

Complaint from Independent Media Support Limited about BBC Broadcast's provision of television access services to Channel 4

Case CW/00842/06/05

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Decision
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Section 1

Summary

- 1.1 The Office of Communications ("Ofcom") has concluded that BBC Broadcast Limited ("BBC Broadcast") has not infringed section 2 (the "Chapter I prohibition") of the Competition Act 1998 (the "Act") or Article 81(1) of the EC Treaty in relation to its exclusive agreement with the Channel 4 Television Corporation ("Channel 4") to provide television access services (the "Channel 4 contract"). Ofcom has further concluded that BBC Broadcast has not infringed section 18 (the "Chapter II prohibition") of the Act or Article 82 of the EC Treaty in relation to the pricing of access services supplied to Channel 4 nor as a result of its length and exclusive nature.
- 1.2 Ofcom's decision is made following an investigation which was opened on 13 July 2005 following the submission of a complaint by Independent Media Support Group plc ("IMS") alleging that the agreement between BBC Broadcast and Channel 4 prevents, restricts or distorts competition by virtue of its duration and exclusive nature, and is an abuse of BBC Broadcast's allegedly dominant position as the prices offered under the contract are predatory and by virtue of its duration and exclusive nature.
- 1.3 During its investigation Ofcom considered the available evidence and concluded that the relevant market is the market for the supply of access services to television broadcasters in the United Kingdom, although it also considered that there may be a credible case for adopting a wider market definition. Ofcom finds that BBC Broadcast is not dominant in the narrower market and notes that this conclusion would also hold with a broader market definition. Consequently, BBC Broadcast's conduct in relation to the pricing of the Channel 4 contract and the allegation of foreclosure as a result of the length and exclusive nature of the Channel 4 contract is not caught by the Chapter II prohibition nor Article 82 EC Treaty and, therefore, there are no grounds for action.
- 1.4 Further, Ofcom considered whether BBC Broadcast's agreement with Channel 4 infringed the Chapter I and Article 81 prohibitions. At the time BBC Broadcast entered into the Channel 4 contract, Ofcom considered that the contract benefited from the Vertical Agreements Block Exemption ("Block Exemption") due to the market share of BBC Broadcast at that time, and similarly this conclusion is also likely to apply with a broader market definition.¹ The market share of BBC Broadcast rose following the acquisition of BBC Broadcast by Creative Broadcast Services Limited ("CBSL"). The Channel 4 agreement retained the benefit of the Block Exemption until 31 December 2006. For the remaining term of the non-compete obligation, in the circumstances of this case and applying the principles set out in the Block Exemption and the Block Exemption Guidelines², Ofcom has concluded that the non-compete obligation would be unlikely to have the effect of appreciably restricting competition in the relevant market and so does not infringe the Chapter I prohibition or Article 81 of the EC Treaty.

¹ Commission Regulation 2790/99/EC of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

² Commission Notice Guidelines on Vertical Restraints 2000/C291/01.

- 1.5 When submitting its complaint IMS also alleged an infringement of the Chapter I prohibition and/or Article 81(1) of the EC Treaty in relation to the duration and exclusive nature of BBC Broadcast's contract to supply television access services to the British Broadcasting Corporation (the "BBC") (the "BBC contract"). Ofcom initially excluded from the scope of its investigation the allegations regarding the BBC contract whilst the Office of Fair Trading ("OFT") was considering the merger of BBC Broadcast and CBSL (see paragraph 2.2), and in particular, whether the Framework Agreement (of which the BBC contract is a part) was an ancillary restraint to the merger. Following the OFT's conclusion that the Framework Agreement was not an ancillary restraint to the merger, on 15 December 2005 Ofcom began its investigation into the terms of the BBC contract.
- 1.6 This document deals solely with Ofcom's consideration of the Channel 4 contract at the time it was entered into by the BBC's subsidiary, BBC Broadcast (which was the subject of the IMS complaint). Ofcom's decision not to take forward the related investigation of the BBC contract is contained in a separate document which adopts the reasoning set out in this document in particular in relation to market structure and market shares (*Complaint from Independent Media Support Limited about BBC Broadcast's provision of television access services to the BBC: case closure ("BBC contract case closure")*).

Section 2

Background

- 2.1 On 13 July 2005, Ofcom opened an investigation following a complaint that BBC Broadcast had infringed Chapter I of the Act and/or Article 81 of the EC Treaty ("Article 81") and Chapter II of the Act and/or Article 82 of the EC Treaty ("Article 82"). The complaint was submitted by IMS in respect of the duration and pricing prevailing under the Channel 4 contract and also in respect of the duration and exclusive nature of the BBC contract.
- 2.2 Ofcom initially excluded from the scope of its investigation the latter allegation involving the arrangements for BBC Broadcast's provision of access services to the BBC which, at that time, took the form of an exclusive agreement with a term of approximately seven years. This was because the OFT was considering whether the broader Framework Agreement, of which the BBC contract is a part, was an ancillary restraint directly related and necessary to implement the merger of BBC Broadcast and CBSL. On 11 November 2005 the OFT published its decision on the merger, clearing the transaction but finding that the Framework Agreement was not an ancillary restraint to the merger. Given the OFT's decision, the basis for Ofcom excluding the BBC contract no longer applied, and Ofcom considered whether to include the BBC contract within the scope of the investigation.
- 2.3 On 15 December 2005 Ofcom widened the scope of the investigation to include the BBC contract which, by that time, had had its term extended by the parties to over 10 years. However, on 7 July 2006, the BBC contract was amended back to seven years five months by the parties to that contract. Ofcom therefore announced on 4 December 2006, to IMS, BBC Broadcast, and the BBC that it proposed to close its file on the BBC Contract and invited their responses. Ofcom has now closed its file following consultation (see the BBC contract case closure)
- 2.4 On 4 December 2006, Ofcom issued a draft non-infringement decision in respect of this matter to IMS, BBC Broadcast, the BBC and Channel 4, allowing them the opportunity to comment on it. On 19 January 2007 comments were received from Michael Simkins LLP Solicitors, acting for IMS ("IMS's response") and also from BBC Broadcast and the BBC. Details of the responses to the draft decision, together with Ofcom's considerations and reasons for making this decision are set out in particular in sections 4, 7, 8 and Annex 4.
- 2.5 Ofcom's Competition Bulletin entry for this investigation is accessible via Ofcom's website.³
- 2.6 This document deals primarily with Ofcom's assessment of the relevant terms of the Channel 4 contract at the time the BBC entered into the contract (which was the subject of the IMS complaint).

Overview of the access services industry

- 2.7 This section describes the types of access services applied to television broadcasting content, how they are produced, and the legal requirements which regulate the provision of access services.

³ http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_842/

- 2.8 Under Ofcom's Code on Television Access Services (the "Ofcom Code"), licensed public service television broadcasters are required to address the needs of the deaf, hard of hearing, blind and visually-impaired communities by providing access services in the form of subtitling, signing and audio description (described below at paragraphs 2.9 to 2.14). Independent research commissioned by Ofcom suggests that there are about 4 million people with a hearing impairment, and about 2.7 million visually-impaired people.⁴ About 1.4 million hearing-impaired people have used subtitling at least once, as well as a further 6 million people with no hearing impairments. The figures of those who have used audio description is much less certain, but in Ofcom's view is likely to be in the low hundreds of thousands.

Subtitling

- 2.9 Subtitling consists of transcribing speech and displaying it as text on the television screen. Subtitling work can usefully be considered in two main categories: subtitling for the deaf and hard of hearing ("SDH") and language subtitling (where a translation of the speech into a different language appears on the screen). United Kingdom ("UK") television broadcasters are only required by law to provide SDH. SDH varies from language subtitling in that it involves transcription, not translation, and in that it often includes a description of how something is said (for example "shouting"), and other noises that the deaf or hard of hearing viewer may not be aware of (for example "doorbell rings"). In the UK, text for each speaker is colour coded. In contrast, in other jurisdictions there is no differentiation in text colour between speakers.
- 2.10 Different techniques are used to produce SDH for programmes broadcast live (such as a news bulletin), compared to those that are pre-recorded (such as a soap opera). In all cases, subtitles only appear if the viewer chooses to display them ("closed subtitling").
- 2.11 *Pre-recorded subtitling* involves the creation of a subtitle data file prior to transmission. The traditional method involves the subtitler watching the programme and manually typing the dialogue, before ensuring the text is time-coded to appear in synchronisation with the picture. The subtitler also ensures that it appears in the correct area of the screen and applies different styles and colours to the text. The data file is then sent back to the broadcaster in time for transmission. 'Assisted subtitling' is a form of pre-recorded subtitling which uses software that automatically converts a programme's electronic post-production script into subtitles which are then checked and edited to create a subtitle file. Pre-recorded subtitles may also be created by using voice recognition software, although this is more commonly used for live subtitling.
- 2.12 *Live subtitling* involves either 'live-cued' or 'real-time' production. 'Live-cued' subtitling involves the subtitler reviewing speeches or scripts before the programme is aired and creating subtitles for scripted or pre-recorded elements of live programmes. These subtitles are then cued on screen in real time rather than creating a file in advance. 'Real-time' subtitling involves the subtitler reacting to live speech with the subtitles appearing on the screen as close to real time as possible. This is done by a variety of methods, such as stenography, typing and voice recognition software.

⁴ Ofcom, Provision of Access Services: Research Study Conducted for Ofcom, March 2006
<http://www.ofcom.org.uk/consult/condocs/accessservs/provision.pdf>

Signing

- 2.13 Signing consists of a person (a "signer") shown on screen interpreting speech into sign language. British Sign Language ("BSL") is the most widely used method of signed communication in the UK with about 50,000 deaf people using it as their first or preferred language.⁵ Sign languages vary amongst countries, even those with a common language - for example, Irish and American sign languages are each quite different to BSL. The BSL interpretation of a programme is filmed in a studio and then broadcast at the same time as the programme, with the signer appearing in a corner of the screen. Unlike subtitling only "open" signing is currently used in the UK. This means that if a programme is signed, all viewers will see the signer in the corner of the screen. The technique for producing signing depends on whether the signer producing it is deaf or hearing. Deaf signers need to work from a script while hearing signers can work from watching the programme. Live signing can therefore only be undertaken by a hearing signer.

Audio Description

- 2.14 Audio description consists of the inclusion of a spoken description of programme scenes when there is no speech or dialogue, and aims to improve the quality of television for the blind and visually-impaired. It is a recent innovation in access services and is available on digital television only. Audio descriptions are produced by a person who watches the programme and manually produces a script which is then recorded by an actor and dubbed on to the programme during pauses in the dialogue or narrative.
- 2.15 For the purposes of this Decision, Ofcom defines SDH, signing and audio description to television broadcasters as "access services".

Production of access services

- 2.16 Access services suppliers can source access services content in different ways, depending on whether the programme is being broadcast for the first time or is a repeat of an earlier broadcast.
- 2.16.1 *Origination*: for new programmes, a supplier can create an entirely new subtitle, signing or audio description file, using one of the methods described above at paragraphs 2.9 to 2.14.
- 2.16.2 *Repeats*: if the programme has previously been broadcast with access services content, a supplier may re-use the existing file. However, it may need to be adapted if, for example, commercial breaks are in different places within the programme.
- 2.16.3 *Re-versioning*: sometimes a broadcaster will purchase a programme together with access services content produced for a different broadcaster. When this happens it is likely that the file will need to be adapted ("re-versioned"), especially if it has been imported from abroad. For example, US subtitle files have to be converted from a US format to a UK format to ensure optimum synchronicity with the speech and scenes. The US television standard (NTSC) uses 30 frames per second, while the UK

⁵ From the website of the Royal National Institute for the Deaf.
http://www.rnid.org.uk/information_resources/factsheets/communication/factsheets_leaflets/british_sign_language.htm

television standard (PAL) uses 25 frames per second. This means that in order for a US programme to be broadcast in the UK, the broadcast of the access services file needs to be slowed down so as to keep in time with the broadcast of the programme. Another example is that US subtitles are not coloured to indicate who is speaking, whereas in the UK they are. Signed versions of programmes from other countries are unlikely to be used, because of the differences in sign languages.

Regulation of access services

- 2.17 Subtitled television programmes were first routinely broadcast in the UK in the 1980s, when the BBC built commitments into its Royal Charter to broadcast programmes with access services content. Throughout the period 1990 to July 2004 public service broadcasters were required, either by the Broadcasting Act 1990 or pursuant to a licence condition, to provide access services content. In addition, the Broadcasting Act 1996 imposed access services obligations on cable and satellite broadcasters.
- 2.18 Sections 303 to 307 of the Communications Act 2003 (the "Communications Act") set out the requirements for access services. Section 303 requires Ofcom to produce the Ofcom Code, which sets out the level of access services broadcasters must provide per channel. The Ofcom Code is periodically reviewed. The present Ofcom Code was published in July 2004 and came into force on 1 January 2005. A revised version was published on 27 September 2006. Access services obligations set out in the Ofcom Code take the form of quota requirements for the percentage of programme hours to which various access services must be applied. The current Ofcom quotas are shown in Annex 1.
- 2.19 The effect of the Ofcom Code is that those broadcasters which provide "television services" are required by licence condition to meet annual targets for hours broadcast with access services content. Failure to meet the targets specified may result in the imposition of a financial penalty and/or ultimately revocation of the broadcaster's licence.
- 2.20 "Television services" to which the Ofcom Code applies include licensed public service broadcasters ("PSBs") and television licensable content services ("TLCs").
- PSBs are broadcasters which are required under sections 264 to 265 of the Communications Act to comply with a public service remit. The current PSBs are BBC, ITV Plc ("ITV"), Channel 4, S4C, Channel Five Television Group Ltd ("Five") and Teletext. Also included in this definition are any digital television programme services ("DPSs") provided by the Welsh Authority (including S4C Digital).
 - TLCs comprise most television services provided by cable or satellite. Certain BBC channels are exempted, as their licensing requirements are covered by the Royal Charter. The full definition is found in sections 232-240 of the Communications Act.
- 2.21 The Ofcom Code applies to all terrestrial channels; the Code also applies to many digital, cable and satellite channels, depending on their expenditure on access services. BBC1, BBC2, ITV, Channel 4 and Five have individual targets which represent the most onerous obligations under the Code. Broadcasters' digital channels (for example, BBC3 or ITV2) have separate obligations which are less stringent.

- 2.22 The cable and satellite channels' obligations are categorised into three levels: Level 1; Level 2, set at 66% of the Level 1 requirements and Level 3, set at 33% of the Level 1 requirements.
- 2.23 Ofcom receives revenue data from each channel and then determines the relevant Level for the channel: the budget for access services must equate to no more than 1% of the channel's UK-derived qualifying revenue. If a channel hits this 1% threshold in its spending on access services, the channel will be moved down a Level (or removed completely if it started on Level 3).
- 2.24 In 2005 sixty-nine channels were required to comply with the Code.
- 2.25 Table 1 and Table 2 below show a sample of the targets for 2006 and 2008, further details of which are set out Annex 1.

Table 1: Sample Ofcom Code requirements (2006)

Service	BBC 1 & 2	ITV regional licensees	Channel 4	Five	Level 1 (e.g. Sky One)	Level 2 (e.g. Discovery Channel)	Level 3 (e.g. The History Channel)
Subtitling	95%	85%	85%	72%	10%	10%	10%
Signing	4%	4%	4%	4%	1%	1%	1%
Audio description	8%	8%	8%	8%	4%	4%	4%

Source: Ofcom Code

Table 2: Sample Ofcom Code requirements (2008)

Service	BBC 1 & 2	ITV regional licensees	Channel 4	Five	Level 1 (e.g. Sky One)	Level 2 (e.g. Discovery Channel)	Level 3 (e.g. The History Channel)
Subtitling	100%	88%	88%	80%	35%	35%	35%
Signing	5%	5%	5%	5%	2%	2%	2%
Audio description	10%	10%	10%	10%	8%	8%	8%

Source: Ofcom Code

- 2.26 There is no differentiation in the Ofcom Code between access services content provided from different sources (origination, repeats and reversioning, see paragraph 2.16). The proportion of access services content sourced as repeats as opposed to origination varies by channel. Some cable and satellite channels, for example, broadcast a higher volume of repeats, while PSBs have a requirement under their licences to produce more new material, for which access services content is sourced by origination.
- 2.27 The Ofcom Code is supported by Ofcom's Guidelines on the Provision of Access Services.⁶ These make specific recommendations as to the quality and technical standards of access services, such as the size and speed of subtitles, minimum levels of competency for signers and selection of adjectives for audio description.

⁶ http://www.ofcom.org.uk/tv/ifi/guidance/tv_access_serv/

Section 3

The facts

The Undertakings

BBC Broadcast

- 3.1 BBC Broadcast, company number 04257461, was incorporated on 1 April 2002 as a wholly-owned subsidiary of the BBC accountable to the BBC's Commercial Board and the BBC Fair Trading Department.⁷ Prior to incorporation it operated as a division of the BBC known as "Broadcast and Presentation". On 1 August 2005 BBC Broadcast was sold to CBSL, wholly owned by Macquarie Capital Alliance Group and Macquarie Bank Limited. BBC Broadcast was renamed Red Bee Media Limited ("Red Bee ") on 1 November 2005. As this investigation is concerned primarily with behaviour before 1 November 2005, Red Bee is referred to as BBC Broadcast in this Decision.
- 3.2 BBC Broadcast provides a range of broadcasting services, including access services. BBC Broadcast is currently the sole provider of access services to Channel 4 as well as to certain BBC channels.⁸ BBC Broadcast is an undertaking for the purposes of the Chapter I and Chapter II prohibitions and Articles 81 and 82.

Channel 4

- 3.3 Channel 4 was created by virtue of the Broadcasting Act 1981 and was originally regulated by the Independent Broadcasting Authority (an organisation which subsequently became a precursor organisation of Ofcom). The Channel Four Television Corporation was established under the Broadcasting Act 1990 and all its publisher/broadcaster functions were transferred over to the new company in 1993. It transmits across the whole of the UK, except some parts of Wales which are covered by the Welsh language channel S4C.
- 3.4 Channel 4 is a publicly owned corporation, the Board of which is appointed by Ofcom as the television regulator in agreement with the Secretary of State for Culture Media and Sport. Channel 4 receives no public funding but is funded entirely by advertising and its own commercial activities.⁹
- 3.5 Channel 4 is a PSB with one terrestrial channel and several digital channels: E4, More4 and the FilmFour channels. Channel 4 is an undertaking for the purposes of the Chapter I prohibition and Article 81.

IMS

- 3.6 The complainant, IMS, company number 02425634, has been a provider of access services since 1989. It provides access services to the broadcasting industry, as well as access services and language subtitling to other areas such as DVD, film and advertising.

⁷ The Commercial Board scrutinises all significant (in terms of revenue and capital expenditure) transactions and commercial decisions. The Commercial Board reviewed and 'signed off' BBC Broadcast's bid to provide access services to Channel 4.

⁸ Including BBC One, BBC Two, BBC Three, BBC Four, CBBC, CBeebies, BBC Parliament and BBC News 24.

⁹ http://www.channel4.com/about_c4/information.html.

The Complaint

- 3.7 On 6 June 2005 IMS submitted a complaint to Ofcom in relation to the contract awarded to BBC Broadcast by Channel 4 on 14 July 2004 for the provision of access services. The complaint focused on two main aspects of the Channel 4 contract, namely that:
- i) the length and exclusive nature of the Channel 4 contract infringes the Chapter I and Chapter II prohibitions and Articles 81 and 82 given BBC Broadcast's high market share and strong market position; and
 - ii) the prices on which BBC Broadcast won the Channel 4 contract were below cost and therefore BBC Broadcast infringed the Chapter II prohibition and Article 82 given its position of dominance in the market.
- 3.8 In July 2004, just after the Channel 4 contract was finalised and signed, and prior to submitting its complaint with Ofcom, IMS raised its concerns regarding the Channel 4 contract with the BBC's Fair Trading Compliance Committee. In January 2005 the BBC Governors considered IMS's complaint, and on 10 February 2005 the BBC Fair Trading Committee wrote to IMS rejecting their complaint. IMS subsequently pursued the matter with Ofcom.

BBC's initial comments on the allegations

- 3.9 Ofcom sought initial comments from the BBC and BBC Broadcast for the purpose of assisting it to decide whether to open an investigation into the matters raised by IMS.
- 3.10 In a letter of 1 July 2005 the BBC responded on behalf of itself and BBC Broadcast. In its response the BBC cited the consideration given to IMS's complaint by the BBC Fair Trading Committee, referring to this as evidence that BBC Broadcast had complied with internal guidelines and competition law requirements. In support of this assertion the BBC noted that the BBC Fair Trading Committee had prevented BBC Broadcast from signing the contract with Channel 4 until the Fair Trading department had cleared it, and further, that the contract was generating a positive financial return.
- 3.11 The BBC also specifically refuted further claims made by IMS about advantages allegedly obtained by BBC Broadcast from BBC Research & Development's ("R&D") access services technology. The BBC submitted that all BBC Broadcast's relations with BBC Research and Development were on an arm's length basis and that the access services software was licensed non-exclusively to BBC Broadcast and was available to other suppliers.
- 3.12 Ofcom's consideration of these issues is set out in paragraphs A2.25 to A2.28.

The Channel 4 contract

- 3.13 Prior to the award of the contract to BBC Broadcast, Channel 4 purchased access services from Intelfax Limited ("Intelfax").
- 3.14 In January 2004 Channel 4 invited [] to tender for the provision of any or all of its access services. In early June, Channel

4 informed all the bidders that subject to contract, it planned to purchase all of its access services from BBC Broadcast.¹⁰

3.15 The Channel 4 contract, which was signed on 14 July 2004, confers on BBC Broadcast the exclusive right to provide access services to Channel 4. The duration of this contract, which began on 1 December 2004, is for a period of five years and one month, although the operative service provisions are of five years duration (beginning 1 January 2005), given that a one month period was for Migration Services only (e.g. the transfer of the subtitle archive from the incumbent supplier, the establishment of connectivity between Channel 4 and BBC Broadcast's networks and testing). During that one month the access services were still supplied by the incumbent. The contract also provides for an option to renew for a further three years however Ofcom considers, for the reasons set out in paragraph 8.24, that the contract should be assessed as a contract of five years.¹¹

3.16 Subsequent to its losing the contract with Channel 4, Intelfax ceased trading.¹²

Ofcom's investigation

3.17 In assessing IMS's complaint, Ofcom applied those provisions of the Act and the EC Treaty set out in Section 4 of this document.

3.18 During its investigation, Ofcom obtained evidence from a number of broadcasters and access services providers and engaged consultants IAMCO Partners LLP ("IAMCO") to conduct market research.

IAMCO research

3.19 IAMCO undertook 15 structured interviews with providers of media services across a range of areas including broadcasting, language subtitling and access services for the DVD, cinema and advertising sectors in order to assist Ofcom in its understanding of the television access services industry. Four of the respondents were American-, Asian- or Australian-based companies. One respondent provided specialist software to access services providers and one was a consultant with expertise in the design and production of subtitling software.

Formal information requests relevant to the Channel 4 contract complaint

3.20 Ofcom used its information-gathering powers under section 26 of the Act to obtain evidence from parties to this investigation, other broadcasters and other access services providers:

- On 5 August 2005, requiring the BBC to provide various documents relating to the Channel 4 bid and contract and the associated Fair Trading assessment, its analysis of the relevant market, and further detail on the points made in the letter of 1 July 2005;
- On 5 August 2005, requiring BBC Broadcast to provide various documents relating to the Channel 4 bid and contract and the associated Fair Trading assessment; copies of all

¹⁰ Channel 4 response of 6 October 2005 to Ofcom's Notice of 30 September 2005 under Section 26 of the Act.

¹¹ Ofcom notes the letter of 14 July 2004 from the Managing Director of BBC Broadcast to the Managing Director of Channel 4 which sets out that the parties may discuss entering into a further contract at the end of the option to renew. Ofcom notes that this letter is non-binding and has no contractual force. (Provided as part of the BBC/BBC Broadcast response of 15 August 2005 to Ofcom's Notice of 5 August 2005 under Section 26 of the Act.)

