FACTUAL ERRORS IN THE COMPLAINANTS' RESPONSES TO THE SECOND PAY TV CONSULTATION

1. INTRODUCTION

1.1. Ofcom has published a number of non-confidential responses to its consultation document 'Pay TV Second Consultation: Access to Premium Content' of 30 September 2008 (the "**Consultation Document**").[1] In particular, Ofcom has published the following responses by the Complainants (collectively the "**Complainants' Responses**"):

- Joint response to the Consultation Document by BT, Setanta, TUTV and Virgin Media, 12 December 2008 (the "**Joint Response**");
- Virgin Media's response to the Consultation Document, 18 December 2008 (the "**Virgin Media Response**");
- BT's response to the Consultation Document, 16 December 2008; and
- Joint supplemental submission by Setanta and TUTV to the Consultation Document, January 2009.

1.2. This submission, in line with our usual approach to individual responses, does not address and rebut each and every argument or allegation made in the Complainants' Responses. Rather, this submission addresses, and is focussed upon:

- a number of key instances where continuing allegations made about Sky's conduct are wrongly treated as facts; and
- certain key factual errors contained in the Complainants' Responses.

Sky considers that these errors warrant a response so as to avoid Ofcom from being misled and accordingly they are dealt with in sections 2 and 3 below. A lack of comment on any other points in the Complainants' Responses does not denote Sky's acceptance of those points.

1.3. Before addressing the inaccuracies and errors contained in the Complainants' Responses, we set out brief general observations.

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[1] http://www.ofcom.org.uk/consult/condocs/second_paytv/responses/

1.4. In general, none of the Complainants' Responses has anything new to say. As a consequence, we have comprehensively dealt with many of the points made in our previous submissions.[2]

1.5. In addition to saying nothing new, the Complainants' Responses also rely upon bald assertions, which are unsupported by evidence. For example, the Virgin Media Response states that "*a rival retailer unable to offer a comparable bundle [of sports channels to those retailed by Sky] would be unable to compete with Sky even if it were to be supplied with channels containing live FAPL content.*"[3] A substantially similar bald assertion is made in the Joint Response, though this time the Complainants preface it with emotive language:

> "*Sky's market power in premium sports arises from its aggregation of a* ***compelling*** *portfolio of sports content. Accordingly, a rival retailer which is unable to offer a comparable portfolio of content would be* ***unable to compete*** *with Sky even if it were to obtain wholesale access to Sky's channels containing live FAPL content.*"[4] (Emphasis added).

1.6. No evidence is provided to support these assertions.

1.7. Not only are the Complainants' Responses bereft of evidence to support their unsubstantiated claims (because such evidence does not exist), they are also inconsistent with statements made elsewhere. One such example of this inconsistency is Virgin Media's view on the relevant market, which, in the Virgin Media Response, may be summarised as follows:

> "*...the evidence assembled by Ofcom...points irrefutably towards there being a separate market for the retailing of premium content...*"[5]

1.8. Outside of the context of Ofcom's investigation, Virgin Media's view of the market is very different. The (then) Chief Executive of Virgin Media's content division stated in a newspaper article in June 2008 that:

> "*The UK is a really competitive market with 150 pay-TV channels, Sky, Freeview, Tiscali and BT's TV service.*"[6]

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2 It is possible that the Virgin Media Response may contain new arguments or evidence of which Sky is unaware due to redactions made to that submission. We trust that any such arguments/evidence will be put to Sky, should Ofcom place any weight upon them.

3 Virgin Media Response, paragraph 3.57.

4 Joint Response, paragraph 4.29.

5 Virgin Media Response, paragraph 5.3 (c).

6 The Guardian, Media Supplement, 30 June 2008, page 6.

1.9. This view, of a competitive market, was recently reiterated, again, in Virgin Media's most recent Form 10-K filing to the United States Securities and Exchange Commission (the same, or substantially similar statements have been made in previous Virgin Media Form 10-K's, including February 2006, March 2007 and February 2008):

> ***"We are subject to significant competition.***
>
> *The level of competition is intense in each of the markets in which we compete, and we expect competition to increase...In the* ***digital television market****, we compete primarily with BSkyB in providing digital pay television services.* ***Competition increased as a result of the launch of Freeview****, which provides over 40 digital terrestrial television channels on a free-to-air basis to consumers who have purchased a Freeview digital set-top box or digital television recorder...."*[7] (Emphasis added).

