



Review of the pay TV wholesale must-offer obligation

TalkTalk initial submission

Non-confidential version

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1 Summary

- 1.1 This document is TalkTalk's response to Ofcom's consultation paper, dated 19 December 2014, on its ongoing review of the pay TV wholesale must offer ('**WMO**') obligation.
- 1.2 TalkTalk welcomes Ofcom's review of the WMO. This remedy was imposed on Sky in relation to Sky Sports 1 and 2 in 2010, and has been the subject of continual litigation and appeals since then; the appeal against the initial decision remains extant at the CAT. Nearly five years after the remedy was initially imposed, the pay TV market has changed considerably, both with the emergence of new pay TV platform operators (notably TalkTalk's TV platform) and changes in the line up of premium sports channel providers, particularly due to BT's acquisition of Premier League ('**PL**') and UEFA Champions League ('**UCL**') rights. It is vital that Ofcom reviews its WMO obligation regularly, to reflect changing circumstances and ensure that it remains effective in protecting consumers' interests.
- 1.3 Although we welcome the review, in its current proposals Ofcom has reached the incorrect conclusion that BT should not be subject to a WMO obligation. This incorrect conclusion has stemmed from several errors made by Ofcom in its consultation paper:
- Ofcom has underweighted the importance of competitions other than the Premier League ('**PL**') relative to the PL itself. In reality, at least the Champions League ('**UCL**') has the same degree of importance to viewers. [§<].
 - In determining whether to impose WMO obligations in future, Ofcom has only considered historic market shares rather than the more relevant forward looking shares.
 - Ofcom has in several instances referred to the prospect that BT, which Ofcom asserts to be a 'relatively new entrant', might be able to grow its premium sports channel business, and thereby impose a more effective competitive constraint on Sky. Ofcom appears to be willing to accept the elimination of some competitors (such as TalkTalk) and a less competitive broadband market in order to achieve such a constraint on Sky's pay TV business. However, Ofcom has not identified how the growth of BT viewer numbers will increase any competitive constraint on Sky, nor how (if there is any such increase in competitive constraint due to higher viewer numbers) this would generate consumer benefits.
 - Ofcom has failed to assess the consumer benefit of a WMO obligation which prevents BT from distorting competition in broadband markets, despite BT's stated aim to use BT Sport to enhance its position in these markets.
 - Ofcom has failed to consider why BT has refused Sky the possibility of a wholesale deal for BT Sport, instead engaging in self-retail over the Sky DTH platform.
 - Ofcom's position that it is acceptable for BT to refuse to deal BT Sport to TalkTalk so that BT can pursue a goal of increasing its market share in broadband, and that TalkTalk is of no relevance because we are 'small', is incoherent (as TalkTalk's TV business is larger than BT's), fails to reflect competition law, and so should be reversed. BT should not be permitted to use market power derived from football rights to eliminate any broadband competitors, which is clearly anticompetitive.

1.4 If Ofcom does not amend its current conclusion to impose a wholesale must offer obligation on BT, consumers and the competitive process will be damaged. From next season, BT will hold a market share in the region of 45% [3<], allowing BT a high degree of market power. BT's market position is therefore clearly sufficient to harm both competitors and consumers; it has already demonstrated that [3<]. Only a WMO obligation will be effective in addressing this anticompetitive behaviour to prevent BT from harming consumers.

1.5 [3<]

1.1 Structure of this document

1.6 The main body of this response is structured as follows:

- section 2 discusses what content should be seen as 'key' for the purposes of Ofcom's review. It sets out both Ofcom's view on key content, and the areas in which Ofcom's current view is flawed.
- section 3, in light of the definition of key content set out in section 2, then determines the market shares and market power of the various market participants, finding that both BT and Sky will hold significant market power in the Core Premium Sports Content ('CPSC') market from the start of the 2015/16 football season.
- section 4 then reviews the incentives on BT and Sky to distort competition, given that they hold market power and are therefore able to do so. It finds that both companies are likely to be able to distort competition.
- finally, section 5 concludes.

2 What constitutes key content?

2.1 This section provides TalkTalk's analysis of Ofcom's assessment of key content. It is structured as follows:

- section 2.1 details the manner in which Ofcom has defined key content in its consultation paper.
- section 2.2 briefly reviews the approach to determining key content taken by Ofcom;
- section 2.3 then provides an analysis of that approach, finding both that there are significant flaws in the way that Ofcom has used the data adduced in the report, and that other data that could have been drawn on by Ofcom has been ignored; and,
- section 2.4 sets out the appropriate conclusion that would have been reached by Ofcom if it had assessed the data in a more comprehensive manner.

2.1 Ofcom's definition of key content

2.2 The most important step in Ofcom's analysis of whether to impose WMO obligations is the question of which content can be considered 'key'. This is the primary issue addressed by Ofcom because of the methodological approach taken, which is not a standard 'structure-conduct-performance assessment', but rather an attempt at 'direct effects assessment' of the effects of content ownership.¹ All of these effects flow, in Ofcom's approach, from the key content held by the broadcasters.

2.3 Ofcom defines key content in its consultation paper as:²

content that is capable of influencing the choice of pay TV provider for a significant number of consumers.

2.4 In light of the approach adopted by Ofcom, this is a reasonable definition of key content, albeit too narrow in the sense that it only considers that sports rights might influence choice of pay TV provider. In a market which is increasingly moving towards so-called 'triple play' and 'quad play' bundles which involve broadband, fixed line telephony, and pay TV being supplied together with one another, it is important for Ofcom to take account of the fact that consumers' choices of broadband provider, and not just pay TV provider, may be influenced by the availability of live sports content. Furthermore, linear content, including live sports content, is increasingly accessed in different ways by consumers, such as watching using an app on a PC or tablet, which does not require a pay TV contract, but only a broadband subscription.

2.5 Ofcom should therefore amend its definition of key content to be as follows:

content that is capable of influencing the choice of pay TV and/ or broadband provider for a significant number of consumers.

2.2 Ofcom's approach to determining key content

2.6 Ofcom's approach to determining what sports content can be considered 'key' is crucial to the overall analysis it has undertaken, as all of the results of Ofcom's analysis are based on this prior step.

2.7 In determining which content should be considered as 'key', Ofcom relies heavily on two surveys that it has undertaken:

¹ Under a structure-conduct-performance approach, a competition authority or regulator will first assess the market structure, considering market shares of all market participants, and other market features such as barriers to entry and product differentiation. They will then consider the conduct (past and prospective) of market participants, including aspects such as pricing and promotion. These two elements are then used to derive conclusions as to how well the market is functioning for consumers. Under the direct effects approach adopted by Ofcom, market structure is broadly ignored, as is pricing and supply conditions, in favour of using survey evidence on consumer behaviour to attempt to derive direct conclusions as to the impact of a particular form of conduct. Given that survey evidence is stated preference, rather than the revealed preference data derived from firms' and consumers' past behaviour, direct effects analysis is generally more uncertain, particularly in situations (such as the current case) where market structure is not static (due to BT's increasing rights acquisitions).

