

**The Legislative Council
Bills Committee on Broadcasting Bill**

Competition Guidelines

Purpose

This paper sets out the outline and approach of the draft guidelines on competition, which are currently under preparation by the Broadcasting Authority (BA).

General

2. The Competition Guidelines are intended to provide practical guidance to licensees regarding the manner in which the BA proposes to perform the functions conferred on it by the competition provisions of the Broadcasting Bill (the Bill). In the process of drawing up the Competition Guidelines, the BA will draw reference from the guidelines issued by overseas jurisdictions, in particular, those issued by the Independent Television Commission (ITC) of the UK. A copy of the ITC code is at the Annex.

3. With reference to similar guidelines issued by overseas jurisdictions, we expect that the Competition Guidelines to be issued by the BA will cover three main sections, as follows -

- (a) an overview of the competition provisions in the Bill;
- (b) an overview of the BA's enforcement procedures; and
- (c) the analytical framework that the BA will use when enforcing the competition provisions.

Competition Provisions Overview

4. This section would give an overview of the competition provisions in the Bill, i.e. Clauses 13 & 14, as well as the sanctions that the BA may impose on licensees for infringement of the provisions, such as financial penalty, suspension and revocation of licences. This section would also elaborate on relevant terms used in the Bill, such as "direct or indirect agreements", "substantial restriction of competition", etc.

Enforcement Procedures

5. This section would explain the procedures that the BA will adopt when enforcing the competition provisions. It would include the complaint-handling procedures, the circumstances under which the BA will initiate an investigation, the information-gathering process and the decision-making process. In this connection, paragraphs 31 to 53 of the ITC Code attached at Annex would be relevant.

Competition Analysis Framework

6. This section would explain the general principles and analytical approach that the BA will apply when exercising powers under the competition provisions. In broad terms, the competition analysis framework consists of three main stages, namely -

- (a) Stage 1: Defining the relevant market;
- (b) Stage 2: Assessing market power and/or the presence of agreements or practices;
and
- (c) Stage 3: Assessing whether there is an abuse of a dominant position or substantial effect on competition.

7. The first stage in the competition analysis is the definition of the market, or markets, relevant to the alleged anti-competitive practice. The purpose of defining the relevant market is to identify the boundaries in which competition takes place. To define the relevant market, one needs to consider the demand and supply conditions associated with the products or services under examination, and the geographical scope of the market. A product market as defined in the ITC Code is “all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use”. Therefore the BA would need to consider the demand and supply substitutes for the products or services in question, i.e. how far it is possible for customers to substitute other services or products for those in question (demand-side substitution) and how far suppliers not presently supplying the relevant products could increase or switch production capacity to do so (supply-side substitution). In defining the relevant markets, the BA is expected to follow closely the established guidelines and practice as outlined in paragraphs 63 to 94 of

the attached ITC Code.

8. The next step in the competition analysis is to assess whether licensees in those markets have the potential ability to behave in an anti-competitive manner, i.e. whether one is dominant or whether they have market power. Only a licensee with market power (or a group of licensees acting together that jointly possess market power) can behave in a potentially anti-competitive manner. Factors to be considered in determining whether a licensee has market power include the behaviour of existing competitors, the scope for potential competition and the strength of buyer power. In assessing market power, the indicators as described in paragraphs 95 to 118 of the ITC Code would serve as a useful reference to the BA when formulating its own guidelines on the subject.

9. The third step of the analysis is to ascertain whether there is an abuse of a dominant position and/or whether any agreement or conduct has or is capable of having a substantial adverse effect on competition in the relevant market. Based on overseas jurisdictions and as a yardstick for establishing substantial effect on the relevant market, there would be a presumption of market dominance if the licensee's market share is persistently in excess of 50%. On the other hand, market power would unlikely to exist if the market share or combined market share of the licensees under examination is less than 25%. In determining whether any agreements or concerted practices would have an appreciable effect in a particular market, the BA is likely to make reference to the guidelines outlined in paragraphs 119 to 126 of the ITC Code.

Consultation

10. The BA is currently finalizing the draft Competition Guidelines before they are put forth for consultation with the industry. It is expected that the draft Competition Guidelines would largely be modelled along similar guidelines issued by overseas jurisdictions like the UK Code at Annex, with suitable adaptation for the local television market environment. In the light of Members' concern about whether the industry's views would be reflected in the Competition Guidelines, we will propose a Committee Stage Amendment to the Bill to the effect that the BA shall, before issuing the Competition Guidelines, consult all those licensees who may be affected by the Guidelines. In addition, the competition provisions will come into operation only after the

Competition Guidelines have been promulgated by the BA after the consultation exercise.

Information Technology and Broadcasting Bureau

24 May 2000

ITC CODE OF COMPETITION POLICY PROCEDURES:

December 1999

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1. INTRODUCTION

Background

1. The ITC licenses and regulates all commercial television in the United Kingdom. The legislative framework is set out in the Broadcasting Act 1990 (“the Act”), as amended by the Broadcasting Act 1996.

2. An important function of the ITC under the Act is the economic regulation of all the services that are licensed by the ITC. In particular, the ITC has the duty to discharge its functions in the manner which it considers is best calculated to ensure “fair and effective competition” in the provision of licensed services and services connected with them (Section 2(2)(a)(ii)). Although not given concurrent powers under the Competition Act 1998, the ITC’s competition duties give it an essential role in applying competition policy in the commercial television broadcasting sector.

3. In order for the ITC to carry out its duty effectively, there must be transparent and accountable regulatory processes and procedures which allow viewers, licensees and other interested parties to understand how - and in what circumstances - the ITC will fulfil its statutory duties in respect of competition. This document is designed to assist that process.

4. The ITC publishes a variety of codes and guidance that apply to ITC licensees. Some Codes, such as the **Programme Code** and the **Advertising and Sponsorship Code**, are a statutory requirement, whereas others, such as the **Code of Conduct on Electronic Programme Guides**, are published voluntarily by the ITC. This Code, which the ITC is publishing voluntarily, sets out the ITC’s procedures for undertaking and reaching decisions in competition investigations.

5. The ITC’s procedures in competition cases are intended to provide an efficient and effective means of dealing with complaints and investigating issues within the scope of the ITC’s powers and in compliance with its statutory duties. Any party affected by the ITC’s decisions in this area has the opportunity to make representations in writing. The Commission’s decisions will be published together with a statement of reasons although respect for genuine requests for confidentiality will be balanced against the need for sufficient transparency of process. The procedures as a whole are intended to produce a robust result in a reasonable time. The ITC has ensured necessary checks are applied to the procedures at key stages to provide fairness and the whole process is subject to the possibility of judicial review.

6. The ITC keeps all of its procedures, guidance and Codes under continuous review with a view to ensuring that their requirements are reasonable, meet public expectations and remain up to date. Significant changes are only made after public consultation.

7. Nothing in this Code can override any legislation, licence condition or direction currently in force. It does not affect the discharge of the ITC’s duties under Section 8(2)(b) of the 1990 Act (which states that a licensee must not unreasonably discriminate either in favour or against any particular advertiser), or under Section 12(1)(e) of the 1996 Act (which states that a multiplex licensee must not show undue discrimination in the terms on which he contracts with broadcasters).

8. The ITC is required to balance its competition duties against its other duties. It is not required to give primacy to its competition duties although it may do so. This situation is effectively no different to that of other regulators who exercise their powers under sector-specific legislation that bear on the competitive process, rather than their concurrent powers under the Competition Act 1998 (the “Competition Act”). The ITC must also have regard to principles of EC competition law (see paragraph 22 below).

