



Comments regarding the Remedies proposed by the Competition Commission following its Investigation into the Competitive Impact of the Proposed Joint Venture between BBC Worldwide Limited, Channel Four Television Corporation and ITV plc

The Competition Commission (“CC”) has invited comments from interested parties regarding the remedies proposed by the CC following its investigation into the joint venture between BBC Worldwide Limited (“BBCW”), Channel Four Television Corporation (“C4C”) and ITV plc (“ITV”), known as Project Kangaroo (the “Joint Venture”). BBCW, C4C and ITV are referred to collectively as the “Parties”.

The following represent comments from Joost UK Limited and its affiliates (collectively “Joost”).

The three remedies proposed by the CC are considered in Paragraph 1 of this submission, and alternative remedies are considered in Paragraph 2.

1. Proposed Remedies

1.1 Prohibition of the Joint Venture

The CC has concluded (quite correctly, in Joost’s opinion) that the Joint Venture will result in a substantial lessening of competition with respect to both the retail and wholesale offering of UK video on demand (“VOD”) content in the UK¹.

Joost would urge the CC to consider seriously the possibility of prohibiting the Joint Venture on the basis that the parties can compete effectively, at both the retail and wholesale level, without any form of merger being required. To allow the Joint Venture to proceed would likely have a detrimental effect on consumers and other participants in the market, with no tangible benefit to anyone other than the Parties.

(a) Retail Market

With respect to the retail market, in the absence of the Joint Venture, Joost believes that the Parties would have sufficient incentive to exploit their own content through their own VOD services, and would each be able to build a successful business as a result.

While the convenience of having a single destination for popular UK-produced VOD content might be considered of benefit to consumers, this benefit is limited due to the ease with which consumers can switch between services online. More importantly, any such benefit is significantly outweighed by effects of the loss of competition between entities which would otherwise be each other’s strongest competitors, as identified by the CC².

¹ Provisional Findings Report, paragraph 4.133

² Provisional Findings Report, paragraphs 4.128 - 4.133

The Parties have stated as the rationale for the Joint Venture the need “to create a customer proposition that could compete in the VOD market against powerful competitors who [are] able to leverage significant existing assets that the broadcasters [do] not possess”³. Joost understands that the Parties are referring to competitors such as Apple (who could leverage their iPod player) and Microsoft (who could leverage their games consoles).

In Joost’s view, this rationale is misguided. The success of a VOD offering will depend primarily on the quality of the content, not the device through which that content is accessed. This is particularly true in the case of free streaming, which the Parties anticipate to constitute over 90% of the Joint Venture’s views⁴. In order to leverage their hardware assets in free streaming VOD, Apple or Microsoft would not only have to build a VOD offering that can be accessed only by users of their hardware, but would also have to make this offering so compelling that consumers would be prepared to purchase an additional device specifically to access that content (access to VOD content generally being a secondary or ancillary feature of devices such as games consoles, in any event).

As the CC has concluded, any compelling offering in the UK would need to feature content from at least two of the three Parties⁵, and in order to convince users to buy a specific device in order to access that offering, the content would need to be made available exclusively. The Parties could therefore limit the opportunities for Apple or Microsoft in the VOD market simply by not providing any exclusive content – it is not necessary to distort the competitive landscape by creating the Joint Venture.

The Parties argue that “none of them had the scale and scope individually to guarantee long term success”⁶. Joost disagrees strongly with this assertion. The Parties have the strongest media brands in the UK, and will each be able to develop a highly compelling VOD offering without the need to eliminate competition between them. This is clearly demonstrated by the success of the iPlayer, which has risen to become one of the most popular internet video destinations in the country, and according to Google, the fastest rising search term in the UK during 2008⁷ – all on the back of BBC content alone.

It is the strength of the Parties’ brands that is important in this context – also in distinguishing the analogy that the Parties have drawn with the music industry. The Parties argue that the Joint Venture is necessary in order to ensure that they “maintain control of the content, in order to avoid the ‘disintermediation’ faced by music companies”⁸. Unlike record companies, the Parties’ product is closely associated with their brands making it possible for each of the Parties to create a branded retail offering that will be meaningful to consumers. A consumer will automatically associate *Skins* with Channel 4, *Doctor Who* with the BBC, and

³ Provisional Findings Report, paragraph 3.18

⁴ Provisional Findings Report, paragraph 4.131

⁵ Provisional Findings Report, paragraph 4.91, 4.92

⁶ Provisional Findings Report, paragraph 3.21

⁷ <http://news.bbc.co.uk/1/hi/technology/7775344.stm>; <http://www.google.com/intl/en/press/zeitgeist2008/world.html>; <http://www.brandrepublic.com/News/868723/BBC-iPlayer-tops-Google-search-terms/>;

⁸ Provisional Findings Report, paragraph 3.18

Coronation Street with ITV, but the same cannot be said of music content. A consumer who wants to buy the new Guns N' Roses album would not immediately think to go to the Universal Music Group or Geffen website to find it. This makes it very difficult for record companies to build their own on-demand retail offering, but creates a clear opportunity for the Parties.