² At paragraph 5.1

- the first survey was undertaken in November 2013. In that survey, the question relied on by Ofcom when determining which content is key was question C7A: *'Thinking about the sports TV channels you receive, which of the following does your household consider essential to have access to as part of your TV service?'*. This question was asked to Sky Sports or BT Sport subscribers personally or jointly responsible for the TV service, a base of 968 respondents.
- the second survey was undertaken in October 2014. In that survey the questions most relied on by Ofcom when determining what constitutes key content were questions 10 to 13 of the survey, which asked subscribers to BT Sport and/or Sky Sports why they get those channels, and what the main reason for getting the channels is. The survey base was 612 Sky Sports subscribers and 316 BT Sport subscribers.

2.8 These two surveys are to some extent supported by other limited data and argumentation, but they remain the primary element of the evidence base adduced by Ofcom in reaching its provisional conclusions.

2.3 Analysis of Ofcom's approach

2.3.0 Ofcom is correct to determine that PL content is 'key'

2.9 The data adduced by Ofcom in section 5 of its consultation document consistently leads Ofcom to find that PL content (that is, matches in the PL competition, rather than matches played by PL clubs in other competitions) is the most valuable content to subscribers to sports channels. This result holds for both the November 2013 and October 2014 surveys, and for both Sky Sports and BT Sport subscribers.

2.10 This is supported by the high sums paid for live PL television rights in the last two auctions. In the auction for rights covering the 2013/14 to 2015/16 seasons, Sky paid £6.6m per match, while BT paid £6.5m per match. In the recently concluded auction for rights for the 2016/17 to 2018/19 seasons, BT paid £7.6m per match, and Sky paid £11m per match, a significant increase on the previous auction.

2.11 Furthermore, CPSCs without live PL rights have usually exited the market, whether by bankruptcy or by being acquired. Setanta Sports exited the UK market in June 2009 when it went into administration only days after it lost PL rights.³ ESPN's UK operation was then sold to BT in February 2013 after it was outbid for PL rights from the 2013/14 season onwards.⁴ Eurosport has continued to broadcast in the UK without PL rights, but has done so as a basic pay-TV channel rather than a CPSC which is subscribed to individually. Other CPSCs (such as Boxnation) are niche channels specialised on a single sport, rather than attempting comprehensive sports coverage.

2.12 Overall, therefore, there is overwhelming evidence that live PL matches constitute key content for the purposes of determining whether a wholesale must offer obligation

³ <http://news.sky.com/story/703112/switched-off-setanta-tv-in-administration>

⁴ <http://www.bbc.co.uk/news/business-21577676>

should be imposed. Ofcom is correct to conclude, at §5.33, that PL live television rights are key content.

2.3.1 Ofcom is correct that UCL content is key content, but underrates its importance to consumers

2.13 Ofcom finds at §5.34 of its consultation paper that UCL content '*is important to a high proportion of consumers, albeit to a lesser extent than Premier League football*'. This is a broadly appropriate conclusion, albeit that TalkTalk considers that UCL content is likely to be roughly equally important to consumers as PL content. However, Ofcom then goes on to state that '*Champions League coverage alone is unlikely to drive pay TV provider choice for a material group of customers*'. This second conclusion does not appear to be strongly supported by the data presented by Ofcom, and moreover even to the extent that it is accurate, it appears likely to be an artefact of the number of televised matches in each competition, rather than the importance of the competition itself

2.14 In Figure 5.2, Ofcom presents the results of its November 2013 survey on the importance of the PL. The question asked of respondents (who were subscribers to BT Sport or Sky Sports) was '*Thinking about the sports TV channels you receive, which of the following does your household consider essential to have access to as part of your TV service*'. The question was prompted for. Table 2.1 below sets out the results of this question, alongside the number of matches featuring PL teams televised in each competition during the 2013/14 season.

Table 2.1: 2013 Survey responses on importance of different football content, and number of live matches screened in 2013/14

Competition	(A) % essential	(B) Live matches w/ PL teams	(A)/(B)
Premier League	60	152	0.4
Champions' League	47	40	1.2
FA Cup	43	25	1.7

2.15 It can be seen from this table that, on a match-by-match basis, both the UCL and FA Cup are at least comparably important to subscribers to the PL.⁵ That is, **the difference in the stated importance of the PL and other competitions appears to largely be an artefact of the number of live televised matches in each competition**. Although they do not appear, on the basis of these data, to be as important overall, on a match-by-match basis they appear to be as important as the PL in driving consumer preferences.⁶

2.16 The same picture emerges if the data from the October 2014 survey is considered, although in this case there is a split between data for the two broadcasters, so the importance of each competition for Sky Sports and BT Sport subscribers can be considered individually.

⁵ On the other hand, it does not appear to provide significant support for the contrary- that the UCL and FA Cup are more important than the PL. To achieve comparable importance to the FA Cup, on a match-by-match basis, 258% of subscribers would have to have stated that they found the PL essential. This is clearly impossible.

⁶ It is unclear whether the same is true of League Cup football given that the League Cup was not prompted for in the November 2013 survey.

Table 2.2: 2014 Survey responses on importance of different football content, and number of live matches screened in 2013/14

Competition	Broadcaster	(A) % reason for taking	(B) Live matches	(A)/(B)
Premier League	Sky	43	114	0.4
Champions' League	Sky	28	c.30	0.9
Premier League	BT	28	38	0.7
FA Cup	BT	14	13	1.1

- 2.17 Again, on a match-by-match basis it can be seen that the UCL and FA Cup are comparably important to the PL. The survey therefore does not provide support for the hypothesis that a PL match is more important to viewers than either a UCL or an FA Cup match.
- 2.18 The one potential differentiating factor between the PL and the UCL comes when Sky Sports subscribers were asked (in the October 2014 survey) what their main reason for subscribing to Sky Sports is. With respect to that question, 27% of customers mentioned PL football, whereas only 2% specifically mentioned UCL football. However, this should not be seen as surprising. The vast majority of matches featuring PL teams on Sky Sports are PL matches: there are 114 live PL matches compared to only around 30 UCL matches, and most customers interested in UCL matches will also be interested in PL matches. If a customer is interested in both competitions, then it would seem completely plausible for them to respond that the "main reason" for them subscribing to Sky Sports is the competition with the greater amount of content. Again, this does not appear to contradict the hypothesis that a PL match and a UCL match are of approximately equal importance to customers.
- 2.19 Overall, therefore, there appears to have been no evidence presented by Ofcom that a PL match and a UCL match are of significantly different importance to consumers. Overall, the PL is likely to be more important, but this necessarily follows from the much larger number of televised matches when compared to the UCL (around four times as many). The evidence presented appears consistent with a PL match and a UCL match being treated as equal for the purposes of determining each broadcaster's market power.
- 2.3.2 Ofcom's document has no valid approach for assessing the importance of Europa League matches**
- 2.20 In addition to the UCL, the second European cup competition participated in by English clubs is the Europa League (UEL). Three clubs qualify for the UEL: the team finishing fifth in the preceding season's PL (i.e., the highest placed club that does not qualify for the UCL); the winner of the FA Cup, and the winner of the League Cup.⁷ In the event that the winner of the League Cup is one of the teams finishing in the top 5 of the PL, then the 6th placed team in the PL takes the place in the UEL. In the event that the winner of the FA Cup finishes in the top 5 of the PL, the runner up in the FA Cup takes the UEL place instead. On

