Qualifying retailers

1. This brief paper on behalf of Setanta and TUTV supplements the Joint Response to Ofcom's Second Pay TV Consultation by BT, Setanta, TUTV and Virgin Media dated 12 December 2008.

2. On the subject of the pay TV retailers to which the proposed wholesale must-offer obligation would apply, Ofcom states the following in its Second Pay TV Consultation Document:

   "*Our key competition concern is that Sky has an incentive not to supply content to* ***other retailers on other platforms, and that this might foreclose competition from other platforms****. If this was our only concern, then it might be appropriate to limit eligibility to retailers on platforms other than those operated by Sky. Extending eligibility to multiple retailers on Sky's platform would result in a model of resale competition which may do little to promote inter-platform competition. It could conceivably even be counter-productive, since it might reduce the incentive to develop new platforms*".[1] (Emphasis added.)

   "*A particular reason to extend an obligation to provide the wholesale offer to all retailers, including those on Sky's own platform, would be to assuage the concerns we expressed in section 7 about buy-through. Retailers on Sky's platform would in theory be able to sell a stand-alone premium package*".[2]

3. Ofcom has confirmed elsewhere in its Second Pay TV Consultation Document that its concerns are not limited to the foreclosure of competition between pay TV platforms. For example, Ofcom has stated that:

   "*… Sky, as a vertically integrated firm, with market power in a key upstream market, will distribute its premium content in a manner that favours its own platform and* ***its own retail business***".[3] (Emphasis added.)

4. It is clear from Ofcom's Second Pay Consultation Document and also its proposed approach in respect of Picnic that concerns relate not only to competition between pay TV platforms (i.e. inter-platform competition) but also to competition between pay TV retailers (which entails intra- as well as inter-platform competition). Furthermore, Ofcom's principal statutory duty is to further the interests of consumers, where appropriate by promoting competition, and this statutory duty is in no way limited to inter-platform competition. In light of this, the corollary of Ofcom's second sentence quoted in paragraph 2

[1] Paragraph 9.11 of Ofcom's Second Pay TV Consultation Document.
[2] Paragraph 9.12 of Ofcom's Second Pay TV Consultation Document.
[3] First bullet of paragraph 1.28 of Ofcom's Second Pay TV Consultation Document.

above applies – i.e. it is **not** "*appropriate to limit eligibility [to the wholesale must-offer obligation] to retailers on platforms other than those operated by Sky*".

5. Allowing pay TV retailers on Sky's satellite platform to benefit from the wholesale must-offer obligation should, however, not be seen as an end in itself. Wholesale access to Sky's premium channels is a necessary step to promoting competition in pay TV through investment and development at all levels of the pay TV supply chain.[4] The wholesale must-offer remedy should, therefore, provide an opportunity for competitors to develop their own retail customer bases of premium pay TV subscribers on all pay TV platforms in the UK, including Sky's satellite platform which has the largest base of pay TV subscribers. In this way, it would provide an opportunity not only for competitors to resell Sky's premium channels on the largest pay TV platform but also to bundle Sky's premium channels with other content and channels that they have acquired in their own right. It would also give competitors better business cases, through access to larger subscriber bases with bundles containing Sky's premium channels, to bid for content and would thereby ameliorate a major barrier to entry upstream.

6. Indeed, in its Second Pay TV Consultation Document, Ofcom confirms that:

> "*We acknowledge in our assessment of market power that Sky's established subscriber base is one of the factors associated with high barriers to entry in the markets for the acquisition of key content rights*".[5]

Specifically, when acknowledging the bidding advantages enjoyed by Sky, Ofcom cites as the first such advantage Sky's "*more efficient access to a greater number of subscribers*".[6] Ofcom then states that:

> "*… Sky is the most effective retail outlet on the platform with the largest number of likely subscribers and third parties are unable to access that outlet as efficiently. As a result of this efficiency advantage, Sky is likely to be able to outbid potential rival bidders for the live FAPL rights*".[7]

7. If third parties such as Setanta were able to sell bundles including Sky's premium channels on Sky's satellite platform without the need for the acquisition of a package of basic channels, then they should relatively quickly be able to establish a critical mass of premium pay TV subscribers which would facilitate bids for key content in future. In this way, the first bidding advantage which Ofcom has attributed to Sky would be reduced.

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4 That investment and development is stifled by the current market structure and the vicious circle in pay TV described in the Parties' previous submissions.

5 Paragraph 1.31 of Ofcom's Second Pay TV Consultation Document

6 Page 106 of Ofcom's Second Pay TV Consultation Document.

7 Paragraph 5.61 of Ofcom's Second Pay TV Consultation Document.

8. The wholesale must-offer obligation proposed by Ofcom will underpin the economics of developing competing distribution platforms for those pay TV companies that also operate platforms. If the wholesale must-offer obligation were to include Sky's satellite platform, it would also enable competitors to make significant investments in pay TV broadcasting/retailing businesses. Thus, setting the scope of the wholesale obligation so that it encompasses all pay TV retailers, including those on Sky's satellite platform, would have far wider benefits than the one acknowledged by Ofcom in paragraph 2 above of providing satellite viewers with the choice of acquiring premium channels without the need to buy through a basic package.

9. The only objection which is voiced by Ofcom to this approach (i.e. the inclusion of Sky's pay TV platform within the scope of the wholesale must-offer obligation) is that:

> "*It could conceivably … be counterproductive, since it might reduce the incentive to develop new platforms*".[8]

In this context, it should be noted that the principal alternative TV platforms to Sky's satellite platform in the UK at present are those operated by Virgin Media, BT Vision, TUTV, Tiscali and Freesat.[9] In practice, it is simply not credible to suggest that any of these platform operators would forego the development of their existing platforms in order, instead, to focus on the resale of Sky's premium channels on Sky's satellite platform. Indeed, it is likely that the majority of these platform operators will not, themselves, seek to retail pay TV services on Sky's satellite platform.

10. If, however, Ofcom were to include Sky's satellite platform within the scope of the wholesale must-offer obligation, both Setanta and TUTV would seek to take advantage of that opportunity. In this context, TUTV confirms that the opportunity to launch pay TV services on Sky's satellite platform which included Sky's premium channels would not deter TUTV from investing in and continuing to develop its DTT platform. This should be contrasted with Ofcom's proposal to authorise Picnic, albeit subject to the wholesale must-offer obligation and certain ancillary conditions. For the reasons that have previously been set out in the Parties' submissions to Ofcom, Setanta and TUTV believe that the authorisation of Picnic will inevitably lead to Sky effectively becoming the sole pay TV retailer on DTT. Hence such authorisation will be a very material deterrent to any further investment by TUTV in its DTT platform.

11. In summary, the wholesale must-offer obligation is only the first step on a "*ladder of investment*". In order to enable third parties to build up a critical mass of premium pay TV subscribers so as to be able to make necessary investments at all levels of the pay TV supply chain (including in content) and

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8 Paragraph 9.11 of Ofcom's Second Pay TV Consultation Document.

9 Whilst Setanta has invested in DTT set top boxes in order to facilitate their deployment, it is not, itself, developing or running the DTT pay TV platform, which is operated by TUTV.

thereby compete more effectively with Sky, Ofcom must include Sky's satellite platform within the scope of the wholesale must-offer obligation.

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