



EC Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market (COM(2011)427)

Response from BT

17 November 2011

Introduction

BT is pleased at this timely opportunity to review developments in the audiovisual sector. While the consultation focuses on the online distribution of audiovisual works across the Single Market, we feel this is also an important opportunity to raise key issues of competition across converging sectors, and the need for a level playing field with a consistent ex-ante regulatory regime to promote competition and protect consumers across all media and communications sectors including PayTV platforms.

Customers now have the opportunity to buy packages of services from different suppliers, which may include all or some of fixed line services, mobile services, internet connectivity and content, and TV distribution and content. Consumers are able to watch television on their home computer, and access the internet via their television or a game system. Time shift television and replay services allow customers to watch what they want when they want without having to worry about whether the service is delivered through the ether or down a broadband line. There are many suppliers of such services but the regulation applied to each of these companies is markedly different. This differential approach has become a regulatory barrier to a truly competitive regime.

An even-handed, objective and light touch regulatory regime should provide the foundation for fair competition, consumer protection and the encouragement of investment across converging communications markets including PayTV. A regime that deals with bottlenecks in only one part of the market – fixed line telecommunications – and is systematically biased in favour of the owners of bottleneck assets in other parts of the market – will not deliver optimal long term outcomes for consumers. The regulatory regime should follow the same coherent process as is currently applied in telecoms market reviews – defining markets, assessing market power and proposing appropriate remedies.

Our comments on this consultation explain these views in more detail as well as responding to some of the Commission's specific questions regarding online content distribution.

Business Context

BT is the major provider of telecommunications networks and services in the UK and in more than 170 countries worldwide. Our main activities are the provision of fixed-line services, broadband, mobile and TV products and services as well as networked IT services. In the UK, we serve around 20 million businesses and residential customers, as well as providing network services to other operators.

Broadband is a key element of our strategy as it is a major platform to provide our customers a new range of services and acts as an engine for growth for high tech and creative industries. We are rolling out at large scale the delivery of NGA capability which represents an investment of c€3Bn by 2015. BT's roll-out of fibre broadband is well underway, with six million premises already having access to the technology. That figure will leap to ten million in 2012 and then two thirds of premises by the end of 2014. BT's network can be used by all companies on an open wholesale basis and so underpins a fully competitive marketplace.

On the delivery of audio –visual services, we have over 600,000 customers for BT Vision, our on-demand television service platform. BT vision uses a single set-top box to deliver to the TV set pay

per view and subscription video on demand services, digital terrestrial free to air and pay TV channels, communications and interactive services.

BT Vision has over 6,000 hours of video on-demand content available, the most in the UK. Among its selection of more than 7,000 programmes, it has 600 films, from classics to family favourites, with seven new titles added every week. BT Vision will be expanded to include free-to-air HD programming, more interactive services, a wider choice of on-demand programming, and is now able to provide more premium sports channels following Ofcom's decision to require Sky to offer wholesale access to Sky Sports 1 and 2. Customers are now able to watch Premier League football plus other sports without having to sign up for other channels that they do not want.

YouView is the joint venture between BT, the UK public service broadcasters and other partners to develop and promote a new open standard for TV, combining broadcast and broadband television delivery. We believe that YouView will transform the UK TV market, combining broadcast digital channels with catch-up, archive and on-demand content and interactive TV over broadband. It will give a far greater range of content providers access to the living room, creating unprecedented consumer choice. Consumer launch is planned in early 2012.

The case for a converged regulatory regime

We welcome the EC's objective of developing further the market of audiovisual services, and exploring in the Green paper the technical elements and specific regulatory instruments that may need to be further developed, especially in relation to stimulating and creating a genuine single European market.

The paper recognises the importance of convergence, mainly focusing on devices and delivery platforms, as a major development affecting the current audio-visual markets, but it also needs to consider the overall question of competition in the media and communications markets, and the level of regulation that applies to each of the players in the market place.

In our view the main line of action for the achievement of a more dynamic audio-visual market should be to ensure that there is an even-handed, objective and light touch regulatory regime that applies to all parts of the communications industry clearly and consistently. Such an ex-ante regulatory regime would provide the foundation for fair competition, consumer protection and the encouragement of investment across converging communications markets. The regime should follow the same coherent process as is currently applied in the telecoms market reviews – defining markets, assessing market power and proposing remedies.