1.10. As Ofcom may be aware, a Form 10-K is subject to stringent verification requirements and, as such, and given the objective standing of a 10-K, it, rather than the consultation response, should be treated as representative of Virgin Media's actual view of the market.

1.11. Thus, Virgin Media has confirmed both to the wider world (through a newspaper interview) and to its investors (and also to the US Securities and Exchange Commission) that it competes at the retail level in a "*really competitive*" "*digital television market*" and that Freeview has been a specific contributor to the intensity of competition within that market.

1.12. The divergence of views between that of (a) the author(s) of the Virgin Media Response, and (b) senior management at that company, is both noteworthy and is something of which Ofcom should be aware. This divergence indicates a cynical approach to the regulatory process and the self-serving way in which it is being used.

1.13. Ofcom will also be aware that the Complainants are now advancing extreme views as to the details of the compulsory licensing regulation that they submit should be imposed on Sky. For example, the Complainants are proposing that there should be a point at which Sky cannot incur subscriber acquisition costs without Ofcom's prior consent.[8] In Sky's submission, the extremity of such propositions both (a) further diminishes the credibility of the Complainants as contributors to Ofcom's review, and (b) illustrates the barriers to negotiating with the Complainants on a rational basis. Ofcom should take these factors into account when examining the reasons why Sky's channels are not currently available via all platforms.

1.14. Given the extreme nature of the Complainants proposals, we do not find it surprising that the Complainants' Responses are not accompanied by any supporting contributions from external economists.

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[7] Virgin Media Inc Form 10-K, filed on 26 February 2009.

[8] See Joint Response, paragraph 6.17.

1.15. Finally, it is notable that gaps are now appearing between the Complainants in that divergent (and self-serving, albeit conflicting) views are now beginning to emerge. Virgin Media argues that the compulsory licensing obligation to be imposed on Sky must be set on a ratecard basis:

> "*in order to ensure a level playing field between different retailers regulated wholesale prices should be set which apply to all actual and potential retailers of premium content – i.e. there should not be different prices for different retailers…*"[9]

1.16. In contrast, BT argues that the:

> "*optimum theoretical approach to determining the retail minus rule would be to determine a separate value for the minus, and thus a separate wholesale price, for each rival pay TV platform (DTT, cable and DSL), each reflecting their individual costs of provision of the competing service.*"[10]

1.17. The fact that the Complainants' Responses are lacking evidence, contain bald assertions and are now beginning to diverge on points such as how any compulsory licensing regulation should operate is, at least, suggestive that, for the Complainants, the market investigation is viewed as an opportunity to improve their competitive position through regulatory means rather than competing on the merits.

2. THE COMPLAINANTS' MISLEADING ALLEGATIONS ABOUT SKY'S CONDUCT ARE NOT BASED IN FACT

2.1. The Complainants continue to make general assertions in support of their case, for example, paragraph 2.1 of the Joint Response repeats, without evidence, the 'vicious circle' theory, and paragraph 5.8 asserts, again, without evidence, amongst other things, that there is a "*clear disparity in bargaining power*" and, contrary to fact, that Sky has "*either refused to make its premium channels available to third party pay TV retailers or offered them at uneconomic rates*".

2.2. Sky sees no benefit to be gained from responding in detail, yet again, to reiterated allegations presented by the Complainants as fact. We have provided Ofcom with detailed factual explanations (including relevant correspondence) in respect of these allegations and trust that Ofcom, as an objective, impartial regulator, is able to separate fact from fiction. Instead, this section of Sky's submission addresses briefly the specific allegations made about Sky's conduct in the Complainants' Responses. It is not, and should not be treated as, exhaustive and Sky reserves the right to comment further on the Complainants' Responses. The specific conduct allegations which are addressed are:

- Sky's purported refusal to supply its HD channels and certain of its interactive features to Virgin Media;

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9 Virgin Response, paragraph 6.14 (b).