¹² Complaint submitted by IMS 6 June 2006.

documents, including e-mails, minutes, memoranda, briefing or background papers or other documentation which explain or discuss the various versions of the tender, including those which relate to discussions held by internal BBC and/or BBC Broadcast committees or teams which approved the details of the tender to Channel 4 and the contract entered in to with Channel 4; company financial information; BBC Broadcast's analysis of the relevant market; and further detail on the points made in the letter of 1 July 2005;

- On 28 September 2005, requiring the broadcasters British Sky Broadcasting Ltd ("Sky"), The Walt Disney Co Ltd ("Disney"), Five, Flextech Television Ltd ("Flextech"), ITV and S4C to provide details relating to their access services contracts; the process by which the contracts were awarded and details of any bidding process; the considerations taken into account when selecting an access services supplier; views on in-house supply and views on various aspects of the market;
- On 30 September 2005, requiring Channel 4 to provide details relating to its access services contracts; the process by which the contracts were awarded and details of any bidding process; the considerations taken into account when selecting an access services supplier; views on in-house supply and views on various aspects of the market;
- On 6 October 2005, requiring BBC Broadcast to provide its key performance indicators ("KPIs") for access services and its current weighted average cost of capital ("WACC"); detailed information on the Channel 4 financial models; copies of the Information Memorandum and Prospectus from the sale of BBC Broadcast; any relevant business plans; Channel 4 performance reports; further explanations of its response to the Notice of 5 August 2005; commentary on contingency costs and an explanation of depreciation charges;
- On 7 October 2005, requiring IMS to provide its KPIs for access services and current WACC, documentation relating to its bid for the Channel 4 contract, its prospectus issued when floating on the AIM and its recent management accounts;
- On 2 November 2005, requiring the BBC to provide information relating to access services technology developed by its R&D department; how such technology is owned or licensed and its views on competing technology; whether the BBC considered or invited tenders from external providers regarding the contract that was formed with BBC Broadcast on 1 April 2002; and whether the BBC had ever invited tenders, quotes or expressions of interest from external third party suppliers from the period commencing 1 January 2000;
- On 2 November 2005, requiring Channel 4 to provide details of dialogue between Channel 4 and BBC Broadcast between 5 May 2004 and 14 July 2004; when Channel 4 considered the contracts to be formally awarded to BBC Broadcast; other bid considerations and whether it required any specific type of technology for its live subtitling;
- On 5 November 2005, requiring the access services suppliers Independent Facilities Centre Ltd ("ITFC"), ITV Signpost ("Signpost") and Visiontext to provide output information in terms of total hours to each customer, sales value and origination hours;
- On 5 November 2005, requiring IMS to provide output information in terms of total hours by customer, sales value and origination hours; further details of its contract with Sky; the basis for its assertion that the contract between Channel 4 and BBC Broadcast is anti-competitive; details of key contracts available for bidding in the UK market and further information on its bid for the Channel 4 contract;

- On 16 November 2005, requiring BBC Broadcast to provide output information in terms of total hours by customer, sales value and origination hours; the proportion of its output represented by the BBC contract; further detailed financial information relating to staff, salary, pensions and recruitment; information on productivity, central cost allocation, management accounts, bid costs, capital expenditure, service level agreements, benchmarking and clarification of earlier responses to financial questions;
- On 16 November 2005, requiring the broadcasters Sky, Disney, Five, Flextech, ITV and S4C to provide further information on supplier selection criteria, particularly the importance of reputation and track record;
- On 17 November 2005, requiring Channel 4 to provide further information on supplier selection criteria, particularly the importance of reputation and track record;
- On 21 November 2005, requiring Education Digital Management Ltd ("Teachers' TV") to provide information on supplier selection criteria and the selection process;
- On 6 February 2006, requiring Nickelodeon UK ("Nickelodeon") to confirm statements made about its access services provisions and arrangements;
- On May 4 2006, requiring BBC Broadcast to provide output information in terms of total hours to each customer, sales value and origination hours;
- On May 4 2006, requiring the BBC to provide information about repeat rates, BBC Worldwide access services providers and information about their supplier selection criteria;¹³
- On 12 May 2006, requiring the access service suppliers SDI Media and Broadcast Text to provide output information in terms of total hours to each customer, sales value and origination hours;
- On 19 May 2006, requiring the television broadcasters Music Television Networks Europe ("MTV"), Paramount UK ("Paramount") and Sparrowhawk Entertainment Ltd ("Hallmark") to provide the percentage of total programme hours with access services provided which are repeats;
- On 22 May 2006, requiring the broadcasters Discovery and Nickelodeon to provide the percentage of total programme hours with access services provided which are repeats, and information on self-supply versus engaging an external access service provider;
- On 22 May 2006, requiring the broadcaster Five to provide the percentage of total programme hours with access services provided which are repeats, and further information on self-supply, number of bidders for tender, and the criteria they provided in response to the second information request;
- On 22 May 2006, requiring the broadcaster Flextech to provide the percentage of total programme hours with access services provided which are repeats, and to confirm the accuracy of the note from the conference call of 16 May 2006;

¹³ This information request also required the provision of information by the BBC regarding changes to its Framework Agreement and the sale of BBC Broadcast and its move to a 100% subtitling commitment. These questions related to the supplementary allegations raised by IMS regarding the duration and exclusivity of the BBC contract.

- On 24 May 2006, requiring the broadcaster ITV to provide the percentage of total programme hours with access services provided which are repeats, information on possible procurement guidelines and to confirm the accuracy of the note from the conference call of 17 May 2006;
- On 30 May 2006, requiring the broadcaster Channel 4 to provide the percentage of total programme hours with access services provided which are repeats, and to confirm the accuracy of the note from the conference call of 23 May 2006; and
- On 30 May 2006, requiring the broadcaster Sky to provide the percentage of total programme hours with access services provided which are repeats, information on the contract between Sky and IMS, and to confirm the accuracy of the note from the conference call of 19 May 2006.

Parties' comments on Ofcom's draft decision

- 3.21 On 19 January 2007 IMS provided Ofcom with comments on the draft decision, its overall position on which was that Ofcom cannot find that BBC Broadcast is not dominant in the relevant market and as a result Ofcom must examine the pricing of the Channel 4 contract and its behaviour in entering into the Channel 4 contract. Further, it argued that Ofcom cannot properly reach a decision that the Channel 4 contract does not infringe Chapter 1 and Article 81(1) and that the Block Exemption did not apply to cover the Channel 4 agreement. Its detailed comments included remarks about Ofcom's application of market share analysis to the Block Exemption; Ofcom's analysis of BBC Broadcast's position within the relevant market, in particular in relation to market shares; and the existence or not of bidding market characteristics and countervailing buyer power. On 28 March 2007, IMS met with Ofcom to further explain its comments on the draft decision.
- 3.22 On 19 January 2007 BBC Broadcast provided Ofcom with comments on the draft decision in relation to Ofcom's analysis of the duration of the Channel 4 contract. Both BBC Broadcast and the BBC (in its letter also of 19 January 2007) provided further comments on various matters of drafting and emphasis in the draft decision.

Section 4

Legal framework

- 4.1 In investigating IMS's complaint, Ofcom has considered the Chapter I and Chapter II prohibitions in the Act.
- 4.2 Since 1 May 2004 Ofcom, when applying national competition law to agreements, decisions or concerted practices or the abuse of a dominant position, has been required to also apply Articles 81 and 82 as appropriate where the conduct may affect trade between Member States. Ofcom considers that the nature of the agreement and conduct under investigation in this case - namely alleged market foreclosure by virtue of long-term exclusive contracts and exclusionary predatory behaviour by an undertaking which supplies the UK's largest acquirer of access services – is capable of having an effect on trade between Member States by deterring entry into the UK market.¹⁴ Ofcom has therefore also assessed the allegations against the Article 81 and 82 prohibitions.

Community law on restrictive agreements: Article 81 EC Treaty

- 4.3 Article 81(1) prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.
- 4.4 Any agreements or decisions prohibited pursuant to Article 81(1) are automatically void, subject to the exception created by Article 81(3).¹⁵ Article 81(3) provides that the prohibition in Article 81(1) does not apply where the agreement meets certain specified criteria set out in Article 81(3).¹⁶ There are two positive and two negative criteria, all of which must be satisfied. First the agreement must improve the production or distribution of goods or promote technical or economic progress and consumers must receive a fair share of the benefits. Secondly, the agreement must not contain dispensable restrictions and must not eliminate competition in relation to a substantial part of the market in question.
- 4.5 Exemption from the Article 81(1) prohibition may also be conferred by way of a block exemption in relation to categories of agreements. Ofcom has considered whether the Channel 4 contract would benefit from one of the block exemptions. Agreements which meet the criteria for the application of a block exemption adopted by the Commission are automatically exempted from Article 81(1), and those which do not are then assessed individually under Article 81(1) and 81(3) Ofcom shares competence to apply Article 81(1) and 81(3) to agreements with other national

¹⁴ As noted by the European Commission (the "Commission") in its Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty 2004/c 101/07 (paragraph 86): "Vertical agreements covering the whole of a Member State may, in particular, be capable of affecting patterns of trade between Member States when they make it more difficult for undertakings from other Member States to penetrate the national market in question, either by means of exports or by means of establishment (foreclosure effect). When vertical agreements give rise to such foreclosure effects, they contribute to the partitioning of markets on a national basis, thereby hindering the economic interpenetration which the Treaty is designed to bring about.". And further at paragraph 93: "Where an undertaking, which holds a dominant position covering the whole of a Member State, engages in exclusionary abuses, trade between Member States is normally capable of being affected. Such abusive conduct will generally make it more difficult for competitors from other Member States to penetrate the market, in which case patterns of trade are capable of being affected."

¹⁵ Council Regulation 1/2003 (the Modernisation Regulation), Article 1(1).

¹⁶ Modernisation Regulation Article 1(2).

competition authorities, the European Commission and national courts.¹⁷ In this case, it is for Ofcom to meet the burden of proof of an infringement of Article 81(1) and it would be for the BBC, BBC Broadcast and/or Channel 4 to prove the conditions of Article 81(3) are met if they seek to claim the benefit of Article 81(3).¹⁸ The next section summarises the only block exemption that is relevant to this investigation.

Regulation 2790/99/EC - Vertical Agreements Block Exemption

4.6 The Block Exemption governs the application of Article 81(3) to categories of vertical agreements and concerted practices. Specifically, it applies to:

“...agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services”.¹⁹

4.7 The Block Exemption specifies the criteria which must be met in order for a vertical agreement to obtain the benefit of the Block Exemption. In so far as they are relevant to this investigation these criteria include:

- i) that the market share²⁰ of the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services²¹; and
- ii) that the agreement does not contain any “hard core” restrictions such as resale price maintenance²²; and
- iii) that the agreement does not contain any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years.²³

4.8 A ‘non-compete obligation’ is defined by the Block Exemption as meaning:

“...any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer’s total purchases of the contract goods or services and their

¹⁷ Modernisation Regulation (European Commission - Article 4, national competition authorities - Article 5 and national courts – Article 6).

¹⁸ Modernisation Regulation, Article 3.

¹⁹ Regulation 2790/99/EC, Article 2(1).

²⁰ Market share is to be calculated on the basis of the market sales value of the contract goods or services and other goods or services sold by the supplier, which are regarded as interchangeable or substitutable by the buyer, by reason of the products’ characteristics, their prices and their intended use; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned: Regulation 2790/99/EC, Article 9(1). Article 9(2)(d) states if the market share is initially not more than 30% but subsequently rises above 35%, then the exemption provided for shall continue to apply for one calendar year following the year in which the level of 35% was first exceeded.

²¹ Regulation 2790/99/EC, Article 3(1).

²² Regulation 2790/99/EC, Article 4. If this criterion is not satisfied then it is the entire agreement which does not obtain the benefit of the block exemption.

²³ Regulation 2790/99/EC, Article 5(a). If this criterion is not satisfied then it is the offending clause or obligation which does not obtain the benefit of the Block Exemption.

substitutes on the relevant market, calculated on the basis of the value of its purchases in the preceding calendar year.”²⁴

- 4.9 Where an agreement contains an excluded ‘non-compete obligation’, this excluded obligation will not gain the benefit of the Block Exemption. The Block Exemption continues to apply to the remaining part of the vertical agreement if that part is severable from the non-exempted non-compete obligation. There is no presumption of illegality where an excluded obligation falls outside the scope of the Block Exemption. Instead, an excluded obligation must be assessed for compatibility with Article 81(1) and 81(3).
- 4.10 The Commission has issued Guidelines on the application of the Block Exemption and the assessment of certain types of vertical restraints which Ofcom has considered in its analysis (the "Commission's Guidelines").²⁵

UK law on restrictive agreements: the Chapter I prohibition

- 4.11 The Chapter I prohibition contained in section 2 (1) of the Act provides that agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the UK and may affect trade within the UK are prohibited.
- 4.12 Any agreement or decision which is prohibited by section 2 (1) of the Act is void.

UK exception for vertical agreements

- 4.13 The Block Exemption discussed above has direct effect in UK law by virtue of section 10 of the Act which deals with parallel exemptions. Section 10 states, insofar as is relevant:

“(1) An agreement is exempt from the Chapter I prohibition if it is exempt from the Community prohibition [that is, Article 81(1)] –

(a) by virtue of a Regulation...”

Agreements of minor importance

- 4.14 Agreements which are not capable of appreciably affecting trade between Member States or not capable of appreciably restricting competition by object or effect are not caught by the Article 81(1) or Chapter I prohibitions. The Commission has published a notice setting out the circumstances in which agreements will not be considered to have an appreciable effect on competition (the “*de minimis* Notice”).²⁶ In relation to vertical agreements the *de minimis* Notice provides that there will be no appreciable

²⁴ Regulation 2790/99/EC, Article 1(b).

²⁵ Commission Notice Guidelines on Vertical Restraints, 2000/C291/01, OJ C291, page 1. In its comments on the consultation on the draft decision, IMS submitted that Ofcom had erred in its draft decision by applying the Block Exemption to a copyright agreement (see IMS's response at paragraph 1.12). Article 2(3) of the Block Exemption states that it shall apply to vertical agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights provided they are not the primary object of such agreements and are directly related to the use, sale or resale of the good or services by the buyer or its customers. Ofcom considers that the primary purpose of the Channel 4 contract is not the assignment or use of intellectual property rights, rather it is the provision of access services, and the provisions relating to intellectual property rights are directly related to the use of access services by Channel 4. Ofcom therefore considers that the Block Exemption applies.

²⁶ Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community 2001/C368/07.

restriction of competition within the meaning of Article 81(1) if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement in circumstances where the agreement is made between undertakings which are not actual or potential competitors on any of these markets.²⁷

- 4.15 In circumstances where the market is characterised by a parallel network of agreements having similar effects on the market (that is, where such agreements have a cumulative foreclosure effect), then the market share thresholds referred to above are reduced to 5%. The Commission notes that a cumulative foreclosure effect is unlikely to exist if less than 30% of the relevant market is covered by such a network of agreements.²⁸
- 4.16 The above provisions of the *de minimis* Notice do not apply to agreements which contain "hard core" restrictions such as those previously referred to in paragraph 4.7.
- 4.17 Ofcom has had regard to the Commission's *de minimis* Notice in assessing the matters raised by IMS.

Community law on abuse of a dominant position: Article 82

- 4.18 Article 82 prohibits the abuse of a dominant position if it affects trade between Member States.

UK law on abuse of a dominant position: the Chapter II prohibition

- 4.19 The Chapter II prohibition contained in section 18 (1) of the Act prohibits the abuse of a dominant position if it affects trade within the UK.

²⁷ *De minimis* Notice paragraph 7.

²⁸ *De minimis* Notice paragraph 8.

Section 5

Market definition

Introduction

- 5.1 The Chapter I prohibition and Article 81(1) prohibit agreements which restrict competition. The Chapter II prohibition and Article 82 prohibit abusive conduct by a dominant undertaking. Market definition provides a framework for the competition analysis in both cases.²⁹
- 5.2 In order to assess whether BBC Broadcast has infringed the Chapter I prohibition and Article 81(1) and/or the Chapter II prohibition and Article 82 in this case, Ofcom has considered how to define the relevant market and the position of BBC Broadcast in that market. Specifically, Ofcom has considered two key aspects of market definition: the product market and the geographic scope of the market.
- 5.3 In defining the scope of the relevant economic market Ofcom has taken into account the views of BBC Broadcast and the BBC (in a joint submission) and IMS. These are summarised below and are followed by Ofcom's methodology for, and analysis of, market definition.

IMS's view of the relevant market

- 5.4 IMS argued that the relevant market is for the supply of access services for television broadcasting in the UK.³⁰
- 5.5 IMS stated that the market is defined by the number of "captive disabled customers who need the services in question and determined by the legal requirement that broadcasters provide those individuals with such services."
- 5.6 IMS contended that, from the perspective of the consumer, there is no substitute for the services in question. If the services are not provided, the consumer would be unable to gain access to broadcast programme material. It stated that although it is technically possible for suppliers in adjacent sectors, e.g. DVD access services, to supply services to broadcasters, a credibility gap would have to be overcome.

BBC Broadcast and the BBC's view of the relevant market

- 5.7 BBC Broadcast and the BBC submitted that the relevant market is for the supply of media access services for audiovisual content providers, including broadcasters and film and DVD producers, based in the major English-speaking nations and potentially worldwide.³¹ They submitted that the definition of access services should include subtitling for the hard of hearing, multilingual or language subtitling, signing and audio description.
- 5.8 In relation to the relevant product market, BBC Broadcast and the BBC submitted that while there is only limited demand-side substitution (because broadcasters cannot easily substitute between, say, television and DVD subtitling or between

²⁹ OFT Guideline 403, *Market Definition*, December 2004 ("OFT 403"), paragraph 2.1:

<http://www.ofcom.gov.uk/nr/rdonlyres/972af80c-2d74-4a63-84b3-27552727b89a/0/oft403.pdf>

³⁰ Complaint submitted by IMS 6 June 2005.

³¹ BBC/BBC Broadcast response of 24 August 2005 to question 10 of Ofcom's Notice of 5 August 2005 under Section 26 of the Act.

subtitling and audio description), supply-side substitution is easily possible. They argued that this is supported by the fact that most major suppliers of access services provide, or could easily provide, the full range of access services. As a further example of this BBC Broadcast and the BBC stated that any supplier of television subtitling services for the deaf or hard of hearing can easily provide subtitling services for, say, DVDs.

- 5.9 In support of their submissions on the geographic scope of the market BBC Broadcast and the BBC argued that although the customers for UK-based media access service providers have historically been based in the UK and Ireland, this pattern of demand is changing as access services providers are increasingly looking beyond their traditional geographic market in search of new opportunities. They also argued that developments in production and communications technology have considerably facilitated cross-border provision of access services.

Ofcom's approach to market definition

- 5.10 Ofcom's approach to market definition follows that used by the Commission³² and the UK OFT.³³ This involves establishing the boundaries of a market (in terms of the products/services being offered in the market and the geographic area over which trading occurs) by identifying constraints on the price-setting behaviour of firms. There are two main competitive constraints to consider in the event of a price increase: to what extent it is possible for customers to switch to other products or services (*demand-side substitution*), and how easily suppliers could switch, or increase, production to supply the relevant products or services (*supply-side substitution*).
- 5.11 To identify the relevant market the hypothetical monopolist test is useful to identify close demand- and supply-side substitutes. A product or set of products is considered to constitute a separate market if a hypothetical monopolist could impose a small but significant non-transitory increase in the price of those products (in the range of 5-10%) above the competitive level without losing sales to such an extent as to make this unprofitable (known as the "SSNIP test"). If such a price rise would be unprofitable because of demand- or supply-side substitution then the market definition should be expanded to include the substitute products.
- 5.12 Demand-side substitution occurs if consumers would switch products in response to the price increase. Supply-side substitution occurs if suppliers of other products would rapidly, effectively and without substantial sunk cost start to compete with the hypothetical monopolist in the supply of the product under investigation in response to the price increase.
- 5.13 As set out in paragraphs 2.17 to 2.26, broadcasters in the UK are required by law to provide programmes to which the various forms of access services (that is, SDH, signing and audio description) have been applied. These requirements are set out in full in Annex 1. Given that the demand for access services by broadcasters is affected, to a material extent, by regulation, Ofcom has considered whether this should be taken account of in its assessment of demand- and supply-side substitutability.

³² Commission Notice on the definition of relevant market for the purposes of Community competition law 97/C372/03.

³³ See OFT 403.

- 5.14 There is an argument that television access services in the UK would not exist to the same extent if regulation were not in place. The reason for this is the relatively small number of viewers needing these services (see paragraph 2.8 above) which may result in free-to-air broadcasters not having a business case to provide them. Where free-to-air services are financed by advertising, indirect pressure for provision of access services may exist because of the desire by broadcasters to maximise the number of viewers in order to attract advertisers. However, given the small percentage of the population that require access services and the fact that not all advertisements are subtitled, it is doubtful whether this pressure would be sufficient to ensure their provision to the same extent absent regulation. Further, the existence of the regulations may have, indirectly, helped to promote competition in the access services market by increasing demand which can sustain a greater number of suppliers.
- 5.15 Although there appear to be few incentives for free-to-air broadcasters to provide access services for commercial reasons, there is evidence that the same is not necessarily true of subscription channels (which have an incentive to maximise subscription revenues and derive revenue directly for each additional subscriber). For example, Sky started to provide access services before the regulations were put in place and since then has frequently exceeded its targets. Additionally, both BBC and ITV were providing some access services before the regulations were put in place.
- 5.16 Given the inconclusive nature of the available evidence, Ofcom has not reached a firm conclusion on the question of the likelihood of television access services being available (or their extent), absent regulation. Nevertheless, given their possible impact, the following analysis does not attempt to exclude the effect of any regulatory constraints that exist in the market.
- 5.17 The demand for access services is characterised by large, irregular and infrequent contracts, and, as a consequence, empirical data concerning the access services market (such as information on prices, demand and supply) sufficient to conduct a SSNIP test, is difficult to gather directly (for example, there are relatively few observed prices, given that transactions are months or years apart). In assessing demand- and supply-side substitution to define the scope of the market, Ofcom has therefore relied on evidence provided by broadcasters and access services providers on the current structure of the market and the way in which customers purchase access services.
- 5.18 Ofcom has considered information gathered from the following sources:
- i) Information from IMS and BBC Broadcast;
 - ii) Research by IAMCO;³⁴
 - iii) Information from 14 television broadcasters: the BBC, ITV, Channel 4, Five, Sky, Flextech, Disney, S4C, Teacher's TV, Nickelodeon, Hallmark, Discovery, MTV and Paramount;³⁵
 - iv) Information from five access services providers: Broadcast Text, ITFC, SDI Media, Signpost and Visiontext;³⁶ and

³⁴ See paragraph 3.19.

³⁵ See paragraph 3.20.

³⁶ Ibid.

- v) Ofcom's own understanding of the access services market stemming from Ofcom's role as the regulatory agency setting rules concerning such services.

Product Market

- 5.19 Defining the product market requires, initially, a consideration of the good or service under investigation, and those goods or services, if any, which are substitutable by consumers and suppliers for the good or service under investigation.³⁷
- 5.20 Ofcom's investigation considers access services (that is, SDH, audio description and signing (see paragraphs 2.9 to 2.15 above). Ofcom has therefore used these services as the starting point for its assessment of demand- and supply-side substitutability.

Demand-side substitution

- 5.21 In assessing the extent of demand-side substitution, the relevant consumers are the television broadcasters which buy access services (whether pursuant to, or in addition to, their obligations under the Ofcom Code). However, broadcasters' demand for access services (to the extent that it exists above and beyond a regulatory requirement to offer those services to viewers) is derived from viewer and/or advertiser demand. For the sake of completeness Ofcom has therefore considered demand-side substitution from both viewers' and broadcasters' perspectives. The first question addressed is whether the three access services are in the same or different markets.

Viewers

- 5.22 Ofcom does not consider that all three access services are in the same market from the viewers' perspective. Viewers cannot substitute one type of access service for another since:
- 5.22.1 Subtitling in television broadcast services is provided for the benefit of deaf and hard of hearing viewers. As set out in paragraph 2.9, SDH differs from language subtitling in that the former includes comments and features that are inserted specifically for the deaf or hard of hearing and are not provided in language subtitles, the latter being a direct translation for the benefit of all viewers. Ofcom therefore considers that language subtitling would only be a weak substitute and then only to the extent that language subtitling has been undertaken in English.
- 5.22.2 Signing is also targeted at the deaf and hard of hearing. Whilst on this basis signing may be considered a substitute for subtitles (and vice versa), Ofcom notes that only 16% of the deaf or hard of hearing have any knowledge of signing.³⁸ Therefore, Ofcom considers signing to be a very weak or limited substitute for subtitles.
- 5.22.3 By its nature, audio description is not substitutable for signing or subtitling from the perspective of a viewer who is deaf or hard of hearing. Equally, subtitling and signing, by virtue of the nature of the services, are not substitutable for audio description for blind or visually impaired viewers.

