Pay TV second consultation. Access to premium content – Standards for intervention and analysis of the anticompetitive effects of the remedies proposed

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I am grateful for having been given this opportunity to express my views. I do not intend to undertake a comprehensive analysis of all the points raised by Ofcom in its second consultation document. I will on the contrary focus on the aspects I find particularly problematic and controversial and that deserve, in my opinion, further reflection by the regulator. First of all, I am concerned about the standards for intervention set in the document. Even though Ofcom relies explicitly on competition law methodology, it also departs from it in a number of ways. This results in the application of a form of "Ofcom-specific" competition law, which lacks any theoretical basis. Ofcom develops in its consultation document untested or discredited theories of consumer harm that would never uphold scrutiny by a competition authority. Secondly, I am most surprised that the consultation document does not even examine the anticompetitive effects of its own intervention. Even if it is accepted that the *statu quo* may be the source of anticompetitive behaviour by BSkyB, Ofcom's proposal to socialise BSkyB's premium television channels is very intrusive. When regulatory intervention alters the shape of a market in such a way, negative effects on innovation and on competition can be expected. In particular, the proposed remedies may lead to collusion and may rigidify downstream broadband markets. These obvious risks cannot be ignored by a regulatory authority. Therefore, Ofcom should at least have weighed the expected benefits of the "must-offer" remedy against the anticompetitive effects its intervention is likely to produce.

1. The consultation document does not examine whether BSkyB's hypothetical behaviour would lead to the foreclosure of downstream markets

I welcome that Ofcom explicitly relies on competition law methodology to assess whether an intervention in the market is necessary. Ofcom engages, as a competition authority, in a market definition exercise. Market definition is an inexact science and I

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will therefore not go into the definition of upstream markets, which appears in any case to be in line with recent practice of competition authorities.[1] I welcome in particular that you follow an "ability-incentive" framework of analysis that is commonplace in vertical mergers.[2] As I will show below, however, the reliance on competition law principles is incomplete in several ways. In general, the remedies proposed by Ofcom would not be justified under competition law, considering there is no evidence that a refusal by BSkyB to supply its premium television channels to its downstream competitors would lead to the foreclosure of downstream markets. In this regard, it is interesting to compare Ofcom's assessment in the present consultation and the assessment of the OFT in the *BSkyB/easynet* merger,[3] in which similar issues were debated.

1.1. Ofcom should not ignore decades of competition law analysis

Competition law has evolved enormously in recent decades. As a consequence of this evolution, competition authorities are now very careful to protect competition in such a way that the welfare of consumers, and not the welfare of competitors, is protected and promoted.[4] The consultation document is not in line with this focus: the fact that BSkyB's competitors are disadvantaged in the downstream market is considered sufficient to impose remedies; put shortly, it seeks to achieve a level playing field without examining at first whether a "non-level playing field" would have led to higher prices for consumers.

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[1] I think in particular of recent "merger to monopoly" cases in the pay television segment, an example of which is Avis n° 06-A-13 du 13 juillet 2006 relatif à l'acquisition des sociétés TPS et CanalSatellite par Vivendi Universal et Groupe Canal Plus.

[2] See in particular the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ (2008) C 265/6.

[3] Decision of the OFT of 30 December 2005, *BSkyB/easynet*.

[4] The European Commission has been extremely careful to clarify this point in the most recent documents. In the Discussion Paper on Article 82 EC: "54. The essential objective of Article 82 when analysing exclusionary conduct is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. The concern is to prevent exclusionary conduct of the dominant firm which is likely to limit the remaining competitive constraints on the dominant company, including entry of newcomers, so as to avoid that consumers are harmed. This means that it is competition, and not competitors as such, that is to be protected [...]". See also the Guidelines on the application of Article 81(3) of the Treaty, OJ (2004) C 101/97: "13. The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers".