The Focus of the ITC’s Competition Duties: Customers and Viewers

9. One of the central aims of competition policy generally is to protect the interests of consumers, rather than firms or other organisations, by ensuring that consumers see the benefits of competition, including efficiency, in the market place. The focus of the ITC’s competition policy is, therefore, on the competitive process, and particularly on the impact - whether direct or indirect - of the behaviour and practices of its licensees on customers of licensed services, and predominantly, on viewers. The ITC considers that it is most likely that in a competitive environment customers and viewers would have the maximum possible choice and availability of services, at the lowest possible price.

10. Whenever there are appreciable distortions in a market or markets through the anti-competitive practices of one or more participants, this distortion is likely to manifest itself either directly or indirectly in the terms - in the broadest sense, ie, price, range and so on - on which licensed services are being provided to customers and viewers. Similarly, whenever the ITC acts to remove or prevent behaviour prejudicial to fair and effective competition (ie, when there are appreciable effects on viewers and/or customers), it will seek to ensure that customers and viewers - whether today’s or tomorrow’s - will benefit directly or indirectly through some or all of the greater choice of services, better value, lower prices, greater efficiency, etc.

11. The ITC’s jurisdiction in competition matters is limited to its licensees. The reference to “connected services” in the Act does not mean that the ITC can apply its competition duties in any market for connected services, except to the extent that competition in that market is affected by, or related to, the behaviour of one or more of its licensees. For example, telephone services were treated as a connected service by the ITC in its joint investigation with the Office of Telecommunications (“OFTEL”) into the bundling of television and telephone services by cable operators (see joint ITC/OFTEL Press Release, 20 April 1999).

Statutory Basis of the ITC's Competition Duties

The Broadcasting Acts 1990 and 1996

12. The ITC's primary functions are defined in Section 2 of the Act (as amended by the Broadcasting Act 1996). Section 2(1) sets out the functions of and the scope of the services to be regulated by the ITC. Section 2(2)(a) defines specific duties of the Commission, and states that:

"It shall be the duty of the Commission to discharge their functions...in the manner which they consider best calculated-

- (i) to ensure that a wide range of...services is available throughout the United Kingdom, and*
- (ii) to ensure fair and effective competition in the provisions of such services and services connected with them".*

13. Section 2(2)(b) places a further duty on the Commission to ensure that the services taken as a whole are of high quality and offer a wide range of programmes calculated to appeal to a variety of tastes and interests.

14. There can often be an inter-relationship between these duties. This is apparent, for example, in the ITC's investigation into channel bundling in the pay-TV market and in the regulation, in co-operation with OFTEL, of Electronic Programme Guides (EPGs). The ITC's duties to ensure the availability of a wide range of services and fair and effective competition are interlinked in that the existence of a wide range of services is more likely to ensure fair and effective competition and vice versa. By way of example, in addition to seeking to prevent anti-competitive practices, one of the main aims of the **ITC Code of Conduct for Electronic Programme Guides** is to ensure that the terms on which an EPG service is offered do not limit viewers access to a wide range of services, particularly to those services viewers watch most.

15. Nothing in Section 2(2)(a)(ii) of the Act affects the discharge by the Director General of Fair Trading ("DGFT"), the Secretary of State or the Competition Commission of any of their duties or functions with respect to competition. The ITC's powers operate in parallel with those other authorities, including, where appropriate, the European Commission.

Mergers

16. The duty in Section 2(2)(a)(ii) relates to the operation of the competitive process. The ITC has no direct powers in relation to mergers involving its licensees, except to the extent that it administers and enforces statutory rules on ownership (which, in some cases, contain a competition dimension).

Licence Conditions

17. All ITC licences contain a “Fair and Effective Competition” Condition. This reads as follows:

Fair and Effective Competition

The Licensee shall:

(a) not engage in any practice or enter into any agreement or give effect to any arrangement¹ which is prejudicial to fair and effective competition in the provision of licensed services and services connected with them; and

(b) comply with any direction, from time to time issued by the Commission to the Licensee, for the purposes of ensuring fair and effective competition in the provision of licensed services and services connected with them.

18. As a result of an investigation, the ITC may issue a direction under this licence condition to deal with any anti-competitive practices identified. Directions may both prohibit such practices and prescribe behaviour which the ITC considers appropriate to prevent the practice recurring with the same or similar effect.

19. Instead of issuing a Direction, the ITC may decide to vary an existing licence condition or to add a new licence condition, depending on the particular circumstances. Should the ITC choose to follow this route then it will consult those affected in accordance with Section 3(4) of the Act.

20. The ITC has, in addition, a range of sanctions available to it, including financial penalties and revocation of a licence, in the event that a licensee is determined to be behaving in contravention of its licence. Details of these sanctions are contained in each licence.

The ITC’s Approach: The Relevance of UK and EU Competition Law

EU Competition Law

21. EC competition law is embodied in Articles 81 and 82 (ex Articles 85/86) of the Treaty of Rome. In essence, Article 81 prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition (for example those which fix prices, limit production, agree market shares or apply dissimilar conditions in equivalent circumstances). Article 82 prohibits the abuse by one or more undertakings of a dominant position in a substantial part of the common market. In each case there must be an effect on trade between member states.

¹ *(Multiplex licences includes the term “(whenever made)” here)*

22. Although the ITC has discretion when determining how to discharge its competition duties, this is limited in a number of ways. In particular, the ITC must have regard to recognised principles and practice of competition law, particularly those established under Articles 81 and 82 of the EC Treaty (upon which the Competition Act is based). Furthermore, the ITC, as a public authority, has a responsibility not to adopt or maintain any measure that would result in a breach of Article 86(1) (formerly Article 90(1)) by the United Kingdom as a member state, or to take measures which would lead undertakings into conduct contrary to Articles 81 or 82 read in conjunction with Article 86(2) (formerly 90(2)). Nor can the ITC take any measure which would involve the United Kingdom jeopardising the attainment of EU objectives, including the ensuring of effective competition within the internal market (see Article 10 (formerly 5) and Case 66/86 Ahmed Saeed Flugreisen v ZBUW [1989] ECR 803)

UK Competition Law

23. For the purposes of the ITC's competition duties, the most relevant piece of UK legislation is the Competition Act, which comes fully into force in March 2000. The key prohibitions in the Competition Act are modelled on Articles 81 and 82 of the EC Treaty. The DGFT and the sector regulators, have powers to apply the provisions of the Act concurrently. The ITC does not have concurrent powers under the Competition Act. However, in recognition of its role as the regulator for the commercial television sector with competition duties, the ITC is an "observer" member of the Concurrency Working Party, a non-statutory body whose remit has been to facilitate co-ordination among the bodies responsible for administering the new competition law. The ITC intends to adopt the principles and procedures in the guidelines which the DGFT is required to publish under the Competition Act, so far as practicable, and will act in co-ordination with and consistently with the approach adopted by the UK competition authorities (the DGFT, assisted by the Office of Fair Trading ("OFT") and the Competition Commission) and the regulators.

Co-ordination with other authorities and regulators

24. Notwithstanding the ITC's intention to adopt the principles and procedures in the Competition Act and the guidelines prepared under it, the Guideline on Concurrent Application to Regulated Industries (OFT Guideline 405) does not apply to the ITC's work. Consequently, the ITC needs to ensure that any over-lapping jurisdictions are managed effectively. To this end, the ITC, OFT and OFTEL are parties to the Standing Committee on Competition in Communications (the "Group of Three" or G3) which aims to co-ordinate a common approach to dealing with problems of competition in communications markets, particularly where markets overlap. The G3 has also agreed a memorandum of understanding on handling cases in the communications sphere which are being examined by the Directorate General for Competition of the European Commission (DGCOM) (see Appendix 1).

