



## Competition Act 1998

Complaint by British Telecommunications plc against  
British Sky Broadcasting Group plc regarding the wholesale  
supply of Sky Sports 1 and 2

Request for Interim Measures

CW/01106/05/13

This version is non-confidential  
Redactions are indicated by [X]

Final Decision

31 July 2013

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# Glossary of terms

The following abbreviations are used in this document:

**BT:** British Telecommunications plc;

**BT's Complaint:** BT's complaint against Sky, dated 24 May 2013, alleging a breach of Chapter II of the CA98 and/or Article 102 TFEU;

**BT's Representations:** BT's representations of 19 July 2013, provided in response to the Provisional Decision;

**BT Infinity:** BT's fibre-based, super-fast broadband service;

**BT Sport:** The TV channels BT Sport 1, BT Sport 2 and ESPN channels, which are marketed by BT collectively as 'BT Sport';

**BT TV:** BT's retail pay TV offering (comprising services over YouView or Cardinal STBs);

**CA03:** Communications Act 2003;

**CA98:** Competition Act 1998;

**Cardinal:** BT's legacy platform, used along with YouView, to deliver its BT TV service. The Cardinal platform exists in two variants, Cardinal 2.0 and Classic;

**CAT:** Competition Appeal Tribunal;

**CC:** Competition Commission;

**CoA:** Court of Appeal;

**CPSCs:** Core Premium Sports Channels, defined in Ofcom's Pay TV Statement as (i) wholesale bundles including HD and/or SD and/or interactive versions of Sky Sports 1 and/or Sky Sports 2 and (ii) wholesale bundles including ESPN;

**DSat:** Digital satellite;

**DTT:** Digital terrestrial television;

**Enforcement Guidelines:** Ofcom's guidelines for the handling of competition complaints and complaints concerning regulatory rules, July 2012:  
<http://stakeholders.ofcom.org.uk/consultations/draft-enforcement-guidelines/enforcement-guidelines/>;

**ESG:** Executive Steering Group – a senior management body within BT, authorised by the BT plc Board;

**ESPN:** ESPN Global Limited;

**Freeview:** Freeview is a service which offers free-to-air digital TV channels, radio stations and interactive services through an aerial;

**Grant-Back Condition:** Proposal of Sky whereby its wholesale supply of SS1&2 to BT's YouView platform is conditional on BT wholesaling BT Sport channels to Sky for retail on Sky's satellite platform;

**Interim measures:** Interim relief granted under section 35 CA98;

**Interim period:** Period covered by the investigation of BT's Complaint;

**Multicast:** IP multicast allows a single source of IP traffic to be distributed to multiple recipients. Multicast is analogous to traditional broadcast TV in that the load on the source of the traffic does not vary with the number of end users. With multicast the IP packets are replicated within routers in the network in response to end users wishing to access the multicast stream;

**NOW TV:** An internet-based instant streaming TV service provided by Sky. NOW TV is accessible through web browsers, via smartphone, tablets and Xbox games consoles, and through apps downloaded to STBs including those for YouView;

**Pay TV:** TV content accessed by consumers on a subscription basis (such as Sky TV and BT TV) and non-subscription (i.e. 'pay per view') pay-TV services;

**Pay TV Statement:** Ofcom's *Pay TV Statement*, 31 March 2010, available at: [http://stakeholders.ofcom.org.uk/binaries/consultations/third\\_paytv/statement/paytv\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/third_paytv/statement/paytv_statement.pdf);

**PL or Premier League:** The Premier League relates to both the football competition (currently the Barclays Premier League) and the organising body of the Barclays Premier League. References in this document are to the competition itself, rather than the organising body;

**Provisional Decision:** Ofcom's provisional decision on BT's request for interim measures, 9 July 2013;

**Setanta:** Setanta GB. Setanta GB operated Setanta Sports 1 & 2 in Great Britain. Setanta GB went into administration on 22 June 2009;

**Sky:** British Sky Broadcasting Group plc;

**Sky's Representations:** Sky's representations of 19 July 2013, provided in response to the Provisional Decision;

**Sky's Response:** Submissions made by Sky in response to BT's Complaint, prior to Ofcom issuing the Provisional Decision;

**Sky TV:** A pay TV offering to residential subscribers, provided over Sky's satellite platform as well as to various internet-enabled devices;