10 BT Response, page 3.

- Sky's purported refusal to supply its premium sports and movie channels to Virgin Media for an IPTV service;
- Sky's alleged "*warehousing*" of SVoD rights;
- the allegation that Sky has used security concerns as a pretext to withhold content from third party platforms; and
- Sky's alleged motives for running certain promotions on certain of its channels in 2007.

<u>Sky has not refused to supply HD channels or certain of its interactive features to Virgin Media</u>

2.3. The first allegation of conduct relates to Sky's purported refusal to supply its HD channels and certain of its interactive features to Virgin Media. Virgin Media states:

> "*Ofcom has not, however, explicitly recognised that Sky has also refused to supply Virgin Media…HD and interactive enhanced features related to the Sky's (sic) premium sports and movies channels.*"[11]

2.4. Virgin Media misrepresent the true factual position. Between the time of Sky's submission in response to the Complaint and the start of this year (when Virgin Media sent to Sky, amongst others, a "High Definition Request For Proposal" ("**RFP**"), which asked respondents to submit a proposal to distribute HD channels on the Virgin Media platform) there had been no meaningful engagement between Sky and Virgin Media with respect to the supply of Sky's premium sports and movie HD channels.[12] It is clear from the RFP that the distribution of HD channels has only now become a realistic consideration (and therefore proposition) for Virgin Media and that such a service will not launch until late 2009 at the earliest. The RFP states:

> "This document and its enclosures (the "**RFP**") has been prepared following a assessment of Virgin Media's high definition (HD) strategy. Virgin Media **is now keen** to receive proposals and open formal discussions with content providers who wish to seek distribution of one or more of their HD channels via the Virgin Media platform to its customers….*[However, even if a HD channel is accepted by Virgin Media under the RFP, the launch date for such a channel is not expected until]* Q3 2009.**"**[13] (Emphasis added.)

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11 Annex 1 to the Virgin Media Response, paragraph 15.4.

12 Details of Sky's dealings with Virgin Media in respect of Sky's HD channels were provided to Ofcom in Annex 5.1 of Sky's October 2007 response to the Complaint.

13 Virgin Media: High Definition Channels, Instructions to Respondents, March 2009.

2.5. With regard to Virgin Media's related allegation that access to certain content in HD is both necessary and "*essential*"[14] in order for pay TV retailers to compete with Sky, it is notable that Virgin Media has not been (and indeed is still not) in a position to launch linear HD channels and nor has it (until recently) had a desire to do so. Indeed, Virgin Media has previously stated:

> "*We are bandwidth constrained. We have advanced head ends for HD channels. But the main focus with HD is VoD and it's our belief that there is an appetite for HD film.*"[15]

2.6. More recently, at a Goldman Sachs conference[16], Neil Berkett was questioned about Virgin Media's HD achievements to date and his outlook for the future. Berkett confirmed that Virgin Media believed that being the first mover in high speed broadband and VoD, and not HD, was key to creating value for the business. Moreover, whilst Berkett noted the obvious superior quality of HDTV, he stated that as at "*Q3 2008*" linear HD was not "*the killer application*". This disinterest in HD is reflected in Virgin Media's lack of engagement with Sky. As explained above, Sky's only recent engagement with Virgin Media about the supply of Sky's premium sports and movie HD channels has been the RFP. Even though Virgin Media has now expressed an interest in the supply of HD channels, it is notable that just a few weeks before the RFP was issued, Virgin Media was highlighting the regulatory process as a means to secure Sky's premium sports and movie HD channels, rather than entering into a commercial discussion with Sky:

> "*Developing our HD capability…Ofcom Market Investigation may deliver access to Sky premium sports and movies channels on HD*"[17]

2.7. In sum, at the time of the Virgin Media Response, Virgin Media did not regard HD as essential. The fact that Virgin Media has since circulated its RFP does not suddenly make linear HD channels "*essential*" for Virgin Media, despite what the author(s) of the Virgin Media Response may state.