³⁷ Office of Fair Trading, *Market definition – Understanding competition law*, December 2004, paragraph 2.5.

³⁸ Ofcom, *Provision of Access Services: Research Study Conducted for Ofcom*, March 2006
<http://www.ofcom.org.uk/consult/condocs/accessservs/provision.pdf>

Additionally, whilst visually impaired viewers may be able to substitute television broadcasting featuring audio description for other broadcast mediums such as radio, Ofcom does not consider that this form of substitution is relevant for the purposes of this investigation which is concerned with the supply of access services to broadcasters, and not the broader question of the availability of programmes or entertainment generally for the hearing- and visually-impaired.

Broadcasters

5.23 Ofcom has considered whether subtitling, audio description and signing services comprise one market from the perspective of broadcasters. Ofcom considers that:

5.23.1 Television broadcasters are required by the Ofcom Code to provide all three access services in accordance with the quotas set under the Code. They therefore cannot elect to provide, say, subtitling instead of audio description and/or signing services, nor are they able to provide any other service in the alternative to the access services set out under the Code.

5.23.2 The manner in which broadcasters acquire access services is also relevant to Ofcom's consideration of demand-side substitutability. Specifically, Ofcom notes that broadcasters often purchase all three services from the same supplier, for example the BBC, ITV, Channel 4 and Flextech. When asked, the reasons that broadcasters gave for using a single supplier include that it reduces the complexity, risk and expense of using suppliers of individual access services (see also paragraph A4.3). For example, the use of integrated software and hardware systems by the supplier and broadcaster reduces the complexity and cost.³⁹ One broadcaster stated that there was increased efficiency in having only one supplier because they only had to deliver programme material for each of its programmes to one address for all three access services. The broadcaster also saw it as an advantage to have a single point of contact for any schedule changes, or if a programme is to be edited and more than one connection between broadcaster and access services provider would add to the expense of providing access services.⁴⁰ Finally, the requirement under the Ofcom Code to provide Ofcom with data on access services output is made easier by the use of one supplier.

5.24 Thus the nature of the provision of access services suggests that all three access services could form part of the same market.

Conclusion on demand-side substitution for individual access services

5.25 In Ofcom's view, it is appropriate to assess demand-side substitution from the perspective of broadcasters in light of the requirements placed on them by the Ofcom Code to provide access services. The fact that most broadcasters buy all their access services requirements from one supplier is consistent with SDH, signing, and audio description services being in the same market (see also, paragraphs 5.31 to 5.33).

³⁹ Channel 4's response of 6 October 2005 to Ofcom's Notice of 30 September 2005 under Section 26 of the Act.

⁴⁰ [redacted] response of [redacted] October 2005 to Ofcom's Notice of [redacted] September 2005 under Section 26 of the Act.

All access services

5.26 Having considered whether the three access services are in the same or different markets, Ofcom considered whether, from a demand-side perspective, other services could be substituted for SDH, signing and audio description. From the perspective of a user of access services, it is possible that there could be a technological solution so that the user could source an equivalent service to, say, audio description, from another source, such as a radio broadcast which was synchronised with the television programme. However, Ofcom is not aware that any such solution exists and so could not be a demand-side substitute from a viewer's perspective. In addition, as broadcasters are required by regulation to provide programmes with SDH, signing and audio description services, this prevents substitution of these services with any alternative service.

Supply-side substitution

5.27 The OFT's guidelines state that:

"supply-side substitution can be thought of as a special case of entry – entry that occurs quickly (e.g. less than one year), effectively (e.g. on a scale large enough to affect prices), and without the need for substantial sunk investments".⁴¹

5.28 Given that the demand for, and therefore the provision of, access services is characterised by large, irregular and infrequent contracts (as set out in paragraph 5.17) the key time dimension for supply side substitutability is the ability of potential suppliers to compete effectively for contracts as and when they come up. However, the precise timeframe required for such effective competition is not clear and, in any case, would be influenced by the broadcasters. Consequently, and taking account of the OFT's guidelines, Ofcom has used one year as a reasonable timeframe within which to assess supply-side substitution.

5.29 In the event of a SSNIP it is useful to consider some of the existing industry participants and the customer segments in which they are active. Table 3 below sets out some of those providers operating in various countries supplying broadcasters, DVD suppliers, commercial producers and corporate customers (for e.g. websites or training materials).

Table 3 Industry participants providing media access services to customer segments

Company	Media Access Services	Customer Segments	Geographical Base
Australian Caption Centre	SDH, Audio Description & Language subtitling	Broadcast, DVD, Commercials, Corporate	Australia
BBC Broadcast	SDH, Audio Description, Signing & Language subtitling	Broadcast, DVD, Corporate	UK
Broadcast Text	SDH, Audio Description & Language subtitling	Broadcast, DVD	Europe
CSI	SDH	Broadcast	UK, Australia
Deluxe	Language subtitling	DVD	Worldwide

⁴¹ OFT 403, paragraph 3.15.

Company	Media Access Services	Customer Segments	Geographical Base
ECI	SDH & Language subtitling	DVD, Cinema	UK
IBF	SDH, Audio Description & Language subtitling	Broadcast, DVD, Cinema, Commercials, Corporate	UK
IMS	SDH, Audio Description & Language subtitling (Signing through subcontracting)	Broadcast, DVD and Commercial	UK
ITFC	SDH, Audio Description & Language subtitling (Signing through subcontracting)	Broadcast, DVD, Cinema	UK
Media Movers	Audio Description & Language subtitling	Broadcast, DVD, Corporate	Asia
MPH	SDH, Audio Description & Signing	Broadcast, Other	UK
NCI	SDH, Audio Description & Language subtitling	Broadcast, DVD, Corporate	US
SDI Media	SDH & Language subtitling	Broadcast, DVD, Cinema & Corporate	Worldwide
SignPost	Signing	Broadcast, Other	UK
Technicolor	Audio Description & Language subtitling	DVD, Cinema	Worldwide
Visiontext	SDH, Audio Description & Language subtitling	Broadcast, DVD and Commercial	UK, US
VITAC	SDH & Language subtitling	Broadcast, Cinema	US
VSI	SDH & Language subtitling	Broadcast, DVD, Cinema, Corporate	Europe, US
WGBH	SDH & Audio Description	Broadcast, Cinema and Corporate	US

Source: IAMCO

5.30 Ofcom considers that a useful distinction can be drawn between the supply-side substitution of individual access services and the supply-side substitution of all access services from adjacent sectors.

Individual access services

5.31 Ofcom considers that from a supplier's perspective it is possible for a supplier of SDH, signing and/or audio description to supply another of these services within a one-year period and without substantial sunk cost for the following reasons:

5.31.1 There are many similarities between the technical production of these services both in terms of the technology used and the working processes required, as set out in paragraphs 2.9 to 2.16.⁴² This is supported by, for example, evidence given by Softel Limited ("Softel"), a producer of access

⁴² Although Ofcom notes that, after the production of a script, audio description requires a further step of an actor recording the script.

services software which stated that the workflow required to produce audio description services is similar to that of a subtitler.⁴³ As can be seen in Table 3 above many of the access services providers interviewed by IAMCO include both SDH and audio description in their service offerings.⁴⁴

5.31.2 In addition, the cost of the software used to produce SDH and audio description is not prohibitively high. For example, BBC Broadcast and the BBC stated that there are "off-the-shelf" packages available for audio description and subtitling for less than £10,000 each.⁴⁵ Ofcom does not therefore consider that any significant barriers exist to providing audio description services where a provider is already supplying SDH services.

5.31.3 For access services providers without an in-house signing capability, there is an active market in freelance signers and firms specialising in signing which enables an access service provider without a signing capacity to offer a signing service and then subcontract its delivery. For example, there is Signpost which works in conjunction with ITFC⁴⁶ and Remark and MPH Accessible Media ("MPH") (which Ofcom understands have been subcontracted to provide signing services to IMS).⁴⁷ The practice of subcontracting signing has developed for a number of reasons:

- a) Signing is not a natural expansion for suppliers who provide SDH and/or audio description as the skills required to produce signing are different from those used for SDH and audio description.⁴⁸
- b) The additional equipment needed for an access service supplier to offer signing includes a camera and editing equipment at a cost of around £75,000.⁴⁹
- c) Signing generally forms only a very small part of a broadcaster's total access services obligations⁵⁰ and so the ability to subcontract this aspect of a total access services package enables access services providers to potentially provide the signing component of the contract without the need to incur additional upfront costs and employ additional specialist staff in what may not be a cost effective manner.

5.32 Similarly signing specialists wishing to embark upon the provision of SDH and/or audio description could subcontract from other specialist providers. This is confirmed by one signing specialist who stated that if requested to provide access services including SDH, it will use its alliance with a subtitling company, passing this work to them.⁵¹

⁴³ Managing Director of Softel in IAMCO interview 10 October 2005.

⁴⁴ For example, The Australian Caption Centre, Broadcast Text International, ITFC, MPH Group and the National Captioning Institute ("NCI").

⁴⁵ BBC/BBC Broadcast response of 24 August 2005 to question 12 of Ofcom's Notice of 5 August 2005 under Section 26 of the Act.

⁴⁶ <http://www.itfc.com/?pid=3&sub=3>

⁴⁷ Managing director of MPH in IAMCO interview, 3 October 2005.

⁴⁸ See paragraphs 2.9 to 2.14.

⁴⁹ Managing Director of MPH in IAMCO interview 3 October 2005.

⁵⁰ The Ofcom Code requires between 1-5% of broadcast hours per day to be signed. This varies by individual broadcaster.

⁵¹ Managing Director of Signpost in IAMCO interview 4 October 2005.

Conclusion on supply-side substitution for individual access services

- 5.33 Ofcom has concluded that the individual access services as governed by the Ofcom Code are substitutable from a supply-side perspective (i.e. effective entry could occur within a one year time period and without substantial sunk cost) given the similarities in technology and production process used for SDH and audio description, and the common practice of subcontracting out for signing expertise when this function is not performed in-house. On this basis, Ofcom is of the view that SDH, audio description and signing for television broadcasters should be included in the same product market.⁵²

All access services

- 5.34 Having concluded that subtitling, audio description and signing to broadcasters should be defined as one market, Ofcom considered whether providers of access services and language subtitling in the adjacent audiovisual sectors could enter effectively within a one year time period and without substantial sunk cost to supply access services to television broadcasters. Audiovisual content which may require access services or language subtitling includes DVDs, cinematic film, corporate communications and television commercials (together referred to as "adjacent access and language services"). In assessing this, Ofcom considered a number of factors which are set out below.

Buying patterns of broadcasters

- 5.35 Ofcom has reviewed the historic buying patterns of broadcasters in order to assess the extent to which television broadcasters have switched their supplier of access services. Ofcom notes that generally broadcasters appear to have remained with their original access services suppliers, with a few exceptions: Channel 4 switched from Intelfax to BBC Broadcast in 2005; Flextech switched its subtitling services from SIUK to ITFC in 2000 and Five switched its audio description and signing requirements from ITFC to BBC Broadcast in 2005.
- 5.36 Demand for access services by television broadcasters in the UK is characterised by, first, a small number of television broadcasters which have significant access services requirements (in the order of, say, 30-50 workstations⁵³), and second, a large number of television broadcasters which have smaller requirements.⁵⁴ The large UK broadcaster contracts (the BBC channels, ITV, Channel 4, Five and Sky) accounted for approximately 94% of all origination hours in 2005 and are currently served by the three largest suppliers of access services to broadcasters, namely IMS, BBC Broadcast and ITFC.⁵⁵ Evidence from the larger broadcasters⁵⁶ shows that only one provider outside of these three suppliers (excluding Intelfax) submitted a bid

⁵² It may be the case that similar arguments regarding language subtitling could be made, from a technology point of view. However, because broadcasters are not required to provide such services, (apart from S4C), this has not been considered further.

⁵³ CEO of Broadcast Text in IAMCO interview 29 September 2005; [redacted] in IAMCO interview [redacted] September/October 2005

⁵⁴ Ofcom notes that Sky, as a "Level 1" broadcaster, has lower access services requirements than the terrestrial broadcasters. Ofcom understands that it typically exceeds its required quotas and so is better characterised as a "large" contract for the purposes of Ofcom's analysis. For example, by the third quarter of 2005, Sky News had subtitled 81.1% of its programme hours as against a Code quota of 10%.

⁵⁵ Ofcom analysis derived from access service providers' data provided in responses of 11 and 15 November 2005 to Ofcom's Notices of 8 November 2005 under Section 26 of the Act.

⁵⁶ Defined in this context as the BBC, ITV, Channel 4, Five and Sky. In this Decision, Ofcom also refers to them as "top five" in the context of size of access services contracts.

for their access services contracts.⁵⁷ Smaller providers have indicated that they are unlikely to be seriously considered for the larger contracts.⁵⁸

5.37 Table 4 below sets out the principal UK broadcasting access services contracts and suppliers.

Table 4 Principal UK broadcasting access services contracts and suppliers

Broadcaster	Service	Current supplier	Previous supplier(s) in reverse order
BBC	All access services	BBC Broadcast	BBC Broadcast (in-house)
Channel 4	All access services	BBC Broadcast	Intelfax
Five	Subtitling	IMS	IMS
	AD and signing	BBC Broadcast	ITFC
Flextech	All access services	ITFC	ITFC, SIUK
ITV (national and most regional)	All access services	ITFC (in-house)	ITFC (in-house)
ITV (Granada and some regional)	Subtitling	ITFC (in-house)	ITFC (in-house)
S4C	Subtitling	Various	
	Signing	IMS	
	AD	Cardiff Television Company	
Sky	Subtitling	IMS	
	AD and signing	In-house	

Source: television broadcasters

5.38 In contrast, smaller contracts are open to a wider range of suppliers. For example, the Disney contract in 2006 is served by IMS and Broadcast Text,⁵⁹ and Teachers' TV is served in 2006 by Visiontext.⁶⁰

5.39 Ofcom has considered whether, in order to be able to compete effectively for the large contracts, suppliers of access services need to be of a minimum size or have a minimum level of experience.

⁵⁷ Broadcaster responses of 4-6, 10 and 13-14 October 2005 to Ofcom's Notices of 28 and 30 September 2005 under Section 26 of the Act.

⁵⁸ IAMCO interviews September-October 2005.

⁵⁹ <http://www.ims-media.com/docs/aboutus.html>; <http://www.sbsbroadcasting.com/commercialtv.jsp?id=13411>

⁶⁰ Director of Visiontext in IAMCO interview 6 October 2005.

- 5.40 One provider has suggested to Ofcom that a "large" contract or "large" customer would require 30 or more workstations (each costing between £4,000 and £5,000) and staff to operate them.⁶¹ This suggests that a potential provider would need to be a large scale operation already in order to demonstrate that they are capable of delivering the required services.
- 5.41 In addition, a larger supplier is likely to have more flexibility to cope with peaks in demand. For example, BBC Broadcast is able to utilise its live subtitlers more effectively across the BBC and Channel 4 contracts because the demand peaks for each contract occur at different times – that is, BBC Broadcast is able to achieve production and resource efficiencies as a result of having the additional contract which can be "worked in" with the existing work.⁶² IMS indicated that those providers which already have contracts are able to utilise their staff more effectively:
- "As a simple example, a broadcaster decides to subtitle the six o'clock news and the nine o'clock news – the subtitler is unemployed between seven and nine. An incumbent subtitling company can therefore use that subtitler on other contracts in those two hours at a nil marginal cost."⁶³
- 5.42 For smaller broadcasters the need for potential suppliers to demonstrate an ability to operate at scale is less significant. As the regulatory requirements for access services are extended for smaller channels, new entrants and existing competitors may have an opportunity to build up scale and a track record.⁶⁴
- 5.43 Access services providers currently supplying UK broadcasters are also active in adjacent audiovisual markets. For example, BBC Broadcast has become increasingly active in bidding for and providing services outside of the broadcasting arena; IMS is active in the DVD and advertising sectors; and ITFC, along with the European Caption Institute, provides subtitling services for DVDs to DD Home Entertainment.⁶⁵ Similarly, an SDH supplier may also provide language subtitling, given the similarities in the software and workflow required for each.⁶⁶
- 5.44 Adjacent access and language services suppliers should therefore be able to exploit similarities in technology and workflow within a one year time period and be able to supply television broadcasters. However, this has not occurred in practice and so Ofcom has considered the reasons for this lack of diversification by adjacent access and language services providers.

Reputation and experience

- 5.45 In order to understand why suppliers of services in the adjacent audiovisual sectors have not entered the television access services sector Ofcom asked a number of television broadcasters for their views on their minimum requirements when selecting access services suppliers. These requirements, which are set by the broadcasters

⁶¹ CEO of Broadcast Text in IAMCO interview 29 September 2005.

⁶² Information gathered during a site visit to BBC Broadcast's facilities on 28 March 2006.

⁶³ Letter of 18 May 2006 from Simkins LLP (for IMS) to Selena Bevis at Ofcom.

⁶⁴ For example, as a result of Ofcom's 2006 review of channels required to provide television access services, 91 channels will be required to provide them in 2007, as against 76 during 2006. See http://www.ofcom.org.uk/tv/ifi/guidance/tv_access_serv/tv_access_statement07/ for further details.

⁶⁵ See www.redbeemedia.com; www.ims-media.com; and http://www.itfc.com/?pid=2&archive=1#news_32 for more details. Although Ofcom notes that the exception to this is Intelfax which, prior to exiting the market upon the loss of the Channel 4 contract, exclusively provided access services to Channel 4.

⁶⁶ Although Ofcom notes that a subtle difference with language subtitles is that they are exported as graphics files rather than text files. Managing Director of Softel in IAMCO interview 10 October 2005.

given the current market conditions, are set out further in Annex 2. Ofcom also asked broadcasters to rank each criterion in order of importance. From these television broadcasters' responses it is clear that the majority of them place strong reliance on a supplier's reputation, experience and track record in providing access services to larger UK broadcasters.⁶⁷ For example, Flextech stated that:

"access services are services where we expect top quality and are risk-averse (given the regulatory scrutiny). On this basis, an established track record in delivering to major broadcasters is central."⁶⁸

- 5.46 Further responses from Ofcom information requests showed that whilst price is an important factor in television broadcasters' selection decisions, it only becomes relevant after reputation, experience and track record thresholds have been met.⁶⁹ The broadcasters' views on reputation are supported by those of the various access services providers interviewed by IAMCO.⁷⁰ However, the BBC is of the view that providers in adjacent markets would be credible bidders, that is, bidders which meet their selection criteria.⁷¹
- 5.47 A summary of the views of the broadcasters and the access services providers is set out in Annex 2.
- 5.48 Given the strong reliance placed on reputation, experience and track record by broadcasters with larger access service requirements (see paragraph 5.36), there appears to be an asymmetry between providers who provide access services to UK broadcasters and providers of adjacent access and language services – that is, whilst reputational effects in adjacent audiovisual markets can be overcome so that a supplier to UK broadcasters can supply the adjacent audiovisual sector, the reverse is not necessarily true. Reputation could thus be considered a barrier to supply-side substitution.
- 5.49 However, the relevant supply-side substitution question when defining the relevant market is the response to a SSNIP. That is, in the event that there were a non-transitory, 5-10% price increase by *all* existing suppliers above the competitive level, whether entry by suppliers in adjacent audiovisual sectors of access services would be sufficiently quick, effective and without substantial sunk investment to make that price increase unprofitable.
- 5.50 There is evidence to suggest that in the event that current suppliers of access services did not meet the requirements of the broadcasters, these broadcasters would be willing to relax their reputational criteria and take action to stimulate entry, such as sponsoring new entry by suppliers of adjacent access and language services (see further paragraphs 7.54 to 7.63).

⁶⁷ Broadcaster responses of 4-6, 10 and 13-14 October 2005 to Ofcom's Notices of 28 and 30 September 2005 under Section 26 of the Act. The exception to this is the response of the BBC, which stated that experience in supplying access services to audiovisual content providers generally would be sufficient (BBC response of 16 May 2006 to question 11 of Ofcom's Notice of 4 May 2006 under Section 26 of the Act). More detail on the BBC's response is contained in Annex 2.

⁶⁸ Flextech's response of 6 October 2005 to question 9 of Ofcom's Notice of 28 September 2005 under Section 26 of the Act.

⁶⁹ Broadcaster responses of 22-25 and 30 November 2005 to Ofcom's Notices of 16, 17 and 21 November 2005 under Section 26 of the Act.

⁷⁰ These responses are set out in detail in paragraphs A2.17 to A2.20.

⁷¹ As discussed in paragraphs A2.13 to A2.15.

- 5.51 If the threshold to trigger such action by broadcasters did not exceed that of the SSNIP, supply-side substitution could be present. That is, suppliers in adjacent audiovisual sectors could undercut existing suppliers and win larger contracts, so representing a competitive constraint on current suppliers in the event that a SSNIP occurred.
- 5.52 There is some evidence (see paragraphs 7.61 and 7.62), that the price increase threshold to induce action on the part of the broadcaster is quite low. However, it is not clear how robust the evidence of the size of such a threshold is and also whether entry could be induced within a one year timeframe, not least because, in responding to Ofcom's questions, the broadcasters were discussing circumstances that they had not in fact faced, and so the available evidence reflects responses to hypothetical questions.
- 5.53 Ofcom recognises therefore that one credible interpretation of the available evidence points towards the existence of supply-side substitution and so a broader market definition. There is, however, an alternative interpretation that is consistent with reputation constituting a barrier to supply-side substitution, which implies a narrower market. (These alternative interpretations are also applicable in considering the evidence of supply-side substitution by overseas suppliers of access services – see paragraph 5.73 below.) Given the level of uncertainty, for the purpose of the assessment in this case, Ofcom has taken a cautious approach and adopted the narrower market definition. Ofcom considers that if the possible concerns about competition effects or market power are not shown in this narrower market definition then this conclusion is also likely to hold with a wider market definition.

Entry costs

- 5.54 The principal costs of entering the access services market are those of technology and training. Whilst it appears that the technology used to produce SDH and audio description is widely available and is not a significant proportion of the total cost of providing access services (see paragraphs A2.21 to A2.22), IMS stated that some sunk costs, that is, costs which are not recoverable on exit, arise as a result of the technology required to perform live subtitling. IMS also stated that "Whilst not large in respect of the overall contract values, this would tend to discourage small start-up operations with no existing live contracts".⁷²
- 5.55 Ofcom has also considered whether BBC Broadcast enjoyed any technology cost advantages resulting from its relationship with BBC R&D, and has noted that the technology can be licensed to other providers on similar terms to BBC Broadcast. Ofcom therefore considers that this does not constitute a barrier to entry. This is set out in more detail in paragraphs A2.25 to A2.28.
- 5.56 Another set-up cost is that of establishing a direct data link between the access services provider and the broadcaster, although this is likely to be a relatively small cost (see paragraph A2.24).
- 5.57 The time and costs for training, (see also paragraphs A2.29 to A2.33) are an important consideration for signing. Whilst it takes a number of years for a new signer to attain the standard required for broadcasting⁷³, Ofcom is aware that there are a number of freelance signers and specialist providers who could provide services to a

⁷² Letter of 18 May 2006 from Simkins LLP (for IMS) to Selena Bevis at Ofcom.

⁷³ Although it may be a shorter period for a native-speaking BSL signer.

new entrant seeking to provide access services to UK broadcasters. Thus training by itself should not preclude entry within a supply-side time frame of one year.

- 5.58 In Ofcom's view the costs of entry are relatively small compared to total contract values and are therefore unlikely to prevent market entry.⁷⁴

Conclusion on supply-side substitution for all access services

- 5.59 In summary, for the reasons set out above, Ofcom concludes that, for the purpose of the assessment in this case, barriers to supply-side substitution exist in the form of selection criteria imposed by UK broadcasters which require that access services providers have experience in, and a reputation for, servicing a larger UK broadcaster (despite the existence of a credible alternative interpretation of the evidence). This implies that, in the event of a SSNIP, those providers which only have a track record in supplying services to the adjacent audiovisual sector may not be able to win contracts to supply access services to broadcasters. In addition to selection criteria, broadcasters have also suggested that service providers need to be of a particular size in order to be able to supply the larger broadcasters, creating a disadvantage for smaller providers to be able to supply the larger broadcasters.
- 5.60 Ofcom has therefore concluded that it is more appropriate to adopt the interpretation of the evidence (with reference to reputation, experience and track record) that does not support an expansion of the market definition to include those providers which supply access services or language subtitling to other audiovisual buyers.