**SPL:** Scottish Premier League;

**SS1&2:** Sky Sports 1 and Sky Sports 2;

**SSSL:** Sky Subscribers Services Limited, a subsidiary of Sky;

**STB:** Set top box;

**TalkTalk or TTG:** TalkTalk Telecom Group plc;

**TFEU:** Treaty on the Functioning of the European Union;

**Unicast:** IP unicast is the usual method for delivering video to end users via the internet. With unicast, a separate stream of IP traffic is generated from the providers server in response to each request from an end user, even when multiple end users are requesting exactly the same content (such as a live streamed TV channel);

**Virgin Media or VM:** Virgin Media Limited;

**VoD:** Video on demand;

**WMO:** Wholesale must-offer. Regulatory obligation set by Ofcom in its Pay TV Statement, requiring Sky to provide wholesale access to premium content (SS1&2) on regulated terms;

**YouView:** A joint-venture between the BBC, ITV, Channel 4, Channel 5, Arqiva, BT and TalkTalk offering a subscription-free digital TV service, delivered via a combination of a broadband internet connection, television aerial and a YouView set-top box. YouView is one of the two platform systems used by BT to deliver its BT TV service.

## Section 1

# Summary

## Introduction

- 1.1 On 24 May 2013 Ofcom received a complaint from British Telecommunications plc (“BT”) alleging that British Sky Broadcasting Group plc (“Sky”) is, and has been, abusing a dominant position in breach of the Chapter II prohibition in the Competition Act 1998 (“CA98”) and/or Article 102 of the Treaty on the Functioning of the European Union (“TFEU”). BT alleges that Sky’s offer of wholesale provision of Sky Sports 1 and Sky Sports 2 (“SS1&2”) to BT imposes terms on BT that amount to an abuse of Sky’s dominant position. Specifically, BT alleges that Sky is making wholesale supply of SS1&2 to BT’s YouView platform conditional on BT wholesaling its BT Sport channels to Sky for retail on Sky’s satellite platform (“the Grant-Back Condition”).
- 1.2 On 14 June 2013, Ofcom opened an investigation under section 25 CA98 on the basis that we have reasonable grounds for suspecting an infringement of Article 102 TFEU and/or the Chapter II prohibition.

## BT’s request for interim measures

- 1.3 BT has made an application for interim measures pursuant to section 35 CA98 either to restrain Sky from insisting on the Grant-Back Condition, or to mandate Sky to provide wholesale access to SS1&2 on equivalent terms to those which Sky has already agreed for other platforms.
- 1.4 BT states that, if it is denied wholesale supply of SS1&2, it will [X].<sup>1</sup> BT submits that the launch of BT Sport will represent [X]. BT argues that serious and irreparable harm will arise because [X]. BT also submits that interim measures should be granted in order to protect the public interest.

## Legal framework

- 1.5 Ofcom may issue an interim measures direction where it has commenced an investigation under section 25 CA98 (which is ongoing) and where it considers that it is necessary to act as a matter of urgency for one of the following purposes:
- 1.5.1 to prevent serious, irreparable damage to a particular person or category of persons; or
- 1.5.2 to protect the public interest.<sup>2</sup>
- 1.6 If we consider that the test is met then we may grant interim measures at our discretion. In exercising this discretion, we consider that we should have regard to other relevant considerations, including the impact on Sky of granting the proposed interim measures direction and any relevant third party interests.
- 1.7 The timing of BT’s application for interim measures is such that we are assessing it at the very start of our investigation, before we have developed our thinking on the

<sup>1</sup> BT’s Complaint, paragraph 6.21.

<sup>2</sup> Section 35(1) and (2), CA98.

substance of BT's complaint (beyond concluding that the test in section 25 CA98 is met). When considering whether to grant interim measures, we have therefore not yet formed a view on whether Sky's conduct is abusive, or the extent to which any such abusive conduct might distort competition. In assessing BT's application, we have nevertheless borne in mind the importance of considering the extent to which irreparable damage may be caused during the interim period of our investigation which could not subsequently be remedied by our final decision. We have also considered the quality of the evidence before us, taking into account the nature of the directions sought and the fact that (in the context of this interim procedure) no breach of competition law has yet been found.

- 1.8 In our provisional decision in respect of BT's application for interim measures, dated 9 July 2013 (the "Provisional Decision"), we provisionally concluded that we should refuse BT's application for interim measures.