25. Where appropriate, the ITC will involve the OFT and OFTEL in its investigations (whether or not under the aegis of the Group of Three). In some cases (for example, EPGs), the ITC and OFTEL will establish a joint project to conduct an investigation to agree on regulatory principles. It is recognised, however, that the ITC, DGFT, and OFTEL operate under different statutory regimes and that any coordinated approach cannot compromise their individual objectives and statutory duties.

Advice to Competition Authorities and Regulators

26. The ITC may be asked to give advice to other competition authorities, such as the DGFT, the Competition Commission, DGCOM and other sector regulators (primarily OFTEL). Frequently this is in the form of expert advice about facets of television broadcasting and is provided by ITC staff.

27. More formal requests for the ITC's views may come from another competition authority or regulator, for example, in relation to a merger or consideration of a joint venture where an ITC licensee is involved. The procedures set out in this document do not apply to these situations. The ITC would not normally consult the relevant licensee in these circumstances nor discuss with it the views to be expressed. However, it is open to licensees to seek a meeting with the ITC to explain their case. If a licensee wishes to follow this approach, it would be preferable for such a meeting to take place as soon as possible after the relevant competition authority/regulator is notified of or otherwise becomes involved in the case.

28. Where the ITC is asked to give its views formally to another competition authority or a regulator and the matter is of some significance, ITC staff will seek comments from Members of the Commission before doing so. The basis on which advice is given, ie, by staff alone or after consideration by Members, will be made clear to the relevant authority. Should the relevant authority wish to publish the ITC's views (or those of its staff), this will be supported, subject to considerations of commercial confidentiality.

2. THE ITC'S COMPETITION INVESTIGATION PROCEDURES

Introduction

29. An investigation may arise in a number of ways, including a complaint, a concern identified by the ITC's own monitoring procedures or an issue passed to the ITC by another competition authority or regulator. The procedure for carrying out the investigations is broadly similar for both external and self-instigated investigations, although the procedure adopted (see summary at Appendix 2) - and the relevant timescales - will depend on the size and complexity of the task.

30. A major issue that would be expected to impact on the industry and/or viewers generally is likely to involve one or more public consultation exercises and may take longer to complete. An example of this was the ITC's review of channel bundling. Small, focussed issues, on the other hand, such as a complaint about the behaviour of two or three licensees may not, in general, be expected to result in a formal public consultation document. An example of such a case might be a complaint about the use of an alleged discriminatory algorithm to determine the order of channels on an EPG. The ITC may instead issue a press release inviting comment and will give notice of all its investigations in the ITC Bulletin and on the ITC Internet Web Site <http://www.itc.org.uk>.

Sources of Competition Cases

Complaints

31. Complaints may come from any source but are usually the result of formal contact from a licensee or affected party, or from members of the public. Many complaints that are alleged to involve anti-competitive conduct are found on examination to be no more than commercial disputes between parties that do not, in practice, contain an anti-competitive dimension. The ITC cannot become involved in resolving disputes of this sort unless they otherwise impact upon the discharge by a licensee of its duties and obligations under its licence.

32. In order for the ITC to begin a competition investigation, there needs to be reasonable grounds for suspecting that any alleged anti-competitive practice may have an appreciable adverse effect on competition so as to affect customers or viewers - whether directly or indirectly. In general, the onus will be on the complainant to state its case in full, identifying clearly the competition grounds for the complaint. The ITC will then put the complaint, usually in its original form, to the party (or parties) complained of. In any submission, complainants should identify and place confidential material in a separate section which will not normally be disclosed to the other party. Where appropriate, the identity of the complainant will be protected, if requested. In certain cases, the ITC may act on an anonymous complaint, but there may be some circumstances where it may not be possible to pursue an investigation if a complainant is unwilling to disclose his or her identity.

33. Depending on the urgency of the case, the party complained against will normally be given four weeks to respond in writing. The ITC would not normally show this response to the complainant unless it raises points on which the ITC needs the complainant's views, and on which it proposes to rely in reaching its conclusions.

34. The ITC is bound by Section 197 of the Act which restricts the disclosure by the ITC of business information obtained by it in the course of its duties. This restriction does not apply to disclosures that are made to facilitate the performance of the ITC's functions (and the function of certain other authorities) but the ITC will, wherever possible, respect the confidentiality of information, the disclosure of which would damage the interests of the person or company concerned, or where disclosure would itself risk damaging the competitive process. Subject to that, the ITC's intention is to put as much as possible into the public domain (see also paragraph 39).

ITC - Instigated Investigations

35. When the ITC initiates an investigation, and in particular if the matter affects the industry and/or viewers generally, it will normally consult publicly on the issues, and a public consultation document will be approved by Members of the Commission.

36. The consultation document will provide a summary of the issues, and set out the (initial) scope of the investigation, an indicative timetable for the investigation, and the questions on which the ITC is seeking views (for example, the relevant market, market power, impact on customers and viewers) as well as the ITC's initial views on the analytical framework it will adopt. The document will state under which of the ITC's statutory duties the consultation is being conducted and the likely extent of involvement of the DGFT or sector regulators (and in certain cases, DGCOM) in the exercise.

37. The ITC will make responses to the consultation public, unless requested to do otherwise. It will publish the names of respondents even where the response itself remains confidential. Where the DGFT or others are to be involved, the ITC will copy responses to these organisations. In some cases, it may also be necessary to copy responses to DGCOM.

Preliminary Investigation

38. On receipt of responses, either to a complaint or consultation, the ITC will conduct a preliminary investigation. The purpose of the preliminary investigation is to analyse the evidence provided, to determine whether there is a prima facie case to answer, and whether there could be an appreciable adverse impact on fair and effective competition. Evidence about the case, provided by those making the complaint(s), from respondents and/or from the ITC's own sources, will be considered and analysed to determine also if there is prima facie evidence of a breach of a licence condition or Direction.

Information Requirements

39. Whether or not it is deemed necessary to hold a public consultation exercise, the ITC will endeavour to identify the relevant information required from licensees (and others) prior to or during the course of the preliminary investigation. Deadlines (consistent with the procedural timetable) will be set for the provision of information to the ITC. It may, however, be necessary to make further requests for information as the investigation progresses. Information from parties who are not licensees may also be requested by the ITC, and its investigation of a matter will be greatly assisted by their full co-operation. A request for information will be sent to relevant parties, seeking the information by a specified date, and citing statutory powers to obtain information where these exist. Respondents should be aware that the ITC would intend to make full use of all the information available to it in any investigation. The ITC would expect in due course to publish such information as is material to the conclusions of its investigation in its statement of reasons (see paragraph 54 below), subject to the provisions of Section 197 of the Act (see paragraph 34 above).

40. Sections 55 of the Competition Act and 197 of the Broadcasting Act 1990 provide scope for the disclosure of information between the DGFT and the ITC in the performance of their respective functions (subject, in the case of the DGFT to the provisions of Section 56 of the Competition Act), including in relation to the ITC for the purposes of carrying out its competition duties.

41. The ITC may commission its own research and surveys relating to the matter being investigated (see Section 4 also). It would usually publish the results of these surveys, either via a press release or in the ITC Bulletin.

42. External advice may be taken on specific matters, including advice from the ITC's specialist external lawyers. The ITC's legal advice will not normally be made available to the parties, although other external advice may be.

Preliminary Meetings

43. Ordinarily, the ITC will, if it is necessary to do so, seek clarification from respondents (or complainants) in writing. If, in addition to written clarification, a meeting is considered necessary, ITC staff will give in advance a written indication of the issues to be covered. One or more Members of the Commission together with staff and advisers may be present at the meeting. A note of any such meeting will be provided by the ITC to those present.

Seminars

44. The ITC may also hold a seminar at which interested parties will be able to exchange views. This is more likely to occur in the case of self-instigated investigations of a matter with generic effect rather than complaints. A record of the discussion would be kept by the ITC and used as an input to its investigation.