Ofcom's conclusion on the relevant product market

- 5.61 For the purpose of assessing whether BBC Broadcast has infringed the Chapter I prohibition/Article 81(1) and/or the Chapter II prohibition/Article 82 Ofcom has concluded that the relevant product market is for the supply of access services – that is, SDH, audio description and signing – to television broadcasters.

Geographic Market

- 5.62 Geographic markets are defined using the same methodology as that used to define the product markets, that is, by considering possibilities for demand- and supply-side substitution over a geographic area, as well as other factors such as buying patterns. This sets the geographic area in which substitution, and therefore competition, takes place – that is, on a regional, national or international basis.
- 5.63 In assessing the geographic scope of the relevant market, Ofcom notes that the Ofcom Code applies to all broadcasters in the UK and is not differentiated by region. Accordingly, Ofcom's starting point for analysis is the supply of access services to broadcasters in the UK. Ofcom sets out below its assessment of the potential for substitution of UK access services with access services supplied by overseas-based providers on both the demand- and supply-side.

⁷⁴ An exclusive contract to supply access services to one of the larger broadcasters could amount to annual revenues in the region of £1 million or more per annum. Depending on the extent of the suppliers' existing facilities, technology and resources. In Ofcom's view set up costs for the supplier to fulfil such a contract could potentially range from £50,000 to £500,000 depending primarily on the need to procure additional equipment such as cameras for signing etc (although this aspect of the service could be subcontracted). This could represent between 1% and 10% of the total contract revenue for a 5 year contract for one of the five broadcasters with larger requirements.

Demand-side substitution

- 5.64 Ofcom's assessment of demand-side substitution considers the extent to which, in the event of a SSNIP, UK viewers and broadcasters would be able to switch their demand to a service which is produced and/or supplied in a different country.
- 5.65 Ofcom does not consider that there are prospects for substitution of UK-produced access services with access services produced and/or supplied elsewhere than in the UK, for the reasons set out below:

Viewers

- 5.66 As previously stated in paragraph 2.16.3, access services supplied to UK viewers have different characteristics to those provided for viewers in other countries. For example, BSL is different to American Sign Language ("ASL") so a UK viewer would be unlikely to understand the signing used by a US-based provider of access services who used ASL, and a US viewer would be unlikely to understand BSL.⁷⁵ In addition there are obvious differences arising from the language barrier between English speaking and non-English speaking countries so that subtitles produced in, say, French, would not be substitutable for English subtitles. Programmes with subtitles from, for example, the US will need to be re-versioned in order to make them compatible with UK broadcast standards. On this basis, in Ofcom's view a UK viewer is unlikely to be able to substitute access services produced for broadcasters serving viewers in another country for UK access services.
- 5.67 However, in Ofcom's view, viewers are likely to be indifferent between access services material produced in the UK and that produced overseas, provided it meets all UK standards and language issues are adequately dealt with.

Broadcasters

- 5.68 Television broadcasters appear to have a strong and demonstrable preference for sourcing access services from within the UK. All major UK broadcasters currently purchase access services from companies which at least have a base in the UK. Ofcom has been informed by several broadcasters that the existence of a UK base is important in choosing a supplier (see Annex 3 which discusses broadcasters' minimum requirements in respect of geographical location).

Supply-side substitution

- 5.69 Ofcom's assessment of supply-side substitutability for geographic markets considers whether, in the event of a SSNIP, suppliers in different countries would be willing or able to supply access services to UK television broadcasters rapidly and without incurring substantial sunk cost.
- 5.70 There has only been one recent overseas entrant into the UK access services market - the US company WordWave, which entered the market in a joint venture (CSI) with ITFC - one of the major UK-based providers. However, for the reasons set out below, Ofcom does not consider that there are prospects for substitution of UK-supplied access services with access services supplied by overseas-based access services providers.

⁷⁵ See previously paragraph 2.13, and also the differences between UK and US standards for subtitling. Also meanings of words, spelling and colloquialisms in English will differ between English-speaking countries.

Business process requirements of UK broadcasters

- 5.71 UK broadcasters have indicated to Ofcom that they have a preference for using UK-based access services providers due to a range of factors including cost, video transfer practicalities, business continuity, disaster recovery, the importance of face-to-face meetings and the challenge of operating in different time zones.⁷⁶ BBC Broadcast and the BBC stated that it was "normal" for access services providers to have a domestic presence.⁷⁷ The business process requirements of UK broadcasters are discussed in paragraphs A3.2 to A3.7.

Reputation, experience and track record

- 5.72 For the reasons outlined previously in paragraphs 5.45 to 5.50, overseas-based providers of access services are unlikely to meet at least some of the selection criteria used by UK broadcasters, most notably reputation, experience and a track record in providing access services to UK broadcasters. For example, WordWave stated:

"We decided that it would be very hard to start from scratch in the UK. It is a small market in comparison to the US, served by several large, established companies. My reputation as the former Managing Director of Intelfax would have counted for something, but it probably would not have been enough."⁷⁸

- 5.73 However, as set out in paragraphs 5.50 to 5.52, there are two interpretations of the available evidence: one that points towards the existence of supply-side substitution and one that is consistent with reputation constituting a barrier to supply-side substitution. For the same reasons as set out in paragraph 5.53, Ofcom has adopted the latter interpretation that the need for reputation, experience and track record represents a barrier to supply-side substitution for overseas providers of access services.

Quality and standards required by UK broadcasters

- 5.74 UK broadcasters and access services providers have stated that there are actual and perceived differences in the standards offered by overseas-based providers of access services. A reason for this is because of the regulatory requirements imposed by Ofcom⁷⁹, as well as the absence of requirements in other countries, such as the US, for presentational standards which may result in different subtitling styles. Further detail on differing standards is contained in paragraphs A3.13 to A3.16.

Ofcom's conclusion on the relevant geographic market

- 5.75 For the purpose of the assessment in this case, Ofcom has concluded that it is more appropriate to adopt the interpretation of the evidence on UK television broadcasters' responses in the event of a SSNIP that implies limitations on demand-side and supply-side substitution. Under this interpretation, on the demand side, broadcasters would be unlikely to switch to suppliers of access services located abroad. On the

⁷⁶ Broadcaster responses of 4-6, 10 and 13-14 October 2005 to Ofcom's Notices of 28 and 30 September 2005 under Section 26 of the Act.

⁷⁷ BBC/BBC Broadcast response of 24 August 2005 to question 10 of Ofcom's Notice of 5 August 2005 under Section 26 of the Act.

⁷⁸ Business Development Director of WordWave / Director of CSI in IAMCO interview 29 September 2005

⁷⁹ Ofcom's *Guidelines on the provision of access services* set out best practice in support of the Ofcom Code - http://www.ofcom.org.uk/tv/ifi/guidance/tv_access_serv/guidelines/.

supply side, effective, low sunk cost entry into the UK market by overseas-based providers within a one year timeframe would be unlikely given the UK broadcasters' requirements for a proven track-record and experience and perceptions about differences in quality and standards. Ofcom has therefore concluded that overseas-based providers of access services do not constitute sufficiently close supply-side substitutes to justify broadening the extent of the geographic market beyond the UK.

Ofcom's conclusion on the relevant market

- 5.76 As stated above, the evidence from television broadcasters is that they place a strong reliance on a supplier's reputation, experience and track record in providing access services to larger UK broadcasters and that this significantly limits the ability of suppliers in adjacent audiovisual sectors and overseas-based providers to win larger UK contracts to supply access services to UK broadcasters. As a consequence, this reputation and track-record requirement could be considered a barrier to supply-side substitution.
- 5.77 It is important to note, however, that UK broadcasters impose these reputational criteria themselves. As stated above there is evidence to suggest that in the event that current suppliers of access services did not meet the requirements of the broadcasters, these broadcasters would be willing to relax their reputational criteria and take action to stimulate entry, such as sponsoring new entry by suppliers of adjacent access and language services or overseas suppliers of access services, and that the price increase threshold to induce such action is quite low. However, it is not clear how robust the evidence of the size of such a threshold is and also whether entry (especially from overseas) could be induced within a one year timeframe, not least because, in responding to Ofcom's questions, the broadcasters were discussing circumstances that they had not in fact faced, and so the available evidence reflects responses to hypothetical questions.
- 5.78 Ofcom recognises therefore that one credible interpretation of the available evidence points towards the existence of a broader market definition because of supply-side substitution, especially in terms of the product market (to include providers of adjacent access services), but also the geographic market (to include overseas providers of access services in English-speaking countries). There is, however, an alternative interpretation that is consistent with broadcasters' requirements for reputation and track record constituting a barrier to substitution for both UK providers of adjacent access services and overseas providers of access services and hence a narrower market definition. Given the level of uncertainty, for the purpose of the assessment in this case, Ofcom has taken a cautious approach and adopted the narrower market definition of the supply of access services to UK television broadcasters. Ofcom considers that if the possible concerns about competition effects or market power are not shown in this narrower market definition then this conclusion is also likely to hold with a wider market definition.

Section 6

Calculation of market shares

- 6.1 For the purpose of assessing whether BBC Broadcast has infringed the Chapter I prohibition/Article 81(1) and/or the Chapter II prohibition/Article 82, Ofcom must determine the position of BBC Broadcast in the market for the supply of access services to UK television broadcasters. In the context of the Chapter I prohibition and Article 81(1) Ofcom's assessment of BBC Broadcast's market position is the main factor in determining whether the terms of the agreement between BBC Broadcast and Channel 4 have the purpose or effect of restricting competition in the relevant market. In the context of the Chapter II prohibition and Article 82, Ofcom's assessment of BBC Broadcast's market position is one of the factors Ofcom must consider in ascertaining whether BBC Broadcast is in a position of dominance and the extent to which its competitors may act as a constraint on its behaviour.
- 6.2 In the context of calculating market shares for the supply of access services to UK television broadcasters, an important consideration is the treatment of self-supply (i.e. access services provided by a television broadcaster to itself). In some circumstances in-house suppliers are unlikely to be able to act as a competitive constraint on the actions of other suppliers in the market. The market for television access services in the UK is characterised by some instances of in-house supply (e.g. ITV by ITFC). In assessing market shares Ofcom has considered the usefulness and relevance of market shares including and excluding in-house supply.
- 6.3 In some situations market shares may overstate or understate an undertaking's position in the market and therefore other factors must be considered as part of the assessment of market power. These include potential competition (including barriers to entry and expansion) and other factors such as countervailing buyer power. In particular, Ofcom considers that the market for the supply of access services to UK television broadcasters may exhibit some of the features of a bidding market (as discussed further in Annex 4), a situation in which it is well recognised that market shares may not accurately reflect market power. In addition, Ofcom's understanding is that should a wider market definition have been adopted, the market share of BBC Broadcast is likely to be lower although Ofcom has not collected market share statistics on this basis. However, for the purposes of its current assessment, market shares are based on Ofcom's definition of the market as that of the supply of access services to UK television broadcasters.

IMS's views on market share

- 6.4 IMS submitted that given the acquisition of BBC Broadcast by CBSL, the BBC's contract with BBC Broadcast should no longer be viewed as captive and as such it should be included in any market share calculation.⁸⁰ Including this contract, IMS calculates that BBC Broadcast had a market share in excess of 50% at the time of the alleged infringement.⁸¹ In IMS's view, a consideration of bidding markets' characteristics is inappropriate in this case since high market shares are frozen for long periods of time.⁸²

⁸⁰ IMS response of 24 November 2005 to Ofcom's Notice of 8 November 2005 under Section 26 of the Act.

⁸¹ Based on origination hours.

⁸² Letter of 18 May 2006 from Simkins LLP (for IMS) to Selena Bevis at Ofcom.

BBC Broadcast and the BBC's views on market share

- 6.5 BBC Broadcast submitted jointly with the BBC that competition in access services takes place via competitive tendering and that assessing market shares is not always insightful when competition in the relevant market takes place through bidding for infrequent, long-term contracts.⁸³ In this situation, market shares may change substantially and hence a high market share at one point in time may not be a permanent feature and may not be a reliable guide when assessing market power.
- 6.6 The BBC stated that BBC Broadcast's estimate of its market share at the time of the alleged infringement was less than 20%.⁸⁴ BBC Broadcast arrived at this figure by excluding from its calculation the share of supply attributable to its in-house access services contract with the BBC, as the contract was "captive" and, in its view, should be excluded from the calculation, as should other in-house supply such as ITFC to ITV and Sky's audio description and signing services.⁸⁵

Ofcom's approach to the calculation of market shares

- 6.7 As set out by the OFT, the appropriate method for calculating market shares - that is, using sales data by value or alternatively by volume - depends on the case in hand.⁸⁶ In the context of this case, Ofcom considered both market shares calculated by sales value data and those calculated by volume data. In respect of volume data, Ofcom considers that there is a further distinction to be made between sales of origination hours and sales of all hours given that there are different ways in which an access services supplier may produce content for its broadcasting client: origination, repeats and reversioning (see paragraph 2.16).
- 6.8 For the purpose of calculating market share Ofcom obtained volume (origination hours) and value (revenue) data from several access services providers.⁸⁷ Given that, firstly, one of the allegations under investigation is of predatory pricing and there is therefore the potential for value data to be distorted; and secondly the pricing of the BBC contract does not differentiate between origination sales and repeats and therefore is not directly comparable with the data provided by other access services providers, Ofcom has used volume data to calculate market share.
- 6.9 Ofcom considers that of the three types of access services data outlined in paragraph 6.7 it is most appropriate to use origination hours to calculate market shares. Of the two types of volume data, origination hours represent the closest proxy to value data, as repeats or reversioning have a relatively low value per hour and their inclusion could distort the result.

Treatment of in-house supply

Chapter I/Article 81

- 6.10 In relation to the allegations of infringement of the Chapter I prohibition and Article 81, the starting point for Ofcom's assessment is the Commission's Guidelines on the application of the Block Exemption (see paragraph 4.10), which state:

⁸³ BBC/BBC Broadcast response of 24 August 2005 to question 11 of Ofcom's Notice of 5 August 2005 under Section 26 of the Act.

⁸⁴ BBC submission to Ofcom 24 January 2006.

⁸⁵ *ibid.*

⁸⁶ OFT Guideline 415, *Assessment of Market Power*, December 2004 ("OFT 415"), paragraph 4.7:

<http://www.ofcom.gov.uk/NR/rdonlyres/A92F91BC-B556-4724-8D2B-7002F6CDEA65/0/oft415.pdf>

⁸⁷ ITFC, IMS, BBC Broadcast, SDI Media, Sky, Signpost, Nickelodeon and Visiontext.

"In-house production, that is production of an intermediate product for own use, may be very important in a competition analysis as one of the competitive constraints or to accentuate the market position of a company. However, for the purpose of market definition and the calculation of market share for intermediate goods and services, in-house production will not be taken into account."⁸⁸

6.11 Ofcom considers that access services are an intermediate product or service. Whilst the term is not specifically defined in the Commission's Guidelines, Ofcom considers that the term "intermediate" implies that the product is either not available or ready for consumption by the final consumer (or alternatively, that it may be ready for consumption but may also have further work applied to it – that is, it is incorporated into or forms a component of the final product). This is confirmed by paragraph 52 of the Commission's Guidelines which states that:

"The term "component" includes any intermediate goods and the term "incorporation" refers to the use of any input to produce goods."

6.12 At paragraph 119 of the Commission's Guidelines the Commission states:

"Intermediate goods and services are sold to undertakings for use as an input to produce other goods or services and are generally not recognisable in the final goods or services. The buyers of intermediate products are usually well-informed customers, able to assess quality and therefore less reliant on brand and image. Final goods are, directly or indirectly, sold to final consumers who often rely more on brand and image."

6.13 In Ofcom's view access services are intermediate products as they cannot be consumed by viewers, irrespective of whether they are sold to or purchased by them, in the absence of a broadcast. That is, Ofcom considers that access services are an input into and component of the final television broadcast watched by viewers.

6.14 Ofcom has applied the Commission's Guidelines in its assessment of market size and shares for its Chapter I and Article 81 assessment for the application of the Block Exemption, and has calculated market shares in accordance with the clear statement in the Commission's Guidelines (see paragraph 6.10 above) (i.e. excluding in-house supply). Market shares before the signing of the Channel 4 contract are set out in Table 5 below.

⁸⁸ 2000/C291/01, OJ C291/1, 13.10.2000 at paragraph 98.

Table 5 Market shares of key access services providers (2004⁸⁹) (percentage of origination hours) excluding in-house supply

Supplier	Market share excluding in-house supply
BBC Broadcast	[0-10]%
IMS	[60-70]%
ITFC	[0-10]%
Intelfax	[10-20]%
Sky	[0-10]%
Other	[0-10]%
Total	100%

Source: Ofcom analysis of access services providers' data⁹⁰

6.15 In section 7, which contains Ofcom's assessment of Chapter I/Article 81 allegations, Ofcom has applied the Commission's Guidelines which state that for the application of the market share threshold in the Block Exemption, in-house supply should be excluded.⁹¹

Chapter II/Article 82

6.16 For the purposes of Ofcom's Chapter II and Article 82 assessment, Ofcom has considered market shares both including and excluding in-house supply (as set out in Table 6 below).

Table 6 Market shares of key access services providers (2004⁹²) (percentage of origination hours)

Supplier	Market share excluding in-house supply	Market share including in-house supply
BBC Broadcast	[0-10]%	[30-40]%
IMS	[60-70]%	[20-30]%
ITFC	[0-10]%	[20-30]%
Intelfax	[10-20]%	[0-10]%
Sky	[0-10]%	[0-10]%
Other	[0-10]%	[0-10]%
Total	100%	100%

Source: Ofcom analysis of access services providers' and broadcaster in-house supply data⁹³

⁸⁹ Results are based on data provided for the calendar year 2005, or first six months of 2005 in some cases, from access services providers. Because Intelfax had ceased to exist as a company by that time, Ofcom then imputed from this 2005 data a market share for Intelfax in 2004. Because supply in this market is based on one-off contracts, in Ofcom's view the 2005 data provides an accurate reflection of market shares in 2004.

⁹⁰ Ofcom has considered the market share of BBC Broadcast at the time of entering into the Channel 4 contract when the share of supply attributable to the BBC's requirements was regarded as in-house and therefore excluded from market share calculations. Ofcom notes that the characterisation of the BBC's requirements as in-house supply subsequently changed upon the sale of BBC Broadcast to CBSL on 1 August 2005.

⁹¹ Paragraph 99.

⁹² See footnote 89.

⁹³ Sky's share of the market, through its in-house supply of signing and audio description services, appears to Ofcom to be relatively high. This may be linked to the fact that as Sky's origination hours were not easily available, Ofcom calculated a proxy for them from total hours and a sample week of repeat rates provided by Sky.

- 6.17 In considering the relevance of market shares which include or exclude in-house supply, Ofcom notes the OFT's Guidelines on the Assessment of Market Power which state:

"Internal production – In some cases, a supplier may be using some of its capacity or production to meet its own internal needs. In the event of a rise in price on the open market, the supplier may decide to divert some or all of its 'captive' capacity or production to the open market if it is profitable to do so, taking into account effects on its downstream business that is now deprived of the captive supply. The extent to which 'captive' capacity or production is likely to be released onto the open market (or might otherwise affect competition on the open market) will be taken into account in assessing competitive constraints."⁹⁴

- 6.18 Thus the rationale for disregarding in-house production from market shares in an assessment of dominance is based on an assumption of finite production capacity – that is, a supplier of in-house goods or services is assumed to have limited production capacity or no ability to divert resources to external production which means that it is unable to act as a competitive constraint on the actions of other market participants.
- 6.19 Under this assumption, an undertaking operating at full capacity and without the option to expand would therefore need to make a choice between supplying the in-house customer and supplying the external customer. Assuming that the in-house and external customers compete against each other, companies engaged in self-supply are unlikely to be willing to sell in the market because doing so may leave unsatisfied internal demand.
- 6.20 Ofcom notes that the production process for most access services involves no significant barriers to expansion. As discussed at paragraph 5.31 and in Annex 2, the evidence available to Ofcom shows that access to skilled personnel and the technology used to produce access services are readily available. Further it is relatively easy to subcontract particular services, for example signing, and there are sufficient qualified personnel in the market place who can be hired to provide audio description and subtitling services. This suggests that there is unlikely to be an unduly restrictive opportunity cost in terms of supply and that capacity is therefore unlikely to be finite.⁹⁵
- 6.21 The relevance of in-house sales to an assessment of market power has been considered by Inotai, in his paper on captive sales, which states that:

"captive sales should be included in the market (and in the calculation of market shares) if they can be realistically diverted from the subsidiary or downstream operation to independent third parties".⁹⁶

⁹⁴ OFT 415, paragraph 4.8.

⁹⁵ In general there might be further arguments for the inclusion of captive sales when measuring market shares for the purpose of assessing market power. For example, for wholesale inputs where an indirect constraint operates via substitution at the retail level (and the input under examination represents a sufficiently large proportion of the retail price). However, this consideration does not appear to be relevant to access services in the circumstances of this case.

⁹⁶ Inotai, A. G (2005) *The Treatment of Captive Sales in the Electronic Communications Sector, with Special View to the New Regulatory Framework for Electronic Communications* European competition law review: a quarterly review, vol. 26, issue 9, pages 491-499.

- 6.22 As set out in paragraph 3.1, BBC Broadcast was until 1 August 2005 a wholly owned in-house provider of access services to the BBC. It was incorporated in 2002 but it was still wholly-owned by the BBC and its activities remained unchanged. At the time of entering into the Channel 4 contract the BBC's access services requirements continued to be met by BBC Broadcast. Ofcom must therefore assess whether in these circumstances it is appropriate to exclude from its market share calculations that share of supply attributable to in-house clients such as the BBC.⁹⁷
- 6.23 After incorporation, BBC Broadcast tendered unsuccessfully for several external access services contracts.⁹⁸ Although unsuccessful, BBC Broadcast's willingness to tender suggests that it had the capacity prior to entering into the Channel 4 contract to increase production of access services for the purpose of supplying external parties. Ofcom is also aware that ITFC supplies to the external market, for example through its contract with Flextech. This would appear to indicate that for the purposes of calculating market shares for Ofcom's Chapter II assessment there is a case for the inclusion of in-house supply. Otherwise the true market strength of BBC Broadcast and ITFC would be underestimated. This is discussed further in section 8.
- 6.24 In addition, as set out in paragraph 5.45 *et seq.*, in the market for provision of television access services to UK broadcasters, the larger broadcasters place a strong reliance on reputation and experience of supplying access services to larger broadcasters. Accordingly the exclusion of in-house sales for BBC Broadcast, which both supplies in-house and externally, potentially leads to a market share figure for BBC Broadcast that underestimates its market strength. However, changes in market share may not indicate any material change in market strength. For example, following the sale of BBC Broadcast to CBSL the BBC contract ceased to be supplied in-house. Inclusion of the BBC contract in a market share calculation substantially increases BBC Broadcast's share of the market (to [60-70]%⁹⁹) but its underlying power does not change. In fact, it could be argued that it has decreased as the BBC contract will be contestable in the future.
- 6.25 In section 7, Ofcom's assessment of Chapter II/Article 82 allegations, Ofcom has considered market shares both including and excluding in-house supply. The reason for this is that, as laid out above, in the market for the supply of access services to UK television broadcasters, market shares excluding in-house supply may not provide an accurate picture of market power, as they may underestimate the market power of the suppliers which supply significant business to their vertically integrated owners.

⁹⁷ Similarly, ITV's access services requirements were met by its in-house subsidiary, ITFC, at the time of the alleged infringement.

⁹⁸ For example, ITV provided details about BBC Broadcast submitting a proposal to provide regional subtitling to Granada in its response of 13 October 2005 to Ofcom's Notice of 28 September 2005 under Section 26 of the Act. BBC Broadcast also mentioned that it had submitted bids prior to the Channel 4 and Five tenders in a meeting between BBC Broadcast and Ofcom which took place on 7 October 2005.

⁹⁹ This figure excludes in-house supply.

Section 7

Assessment of Chapter II/Article 82 allegations

Introduction

- 7.1 The Chapter II prohibition provides that any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market within the UK is prohibited if it may affect trade within the UK and Article 82/EC prohibits the abuse of a dominant position if it affects trade between Member States.
- 7.2 To consider the allegations relating to the Chapter II/Article 82 prohibitions, Ofcom has therefore considered whether BBC Broadcast:
- i) was dominant in the relevant market at the time of the alleged infringement; and
 - ii) if so, abused that position of dominance.