2.8. Finally, with regard to HD, the Virgin Media Response (and indeed the RFP) fails to reflect both the security concerns that Sky has about the cable platform (as set out in Annex 5.1 of Sky's response to the Complaint) and the fact that the cable platform has limited capacity which has prevented it from launching linear HD channels. The Virgin Media Response omits to refer to this concern and limitation, stating that there "*are no technical or other issues which would prevent the inclusion of HD services in the WMO.*"[18] Contrary to what Virgin Media

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14 Virgin Media Response, paragraph 7.34.

15 Malcolm Wall, Chief Executive Officer of Content, Virgin Media, Media Week 20 October 2007.

16 Goldman Sachs Communacopia Conference, 17 September 2008 http://cc.talkpoint.com/GOLD006/091708a_mg/?entity=virginmedia

17 Virgin Media, Fourth Quarter 2008 results, 25 February 2009, http://library.corporate-ir.net/library/13/135/135485/items/325887/6941D70A-3672-40B9-ACBC-FC9BD36E1DFF_Q4-08_Presentation_FINAL.pdf

18 Virgin Response, paragraph 7.39.

states, there are issues, of which Virgin Media is aware, in relation to the distribution of linear HD services on its cable platform. To suggest otherwise is incorrect.

2.9. With regard to the allegation that Sky has refused to supply interactive functionality there have been no material developments on this matter since Sky's response to the Complaint, save that Sky contractually committed to discuss interactivity in good faith with Virgin Media as part of the contract for the recommencement of carriage of Sky's basic channels. Despite this commitment, Virgin Media has not engaged with Sky any further on this matter.

2.10. Whilst Virgin Media asserts that the "*cable platform is technically able to carry Sky's interactive and enhanced services*"[19] this assertion is both false and is based upon a key misunderstanding. It is not technically possible for Virgin Media to carry Sky's interactive and enhanced functionality on the cable platform. It may be possible to partially replicate Sky's interactive and enhanced services but, critically, this would be at the expense of editorial integrity of Sky's content and, given the nature of a service that replicates another service (e.g. a service that copies – or attempts to copy – that of another), this would potentially hinder Sky's development and innovation of a service that operates in a rapidly changing environment.

<u>Sky has not refused to supply channels for a Virgin Media IPTV service</u>

2.11. The second allegation, which is a new one not previously raised by the Complainants, relates to IPTV and specifically Virgin Media's assertion that:

> "*Ofcom has not, however, explicitly recognised that Sky has also refused to supply to Virgin Media…Sky Sports and Sky Movies on a wholesale basis for a Virgin Media's (sic) off-net IPTV service*".[20]

2.12. Again, this is factually incorrect.

2.13. In 2007, Virgin Media asked Sky to provide it with terms for the supply of Sky's premium channels so that Virgin Media could retail these channels via a proposed Virgin Media IPTV service. Despite Sky's offer to enter into discussions relating to the retailing of Sky's premium channels via a Virgin Media IPTV proposition, Virgin failed to engage in those discussions. Moreover, Virgin Media did not even provide Sky with details about how its proposed IPTV service would work nor was sufficient comfort given that the security of Sky's content would be protected should it be distributed on a Virgin Media IPTV service.

2.14. Irrespective of Virgin Media's failure to engage with Sky, it is clear that Virgin Media has no immediate plans to develop an IPTV platform. Such a service would be inconsistent with its strategy of differentiating its cable offering from

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[19] Virgin Response, paragraph 7.60.

[20] Annex 1 to the Virgin Response, paragraph 15.4.

a DSL service. Set out below are a couple of statements by Neil Berkett which confirm this:

> "*IPTV across DSL will never be able to compete with us in terms of quality, speed and reliability.*"[21]
>
> *"In our marketing messages we're positioning the superior quality of aspects of cable over DSL copper with visible success…"*[22]

2.15. Further to this, the importance of IPTV (or lack thereof) has publicly been confirmed by Neil Berkett on a number of occasions and we set out below two such instances:

> *"We've made no decisions in terms of whether we would restart an IPTV build."*[23]
>
> *"We'll not be bringing IPTV to the front of the agenda until at least 2009…I haven't walked away from a national franchise – **it's just not as important at the moment** and we get far better value for money if I can get the on-net proposition really humming."*[24] (Emphasis added).