⁷ The sole exception to this is that if an English club wins the UCL, but does not finish in the top-4 in the PL, the UCL winner takes the fourth UCL spot, and the fourth-placed team in the PL enters the UEL instead.

average, therefore, clubs entering the UEL tend to be those with smaller fanbases than clubs entering the UCL, but larger than PL clubs not qualifying for European competitions.⁸

- 2.21 Further English clubs may join the UEL competition after the group stages of the UCL. In each four club UCL group, two clubs progress to the knock-out stages of the UCL, the third placed club joins the knock-out stages of the UEL, and the fourth placed club is eliminated from European competition.
- 2.22 At present, live UEL rights are exclusively held by ITV, which shows matches on ITV4. It is the only competition played in by PL teams which is primarily screened live on free-to-air television. From the 2015/16 season, exclusive UEL rights have been acquired by BT, which will show them on one or more of its BT Sport channels.
- 2.23 Given that UEL matches of English clubs are shown live on ITV, the various survey questions asked by Ofcom will not have picked up the importance of UEL content:
- in Ofcom's November 2013 survey, question C7A asked about the importance of different sports and competitions when choosing a TV platform provider. In that survey, seven different football competitions (or groups of competitions) were prompted for, including the PL, UCL, and FA Cup. However, the UEL was not prompted for; this is a clear omission, which is likely to have led to the UEL being under-represented in responses, particularly when the list of competitions was otherwise comprehensive, including the catch-all response of "other non-English leagues/ cups". Moreover, as UEL matches were at the time of the survey shown on ITV4, there is no sense in which the availability (or lack of availability) of UEL matches could ever have an impact on choice of platform, as ITV4 is a free-to-air channel that is available on all platforms including Freeview/ Freesat. Given these two issues, this question contains no valid information regarding the importance of UEL rights to subscribers to sports channels.
 - in Ofcom's October 2014 survey, Q10 asked the competitions that were important for taking Sky Sports, and Q12 asked the competitions that were important for taking BT Sport. As neither of these channels showed UEL content, it is not possible for respondents to have stated that they would be more likely to take a channel due to the presence of UEL content. This evidence was relied on by Ofcom at Figure 5.3, and subsequently at §§5.23-5.28 and 5.33-5.34. Effectively, then, Ofcom could not have considered the importance of the UEL to consumers on this basis.
- 2.24 Viewing figures for UEL matches appear inconsistent with Ofcom's contention that UEL matches are unimportant for viewers. Live coverage of UEL matches has consistently

⁸ For example, this season's Capital One cup final (offering a UEL place) was played between Spurs and Chelsea, two of the best-supported sides in the PL. The teams in fifth, sixth, and seventh places in the PL were (at 4 February) Southampton, Spurs and Liverpool; two of these three sides are among the best supported sides in the PL. In the six seasons since the Europa League was established, 14 of the 19 spots available have been taken by sides finishing between 4th and 8th in the PL. Spurs have participated in four of the six seasons, and Liverpool, Everton, Aston Villa, and Fulham have each participated twice.

attracted around 1m viewers based on BARB ratings.⁹ This is broadly comparable with ratings for PL and UCL content on Sky Sports, and in excess of average ratings for PL content on BT Sport.

- 2.25 While BT Sport has also shown some UEL matches this season, their ratings for this competition are not relevant– ITV holds the rights to both the first and second pick UEL matches, and in the current season Hull were eliminated in the playoff round of the tournament, meaning that there were only two PL clubs playing in the group stages of the UEL.¹⁰ In each of the six group rounds, either Tottenham or Everton (whichever was away from home) kicked off at 1900 CET while the other (whichever was at home) kicked off at 2105 CET, enabling ITV to screen both matches in succession. BT Sport were therefore left showing matches not involving English clubs; as such, it is unsurprising that the ratings for these matches were very poor, as matches not involving PL teams have little value when screened head-to-head against matches involving PL teams.¹¹
- 2.26 As such, it appears likely that UEL fixtures featuring PL clubs (although not those featuring no PL clubs) are key content which is able to bring an audience broadly comparable to PL fixtures on midweek evenings (currently only Monday Night Football). The attractiveness of these fixtures is enhanced by participants in the UEL generally being PL teams with larger-than-average fanbases. Ofcom should include UEL rights when calculating market shares for the purposes of determining which broadcasters should be subject to a WMO obligation.

2.3.3 FA Cup content may be key

- 2.27 FA Cup rights are jointly held between BT and the BBC under a deal that runs for four years from the current season. In the same way as for the UCL and UEL, the number of matches featuring PL teams in the FA Cup is somewhat unpredictable, as the exact line up of matches depends upon results. However, due to the larger proportion of PL clubs in the competition, and the substantial gap in playing strength between the average PL club and the average non-PL club, the number of PL teams in the FA Cup will tend to be more predictable than in European competitions.
- 2.28 In the 2013/14 season, the number of matches in the FA Cup and League Cup featuring PL teams were as follows:
- the BBC screened 12 FA Cup matches live which featured PL teams; and,

⁹ Taking this season's round of UEL group matches, on 18 September UEL coverage attracted 996k viewers; on 2 October 1,004k viewers; on 23 October 1080k viewers; on 6 November 1,023k viewers; and on 30 November 985k viewers. In every one of these weeks, UEL coverage was the highest-rated programme on ITV4, and no other programme attracted more than 470k viewers, despite the presence of other sports content including Moto GP highlights, live snooker and live darts in the same weeks.

¹⁰ There were also only two English clubs in the playoff round, as Everton qualified by right for the group stages.

¹¹ In the first knockout round, BT will finally screen a match featuring a PL team (Spurs-Fiorentina). However, ratings for this match will likely be depressed by the simultaneous screening of the more attractive Liverpool-Besiktas match in the same time window on ITV, particularly as ITV's rating is likely to receive a boost as it directly follows the end of the Young Boys-Everton match on the same channel.

- BT Sport screened 13 FA Cup matches live which featured PL teams.

2.29 There is some evidence that a meaningful proportion of sports subscribers may consider FA Cup matches to represent key content:

- in the November 2013 survey, 43% of subscribers to BT Sport and Sky Sports indicated that they considered FA Cup content to be 'essential'. This is approximately the same proportion as those who considered UCL content to be essential (47%);
- in the October 2014 survey, 14% of BT Sport subscribers indicated that they considered FA Cup content to be one of the reasons why they chose to subscribe to BT Sport. This is approximately half the proportion who indicated that PL content was one of the reasons why they subscribed to BT Sport, but exceeds any other content on BT Sport (rugby union was the next highest, on 10%, despite there being many more rugby matches than FA Cup matches on BT Sport).¹²

2.30 It is notable that the timing of these surveys is liable to have depressed the proportion of football fans stating that the FA Cup is important. The two surveys were undertaken in November and October; PL teams (and teams from the second tier Championship) do not enter the competition until the Third Round proper in January. Undertaking the surveys at this time of year will have maximised the time since most football fans will have watched an FA Cup tie, and therefore may have led to the FA Cup being stated to be less important than, for example, in February when key FA Cup matches are being played by major clubs. The survey data should be taken as a lower bound on the proportion of football fans considering the FA Cup to be important, rather than as a central estimate. This should further increase the likelihood of the FA Cup being considered as key content.