Competition Analysis

45. Once all the requisite information and responses to the consultation have been collected, a more detailed competition analysis, following the economic framework described in Section 4 of this Code and taking account of legal issues, will be undertaken.

Issues Paper

46. A Paper summarising the issue(s) and evidence and containing a provisional analysis will be prepared by ITC staff within, usually, not more than two months of the receipt of the responses, although more complex cases may take longer. In all circumstances, the Paper will first be considered by the ITC's senior management including the ITC's Heads of Division. In some circumstances, ITC Members may be invited to comment on the Paper before it is sent to the relevant parties for comment. Parties will normally be given four weeks to comment.

47. Parties to a complaint or consultation exercise must be aware that the final decision on a matter rests with ITC Members as a whole. The fact that Members may have considered the Issues Paper cannot fetter their final decision.

48. In some circumstances, the ITC staff analysis may recommend at this stage that there is no case to answer or that the matter being investigated has no appreciable effect on competition, or both. If so, ITC Members will be invited to reach a conclusion on the case and their decision will be conveyed to all the parties. Normally, a Statement of Reasons (see paragraph 54 below) will be issued together with the ITC's decision.

Interim Measures

49. Once the ITC has completed its preliminary investigation, there may be circumstances where it would be appropriate for the Commission to impose interim measures in order to safeguard the interests of individual parties and viewers whilst the investigation is being completed. Such circumstances would arise where there are reasonable grounds to believe that there is a breach of a licence condition or any Direction and where the potential damage to competition is likely to be sufficiently severe as to damage irretrievably the operation of the competitive process, or where the complainant is likely to suffer significant financial loss unless urgent action is taken. In considering interim measures, the ITC will bear in mind the balance of convenience between the relevant conflicting interests and the need to preserve the situation as it is pending a full investigation.

50. Interim measures would be imposed and enforced by means of a Direction under the licence. A decision to impose interim measures will always be taken by ITC Members; if necessary, in accordance with its standing rules on delegation. Before issuing a Direction, licensees will be given written notice of the ITC's intention and the reasons for the proposed Direction. The licensee will be given no less than three working days in which to comment on the ITC's intention and in some circumstances this right may be extended to other interested parties.

Final Assessment

51. Following the various consultative stages, ITC staff will prepare a detailed assessment of the issues for Members' consideration. This will take account of responses to the Issues Paper. Prior to Members' consideration of it, this assessment will not be made public. ITC staff will also not be able to discuss issues surrounding the investigation after completion of the report - unless new and material factors come to light.

Decision Making

52. The decision will be taken on the basis of all the available evidence, including the original submissions, the responses to the Issues Paper and other information gathered by the ITC.

53. Decisions on all competition matters are taken by ITC Members. All staff analyses and recommendations are considered first by the ITC's Chief Executive's Group. Where time is of the essence, the decision may be delegated by the Members in accordance with its standing rules on delegated authority. It may also be necessary - again largely depending upon the circumstances of the case - for the Members of the Commission to consider the case at more than one meeting.

3. STATEMENT OF REASONS AND REMEDIES

Statement of Reasons

54. Whatever course of action is decided upon by the Commission, the ITC will publish its decision and a statement of reasons as soon as possible after the decision is reached. Normally, the statement of reasons will be published at the same time as the decision. The decision and statement will be notified to the parties involved. The decision will also be published as a press release and the statement of reasons will be placed on the ITC's Web Site.

Remedies

55. Where the ITC has concluded that anti-competitive behaviour exists which requires remedial action, the ITC will, in announcing its decision and statement of reasons, publish details of the remedies to be implemented and the timescale for so doing. In some cases, the ITC may wish to consult on what form remedies should take and how, and over what period, remedies should be introduced. In such circumstances a period of not less than four weeks will be allowed for consultation. A decision on the implementation programme for the remedies will then be taken by Members and announced as soon as possible.

56. If the remedies take the form of a licence variation the ITC will consult licensees in accordance with Section 3(4) of the Act. The consultation will address also the timescale for implementation.

Other Sanctions

57. The ITC has at its disposal the power to impose a range of other sanctions in respect of a breach of licence conditions, including the condition relating to fair and effective competition. Details of these sanctions, which include formal warnings, financial penalties, shortening of the licence and licence revocation, and the procedures involved in their imposition can be found in the Broadcasting Acts 1990 and 1996, licences and relevant guidance notes. Current broadcasting legislation does not include provision for an appeals procedure. The ITC will consult separately on this issue in due course, if appropriate, in the light of current developments.

4. COMPETITION ANALYSIS FRAMEWORK

Introduction

58. In a competitive market for television services, firms will behave in such a way as to obtain maximum competitive advantage over rivals. This is part of the workings of a healthy competitive process and should provide customers and viewers with a wide range of services, including some of high quality, and innovative television at reasonable prices, reflecting the efficiency of licensees.

59. It is also possible, however, for firms to adopt practices aimed at conferring an advantage that is not in the interests of customers and viewers. A fundamental objective of the ITC is to ensure fair and effective competition in the provision of licensed services by identifying and remedying practices that appreciably restrict, prevent or distort competition, as assessed in relation to factors such as prices, costs, range of services, efficiency and incentives to invest and innovate.

60. Whilst it is possible to list and prohibit certain practices that are likely to restrict, prevent or distort competition, no such list can ever be exhaustive. Moreover, some such practices may have, on balance, beneficial effects in certain circumstances. What matters is the effect of a practice and not the practice itself, or its form. For example, the refusal by a channel provider to supply a retailer with a particular channel may be acceptable where there is a large number of substitute channels available to that retailer and, hence, to viewers. In different circumstances, however, the impact of this refusal to supply could be to foreclose competition from another retailer to the detriment of customers and viewers. For this reason, it is important to carry out an analysis of the particular factors affecting competition in each case - and be prepared to revisit this analysis should market conditions change.

61. The framework for the ITC's competition analysis has a series of main steps which are summarised below. These are similar to those used by European and UK competition authorities and other regulators. In this context readers might find it useful to refer also to the European Commission's Notice on the definition of the relevant market for the purposes of Community Competition Law, (OJ C372/5 (9/12/1997)) and the OFT's Guidelines (in particular, Market Definition (OFT 403), Assessment of Market Power (OFT 415) and Assessment of Individual Agreements and Conduct (OFT 414)) for the application of the Competition Act 1998 which give a fuller explanation. In very broad terms, there are three steps, which are - to some degree - interlinked:

- Defining the relevant market (including its product and geographic dimensions);
- Assessing whether the firms involved either individually or collectively possess some degree of market power; and
- Assessing whether there is an abuse of a dominant position and/or whether any agreements or concerted practices are liable to have an appreciable effect on competition (and, hence, on customers and viewers).

62. Although television broadcasting has some unusual economic characteristics, these do not, in the ITC's view, require a fundamentally different analytical approach: they can be taken into account in the analysis. Accordingly, the competition analysis framework can be applied in any competition case and is in harmony with the conceptual approach adopted by other authorities and regulators. Paragraphs 63-94 are concerned with market definition and this leads on to both the Assessment of Market Power and its Abuse (paragraphs 95-119) and the consideration of Agreements and Concerted Practices (paragraphs 120-126).

Market Definition

63. The first step in the competition analysis is the definition of the market, or markets, relevant to the alleged anti-competitive practice. This is an explicit step in the competition procedures adopted by the UK competition authorities and regulators, and by DGCOM. Market definition is not an end in itself, but a tool used to identify and define the boundaries in which competition takes place. As such, it needs to be carried out on a case-by-case basis, and existing definitions revisited with the passage of time. (This is not to preclude, however, the use of UK and EC precedents as a useful starting point for the analysis in some cases.)