On the issue of retaining control, as the CC has determined, it will be difficult for any independent third party to build a compelling UK VOD offering without access to content from at least two of the Parties. Unlike record companies which failed to embrace online distribution sufficiently early, thereby allowing companies like Apple to take advantage of the opportunity, the Parties have identified the potential of online VOD and are able to enter a market that is still in its early stages of development, and to bring with it the content that is in the highest demand amongst UK consumers. The Parties (individually) therefore retain complete control over their content, and would continue to do so if they operated individual VOD services, rather than a combined service through the Joint Venture.

The Parties will no doubt point to the fact that their individual VOD services have only enjoyed limited success in the past as evidence of the need to create the Joint Venture. Joost would argue that the Parties have had little incentive to invest in their individual services over the past 12 months due to their stated commitment to the Joint Venture – in particular, their intention for the Joint Venture to be “the primary route to market for the Parties’ archive content”⁹. Had all of the Parties invested in and promoted their own catch up and/or archive services in the way the BBC has invested in and promoted iPlayer, and the way independent services such as Joost have invested in their businesses, they would doubtless have enjoyed greater success.

With the BBC now considering offering its iPlayer technology to ITV and C4C¹⁰, the opportunity for ITV and C4C to build a compelling, cost effective VOD offering outside of the Joint Venture would seem to be greater than ever.

(b) *Wholesale Market*

With respect to the wholesale market, it is difficult to find any justification for allowing the Parties to combine their syndication activities.

At present, potential licensees can approach each of the Parties individually in order to build a VOD offering, but if these businesses are combined the third party distributor would have no alternative source for popular UK-produced content. A potential licensee would be unable to take advantage of the competition between the Parties, either in negotiating prices, or in positioning itself as an alternative distribution platform to enable one party to secure a strategic advantage over its rivals (a strategy that Joost has employed successfully in other markets).

The CC’s own findings reveal that it is “unlikely that [the Joint Venture] would have an incentive to enter into future syndication deals, particularly to open VOD

⁹ Provisional Findings Report, paragraph 3.57

¹⁰ <http://www.guardian.co.uk/media/2008/dec/09/bbc-iplayer-channel-4-itv>

services, which might undermine its own retail operation”¹¹. Joost has been unsuccessful to date in licensing content from any of the Parties, and once competition between the Parties is removed, this situation will likely be worse.

The Parties will no doubt argue that independent producers retain plenty of secondary rights and therefore provide an alternative source of content. However, as the CC has noted¹², this is of limited benefit as it would only apply to content for which the holdback period under the relevant Terms of Trade has expired, would not cover any content produced by the Parties’ in-house teams, or content produced before the Terms of Trade came into effect, and would not permit any form of exclusivity to be negotiated. According to the CC’s own findings, the number of hours of suitable content available from sources other than the Parties is less than one tenth of that controlled by the Parties¹³, and Hulu (which operates an extremely successful VOD platform in the US) confirmed to the CC that “the content available from [the independent sector] was insufficient in total to represent the critical mass needed to launch a successful online offering in the UK”¹⁴.

There are advantages to the Parties, of course, in combining their syndication businesses. As well as the ability to control prices and foreclose against competitors, the Parties can also achieve synergies and make associated cost savings. Joost feels it unlikely that any such savings would be reflected in the prices charged to licensees, and in any event, any potential benefits are significantly outweighed by the loss of competition.

In the absence of any clear benefit to anyone other than the Parties, Joost believes that the Parties’ syndication businesses must remain distinct.

1.2 Access Remedies Alone

As discussed above, Joost does not believe that there is any justification for allowing the Parties to combine their wholesale businesses. To do so, would have a detrimental effect on the nascent online VOD market in the UK, with no consumer benefit whatsoever – in fact, quite the contrary.

If the CC is minded to permit this, then a requirement on the Joint Venture to license content on fair, reasonable and non-discriminatory terms should be an absolute minimum requirement (see also paragraph 2.2 of this submission in this context).