2.31 Moreover, given the lower number of matches per season featuring PL teams in the FA Cup (25 versus 152), compared to the PL, it is unsurprising that fewer people stated FA Cup content to be key than PL content, as PL content is always likely to be more significant to customers' subscription decisions.

2.32 However, other evidence on the importance of the FA Cup is more mixed. The fee paid for FA Cup rights by BT Sport has been estimated at around £25m per annum (full figures do not appear to have been released).¹³ With 13 matches featuring PL clubs, the price paid is therefore about £2m per match, less than a third of the price per match paid by PL broadcasters under the current deal, and only around a fifth of the price per match paid by PL broadcasters under the deal for the 2015/16 season onwards.¹⁴

2.33 On balance, therefore, FA Cup rights are likely to represent key content. However, the situation is much more balanced than for PL, UCL or UEL rights. Ofcom should carefully

¹² BT shows approximately 17 FA Cup matches per season from the First Round Proper onwards. BT Sport broadcasts 69 Aviva Premiership matches per season, and also has live rights to the European Rugby Champions Cup and European Rugby Challenge Cup.

¹³ <http://www.mediaweek.co.uk/article/1191666/bt-sport-muscles-sky-fa-cup-100m-deal>

¹⁴ Properly, some value should be attributed to matches only featuring Championship or lower level clubs, although this is likely to be small relative to the value of matches featuring PL clubs. £1.9m per match is therefore an upper bound, and the true price is likely to be somewhat less than this.

investigate the extent to which an FA Cup match compares to a match in these other competitions.

2.3.4 No evidence is provided on the League Cup

2.34 The final competition entered by PL teams is the League Cup. This competition does not appear to have been prompted for in the November 2013 survey, making the results of that survey difficult to interpret in this regard. Similarly, it is unclear from Ofcom's paper whether the League Cup is one of the "other live football competitions" mentioned by 21% of Sky subscribers as a reason for taking Sky Sports.

2.35 Furthermore, due to the manner in which League Cup live rights are sold (bundled with rights to show Championship, League One and League Two matches), and the lack of publicity for the amount paid for these rights, it is not possible to determine even an approximate cost per match for live League Cup content featuring PL teams.

2.36 As such, there is insufficient evidence available to determine whether League Cup matches featuring PL teams are likely to be key content.

2.3.5 Public statements from BT are consistent with all matches featuring PL teams representing key content

2.37 The analysis in sections 2.3.0 to 2.3.4 above demonstrates that at least PL, UCL and UEL matches featuring PL clubs represent key content, and that FA Cup and League Cup matches featuring PL clubs may represent key content.

2.38 Statements recently made by BT and are consistent with the position that all competitive matches featuring PL teams, regardless of the competition in which they are played, represent key content. For example, BT's release to the London Stock Exchange following the award of PL rights for the seasons 2016/17 to 2018/19 stated that:

BT is to show even more live top-flight football matches on its BT Sport TV channels after winning exclusive live rights to 42 Premier League matches in each of the 2016/17 to 2018/19 seasons. This is an increase of four matches per season on the current 38.

The new rights will see BT Sport show a live Saturday evening game every Premier League weekend from 2016/17 for three seasons. This will allow BT to build on its current Saturday programming and appeal to an even larger audience, having secured the prime evening TV viewing slot.

These new Premier League games from 2016/17 will be added to the 350 exclusive live matches from the UEFA Champions League and Europa League that BT Sport will be showing from both tournaments starting this summer. The channel also has live rights to the FA Cup for the next three years.

BT Sport currently shows around 50 live matches each season featuring Premier League clubs. It will show around 115 of these matches from the 2015/16 season onwards when all competitions featuring Premier League clubs are taken into account.

2.39 In this statement, BT not only flags the matches that it will have in the PL, but also in the UCL, UEL and FA Cup. Furthermore, it aggregates these matches together to indicate that

it will show *'around 115 of these matches from the 2015/16 season onwards when all competitions featuring Premier League clubs are taken into account'*. This is exactly the same as the number of matches in the 2013/14 season that TalkTalk uses to calculate market shares in section 3 below. This statement is therefore consistent with the approach to key content detailed in this section, and used in section 3 to calculate market shares.

2.4 Conclusions on key content

2.40 On the basis of a full analysis of the evidence set out by Ofcom in its consultation paper, particularly the two surveys:

- PL matches are key content;
- UCL matches featuring PL teams are key content;
- There is little evidence adduced by Ofcom on UEL matches, but what evidence there is points to UEL matches being key content;
- On balance, FA Cup matches are also likely to represent key content;
- It is unclear whether the League Cup represents key content.

2.41 As such, there are a range of potential definitions of key content. The narrowest of these is PL matches and UCL matches; the widest is all competitive matches featuring PL teams. As set out at section 3 below, any of these market definitions leads to the same conclusion: [§<].

3 Market shares and market power

3.1 Section 2 above has set out the appropriate definition of key content for CPSCs. Given that key content has been defined, market shares for different market participants can be calculated, and these can be compared to a threshold for the point at which the market participant is likely to hold market power that can be exploited.

3.2 Ofcom considers elements of these matters in section 7 of its consultation paper. However, despite the significant change in the structure of rights that will occur at the start of the next football season, Ofcom's sole analysis of market shares (at §7.15) is entirely backwards-looking. This is inappropriate, and leads to Ofcom reaching incorrect conclusions as to which firms hold market power, and therefore which should be subject to regulatory action. WMO obligations are inherently forward-looking in their nature, and so should be imposed based on forward-looking, rather than backwards-looking, market shares.

3.3 This section is set out as follows:

- firstly, evidence on the market share threshold at which market power is likely to be found is presented. Due to the current manner in which PL, UCL and UEL rights are auctioned, and the nature of those rights, it is found that [§<];

- on the basis of the approach to key content outlined in section 2, current market shares for PL content (which leads to market power in the CPSC market) are set out. It is found that under any plausible market definition, [3<];
- the market shares for the PL content from the 2015/16 season (i.e., next season) are then set out. It is found that under any plausible market definition, [3<].

3.1 Thresholds for market shares to generate market power

3.4 Market power in the CPSC market is primarily predicated upon a channel holding rights to show attractive sports content. A strong channel cannot exist in the CPSC market without access to such content. The reason that Setanta and ESPN have exited the UK market, and that the current incumbents are Sky Sports and BT Sport, is because the incumbents have access to the most attractive content (specifically, football matches featuring PL clubs) while firms exiting the CPSC market were those that had lost access to high quality content, and particularly to PL football matches. The performance of the channel beyond its rights holdings— for example, innovative and high quality coverage— is secondary to the quality and quantity of those holdings.