64. Defining the relevant market helps in the subsequent two stages of the analytical framework. For example, it helps in the assessment of market power by permitting the calculation of market shares. It also helps in the assessment of abuse of a dominant position or the likely effect on the market. Market definition also has indirect benefits in that it helps uncover and prioritise other pieces of economic evidence, such as who a firm's competitors are and the form of any barriers to market entry.

65. In some cases, a precise market definition may not be required. This may be the case if, for example, it becomes clear that on any reasonable market definition the undertakings under investigation possess only very limited market power.

66. This first step in the ITC's competition analysis framework, therefore, involves collating the evidence required to define the relevant market(s). One way of doing this is to apply the "hypothetical monopolist" test. This involves a conceptual framework in which it is assumed that there is a single monopoly supplier of the services in question. The key objective is to identify whether this hypothetical monopolist could maximise profits by charging prices (usually tested by postulating a price increase of 5 to 10 per cent above competitive levels) on a consistent basis above those which would prevail under competitive conditions. If the hypothetical monopolist would be prevented from setting prices above competitive levels by customers switching to substitute services, these substitutes can be added to the potential market. Equivalently, the hypothetical monopolist's prices could be constrained by the ability of suppliers of alternative services to switch into the supply of the service in question. Again, these alternatives can be added to the potential market. The test is then re-applied until the set of services is such that the hypothetical monopolist could maintain prices above competitive levels. This is usually the relevant market definition.

67. Central to this test are the demand and supply conditions associated with the products or services under examination, and the geographical scope of the market. (The market definition analysis is applied separately to determine both the relevant product/services and geographic area). These principles are discussed in turn below.

68. It should be noted, however, that the hypothetical monopolist test is only ever a rough guide, rather than a rule. It may have limited value where price is often not easily identifiable or measurable, for example for free-to-air services or bundled products, and where a range of other factors, for example content, scheduling, quality and popularity influence viewers' decisions. In many cases, therefore, the ITC will have to draw upon other evidence and tests to determine what are demand side substitutes.

(a) Product Markets

69. DGCOM's market definition notice (see paragraph 61 above) defines the relevant product market as "*all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.*" The sections below discuss how the product market would be defined by the ITC, using examples from television broadcasting.

Demand Substitution

70. On the demand side, the main questions relate to the choices available to customers and viewers, how the choices between different television services are made and whether there are restrictions on those choices being made. Demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in relation to their pricing decisions as well as other factors affecting the terms on which services are available to customers and viewers. Its assessment requires an understanding of the particular services (for example, the importance of price in relation to other features such as quality and content) and the possible alternatives available. It is important to note in this context, however, that substitutes; for example, alternative programme channels, do not have to be identical to be included in the same market. The key factor, as described above, is whether the number of customers or viewers likely to switch to an alternative channel is sufficient to prevent the "hypothetical monopolist" exercising market power. If the number is large enough, this will generally act as a competitive constraint and the alternative product or service will be included in the market definition.

71. Questions of demand substitutability have played an important role in recent product market definitions in television broadcasting. For example, when investigating the practice of selling television channels in bundles to subscribers, the relevant market was found to be retail pay-TV (excluding free-to-air terrestrial television channels but including pay-TV channels broadcast via both cable and satellite delivery systems). Free-to-air terrestrial television services were seen as a complement to pay-TV but, given their inability to provide as much choice of services and programming and coverage of sports or movies, for example, they were not regarded as a substitute.

72. By way of contrast, in the ITC's investigation of the alleged refusal to supply ITV2 to the digital satellite platform, the appropriate market definition was thought to be wider than this (although a final market definition in this case was not necessary) since both free-to-air pay-TV services were available on the three competing platforms and viewers would take into account the whole range of services in their decision-making.

73. It may be the case that key programming, such as mass audience, long-running popular soaps or a premium football match, within a channel has no, or very restricted, substitute(s). Audience research reveals, for example, that for most viewers a documentary is not a substitute for a soap and other sports are not necessarily substitutes for such football, although they are carried sometimes on the same channel.

74. In a different area, the ITC has previously taken the view that teletext advertising was part of a market which was broader than television advertising. It included display and classified advertising, as well as advertising on new media, such as the internet.

75. Much will depend on the circumstances of each case and customers' and viewers' needs and preferences. In the context of programmes and viewers' interests a broad assessment of the nature of the service (taken as a whole as well as in its component parts) and its likely substitutes for viewers - having regard to viewers' preferences - produces an initial market definition. Any services that are likely to benefit from migrating viewers should be included in the market definition, and those that would not should be excluded.

Switching Costs

76. An additional, and very important piece of evidence, is the existence and significance of any costs incurred by customers and viewers in switching to an alternative service (switching costs). Switching costs have been an important consideration in the definition of the relevant market for pay-TV services, including in the ITC's channel bundling investigation.

77. In that case, pay-TV services provided by both cable and satellite distribution systems were deemed to be in the same market, ie they were found to be effective substitutes. This conclusion was based on a consideration of the role of price and non-price factors in a subscriber's decision-making. Although many subscribers had invested in satellite dishes, this did not appear to deter subscribers from switching from satellite to cable (sometimes assisted by the practice of some cable companies of buying-back dishes). Moreover, non-price factors, such as aesthetic considerations and the volume and range of programming, were not sufficient in themselves to determine a viewer's decision to subscribe to, or switch between, pay-TV suppliers.

78. Insofar as some viewers are deterred from subscribing to pay-TV because of a perception that switching costs will make transfer from one digital platform to another difficult, the ITC's policy of facilitating the interoperability of set top boxes and open access integrated television sets is seen as a means of promoting demand-side substitution. This policy is also a means of enhancing the competitiveness of digital television.

Captive Customers and Discrimination

79. In the examples in the preceding paragraphs alternative delivery systems were described as substitutes since a sufficient number of viewers could switch from one to another. Hence, the hypothetical monopolist supplier is unable to set consistently the terms of his services at uncompetitive levels. There may be cases, however, where a group of customers or viewers is unable to choose between suppliers (because of the characteristics of the product or service they require) and is, thus, captive to the supplier which is the focus of the investigation. With a significant number of such customers, alternative suppliers may no longer represent a competitive constraint on the hypothetical monopolist and they would therefore be excluded from the relevant market definition. Moreover, if the hypothetical monopoly supplier is able to discriminate between captive and non-captive customers in the terms it sets (for example, charging monopoly prices to captive customers and competitive prices to others), a relatively small proportion of captive customers may warrant the exclusion of alternative suppliers from the relevant market definition (or their inclusion in a second relevant market definition). An example (which is untested) may be advertisers who wish to reach mass audiences. They are generally unlikely to regard advertising on small, niche channels - or in other media - as an alternative to peak-time advertising on ITV.

80. In order to identify demand-side substitutes, a variety of different sources of evidence will be sought. The ITC will make extensive use of its audience research, focussed surveys of subscribers and potential subscribers, market research, as well as other statistical data, including, where possible, price trends in relation to range and costs and price elasticities (the sensitivity of demand for a product as its price changes).

Supply Substitution

81. Supply-side conditions are also important in defining the product market. Supply substitutability relates to the ease and speed with which firms could switch to the supply of the product or service in question; in response, for instance, to a price change or a change in viewing habits, that would make it profitable to do so. For example, viewers of a weather channel may only consider existing suppliers of weather channels to be effective alternatives. A consideration of only the demand conditions, ie what viewers perceive to be substitutes in the range of channels currently available to them, may lead to a market definition that only embraces these channels. There may, however, be, say, a supplier of a news channel, or providers of non-broadcast news or weather reports, that could - in a response to a hypothetical price increase or some other factor - launch a rival weather channel within a short period (without having to invest substantially in new resources) on a profitable basis. The relevant market could, therefore, include this supplier in recognition of the competitive constraint that it imposes - even if viewers themselves do not currently recognise it as an alternative.