Before I enumerate the ways in which the consultation document departs from competition law, let me concede that Ofcom's proposed intervention stems from its regulatory remit and is not formally required to follow competition law principles.[5] This does not mean however that such an outcome is desirable, even when it remains possible. I have followed the pay TV market investigation and I understand that Ofcom was invited by some of BSkyB's competitors to submit a market reference to the Competition Commission. Had this market reference been submitted, the Competition Commission would have examined the behaviour in accordance with competition law principles.[6] In that case, competition in electronic communications markets would have been protected in a way that conforms to the current standards under competition law, i.e. the Competition Commission would have been careful not to protect competitors but to protect competition. I cannot think of a valid reason why the same standards should not apply when Ofcom follows a different procedural path, as *in casu*. In page 180 of the consultation document Ofcom considers that even when BSkyB's behaviour would not have been abusive under competition law, regulatory intervention would still be necessary because a "negative impact on competition and consumers" has been identified.[7] This line of reasoning is as illogical as dangerous. If there is no anticompetitive behaviour under competition law, then there is *a fortiori* no negative impact on competition and consumers. If a market reference before the Competition Commission would not have resulted in the imposition of remedies on BSkyB, then Ofcom's intervention under its duties should lead exactly to the same result. It is unsurprising in this regard that the EU Regulatory Framework for electronic communications on which the Communications Act 2003 is based explicitly on competition law principles and does not depart from them.

[5] I understand that Ofcom is able to choose between submitting a market reference to the Competition Commission, using its powers under the Competition Act of 1998 and making use of its regulatory powers under the Communications Act of 2003.

[6] The Competition Commission's Guidelines on market issued in 2003 appear to me based on standard competition law principles, even though the instrument as such is an original one. What is more, I have followed some of the Competition Commission's most recent proceedings and they appear to be based on genuine concerns under competition law. The originality of market references comes from the fact that they enable the Competition Commission to tackle the exploitation of market power, not from the fact that it departs from standard competition law analysis.

[7] "**We would still see a competition problem even absent a finding of anticompetitive behaviour.** One of the potential reasons we identified for Sky's lack of incentive to supply was possible differences in efficiency between Sky and other retailers. If that were the case, an abuse might well not have taken place, but the negative impact on competition and consumers that we have identified would still exist. If we were to rely on our powers under CA98, we would not be able to address this competition problem absent an actual finding of anticompetitive behaviour".

Ofcom's approach is also dangerous. Ofcom is a young authority that cannot afford to ignore decades of developments in the field of competition law. In the abovementioned passage, Ofcom goes as far as to claim its right to protect competition and promote the welfare of consumers as it sees fit, and this in overt contradiction with competition law principles. In essence, Ofcom engages in "cherry-picking" of competition law and economic principles. Ofcom relies on competition law tools when they conform to the preconceived remedy and departs from it when they do not. I have no doubt that this is unacceptable not only from a competition law perspective but also, and most importantly, from the perspective of accountability and legal certainty. It is particularly striking for a competition lawyer to read in the consultation document that it may be bad for competition (i.e. for competition as understood by Ofcom) that a more efficient firm manages to survive over its competitors. To a large extent, Ofcom is not discovering new theories of harm or new basis for intervention. Quite to the contrary, it is basically endorsing outdated competition law ideas that have long been marginalised because they harm consumers in the name of the protection of the competitors of the more efficient firm. It is not by chance that, as competition law has become more sophisticated and economic analysis has been taken into consideration that these ideas have fallen out of the mainstream. An authority cannot ignore this fact and if it does, it is opening the door to arbitrariness in policy-making.

Ofcom's intervention is extremely intrusive, regardless of what it is claimed in the consultation document. By mandating unbundled access to BSkyB's premium television content to all of its downstream competitors Ofcom is re-engineering the British pay television market. There are many reasons why pay television operators rely on exclusivity and bundling, as will be shown *infra*. Ofcom conceives in its consultation document a completely different market where exclusivity and bundling are banned and premium television channels are socialised and made accessible to all market participants. If the remedies proposed are finally put in practice, the British pay television market will change completely. When the Communications Act of 2003 was passed, it was insisted that Ofcom would be a "light touch" regulator. Behind this label there is the belief that heavy handed regulatory intervention is undesirable because regulators have imperfect information about the functioning of markets and are unable to foresee technological evolution. This was not simply a fashionable label expressing the sign of the times. Quite to the contrary, this approach is based on the experience of agencies like the US Federal Communications Commission. From this perspective, altering the market structure and banning pervasive commercial practices so that the pay television market fits with the desires of the regulator would be—rightly, in my opinion—seen with the greatest suspicion. What is more, there should be strong economic and legal evidence, absent in the consultation document, that such regulatory intervention would be justified. What Ofcom proposes is, in essence, to transpose the regime regarding access to BT's local loop to premium television channels. As will be shown in detail *infra*, there are very solid legal and economic reasons justifying the socialisation of the incumbent telecommunications operators' infrastructures (and yet this approach to regulation remains controversial), which do not apply in the case of premium television channels.