3.5 However, television rights for matches involving PL clubs are not homogenous, but are instead differentiated across a range of features:

- *clubs involved in the match*— each PL club will play each other PL club (or club from another league) only a handful of times in a season; it is rare for there to be more than three competitive matches between two teams in a given campaign. A substantial proportion of viewers of PL content will be supporters of one of the teams in the PL competition; for these supporters, matches featuring other clubs may be relatively poor substitutes for ones featuring 'their' team. However, matches which do not involve the team they support may all be relatively close substitutes for one another.
- *day of the match*— PL teams regularly play on all days of the week apart from Fridays (and this last day will also be used for matches from the 2016/17 season). The day of the match will be a substantial differentiating factor by many fans, who may see matches on (say) Tuesday and Sunday as complementary to one another, rather than substitutes.
- *time of kick-off*— matches featuring PL clubs kick off at various times. Although midweek matches in domestic competitions will tend to kick off in a fairly narrow window between 1930 and 2015, matches played overseas in European competition may kick off at various times, depending upon the time zone in which the match is being played. On Saturdays and Sundays, matches kick off at a range of times, particularly 1230 and 1715 Saturday, and 1400 and 1600 Sunday. For some fans, these different kick-off times may not be good substitutes for one another, either because fans see them as complementary to one another rather than substitutes (for the subset of fans who wish to watch a large proportion of all PL games that are screened) or because fans are not able to watch at one time, but are free at a different kick-off time.

- *competition*– the competition in which the match is played is a further differentiating factor. As section 2 shows, although most televised matches featuring PL teams are likely to represent key content, there is the possibility for both horizontal and vertical differentiation between matches.

3.6 Overall, the extent of substitutability is therefore likely to differ from customer to customer. For some consumers, matches featuring PL teams will be substitutes; for others they may be complements. Moreover, even for the same consumer, some matches may be complements and others substitutes, depending upon the characteristics of the matches in question.

3.7 [redacted].

3.1.1 What market share threshold is likely to lead to significant market power?

3.8 As a starting point for significant market power, the European Commission's Guidance on the Application of Article 82 is relevant:¹⁵

The Commission considers that low market shares are generally a good proxy for the absence of substantial market power. The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations.

3.9 The same 40% threshold has been used by the UK competition authorities in their assessment of market power. For example, the OFT previously stated that:

The OFT considers it unlikely that an undertaking will be individually dominant if its share of the relevant market is below 40 percent, although dominance could be established below that figure if other relevant factors (such as the weak position of competitors in that market and high entry barriers) provided strong evidence of dominance.

3.10 [redacted]:

- [redacted].
- [redacted].
- [redacted].
- [redacted].

3.11 [redacted].

3.12 [redacted].¹⁶

¹⁵ European Commission (2009), *Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, at paragraph 14

¹⁶ See [redacted].

3.13 [redacted].

3.14 [redacted] also gives the significant advantage that it is neutral to the identity of firms holding PL rights, and Ofcom can therefore provide significant regulatory certainty to future acquirers of rights to show matches involving PL teams by consistently adopting this approach with all rights acquirers. Ofcom would be able to set out that it would expect to act in a similar manner in future, unless there was a material change of circumstances.

3.2 Current market shares for PL content

3.15 In the current (2014/15) football season, the distribution of rights to show live matches played by PL teams is as follows.

Table 3.1: Distribution of rights for 2014/15 season

Competition	Broadcaster	Total matches	Top-5 matches
Premier League	Sky	114 (45%)	77 (43%)
Premier League	BT	38 (15%)	26 (15%)
Champions League	Sky/ ITV	40 (16%)	40 (22%)
Europa League	ITV	24 (9%)	12 (7%)
FA Cup	BBC	12 (5%)	6 (3%)
FA Cup	BT	13 (5%)	7 (4%)
League Cup	Sky	13 (5%)	11 (6%)

3.16 In Table 3.1 the number of matches televised in cup competitions is based on the number of matches shown in the 2013/14 season (as the performance of PL teams in the various cup competitions is not yet known). The number and proportion of matches of top-5 teams is also shown, reflecting the references to top-5 matches in the PL's previous agreement with the European Commission.

3.17 This breakdown of top-5 matches demonstrates that there is little difference in the 'quality' of the rights of different competitions, from the perspective of the larger teams representing a greater proportion of matches. The sole exception to this is the UCL, which by definition has a meaningfully greater share of matches played by clubs in the top-5 of the PL in the previous season. As the share of top-5 rights is similar to the share of rights to all PL teams' matches, the distinction will not be made in the remainder of this paper.

3.18 Overall, on the basis of this distribution of rights, market shares for the current season are as follows (depending upon the definition of key content).

Table 3.2: Market shares (2014/15) based on key content definition

Broadcaster	PL+UCL	PL+UCL+UEL	PL+UCL+FAC	PL+UCL+UEL+FAC	All
Sky	144 (75%)	144 (67%)	144 (66%)	144 (60%)	157 (62%)
BT	38 (20%)	38 (18%)	51 (23%)	51 (21%)	51 (20%)
BBC	0	0	12 (6%)	12 (5%)	12 (5%)
ITV	10 (5%)	34 (16%)	10 (5%)	34 (14%)	34 (13%)

3.19 As such, based on the current rights holdings, [redacted].

3.3 2015/16 market shares for PL content

3.20 In the current (2015/16) football season, the distribution of rights to show live matches played by PL teams is as follows.

Table 3.3: Distribution of rights for 2015/16 season

Competition	Broadcaster	Total matches	Top-5 matches
Premier League	Sky	114 (45%)	77 (43%)
Premier League	BT	38 (15%)	26 (15%)
Champions League	BT	40 (16%)	40 (22%)
Europa League	BT	24 (9%)	12 (7%)
FA Cup	BBC	12 (5%)	6 (3%)
FA Cup	BT	13 (5%)	7 (4%)
League Cup	Sky	13 (5%)	11 (6%)

3.21 As before, the shares in Table 3.3 are based on PL clubs' cup performances in the 2013/14 season. It is important to note that public statements from BT (the broadcaster most impacted by PL clubs' cup performances) agree with this number of matches.¹⁷

3.22 Overall, on the basis of this distribution of rights, market shares for the 2015/16 season are as follows (depending upon the definition of key content).

Table 3.4: Market shares (2015/16) based on key content definition

Broadcaster	PL+UCL	PL+UCL+UEL	PL+UCL+FAC	PL+UCL+UEL+FAC	All
Sky	114 (59%)	114 (53%)	114 (52%)	114 (47%)	127 (50%)
BT	78 (41%)	102 (47%)	91(42%)	115 (48%)	115 (45%)
BBC	0	0	12 (6%)	12 (5%)	12 (5%)
ITV	0	0	0	0	0

3.23 Once more, therefore, [§6.72].

3.4 BT's growth will not lead to a more competitive pay TV market

3.24 At various places in its consultation document, Ofcom asserts that the growth of BT Sport will be beneficial for consumers, in and of itself. For example, at §6.72:

BT is a recent entrant to the pay TV market and holds content that is important to a relatively small segment of pay TV subscribers. BT is a relatively new entrant and currently has a relatively modest position in the supply of sports channels and as a pay TV retailer. Given the scale of rights BT currently holds, the impact of limited distribution of BT's content is less clear. There may be a small impact on short-term competition (i.e. lack of supply on TalkTalk). However, this may be offset if BT establishes itself as a more effective competitor.