Customers now have the opportunity to buy packages of services from different suppliers, which may include all or some of fixed line services, mobile services, internet connectivity and content, and TV distribution and content. Consumers are able to watch television on their home computer, and access the internet via their television or a game system. Time shift television and replay services allow customers to watch what they want when they want without having to worry about whether the service is delivered through the ether or down a broadband line. Many suppliers of such services, including players such as BT, Sky and Virgin Media offer telephony, broadband and pay-TV packages, but the regulation applied to each of these companies is markedly different – both in terms of content regulation (Ofcom Broadcasting Code v. ATVOD code) and the applicability of an ex ante competition regime. This differential approach has become a regulatory barrier to a truly competitive regime and continuation of it in its current form will not deliver optimal long term outcomes for consumers.

It is essential that a regulatory regime reflects this reality so that the conditions of free market processes can operate in an unbiased fashion. A regime that deals with bottlenecks in only one part of the market – fixed line telecommunications – is systematically biased in favour of the owners of bottleneck assets in other parts of the market – mobile and content.

There should be a consistent approach to economic regulation and the analysis of market power across the broader communications sector. It is important that the scope of communications-sector regulation properly recognises convergence, given that an asymmetric approach will not adequately deal with all sources of market power.

Response to selected consultation questions

1. *What are the main legal and other obstacles – copyright or otherwise - that impede the development of the digital single market for the cross-border distribution of audiovisual works? Which framework conditions should be adapted or be put in place to stimulate a dynamic digital single market for audiovisual content and to facilitate multi-territorial licensing? What should be the key priorities?*

As outlined in our general remarks, a key priority is the establishment of effective competition and the introduction of an even-handed, objective and light touch regulatory regime that applies to all parts of the communications industry.

The policy goals of IP and competition law are aligned to the extent that both systems aim to promote consumer and economic welfare. Achieving this in practice can only be successful though if policy makers focus on the way rights are exercised - whether in terms of the duration of rights or in the exercise terms applied. These should always be proportionate and therefore appropriate checks and balances are required between the IP and competition frameworks.

Competition authorities should be alive to barriers to new entry and potentially abusive behaviour by established rights holders. This has been a significant issue in the UK premium pay TV market which has come under scrutiny by Ofcom and the Competition Commission. Hoarding of rights by incumbent right-holder companies and their power to make the grant of licences conditional on securing other benefits (tying behaviour) can significantly impede and distort market growth and development opportunities for non-incumbents.

In addition, care is needed to avoid creating a marked imbalance or new barriers in the system as a result of for example increasing copyright terms and stronger enforcement.

Intellectual property laws represent a delicate balance between those wishing to be recompensed for their endeavours, highly-demanding consumers wanting to access content and services as competitively as possible across a range of platforms and technologies, and those engaged in lawful pro-competitive activities.

3. *Can copyright clearance problems be solved by improving the licensing framework? Is a copyright system based on territoriality in the EU appropriate in the online environment?*

9. *How could technology facilitate the clearing of rights? Would the development of identification systems for audiovisual works and rights ownership databases facilitate the clearance of rights for online distribution of audiovisual works? What role, if any, is there for the European Union?*

BT would support any initiative that facilitates more timely, transparent and effective procurement of licences to use copyright material. Equally, we should not allow the collecting societies to establish disproportionate power that could be abused to restrict supply or as a result inflate transaction costs. A smooth running and cost effective content licensing system will allow many small players to enter the market.

Any EU initiative should not replace licensing systems with a national scope.

7. *Are specific measures needed in light of the fast development of social networking and social media sites which rely on the creation and upload of online content by end-users (blogs, podcasts, posts, wikis, mash-ups, file and video sharing)?*

Measures should generally be designed to enhance consumer outcomes, by enabling markets to serve the dynamic needs of consumers and by encouraging investment through a clear, fair and predictable regime which will drive the innovation that flows from increased competition, enhanced by essential consumer protection measures.

However, shifts in consumer behaviour occur very rapidly in the digital age. The world has moved away from one where established industry players hand down products and services for consumers passively to consume. It will become increasingly difficult to target for consumer outcomes going forward through interventions. What is essential is that a well-equipped regulator should have the ability to apply its powers in a manner that recognises rapidly changing markets, to define markets as they converge and change and to analyse market behaviour to ensure that it supports consumer benefit, and allows it to intervene if required and if the risks of intervention are outweighed by the likely benefits.

In particular, although the internet does undoubtedly bring new challenges and potential concerns, we believe that the emphasis needs to be on enabling outcomes through encouraging competition and enabling consumer choice to drive market outcomes. Intervention should only be contemplated when there is clear evidence of market failure or other consumer detriment. This approach needs to recognise that there could be a wide variety of bottlenecks. Dealing with bottlenecks should come together with an emphasis on encouraging greater education, information, transparency etc. This approach will, in our view, better safeguard consumer interests than would the introduction of new mechanisms, which are likely to be cumbersome and expensive to implement, and may become rapidly out of date.