IMS's submissions on dominance

- 7.3 IMS argued that BBC Broadcast was dominant in the supply of UK television access services because:
- i) BBC Broadcast had foreclosed 50% of the market for the foreseeable future by virtue of its contracts with the BBC and Channel 4;
 - ii) "[BBC Broadcast] benefits from the cushion provided by profitable sales at prices that were not the product of arms length negotiation. This provides the basis to offer low prices to other customers. In the circumstances, other firms in neighbouring markets would have to be very bold indeed to switch to the media access market. Such potential switching would not therefore operate as a constraint on [BBC Broadcast]"; and
 - iii) The Ofcom Code also means that "there are no substitutes for media access services outside the bundle of specific services for blind and deaf people described above. The broadcaster would have no option but to continue to buy the relevant services if their price were to be increased."¹⁰⁰
- 7.4 For these reasons, IMS argued that BBC Broadcast was (and is) able to act independently of its competitors and customers in the market place.¹⁰¹

BBC Broadcast's and the BBC's submissions on dominance

- 7.5 The BBC on behalf of itself and BBC Broadcast argued that at the time it bid for the Channel 4 contract, BBC Broadcast was not (and continues not to be) dominant in the supply of UK television access services because:

¹⁰⁰ Complaint submitted by IMS 6 June 2006.

¹⁰¹ IMS's and Ofcom's market share figures differ due to different data collection methods. Ofcom's figures are based on data collected from access services providers and use origination hours. Such data would not be available to IMS.

- i) "its market share [excluding self-supply] was, and is, not large enough to give rise to a presumption of dominance;
- ii) in any event, market shares are not very meaningful in a bidding market like the market for media access services and it is rather the number of credible bidders which is key in assessing market power; and
- iii) at the time of the Channel 4 bid, [BBC Broadcast] was facing significant competitive constraints from competing suppliers of media access services, potential entrants, the threat of customers switching to self-supply, low barriers to entry including the threat of customers sponsoring new entry and countervailing buyer power – and [BBC Broadcast] continues to face these constraints."¹⁰²

7.6 For these reasons, the BBC and BBC Broadcast argued that BBC Broadcast was not in a position to behave independently of its competitors and customers in the market place. It argued that the prices offered by BBC Broadcast were the result of normal price competition and constituted a legitimate means for it to compete in this market.

Ofcom's approach to the assessment of dominance

7.7 In considering dominance Ofcom has had regard to the case law of the European Court of Justice ("ECJ"), which has defined a dominant position as:

"...a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".¹⁰³

7.8 An assessment of the existence of market power, and dominance, must therefore necessarily focus on a consideration of competitive constraints on the ability of an undertaking to behave independently of the rest of the market.

7.9 In assessing whether BBC Broadcast was dominant at the time of the alleged contravention Ofcom has considered the following factors:

- i) *Existing competition* – an undertaking is unlikely to possess market power if alternative sources of supply are present in the market, to which a consumer could switch if that undertaking attempts to act anti-competitively. Therefore, the market shares of firms in the market, both in absolute terms and relative to each other, can give an indication of the potential extent of a firm's market power.¹⁰⁴

¹⁰² BBC (on behalf of itself and BBC Broadcast) submission to Ofcom, 24 January 2006.

¹⁰³ Case 27/76 *United Brands v Commission* [1978] ECR 207 at paragraph 65. See also OFT Guideline 402, *Abuse of a Dominant Position*, December 2004 ("OFT 402"), in particular at paragraphs 4.10 to 4.15.

¹⁰⁴ In its response to the consultation on the draft decision, IMS argued that the market shares that Ofcom has used in its assessment of BBC Broadcast's market position are incorrect as they should not be based on BBC Broadcast's position prior to the signing of the Channel 4 contract, rather Ofcom should have taken a "dynamic" approach to its analysis as the alleged pricing abuse persists as long as the price is maintained (paragraphs 2.5 and 2.5). Accordingly, in IMS's view, Ofcom should have taken into account that BBC Broadcast gained the Channel 4 contract and that, subsequently, the BBC contract ceased to be in-house, giving it market share in the range of 60-80%. Ofcom considered the market shares at the time the contract was entered into and which is the point in time at which IMS alleged that BBC Broadcast abused a dominant position through the alleged abusive conduct of predatory pricing to gain the contract and by the length or exclusive nature of the contract. In doing this, Ofcom has considered market shares both with and without in-house sales i.e. taking into account BBC Broadcast's supply to the BBC. In addition, as set out in paragraph 6.24 while inclusion of the BBC contract in a market share calculation does increase BBC Broadcast's market share, its underlying market power remains unchanged and may in fact decrease as the BBC contract will in future be contestable. In any case, as set out in

However as is well recognised, a firm with a large market share will not always be dominant, since other features of a market may affect a firm's ability to exercise any potential market power. It is thus necessary to take into account both the competitive conditions at the time of the alleged abuse and those subsequent to it. Ofcom's consideration of market shares and other related factors is set out above in section 6 and in paragraphs 7.10 to 7.26.

- ii) *Potential competition* – Existing market shares sometimes do not accurately reflect market power. Specifically, irrespective of market shares the existence of potential entrants to the market means that it might not be feasible for an undertaking in a market to act anti-competitively, as new entry, or expansion of existing market participants, could result in customers switching their purchases to new sources of supply. The extent of any competitive constraint from the threat of new entry or expansion will thus depend on an assessment of barriers to entry and expansion and the existence of other undertakings that might readily enter the market. Ofcom's consideration of barriers to entry and expansion in this market is set out below in paragraphs 7.27 to 7.43.
- iii) *Other factors* – the ability of a supplier to realise its potential market power may be weakened by other factors such as countervailing buyer power.¹⁰⁵ Ofcom's assessment of buyer power is set out below in paragraphs 7.44 to 7.72.

Existing competition

- 7.10 Ofcom's calculations of market shares are set out in section 6. As explained above, Ofcom has considered the market shares for its dominance assessment both on the basis of including in-house supply and excluding in-house supply.
- 7.11 In this sub-section, Ofcom sets out the use of market share thresholds in assessing dominance, and considers the relevance of market shares in this case given the specific features of this market.

Market share thresholds relevant to the assessment of dominance

- 7.12 The ECJ has provided guidance on the level of market share which may be indicative of a dominant position. In *AKZO*, the ECJ held that, in the absence of evidence to the contrary, dominance could be presumed if an undertaking has a market share persistently above 50%.¹⁰⁶
- 7.13 The OFT states that it considers it unlikely that an individual undertaking would be dominant with a market share of below 40% but acknowledges that, if other factors are present such as the weak position of competitors in the relevant market, dominance could be established even with market shares below 40%.¹⁰⁷

paragraph 7.17, Ofcom's analysis of dominance relies more heavily on criteria such as barriers to entry and expansion and countervailing buyer power, and less on market shares.

¹⁰⁵ OFT 415, paragraph 2.10.

¹⁰⁶ *AKZO Chemie BV v Commission*, Case C62/86, [1991] ECR I-3359. See also *F Hoffmann La Roche & Co AG v Commission*, Case 85/76, [1979] ECR 461 where the ECJ held that an undertaking which has a very large market share and holds it for some time is by, virtue of that share, in a position of strength.

¹⁰⁷ OFT 415, paragraph 2.12. In *Virgin/British Airways*, Commission Decision of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty, 2000/74/EC, OJ 2000 L30, p.1, the Commission found that BA was dominant in the UK air travel agency services market with a market share of 39.7%. The CFI upheld the finding of dominance on appeal: *British Airways v Commission T-219/99*, ECR 2003 II-05917 (the dominance finding did not form part of the subsequent appeal to the European Court of Justice by British Airways).

- 7.14 The market share of BBC Broadcast at the time of the alleged infringement was [0-10]% excluding in-house supply. Further, Ofcom has considered the composition of the remainder of the market, and notes that it consisted of three major competitors (IMS, ITFC and Intelfax) and several much smaller competitors. This gives Ofcom grounds for concluding that BBC Broadcast was not dominant at the relevant time.
- 7.15 However, Ofcom has also considered the impact of market shares calculated on the basis of the inclusion of in-house supply with resulting market shares as set out in Table 7 below. On that basis BBC Broadcast's share of the market at the time of the alleged infringement was [30-40]%.

Table 7 Market shares of key access services providers (2004)(percentage of origination hours)

Supplier	Market share excluding in-house supply	Market share including in-house supply
BBC Broadcast	[0-10]%	[30-40]%
IMS	[70-80]%	[20-30]%
ITFC	[0-10]%	[20-30]%
Intelfax	[10-20]%	[0-10]%
Sky	[0-10]%	[0-10]%
Other	[0-10]%	[0-10]%
Total	100%	100%

Source: Ofcom analysis of access services providers' and broadcaster in-house supply data¹⁰⁸

- 7.16 In Ofcom's view, a [30-40]% share of the relevant market is not, on its own, sufficient to conclude that BBC Broadcast was dominant. This is particularly true in this case given that the relevant market exhibits some of the characteristics of a bidding market (see paragraph 7.24 below and Annex 4). Ofcom has therefore considered other indicators of market power. These features are discussed in paragraphs 7.32 to 7.42 below.

Reliance on market shares: the significance of bidding markets

- 7.17 In the relevant market contracts are only awarded infrequently and so market shares may change substantially on the award of a major contract. In such a market, a high market share at one point in time may not be a permanent feature and material market share changes can occur rapidly (albeit at infrequent intervals). Consequently Ofcom's analysis of dominance relies more heavily on criteria such as barriers to entry and expansion and countervailing buyer power, and less on market shares.
- 7.18 The characteristics of a bidding market were identified in the Competition Commission's report on the Arcelor SA and Corus Group plc merger (the "Arcelor/Corus") and include:
- i) Relatively few, large contests to supply customers. If there are many smaller contests, then suppliers with large market shares might be prepared to bid high,

¹⁰⁸ Sky's share of the market, through its in-house supply of signing and audio description services, appears to Ofcom to be relatively high. This may be linked to the fact that as Sky's origination hours were not easily available, Ofcom calculated a proxy for them from total hours and a sample week of repeat rates provided by Sky. In its response to the consultation on the draft decision, IMS argued that this figure should be around 5% (paragraph 4.2).

taking the risk of the loss of some orders to raise margins on the remaining orders (as in a normal market);

- ii) Open contests, with the opportunity for all suppliers to compete in each contest;
- iii) No significant capacity constraints (again, to ensure that suppliers are indeed interested in winning); and
- iv) 'Brand image' and other factors that are likely to be reinforced by repeated sales (for example, costs of switching between suppliers for customers) should play no part. In this relevant market, 'brand image' is akin to reputation.¹⁰⁹

7.19 The Competition Commission also stated:

"The existence of a bidding market is not an all-or-nothing question. If the market...exhibits some of the characteristics of a bidding market—but does not quite match the idealized concept—then a high market share is likely to confer some market power but not as much as may usually be expected".¹¹⁰

7.20 Market share data for markets which exhibit features of a bidding market needs to be interpreted cautiously. For the purposes of competition analysis, markets where the majority of sales are made by competitive tenders may be characterised as bidding markets. The significance of bidding markets in a competition analysis was identified in Competition Commission's report on the *Arcelor/Corus* merger as follows:

"In a bidding market, suppliers compete by submitting tenders for relatively large orders. Because there is a competitive tender, and because orders are large enough to induce all capable suppliers to want to participate (i.e. there is a 'winner takes all' aspect to the market), each tender is almost a separate market in which suppliers compete—on price, quality or other characteristics—to win the business from scratch. The economic effect is that historical market share conveys no market power whatsoever, and consequently competition authorities need be less worried about high or growing market shares. Market share just reflects the historical success of a company in winning bidding contests in the past and this does not imply that it has any incentive to bid any less competitively in the future."¹¹¹

7.21 Therefore in a bidding market, if competition at the bidding stage is effective, having a high share of sales over a period of time may not be indicative of market power because most or all sales could be lost to a competitor in the next bidding round.¹¹²

7.22 The "winner takes all" aspect to a bidding market is an important factor in an assessment of competitive constraints. In the market for access services Ofcom has observed that, in general, television access services are either supplied in-house (for example ITV or, before the sale of BBC Broadcast, the BBC), as a result of a negotiated procurement (for example Sky) or a competitive tender (for example

¹⁰⁹ Competition Commission, *A report on the acquisition by Arcelor SA of part of Corus Group plc's UK hot rolled steel sheet piling business: Appendix B*, 10 February 2005, http://www.competition-commission.org.uk/rep_pub/reports/2005/fulltext/498arcelor.htm.

¹¹⁰ *ibid*, paragraph 10.

¹¹¹ *ibid*, paragraph 8.

¹¹² OFT 415, paragraph 4.4.

Channel 4 or Five, Flextech and Disney). In the future it is likely that an increasing number of new, but much smaller, contracts will become available, as more television broadcasters are required to offer more access services under the Ofcom Code.

- 7.23 Ofcom has observed in paragraph 5.23.2 that most UK broadcasters prefer not to have more than one provider of all access services (i.e. they prefer to award exclusive contracts). This exclusivity means that most significant orders in the access services market are likely to be large enough to induce all capable suppliers to want to participate in each available tender.
- 7.24 Ofcom's assessment of bidding markets is set out in Annex 4 along with IMS's comments on that assessment. In Ofcom's view:
- i) the majority of the market is characterised by a few large contracts, even excluding the BBC and ITV contracts. These large contracts are likely to be large enough to encourage capable suppliers to want to participate in each available tender;
 - ii) the tenders are, however, not completely open in that not all suppliers are invited to tender or regarded as suitably qualified bidders although there are usually three or four suppliers which participate in each competitive tendering process;
 - iii) there are no significant capacity constraints; and
 - iv) in this market a well-established brand (akin to reputation) is likely to be favoured over another less established one. Broadcasters generally stated that they require their access services providers to have a certain minimum level of reputation and experience and that at least three suppliers meet that threshold. Once this reputational pre-condition has been met, selection of a supplier then comes down to price which means that switching could and does occur. Thus although switching costs exist, they do not in general preclude customers from switching provider.
- 7.25 In light of these points and the analysis set out in Annex 4, Ofcom has concluded that the access services market displays some of the characteristics of a bidding market.
- 7.26 Therefore Ofcom has placed greater weight on the wider competitive context within which these providers operate in order to assess whether BBC Broadcast is dominant in the relevant market.

Potential competition: barriers to entry and expansion

- 7.27 Barriers to entry or expansion are features of a market of an economic, strategic or legal nature that prevent or deter firms from entering or expanding in that market. An assessment of barriers to entry and expansion is important in the assessment of potential competition and, accordingly, the assessment of market power. Specifically, high barriers to entry will tend to weaken competitive constraints, for example by restricting or slowing market entry and expansion.¹¹³
- 7.28 Economic barriers to entry are those linked to production or proprietary technology, scale or scope economies, product differentiation or branding. Economic barriers may impose cost disadvantages to new entrant undertakings since they may have to incur higher costs than existing suppliers.

¹¹³ OFT 415, paragraph 5.5.

- 7.29 Strategic barriers are barriers created or strengthened by an undertaking in order to deter entry of new firms into the market. They include exclusionary practices by undertakings to restrict conditions of competition on the market, such as the threat to engage in a price war or to expand output in response to new entry or excessive investments in product range or advertising.
- 7.30 Legal barriers are laws or other legal restrictions that may prevent or restrict firms from entering markets and competing. A common form of legal barrier is licensing, for example where only certain suppliers are authorised to provide a particular service and such authorisations are costly or time consuming to secure.
- 7.31 For the purposes of this assessment Ofcom has considered various potential economic and strategic barriers to entry or expansion. Ofcom does not consider that legal barriers to entry or expansion are present in the market for access services and therefore they are not relevant to its assessment of dominance. Specifically, Ofcom has considered the following potential barriers to entry or expansion:
- i) Economies of scale and scope, and minimum size (paragraph 7.32);
 - ii) Technology (paragraphs 7.33 to 7.34);
 - iii) Access to skilled personnel (paragraph 7.35);
 - iv) Switching costs (paragraph 7.36); and
 - v) Reputation and experience (paragraphs 7.37 to 7.42).

Economies of scale and scope, and minimum size

- 7.32 In larger organisations because the cost of initial investment can be spread across a greater number of producing units, savings in the cost of production can be achieved. This is referred to as economies of scale and can represent an economic barrier to entry which may give rise to market power. Economies of scale are therefore more likely to be present the higher the fixed costs of production. In Ofcom's view the majority of costs in the production of television access services (70-80%) are labour-related¹¹⁴ (and so not fixed), suggesting that economies of scale are unlikely to be significant. However, larger access services providers may be better placed to lower unit costs by maximising the use of equipment and software that they have across a number of contracts (see paragraph 5.41). Further, a supplier of sufficient size may be better able to demonstrate that they have the flexibility to cope with peaks in demand.

Technology

- 7.33 Access to and the cost of technology as a potential economic barrier to entry to the UK access services market is discussed in summary in paragraph 5.31 and in detail in paragraphs A2.21 to A2.24. The up-front cost of the technology required to produce access services is not significant in the context of total operating costs.¹¹⁵ In Ofcom's view, technology costs are relatively small in comparison to staff costs and are therefore unlikely to represent a barrier to entry or expansion

¹¹⁴ Five interviewees cited between 70-80% in IAMCO interviews September-October 2005.

¹¹⁵ Including the cost of establishing and maintaining direct links between the access services provider and its broadcasting customer.

- 7.34 Ofcom has also considered whether BBC Broadcast enjoyed any advantages resulting from its ability to use access services technology through its relationship with BBC R&D. The technology developed by BBC R&D is not licensed exclusively to BBC Broadcast and is therefore available to other market participants on terms similar to those prevailing under the agreement between BBC Broadcast and BBC R&D. On this basis, Ofcom does not consider that access to technology constitutes a barrier to entering or expanding in the access services market (see paragraphs A2.25 to A2.28).

Access to skilled personnel

- 7.35 Ofcom considers that there is an active market for skilled staff required to provide subtitling and audio description services and that there is also an active freelance signer market and a number of specialist signing firms to which signing can be subcontracted (see paragraphs A2.31 to A2.33). Ofcom therefore does not consider that access to a skilled workforce poses an economic barrier to entry or expansion.

Switching costs

- 7.36 Ofcom has concluded that although switching costs, that is the costs incurred in moving from one access services provider to another, exist, they are unlikely to prevent broadcasters from switching providers; indeed, in paragraph 5.35 Ofcom set out several examples of broadcasters which switched suppliers. (Ofcom's discussion of switching costs is set out in paragraphs A4.19 to A4.27.) Ofcom therefore does not consider that switching costs pose an economic barrier to entry or expansion.

Reputation and experience

- 7.37 Using the same evidence set out in paragraphs 5.45 to 5.46 in Ofcom's assessment of supply-side substitution, Ofcom has considered the extent to which reputation, experience and track record is a barrier to entry. Ofcom has found that television broadcasters prefer to work with an established provider, and place a high value on reputation, experience and track record. Ofcom notes, however, that this barrier is one that is set by the broadcasters and that in the event that suppliers of access services fail to make acceptable offers, there is evidence that some action would be taken by them to stimulate entry (see further paragraphs 7.54 to 7.63).
- 7.38 When questioned, among the minimum criteria for their access services provider cited by these broadcasters were the successful fulfilment of contracts, experience of providing services to UK television broadcasters, and preferably some knowledge of the company. Although these broadcasters stated that they would accept a tender from companies which did not meet these criteria, they nonetheless suggested that these companies would be unlikely to be awarded the contract (see further Annex 2).
- 7.39 Most of the broadcasters stated that they considered evidence of previous contracts, references, or (in some cases) the ability to perform a satisfactory demonstration of their services as suitable ways of establishing track record, experience and reputation. In relation to previous experience, only two out of eight broadcasters stated that they would consider access services providers which had supplied overseas broadcasters, as well as those which currently serve UK broadcasters,

whilst four out of eight broadcasters suggested that they would only consider providers who have previously worked with a "top five" UK broadcaster.¹¹⁶

- 7.40 Ofcom therefore considers that reputation and experience pose a barrier to large scale entry or expansion for smaller suppliers, under current market conditions (noting Ofcom's comments at paragraphs 5.48 to 5.53).
- 7.41 However, broadcasters have indicated to Ofcom that there are a number of television access services providers which meet their thresholds for reputation and experience. For each broadcaster there are at least two suppliers which meet their threshold as a "credible" bidder, and for most, three.¹¹⁷
- i) Five out of eight broadcasters view at least ITFC, IMS and BBC Broadcast as meeting their thresholds for reputation;
 - ii) Seven out of the eight broadcasters view at least BBC Broadcast and ITFC as meeting their thresholds for reputation;
 - iii) Five out of the eight broadcasters view at least ITFC and IMS as meeting their thresholds for reputation; and
 - iv) Six out of the eight broadcasters view at least BBC Broadcast and IMS as meeting their thresholds for reputation.
- 7.42 In Ofcom's view there are at least three access services providers – ITFC, IMS and BBC Broadcast, (and at the time of alleged infringement there was a fourth provider, Intelfax, which has subsequently exited the market) that can credibly compete for the larger contracts. The information provided by broadcasters shows that BBC Broadcast's reputation is not necessarily any stronger than other large access services providers. However, the same cannot be said for those providers that do not have experience with a "top five" UK television broadcaster. Ofcom therefore considers that reputation and experience poses a barrier to entering into or expanding in the access services market for smaller suppliers under current market conditions.

Conclusion on barriers to entry and expansion

- 7.43 In summary, Ofcom considers that:
- i) Technology costs are not high and so do not represent a significant barrier to entry or expansion;
 - ii) The technology used by BBC Broadcast is available to other providers and does not act as a barrier to expansion for existing competitors in the market;
 - iii) Switching costs do not preclude broadcasters from switching provider;
 - iv) The skilled personnel required to provide access services are generally available or can be obtained using freelancers or subcontractors;

¹¹⁶ See footnote 56. Conference calls with broadcasters 16-23 May 2006, confirmed by Ofcom Notices under Section 26 of the Act and broadcasters' responses of 23 May – 22 June 2006 to Ofcom's Notices of 19, 22, 24 and 30 May 2006 under Section 26 of the Act.

¹¹⁷ See paragraph A2.8 *et seq.* for more details of the broadcaster responses.

- v) The majority of operating costs are staff-related, but larger suppliers may be better placed to lower unit costs by maximising the use of equipment and software; and
- vi) Reputation and experience represent a barrier to large scale new entry or to the expansion of smaller existing suppliers under current market conditions, but BBC Broadcast's reputation is not necessarily any stronger than those already serving in this market and is therefore unlikely to constitute a barrier to expansion for the larger existing suppliers. However Ofcom notes that this barrier is one that is set by the broadcasters and that in the event that suppliers of access services failed to make acceptable offers, there is evidence to suggest that some action would be taken by them to stimulate entry.

Other factors: assessment of buyer power

- 7.44 Buyer power exists where buyers have a strong negotiating position with their suppliers, which weakens the potential market power of a supplier.
- 7.45 The OFT's Guidelines on assessment of market power set out that the:
- "strength of buyers and the structure of the buyers' side of the market may constrain the market power of a seller. Size is not sufficient for buyer power. Buyer power requires the buyer to have choice".¹¹⁸
- 7.46 The significance of buyer power is highlighted in the Commission's guidelines on the assessment of horizontal mergers¹¹⁹, where it is stated that:
- "...firms with very high market shares may not be in a position post-merger, to significantly impede effective competition, in particular by acting to an appreciable extent independently of their customers, if the latter possess countervailing buyer power. Countervailing buyer power in this context should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers".¹²⁰
- 7.47 Ofcom's examination of market shares shows that a small number of buyers (the BBC, ITV, Channel 4, Five and Sky) account for approximately 94% of all origination hours purchased, indicating the potential for buyer power.¹²¹ In considering whether buyer power exists in the relevant market, Ofcom has used the framework set out by the OFT in its guideline on assessment of market power, which states that a buyer's bargaining strength might be enhanced if the following conditions are present:
- "(a) the buyer is well informed about alternative sources of supply and could readily, and at little cost to itself, switch substantial purchases from one supplier to another while continuing to meet its needs;

¹¹⁸ OFT 415, paragraph 6.1.

¹¹⁹ Commission Notice *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* 2004/C31/03 at section V.

¹²⁰ *ibid*, paragraph 64.

¹²¹ See paragraph 5.36.