3.25 Effectively, Ofcom appears to be saying that, in order to drive down Sky's market share in the CPSC/ pay TV market, it is willing to see other markets become less competitive. In

¹⁷ See BT's RNS release regarding the acquisition of live PL rights for the 2016/17 season onwards: " BT Sport currently shows around 50 live matches each season featuring Premier League clubs. It will show around 115 of these matches from the 2015/16 season onwards when all competitions featuring Premier League clubs are taken into account."

particular, Ofcom is willing to see TalkTalk's market share reduced [redacted], and BT to gain market share in broadband (where it is already the market leader, even before any gains in share due to the merger with EE) in an attempt to engineer some reduction in Sky's share of the pay TV and/ or CPSC market. As set out in sections 4.2.2 and 4.2.4 below, such an approach is inappropriate.

3.26 [redacted].

3.27 Ofcom has presented no evidence to rebut this analysis. Indeed, there is no evidence or even assertion from Ofcom as to the manner in which BT limiting its supply of BT Sport could enable it to become a 'more effective competitor' nor any evidence of whether and how this could benefit consumers. These are central omissions in Ofcom's analysis.

3.28 Furthermore, even if BT were a 'new entrant' and could in principle increase the competitive constraints facing Sky, it is unclear why this matters in a situation where it has a share of key content in excess of 40%. [redacted]— entry to the CPSC market via the acquisition of key content is more similar to a firm entering a market by takeover than by growing its business organically. In the case of BT, this analogy is further strengthened by the fact that BT actually purchased the UK assets of ESPN, its predecessor as the broadcaster holding the live PL rights not acquired by Sky.

3.29 Ofcom has pointed to no reason why a broadcaster should need a significant period to establish itself in the CPSC market: there do not appear to be meaningful branding effects, as most advertising for CPSCs is based on specific sporting events and rights held; and distribution deals are generally easy to acquire (indeed, [redacted]). In the absence of such evidence, Ofcom should attribute no weight to the period for which BT has been in the market in Ofcom's market assessment.

3.5 Conclusions on market definition and market shares

3.30 Overall, therefore, the conclusions on market shares are clear:

- [redacted]; and,
- [redacted].

3.31 These results are not sensitive to the definition of key content that is adopted. Any reasonable market definition, from PL and UCL content at the narrowest, to all competitive fixtures involving PL clubs at the widest, leads to the same conclusion.

3.32 [redacted].

3.33 Ofcom's analysis of (current, static) market shares at §7.15 of its consultation paper should also provide increased confidence in the results of this analysis. As demonstrated in Table 3.2, Sky currently has a share of supply in the range of 60-75% across all channels showing live PL content. If only CPSCs (i.e., Sky Sports and BT Sport) are considered, then Sky's share of supply ranges from 74% (for a key content definition based on PL, UCL, UEL and FA Cup) to 80% (for a definition based on PL, UCL, and UEL). This is broadly consistent with Sky having a 'current share of supply of key sports channels of over 80%'.

4 Incentives to distort competition

4.1 This section briefly covers the incentives on broadcasters holding a large share of key content to use this key content to distort competition either in the pay-TV market, or in other related markets. It primarily responds to Ofcom's analysis, firstly with respect to Sky, then with respect to BT.

4.1 [redacted]

4.2 At §7.19-7.20, Ofcom summarises Sky's incentives to distort competition using its Sky Sports CPSCs as follows:

...we consider that there are risks that Sky might have incentives to not supply rivals retailer's [sic] platforms or to supply only on unfavourable terms.

In the case of the smaller platforms, it is possible that there is a static incentive for Sky to supply Sky Sports. But even if no sales are recouped at the retail level the static losses involved in pursuing limited distribution would only be in the region of [redacted].

Consequently it would take only a small short or long-term benefit to render limited distribution profitable. Given this, and the evidence that BT in particular might pose a long term competitive threat to Sky's existing market position, we consider that there may be a risk that Sky has incentives to limit distribution of Sky Sports or to supply on unfavourable terms absent regulation.

4.3 [redacted].

4.4 However, Ofcom is incorrect to state that BT may represent a stronger constraint to Sky than other pay-TV providers. Two elements of the supporting evidence used by Ofcom are particularly flawed.

4.5 First, although BT has indeed invested considerable sums in acquiring sports rights and marketing in order to set up BT Sport, [redacted]:

- for fans of a particular PL club, the only way in which they can watch all of the (live televised) matches of their club is to subscribe to both channels. BT Sport and Sky Sports never show the same match.
- for fans who wish to watch all PL matches, it is obviously necessary to have access to both channels.
- for fans who have an 'appointment to view' at a particular time, it will only be necessary to subscribe to one or the other of Sky Sports and BT Sport, as BT Sport and Sky Sports never both simultaneously screen PL, UCL, or UEL matches.¹⁸ For example, fans who wish to watch PL football on Sunday afternoon will have to subscribe to Sky Sports. [redacted].

4.6 [redacted].

¹⁸ The only potential exception to this is on the final day of the season, when all ten PL matches kick off simultaneously. It is unclear whether BT holds rights to this round of matches, either at present or under the new PL rights agreement from the 2016/17 season.

4.7 This is supported by [redacted].¹⁹[redacted].

4.8 Second, Ofcom avers that ‘BT could become ‘the home of football’ in that it would be able to offer both Sky Sports and BT Sport in a bundled offer may lead to faster growth in BT’s retail pay TV business’. It is unclear why this would make BT a greater threat than (for example) Virgin Media, which can already retail both Sky Sports and BT Sport, is the second-largest pay-TV retailer (with around three times as many TV customers as BT), and has recently announced plans to extend its network to an additional 4m residential properties in the UK. Moreover, this comment fails to recognise that BT’s pay-TV offering has failed- it is currently the fourth largest pay-TV platform in the UK (well behind TalkTalk’s third place) and is one of the slowest growing platforms (TalkTalk is the fastest-growing), falling further behind its competitors each quarter.²⁰ BT TV becoming the ‘home of football’ is a contention which should only be found in BT’s press releases- it has no place in documents from regulators such as Ofcom, which should rely on evidence rather than BT’s marketing rhetoric.

4.9 [redacted].

4.2 [redacted]

4.10 Ofcom considers BT’s incentives to distort competition using its BT Sport channels at §§7.22-7.27. It concludes that:

- BT has static incentives to supply BT Sport ‘on the larger platforms’;
- it is ‘unlikely that there would be large strategic benefits to BT from limited distribution’ of BT Sport;
- BT has weaker incentives to supply TalkTalk with BT Sport ‘since any revenues it foregoes as a result of limited distribution are likely to be small’.

4.11 As a result of this analysis, Ofcom concludes that BT should not have any Wholesale Must Offer or other remedy applied to its BT Sport channels.

4.12 [redacted], as set out in the next following subsections:

- [redacted];
- Ofcom has failed to assess, as it should have done, the impact of BT’s behaviour on the broadband sector, but instead has only analysed the impact on the pay TV market. This is an inappropriate omission in light of Ofcom’s detailing of BT’s strategy at §7.25;
- Ofcom has failed to provide any assessment of the static and dynamic incentives underlying BT refusing a wholesale deal with Sky, and instead self-retailing over the Sky DTH platform;

¹⁹ [redacted].

