

The European Commission e-commerce sector inquiry
BT Group plc Response to
The Consultation on the Preliminary Report

Introduction and summary

BT is submitting these comments on the Preliminary Report in its capacity as: (i) a licensee of online and other rights to content; (ii) a new entrant online digital content provider; and (iii) a respondent to the Commission questionnaire on the online sales of digital content.

In its Executive Summary, the Commission says:

“The preliminary results of the sector inquiry raise the question whether some of the current licensing practices may make it more difficult for new online business models and services to emerge and for new or smaller players to enter the market or expand their activities into other markets, in particular cross-border due to geo-blocking requirements. This may be particularly true when online rights are sold exclusively on a per Member State basis or bundled with rights in other transmission technologies and then remain unused”¹.

The Preliminary Report rightly identifies potential barriers to entry and expansion, and distortions to competition more generally, where key content cannot be accessed by new entrants and smaller players. By far the most important obstacle to the emergence of effective competition in the supply of online digital content is the concentration of the large majority of rights to the most attractive content in the hands of a minority of powerful incumbent content providers who may use this content to reinforce their strong market position. This can create a ‘vicious circle’ which perpetuates market power in the supply chain. In particular, content providers which have built large subscriber bases on traditional media platforms are able to leverage their market power and extend this vicious circle to include the exploitation of online rights.

In the absence of commercial arrangements, a variety of interventions may be appropriate in these circumstances. These include constraining the manner in which content rights holders sell their rights, in order to avoid their creating downstream market power, as well as obligations on downstream entities with market power to wholesale on reasonable terms.

Market power throughout the supply chain – a ‘vicious circle’

The relevant supply chain in online digital content in the UK (and Europe more widely) can be divided into the following main tiers: (i) rights production and acquisition; (ii) content production (and the assembly of (i) and (ii) into channels); (iii) the wholesale supply of channels; and (iv) online and other forms of distribution of those channels by platforms/retailers.

¹ Preliminary Report, page 11.

The nature of the content market, where marginal costs are very low but fixed costs are typically high, means that upstream and downstream bottlenecks can be mutually reinforcing. In particular, a large subscriber base may enable a content provider to reduce its average content acquisition costs per customer. This downstream advantage provides it with an ability to outbid its rivals in the competition for key content rights for online transmission as well as for other transmission technologies.

New entrant digital content providers need to be able to offer attractive content to attract subscribers to their services. The contest for content, especially for exclusive rights to key content in circumstances where the holder of market power can buy all the rights, will most often be won by the content providers with the largest number of subscribers. Where this content is not made available to downstream rivals at all, or only on terms which limit competitive pressure, the incumbent provider may be able to enlarge its subscriber base even further across a range of technologies which, in turn, renders the contest for content ever more uneven. This makes it very difficult for a new entrant to compete for subscribers. Taken together, these factors mean that leading market positions become entrenched.

Given that, as the Commission recognises, consumers will not subscribe (or switch) to new entrants without sufficiently attractive content, regulators need to prevent such distortions of competition. One such intervention would be to mandate the wholesale supply of key content on fair and reasonable terms, so the established incumbent cannot use its scale advantages to deny this content to would-be rivals and, thereby, prevent them from competing for subscribers. Intervention at the rights level may also be appropriate.

The Commission's preliminary findings on access to key content and market power

BT agrees, therefore, with the Commission's statements on the importance of access to key content and of market power. The Commission is correct to state that:

"... Securing attractive digital content is essential for digital content providers that wish to maintain or improve their competitive position ... the main driver of competition remains the same: attractive content"²,

that:

"The availability of the relevant rights for online distribution of digital content is one of the key determinants of competition among digital content providers"³.

and that:

"An important element of the assessment of exclusive licensing is the presence of market power at different levels of the supply chain which, being closely related to the

² Ibid., paragraph 924.

³ Ibid., paragraph 944.

*specific product and geographic market, needs to be examined on a case-by-case basis*⁴.

It is the combination of: (a) exclusivity of content, (b) the ability to outbid others for all the rights to attractive content, and (c) market power in the value chain, which creates the vicious circle which impedes competition. Exclusivity refers to the characteristic that only one distributor can distribute a particular right (for example, a single football match or a single movie): it owns the right exclusively. The ability to outbid others for all the rights to attractive content refers to the characteristic that some rights holders sell all their rights to only one buyer (for example, all the matches of one league or all the movies from one studio). The combination of both these characteristics with market power in the value chain is likely to create insurmountable barriers to entry.

The position of new entrants

New entrants are acutely aware of the need for access to attractive content and of the significant cost of that access.