2.16. Sky has not refused to supply channels for a Virgin Media IPTV service. The simple fact is that Virgin Media has not engaged in any meaningful discussion with Sky about the supply of Sky's channels for an IPTV service. Indeed, in around March 2008, in a meeting between senior representatives of Virgin Media and Sky, Virgin Media confirmed that it did not have plans for IPTV.[25] The apparent reason for this is that, as Neil Berkett has stated, "*IPTV…it's just not as important [to Virgin Media] at the moment…*"

<u>Sky has not "*warehoused*" SVoD rights</u>

2.17. The third conduct allegation, relates to the "*warehousing*" of SVoD rights. The Complainants state:

> *"Sky's 'warehousing' of content rights i.e. buying rights and then not using them, results in the prevention, restriction or distortion of competition as it stops other providers using the rights and perhaps even from entering the market (sic) at all….*

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21 28 May 2008. Neil Berkett quoted by Credit Suisse.

22 Q4 2008 Earnings Release, 25 February 2009, http://investors.virginmedia.com/phoenix.zhtml?c=135485&p=irol-EventDetails&EventId=2090600

23 Q1 2008 Virgin Media Inc. Earnings Conference Call http://phx.corporate-ir.net/phoenix.zhtml?p=irol-eventDetails&c=135485&eventID=1832487

24 New Media Markets, 15 May 2008.

25 Note taken by Mike Darcey, Chief Operating Officer of BSkyB, at a meeting around March 2008. Part of this note was disclosed to Ofcom as part of Sky's fifth response to Ofcom's second information request of 20 March 2009.

> *...the competition problems in respect of SVoD services do not relate just to Sky warehousing SVoD rights. In many instances, Sky does not possess SVoD rights but, instead, has secured 'holdback' provisions in respect of such rights which prevent the content owners (e.g. the Hollywood studios) from licensing SVoD rights to third parties."*[26]

2.18. The Complainants add nothing new through this allegation.

2.19. As Ofcom is aware, Sky, in common with all participants in the broadcasting industry, acquires exclusive rights to television programming. The grant of exclusive rights means that competitors cannot acquire and exploit the same content at the same time and in the same manner. Far from being "warehoused", the television programming licensed in this way <u>is used</u> by Sky and <u>is scheduled</u> on various Sky services. Depicting the acquisition of exclusive rights as some form of deliberate strategy to deny competitors entry to the market is misconceived and misleading. Rather, Ofcom is directed to a recent BT press release which contains references to customer surveys conducted on its behalf that are said to show that:

> "*71 per cent of respondents...[agreed] that they would rather watch movies on demand when they want to see them rather than when the broadcasters have scheduled them. This suggests a dramatic change in the way people want to watch movies.*"[27]

2.20. The underlying message of the press release is that "*BT's digital and on-demand TV service, BT Vision, enables people to choose what movie they want to watch, when they want to watch it, from more than 600 current and classic films – all without a mandatory TV subscription.*" Contrary to what the author(s) of the Joint Response states (that Sky's alleged "*warehousing...perhaps*" prevents market entry), BT, which is already competing in the market, considers its platform to be satisfying changing consumer demand for movies content. Given BT's claim that it is satisfying consumer demands, it is difficult to see how Sky's exclusivity in relation to certain movie-release windows could create competition problems.

<u>Security concerns are not a pretext for Sky withholding content</u>

2.21. The fourth conduct allegation relates to Sky purportedly "*using security as a pretext for withholding content.*"[28] As Ofcom itself acknowledges in its second consultation on Sky's Picnic proposal, Sky has "*genuine concerns regarding the security of CA systems other than NDS*".[29] Sky's concerns, as Ofcom rightly points out, are genuine and as such Sky has an objective justification in wanting to ensure that its valuable content is adequately protected.

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26 Joint Response, paragraphs 9.4 and 9.7.