²⁰ At the end of December 2014, BT had 1.09m TV customers, 83k more than six months previously. TalkTalk had 1.33m TV customers, 230k more than six months previously.

- Ofcom's assessment of the static incentives on BT to supply BT Sport to TalkTalk is fundamentally flawed.

4.13 As such, [§<].

4.2.1 Ofcom's evidential base is insufficient to conclude on BT's incentives following the acquisition of UCL and UEL rights

4.14 It is clear that the position of BT Sport in the 2015/16 season, when it holds exclusive UCL and UEL rights, as well as rights to PL and FA Cup matches, will be appreciably different to the position of BT Sport in the ongoing 2014/15 season. The market share evidence supporting this is set out at sections 3.2 and 3.3, above.

4.15 However, [§<], it is important fully to take into account the market changes that will result from BT's UCL and UEL acquisition, even when conducting the analysis within Ofcom's preferred direct effects based approach.

4.16 Ofcom notes at §A6.25 that it does *'not have any direct survey evidence on the likely impact this will have on the importance of BT Sport which [Ofcom] can place weight on. Therefore, [Ofcom is] limited to considering more general evidence on the number of subscribers for whom Champions League content appears to be important'*. This lack of relevant data appears to vitiate all of the analysis presented by Ofcom, and results in Ofcom having to draw conclusions that amount to little more than guesswork.

4.17 At §A6.26 Ofcom states that 47% of survey respondents who subscribe to BT Sport or Sky Sports said that UCL coverage was essential, but that *'this is likely to overstate the proportion of pay TV subscribers for whom the availability of Champions League content is likely to influence their choice of pay TV subscriber. This is because some of these respondents may be satisfied with the partial coverage that is currently available and will continue to be available on FTA.'* This assertion is unlikely to be accurate, for several reasons:

- there is no evidence presented on either how many matches BT will show on FTA television, nor which games will be shown. For example, if BT commits to show each English/ Scottish club once on FTA, it would have to move only five matches to FTA (of approximately 40), and would be able to choose the least attractive matches for each side, which would limit the impact on the strength of BT Sport as a pay TV proposition, particularly since many of these matches may be played at kick-off times that are unattractive for the British television market.²¹
- Ofcom presents no evidence on what proportion of pay TV subscribers are satisfied with the partial coverage available on FTA even now, let alone the coverage that would exist following the rights' acquisition by BT.

²¹ For example, in the current season all teams would have been shown on FTA by screening Ludogorets (of Romania) v Liverpool; Maribor (of the Czech Republic) v Chelsea; Besiktas v Arsenal; CSKA Moscow v Man City; and Maribor v Celtic. CSKA Moscow's home Champions' League matches kick off at 1700 UK time, which would make them particularly unattractive for a British television audience.

- When stating whether the UCL was essential to them, pay TV subscribers may already have taken into account the presence of UCL matches on FTA television, and only answered whether they would require the UCL on their pay TV provider in addition to the coverage on FTA TV. This would imply that the proportion stating UCL coverage to be essential may in fact be understated, rather than overstated, due to BT's likely reduction in the quantity and quality of UCL matches on FTA.
- Moreover, it is unclear in what manner FTA coverage will be offered by BT. If this is provided via temporary decryption of the BT Sport channels, then this would not reduce the harmful impact on TalkTalk TV customers, who would still have to switch to another platform which carried the BT Sport channels on an encrypted basis to obtain even the 'free to air' coverage.

4.18 Ofcom has also failed to attribute any impact at all to UEL rights when considering the change of circumstances for next season. The UEL rights bring with them a further 24 games per season featuring PL teams, games which (as with the UCL) are weighted towards the larger English clubs, particularly since the fifth placed finisher in the PL obtains a place as of right and in most years the sixth placed team in the PL will also qualify for the UEL.

4.2.1.1 Ofcom's lower bound on the proportion of subscribers seeing BT Sport as essential is implausibly low

4.19 At §A6.18, Ofcom states that:

in our October 2014 survey, 10% of respondents taking BT Sport told us they switched pay TV provider or started a pay TV subscription to get BT Sport initially. These respondents may have taken such actions solely to get BT Sport. If so, this would suggest that BT Sport is likely to be very important to them. This would point to at least 2% of all pay TV subscribers as a lower bound for the size of the group that are unlikely to consider a pay TV service that cannot offer BT Sport.

4.20 Ofcom makes a fundamental error of reasoning in its analysis in the paragraph, which means that it is likely significantly to underestimate the proportion of BT Sport subscribers who consider it to be essential. Ofcom has made this error by failing to reflect which groups of customers might have needed to switch provider to take BT Sport:

- no customer already taking BT TV would have needed to switch provider to obtain BT Sport, as they were already on a platform offering it. TalkTalk is not able to calculate the proportion of BT Sport subscribers who were BT TV subscribers prior to BT Sport being launched, but would expect it to be substantial;
- no customer already subscribing to Sky's DTH TV platform would have needed to switch pay TV provider or take a new pay TV subscription in order to obtain BT Sport, as they were also on a platform offering it – for free if they take BT broadband, or via BT's self-retail offer if they take BT or TalkTalk broadband. It is at least in principle possible that some of these customers switched broadband provider to obtain BT Sport more cheaply, but as they question asked whether they had switched pay TV provider, there should be little or no switching amongst Sky DTH viewers;

- customers subscribing to Virgin Media have been able to obtain BT Sport on their platform since 15 August 2013. This was before the first PL match played on the BT Sport channel (Liverpool v Stoke City, 17 August 2013), and so there is unlikely to have been significant switching away from VM to BT TV (or Sky TV) before this date.

4.21 As such, the pool of customers who could reasonably be expected to have considered switching pay TV provider only comprises customers who want BT Sport who:

- do not have an existing pay TV provider; *or*
- are TalkTalk TV customers; *or*
- were Virgin Media customers who switched platform before 15 August 2013.

4.22 Ofcom has therefore undertaken the wrong calculation in order to determine that 2% of pay TV subscribers is the lower bound for the proportion who would consider BT Sport very important. Effectively, there will be a proportion of BT's pre-existing TV customers who *would have* switched provider to get BT Sport but did not have to do so because of their prior choice of pay TV provider; a proportion of Sky TV customers who would have been willing to switch if BT had not self-retailed BT Sport over the Sky DTH platform, and a proportion of Virgin Media subscribers who would have switched if BT and Virgin Media had not entered into a wholesale agreement for the supply of BT Sport. All of these groups of customers need to be adjusted for in Ofcom's calculation.

4.23 Furthermore, and more crucially the survey evidence was based on the period before BT acquired UCL and UEL rights and therefore will significantly underestimate the proportion of subscribers who will see BT Sport as essential from the start of the 2015/16 football season.

4.24 Ofcom's lower bound is therefore well below a plausible level for the proportion of subscribers who would see BT Sport as essential. Given the scale of the TV businesses of BT, Sky and Virgin Media, it is unlikely that less than 40% of BT Sport subscribers would see BT Sport as essential.