The Commission states:

*“Since users will tend to attach greater value to a provider that is in a unique position to offer a specific product, exclusivity is used by digital content providers as a means to differentiate their offerings from that of their competitors in order to compete for a wider audience. This is all the more true when the product in question is in high demand”*⁵.

Indeed, the exclusive rights that new entrants do manage to acquire are crucial in helping them to differentiate their offerings from those of other players and to attract subscribers.

Moreover, where a new entrant has made a substantial investment in attractive content, it is critical that the new entrant should be able to use that investment to build a material subscriber base and establish itself⁶.

[...].

As a new entrant in the UK, BT has managed to acquire, following its participation in the 2012 and 2015 Football Association Premier League auctions, a minority share of the available live broadcasting rights on an exclusive basis. In 2015, this was at a total cost to BT of £960M over three years. BT has also invested £897 million in its current set of exclusive UEFA Champions League rights (plus Europa League rights) also over a three year period.

[...]

EU-wide licensing is not the answer [...].

⁴ Ibid., paragraph 949.

⁵ Ibid., paragraph 817.

⁶ Cf paragraphs 61 and 107(b) of the Commission’s Guidelines on vertical restraints and the positive effects of such restraints in relation to new market entry ([2010] OJ C130/1).

Exclusive licensing on a national basis therefore makes sense for many players with a national focus, and EU-wide licensing would be a form of bundling of content which would be adverse to the development of competition from new entrants.

EU-wide licensing would exclude digital content providers with a national focus and little (or no) ability to operate outside their home markets. By contrast, it would favour large media companies with the ability to outbid competitors and acquire attractive content rights on a multi-territorial basis. The existing market power of large media companies at a national level would simply be re-enforced, and competition further impeded.

Bundling of rights

According to the Preliminary Report⁷, the widespread use of exclusivity in conjunction with the licensing of technology rights implies that both new entrants and existing operators which do not have access to specific technology rights might find it difficult to acquire online transmission rights, depending on how such rights have been licensed (split up) and to which company in a particular territory.

Moreover, rights for online transmission of digital content are to a large extent licensed together with the rights for other transmission technologies (mobile, terrestrial and satellite). The Commission suggests that bundling of rights for online transmission with rights in other transmission technologies may limit the availability of a varied offer of digital content services to users and may lead to a restriction of output, in particular where the online rights are not, or are only partly, exploited by the licensee. Bundling of rights, according to the Commission, may also hinder both existing operators and new entrants from competing and developing new innovative services, which in turn may reduce consumer choice.

[...]. It is not BT's experience as a new entrant that either the exclusive licensing of technology rights to it or the bundling of rights across transmission technologies in BT's licences is a hindrance to competition and the development of new and innovative services *per se*.

Similarly, the so-called 'temporal exclusivity' through different release windows does not in BT's view have an adverse impact on competition where it benefits new entrants⁸.

Duration of licensing agreements

The Commission summarises its findings as follows:

"Licensing agreements are often concluded for rather long durations and contracting parties often renew existing agreements. Such renewal of licensing agreements is sometimes done on the basis of specific clauses such as automatic renewal clauses and clauses providing for a right of first negotiation, a right of first refusal or a matching

⁷ Preliminary Report, paragraphs 689 to 694.

⁸ Ibid., paragraphs 804 to 814.

*offer right. The fact that contracting parties often decide to contract again or renew or extend existing licensing agreements instead of contracting with new parties, leads to long term contractual relationships. This is likely to make it more difficult for new players to enter the market, or for existing operators to expand their current commercial activities into e.g. other transmission means such as online, or to other geographical markets*⁹.

As a new entrant, BT's own experience is that an established relationship between licensee and rights holder of attractive content will always favour the former in its ability to renew its licensing agreements even if they are of relatively short duration. Rights holders have a clear preference for incumbents.

Conclusion

The Commission has correctly identified access to content as key to competition and recognises the importance of market power at different levels of the supply chain in assessing the impact of exclusive licensing.

BT agrees with the Commission that licensing of content needs to be assessed on a case-by-case basis given the problems for competition which are caused by the combination of market power, exclusive licensing and the ability to acquire all related rights. Access to content can be facilitated by addressing instances of limited distribution practised by digital content providers with market power (and/or by regulating the manner in which key rights vendors sell their rights). In the absence of commercial solutions, digital content providers with market power might be required, for instance, to resell certain key content to downstream digital content providers for online and other forms of transmission on fair and reasonable terms. Key rights vendors might be required not to sell all rights to one buyer and to sell their rights through transparent auction processes. At the same time, new entrant digital content providers need to know that their investments in attractive content will not be undermined.

⁹ Ibid., page 268.