27 BT press release, 6 March 2009.

28 Virgin Media Response, paragraph 8.3.

29 Virgin Media Response, paragraph 4.38.

2.22. Virgin Media argue that because "*Sky has been prepared to supply premium channels to Virgin Media on the basis of the existing security arrangements for a number of years*"[30] Sky should *de facto* be content with Virgin Media's security arrangements. This is simply not the case. Sky has expressed its concerns with regard to cable's security over a number of years and remains deeply concerned about the security of the platform. Sky does not consider the cable platform to be secure and intends to provide Ofcom with a separate submission in relation to Sky's concerns.

Sky's promotions were not intended to damage Virgin Media's relationship with its customers

2.23. Virgin Media raises the issue of certain promotions run by Sky in 2007 on Sky One and other Sky channels. Virgin Media alleges that these promotions "*were aimed at damaging Virgin Media's relationship with its customers*"[31]. This is simply not the case. The rationale for the promotions was to promote the various Sky channels that were the subject of various carriage discussions at the time, and to provide information as to the likely (un)availability of the channels depending upon the outcome of the discussions. We note that Ofcom has now closed the matter and do not intend to comment upon this allegation any further at this stage.

Additional misleading allegations

2.24. Finally, Virgin Media's Response asserts a number of specific concerns at paragraph 2.5. Virgin Media does not provide any further evidence to substantiate these assertions and in any event, we note that Sky has already dealt with such assertions in our response to the Complaint.

ANALYTICAL ERRORS

2.25. The Complainants' Responses include numerous significant analytical errors. Whilst we have chosen to comment on a small number of them in this submission, we reserve the right to comment further on these errors in due course.

Margins earned by Virgin Media

2.26. The Virgin Media Response states that Virgin Media earns a "*lower margin for a pay TV bundle including Sky Sports (i.e. Sky Sports 1, 2, 3 and Xtra) than it does for the equivalent bundles without the Sky Sports channels*"[32] and that as a result this "*create[s] an incentive for Virgin Media not to retail Sky's premium channels at*

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30 Virgin Media Response, paragraph 8.4.

31 Virgin Media Response, paragraph 9.5.

32 Virgin Media Response, paragraph 3.8.

all…"[33] The response goes on to state that the wholesale access to such content offered by Sky to Virgin Media is "*uneconomic*"[34].

2.27. These propositions are flawed for a number of reasons. First, the fact that the margin earned from selling one type of product is lower than that earned on another does not make selling the lower-margin product "*uneconomic*".

2.28. Second, if margins on Virgin Media packages that include Sky's premium channels are lower than those earned on selling other products, it is erroneous to claim that this means that this "*creates an incentive for Virgin Media not to retail Sky's premium channels at all*". It is clear that many existing and potential Virgin Media subscribers wish to include such channels in their packages, and the positive margins earned on those packages means that Virgin Media has a clear incentive to offer them.

2.29. Finally, it is abundantly clear that Virgin Media's margins are primarily a function of Virgin Media's retail pricing decisions rather than wholesale charges. Accordingly, it is facile to seek to blame Sky for relative margins earned by Virgin Media on different products that it offers consumers.

<u>Virgin Media's alleged disadvantages in bidding for rights</u>

2.30. Virgin Media alleges that a number of factors restrict its ability to bid effectively for content rights. Virgin Media states states:

> "*[Virgin Media]…is dependent on Sky for gaining access to the large DSat subscriber base. Its [Virgin Media's] bidding strategy is constrained by the uncertainty surrounding the level of wholesale price which would be offered by Sky for the movie content in question even if Virgin Media were to win movie rights from one of more Major Hollywood Studios. Moreover, further uncertainty arises because there is no guarantee that Sky would promote the content from a rival entity as actively as the rival would like in order to allow that rival to make a timely return on its content acquisition costs.*" [35]

2.31. This argument contains a number of fundamental flaws.

- Virgin Media is not dependent on Sky to gain access to Sky's digital satellite subscriber base (and also the large number of households on Sky's platform who are not Sky subscribers). As Ofcom is aware, and as no doubt Virgin Media is also aware, access to Sky's digital satellite platform (unlike the closed cable platform) is regulated, such that access is made available to third parties on a fair, reasonable and non-discriminatory basis. Accordingly, Virgin Media would be able itself to act as the retailer of its new service on Sky's digital satellite platform.