### Ofcom's decision

- 1.9 Both BT and Sky provided representations in response to the Provisional Decision on 19 July 2013 ("BT's Representations" and "Sky's Representations", respectively).
- 1.10 We understand that, in the absence of interim measures, [redacted].<sup>3</sup> BT submits that Sky's conduct will have the direct effect [redacted] which, in turn, will cause serious, irreparable damage to BT and/or to the public interest.
- 1.11 Accordingly, in order to consider whether there is a need to act urgently to direct Sky as requested by BT by 1 August 2013 in order to prevent serious, irreparable damage to BT and/or to protect the public interest, we need to address the impact during the period of our investigation that the absence of SS1&2 on YouView will have on take-up of BT's YouView service and/or BT's incentive to bid for future sports rights.
- 1.12 However, we are not satisfied on the evidence that BT will suffer serious, irreparable damage or that the public interest will be harmed such that we need to act urgently in this manner. In reaching this conclusion, we have considered BT's ability to acquire pay TV subscribers (in particular premium sports subscribers) to BT Sport and BT's YouView platform during the period of our investigation, as set out in BT's Complaint. We have also taken into account the role that BT expects its investment in sports rights and BT Sport to play in acquiring and retaining broadband subscribers, [redacted]. We note in particular:
- 1.12.1 BT has not provided us with any analysis of [redacted];
- 1.12.2 business planning targets that have been provided to us and that were prepared on the assumption that BT would have wholesale access to SS1&2 and [redacted], envisaged [redacted] take-up of YouView in the interim period as a result of BT offering BT Sport;
- 1.12.3 on the evidence available to us, we do not consider that the absence of SS1&2 will have a large adverse impact on BT's ability to build its YouView subscriber base in the interim period;
- 1.12.4 to the extent that there were to be an adverse effect on YouView take-up in the period of our investigation as a result of the absence of SS1&2, then

<sup>3</sup> We also consider alternative scenarios in Section 4

[§]. While in the longer run Cardinal may well [§], this option is likely to partially mitigate any short run impact;

- 1.12.5 taking into account BT's strategy for acquiring and retaining broadband subscribers, we consider that [§]; and
  - 1.12.6 finally, BT has not explained how successful the take-up of BT Sport and BT's YouView platform must be in the period of our investigation in order for it [§].
- 1.13 Having carefully considered all of the evidence and submissions provided to us by both parties and their representations in response to the Provisional Decision we remain of the view that it is not necessary to grant interim measures as a matter of urgency in order to prevent serious, irreparable damage to BT or to protect the public interest.
- 1.14 This decision deals with BT's application for interim measures. Separately we are continuing with our investigation of whether Sky's insistence on the Grant-Back Condition as a condition of supply of SS1&2 to BT's YouView platform constitutes an infringement of the Chapter II prohibition and/or Article 102.



## Section 2

# Introduction

- 2.1 On 24 May 2013 we received a complaint from BT alleging that Sky is, and has been, abusing a dominant position in breach of the Chapter II prohibition in the CA98 and/or Article 102 of the TFEU (“BT’s Complaint”).
- 2.2 BT alleges that Sky’s offer of wholesale provision of SS1&2 to BT imposes terms on BT that amount to an abuse of Sky’s dominant position in the wholesale market for Core Premium Sports Channels (“CPSCs”).<sup>4</sup> Specifically, BT’s Complaint alleges that Sky is making wholesale supply of SS1&2 to BT’s YouView platform conditional on BT wholesaling BT Sport channels to Sky for retail on Sky’s satellite platform (“the Grant-Back Condition”).<sup>5</sup>
- 2.3 On the basis that we considered there to be reasonable grounds to suspect that the Chapter II prohibition and/or Article 102 has been infringed, and that the complaint met our administrative priorities, we considered it appropriate to investigate the matters raised in BT’s Complaint. Pursuant to Regulation 4(2) of the Concurrency Regulations, the Office of Fair Trading agreed that we should exercise prescribed functions in relation to this case. Accordingly, on 14 June 2013, we opened an investigation under section 25 CA98.<sup>6</sup> We consider that the section 25 test continues to be met as at the date of this decision.
- 2.4 BT’s Complaint includes a request that we grant interim measures under section 35 CA98 either to restrain Sky from insisting on the Grant-Back Condition, or to mandate Sky to provide wholesale access to SS1&2 on equivalent terms to those which Sky has already agreed for other platforms.<sup>7</sup> The purpose of this document is to consider BT’s interim measures request. BT’s Complaint is being separately considered in line with our standard procedures.<sup>8</sup>
- 2.5 BT submits that it is necessary for us to grant interim measures in order to prevent serious, irreparable damage to BT. [§<].<sup>9</sup>
- 2.6 BT also submits that we should grant interim measures in order to protect the public interest. In this respect, BT states that the impact on its YouView platform will distort competition in the retailing of packages containing premium sports channels.<sup>10</sup> BT also states that there is a clear public interest in seeking to encourage more viable bidders for upstream content rights in competition with Sky and, if interim measures are not granted, that the [§<].<sup>11</sup> Finally, BT states that consumers will be harmed if it does not obtain wholesale supply of SS1&2, primarily because they will be unable to

