

Ofcom Pay TV Second Consultation

Ofcom BSkyB DTT Proposal Second Consultation

Tiscali UK Ltd Consultation Response – December 2008

This submission addresses conclusions and proposals made by Ofcom in the consultation documents and offers Tiscali's perspective on concerns that should be acknowledged as Ofcom reaches a conclusion of this work.

Tiscali is in general agreement with the conclusions and proposals Ofcom makes in both documents, which directly address issues raised in previous responses Tiscali has submitted. In particular, the need for a wholesale remedy to allow access to premium content by alternative TV service operators has been answered and it will be essential now for Ofcom to focus on implementation issues to ensure that the desired effects of regulatory action are achieved and all the benefits for UK consumers transpire.

Market analysis and conclusions

Tiscali agrees with Ofcom's market definitions and market power conclusions. Future developments that could change market function and boundaries include increased use of video on demand (VOD) and different ways to view familiar premium content via the internet, on PC or TV. There is also the potential for new rights structures and ways for content owners to monetise those rights that could alter the basic assumptions that Ofcom has had to make at this time in completing its work. As with all regulatory provisions, Ofcom must be prepared to review the market concerned and the remedies applied at future times, either because of trigger circumstances changing or because of fundamental changes that need to be addressed more rapidly.

Ofcom concludes that related markets such as DVD rental and pay per view (PPV) do not constrain those for premium content that Sky has significant market power in. This is correct, but the market is still evolving and different uses of technology will produce new variations on PPV and VOD that will perhaps strengthen the constraining effects on premium linear channels. The evolution of services will depend to a large extent on the success of Ofcom's current proposals, so there is an element of circular reasoning present in making this point. It is worth noting that one type of service development recently announced is Sky's online premium content subscription offering, at prices that compete with its established TV offerings.

Sky does have incentives to favour its own retail operation and Ofcom correctly concludes that there has been no extension to Sky wholesaling beyond the existing arrangement with Virgin Media and in spite of the desire of other operators to negotiate their own one. Furthermore, the Sky by Wire retail arrangement does not work for alternative suppliers and is not a satisfactory way to address Sky's position in premium content broadcasting. Sky exercises too much restriction over the packaging of Sky by Wire services and prices them too highly for them to achieve any significant take up in the market. Tiscali's experiences as a Sky by Wire operator confirm this view.

Ofcom correctly identifies a strong history of innovation by Sky on its satellite platform and suggests that similar levels of development applied to other platforms would be desirable and facilitated by wholesale access to premium content. The type of innovation that Ofcom refers to has been present on the IPTV platform and is exemplified by Tiscali in some of the service functionality it offers. This would include subscription VOD (SVOD) and PPV services as well as aspects of electronic programme guide (EPG) and digital video recorder (DVR) functionality, as examples. The fact is that the limits imposed on the roll out of IPTV, be it by the lack of access to premium content or the inability to economically provide services on the incumbent telecommunications network, has meant that these innovations do not reach the vast majority of the UK population. This, of course, means that the UK consumer is denied certain types of choice and quality that all would want and this is what Ofcom seeks to address.

As a final point on market analysis, Tiscali agrees with Ofcom's position on content aggregation and believes that it generally produces beneficial results for consumers. This is especially true if one accepts that aggregation of content is necessary for any market participant to construct a viable pay TV proposition. Ofcom seeks to address the market power Sky enjoys having aggregated content without radically affecting its ability to aggregate and intervening in the way in which content rights are sold. The sustainable success of the European Commission football rights intervention is yet to be demonstrated and it would not serve consumer interests to add to or extend it in any way.

Remedies

Tiscali has always supported the concept of a regulatory remedy that requires Sky to wholesale premium content to other retailers and approves of Ofcom's proposals. Tiscali also agrees that Ofcom's sectoral powers should be used to implement the remedies.

Other operators should be able to buy the full range of premium sport and movies content from Sky at prices that enable competitors to construct viable packages and offer consumers increased choice. It is clear that any retailer supplying residential customers should be able to purchase wholesale from Sky. Ofcom raises the question of whether retailers on Sky's own platform should qualify for the wholesale arrangements. It is possible that this outcome may confuse some consumers and it would not serve the purpose of developing other platforms, as Ofcom points out. However, to exclude retailers on the Sky platform may be an option lacking rational justification that could be disputed by such retailers on the grounds of discrimination. The presence of stand-alone premium package alternatives on the Sky platform would certainly put an end to buy-through, but it would probably be ended anyway by similar alternatives on other platforms such as Freeview and Freesat. All pay TV operators use buy-through to some extent, so caution should prevail as decisions are taken to implement measures that will put an end to it.

Ofcom correctly identifies other non-price issues covering functionality, security and technical details that should be a part of the offer arrangements.

