

**REFERENCE RELATING TO THE ANTICIPATED JOINT VENTURE BETWEEN
BBC WORLDWIDE LIMITED, CHANNEL FOUR TELEVISION CORPORATION
AND ITV PLC**

**Notice of possible remedies issued under Rule 11 of the
Competition Commission Rules of Procedure**

Introduction

1. On 30 June 2008 the OFT referred the anticipated joint venture (JV) between the British Broadcasting Corporation (the BBC) through BBC Worldwide Limited (BBCW), Channel Four Television Corporation (C4C) and ITV plc (ITV) relating to the video on demand (VOD) sector to the Competition Commission (CC) for investigation and report. The reference was made under section 33(1) of the Enterprise Act 2002 (the Act).
2. In exercise of its duty under section 36 of the Act the CC is required to decide whether arrangements in progress or contemplation will result in the creation of a relevant merger situation such that:
 - (a) two or more enterprises cease to be distinct; and
 - (b) either the turnover test or the share of supply test is satisfied.
3. If the CC decides that a relevant merger situation will be created it must decide 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 for goods or services.
4. In its provisional findings on the reference notified to the main parties on 3 December 2008, the CC Inquiry Group (the Group) concluded that the proposed arrangements, if carried into effect, would result in the creation of a relevant merger situation. It decided that the creation of that situation may be expected to result in an SLC in the supply of UK VOD content at the wholesale and the retail levels.
5. This Notice:
 - (a) sets out the actions that the Group considers might be taken by the CC, including any recommendations it might make for action on the part of others, for the purpose of remedying the SLC and any resulting adverse effects identified in the provisional findings; and
 - (b) invites comments on possible remedies (see note (i)).

Criteria

6. In choosing appropriate remedial action, the CC will have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it. When deciding on an appropriate remedy, the Group will consider the effectiveness of different possible remedies and their associated costs and will have regard to the principle of proportionality. Between two remedies which the Group considers equally effective, it will choose that which imposes the least cost or restriction.

Possible remedies on which views are sought

7. We note that the terms of the proposed JV have developed over time, including during the course of our inquiry, and it is possible that they may continue to develop in the future, for example, in response to changing market conditions. The possible remedies set out below relate to the anticipated JV as it is currently envisaged.
8. The Group invites views on whether any or all of the remedies that it is considering would be effective in addressing the SLC that it has provisionally identified and whether there are further remedy options that it should consider. Remedy options being considered by the Group are:

Prohibition of the JV

- (a) The CC's guidance¹ states that our starting point will be to choose the remedial action that will restore the competition that has been, or is expected to be, lessened as a result of a merger situation. Our guidance also states that remedies that aim to restore all or part of the market structure prior to a merger are likely to be a direct way of addressing the adverse effects. In an anticipated merger, this can often be achieved by prohibition of the merger in question.
- (b) In the circumstances of an anticipated JV such as this, any prohibition would necessarily be of the transaction as described. It would of course remain open for the parties to enter into other arrangements which did not give rise to the SLC. The Group therefore seeks views on whether prohibition is an appropriate remedy in the circumstances and, if so, whether it should be accompanied by any other conditions.

Access remedies alone

- (c) The Group is considering a remedy which would leave the proposed JV arrangements in place but would require UKVOD and/or the parties to offer access to VOD content to third parties (including retailers of VOD services) on, for example, a fair, reasonable and non-discriminatory basis. The Group would need to consider carefully what terms would be necessary for any such access remedy to be effective, given the different business models of potential customers and the types of editorial control which might be required by the parties. The Group particularly invites views on how any such remedy could be monitored and enforced.

Material modification to the terms of the JV

- (d) The Group is considering whether the SLC and effects arising could be addressed by a material modification to the terms of the JV as envisaged. This might, for example, be by adjusting the scope of activities of the JV or the terms of exclusivity between the JV and its parents. Examples of such adjustments might be:
 - (i) limitations on the JV's ability to retail ITV and C4C catch-up content. The JV could, for example, be limited to providing links to itv.com and Channel4.com, as is proposed in the case of the BBC iPlayer.

¹Merger references: CC Guidelines, CC2, paragraph 4.23.

(ii) limitations on the JV's ability to wholesale the parties' catch-up content. Where UKVOD is wholesaling the whole or a significant representative sample of the parties' VOD content, it could be prevented from including the parties' catch-up content in such wholesale deals.

(iii) limitations on the JV's ability to wholesale both catch-up and archive content from the parties, leaving the parties to wholesale their own content entirely.

Views are invited as to whether a remedy or package of remedies of this type could be developed which would be effective in addressing the SLC and, if so, what other conditions would be necessary. It might, for example, be considered necessary in some or all of the above cases to combine such a remedy with access remedies. The Group would also need to consider carefully how any such package of remedies could be monitored and enforced.

Other types of remedy

(e) The Group will consider whether any other remedy could address the SLC which it has provisionally identified. One third party suggested that all VOD rights to content originating from independent producers (including returning series) should revert to the producer after an initial catch-up window of, for example, seven days rather than these rights remaining with the broadcaster. This would separate VOD rights, other than catch-up, from the primary commission. The Group would need to consider carefully whether this or any other remedy suggested would address the SLC and/or the adverse effects.

9. The Group has not, at this stage, identified other possible remedies for discussion. However, the Group remains willing to consider any other remedies that UKVOD or other persons would like to propose which they consider would remedy the SLC identified and/or the adverse effects.

Relevant customer benefits

10. The Group will also have regard to the effects of any remedial action on any relevant customer benefits within the meaning of section 30 of the Act arising from the merger situation. Such benefits might comprise lower prices, higher quality or greater choice of goods or services or greater innovation in relation to such goods and services. The Group welcomes views on the nature, scale and likelihood of such benefits.

Next steps

11. The main parties, UKVOD and other interested parties are requested to provide any views in writing, including any alternative remedies they wish the Group to consider, by 16 December 2008 (see note (i)).

12. A copy of this notice will be posted on the CC website.

(signed) PETER FREEMAN
Chairman, Competition Commission
3 December 2008

Notes

- (i) This Notice of possible actions to remedy the SLC and any resulting adverse effects is given having regard to the Group's provisional findings notified to UKVOD on 03 December 2008. The main parties, UKVOD and other interested parties have until 24 December 2008 to respond to those provisional findings. In the light of any responses by those parties, the Group's findings may alter, in which case the Group may consider other possible remedies, if appropriate.