<sup>4</sup> See, for example, paragraph 1.13 of BT’s Complaint.

<sup>5</sup> See, for example, paragraph 2.24 of BT’s Complaint.

<sup>6</sup> See Ofcom’s website at: [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01106/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01106/).

<sup>7</sup> BT’s Complaint, paragraph 6.31.

<sup>8</sup> Details of Ofcom’s procedures for handing investigations under CA98 are set out in our Enforcement Guidelines, see <http://stakeholders.ofcom.org.uk/consultations/draft-enforcement-guidelines/enforcement-guidelines/>.

<sup>9</sup> BT’s Complaint, paragraphs 6.21 – 6.24.

<sup>10</sup> BT’s Complaint, paragraph 6.29.

<sup>11</sup> BT’s Complaint, paragraph 6.30.

obtain an attractive package comprising SS1&2 and BT Sport on BT's YouView platform.<sup>12</sup>

- 2.7 BT states that it is imperative that it is able to market and retail packages containing SS1&2 on its YouView platform as soon as possible and [§<], because [§<]. BT therefore submits that it is necessary for us to grant interim measures as a matter of urgency.<sup>13</sup>
- 2.8 On 17 June 2013 we invited Sky to provide initial comments on BT's application for interim measures. Sky responded with its initial comments on 24 June 2013 ("Sky's Response").
- 2.9 We issued our Provisional Decision on 9 July 2013.<sup>14</sup> We received BT's Representations and Sky's Representations in response on 19 July 2013.
- 2.10 In concluding that we have reasonable grounds to suspect that Sky may be infringing the Chapter II prohibition and/or Article 102, we have concerns that Sky's conduct may be abusive and that it may lead to harm arising to BT. However, in this document we deal with BT's request for interim measures. We discuss the legal framework for interim measures and our assessment of BT's request against this framework in the remainder of this document.

### **Our approach to the evidence and the parties' submissions**

- 2.11 In reaching our decision, as well as relying on our own knowledge of the sector, sourced information (e.g. analysts briefings, market reports, stakeholder public statements, published regulatory decisions, etc.), we have taken account of the following information provided by BT and Sky:
- 2.11.1 BT's Complaint and Sky's Response;
- 2.11.2 responses to the information requests issued to each of BT and Sky on 17 June 2013 using our powers under section 26 CA98. These requests were aimed at gathering information relevant to the assessment of the application for interim measures. Responses were provided by BT on 20 and 24 June 2013 ("BT's 1st s.26 response") and by Sky on 24 June 2013 ("Sky's 1st s.26 response");
- 2.11.3 BT's Representations and Sky's Representations; and
- 2.11.4 any clarification by Sky and BT of their respective submissions, including where provided at our meetings with them and in any follow-up emails.<sup>15</sup>
- 2.12 We have carefully considered all of the evidence and submissions provided to us by both parties. With respect to BT's Representations and Sky's Representations, we have considered whether there is anything in those submissions which causes us to alter our provisional conclusion that it is not necessary to grant interim measures as a matter of urgency in order to prevent serious, irreparable damage to BT or to protect the public interest. Whilst we have taken into account the totality of those submissions, we have not attempted to summarise and specifically respond to every

<sup>12</sup> BT's Complaint, paragraph 6.28.

<sup>13</sup> BT's Complaint, paragraphs 6.10 – 6.17 and paragraph 7.4.

<sup>14</sup> We provided a copy of our Provisional Decision to BT on 9 July 2013 and to Sky two days later on 11 July 2013 (due to the need to redact BT confidential information from the version provided to Sky).