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[33] Virgin Media Response, paragraph 6.12.

[34] Annex to the Virgin Media Response, paragraphs 14.1(b) and 16.2.

[35] Virgin Media Response, paragraph 4.17(b).

- Given that Virgin Media is able to access both the Sky digital satellite platform and its own cable platform on a retail basis, it is not constrained by uncertainty about the wholesale price that Sky would pay for Virgin Media's hypothetical premium movie channel(s). On the contrary, given the certainty that Virgin Media has with regard to its ability to access all these subscribers on a retail basis, Virgin Media should have *greater* certainty than Sky about the amount of revenue it can generate from subscribers on both platforms.

- Virgin also asserts that further uncertainty arises because there is no guarantee that Sky would promote third parties' channels as actively as they would like. Sky assumes that in drafting this sentence, Virgin Media is postulating that it has created a movie channel(s) which it would then wholesale to Sky. If (as appears to be the case) it is Virgin Media's position that access to pay TV movie channels containing Major Studios content is essential in order to be able to compete at the retail level, it would be irrational for Sky to refrain from marketing such a channel. In any event, it is routine in such circumstances for carriage agreements to include commitments by retailers in relation to channel marketing, in some circumstances with marketing contributions from channel providers. In addition, or in the alternative, retailers can otherwise be incentivised to market channels, for example through minimum financial guarantees. The proposition that Sky would not market effectively television channels carried in its pay TV packages simply because they were operated by another broadcaster is both facile and flies in the face of all available evidence. Moreover, it overlooks the fact that a channel provider is not wholly dependent on a retailer in marketing the availability of its channels: there is a great deal of marketing that channel providers are able to do – and do in fact undertake – wholly independently of retailers.

<u>Further allegations in relation to the relevant retail market</u>

2.32. The Virgin Media Response asserts that the Consultation Document points "*strongly to a distinct retail market for premium sports*" [36] by virtue of the fact that Freeview has not, in Virgin Media's view, had "*an observable impact on subscriber numbers to packages containing Sky Sports* (sic)".[37]

2.33. In the first instance, such a proposition is facile. The number of subscribers to pay TV packages that include Sky's sports channels is subject to a large number of influences, including the introduction of Freeview. In order to isolate the specific effect of Freeview on the number of pay TV subscribers (including the number of subscribers to packages that include Sky's sports channels), it is necessary to control for the influence of other determinants of subscriber numbers (e.g. prices, quality, hardware propositions and charges for services such as Sky+, marketing effort, quality of customer service and so on).[38] Having

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36 Virgin Media Response, paragraph 5.16.

37 *Ibid.*

38 See Appendix 5 and 9 of Annex 2 of Sky's Response to the First Consultation Document.

examined this issue properly, using robust econometric techniques, Professor Paul Seabright shows that Virgin Media's proposition is false. Professor Seabright's analysis demonstrates that Freeview does in fact have a significant observable impact on subscriber numbers to packages containing Sky's sports channels.[39]

3. FACTUAL ERRORS

3.1. We note here two factual errors in the Complainants' Responses:

- The Complaints state that "*Sky generates approximately £300 million per annum in pay TV revenues from the sale of Sky Sports to commercial premises.*"[40] As Ofcom is aware,[41] that is wrong. In 2006/07, the total UK subscription revenue generated from the commercial sector was £177.9 million.

- The Virgin Media Response describes "*the Newscorp organisation*" as "*the parent company of Sky*".[42] That is not the case. News Corporation has a 39.14% stake in British Sky Broadcasting Group plc. It does not have the right or ability to exercise any powers that would classify it as a parent company of Sky.

Sky **May 2009**

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39 "*The effect of DTT availability on households' willingness to subscribe to Sky's pay TV services*": Report of an econometric study by Paul Seabright, 13 January 2009.

40 Joint Response, paragraph 5.30.

41 See data sent to Ofcom on 25 July 2008 (following an information request).

42 Footnote 77 of the Virgin Media Response.