4.2.2 Ofcom has failed to take account of the impact of BT's behaviour on broadband markets

4.25 At multiple occasions in the document, Ofcom notes that the aim of BT's acquisition of PL rights, and subsequently launching BT Sport, has been to benefit its broadband business. At §§7.25-7.27 Ofcom states that:

BT's business model is therefore based upon its ability to bundle BT Sport and BT broadband. As BT is able to self-retail on the Sky DSat platform²⁰³ and can offer sport-broadband-voice bundles, it has an incentive to self-retail BT Sport on the DSat platform since its ability to acquire and retain broadband customers on that platform is increased.

On TalkTalk, BT would not be able to bundle its BT Sport and BT broadband in the same way as on the Sky DSat platform, because TalkTalk's pay TV packages are only available

to its broadband customers. Therefore a self-retail arrangement is unlikely to align with BT's business model.

Given TalkTalk's limited subscriber base, BT may therefore have incentives not to supply TalkTalk with its channels so as to protect its own broadband base and to acquire customers from TalkTalk for its bundled pay TV/BT Sport/BT broadband products. [emphasis added]

4.26 Ofcom goes on at §7.37 to state that:²²

*BT does not supply BT Sport to subscribers on the TalkTalk YouView platform although any BT broadband customer can watch BT Sport online via the BT Sport app. As set out above this is likely to reflect the relatively small number of TV subscribers on the TalkTalk platform and **the impact that supply of BT Sport to TalkTalk might have on BT's broadband business.** [emphasis added]*

4.27 [redacted]:

[redacted]²³

4.28 It is important to further note that BT does not offer bundles which include pay TV and BT Sport, but do not include line rental or BT broadband. Similarly to TalkTalk, BT's pay TV product is tied to its fixed line broadband product. All BT bundles therefore include broadband.

4.29 In light of this openly stated business strategy, it is clear that Ofcom was required to assess and then take account of the impact of BT's behaviour on the markets for standard and superfast broadband, as the core aim of BT's behaviour is, as set out above, to influence these markets. However, Ofcom makes no such assessment anywhere in its consultation document. Ofcom's conclusion on BT, at §8.21, is as follows:

BT's current holding of key sports content appears likely to affect the purchasing decisions of only a small proportion of pay TV customers. Whilst there could be a small impact on static competition as a result of limited distribution of its key content, BT is a relative new entrant in wholesale sports supply and at present it has only a modest position at the wholesale and retail market levels. The small impact on static competition from limited distribution of BT's key sports content could therefore be offset if BT is able to establish itself as a more effective competitor.

4.30 This conclusion is flawed in the context of BT's strategy, as set out by Ofcom, to use BT Sport to advantage its broadband business. BT does not have a 'modest position' in the wholesale and retail market for broadband— it has significant market power at the wholesale level (as found in the recent FAMR) and is by some way the market leader at the broadband level. Ofcom's failure to acknowledge this and take it into account in its analysis is a serious— and indeed surprising— omission. Ofcom must remedy this, and then consult again on its findings in this area, before reaching any provisional conclusions on its WMO review. It is a matter both of principle and of good economics that Ofcom must take into account the relevant downstream markets which are, or could be, directly impacted

²² It is not clear why the comment that 'any BT broadband subscriber can watch BT Sport online via the BT Sport app' is relevant here. It is not possible for a TalkTalk YouView subscriber to be a BT broadband customer; TalkTalk only sells its TV products bundled with broadband.

²³ [redacted].

through BT's refusal to deal BT Sport. As BT's pay TV product is tied to BT's broadband products, there is a direct relationship between refusal to deal BT Sport and BT's market shares in broadband markets.

4.2.3 Ofcom has failed to assess the reasoning behind BT refusing wholesale supply to Sky

4.31 Ofcom repeatedly refers (for example, at §7.22) to BT having incentives to supply BT Sport to 'the larger platforms', by which it means Sky's DTH platform and Virgin Media's cable pay TV platform. However, Ofcom has failed adequately to take account of the fact that BT has refused wholesale supply of BT Sport to Sky, and has instead only been willing to engage in self-retail of BT Sport over the Sky platform.

4.32 Such an approach will have involved profit sacrifice by BT. By refusing a wholesale deal to Sky:

- BT will forego any possibility of obtaining a minimum revenue guarantee from Sky, [∞].
- Demand for BT Sport is likely to be lower than if it were offered on a wholesale basis to Sky, as Sky will not market the channels to its subscriber base, and there will be increased hassle for Sky subscribers in subscribing to BT Sport, having to make a separate phone call to BT and provide details, and having separate bills for BT Sport and for the customer's other pay TV/ broadband services.

4.33 Ofcom has undertaken no analysis of why BT has engaged in this type of profit sacrifice. In general, however, this type of behaviour suggests that BT has rather weak incentives to supply even the Sky platform, as it is not seeking to maximise its direct revenues when doing so; and/or that it considers it can win a significant number of broadband customers (thus strengthening its already market-leading position in the broadband market) by doing so. Both of these are potentially problematic findings, which imply that Ofcom should look to impose a wholesale must offer obligation on BT Sport. BT's incentives to undertake such behaviour will likely increase further when it increases its holding of matches featuring PL teams from the start of the 2015/16 season through the holding of UCL and UEL rights.

4.2.4 Ofcom's assessment of BT's incentives to supply TalkTalk is flawed

4.34 Ofcom's key conclusions on BT's incentives to wholesale BT Sport to TalkTalk are at §7.27 of its consultation document.

Given TalkTalk's limited subscriber base, BT may therefore have incentives not to supply TalkTalk with its channels so as to protect its own broadband base and to acquire customers from TalkTalk for its bundled pay TV/BT Sport/BT broadband products.

4.35 The first fundamental error in this analysis is Ofcom does not state anywhere why it matters that TalkTalk has a 'limited subscriber base' (even leaving aside, as set out at §4.8 of this submission, that TalkTalk's subscriber base is considerably larger than that for BT TV). From an economic perspective, unless there are fixed costs involved in each supply

contract, there is no difference in the incentives to supply a small distributor and a larger distributor since the benefits and costs of supply will vary linearly in respect of the customer base. Ofcom does not point to any such fixed costs, and TalkTalk has seen no evidence that such costs in fact exist. Ofcom cannot legitimately advance this argument without setting out why TalkTalk's 'limited base' is of any particular relevance. As currently described, Ofcom's approach seems to be [redacted].

4.36 Secondly, it is unclear why it should be considered legitimate for BT to use BT Sport to acquire TalkTalk's broadband customers. [redacted].

4.37 Effectively, Ofcom's argument is analogous to allowing a dominant firm to engage in predatory pricing because it will be profitable in the long term as it will earn additional profits once it has predated rivals out of the market. Such an argument is rightly impermissible in predatory pricing cases, and should also given no weight in this case.

5 Conclusions

5.1 Overall, Ofcom has reached two justifiable conclusions, but has reached a third conclusion that is vitiated by egregious analytical errors.

- [redacted].
- Similarly, Ofcom has concluded that [redacted].
- [redacted]:
 - [redacted];
 - [redacted];
 - [redacted];
 - [redacted];
 - [redacted].

5.2 [redacted].

5.3 Furthermore, [redacted]. This will provide Ofcom with future flexibility to changes in the allocation of rights between broadcasters, and enable the prospect of a WMO to be taken into account when broadcasters are bidding for rights.