<sup>15</sup> We met with BT on 26 June 2013 and with Sky on 27 June 2013.

individual comment in this document. We note in this respect that Sky's Representations contain several comments that do not cause us to change our view regarding the necessity of granting interim measures as a matter of urgency in order to prevent serious, irreparable damage to BT or to protect the public interest. We therefore do not deal with them expressly in this document.

- 2.13 Section 3 of this document provides background information relevant to BT's application for interim measures. Section 4 sets out the legal and analytical framework for assessing BT's application for interim measures.
- 2.14 In line with the statutory test, we have assessed whether it is necessary to act urgently in order to prevent serious and irreparable damage to BT (Section 5) or to protect the public interest (Section 6). Within each section, we have considered each of the grounds advanced by BT in its application for interim measures.
- 2.15 Our final decision is then set out in Section 7.

## Section 3

# Background

3.1 This section sets out some relevant factual background to our assessment of BT's application for interim measures.

### Live sports TV rights

3.2 Live sport (and particularly live Premier League ("PL") football) is a key driver of take-up of pay TV. The latest PL rights auction in 2012 indicates ongoing significant value from exclusive PL content; Sky paid £2.3bn<sup>16</sup> for the three seasons 2013/14 to 2015/16, up from £1.623bn (2010/11 to 2012/13) for broadly similar content (Sky's latest rights have one additional match per season). Sky continues to hold TV rights to the majority of PL games - 116 games of the 154 available.<sup>17</sup> BT obtained rights to the remaining 38 PL games per season,<sup>18</sup> at a cost of £738m.<sup>19</sup>

### Negotiations between BT and Sky

3.3 Following the auction of PL rights, BT and Sky engaged in negotiations in relation to the wholesale supply of SS1&2 and BT Sport channels. Ultimately, the negotiations over the supply of SS1&2 failed. BT states that it was unwilling to agree to the Grant-Back Condition without other conditions being met,<sup>20</sup> and an agreement was not reached with Sky on these other conditions.

3.4 Sky's wholesale supply of SS1&2 to BT's Cardinal STB has been handled as a separate proposition.<sup>21</sup> BT's Complaint therefore only concerns Sky's wholesale supply of SS1&2 for distribution via BT's YouView platform.

### Channel offerings - availability of SS1&2 and BT Sport

#### Sky Sports 1 and 2

3.5 Sky supplies SS1&2 as follows:

3.5.1 **Sky:** SS1&2 are retailed by Sky on its own DSat platform;

<sup>16</sup> <http://www.marketingweek.co.uk/news/bt-surprise-winner-of-football-rights/4002201.article>.

<sup>17</sup> Sky continues to hold the rights to a significant range of other sports content, including UEFA Champions League football, US Masters, Scottish Open and PGA Golf, Formula 1, Rugby League, ERC Heineken Cup, Amlin Challenge Cup, SPL football (held jointly with ESPN - see footnote 19 below) and ECB cricket.

<sup>18</sup> <http://www.premierleague.com/en-gb/commercial/bt-sport.html>.

<sup>19</sup> <http://www.bbc.co.uk/news/business-18430036>. BT has acquired other sports content. BT's acquisition of ESPN gives BT access to live FA Cup coverage until the end of the 2013/14 season, UEFA Europa League and German Bundesliga until the end of the 2014/15 season, SPL football (held jointly with Sky) and US sports broadcast on ESPN America, including college basketball and football, and Nascar. BT also recently announced that it had acquired shared rights to the FA Cup for four years from the end of its current rights in 2014 (shared with the BBC) (BT press release, 17 July 2013: <https://home.bt.com/news/sportnews/bt-sport-wins-joint-fa-cup-rights-11363816257650>). The BT Sport webpage lists "*the full line up*" of its sports content as also including Italian (Serie A), French (Ligue 1), Brazilian (Brasileiro) and US (MLS) football, Aviva Premiership rugby, Women's Tennis Association matches, MotoGB, Ultimate Fighting Championship (UFC) events and Red Bull sports programming (see <http://www.bt.com/sport/>).

<sup>20</sup> [3<] (paragraphs 2.38 and 2.39, and Annexes 3.18 and 3.19 of BT's Complaint).

<sup>21</sup> BT's Complaint, paragraph 2.27.