82. In the same way as for demand substitution, the key consideration is whether or not the appearance of a new substitute would impose a competitive constraint on a hypothetical monopolist. If a monopoly supplier of the existing weather channel could maintain prices above competitive levels - or range, content, etc, below - regardless of the appearance of a new weather channel, that channel would not be an effective supply substitute and should not be included in the relevant market definition.

83. Supply substitution and new entry to the market (which features prominently in the assessment of market power) are very similar concepts. They differ only in terms of the time-scale within which the substitute product or service can be introduced to the market. As such, the analysis is broadly similar and aims to classify a potential new source of supply as part of the market (ie, a supply substitute), a potential new entrant (see paragraphs 104 to 113), or neither, on the basis of the scale of investment and time required to begin competing. Supply substitutes are usually relatively inexpensive to provide - probably utilising existing capacity and resources - and can be on the market within the space of perhaps six months to one year. If substantial, non-recoverable investment in new capacity is required - or there is a need to market and develop a brand - and the time-scale is more than a year or so, the potential new service is more likely to be excluded from the market definition and treated as a potential new market entrant (and considered as part of the assessment of market power).

84. In order to determine whether there are supply-side substitutes the ITC will seek evidence on whether substitution is “technically” possible (including all facets of channel production in the case of the substitutability of services), whether distribution of a service could be achieved, and, through audience research, whether an alternative service would be used by viewers. Analogous information would be sought for other products or services.

(b) Geographic Markets

85. The geographic scope of a market is the area within which the demand and supply conditions referred to above are broadly similar (the area in which substitution occurs). Relevant geographic markets are defined in DGCOM’s market definition notice (see paragraph 61 above) as “*the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas*”. As with the product/service dimension of the market, the key aim is to identify an area just big enough to embrace only those alternative services which represent a competitive constraint on the behaviour of a hypothetical monopolist.

86. Depending on the case under investigation, alternative geographic market definitions in the television broadcasting industry could include an ITV region, a cable franchise area, the current or potential reach of a digital terrestrial service, the UK as a whole, or - possibly - the UK and Eire or some other country. It is important to note that the geographic scope of a market does not automatically align with the area in which a supplier operates, but depends on a proper analysis of demand and supply conditions, as well as the scope for imports. Cultural, linguistic and social preferences have a significant impact on the geographic market definition for television broadcasting.

87. The issue of the appropriate geographic market definition is raised in the ITC/OFTTEL joint consultation on the bundling of television services with telephony services. In this case, considerations of both supply and demand substitutability are relevant. On the demand side, for example, the national pricing policies of BSkyB may suggest the adoption of a pay-TV market at the national level. Another demand side factor, however, may indicate that there is a series of local markets - as a viewer in any given area has a choice of pay television suppliers, limited, in most cases, to BSkyB, the local cable operator and digital terrestrial television. On the supply-side, the existence of exclusive local franchises preventing supply substitution from another cable operator may support a local market definition. (Although from 2001 or earlier in some cases franchises are no longer exclusive, the practical and economic costs of duplicating the network (at least in its current form) may perpetuate their exclusivity.)

88. Television broadcasting, in terms of the services received by UK viewers, may have an intra-Community or international dimension which it is important not to ignore. For instance, the ability of channel providers to substitute UK programmes by foreign-originated ones (subject to the relevant quotas) and the fact that non-UK firms can be licensed to provide services to viewers indicates that the analysis of both demand and supply-side substitutability should also have some regard to international alternatives. Constraints imposed by rights owners on the exploitation of rights suggest, however, that services distributed in, say, one area or Community country - although capable technically of being received - cannot be regarded as substitutes (and, hence, no geographic chain of substitution is likely to exist in this sense).

89. The geographic scope of the market is potentially relevant to the consideration of television advertising markets. At one end of the spectrum, advertising time is available on local television services carried in cable franchise areas and at the other end, some advertisers avail themselves of the opportunity for pan-European advertising. In between, there is advertising on regional Channel 3 services and national services such as Channel 4 and BSkyB or other satellite services. Not all of these will be substitutable - but at any point on the spectrum, some may be.

(c) **Temporal Markets**

90. In addition to product and geographic dimensions, markets may also need to be defined in terms of time. This temporal dimension to markets is particularly relevant to television broadcasting. For example, live coverage (and its scope and duration) of a premium sports event is likely to have much greater value (and, hence, scope for anti-competitive behaviour in the exploitation of the relevant rights) than a repeat the value of which will decline rapidly over time - and may not be seen as an effective substitute.

91. Another example of a broadcasting market with a significant temporal dimension is the market for advertising slots. Off-peak advertising slots, which reach only day-time viewing audiences, are not generally regarded by advertisers as substitutes for peak time slots. In this context also, the rules on the amount and distribution of advertising recognise different times of the day.

(d) **Complements and Secondary Products**

92. Market definition usually rests on an identification of effective demand and supply substitutes. However, complementary products or services can also be included in a market where competition in the supply of that product or service constrains the price that can be charged for the other (or some other term on which the service is supplied) - or vice versa. A channel which is created to utilise fully rights that have been acquired, eg a bonus channel, may be regarded as a complement to the main channel. Although these may not be an effective substitute to the main channel, they should be included in the same market if competition constrains, for example, the price that can be charged for them - or limits the prices which can be charged for the main channel.

(e) **The Competitive Price**

93. As described in paragraph 66 above, an important test used to determine the relevant market definition is the likely impact of a 5 to 10 per cent price increase above *competitive levels* (for example, in terms of identifying demand and supply substitutes). In order to assess what the likely impact would be, it is necessary to have an idea of how close to competitive levels current prices are. This can be very difficult in practice but would draw on evidence such as historical price changes or an analysis of profitability. Where products or services have changed markedly over time or are bundled, etc, the use of such evidence may give little useful information. In such circumstances, the ITC will use the price - cost test which it considers appropriate to the product or service in question.

94. Simply assuming that current prices are competitive could be seriously misleading. For example, there may be an agreement between existing firms to dampen competition and to hold prices to a level just below that which would lead to significant substitution by consumers to alternative products. It would be wrong, therefore - on the basis that a 5 to 10 per cent price increase from current price levels is unsustainable - to conclude that the alternative products prevent market power from being exercised (known as the “cellophane fallacy” after a US case involving cellophane products).

Assessment of Market Power

95. The next stage in the competition analysis framework, having defined the relevant markets, is to assess whether firms in those markets have the ability to behave in an anti-competitive manner, that will have appreciable effects on the relevant market, ie, whether they have market power. Anti-competitive behaviour may take the form either of the abuse of market power, or through anti-competitive agreements and concerted practices. The ability to behave in this way may arise from a single firm acting alone or several firms acting collectively. The analysis is as much concerned with whether a firm or firms can potentially behave anti-competitively, as with whether they already actually do so.

96. In order to address these two inter-linked questions there needs to be a full assessment of the degree of competition in the relevant markets. This will identify whether a firm has market power (or one or more firms collectively hold that position) and is able to abuse it.

97. Effective competition in a market implies that all firms within that market are constrained in the way that they can behave. If a single firm (or several firms acting together) is capable of independently setting prices or any other term on which services are made available to viewers, that would imply a lack of competitive constraints on those firms. This firm or firms is said to possess market power - and possesses more market power than any of its or their competitors.