1.2. The consultation document does not define downstream markets and does not assess downstream foreclosure

When competition authorities engage in an "ability-incentive" assessment such as the one undertaken by Ofcom, they do so to examine the foreclosure effects of a refusal to supply/raising rivals' costs strategy on a downstream market. Such a strategy is only problematic when the downstream players' ability or the incentive to compete is impaired in such a way that prices are increased in downstream markets.[8] Put differently, for foreclosure to arise, it is not sufficient that downstream competitors do not have access to a given input. Competition authorities examine whether the lack of access to such input impairs the ability of downstream players to compete effectively, to the extent that this results in higher prices. Consumers will therefore be harmed only when the refusal to supply/raising rivals' costs strategy leads to higher prices.

[8] See in particular the definition of foreclosure proposed by the European Commission in the Non-Horizontal merger Guidelines, cited *supra*: "18. Non-coordinated effects may principally arise when non-horizontal mergers give rise to foreclosure. In this document, the term 'foreclosure' will be used to describe any instance where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete. As a result of such foreclosure, the merging companies—and, possibly, some of its competitors as well—may be able to profitably increase the price charged to consumers. These instances give rise to a significant impediment to effective competition and are therefore referred to hereafter as 'anticompetitive foreclosure'".

A complete “ability-incentive” analysis requires, first of all, identifying a downstream market in which these foreclosure effects would be manifested. I do not understand why the consultation document does not define the relevant downstream market. The adequate definition of the relevant downstream market has important consequences on whether the hypothetical strategy followed by BSkyB would lead to foreclosure. Having followed the spectacular evolution of British broadband markets, I believe that many of the downstream players compete nowadays for the provision of the whole range of broadband services. In this sense, television offerings are but a component of the bundle of services offered by companies. I notice that BT, Virgin Media or Tiscali seek to attract broadband subscribers by offering a triple or quadruple play bundle, which includes television. In general, television services are not available from DSL providers on a stand-alone basis. In Ofcom’s jargon this is a form of enforced “buy-through”, which is regarded with suspicion by the authority. It is not surprising that BSkyB was obliged to react to market evolution by acquiring easynet in 2005. BSkyB’s main delivery platform, i.e. satellite, is an inferior technology, in that it lacks a return channel. Its acquisition of easynet can be seen as a necessary step to remain competitive in the relevant downstream markets.

If one accepts that companies compete across the whole range of triple play services, it is more than doubtful that, even if BSkyB were found to have an incentive to refuse to supply its premium content, such a strategy would lead to the foreclosure of downstream markets as described above. Premium television channels are undoubtedly an extremely valuable asset; at the same time, this asset is but a small fraction of the television content available to triple play operators. Third party operators, such as Viacom or the BBC supply their services to all platform operators. Operators like BT offer Video-on-demand services. This means there is a large number of television channels and of non-linear services which would be supplied to customers and that would not be affected by BSkyB’s strategy. Moreover, one should take into consideration that all broadband providers are able to attract subscribers through literally countless bundling and pricing strategies regarding broadband speeds and voice telephony services. In other words, it is more than doubtful that if a company like BT is denied access to BSkyB’s premium television channels this would result in increased downstream prices for triple play or, in general, broadband services. It is at least as plausible, and in my opinion much more plausible, to expect that such a strategy would lead a company like BT to react by seeking to attract broadband subscribers with more attractive offers and reduced prices, for instance, of basic television bundles.