(b) the buyer could commence production of the item itself or 'sponsor' new entry by another supplier (e.g. through a long term contract) relatively quickly and without incurring substantial sunk costs;

(c) the buyer is an important outlet for the seller (i.e. the seller would be willing to cede better terms to the buyer in order to retain the opportunity to sell to that buyer; and

(d) the buyer can intensify competition among suppliers through establishing a procurement auction or purchasing through a competitive tender."¹²²

Ofcom's consideration of these factors is set out below.¹²³

(a) Well informed buyer and ability to switch supplier easily

7.48 Ofcom considers that the ability to procure access services through a competitive tender process increases the likelihood of customers being well-informed about alternative sources of supply. Broadcasters are well aware of alternative suppliers in the market and the offerings they make to other broadcasters.¹²⁴ Ofcom therefore considers that their knowledge of the market may help them to resist any attempt by suppliers to exercise market power and thereby has the potential to act as a constraint on the behaviour of suppliers.

7.49 However, Ofcom notes that contract lengths are typically between two and seven years, limiting the opportunities for broadcasters to switch provider. BBC Broadcast has informed Ofcom that it is usual for customers to request several quotes for contracts of different lengths which allows them to assess the value for money of alternative contract lengths against the importance of a secure and dependable source of supply.¹²⁵

7.50 BBC Broadcast's submission that broadcasters set the duration of the contract was confirmed by access services providers who also indicated that in general the scope and terms of the contract were set by the broadcaster. For example:

"Customers will dictate the contract absolutely."¹²⁶

"The client will always dictate the terms of the contract, but negotiation does play a part in this process."¹²⁷

¹²² OFT 415, paragraph 6.2.

¹²³ At paragraph 4.16 of IMS's response to the consultation on the draft decision, IMS submitted that Ofcom has ignored an important element of buyer power (set out in Appendix B, paragraph 20 of the Arcelor/Corus merger report), namely that broadcasters cannot "walk and simply not use the product" because they have to meet their requirements to meet the Ofcom Code. The relevant conditions to assess buyer power are as set out in paragraph 7.47, but in any case, in Ofcom's view, the fact that the Ofcom Code requires the broadcasters to provide access services does not prevent them exercising buyer power; the relevant issue is not the ability to walk away and not use the product but to be able to walk away and buy the service from an alternative supplier, which is covered in the criteria set out above.

¹²⁴ In Ofcom's Notices of 28 and 30 September 2005 under Section 26 of the Act broadcasters were asked about alternative suppliers to their current supplier and all of them listed at least three in their response

¹²⁵ BBC/BBC Broadcast response of 24 August 2005 to question 16 of Ofcom's Notice of 5 August 2005 under Section 26 of the Act.

¹²⁶ Director of WordWave/CSI in IAMCO interview 29 September 2005.

¹²⁷ CEO of Broadcast Text in IAMCO interview 29 September 2005.

"It is typically the customer that specifies the duration of the contract."¹²⁸

- 7.51 The evidence suggests therefore that although longer contract periods restrict the broadcasters' ability to switch, it is usually the broadcasters themselves who determine contract duration and terms in the first place. These broadcasters are generally sufficiently large businesses to have experience in contract negotiation and be able to make informed decision regarding contract duration.
- 7.52 As stated at paragraph 7.36, switching costs, that is the costs incurred in moving from one access services provider to another, exist but they are not so high as to prevent broadcasters from switching provider.
- 7.53 On the basis of the above, Ofcom considers that broadcasters' knowledge of other suppliers and their offerings could act as an effective competitive constraint on the behaviour of access service providers in the market.

(b) Self-supply and sponsorship of entry

- 7.54 Ofcom asked broadcasters whether they would consider self-supplying access services. Four broadcasters were unequivocal in their response that they would not consider this; one broadcaster advised that it self-supplied for audio description and signing but not subtitling; and one said it would self-supply if there were no suitable bids, but would prefer to use a specialist supplier.¹²⁹ Channel 4 had conducted a review of whether self-supply was worthwhile or not, and concluded not.¹³⁰ Of those broadcasters which responded, only ITV, whose in-house work is done by its wholly-owned subsidiaries ITFC and SignPost, was actively in favour of self-supply.¹³¹
- 7.55 In addition, Nickelodeon advised that it self-supplies subtitling.¹³² Another broadcaster advised that it is setting up its own subtitling team and sign language department, to provide it with more flexibility.¹³³
- 7.56 In summary, although there are smaller broadcasters which are considering self-supply, the majority of large broadcasters (with the exception of ITV) are unlikely to do so.
- 7.57 Ofcom has also considered whether broadcasters would 'sponsor' entry by a new supplier through a long term contract and whether new entry could be sufficiently quick.
- 7.58 In considering the potential for sponsorship of entry, Ofcom was mindful that there are no significant sunk costs in the provision of access services (relative to total contract values), the technology used for the preparation of subtitles for all forms of audiovisual content is readily available and access service providers have indicated that it is generally possible to hire experienced personnel. However, there may be some sunk costs in establishing a reputation and relationships.

¹²⁸ Managing Director of ITFC in IAMCO interview 29 September 2005.

¹²⁹ Broadcaster responses of 4-6, 10 and 13-14 October 2005 to Ofcom's Notices of 28 and 30 September 2005 under Section 26 of the Act.

¹³⁰ Channel 4's response of 6 October 2005 to Ofcom's Notice of 30 September 2005 under Section 26 of the Act.

¹³¹ ITV's response of 13 October 2005 to Ofcom's Notice of 28 September 2005 under Section 26 of the Act.

¹³² Conference call with Nickelodeon on 25 January 2006, confirmed as part of its response of 9 February 2006 to Ofcom's Notice of 7 February 2006 under Section 26 of the Act.

¹³³ [redacted] response of [redacted] May/June 2006 to Ofcom's Notices of [redacted] May 2006 under Section 26 of the Act.

7.59 When questioned further on this latter issue, broadcasters advised Ofcom that if for some reason the current access services suppliers which they would anticipate meeting their requirements did not do so, they would consider alternative suppliers and this could include sponsoring entry.¹³⁴ However, in fact broadcasters generally consider that prices are on a downward trend. For example, Sky stated:

“[w]e think that with technology developing, prices will drop. Providers can now cover with fewer people, which means lower prices.”¹³⁵

And ITV stated:

“we expect a price decrease over the next few years”.¹³⁶

7.60 Therefore the questions asked by Ofcom were of a hypothetical nature and the responses were accordingly (sometimes strongly) caveated: broadcasters stated that they would have to consider the commercial reality of the supply of access services at the time and if necessary, adjust their current and anticipated criteria accordingly. For example, Five stated:

“[i]t would depend on the particular circumstances, the market and the availability of the required resources”.

7.61 Nevertheless, the evidence obtained from the broadcasters in answer to the hypothetical question suggests that the point at which they would consider alternative sources of supply in the event that existing potential suppliers failed to make acceptable offers, is relatively low, and that some action may be taken by them to stimulate entry. For example, Five stated:

“if the price payable by Five were to increase we would consider alternative suppliers in the market as and when our existing contracts came to an end and depending upon the level of increases, we may well also consider self supply or sponsoring new entrants into the market. It is not possible to say now what level of increase in price would be necessary in order to make it viable for Five to self supply or sponsor a new entrant”.¹³⁷

7.62 ITV stated:

“If there was more than a 10% increase then we would ask questions of our service provider. If there was no chance of change then we would consider action. But, the way we are set up now, our contract pins down a price, so it is a non-issue”.¹³⁸

¹³⁴ Broadcasters' responses of 22-25 and 30 November 2005 to Ofcom Notices of 16, 17 and 21 November 2005 under Section 26 of the Act and conference calls with broadcasters 16-23 May 2006, confirmed by Ofcom Notices under Section 26 of the Act.

¹³⁵ Conference call with Sky on 19 May 2006, confirmed as part of its response dated 2 June 2006 to Ofcom's section 26 Notice of 30 May 2006.

¹³⁶ Conference call with ITV on 17 May 2006, confirmed as part of its response of 26 May 2006 to Ofcom's Notice of 24 May 2006 under Section 26 of the Act.

¹³⁷ Five's response of 31 May 2006 to Ofcom's Notice of 22 May 2006 under Section 26 of the Act.

¹³⁸ Conference call with ITV on 17 May 2006, confirmed as part of its response of 26 May 2006 to Ofcom's Notice of 24 May 2006 under Section 26 of the Act.

And Sky stated:

"If prices rose unexpectedly, it could be a reason for us to look elsewhere."¹³⁹

- 7.63 Ofcom therefore considers that the broadcasters could sponsor new entry if necessary in response to any failure by existing suppliers to offer acceptable terms, including on price. Ofcom notes that, in this regard, Channel 4 effectively sponsored the entry of Intelfax, stating:

"When access services were first around, there were only 1 or 2 providers (e.g. Oracle) and Channel 4 linked with Intelfax, which had not previously done any access services, and that company grew along with the growth in services."¹⁴⁰

(c) The buyer as an important outlet for the seller

- 7.64 Ofcom considers that access services providers tend to typically depend on a small number of larger individual contracts. As set out in paragraph 7.47, a very small number of broadcasters generate the majority of access services work. Several providers of access services have indicated to Ofcom that they try to spread risk over a portfolio of different contracts, ideally across different sectors, so that if one contract is lost the business will not be too badly impacted. Some access services providers cited Intelfax's dependency on the Channel 4 contract as the reason it went out of business after the contract was lost to BBC Broadcast. Ofcom considers that if a major contract were lost, the access services provider may have to consider restructuring its business in order to remain viable, for example by scaling down its business. This risk empowers a buyer considering switching providers, particularly if the provider is highly dependent on that buyer for a significant proportion of their revenue.

(d) Intensification of competition through auction or purchasing or competitive tender

- 7.65 Many access services contracts are placed following a competitive tender process which allows the broadcaster to compare different offerings. It is clear however that others have been through bilateral negotiations with a single supplier. Nonetheless, such contracts are still subject to the influence of the competition conditions in the wider market. For example, Five, in its negotiations with IMS, had hoped to realise a specified level of savings and so prepared a draft invitation to tender. It discussed this with IMS which responded by providing those savings. Five then decided not to undertake a formal tender process.¹⁴¹ Similarly, Sky told Ofcom:

¹³⁹ Conference call with Sky on 19 May 2006, confirmed as part of its response dated 2 June 2006 to Ofcom's section 26 Notice of 30 May 2006.

¹⁴⁰ Conference call with Channel 4 on 23 May 2006, confirmed as part of its response of 31 May 2006 to Ofcom's Notice of 30 May 2006 under Section 26 of the Act. In paragraph 4.18 of its response to the consultation on the draft decision, IMS argued that even if this sponsorship were to be considered a valuable example, it should be borne in mind that it "basically failed in its objective" as Intelfax was unable to remain in the market once it lost the Channel 4 contract. In Ofcom's view this argument ignores the fact that sponsorship took place and the contract remained in place for as long as Channel 4 were content with it. As such it actually demonstrates Channel 4's buyer power.

¹⁴¹ Five's response of 5 October 2005 to Ofcom's Notice of 28 September 2005 under Section 26 of the Act.

"We have tended to approach providers we believe would be able to provide for us and then we decide amongst them."¹⁴²

7.66 In Ofcom's view, once the barrier identified as reputation and experience is passed, suppliers compete largely on price, resulting in strong competition for the broadcaster contracts.

7.67 The ability of broadcasters to stimulate effective competition is supported by the following quote from an access service provider:

"when we are pricing a contract, we would tend to speculate that somehow we would be able to reduce our costs over 5 years, say to around 10 per cent less than today's levels. Although most of our costs are people-related, and salaries tend to rise, we tend to assume that there will be some sort of efficiency savings, predominantly relating to process".¹⁴³

Further comments from IMS on Ofcom's analysis of buyer power

7.68 IMS argues that Ofcom's evidence on buyer power "clearly contradicts" the conclusion that BBC Broadcast does not enjoy a dominant position. In particular it asserts that:

- i) the lengths of contracts in the relevant market, in particular the BBC contract, means that buyer power can only be exercised very irregularly;¹⁴⁴ and
- ii) Ofcom has ignored that the Arcelor/Corus merger report (Appendix B, paragraph 23) states that if intermediate relevant goods or services account for a relatively small element of the total costs of a product or service, there is less likelihood of buyer power being exercised. According to IMS the relevant services account for a very small proportion of programme costs meaning that "the temptation simply to pass on price increases in the relevant services once choice is reduced will be strong."¹⁴⁵

Ofcom's view

7.69 As set out in paragraphs 7.49 to 7.51, although longer contract periods restrict the broadcasters' ability to switch, evidence gathered by Ofcom in its investigation suggests that it is usually the broadcasters themselves which determine contract duration and terms in the first place. These broadcasters are sufficiently large undertakings, with sufficient experience in negotiating contracts, so as to be able to make informed decisions regarding contract duration. The fact that contracts are long in duration does not of itself indicate a lack of buyer power.

7.70 Ofcom finds that, based on the evidence set out in paragraphs 7.57 to 7.63, it is reasonable to conclude that buyers could sponsor entry in the event that existing potential suppliers failed to make acceptable offers and attempted to exploit them. Broadcasters purchasing access services demonstrate that they are already conscious about cost and will be prompted into action to avoid exploitation rather than pass costs on.

¹⁴² Conference call with Sky on 19 May 2006, confirmed as part of its response of 2 June 2006 to Ofcom's Notice of 30 May 2006 under Section 26 of the Act.

¹⁴³ [redacted] in IAMCO interview [redacted] September/October 2005.

¹⁴⁴ Letter of 19 January 2007, paragraph 4.15.

¹⁴⁵ Letter of 19 January 2007, paragraph 4.17.

Conclusion on buyer power

7.71 Ofcom has concluded that:

- i) Buyers are well informed about alternative sources of supply and typically specify the duration and terms of contracts;
- ii) in the event that existing potential suppliers failed to make acceptable offers buyers have the option of self-supply and could sponsor entry to ameliorate attempts by existing suppliers to exploit them;
- iii) buyers are typically an important outlet for the seller; and
- iv) the conditions in the market mean that buyers can pitch suppliers against each other to obtain a competitive offering.

7.72 This means that buyers of access services typically possess a significant degree of countervailing buyer power in their dealings with access services providers.

Conclusion on assessment of dominance

7.73 In its assessment of dominance in the market for the provision of access services to UK television broadcasters, Ofcom considered market shares of all suppliers to UK broadcasters, finding that BBC Broadcast's share, at [0-10]% excluding in-house supply and [30-40]% including in-house supply, is insufficient on its own to indicate dominance. In any case, given the nature of the market, (and in particular that it displays some characteristics of a bidding market,) market shares may be an unreliable indicator of market power. Ofcom has also considered other factors such as barriers to entry and expansion and countervailing buyer power. Having considered all the factors and market shares, Ofcom has concluded that BBC Broadcast was not dominant at the relevant time, and further, does not consider that the inclusion or exclusion of self-supply alters its conclusion on dominance. In addition, as previously stated in paragraphs 5.53 and 5.78 given the level of uncertainty regarding the scope of the relevant market and Ofcom's more cautious approach of adopting the narrower market definition, had Ofcom adopted a wider market definition then its conclusion on dominance would remain unchanged.

7.74 There are some barriers to entry and expansion in the access services market under current market conditions. In particular, reputation and experience may be a barrier and a minimum size may be required in order to compete for large contracts. There are at present at least three providers of access services which meet the minimum size criterion and which also meet broadcasters' thresholds for reputation and experience. In Ofcom's view, based on the evidence of television broadcasters, BBC Broadcast's position in this group is not necessarily any stronger than the other existing suppliers of large contracts.

7.75 In Ofcom's view, access services buyers are well informed and appear to be in a good bargaining position with suppliers to acquire better terms. The effect of this is that broadcasters can pitch suppliers against each other to obtain a competitive offering. In addition, buyers are typically important outlets for the suppliers and may consider self-supply or sponsoring entry if necessary. This suggests therefore that a strong degree of countervailing buyer power is present.

- 7.76 Ofcom has therefore concluded that on the basis of the evidence available, BBC Broadcast was not dominant in the market for the supply of access services to UK broadcasters at the time of the alleged infringement.

Assessment of abuse

- 7.77 In undertaking this investigation Ofcom has conducted some enquiries into BBC Broadcast's costs and revenues in its provision of the Channel 4 Contract. However, in the light of Ofcom's conclusion that BBC Broadcast was not dominant at the time of the alleged infringement, Ofcom has not gone on to decide whether or not there would have been abusive conduct (through either gaining the Channel 4 contract by predatory pricing or by the length and exclusive nature of that contract) had dominance been found.¹⁴⁶

Conclusions on the Article 82/Chapter II assessment

- 7.78 As Ofcom has concluded that BBC Broadcast was not dominant at the time of the alleged infringement, Ofcom further concludes that there are no grounds for action in relation to the allegation that BBC Broadcast abused a dominant position by means of predatory pricing in relation to the Channel 4 contract and that it abused a dominant position by foreclosure in the relevant market as a result of the length and exclusive nature of the Channel 4 contract.

¹⁴⁶ In IMS's response to the consultation on the draft decision, they argued that the pricing of the Channel 4 contract must be examined (first bullet point, page 2). However, as stated, given that Ofcom has concluded that BBC Broadcast were not dominant at the time of the alleged infringement, it is not necessary for Ofcom to go on to decide whether or not there would have been abusive conduct had dominance been found.

Section 8

Assessment of Chapter I/Article 81 allegations

Introduction

- 8.1 The Chapter I prohibition provides that agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade within the United Kingdom and which have as their object or effect the appreciable restriction of competition within the United Kingdom are prohibited unless they fulfil the conditions contained in section 9 of the Act.¹⁴⁷ Similarly, Article 81(1) prohibits such agreements if they have an effect on trade between Member States. The Article 81(1) prohibition does not apply where an agreement satisfies all of the criteria in Article 81(3).
- 8.2 The Channel 4 contract is an agreement between undertakings within the meaning of Chapter I and Article 81(1).
- 8.3 As noted in paragraph 4.6 to 4.9, vertical agreements which satisfy certain criteria are exempted from the prohibitions contained in Article 81(1) and Chapter I. Ofcom sets out below its consideration of the applicability of the Block Exemption to the Channel 4 contract.

Vertical agreement

- 8.4 Ofcom considers that the Channel 4 contract is a vertical agreement within the meaning of Article 2(1) of the Block Exemption.¹⁴⁸ In this context, BBC Broadcast is the supplier and Channel 4 is the buyer.

Market share of BBC Broadcast as supplier

- 8.5 As set out in section 6, for the purpose of applying the Block Exemption Ofcom has calculated market shares of access services suppliers by excluding in-house supply. Accordingly, BBC Broadcast's share of supply at the time of entering into the Channel 4 contract was 5% (see Table 5).
- 8.6 As set out in paragraph 3.1, on 1 August 2005 BBC Broadcast was sold to CBSL, meaning that the share attributable to its contract to supply access services to the BBC became contestable. Accordingly BBC Broadcast's market share, excluding in-house supply but including the BBC contract, rose to [60-70]%.
- 8.7 Article 9(2)(d) of the Block Exemption states that if the market share is initially not more than 30% but subsequently rises above 35%, then the exemption provided for shall continue to apply for one calendar year following the year in which the level of 35% was first exceeded. In this case, the market share of BBC Broadcast having risen above 30% on 1 August 2005, this date would be 31 December 2006.
- 8.8 Ofcom's draft non-infringement decision related to the application of the Block Exemption at the time the Channel 4 agreement was entered into by BBC Broadcast.

¹⁴⁷ Section 2(1) of the Act

¹⁴⁸ See the definition of 'vertical agreement' included at paragraph 4.6.

This was the focus of the complaint by IMS which alleged that the signing of that contract infringed the Article 81(1) prohibition and was abusive behaviour by a dominant company. Ofcom has found that BBC Broadcast was not dominant when it entered into the contract. Ofcom has also found that the Channel 4 agreement gained the benefit of the Block Exemption at the time of signing (as set out below) until 31 December 2006 (and was covered by that Block Exemption at the date of Ofcom's draft non-infringement decision in December 2006). IMS submitted (in response to the draft decision) that Ofcom should re-examine the agreement to assess the period after the agreement lost the benefit of the Block Exemption (i.e. from 1 January 2007). There is a period of three years of the non-compete remaining after 1 January 2007 (i.e. to 31 December 2009). For the reasons set out below, Ofcom does not consider the remaining non-compete term results in an appreciable restriction of competition prohibited by Article 81(1).

Hard core restrictions

- 8.9 Ofcom does not consider that the Channel 4 contract contains any hard core restrictions of the type specified in Article 4 of the Block Exemption.

Non-compete obligation in excess of five years or of indefinite duration

- 8.10 The Block Exemption exempts only exclusive purchase or non-compete obligations of five years duration or less. As set out in paragraph 3.15, Clause 3.1 of the Channel 4 contract provides for an exclusive non-compete obligation operating for five years.¹⁴⁹
- 8.11 For the remaining three year period, starting on 1 January 2007, from when the agreement loses the benefit of the block exemption (due to the change in market shares) Ofcom's assessment of the effect of the duration of the non-compete obligation on competition in the relevant market has focussed on whether the relevant restriction has the actual or potential effect of appreciably restricting competition.
- 8.12 Ofcom has considered the Commission's Guidelines on the application of the Block Exemption. In particular, Ofcom has considered "Section 2 Analysis of Vertical Restraints" and "2.1 Single branding" (paragraphs 137 to 160) which set out a number of factors relevant to establishing whether there has been foreclosure due to particular vertical restraints.¹⁵⁰ In particular, these factors include the market position of the supplier and the extent of and duration of a non-compete obligation. This requires an assessment of the structure of the market including entry barriers, countervailing power and the level of trade for the product, including an assessment of any cumulative effects of the agreement taking into account other agreements in the market.

¹⁴⁹ In the draft non-infringement decision, Ofcom had considered that the duration of the non-compete obligation might be five years and one month based on its understanding of the terms of the contract. However, in its response to the consultation on the draft decision, BBC Broadcast explained that the operative part of the Channel 4 contract is in effect only five years and provided evidence to justify this. Ofcom agrees with the evidence put forward that the non-compete restriction is limited to five years.

¹⁵⁰ In its draft decision, Ofcom had cited paragraph 146 of the Guidelines where the Commission states: "Foreclosure is less likely in case of an intermediate product. When the supplier of an intermediate product is not dominant, the competing suppliers still have a substantial part of demand that is "free". Ofcom had noted that these services are an intermediate product. In paragraphs 2.12 and 2.13 of its response to the consultation on the draft decision, IMS stated that Ofcom has quoted this paragraph selectively, ignoring that it states that foreclosure may arise where there is a cumulative effect of more than one agreement.