98. Only a firm with market power (or a group of firms acting together that jointly possess market power) can behave in a potentially anti-competitive manner that will have appreciable effects on customers or viewers. The analysis described below is relevant to the assessment of market power exercised by a single firm or several firms acting jointly. It is equally relevant to firms acting through an agreement or concerted practice, although the existence of such an agreement or concerted practice must be established first (see paragraphs 120 to 126). The ITC generally takes the view that the parties to an agreement do not have sufficient market power for the agreement to have an appreciable effect on competition if their combined share of the relevant market does not exceed 25 per cent, unless there are agreements which involve price fixing, impose minimum resale prices or share markets (see paragraphs 120 to 126 for more details).

99. In most cases, due to the inter-relationships between market structure, firms' conduct and financial performance, no single piece of evidence can provide a reliable indicator of the degree of competition in a market. Much of the evidence used to define the market in stage one is also relevant to the assessment of market power - because demand and supply conditions are a key driver of competition. There are other important factors, however, including market shares (and the degree of concentration or distribution of shares between firms) and any changes in these shares over time, the history of recent new entry and exit from the market and the existence and scale of any barriers to market entry. In practice, it is necessary to balance diverse pieces of evidence - qualitative as well as quantitative - before coming to an overall judgement. The key objective of this stage of the analysis is, however, to identify whether there are constraints on a firm's behaviour and how effective these are. The

principal factors to be considered in determining whether a firm has market power can be classified as follows:

- The behaviour of existing competitors (evidence on the degree of competition between existing firms in the relevant market, for example movements in market share, price trends, profitability);
- The scope for potential competition (evidence of competitive constraints - particularly barriers to entry - imposed on existing firms in the market by firms outside the market); and,
- The strength of buyer power (evidence of competitive constraints imposed on existing firms in the market by buyers of the products or services that they sell).

The factors which may constrain market power are considered in turn below.

Existing Competitors and Market Shares

100. The evidence used to define the relevant markets will be of direct relevance to establishing the degree of competition between existing firms. The threat of customers or viewers switching to an alternative product or service, or other suppliers launching rival services, constitutes a rigorous competitive discipline on the behaviour of the incumbent firms. The analysis of demand and supply substitutes as part of the market definition stage provides important evidence about the degree of existing competition.

101. A properly defined market also allows a second source of evidence to be calculated: the market shares of existing firms. The development of market shares over time provides a useful picture of market structure, how this has evolved and gives an initial guide as to those firms likely to hold market power. A firm with a persistently high market share relative to its competitors - and one which is increasing over time - may be considered to have market power.

102. It is important to emphasise, however, that it does not necessarily follow that a firm with a high market share holds market power. Market shares can fluctuate, and there may be many new firms entering the market and eroding market share. It may also be the case that a firm with a fairly low market share in absolute terms has a significant degree of market power - due to the tiny market shares of its many competitors and the absence of any external competitive constraints (from potential new market entrants or large buyers). Market share must, therefore, be treated only as a guide - and examined alongside all the other sources of equally important evidence.

103. Market shares may be calculated on several different bases: according to the value of the services provided, the number of subscribers, the hours of viewing or the share of advertising revenue for example. Which method is most relevant will depend on the particular case and, in some cases, more than one method may be appropriate.

Potential Competition and Barriers to Entry

104. Often the most important piece of supplementary evidence is derived from an analysis of barriers to market entry. This is because a key constraint on the firms within a market may arise from the threat of a new firm currently outside that market (or a start-up firm) investing in the necessary resources and entering as a new rival (see also the discussion of supply substitutes in paragraphs 81 to 84 above). An example of potential new market entry in the television broadcasting sector is the relaxation of the rules preventing large national Public Telephone Operators (PTOs) (such as BT) providing television services. Existing suppliers of these services, such as BSkyB and cable operators, may face additional competitive pressure from the threat that a PTO will launch an alternative distribution service in this market.

105. The potential adverse impact on competition of barriers to entry cannot be over emphasised. However, there are many different sources of potential entry barriers and so the analysis will necessarily change from time to time (particularly in television broadcasting where technology develops quickly) and from case to case. It is possible to distinguish three broad sources of entry barriers: absolute advantages, strategic advantages and exclusionary behaviour. Each of these can be found in television broadcasting and are examined briefly below.

Absolute Advantages

106. Regulation can create a barrier to entry and lead to absolute advantages. Certain types of television broadcasting licences are limited in number; for example, licences to provide Channel 3 (ITV) services, thereby conferring an advantage on ITV licensees both regionally and in terms of universal reach. This has implications for competition in the television advertising market.

107. Other potential sources of absolute advantage include intellectual property rights (IPRs) and “essential facilities”. (An essential facility is an asset that is indispensable in order to compete in the market at all, and duplication of that asset is either impossible or extremely difficult.) In relation to IPRs, absolute advantages may derive from exclusive arrangements with programme producers, artistes, or rights holders, including the holders of key sports and movie rights. Consistently with the approach of other competition authorities, the ITC has not determined - to date - that any input to television broadcasting can be considered an “essential facility”.

Strategic Advantages

108. Barriers to entry can also arise as the result of another firm establishing itself in a market first - and using this fact to deter other firms from entering (the so-called “first-mover” advantage). In the ITC’s investigation into channel bundling, the scale of investment necessary to launch a general entertainment channel (much of it non-recoverable) which could compete with the main terrestrial channels (which are still heavily viewed by pay-TV subscribers) was seen as a barrier to entry by such channels. Entry tended to be concentrated on thematic or niche channels with more specialised audiences - and lower start-up costs.

109. First-mover advantages may be found also in bidding for key rights for exploitation in the pay-TV market. A sizeable subscriber base - making successful distribution more likely - can encourage the incumbent to bid more - and deter the entry of competitors.

Exclusionary Behaviour

110. A third source of barriers to entry is behaviour by incumbent firms with market power aimed specifically at preventing new firms competing in the market. This is generally called exclusionary behaviour of which three examples are: certain kinds of vertical restraints, predatory behaviour and refusal to supply.

111. Vertical restraints (which - as recognised by the European Commission’s proposed broad block exemption and the Government’s proposed exclusion order under the Competition Act 1998 - may, in fact, be benign if market power is not present) may include practices such as exclusive supply agreements between retailers and channel or programme suppliers. New entry by a potential retailer may be deterred as a result of its inability to secure supplies of key programming.

112. Predatory behaviour includes exclusionary pricing; an example of which may be offering increasing discounts for each additional channel a subscriber purchases which are unrelated to costs. These discounts may be such that it is impossible for a new entrant to compete on price for subscribers who already take one or more

channels from the incumbent firm. This is an aspect of the ITC's investigation into deep discounting. However, as with all other types of behaviour, what matters is the effect of the practice.

113. Refusal to supply is another type of potentially exclusionary behaviour. For example, had BSkyB refused to supply its premium channels to ONdigital (which it did not), then this may have had the effect of excluding the entry of a digital terrestrial television operator and inhibiting competition in the pay-TV market.

Buyer Power

114. The strong position of an undertaking may be offset by bargaining power on the part of the buyers of the finished product or service. The significance of any bargaining power held by the buyer relative to the potential market power of the supplier depends on the market characteristics. Buyer power is important if, in the absence of that buyer, prices charged by the supplier would have been higher.

115. A buyer is more likely to possess countervailing power if the buyer purchases a large proportion of the producer's output (for example, purchasing a significant proportion of the output of a Movie House or airtime slots in the case of advertising). For example, a cable operator would be in a stronger position if there were a number of alternative sources of premium sports programming or if a buyer poses a credible threat of backward vertical integration (ie, merging or taking-over the seller, acquiring key rights, etc.) then this would also tend to diminish the market power of a producer.

Assimilation

116. Once the various sources of evidence for market power have been assimilated a clear picture of the extent of market power in the relevant market should emerge. If there is found to be no market power no further action by the ITC will be taken. In the presence of market power, further analysis of the actual or potential effect of alleged anti-competitive practice will be necessary to establish whether or not there is any appreciable detriment to effective competition. This involves assessing whether or not there is any abuse of a dominant position that is capable of having an appreciable effect on viewers and customers.