In sum, it does not follow from a refusal to supply/raising rivals' costs strategy by BSkyB that the downstream market will be necessarily foreclosed in the sense that prices in the downstream market will be higher. Therefore, a thorough analysis of foreclosure issues, which is totally absent from the consultation document, is indispensable before imposing regulatory obligations on BSkyB.

1.3. The alternative theory of harm developed by Ofcom is not in line with competition law principles

Even though foreclosure issues are not discussed in the consultation document, Ofcom develops its own theory of harm. This theory of harm, which assesses the impact of a refusal to supply/raising rivals' costs strategy on consumers and on innovation leads to illogical outcomes.

1.3.1 Refusal to supply under competition law

First of all, competition law interferes with intellectual property only in exceptional circumstances. As I understand British intellectual property legislation, BSkyB holds intellectual property rights over its premium television channels.[9] This means that competition law does not interfere in general with the way in which the holder of these rights exploits its property. Pursuant to the *Magill*[10] line of case law developed by the European Court of Justice, and further confirmed in *IMS Health*,[11] competition law will interfere with the exploitation of intellectual property rights only when intellectual property for which a licence is sought is indispensable in the sense that a refusal to license by the right holder would lead (i) to the elimination of all competition in the downstream market and (ii) would prevent the emergence of new

[9] This issue was already raised by BSkyB in the proceedings open by the OFT regarding an alleged margin squeeze by the company, decided by the OFT in 2002.
[10] Joined Cased C-241/91 and C-242/91, *RTE and ITP v Commission* (*Magill*), ECR I-743.
[11] Case C-418/01, *IMS Health v NDC Health*, ECR I-5039.

product for which there is a potential consumer demand.[12] If it is far from obvious that a refusal to supply/raising rivals' costs strategy by BSkyB would lead to the foreclosure of the downstream market, one should exclude, *a fortiori*, that such a strategy will eliminate all competition in downstream markets, which is a higher standard. Obvious evidence of this is that some players have launched television services without having access to BSkyB's premium channels. This excludes that an intellectual property licence from BSkyB is indispensable in the sense expressed by *Magill* and *IMS Health*.[13]

I understand that Ofcom intervenes under its own regulatory remit. Again, I consider that the authority should not depart from competition law, and I presume that this issue would be raised if examined by the Competition Commission. There are very good reasons why competition law interferes with property only in exceptional circumstances. A reading of the case law developed by the European Court of Justice reveals that interference with property will only occur when such interference is indispensable for a downstream competitive market to emerge. Put differently, interference with property rights is only justified when it results in clear benefits for consumers.[14] The Regulatory Framework for electronic communications, the application of which is one of Ofcom's primary tasks, illustrates this fact. If access to BT's infrastructure is mandated under the Regulatory Framework, it is not simply because BT, as a dominant player, would lack the incentive to supply access to its infrastructure to downstream competitors. If these were the only reasons behind regulatory intervention, then there would be serious doubts regarding the convenience

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[12] According to the consultation document, BT had argued that a refusal by BSkyB to supply its premium television channels (or a decision to stop supplying these channels) would be caught by both Article 82 EC and its national equivalent. As can be seen, this argument is a misinterpretation of the *Magill* line of case law.

[13] The relevant indispensability standard set by the ECJ in IMS Health is extremely high: "28. [...] in order to determine whether a product or service is indispensable for enabling an undertaking to carry on business in a particular market, it must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services. According to paragraph 46 of Bronner , in order to accept the existence of economic obstacles, it must be established, at the very least, that the creation of those products or services is not economically viable for production on a scale comparable to that of the undertaking which controls the existing product or service".

[14] For a clear explanation of the relationship between consumer welfare and the conditions laid down by the ECJ in Magill and subsequent cases, see Larouche, "The European Microsoft case at the crossroads of competition", available at www.ssrn.com.

of departing from standard competition law. There are of course two additional, powerful reasons behind intervention. First and foremost, access to BT's local loop is justified insofar as this company was able to roll out its infrastructure while it was shielded from competition. Moreover, duplicating the incumbent's local loops requires very substantial investments, which would allow the incumbent to exploit its market power following the liberalisation of the telecommunications sector. Because duplication is extremely costly, the risk of downstream foreclosure in the absence of mandated access is very high, at least in the early stages of liberalisation.