- 8.13 IMS drew Ofcom's attention to case law and precedent which takes into account the effect of a network of agreements (paragraphs 2.4 to 2.11 of IMS's response). Specifically, IMS has argued that the fact of BBC Broadcast's contract to supply access services to the BBC should be taken into account in Ofcom's Article 81(1) analysis of the Channel 4 contract.
- 8.14 Ofcom notes that paragraph 133 of the Guidelines requires the assessment of the cumulative effect, i.e. the coverage of the market by similar agreements. Ofcom has considered the context in which the Channel 4 agreement occurred and the test set out by the ECJ in the *Delimitis* case (Case C-234/89 [1991] ECR I-935), namely whether access to the market is impeded by the existence of a network of agreements followed by a consideration of whether the agreement in question is one of a number of similar agreements having a cumulative effect on competition. Ofcom notes that the Guidelines also require an assessment of a number of other factors in assessing foreclosure as summarised above.
- 8.15 In the circumstances of this case a cumulative effect may arise from the fact that a supplier of access services to one television broadcaster has a similar or longer term exclusive agreement to supply access services to another television broadcaster, potentially increasing its market power and its potential to foreclose the market arising from either one of its contracts if considered individually.
- 8.16 Ofcom's analysis of the structure of the market and BBC Broadcast's market power is set out above in relation to Ofcom's assessment of dominance. This has shown that there are at least three access services providers that can credibly compete for the large contracts in the relevant market (see paragraph 7.42) and that buyers of access services typically possess a significant degree of countervailing buyer power in their dealings with access services providers (see paragraph 7.72). Further, in the relevant market contracts are only awarded infrequently meaning that a market position at any particular point in time may not be permanent feature and could change rapidly (albeit at infrequent intervals – see paragraph 7.17). Applying the Commission's Guidelines and taking into account these factors, as well as the nature of the products or services in question and the duration of the remaining non-compete obligation after the contract loses the benefit of the Block Exemption, Ofcom has concluded that the remaining term of the non-compete obligation would be unlikely to have the effect of appreciably restricting competition in the relevant market. Further, Ofcom believes that given the market structure in this case, any cumulative impact of agreements would not alter this conclusion.
- 8.17 Ofcom notes that the contract also provides Channel 4 with an option to renew for a further three years as mentioned in paragraph 3.15.¹⁵¹ This means that if the option is taken up by Channel 4, then the total term of the Channel 4 contract, and therefore the operative term of the non-compete obligation, would be eight years.
- 8.18 Ofcom considers that for an option such as that included in clause 4.2 to be a true option, the party obtaining the right to exercise the option must be faced with a genuine choice. The Commission's Guidelines state:

“non-compete obligations are covered when their duration is limited to five years or less, or when renewal beyond five years requires explicit consent of both parties and no obstacles exist that hinder the

¹⁵¹ Clause 4.2.

buyer from effectively terminating the non-compete obligation at the end of the five year period.”¹⁵²

- 8.19 In considering the terms of this option, Ofcom notes that the Commission's Guidelines indicate that loan repayment terms may hinder the effective termination of a non-compete obligation, and in order to avoid doing so should be structured in equal or decreasing instalments and should not increase over time (paragraph 58).
- 8.20 Ofcom considers that a genuine choice would be unlikely to exist if disincentives existed which on balance make it unattractive or onerous to not take up the option. A conclusion that no genuine choice is offered to the party exercising the option would mean that the extended term of the option should be included for the purpose of calculating the duration of the non-compete obligation.
- 8.21 Ofcom has considered whether the additional (incremental) costs associated with Channel 4 not exercising the option are sufficiently high to provide a material disincentive to Channel 4 terminating the contract at the end of the initial term.
- 8.22 Clauses 4.6 and 4.7 require Channel 4 to reimburse BBC Broadcast certain contingent costs in circumstances where the option created by clause 4.2 is not taken up by Channel 4. [X]. Under clause 4.12 of the agreement, liability for the Cost Reimbursement Fee is capped at [£X]; the actual cost of the reimbursement liability amounted to [£X].
- 8.23 The Cost Reimbursement Fee therefore amounts to an incremental cost to be incurred by Channel 4 in the event that the option in clause 4.2 is not exercised, and may act as a disincentive to Channel 4 not to take up the option. In this regard, the existence of the Cost Reimbursement Fee may be likened to the existence of a loan cited by the Commission in its Guidelines and referred to in paragraph 8.19, insofar as it represents an amount that will need to be repaid after the initial contract period of five years has elapsed if the option is not exercised by Channel 4. Ofcom has therefore considered whether the Cost Reimbursement Fee has the potential to hinder Channel 4's ability to effectively terminate the contract with BBC Broadcast.
- 8.24 Whether the Cost Reimbursement Fee represents a material disincentive depends on its magnitude relative to the benefits that Channel 4 might expect from not extending the contract, such as obtaining better terms following a competitive process to determine its supplier for these three years. A useful benchmark to guide this assessment is to consider the Cost Reimbursement Fee as a proportion of total contract spend over the period. The approximate annual cost of the contract is [£X] and so over a three year period the Cost Reimbursement Fee represents approximately [<5%] of total contract spend. In Ofcom's view, this is unlikely to be sufficiently large to act as a material disincentive against Channel 4 switching providers at the end of the initial five year term, and therefore the appropriate period over which to assess the contract is five years.¹⁵³

Conclusion on assessment of the Channel 4 contract

- 8.25 In summary, Ofcom has concluded that the Channel 4 contract does not appreciably restrict competition and therefore there are no grounds for action. The agreement

¹⁵² Paragraph 58.

¹⁵³ As set out in paragraph 3.16, a side letter to the contract incorporated an offer from BBC Broadcast to Channel 4 to enter into a further agreement at the end of the initial contract. Ofcom does not consider that the side letter represents anything more than an invitation by BBC Broadcast to Channel 4 to negotiate a further agreement at some time in the future.

benefited from the Block Exemption at the time of signing and continued to benefit until 31 December 2006. For the remaining three year period of the non-compete obligation from 1 January 2007, Ofcom does not consider that there is an appreciable foreclosure effect.

Signed:

David Stewart

Director of Investigations

30 May 2007

Annex 1

Targets in Ofcom's Code on Television Access Services

A1.1 The targets for broadcasters for the three access services, as set out in Ofcom's Code on Television Access Services, updated on 27 September 2006, are set out below.¹⁵⁴ The targets are expressed as a percentage of the channels' service including all programmes other than advertisements or programmes specifically excluded under paragraph 10 of the Code.

Targets for broadcasters

Notes

A1.2 Most, but not all, targets apply to a calendar year. Footnotes indicate the relevant twelve-month period. Tables 8, 9 and 10 apply to channels whose relevant date is 29 December 2003 (those cable and satellite channels broadcasting when the Communications Act 2003 came into force).¹⁵⁵

A1.3 A list of channels required to provide access services in 2006 is available on Ofcom's website at:
http://www.ofcom.org.uk/tv/ifi/guidance/tv_access_serv/tv_access_statement06/.
The corresponding list for 2007 is at:
http://www.ofcom.org.uk/tv/ifi/guidance/tv_access_serv/tv_access_statement07/tv07.pdf.

Table A1.1 BBC 1 & 2

Service/ Year	2005	2006	2007	2008
Subtitling	90%	95%	97%	100%
Signing	3%	4%	4%	5%
Audio description	6%	8%	8%	10%

Table A1.2 BBC 3, 4, CBBC, CBeebies, News 24¹⁵⁶

Service/ Year	2005	2006	2007	2008
Subtitling	70%	80%	90%	100%
Signing	3%	4%	4%	5%
Audio description	6%	8%	8%	10%

¹⁵⁴ Available at <http://www.ofcom.org.uk/tv/ifi/codes/ctas/ctas.pdf>.

¹⁵⁵ The relevant dates for other channels providing services in 2006 are as follows: ITV2 30 October 2002 and ITV3 1 November 2004. The relevant dates for other channels providing services in 2007 are ITV4 1 November 2005, More4 10 October 2005 and Sky Three 31 October 2005.

¹⁵⁶ The relevant twelve month period for audio description and signing on the BBC's channels runs from 1 November, and for subtitling from 1 April.

Table A1.3 **ITV 1 regional licensees**¹⁵⁷

Service/ Year	2005	2006	2007	2008	2009	2010
Subtitling	84%	85%	86%	88%	89%	90%
Signing	3%	4%	4%	5%	5%	5%
Audio description	6%	8%	8%	10%	10%	10%

Table A1.4 **ITV 1 national licensee (GMTV)**

Service/ Year	2005	2006	2007	2008	2009	2010
Subtitling	71%	79%	86%	88%	89%	90%
Signing	3%	4%	4%	5%	5%	5%
Audio description	6%	8%	8%	10%	10%	10%

Table A1.5 **Channel 4**

Service/ Year	2005	2006	2007	2008	2009	2010
Subtitling	84%	85%	86%	88%	89%	90%
Signing	3%	4%	4%	5%	5%	5%
Audio description	6%	8%	8%	10%	10%	10%

Table A1.6 **Five**

Service/ Year	2005	2006	2007	2008
Subtitling	66%	72%	76%	80%
Signing	3%	4%	4%	5%
Audio description	6%	8%	8%	10%

Table A1.7 **S4C**

Service/ Year	2005	2006	2007	2008	2009	2010
Subtitling	67%	69%	71%	73%	75%	80%
Signing	1%	1%	2%	3%	4%	5%
Audio description	6%	8%	8%	10%	10%	10%

Other broadcasters

Table A1.8 **Level One broadcasters**

Service/ Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Subtitling	10%	10%	35%	35%	60%	60%	70%	70%	70%	80%

¹⁵⁷ The relevant twelve month period for audio description and signing on ITV's regional services runs from 15 November.

Signing	1%	1%	2%	2%	3%	3%	4%	4%	4%	5%
Audio description	2%	4%	6%	8%	10%	10%	10%	10%	10%	10%

Table A1.9 Level Two broadcasters

Service/ Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Subtitling	10%	10%	35%	35%	60%	60%	70%	70%	70%	80%
Signing	1%	1%	2%	2%	3%	3%	4%	4%	4%	5%
Audio description	2%	4%	6%	8%	10%	10%	10%	10%	10%	10%

Table A1.10 Level Three broadcasters

Service/ Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Subtitling	10%	10%	35%	35%	60%	60%	70%	70%	70%	80%
Signing	1%	1%	2%	2%	3%	3%	4%	4%	4%	5%
Audio description	2%	4%	6%	8%	10%	10%	10%	10%	10%	10%

Annex 2

Evidence on reputation and experience and entry costs

A2.1 This Annex sets out the evidence that Ofcom has used both in its assessment of supply-side substitution and barriers to entry in respect of:

- television broadcasters' selection criteria for providers of access services as regards reputation, experience and track record (paragraphs A2.2 to A2.20 below); and
- costs of entry in the form of technology and training (paragraphs A2.21 to A2.33 below).

Broadcasters' selection criteria: reputation and experience

Views of broadcasters

A2.2 In order to assess potential barriers to entry Ofcom sought television broadcasters' views on their minimum requirements when selecting an access services provider. Ofcom sent information requests under section 26 of the Act to a range of small and large broadcasters.

A2.3 Ofcom asked broadcasters to indicate whether, in assessing tenders from providers of access services, they set minimum selection criteria. As set out in paragraph 7.37 broadcasters typically set out minimum selection criteria in the form of the following factors:

- Previous successful fulfilment of contracts;
- Experience in providing access services to UK television broadcasters;
- A previous working knowledge of the broadcaster;
- Service levels;
- Compliance with tender requirements;
- Technical capabilities; and
- Business continuity.

A2.4 These responses showed that broadcasters require a supplier to have acquired a certain reputation and level of experience in the provision of access services. In particular, seven out of eight broadcasters surveyed indicated that providers of access services would only be considered as credible bidders if they could meet the television broadcaster's minimum criteria.

A2.5 Although these broadcasters stated that they would accept a tender from companies which did not meet these criteria, they nonetheless suggested that these companies would be unlikely to be awarded the contract. For example, Flextech

said that, in its last tender, despite one provider submitting the cheapest price, they failed to meet their other criteria and so were not included in the next round.¹⁵⁸

- A2.6 One broadcaster indicated that their stated thresholds were not strictly “minimum” criteria as such, but rather the level that is achievable in the current market.¹⁵⁹
- A2.7 Ofcom then asked the broadcasters to clarify what they meant by “reputation” and “reliability” in the provision of access services and how they ranked their minimum criteria when assessing bids. The broadcasters’ rankings showed that generally they have minimum requirements for reputation, experience and track record, and only after these minimum requirements have been met is price a factor.
- A2.8 In addition to evidence of previous experience, four out of eight broadcasters cited service levels as being important. This included the need for 24-hour support, monthly meetings and in some cases a dedicated account manager.¹⁶⁰
- A2.9 Most of the broadcasters stated that they considered evidence of previous contracts, references, or (in some cases) the ability to perform a satisfactory demonstration of their services as suitable ways of establishing track record, experience and reputation. In relation to previous experience, only two out of eight broadcasters stated that they would consider access services providers which had supplied overseas broadcasters, as well as those which currently serve UK broadcasters, whilst four out of eight broadcasters suggested that they would only consider providers who have previously worked with a “top five” UK broadcaster.¹⁶¹
- A2.10 In terms of “credible” bidders:
- Five out of eight broadcasters view at least ITFC, IMS and BBC Broadcast as meeting their thresholds for reputation;
 - Seven out of the eight broadcasters view at least BBC Broadcast and ITFC as meeting their thresholds for reputation;
 - Five out of the eight broadcasters view at least ITFC and IMS as meeting their thresholds for reputation; and
 - Six out of the eight broadcasters view at least BBC Broadcast and IMS as meeting their thresholds for reputation.
- A2.11 In addition, broadcasters’ views were sought on the extent to which reputation, experience and other factors posed barriers to providers of access services in adjacent audiovisual sectors winning large television broadcasting contracts.¹⁶²
- A2.12 Responses to these from television broadcasters indicate that it is difficult for companies which supply access services and language subtitling operating in adjacent sectors, such as DVDs and advertising, to compete effectively with providers of access services to television broadcasters. This is because the

¹⁵⁸ Flextech's response of 25 November 2005 to question 6 of Ofcom's Notice of 16 November 2005 under Section 26 of the Act.

¹⁵⁹ Conference call with [redacted] on [redacted] May 2006, confirmed by Ofcom Notice under Section 26 of the Act.

¹⁶⁰ Broadcasters’ responses of 22-25 and 30 November 2005 to questions 1 and 9 of Ofcom’s Notices of 16, 17 and 21 November 2005 under Section 26 of the Act.

¹⁶¹ Conference calls with broadcasters 16-23 May 2006, confirmed by Ofcom Notices under Section 26 of the Act and broadcasters’ responses of 23 May – 22 June 2006 to Ofcom’s Notices of 22, 24 and 30 May 2006 under Section 26 of the Act.

¹⁶² See paragraphs 5.45 to 5.46.

broadcasters generally stated that they require their access services providers to have a certain reputation and level of experience, which successful operation in an adjacent sector was insufficient to provide. For example, one broadcaster stated that:

"...access services are services where we expect top quality and are risk-averse (given the regulatory scrutiny). On this basis, an established track record in delivering to major broadcasters is central."¹⁶³

- A2.13 The one exception to the views set out above was the BBC, which stated that a "credible" bidder would need to have experience and a track record of supplying access services to audiovisual content providers, without distinguishing between UK television broadcasters and other audiovisual content providers.¹⁶⁴ It put forward a variety of providers, including providers not currently supplying the larger broadcasters, such as Visiontext, Broadcast Text, WordWave and SDI Media Group which either currently provide services to smaller UK broadcasters or which provide services in adjacent markets.
- A2.14 However, the BBC stated that it had not undertaken a detailed assessment of the ability of various media access service suppliers to provide relevant services. It stated that, when its existing access services agreement with BBC Broadcast expires, a competitive tendering process would be its preferred course of action and it would undertake a thorough assessment of the relative merits of the offerings from alternative suppliers. It also "expects that the value of the media access services contract will exceed the financial thresholds prescribed by the UK Public Procurement Regulations and as such will need to be advertised in the Official Journal of the European Union. All suppliers who respond with an Expression of Interest will then be evaluated on basic criteria in order to determine which companies would be invited to respond to an Invitation to Tender."¹⁶⁵
- A2.15 The BBC stated that this assessment would include, for example, value for money, quality of service offered and experience (such as past performance and reference to contracts of a similar nature with other organisations), reliability, technical merit and financial viability. In Ofcom's view, these evaluation criteria do not seem to differ materially from those that the other UK television broadcasters are using to select their access services supplier. The BBC stated that it would not be appropriate to rank the criteria as it did not anticipate undertaking such an assessment for many years.
- A2.16 The above shows therefore that broadcasters set a number of minimum criteria in assessing suppliers of access services. However, it should be noted that these responses are related to the current situation in choosing a provider in this market where there are a number of suppliers which meet the reputational requirements of the broadcasters. However, as set out in Ofcom's considerations of buyer power (see paragraphs 7.44 to 7.71) broadcasters informed Ofcom that if circumstances were to change, for example if they did not receive sufficient credible bids or prices quoted rose to an unacceptable level, they may change their current minimum selection criteria by, for example, sponsoring entry.

¹⁶³ Flextech's response of 6 October 2005 to question 9 of Ofcom's Notice of 28 September 2005 under Section 26 of the Act.

¹⁶⁴ BBC's response of 17 May 2006 to question 11 of Ofcom's Notice of 4 May 2006 under Section 26 of the Act.

¹⁶⁵ BBC's response of 17 May 2006 to question 15 of Ofcom's Notice of 4 May 2006 under Section 26 of the Act.

Views of Access Service providers

- A2.17 The views of television broadcasters are largely supported by responses from providers of access services to adjacent audiovisual sectors. For example one provider said that, "the UK broadcast SDH market is very hard to enter, even for us with our ten years of experience in international subtitling. The major broadcasters prefer to use who they know."¹⁶⁶ This view is supported by the fact that there has only been one new provider of SDH to UK television broadcasters in recent years: Visiontext to Teacher's TV: less than 1% of the total market.
- A2.18 Further, as set out in paragraph 5.70, WordWave stated that, "we decided that it would be very hard to start from scratch in the UK. It is a small market in comparison to the US, served by several large, established companies. My reputation as the former Managing Director of Intelfax would have counted for something, but it probably would not have been enough."¹⁶⁷ This suggests that even if a new entrant were able to hire management with a track record and reputation it does not necessarily follow that they would be successful in bidding for the large broadcasting contracts.
- A2.19 Two interviewees from the adjacent audiovisual sectors also cited reputation and experience as important criteria in assessing bids to supply in that adjacent sector.¹⁶⁸ For example, one interviewee stated that, "relationships are extremely important in commercials. It is very difficult for other companies to get in."¹⁶⁹ They went on to cite an example of an access service provider which has the capabilities to enter this adjacent market but had not succeeded in obtaining any new business.
- A2.20 BBC Broadcast (in a joint response with the BBC) indicated to Ofcom that reputational effects can be overcome by hiring sales and marketing personnel who already have established contacts within the industry.¹⁷⁰ However, other providers have indicated that this is not the case.

Costs of entry

Technology

- A2.21 BBC Broadcast (in a joint response with the BBC) argued that the technology required to provide all access services (as well as language subtitling for DVDs) is readily available, and stated that suppliers such as Cavena Image Products AB, Screen Subtitling Systems Limited, Sysmedia Limited and Softel all sell software that can be used for the preparation of subtitles for all forms of audiovisual content.¹⁷¹ Softel has confirmed this, and noted that Starfish Technologies Limited is also such a supplier.¹⁷² The ability to subcontract signing (which requires a camera, editing equipment and studios) implies that it is not difficult for entrants to avoid the need to incur the set-up costs of providing a signing service and so it is unlikely to constitute a barrier to entry.

¹⁶⁶ CEO of Broadcast Text in IAMCO interview 29 September 2005.

¹⁶⁷ Director of WordWave/CSI in IAMCO interview 29 September 2005.

¹⁶⁸ Director of Creative services subtitling, Technicolor in IAMCO interview 5 October 2005; Director of Visiontext in IAMCO interview 6 October 2005.

¹⁶⁹ Director of Visiontext in IAMCO interview 6 October 2005.

¹⁷⁰ BBC/BBC Broadcast response of 24 August 2005 to question 12 of Ofcom's Notice of 5 August 2005 under Section 26 of the Act.

¹⁷¹ BBC/BBC Broadcast response of 24 August 2005 to question 12 of Ofcom's Notice of 5 August 2005 under Section 26 of the Act.

¹⁷² Managing Director of Softel in IAMCO interview 29 September 2005.

- A2.22 Technology costs, for example, voice recognition software such as IBM's ViaVoice (which is used by BBC Broadcast for live subtitling) can be bought "off the shelf" for under £100. IMS stated that the total technology costs for an individual user is a few thousand pounds¹⁷³, a figure which is broadly confirmed by two other providers.¹⁷⁴ Another access services provider estimates that the cost of purchasing subtitling software is between £5,000 and £10,000 and that providers can use shifts in order to maximise the use of this equipment (which also enables them to lower unit costs).¹⁷⁵
- A2.23 As stated in paragraph 5.54, IMS argued that many of the set-up costs would not be recoverable on exit and that although the costs are small when compared to the overall contract values, this would tend to discourage smaller entrants from entering the market.¹⁷⁶
- A2.24 The costs of establishing a direct data link for digital delivery of content between the access services provider and the television broadcaster represent a set-up cost. The costs of these links have been estimated by Flextech as approximately £25,000 per contract. Of this, approximately £15,000 is for the set-up and between £5,000 and £10,000 is for the annual rental.¹⁷⁷
- A2.25 Ofcom has also considered whether the technology available to BBC Broadcast as a result of its relationship with BBC R&D gives it an unfair advantage. Currently, BBC Broadcast licenses two software packages from BBC R&D: Assisted Subtitling ("AST"), which automates part of the subtitling process and "K-Live", which allows for remote subtitling.
- A2.26 The development of AST was undertaken by BBC R&D in conjunction with the BBC's Access Services Unit (which is now part of BBC Broadcast) and BBC Broadcast's subtitling equipment provider Softel. Softel had an agreement with BBC R&D which allowed it to re-sell this technology. However, it was unable to sell any licences. Softel believes that this was partly due to the cost of the technology, in that the savings that could be made were not large enough to warrant the cost. Further, it seems that there were software limitations: it only worked in English, worked better on documentary style programmes than on films and was more suited to situations where scripts could be obtained in advance of transmission.¹⁷⁸
- A2.27 BBC R&D stated that before any technology development is undertaken, they assess the current state of technology to see whether there are any suitable alternative products available. In the case of AST and K-Live it was decided that there were, at the time, no suitable alternative products. However, BBC R&D has indicated that there are now some similar competing technologies.¹⁷⁹
- A2.28 BBC R&D has stated that AST and K-Live were licensed to BBC Broadcast on an arms length basis at market rates. BBC Broadcast's licences are non-exclusive and BBC R&D has been prepared to offer a similar licence on a fair and non-discriminatory basis.¹⁸⁰ Accordingly, it is Ofcom's view that although this technology

¹⁷³ Complaint submitted by IMS 6 June 2005.

¹⁷⁴ For example, the CEO of Broadcast Text in an IAMCO interview 29 September 2005 stated "£4000-5000".

¹⁷⁵ Director of ITFC in IAMCO interview 29 September 2005.

¹⁷⁶ Letter of 18 May 2006 from Simkins LLP (for IMS) to Selena Bevis at Ofcom.

¹⁷⁷ Conference call with Flextech on 16 December 2005, confirmed by email on 18 October 2006 in response to Ofcom's letter of 22 September 2006.

¹⁷⁸ Managing director of Softel in IAMCO interview 10 October 2005.

¹⁷⁹ BBC's response of 9 November 2005 to question 3 of Ofcom's Notice of 2 November 2005 under Section 26 of the Act.

¹⁸⁰ Ibid.

might be more effective than others, it is not provided on an exclusive basis to BBC Broadcast, is available to third parties and therefore should not be construed as giving BBC Broadcast an unfair advantage.

Training

- A2.29 IMS stated that it typically takes [less than a year] of training for a pre-recorded subtitler to reach the optimal output per day and a shorter period for a live voice.¹⁸¹
- A2.30 Another access services provider suggested that it would take up to three months to train the in-house staff needed to provide SDH and audio description services and that this would need to be supplemented with one or two highly trained staff.¹⁸²
- A2.31 BBC Broadcast claimed that there is both a pool of freelance access services staff who are not tied to any particular supplier and a number of trained staff seeking work.¹⁸³ Many subtitling companies rely on the external pool of freelancers rather than have in-house capability because of the temporary nature of the work. It has also been put to Ofcom that in a bid to cut costs providers are hiring and training new graduates who are typically less expensive to employ than 'traditional' subtitlers from a background of writing or journalism.¹⁸⁴ In addition, once fully trained, graduates look to move up the job ladder, leading to a higher turnover of trained people and an active market for access services staff.
- A2.32 In Ofcom's view it is therefore reasonable to assume that providers of access services and language subtitling in adjacent audiovisual sectors could supply trained SDH personnel to the television broadcasting market relatively quickly.
- A2.33 As stated at paragraph 5.57, it takes a number of years for a new signer to reach the standard required, although this may be a shorter period for native-speaking BSL signers. From a supply-side substitution perspective entry dependent on training new signers from scratch would not therefore be possible within a year. However there are a number of freelance agents and a number of specialist providers who could provide services to a new entrant into the broadcasting market.

¹⁸¹ Letter of 18 May 2006 from Simkins LLP (for IMS) to Selena Bevis at Ofcom.

¹⁸² CEO of Broadcast Text in IAMCO interview 29 September 2005.

¹⁸³ BBC/BBC Broadcast response of 24 August 2005 to question 12 of Ofcom's Notice of 5 August under Section 26 of the Act.

¹⁸⁴ [redacted] in IAMCO interview [redacted] September/October 2005.

Annex 3

Evidence on geographic markets

A3.1 This Annex sets out the evidence that Ofcom has used in its assessment of the relevant market and assessing barriers to entry on a geographic basis. Below, Ofcom sets out its more detailed consideration of the factors which it believes are relevant to this issue:

- Business processes and geographic location;
- Reputation, experience and track record; and
- Quality and standards required for UK broadcasting.