Ofcom would, quite reasonably, like to know the level of pricing for wholesale content that would be required by competing operators to enable them to supply their

own services. This could inform the complex task of deciding how Sky's wholesale pricing should be derived and controlled. Unfortunately, it is probably true to say that most retailers couldn't supply that detail without having an idea of what levels Sky would be aiming for and how the wholesale arrangements would affect Sky's retail pricing. It is not likely to be accurate to assess the retail price of Sky's premium content as the incremental difference between package prices, because of the effects of aggregation and buy-through. With the fundamental changes brought about by a wholesale must offer remedy, Sky could be expected to revise retail prices. This may mean that basic package prices fall significantly and higher prices are introduced for premium channels and packages. In such a scenario, Ofcom would find that action taken reduces charges for content that was not subject to any concern and increases them for content alternative retailers now have wholesale access to. The problem would then become one of cost and price assessment, to ensure a reasonable wholesale price and that Sky's wholesale customers could offer competitive premium packages.

Because of the current lack of clarity on the retail price of premium content, there will be considerable work to do to reach a point where price regulation can operate effectively. If an outcome like the one referred to above transpires, it may be that clearer, more cost-reflective pricing of premium content emerges. This could help Ofcom to derive retail-minus wholesale prices, which will be desirable, as long as retail prices are altered first. A mainly retail-minus approach should be followed when there is an overriding need to address retail competition issues, as there is today, but it is possible that pricing policy changes as discussed above could lead to concerns around wholesale margins. Ideally, Ofcom would be able to implement the cost-based crosschecking suggested, assisted by the movements in price that would occur. It would be sensible to derive a reasonable level of new entrant costs as a target for the check, as most of the competing operators that would take advantage of the wholesale deal would be effectively new entrants.

It will be important for Sky to be able to demonstrate a level of transparency of internal trading once the new regime is introduced. This must include rate publication and significant accounting separation data to allow Ofcom to check the operation of the new wholesale arrangements and ensure against discrimination.

Implementation

Tiscali agrees with the approach set out by Ofcom in relation to the definition of which content and channels should be covered by the wholesale obligation. This recognises the complexities and potential difficulties that are presented by having to address the task. Ofcom must be able to deal with alterations in channel content and structure pragmatically and flexibly, to remove any incentive for manipulation of the arrangements by Sky. Any transition arrangements required to deal with instances where the wholesaling obligation is withdrawn for particular channels must be adequately specified to account for the effects on the purchasing retailer and its service offering. This is likely to require at least six months of continued supply by Sky, however it may not be an issue if Sky would intend to continue supply of the channel without premium content in any case.

VOD services are critically important to IPTV and the development of platform competition in the UK. Tiscali currently offers both PPV and subscription VOD

services. The model for this is TV-based 'pull VOD' and Tiscali suffers from not being able to include premium subscription content to which Sky has rights and over which it has monopoly control. Content that Tiscali does offer is comprehensive and of high quality, but does not include 'first run' movies that would make services attractive and able to compete with Sky's premium movie channels. TV-based 'push VOD' services are little more than automated video recorder facilities and should not be considered equally important in this context.

Ofcom points out that licence conditions will relate to linear channels and an obligation to wholesale an SVOD service cannot be applied if it does not exist. Requiring Sky to wholesale Sky Anytime 'push VOD' will have no effect on the competitive market. Ofcom suggests that Sky could be required to produce a wholesale SVOD service so that it could be sold to IPTV operators in need of the relevant content. This solution will be a good one if Ofcom is able to enforce it and assuming that Sky has the relevant rights to the premium content. It should be acknowledged that Sky already makes a significant proportion of its premium movie content available on Sky Player (the PC-based VOD service for Sky premium subscribers) and is launching Sky Player TV to make premium content available by subscription on PC as a standalone service. These developments mean that Sky already supplies premium content to a retail VOD service and that distinctions relating to linear and VOD distributions may be artificial, to say the least. Ofcom should take a pragmatic approach to identifying services provided by Sky based on its premium rights and how these may translate into wholesale propositions. Traditional interpretations of TV channels and retail distribution methods should not hinder progress towards the objective of effective wholesale arrangements and increased consumer choice.

Tiscali agrees with Ofcom's suggested approach to security, subscriber issues and service development and is very willing to assist as these details are negotiated in future phases of implementation. A clean feed of content that limits the amount of Sky promotion should be provided, available to be picked up directly by alternative retailers at an agreed point of handover.

Conclusion

Tiscali believes that Ofcom has made good progress with a very difficult subject in reaching the point it has with this review. Tiscali supports the proposals made and encourages Ofcom to push forward with implementation at the earliest opportunity.

The wholesale must-offer remedy is integral also to the consultation on Sky's DTT proposals and Tiscali believes that Sky should be allowed to proceed on the condition that the remedy obligations are complied with in the future. Other comments made by Tiscali specific to DTT are contained within the response to the first consultation.

Of key concern to Tiscali is that SVOD services that include premium content are enabled as a result of this review and actions taken by Ofcom. Various points have been made above regarding the ability of Ofcom to impose the remedy on VOD services and it is important that Ofcom continues to address details and negotiate this area with Sky so that the IPTV platform and its ability to increase consumer choice and benefits are not ignored by this process.