Ofcom is of course aware that premium television channels are in no way comparable to the local loop and recognises so in the consultation document. There are no legacy rights that would justify relaxing competition law standards for intervention and downstream competition can very well develop in the absence of access to these channels (as it currently does). If comparing one and the other is inappropriate, then developing untested theories of harm is inappropriate as well.

1.3.2 Consumers' welfare or competitors' welfare?

Secondly and more importantly, the theories of harm crafted by Ofcom are based on the protection of competitors, and not on the protection of competition. Competition law has never interpreted the notion of "competition" as meaning that companies are required to share all of their competitive advantages with their rivals so as to ensure that a level playing field is created. If a company has a competitive advantage that is not shared by its competitors, say, premium television channels, there is in general no reason to intervene. Quite to the contrary, intervening in such instances is in general anticompetitive. It is only in exceptional circumstances that intervention would be afforded in these contexts. The *Magill* line of case law is one example.

A reading of the consultation document shows that the fact that BSkyB enjoys a competitive advantage and holds substantial market power in an upstream market is seen as a sufficient condition justifying intervention. Section 7 of the consultation document is entitled "Effects on consumers". However, the way in which Ofcom plans to protect consumers is by protecting BSkyB's competitors, that is, by forcing this company downstream to share its competitive advantage—which is not an indispensable asset to compete, and Ofcom does not produce evidence to the contrary—with its competitors. For instance, when assessing the question of whether there is currently sufficient choice, Ofcom expresses the following:

> "Having a reduced number of retailers with access to Core Premium content reduces the range of price points on premium and reduces the range of bundles of premium products with other products. More simply, decreased competition in the provision of premium content reduces pressure on retail costs relative to the counterfactual".
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> Not only does a reduction in the number of viable retailers reduce choice in an absolute sense, it may also force consumers to make choices that are in effect 'wrong' for them. For instance, if a consumer particularly valued the set of features offered by Top Up TV's DTT platform relative to Sky's satellite platform, but valued the ability to watch all available live FAPL matches even more highly, he or she would be likely to choose satellite. This would in effect be the wrong choice for that consumer's set of preferences.
>
> More fundamentally, lack of access to content is likely to hold back the development of platforms. Platforms may develop more slowly than if they had access to premium content. It is possible that platforms may not even get off the ground at all, if they conclude that their launch depends on access to premium content. Either outcome would reduce consumers' choice of platforms".

This approach to assess the effects on consumers, which permeates the whole of Section 7, is incorrect, unheard of in the field of competition law and potentially anticompetitive, as already sketched in the introduction. This approach is even more problematic in dynamic markets, where regulators expect companies to innovate. If a company has made investments to differentiate itself from its competitors and has developed such an advantage, it will undoubtedly gain some degree of market power and some autonomy from its competitors and consumers. Moreover, it will attempt to recoup its investments in the most convenient manner (via bundling or other strategies). These behaviours are commonplace and in the vast majority of cases unproblematic. A competition authority will never assess whether a refusal to supply/raising rivals' costs strategy is bad for consumers because there will be less retailers offering the product or because consumers will be making what Ofcom considers to be "wrong choices". There are many commercial strategies that produce these results and yet are considered to be pro-competitive. The evolution in the approach of competition authorities in the field of vertical restraints is particularly telling in this regard.[15] Take the example of exclusive distribution agreements. If a supplier designates a single distributor in a given geographic area, this will limit "choice" in the very manner described by Ofcom. The number of retailers selling the product will be reduced and maybe some retailers that would have expected to enter the market will not do so because of lack of access to the product in question. If Ofcom's reasoning were to be followed then all exclusive distribution agreements will have harmful effects on consumers.

