should be defined by:
    - (i) delivery channel (eg Internet; terrestrial broadcast, satellite or cable) or receiving device (eg television or set-top box; mobile telephone);
    - (ii) type of content (eg catch-up, archive; country of origin (eg UK or non-UK); channel of origin (eg BBC1, ITV1); genre (eg comedy, drama); nature of content (short form, long form, television or feature film);

- (iii) supplier business model (eg advertising-funded, subscription, pay per view);
- (iv) consumer business model (eg streaming, download-to-rent, download-to-own);
- (v) a combination of the above;

or whether the retail supply market should be defined more widely to include, for example, the supply of linear broadcast television, associated use of Personal Video Recorder (PVR) equipment, DVD rental or other;

(b) the market for the wholesale supply of VoD services should be defined by:

- (i) delivery channel (eg Internet; terrestrial broadcast, satellite or cable);
- (ii) type of content (eg catch-up, archive; country of origin (eg UK or non-UK); channel of origin (eg BBC1, ITV1); genre (eg comedy, drama); nature of content (short form, long form, television or feature film);
- (iii) customer business model (eg advertising-funded, subscription, pay per view);
- (iv) a combination of the above;

or whether the wholesale supply market should be defined more widely to include, for example, different categories of content rights (including, for example, linear television rights) or the direct licensing of VoD content rights from other content producers and rights owners;

(c) the market for the acquisition of VoD content rights from producers should be defined for VoD content rights only or whether it should be defined more widely to include content rights more generally (including, for example, linear television rights); and

(d) the market for advertising (either surrounding or embedded in the VoD content) should be defined as the market for online video advertising, an overall Internet display advertising market, or should be defined more widely to include, for example, television advertising.

4. We will focus our analysis on the UK, although we have not ruled out the possibility that the relevant geographic market(s) is/are wider than the UK.

## **Assessment of the competitive effects of the merger**

### ***The counterfactual***

5. We will compare the expected effects of the creation of the JV within each of the relevant markets with the situation that would have been likely to have occurred in the absence of the JV (the counterfactual). In particular, we will consider whether, in the absence of this JV, each party would have been likely to have provided an independent VoD service and, if so, what form such a service might have taken. Our understanding of the counterfactual will be informed by our understanding of the nature of the JV.

## ***'Theories of harm'***

6. Theories of harm are used to help focus the analysis of the possible effects of the transaction. The identification of such theories of harm should not be taken to imply that the CC has reached any conclusions, however preliminary. Based on initial evidence received, we have provisionally identified three principal ways in which the creation of the JV might result in an SLC. All of these depend on the parties' ability to exploit market power over the VoD content that they control:
- (a) Loss of competition in the supply of VoD content rights at the wholesale level. If there are few effective substitutes for the parties' VoD content, and the parties competed absent the JV, the JV might offer worse terms (eg price, quality, innovation) for the wholesale supply of content rights to VoD retailers. This would be likely to result in viewers paying higher prices and/or receiving lower quality or less innovative offerings than would otherwise be the case.
  - (b) Loss of competition in the supply of VoD content at the retail level. As a result of the JV, the parties may have less incentive to compete with one another on the terms of their online offerings, resulting in viewers paying higher prices and/or receiving lower quality or less innovative offerings than would otherwise be the case.
  - (c) Loss of competition at the retail level through partial or total foreclosure at the wholesale level. The JV may give the parties the ability and incentive to offer worse terms for VoD content rights or cease to supply them altogether to one or more rival retailers, resulting in viewers paying higher prices and/or receiving lower quality or less innovative offerings than would otherwise be the case.

These theories of harm are not necessarily independent of one another. We may also develop further theories of harm as our analysis progresses.

## ***Related competition issues***

7. In order to test these theories of harm, we will explore, in particular, substitutability between each of the parties' VoD content and between the totality of the parties' VoD content and other competitors. We will consider, in any of the relevant markets:
- (a) whether, and if so to what extent, the BBC, ITV and Channel 4 have competed with each other historically, currently compete, or are likely to compete in the future;
  - (b) whether, and if so to what extent, the BBC, ITV and Channel 4 have historically faced, currently face or are likely to face actual and/or potential competition from:
    - (i) other broadcasters and/or retailers (eg Five, Virgin Media, BSkyB, BT Vision, TopUp TV, Orange or Tiscali);
    - (ii) device manufacturers (eg Apple/iTunes, Microsoft, Sony);
    - (iii) the use of PVR equipment;
    - (iv) DVD/film rental (eg Lovefilm/Amazon, Blockbuster);
    - (v) global players (eg Google, Yahoo); and/or
    - (vi) other players or possible entrants (eg Joost, Babelgum, Hulu);

- (c) the effects of competition in terms of, for example:
    - (i) price (eg pay per view, subscription, advertising);
    - (ii) range of content being offered by different VoD suppliers;
    - (iii) quality of services being provided; and/or
    - (iv) levels of innovation;
  - (d) whether there are any significant barriers restricting the ability of customers (whether viewers or advertisers) to switch between offerings on a particular platform (eg between websites) or between platforms (eg television and Internet), and the likely effect of the creation of the JV upon any such factors;
  - (e) whether, and if so to what extent, the creation of the JV affects the parties' strategies in, and terms under which they acquire, content rights;
  - (f) whether, and if so to what extent, the creation of the JV affects the incentives of the parties to provide advertising-funded content, and the terms under which such advertising is provided;
  - (g) whether the creation of the JV might create or increase the likelihood of coordination between the JV partners, either in any of the relevant markets or in other areas;
  - (h) whether the creation of the JV might affect the ability and/or incentives of the JV partners to foreclose the supply of VoD content rights; and
  - (i) whether there are significant barriers to entry or expansion. In particular, we would like to understand:
    - (i) the recent experiences of entry into the market for VoD services both within and outside the UK by different types of provider (eg other retailers, device manufacturers, global players and so on);
    - (ii) the relevance of ownership of, or access to, VoD content rights at the wholesale level to ease of entry at the retail level, including rights to VoD content that has previously been broadcast on linear television and VoD content of UK origin; and
    - (iii) the likelihood of future entry into any of the relevant markets, and the identity of the most credible entrants.
8. More generally, we will take account of whether there are identifiable trends in the market that have had, or are likely to have, a significant effect on competition in any relevant market in the short to medium term. These might include, for example:
- (a) the evolution of consumers' preferences and tastes and the variation in these by demographic group;
  - (b) the effects of new technologies (eg the convergence of different technologies such as television, Internet, telephony); and/or
  - (c) any major regulatory changes.

9. We will also consider the impact of the ability to download material illegally (eg through peer-to-peer file sharing websites) on our competitive assessment.
10. We will explore whether any factors might offset any of the consequences of the JV, in particular whether any potential lessening of competition in any of the relevant markets might be offset by efficiency gains (see paragraph 13).

### ***Substantial lessening of competition***

11. The CC will consider whether, taking account of all the above, the JV may be expected to result, in an SLC in any relevant market.

### **Possible remedies**

12. Should we conclude that the JV may be expected to result in an SLC, we will consider whether remedies are appropriate and what remedies would effectively address the SLC.
13. In any consideration of possible remedies, we will consider whether any relevant customer benefits may be expected to arise as a result of the JV, the nature of any such benefits and those customers most likely to receive those benefits. Customer benefits may occur at any point in the supply chain and are not limited to benefits to final consumers.