The CC should bear in mind the following:

- (i) What constitutes “fair, reasonable and non-discriminatory” is very subjective, and it is unclear to Joost who would be responsible for making this determination in the event of a complaint, or how any such complaint would be dealt with. If the CC is minded to adopt this approach, its decision must set out a very clear mechanism for the swift handling of complaints, identifying who would hear any referral from a licensee, and the anticipated timescale for the hearing of a complaint, which should

¹¹ Provisional Findings Report, paragraph 4.121

¹² Provisional Findings Report, paragraph 4.94

¹³ Provisional Findings Report, paragraph 4.57

¹⁴ Provisional Findings Report, paragraph 4.100

be no more than [28] days. In a nascent market, huge advantages can be gained or lost by having access to particular content for a relatively short period of time. If the Joint Venture is able to withhold access to content knowing that a determination on its terms will take several months to obtain, the Joint Venture will be able to secure a significant advantage over other platforms.

- (ii) Arrangements already exist which are designed to ensure that the BBC's public service content is syndicated on fair, reasonable and non-discriminatory terms¹⁵. While this seems reasonable in theory, the practice is very different. Despite the existence of these guidelines, and many approaches from Joost over the last two years, Joost has yet to secure any content from the BBC. It is difficult to see how a commercial entity such as the Joint Venture would behave any differently, particularly when, unlike the BBC, it has its own commercial interests to consider.
- (iii) In addition, the guidelines referred to in (ii) contain so much subjectivity and discretion on the part of the BBC that they are effectively worthless. Any similar requirements from the CC regarding "fair, reasonable and non-discriminatory" terms must leave as little room for interpretation as possible (as well as providing for swift and effective enforcement, as mentioned in (i)).

1.3 Material Modifications to the Joint Venture

As discussed above, Joost does not believe that there are sufficient (or any) grounds to justify the Joint Venture in the light of the substantial lessening of competition identified by the CC.

If, however, the CC is minded to permit the Joint Venture, Joost believes that this should only be permitted with the following modifications:

(i) *Syndication Businesses to Remain Distinct*

As discussed above, there is no justification for the Parties' combining their wholesale syndication businesses, and in Joost's view, this aspect of the Joint Venture should be prohibited.

(ii) *No Catch Up Content*

At present, the Parties have suggested that ITV.com and channel4.com will continue as the catch up services for ITV and C4C respectively. However, the Parties also intend for the Joint Venture to feature catch up content, acknowledging that this will be the "driver for viewers consuming archive"¹⁶.

It is difficult to see how or why the Parties would invest in two separate catch up services, and given that the Joint Venture is intended to be the primary route to market for archive content and a "one-stop shop"¹⁷ for UK VOD consumers, one has to assume that catch up will feature heavily in the Joint Venture's service.

¹⁵ <http://www.bbc.co.uk/info/policies/syndication.shtml>

¹⁶ Provisional Findings Report, paragraph 3.20

¹⁷ Provisional Findings Report - Summary, paragraph 13

Catch up rights are closely associated with primary broadcast rights and are therefore not widely available to independent VOD services. To ensure a more level playing field, Joost believes that the Parties should be required to maintain their catch up services separately and independently of the Joint Venture, and allow the Joint Venture to compete on the basis of its archive content only.

(iii) *Restrictions on Cross Promotion*

The Parties have identified the ability to cross promote the Joint Venture as an important factor in the creation of the Joint Venture¹⁸. As Joost has pointed out in previous submissions, the Parties are in a unique position - the Parties' main terrestrial channels have a combined audience share of around 50% in the UK¹⁹ (more when their digital channels are taken into account), with gifted spectrum on DTT, and privileged access to analogue terrestrial spectrum with universal reach. To allow the Parties to use these services to promote the Joint Venture would, in Joost's view, be an abuse of this privileged position, and will potentially have the single greatest effect on third parties' ability to compete effectively with the Joint Venture - even if all VOD services had equal access to the same content, that fact that the Joint Venture is able to cross-promote its service extensively on the Parties' channels and websites would give the Joint Venture a significant and unfair advantage.

If the Parties wish to promote the Joint Venture on their linear television channels, radio services or websites, Joost believes that they should be required to do so through paid advertising, on an arm's length basis, and at normal commercial rates. A similar approach should be taken with respect to any cross promotion of iPlayer, ITV.com and channel4.com from the Joint Venture website – any cross promotion should be through banner (or similar) advertising, with the Parties paying normal commercial rates for this inventory.

In this regard, Joost notes that the CC appears to agree with the Parties' view that "the availability of powerful search engines [means] that it [is] relatively easy to attract users". Joost would point out that the value of search engines as a tool for user acquisition depends to a great extent on how the search results are ranked by the search engine. For the Parties, having established brands and being the source of well known content, a high page ranking can be achieved easily. For others, this is considerably more difficult (and expensive) to achieve.

Joost also notes that the CC appears to agree with the Parties' view that "promotion [is] available to any new entrant that [is] prepared to place advertisements". This is true, and further underlines Joost's view that the Parties should not be entitled to free cross-promotion on linear TV – the playing field should be level for all participants.