This is of course a very inappropriate approach to the analysis of the effects on consumers of exclusive distribution agreements or any other kind of vertical restraint. Consumers are in general served by what Ofcom considers to be a limitation of "choice". The scope for horizontal differentiation expands as a result of these efforts and contrary to what Ofcom claims the incentive to innovate increases. As already explained *supra*, developing a competitive advantage can only be problematic when downstream markets are foreclosed. In the absence of downstream foreclosure, which is never established by Ofcom in the consultation document, regulatory intervention is unlikely to produce any tangible benefit. It is in fact unsurprising that Ofcom does not identify any clear benefit for consumers deriving from its proposed intervention and that it provides no evidence that consumers are being underserved.[16] If there is no clear case for intervention in this regard, then there is probably no reason why BSkyB should not be allowed to develop its competitive advantage so as to thrive in downstream markets in such a way. Once again, innovation arises when companies are allowed to exploit their competitive advantages and competitors are forced to duplicate their efforts to remain present in the market, and not *vice versa*.

2. The anticompetitive effects of Ofcom's intervention

[15] The current approach of the European Commission to the assessment of vertical restraints is laid down in the Guidelines on Vertical Restraints, OJ (2000) C 291/1.

[16] I am particularly surprised about the way in which Ofcom analyses the surveys on consumer satisfaction with pay television. Claiming that these surveys are to be understood with caution because they do not take into consideration potential subscribers to pay television discouraged by the current conditions proposed by BSkyB is first of all a *probatio diabolica* for a regulated firm. More importantly, Ofcom should acknowledge that consumers do not have a "right" to pay television under the conditions they deem appropriate. Stating the contrary would amount to proposing retail price regulations for all services under Ofcom's regulatory oversight, so as to ensure that all consumers fulfil their "right".

2.1. Ofcom's intervention rigidifies the British broadband markets and may lead to collusion

Ofcom ignores the overall impact of the approach it proposes on British broadband markets. The "must-offer" remedy reduces significantly the scope for horizontal differentiation of broadband operators. Virtually all DSL providers in the country currently offer their services through BT's infrastructure. In this sense, the scope for horizontal differentiation is already very limited. Ofcom now proposes that BSkyB offers its products to all of its downstream competitors at regulated rates. In other words, all DSL operators will be proposing a homogeneous triple play offer and will face identical access rates to this content and to BT's local loops. There is no doubt that this approach ensures that no DSL provider is discriminated against and that they will all have the chance to compete on a level playing field. The crucial question is however a different one.

When companies in a market offer homogeneous products or services, they do not innovate. From a static perspective, the risk of collusion is the primary concern for regulators in such markets. Cartel cases are unusual in new, dynamic markets but are commonplace in more mature markets where the scope of innovation is limited.[17] This is one of the reasons why authorities very much hesitate before mandating shared access to tangible or intangible inputs. If a dominant position is replaced by the "supreme evil of antitrust", i.e. collusion, then little is gained from intervention.[18] I am surprised that Ofcom contends that more competition will arise after its intervention and does not even consider the risks of collusion. It is difficult to

[17] For a clear explanation as to why this is so, see the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ (2004) C 31/5: "45. Generally, the less complex and the more stable the economic environment, the easier it is for the firms to reach a common understanding on the terms of coordination. For instance, it is easier to coordinate among a few players than among many. It is also easier to coordinate on a price for a single, homogeneous product, than on hundreds of prices in a market with many differentiated products. Similarly, it is easier to coordinate on a price when demand and supply conditions are relatively stable than when they are continuously changing. In this context volatile demand, substantial internal growth by some firms in the market or frequent entry by new firms may indicate that the current situation is not sufficiently stable to make coordination likely. In markets where innovation is important, coordination may be more difficult since innovations, particularly significant ones, may allow one firm to gain a major advantage over its rivals".

[18] The expression is taken from the opinion of the US Supreme Court in the *Trinko* case: "Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion".

understand Ofcom's claim that competition in triple play markets will be more intense if all operators offer a homogeneous product.