Business Processes and geographic location

A3.2 Ofcom has considered whether an entrant into the access services market would need a presence in the country of supply. As set out in paragraph 5.71, UK broadcasters have indicated to Ofcom that they have a preference for using UK-based access services providers due to factors such as cost, video transfer practicalities, business continuity, disaster recovery, the importance of face-to-face meetings and the challenge of operating in different time zones. For example, Channel 4 suggested that because many programmes are delivered late to the access services provider (a matter of days before transmission), and because analogue tapes are still used, if a provider were based solely overseas then having to physically send the tape abroad may lead to unacceptable delays.¹⁸⁵

A3.3 Broadcasters also stated that face-to-face meetings are important in ensuring the effective provision of access services. Specifically, they felt that differing time zones have the potential to hamper effective communication between the two parties. In addition, broadcasters stated that legislative and regulatory requirements for access services mean that there is no margin for error, so any risk in the effective provision of these services arising as a result of significant physical separation is unlikely to be accepted. However, it has also been suggested to Ofcom by BBC Broadcast and the BBC that there may be benefits in having links with access services providers abroad, for example its use of the Australian Caption Centre for live-subtitling of News 24.¹⁸⁶ This is because Australian subtitlers can be used during their day-time to cover night-time shifts in the UK at a lower cost than it would be to use UK subtitlers to work at night. Ofcom notes that BBC Broadcast/the BBC did not suggest that the existence of overseas links could replace the presence of a local provider – that is, Ofcom understands that such links would be complimentary to the presence of a local provider.

A3.4 Broadcasters' responses therefore suggest that UK television broadcasters are currently unlikely to use access services providers based abroad to a significant extent. (Ofcom is only aware of the example of National Geographic which sources its subtitling requirements from companies outside the UK.)¹⁸⁷ However, Ofcom

¹⁸⁵ Channel 4's response of 6 October 2005 to question 10 of Ofcom's Notice of 30 September 2005 under Section 26 of the Act.

¹⁸⁶ BBC/BBC Broadcast response of 24 August 2005 to question 10 of Ofcom's Notice of 5 August under Section 26 of the Act.

¹⁸⁷ Provided by BBC/BBC Broadcast on 24 August 2005 in response to question 10 of Ofcom's Notice of 5 August under Section 26 of the Act.

considers that the way that this might happen is if a overseas broadcaster moves to the UK and decides to sponsor the entry of its existing access services provider into the "overseas" market (see paragraphs 7.57 *et seq* for Ofcom's consideration of sponsorship of new entry).

- A3.5 The view that access services providers need to have a presence in the local country is not contradicted by BBC Broadcast (in a joint submission with the BBC). Specifically, it has stated that in order to enter an overseas market, it is normal for access services providers to establish an office in the country in order to manage local accounts. BBC Broadcast adds, however, that this can usually be done quite quickly and at little cost, citing SDI Media as a provider which has won various contracts with broadcasters since entering the UK market in the 1990s.¹⁸⁸ However, SDI Media stated that it does not provide access services to any UK broadcaster, but it does provide other services such as language subtitling.¹⁸⁹
- A3.6 BBC Broadcast/the BBC also stated that improvements in production and communications technology have made cross-border provision of access services easier. It provided Ofcom with a number of examples of where the production of subtitles due to digitalisation of audiovisual content has enabled the provider to produce the subtitles in a separate country to that of transmission. Examples include Broadcast Text which occasionally makes use of its Scandinavian subtitling company and ITFC which subcontracts work to the Australian offices of its joint venture company.¹⁹⁰ However, it would appear that for SDH these improvements in technology have not had a strong enough impact on UK broadcasters to break down the reputational barriers that exist.
- A3.7 Some access services suppliers have been testing outsourcing subtitling work to overseas companies¹⁹¹ although one company interviewed stated that they had yet to win a contract directly with a UK broadcaster and found that some UK clients backed out of contracts when they discovered that the firm was based abroad.¹⁹² Thus although the technology is available to outsource the supply of access services, it is not enough to alleviate the concerns about the provider not having a UK base.

Reputation and Experience

- A3.8 In Annex 2 Ofcom set out evidence on whether UK broadcasters' requirements for an access services provider to have achieved a certain reputation and level of experience created barriers to entering the market. Ofcom considers that a consideration of reputational barriers to entry from adjacent audiovisual sectors is also relevant to potential entry by overseas providers.
- A3.9 Ofcom notes that there has recently been one new entrant into the UK market. The US company WordWave entered the UK market, although it was surprised by how hard it was to do so and was in fact unable to do so on its own - it formed CSI, a joint venture with ITFC.¹⁹³ As a result, CSI can benefit from ITFC's UK reputation when it bids for new contracts. Ofcom therefore notes that in this example, entry has only been achieved as a result of an affiliation with a UK provider.

¹⁸⁸ *ibid.*

¹⁸⁹ SDI Media's response of 18 May 2006 to Ofcom's Notice of 12 May 2006 under Section 26 of the Act.

¹⁹⁰ Provided by BBC/BBC Broadcast on 24 August 2005 in response to question 10 of Ofcom's Notice of 5 August under Section 26 of the Act.

¹⁹¹ For example, as mentioned by Ex-managing director of Intelfax in IAMCO interview 6 October 2005.

¹⁹² [redacted] in IAMCO interview [redacted] September/October 2005.

¹⁹³ Director of WordWave/CSI in IAMCO interview 29 September 2005.

- A3.10 Only two out of eight broadcasters responded that a track record of providing access services to overseas broadcasters would fulfil the minimum criterion relating to track record. One said that overseas broadcast experience would “possibly” be acceptable, and one stated it would be unlikely to be acceptable unless the provider had a base in the UK and could demonstrate understanding of the regulation. The other four said that overseas broadcast experience would not sufficiently fulfil the minimum track record requirement: they would only consider providers with UK broadcast experience.¹⁹⁴
- A3.11 One overseas-based company interviewed by IAMCO, whose services include voiceover, dubbing and subtitling, stated that all its UK broadcasting work comes from subcontracted work by UK-based access service providers. The interviewee was not aware of any direct contracts with UK broadcasters, although they had competed for them in the past.¹⁹⁵
- A3.12 However, as set out in Annex 2, these responses are related to the current situation in choosing a provider in this market where there are a number of suppliers which meet the reputational requirements of the broadcasters. However broadcasters informed Ofcom that if circumstances were to change, for example if they did not receive sufficient credible bids or prices quoted rose to an unacceptable level, they may change their current minimum selection criteria by, for example, sponsoring entry, perhaps from overseas.

Quality and standards

- A3.13 Ofcom has also considered whether the quality requirements of UK broadcasters and standards prevailing in the UK are able to be met by overseas access services providers.
- A3.14 Evidence from broadcasters suggests that they are of the view that they require a higher quality of work than that of their overseas counterparts.¹⁹⁶ One reason for this is that the standards set by Ofcom (see paragraph 2.27 above on the Guidance to Standards) may generally exceed those required and/or expected by overseas broadcasters.
- A3.15 A number of access services providers informed Ofcom that there is a general perception that the quality of access services provided in other countries, particularly the US, is of a much lower standard than in the UK. One reason for this may be that although there are technical standards in the US, there are no presentational standards. As a result, subtitling styles vary from broadcaster to broadcaster.¹⁹⁷ Most subtitling is done verbatim and scrolled across the screen at a faster speed than would be permitted in the UK.¹⁹⁸
- A3.16 Ofcom is also aware that different countries have different technical standards for subtitling such as differing time-codes, spellings and television standards (see above at paragraph 2.16.3). There also appear to be differences in style, for example whether subtitles are all in capitals (as in the US but not the UK), or

¹⁹⁴ Broadcasters' responses of 22-25 and 30 November 2005 to Ofcom's Notices of 16, 17 and 21 November 2005 under Section 26 of the Act.

¹⁹⁵ [redacted] in IAMCO interview [redacted] September/October 2005.

¹⁹⁶ Broadcasters' responses of 22-25 and 30 November 2005 to Ofcom's Notices of 16, 17 and 21 November 2005 under Section 26 of the Act.

¹⁹⁷ IAMCO interviews September-October 2005.

¹⁹⁸ In the UK, it was decided after consultation with the deaf lobby that verbatim subtitles were not the best method, as they may be difficult to read for deaf people if their English reading ability is not very high. Ofcom's Guidance on Standards for Subtitling recommends approximately 140 words per minute for adults.

whether different colours are used for different speakers (as in the UK but not the US). In addition, television broadcasters have stated that language differences may be a problem. For example, "Sky would consider, when deciding whether or not to buy media access services from a firm operating outside the UK, whether the firm had the requisite local knowledge (e.g. spelling, colloquialisms, language, dialect, names of celebrities, names of sports stars, etc) to provide access services for channels broadcast in the UK."¹⁹⁹ An overseas supplier may therefore have to incur additional technology and training costs in order to meet UK technical standards.

¹⁹⁹ Sky's response of 4 October 2005 to Ofcom's Notice of 28 September 2005 under Section 26 of the Act.

Annex 4

Assessment of bidding market characteristics

- A4.1 As stated in paragraph 7.17 *et seq*, Ofcom has considered the extent to which the market for the supply of access services to broadcasters in the UK is a bidding market, as this may impact on Ofcom's interpretation of market shares.
- A4.2 The evidence indicates that most UK broadcasters prefer not to have more than one provider for all access services and the contracts to supply each service tend to be exclusive.²⁰⁰ There are, however, examples where this is not the case such as Five contracting with IMS for subtitling and with BBC Broadcast for signing and audio description.
- A4.3 The reasons given by broadcasters and providers for contract exclusivity include:
- the need for integration of software and hardware systems and connectivity between the sites;
 - reduced procurement costs;
 - minimisation of risk, complexity and expense, especially as most broadcasters place the responsibility to meet the Ofcom Code on their supplier of access services;
 - reduced contract management costs; and
 - reduced prices available for larger contracts.²⁰¹
- A4.4 In the light of such exclusivity, Ofcom considers that most significant orders in the access services market are likely to be large enough to induce all capable suppliers to want to participate in each available tender. However, this aspect of a bidding market is just one of many characteristics. Ofcom's consideration of other aspects and the extent to which they apply to the UK television access services market is set out below.
- A4.5 Ofcom has considered the criteria identified by the Competition Commission in its report on the *Arcelor/Corus* merger (see paragraph 7.18) which are:
- Relatively few, large contests to supply customers. If there are many smaller contests, then suppliers with large market shares might be prepared to bid high, taking the risk of the loss of some orders to raise margins on the remaining orders (as in a normal market);
 - Open contests, with the opportunity for all suppliers to compete in each such contest;

²⁰⁰ Broadcaster responses of 4-6, 10 and 13-14 October 2005 to Ofcom's Notices of 28 and 30 September 2005 under Section 26 of the Act.

²⁰¹ *Ibid.*

- No significant capacity constraints (again, to ensure that suppliers are indeed interested in winning); and
- 'Brand image' and other factors that are likely to be reinforced by repeated sales (for example, costs of switching between suppliers for customers) should play no part.

Few large contracts

- A4.6 As set out in paragraph 5.17 the UK television access services market is characterised by first a smaller number of television broadcasters which have significant access services requirements and second, a large number of television broadcasters which have less significant requirements. Television access services are either supplied in-house (BBC, ITV), through bilateral negotiations or through a competitive tendering process. At the time of the alleged abuse the majority of the market (excluding in-house supply) was subject to competitive tendering.
- A4.7 Further, even bilateral negotiations can be competitively negotiated. For example, as set out in paragraph 7.65, Five, in its negotiations with IMS, had hoped to realise a specified level of savings and so prepared a draft invitation to tender. It discussed this with IMS which responded by providing those savings. Five then decided not to undertake a formal tender process.²⁰² Similarly, Sky told Ofcom:
- "We have tended to approach providers we believe would be able to provide for us and then we decide amongst them."²⁰³
- A4.8 In addition even with in-house supply, ITV carried out a tender for regional subtitling for Granada Media.²⁰⁴
- A4.9 In Ofcom's view, the market was characterised by a few large contests at the time of the alleged abuse.

Open contests

- A4.10 As set out in paragraphs 5.36, the same three or four suppliers typically tender for all the larger contracts. However, the tendering process does not appear to be completely open in that not all potential suppliers compete because only a small number (three or four at the time of the alleged infringement) of providers are regarded by broadcasters as being qualified to undertake large UK contracts. Proposals tend to be invited from a pre-selected list of suppliers based on broadcaster's industry knowledge. Broadcasters do not necessarily exclude from this list suppliers who do not meet the minimum criteria but, as stated above at paragraph A2.5, they have indicated to Ofcom that they are unlikely to be awarded the contract.

Capacity constraints

- A4.11 Ofcom does not consider that capacity constraints are significant in the access services market because software and hardware are readily available; it is relatively

²⁰² Five's response of 5 October 2005 to Ofcom's Notice of 28 September 2005 under Section 26 of the Act.

²⁰³ Conference call with Sky on 19 May 2006, confirmed as part of its response of 2 June 2006 to Ofcom's Notice of 30 May 2006 under Section 26 of the Act.

²⁰⁴ Conference call with ITV on 17 May 2006, confirmed as part of its response of 26 May 2006 to Ofcom's Notice of 24 May 2006 under Section 26 of the Act.

easy to subcontract particular services (i.e. signing), and qualified personnel are generally available.

Brand image and other factors which may reinforce repeat sales

- A4.12 Evidence from broadcasters and access services suppliers is mixed on the importance of brand image/reputation.
- A4.13 As set out previously in Annex 2, research shows that entry into the market is quite difficult for an unknown company. One access services provider has suggested that the reason for this is because the market in the UK is small and is served by large established companies.²⁰⁵ Ofcom's view therefore is that a well-established brand is likely to be favoured over a less-established one and that given a sufficient number of well-established suppliers, less strong brands might not be invited to tender. This view is based on evidence from broadcasters: seven out of eight broadcasters from which Ofcom gathered information indicated that they set minimum criteria (with track record, experience and reputation generally ranked as being most important) when selecting suppliers to submit tenders. Although a few broadcasters stated that not meeting the minimum criteria would not preclude players from submitting a tender, these suppliers would be unlikely to win the contract. Accordingly, an established reputation and relationships with broadcasters are important pre-conditions to effectively competing for the award of an access services contract with a major broadcaster, in current market conditions.
- A4.14 Ofcom has considered whether the incumbent supplier will have an advantage at the re-contracting stage because of its experience of the broadcaster. Table 4 appears to support this view, showing that generally broadcasters appear to have remained with their original suppliers. However, evidence from customers and providers suggests that incumbency advantages are not material. Specifically, broadcasters appear to regard at least three or four access services providers as being in the well-established brand category and the tender documentation provided by broadcasters to Ofcom shows that once all the quality criteria are met, it then comes down to price.
- A4.15 For example, in the tender appraisal material submitted by one broadcaster it is clear that it viewed a number of providers as credible bidders and in evaluating all the bids, it took into account the cost effectiveness of each bid and the quality of the service.²⁰⁶ It would appear, therefore, that the incumbent provider did not have a particular advantage over the other bidders.
- A4.16 In the case of other broadcasters' tenders for access services, Flextech stated that "on balance, price is the most important factor but only on the basis that quality and operational issues are equal".²⁰⁷ As stated in paragraph A4.7, when renewing its access services requirements Five produced a draft invitation to tender for subtitling which it hoped would realise a specified level of savings. It discussed this with IMS (its incumbent provider) who responded by providing those savings. Given this, it decided not to undertake a formal tender process.²⁰⁸ However for audio description and signing, a formal tender process was conducted. Five stated:

²⁰⁵ Director of WordWave/CSI in IAMCO interview 29 September 2005.

²⁰⁶ Submitted as part of [redacted] response of [redacted] October 2005 to Ofcom's Notice of [redacted] September 2005 under Section 26 of the Act.

²⁰⁷ Flextech's response of 6 October 2005 to Ofcom's Notice of 28 September 2005 under Section 26 of the Act.

²⁰⁸ Five's response of 5 October 2005 to Ofcom's Notice of 28 September 2005 under Section 26 of the Act.

"The decision to award the contracts to the BBC was based around price, experience, ability to deliver and how the service would develop as a result of advances in technology. BBC Broadcast met each of these criteria and although the then existing provider ITFC indicated some flexibility in its pricing, BBC Broadcast remained the cheapest."²⁰⁹

- A4.17 This suggests that although an established reputation and relationships with broadcasters are important pre-conditions for the award of an access services contract with a larger broadcaster, broadcasters appear to regard at least three or four access services providers as meeting these criteria. Thus once these pre-conditions have been met, price becomes the dominant factor in the selection process.
- A4.18 The presence of this number of credible suppliers means that supplier switching could occur amongst them. Examples of broadcasters changing supplier include Five switching from ITFC to BBC Broadcast for signing and audio description, Channel 4 switching from Intelfax to BBC Broadcast and Flextech switching from SIUK to ITFC.
- A4.19 The likelihood of switching will be influenced by the cost of switching from one provider of access services to another.²¹⁰ Broadcaster responses indicate that switching costs in this market include the cost of installing equipment and data links for a new customer, administrative costs in carrying out a competitive tender process and some changeover costs in ensuring business continuity, that is, that the availability of the service - and therefore regulatory compliance - is not interrupted during switchover.²¹¹
- A4.20 IMS is of the view that switching costs may arise as a result of TUPE regulations which relate to a situation where an undertaking transfers all or part of its business to another (and which can apply where a business moves from in-house supply to an outsourced supply or switches contractor).²¹² The regulations are designed to protect the rights of employees in a transfer situation enabling them to enjoy the same terms and conditions, with continuity of employment, as formerly.
- A4.21 IMS argued that TUPE regulations may create switching costs but acknowledge that there is some doubt as to whether TUPE regulations would apply to the expiration of a contract to provide services. IMS did, however, claim that the probability of TUPE regulations applying is increased in the case of live subtitling where a provider's operations are often embedded at or near a broadcaster's centre of operation. IMS goes on to note that, "TUPE has not been formally applied in any transfer of contracts".
- A4.22 Ofcom notes that IMS recognises that it is not clear whether or not TUPE would apply to a switch in access services provider and that there are no examples of TUPE costs arising on such a switch. Ofcom also notes that no other broadcaster or access services provider has indicated that TUPE costs could create switching costs.

²⁰⁹ Ibid.

²¹⁰ The higher the cost, the lower the incentive to switch provider.

²¹¹ Broadcaster responses 22-25 and 30 November 2005 to Ofcom's Notices of 16, 17 and 21 November 2005 under Section 26 of the Act.

²¹² Letter of 18 May 2006 from Simkins LLP (for IMS) to Selena Bevis at Ofcom.

- A4.23 In Ofcom's view whether or not TUPE regulations will apply and whether or not there are any associated staff costs which act as a switching cost will depend upon the circumstances of each particular case. On this basis Ofcom does not consider there is sufficient evidence to conclude that TUPE related costs are likely to create material disincentives to switching.
- A4.24 One broadcaster stated that in order to maintain business continuity in the event of a change in supplier there may be parallel running costs during the transition period which may need to be borne by broadcasters. It argued therefore that the lower costs offered by an alternative provider would have to be balanced against the potential migration costs associated with moving to another provider.²¹³ This latter point is supported by the example of Channel 4 which, despite stating that there are switching costs, still changed provider.²¹⁴ Sky commented that the new service provider would bear most of the costs involved in the installation of equipment and video and data circuits.²¹⁵ Another broadcaster indicated that switching costs are never a factor in the decision-making process and that there is no difficulty in switching provider.²¹⁶
- A4.25 The BBC stated that the following factors would need to be considered regarding switching suppliers:
- The value for money represented by the alternative supplier compared to the incumbent's offering;
 - The time taken to bring an alternative supplier up to speed with the BBC's internal process and its complex range of services; and
 - The implication of having a different provider for access services and playout and the willingness of the incumbent supplier to allow staff to transfer to an alternative supplier (if required).
- A4.26 However, the BBC also commented on the apparent ease with which other major broadcasters, such as Channel 4 and Five, appear to have switched access services supplier.²¹⁷
- A4.27 The evidence suggests therefore that although there may be switching costs, in general they are not of a level as to preclude larger broadcasters from switching access services provider.

IMS's comments on bidding markets

- A4.28 In its response to the consultation on the draft decision, IMS argues that Ofcom's evidence on bidding markets contradicts the conclusion that BBC Broadcast does not enjoy a dominant position. Specifically, IMS states that it:

“agrees that "bidding market" hypothesis might conceivably be relevant and dilute an otherwise high market share. However, the relevant market is so new that it is difficult to compare it with the

²¹³ [redacted] response of [redacted] November 2005 to Ofcom's Notice of [redacted] November 2005 under Section 26 of the Act.
²¹⁴ Channel 4's response of 30 November 2005 to Ofcom's Notice of 17 November 2005 under Section 26 of the Act.

²¹⁵ Sky's response of 23 November 2005 to Ofcom's Notice of 16 November 2005 under Section 26 of the Act.

²¹⁶ [redacted] response of [redacted] November 2005 to Ofcom's Notice of [redacted] November 2005 under Section 26 of the Act.

Ofcom also notes that switching costs may appear relatively different depending on the size of the broadcaster.

²¹⁷ BBC response of 16 May 2006 to question 17 of Ofcom's Notice of 4 May 2006 under section 26 of the Act.

mature international steel market analysed by the Competition Commission in *Arcelor/Corus*".²¹⁸

- A4.29 IMS also sets out its view that the existence of brand image is incompatible with finding elements of a bidding market because brand image is a hallmark of market power enabling prices to be maintained or increased. In its view, Ofcom's evidence on brand reputation should have been sufficient to rule out the bidding hypothesis altogether. Further, IMS referred to the evidence presented by Ofcom in paragraph 7.62 as showing "a quite significant degree of market power enjoyed by access service providers" and also that Ofcom's evidence shows that entry from abroad is implausible, that "Word Wave "success" is insufficient to rate a mention in the market shares tables" and that there has only been one new provider of SDH in recent years and it only achieved a market share of less than 1%. In IMS's view this evidence further means that the bidding market hypothesis should be discounted.²¹⁹
- A4.30 Further IMS asserts that the evidence shows that "ITV and Sky are prepared to go along with price increases of up to 10% without demur".

Ofcom's response to IMS's comments on bidding markets

- A4.31 Ofcom welcomes IMS's recognition that an assessment of bidding markets might be relevant but does not agree that the maturity of the market is an important factor in considering whether a bidding market exists or not. Ofcom is not comparing the market for the supply of access services to television broadcasters to the international steel market, rather using the factors identified by the Competition Commission as part of the *Arcelor/Corus* merger to assess the market. These relevant factors are as set out in paragraph A4.5 above; market maturity is not one of them.
- A4.32 In respect of brand image, Ofcom agrees that brand image is important in the relevant market which is a reason why it concludes that the relevant market may exhibit some of the features of a bidding market and not all features. In particular, Ofcom considers in paragraph 7.37 *et seq.* that an established reputation and relationships with broadcasters are important pre-conditions for the award of an access services contract with a large broadcaster. However, Ofcom also concludes that broadcasters appear to regard at least three or four access services providers as meeting these criteria (see paragraph 7.42) and that once these brand image pre-conditions have been met, price becomes the dominant factor in the selection process (see evidence in paragraphs 7.59 to 7.63). In Ofcom's view, this evidence shows that the broadcasters that Ofcom was in contact with would be unlikely to tolerate price increases rather than that the access services providers enjoy a significant degree of market power.
- A4.33 In response to IMS's specific comments on the evidence presented at paragraph 7.62, Ofcom notes that while it is possible to interpret ITV's response as saying that it would only consider action if prices rose more than 10%, ITV also stated that they believe that their contract pins down price so that this is a non-issue for them. Sky did not state a level of price increase at which they would consider alternative providers, just "if prices rose unexpectedly". In Ofcom's view, what this means is that although brand image is important, because broadcasters have a number of credible alternatives, price is still a dominant factor in the selection process.

²¹⁸ IMS letter of 19 January 2007, paragraph 4.4.

²¹⁹ IMS letter of 19 January 2007, paragraphs 4.5 to 4.8.

Conclusion on bidding markets

A4.34 In summary, Ofcom considers that at the time of the alleged infringement the market for the supply of access services to broadcasters in the UK was characterised by a few large contracts, the absence of significant capacity constraints, some reputational effects akin to brand image and the selection of suppliers that satisfy the reputational criteria by way of open contests. Ofcom therefore considers that the relevant market, at that time, exhibited at least some of the characteristics of a bidding market.