(iv) *No exclusivity*

¹⁸ Provisional Findings Report, paragraph 3.24

¹⁹

[http://www.barb.co.uk/report/monthlyViewingSummaryOverview?period\[\]=20081001&period\[\]=20080901&period\[\]=20080801&period\[\]=20080701&period\[\]=20080601&period\[\]=20080501&period\[\]=20080401&period\[\]=20080301&period\[\]=20080201&period\[\]=20080101&button_submit=View+Figures](http://www.barb.co.uk/report/monthlyViewingSummaryOverview?period[]=20081001&period[]=20080901&period[]=20080801&period[]=20080701&period[]=20080601&period[]=20080501&period[]=20080401&period[]=20080301&period[]=20080201&period[]=20080101&button_submit=View+Figures)

At present, the Joint Venture contemplates that the Parties' content will be made available to the Joint Venture to the exclusion of other open VOD platforms for a period of 12 months, and Joost further understands that, under the Short Form Agreement that currently governs the Joint Venture, the Parties have agreed non-compete restrictions²⁰ presumably preventing the Parties from competing with the Joint Venture (although it is unclear to Joost whether this would include licensing content to third parties in competition with the Joint Venture).

Joost firmly believes that this exclusivity is unnecessary. The fact that the Joint Venture can launch with more UK origin content than anyone else will ensure the success of the Joint Venture, without the need to prevent third party services from trying to compete for a full year.

Joost would view the above variations as a poor substitute for an outright prohibition, but necessary if the CC is minded to allow the Joint Venture to proceed.

2. Alternative Mechanisms

Joost would invite the CC to consider the following as possible alternative remedies:

2.1 Reduce the Number of Parties

The CC might consider permitting the Joint Venture to go ahead on the proposed terms, or on modified terms, on the condition that one party ceases to be involved, i.e. UK VOD LLP would become a partnership between two of the existing three partners.

The resulting Joint Venture would still retain access to sufficient high quality content to build a successful business, but there would be a clear incentive for the third (former) partner to build a separate offering in competition with the Joint Venture, which it could either do alone or in partnership with another broadcaster or other third party. This would ensure continued competition between the major broadcasters in the VOD market, with consequent benefits for consumers and third party licensees of the Parties' content.

It is also likely that a two-way joint venture would operate more efficiently than a three-way joint venture, with consequent benefits for the partners.

A two-way joint venture on the terms currently proposed would still, in Joost's opinion, represent a substantial lessening of competition in the relevant markets, but the existence of an alternative source of popular UK VOD content might represent some competitive constraint on the Joint Venture's activities. A two-way joint venture incorporating the modifications at paragraph 1.3 might represent a reasonable alternative to outright prohibition.

2.2 Compulsory Licensing on Pre-Agreed Terms

Joost remains of the firm opinion that a combination of the Parties' wholesale syndication business cannot be justified under any circumstances. However, if the CC is minded to permit this, then it might consider some form of compulsory licensing of the Parties' content on pre-defined terms. This would ensure that everyone has access to content on "fair,

²⁰ Provisional Findings Report, paragraph 3.13

reasonable and non-discriminatory terms” without the need for individual determination on a case by case basis. This should be considered for BBCW content in particular, as this is content produced using public funds and should therefore be made freely available to UK licence fee payers through as many different outlets as possible.

Given that the Parties and the Joint Venture would be vertically integrated, these terms should apply to their internal licensing arrangements as well as any licensing to third parties.

It might be instructive for the CC to consider the licensing schemes operated by the MCPS-PRS Alliance with respect to music rights, and in particular, the so-called Joint Online Licence (“JOL”)²¹. Whenever music is made available via online or mobile music services, the operator of the service enters into a JOL with the MCPS-PRS Alliance, which grants the service provider the necessary rights in the musical works, and provides for royalty payments at a pre-determined rate. Although the JOL took some time to be accepted and required a determination by the Copyright Tribunal, it is now reasonably well established and provides consistency and transparency for all stakeholders.

An alternative analogy might be the Terms of Trade agreed between PACT and commissioning broadcasters. Although not as proscriptive as the JOL, they do provide a clear framework for negotiating distribution rights.

Agreeing the terms of any licensing scheme will be difficult, but once agreed would provide a clear benefit to the public in ensuring wide distribution and availability of content (particularly content that is produced using public funds), and would provide adequate limits on the ability of the Parties to control prices in the wholesale syndication market.

Joost trusts that the CC will take its views into account when considering the remedies, and remains available to discuss matters further should the CC so require.

²¹ <http://www.mcps-prs-alliance.co.uk/playingbroadcastingonline/online/MusicServices/JOL/Pages/JOL.aspx>