From a dynamic perspective, the effects of Ofcom's intervention are even more worrying. Ofcom is sending the wrong message to regulated companies, at least if it is concerned about companies innovating and investing. Put simply, broadband operators are being told that substantial competitive advantages will be socialised in the future so as to preserve a competitive level playing field. This is at odds with the objectives of the Regulatory Framework of 2002. The promotion of effective competition is but one of the aims of regulation. There is at present a thriving broadband market in the UK. However, for the reasons exposed above, this is but a form of fringe competition, in which the gains for consumers will always remain limited. Much more would be gained for consumers if only one of these companies would make efforts to deploy an alternative infrastructure to compete on a head-to-head basis with BT and Virgin Media. In countries like France, there are three DSL operators (France Télécom, Iliad and SFR, in addition to the cable operator Numéricâble) that are currently rolling out fibre infrastructure in large metropolitan areas, which means that facilities-based competition is a credible prospect.

There is not a stronger incentive to invest in alternative infrastructure than the ability to keep a competitive advantage. If a company like BSkyB is not forced to share its premium television channels with its competitors, it can expect to build the necessary subscriber base to compete with the incumbent broadband operators. Conversely, if BSkyB's assets are socialised, Ofcom should be aware that these prospects disappear. What is more, if a company is protected from competition by being supplied access to BT's infrastructure and BSkyB's premium content at regulated rates, the incentives to invest in alternative infrastructures by this third party are necessarily distorted, as the company will develop expectations that it will always be able to compete on an equal basis with the incumbent(s). It is no chance that competition after fibre upgrades is a challenge for regulators across Europe.

Finally, if BSkyB is finally forced to share its premium channels at regulated rates, BT will be the main winner of regulatory intervention. BSkyB's advantage is a powerful source of competitive pressure in broadband markets. The fact that BT, the market leader, does not have access to these services is nothing but an ingredient adding dynamism to broadband markets. As soon as BT is given access to premium channels on regulated terms, Ofcom will be simply eliminating this powerful source of competitive pressure. In other words, Ofcom will be contributing to broadband markets becoming more rigid and less dynamic. When markets become rigid and the products offered are homogeneous, the main winners are the existing market leaders. There is no reason why Ofcom should protect BT, and I am again surprised that this consequence of its intervention is completely ignored in the consultation document.

2.2. Ofcom's requires BSkyB to offer a non-existing product

A *leitmotiv* in the consultation document is the idea whereby consumers are currently penalised by bundling practices put in place by BSkyB. According to Ofcom, current BSkyB's practices prevent consumers from making "right" choices for them and BSkyB's competitors from innovating in the offering of new and more attractive packages. Put shortly, Ofcom sees with suspicion the obligation to buy premium television channels through the basic package ("buy-through").

The first objection to Ofcom's claims comes from the quality of the evidence presented. Section 7 (p. 159) leaves the reader with the impression that in other European countries buy-through is progressively giving room to novel and more flexible pay television offers. However, the examples presented by Ofcom are emphatically not evidence of this. Premiere's Flex offer is one of an ailing and unsuccessful pay television operator that tries by any means to enlarge its subscriber base. More importantly, Mediaset's premium digital terrestrial pay television package (Premium Gallery) is nothing more than the very service BSkyB has proposed to offer via Freeview (PicNic). So is Cartapiù. One is very surprised to see that Ofcom has delayed the launch of PicNic for about a year, on the one hand, and then presents a service that is almost identical to PicNic as evidence justifying regulatory intervention against BSkyB. These two approaches are very difficult to reconcile. In these circumstances, one remains sceptical about the added value of regulatory intervention.

It is not surprising that "buy-through" exists in all countries included in PwC's survey, as pointed out in the consultation document. In reality, pay television has never existed in the absence of bundling. From an economic perspective, bundling is an effective mechanism enabling a pay television operator to recoup its investments in programming and serving the interests of consumers by enlarging the number of channels.[19] Ofcom cannot ignore the negative consequences that reinventing pay television would entail. If bundling is banned, the first to suffer will be niche channels catering for minority interests and viewers interested in these.[20] As a regulator concerned about pluralism (or plurality), I understand that Ofcom would think twice before paving the way for such an outcome.