117. In relation to market share, the ITC expects to adopt the quantitative guidelines used by the DGFT (OFT Guideline 415), namely that a firm is unlikely to be individually dominant if its market share is below 40 per cent. Other factors may, however, provide strong evidence of dominance or market power below that figure. These include, for example, the relative strength of competitors and the existence of agreements to fix prices, share markets, or a network of similar agreements.

Collective (or Joint) Dominance

118. A dominant position may be held by more than one undertaking (referred to as collective or joint dominance). This may result from two or more firms adopting the same market conduct for example as a result of certain economic links or of a relationship of interdependence between the parties to a tight oligopoly. The ITC will follow the approach of EC jurisprudence in assessing joint dominance.

Abuse of a Dominant Position

119. The final stage in this aspect of the competition analysis only arises in cases where there is found to be a dominant position (singly or jointly held) in the relevant market. It is then necessary to establish as a third and final step whether that dominant position is being abused, in the sense of being exploited by the undertaking or undertakings concerned to the detriment of the competitive process and the interests of competitors, suppliers, customers or, all importantly, viewers (whether directly or indirectly). Where the ITC establishes that an abuse of dominant position occurs or has occurred, the effect of this abuse on competition will necessarily be appreciable.

Agreements and Concerted Practices

120. In addition to controlling anti-competitive practices by single firms or several firms collectively holding a dominant position, the ITC will seek to ensure that firms do not damage the interests of customers and viewers by concluding restrictive agreements or engaging in concerted practices. An integral part of the ITC's assessment will be whether the agreement or practice in question is liable to have an appreciable effect on competition.

121. In controlling restrictive agreements and concerted practices, the ITC will apply the concepts developed under EC competition law and adopted under the Competition Act. In particular, when assessing whether the effect on competition is liable to be appreciable, the ITC will take account of the cumulative effect of a network of similar agreements or practices where the effect of each taken individually may be insignificant. A good example of this is found in the ITC's investigation into channel bundling (see ITC Press Releases, 1 April 1998 and 26 June 1998). In that case, although no individual basic channel had market power, the ability of all channels to secure common carriage terms resulted in a practice which - when considered cumulatively - had anti-competitive effects.

122. The ITC will apply the terms "agreement" and "concerted practice" in accordance with the broad definitions under EC competition law and the Competition Act. Agreements, for example, may range from formal written contracts between parties to an exchange of letters or oral agreements made on the telephone. An agreement for this purpose does not have to be legally binding. Concerted practices may arise from any co-operation, formal or informal, that is knowingly entered into and is intended to amount to a substitute for competition in the market. Market structure will affect the ITC's assessment and, in an oligopolistic market, the ITC may be more willing to accept that parallel conduct does not result from collusion (but see the discussion of collective dominance at paragraph 118).

123. The ITC will also follow EC competition law and the Competition Act in its attitude to so-called "vertical agreements" (ie, agreements between undertakings which, for the purposes of the agreement in question, are at different levels of the production or distribution chain). It will accordingly regard such agreements as not likely to restrict competition appreciably unless either one or other party enjoys a significant degree of market power or there is a cumulative effect that needs to be considered (see paragraph 121 above). Even here, the ITC's assessment will not inevitably be adverse.

124. In analysing the effect on competition of agreements or concerted practices, the ITC will identify the relevant market or markets and assess whether the parties enjoy market power using the general principles and drawing on the kinds of evidence that were described earlier (see paragraphs 100 - 115). This assessment will enable the ITC to judge whether the agreement or practice in question is liable to have an appreciable effect on competition.

125. What amounts to an appreciable effect depends upon the circumstances of each case. As a yardstick for establishing an appreciable effect on competition, the ITC will, as a general rule, adopt the approach that if the parties' combined share of the relevant market is below 25 per cent, the effect is not likely to be appreciable. In individual cases, the ITC may, nevertheless, find that agreements where the parties' market share exceeds 25 per cent do not have an appreciable effect on competition and that agreements where the parties' market share is below 25 per cent, do have an appreciable effect, particularly where the agreement in question involves price fixing, market sharing or the imposition of resale prices. The test is, however, not a quantitative one alone.

126. The ITC will also take into account any beneficial features of the agreement or practice that may serve to counterbalance the detrimental effects. The ITC will use a framework equivalent to that contained in Article 81 EC Treaty, ie, detrimental effects are assessed alongside any general contribution to economic welfare that allows customers or viewers a fair share of the benefit and does not impose indispensable conditions or lead to the elimination of competition. In the ITC's decision to ban minimum carriage requirements, (see ITC Press Releases, 1 April 1998 and 26 June 1998) for example, due consideration was given to the benefits of such arrangements - including security of income to programme providers. In that particular case, however, the overall assessment was that these benefits could have been achieved by alternative means (ie, minimum carriage requirements were not indispensable to achieving those benefits) - and so the detrimental effects were found to be overriding.

The Future

127. The ITC is all too aware that competition policy is dynamic and evolving rapidly. Not only will the UK competition authorities develop their thinking as the Competition Act comes fully into effect but initiatives at EC level, particularly on the decentralised application of EC competition law, will affect both the institutional framework and practical application of competition law to broadcasting in the UK. The ITC will maintain a flexible and forward-looking approach that recognises the need to take account not only of these developments but also of the impact of new technology and market developments and the evolving interests and expectations of viewers.

MEMORANDUM OF UNDERSTANDING

**CO-OPERATION BETWEEN OFT, OFTEL AND ITC ON COMMUNICATIONS
CASES HANDLED BY DGIV UNDER ARTICLES 85 OR 86**

Principles

1. The aim is to optimise the presentation of the UK competition and regulatory authorities' line in Brussels on DGIV competition cases of notified agreements, complaints and enforcement action in the field of communications which principally involve UK firms and where OFT and one or both of OFTEL and ITC are involved. Where there are different priorities between OFT and OFTEL and/or ITC, it should not be left to DGIV to choose between them. It is recognised that the OFT, OFTEL and ITC operate under different statutory regimes and have distinct high level objectives, and this limits the scope for compromise. However, the UK authorities involved should if at all possible agree a common position to be put to DGIV.

2. It is also important that feedback from DGIV and information about DGIV's approach to cases of interest to the different authorities/regulators is shared and considered collectively as appropriate. The same is true of representations received from UK firms.

3. There is an obvious danger of wasteful duplication of resources where more than one UK authority/regulator is involved. They should avoid unnecessary duplication.

4. The arrangements for handling mergers with a Community dimension, including those in the field of communications, have worked well to date and should continue unchanged.

Guidelines for handling DGIV communications competition cases

5. OFT as competent authority should co-ordinate the UK's approach to competition cases conducted under Regulation 17/62 in the field of communications with OFTEL and/or ITC as appropriate. OFT will present the collective view of the UK authorities/regulators to DGIV. OFTEL and/or ITC will advise OFT accordingly, and will have the opportunity to attend meetings between OFT and DGIV.

6. Where it is appropriate for OFTEL and/or ITC to liaise directly with DGIV, for example where their licensing powers are concerned, or industry-specific expertise is essential, they will keep their colleagues fully informed and the other parties will have the opportunity to attend any meetings with DGIV. Where any of the three parties is to advise DGIV in writing on a case, it will seek the others' advice and contributions wherever appropriate. In the event of disagreements, the parties will discuss and use best efforts to bring about agreement. In the event of a failure to agree, where the issue is of sufficient significance the matter will be referred to the Directors General and ITC's Chief Executive as provided for in the establishment of the tripartite Standing Committee.

March 1

ITC Competition Procedures

Appendix 2