If one considers that bundling is an effective mechanism for pay television operators then several consequences follow. The dominant operator active in the acquisition of television rights from content producers will be less willing to take risks upstream in the value chain and will limit itself to the most attractive offerings. Experimental or risky productions will be the first to suffer for the prohibition of bundling. Domestic productions are very likely to suffer as well, as BSkyB would logically turn to successful Hollywood blockbusters. In this regard, Ofcom seems at least to be aware of the effect of a mandated wholesale offer on upstream prices perceived by right holders. In other words, regulatory intervention is never free. If “buy through” is banned, Ofcom will be simply creating problems elsewhere in the value chain. In relation with prices, but in a different vein, I am not surprised about the difficulties related to the calculation of adequate stand-alone prices acknowledged by Ofcom. I believe that the risks in this regard are underestimated in the consultation document.

3. Summary and conclusions

- Ofcom’s analysis would never be validated by a competition authority. If the agency had chosen to submit a market reference, the must-offer rule would never have been upheld. Ofcom relies on its powers under sector-specific regulation to promote competition without a market reference. This is not a valid reason to depart from well-established competition law principles. The

[19] For a clear explanation of the perverse effects of mandated à la carte pricing of television channels, see Hazlett, “Shedding Tiers for a la Carte? An Economic Analysis of Cable TV Pricing”, *Journal of Telecommunications and High Technology Law*, vol. 5, n. 1 (2006), pp. 253-303.

[20] Ibid. When the US Federal Communications Commission started considering whether to mandate à la carte, the move met with the resistance of virtually all niche cable channels opposed the move, as they considered it would jeopardise their viability.

theories of harm proposed by Ofcom are not totally ignored by competition authorities, but are largely discredited. Ofcom should not be able to shield itself from scrutiny from expert competition authorities by choosing a different procedural path.

- In order to establish that BSkyB's refusal to supply/raising rivals' costs strategy harms consumers, Ofcom should have provided evidence that such a strategy would foreclose downstream markets. More precisely, Ofcom should have established that if premium television channels were not supplied to downstream competitors the ability and/or incentive of the latter to compete with BSkyB would be impaired thereby allowing BSkyB to raise its prices at the retail level. No such analysis is undertaken in the consultation document and the downstream market in which foreclosure would take place is not even defined.
- If the theories of harm developed by Ofcom were upheld, then a wide range of commonplace and innocuous commercial practices would be deemed to have a "negative impact on competition" and consumers. What is more, Ofcom's approach seeks to protect BSkyB's competitors at the expense of consumers. The authority's approach would only be deemed acceptable if premium television channels were a bottleneck comparable to the incumbent telecommunications operators' local loops. Since no evidence of this is given in the consultation document, the remedy proposed is not justified. What is more, the consultation document even concedes that the local loop and premium television channels are not comparable.
- Ofcom ignores the serious anticompetitive effects of the "must-offer" remedy. It is important to stress, in particular, that such an approach is likely to rigidify broadband markets and ease collusion—considering that all DSL providers would be offering the same product. From a dynamic perspective, Ofcom's approach distorts negatively the incentives to innovate and to achieve platform-based competition.
- Ofcom's proposed remedy will be serving the interests of broadband leaders (BT and Virgin Media). It is odd for a regulatory authority to hamper the growth of a new entrant to protect the vested interests of incumbents. Regulatory capture theories may explain the surprising stance taken by Ofcom.

- Ofcom is willing to reinvent pay television by prohibiting “buy-through”. Bundling is so pervasive in pay television that it can be said to be a *conditio sine qua non* of its existence. Ofcom should be very aware of the unintended and serious side effects entailed by the prohibition of “buy-through” on pluralism, consumers and the welfare of upstream right holders, in particular independent film producers.
- BSkyB would have strong reasons to contest the proposed remedies and to resist this regulatory intervention. From my experience, it is not certain that it will do so. Companies usually prefer a settlement with the authority rather than an open challenge, even when regulatory intervention is more than dubious, as *in casu*. For instance, the FA Premier League should never have accepted the settlement proposed by the European Commission regarding its joint selling practices. The forced sale in packages and, more importantly, the so-called “single-buyer rule” were not necessary to bring its practices in line with Article 81 EC. However, the FA Premier League was not willing to challenge the position of the European Commission, and this is understandable. As a consequence, it is primarily Ofcom’s responsibility to reconsider its position as I hope it will do.

I would be very happy to clarify the points made in this document and be willing to participate in further stages of the consultation.