- 3.5.2 **BT:** Sky previously supplied SS1&2 to BT on a wholesale basis for distribution to Cardinal via digital terrestrial television (“DTT”), with this arrangement ending on [redacted].<sup>22</sup> [redacted]. BT’s public position is that SS1&2 will only be available to those subscribers that take its BT Infinity fibre broadband service;<sup>23</sup>
- 3.5.3 **Virgin Media:** Sky supplies SS1&2 to Virgin Media on a wholesale basis for distribution on its cable platform pursuant to an agreement dated 29 April 2013 (which extended prior agreements dating from June 2010);
- 3.5.4 **TalkTalk:** Sky supplies SS1&2 to TalkTalk on a wholesale basis for distribution on its YouView platform pursuant to an agreement dated 13 July 2012 (see also the summary in relation to NOW TV);
- 3.5.5 **NOW TV:** Sky’s NOW TV offering provides movies (on a monthly subscription) and sport channels, including SS1&2 (by purchasing a day pass) on a range of internet connected devices such as a PC, Mac, iPad, iPhone, Xbox and Roku.<sup>24</sup> The NOW TV service is available on the YouView platform, but its content offering is currently limited to video on demand (“VoD”) movies. Sky intends to retail a NOW TV Sports offering (including SS1&2) on YouView when YouView enables unicast functionality [redacted].<sup>25</sup> [redacted];<sup>26</sup> and
- 3.5.6 **Other devices:** Sky also distributes SS1&2 via other devices (Xbox, PS3, PCs, Macs, tablets, smartphones and Roku boxes).

## BT Sport

3.6 BT will supply BT Sport as follows:

- 3.6.1 **BT:** BT Sport will be available to BT TV customers taking BT Infinity, on both its Cardinal and YouView platforms. For BT TV customers in areas not covered by BT’s fibre network, BT will deliver BT Sport via DTT, but only on its Cardinal platform;<sup>27</sup>
- 3.6.2 **Sky:** BT will self-retail BT Sport on Sky’s satellite platform, meaning that Sky’s pay TV customers (and other consumers with a Sky STB) will be able to access BT Sport over their Sky STB (though they will need to contact BT to order the service);<sup>28</sup>

<sup>22</sup> BT’s Complaint, paragraph 2.28. Going forward, BT intends to use its existing DTT capacity for the provision of BT Sport and, as such, it will no longer provide SS1&2 over DTT.

<sup>23</sup> <http://www.guardian.co.uk/media/2013/jun/27/bt-vision-pay-tv-sky-sports>. BT’s website states “Sky Sports 1 and Sky Sports 2. Sky Sports packages are available from £15 a month for one channel and £20 for both. You need BT Infinity. If you haven’t got BT Infinity yet, use the link at the top of the page to check to see if it’s available in your area”. See <http://www.productsandservices.bt.com/products/tv/sport>.

<sup>24</sup> <http://www.nowtv.com/>.

<sup>25</sup> Sky’s Response, paragraph 49.

<sup>26</sup> [redacted].

<sup>27</sup> BT has informed us that it understands that its fibre network passes premises that amount to approximately 60% of total UK homes (BT’s 1<sup>st</sup> s.26 Response, Question 14). At Annex A to its Representations, [redacted].

<sup>28</sup> BT’s Complaint, paragraph 2.22 and Sky’s Representations. As Sky’s satellite platform is an open platform, a broadcaster can distribute its channels to satellite viewers outside of a Sky pay TV package. In order to do so, the broadcaster must obtain transponder capacity from satellite operators (e.g. SES Astra and Eutelsat), and (where the channels are to be encrypted) obtain conditional access (“CA”) services from Sky Subscribers Services Limited (“SSSL”). SSSL is required to provide CA services on fair, reasonable and non-discriminatory terms.

- 3.6.3 **TalkTalk:** [X] <sup>29</sup> ESPN will cease to be available to TalkTalk subscribers on 31 July 2013;<sup>30</sup>
- 3.6.4 **Virgin Media:** [X] <sup>31</sup> ESPN will cease to be available to Virgin Media subscribers after the end of July 2013;<sup>32</sup>
- 3.6.5 **Other devices:** customers of BT Broadband will be able to access BT Sport channels on their smartphone or tablet via the BT Sport Application or watch those channels live via streaming to their computer or other compatible device using the BT Sport online player.

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<sup>29</sup> BT's 1<sup>st</sup> s.26 Response, Question 17.

<sup>30</sup> TalkTalk has advised its customers that ESPN will discontinue after 31 July 2013:  
<http://help2.talktalk.co.uk/tv/changes-espn-and-espn-america>.

<sup>31</sup> BT's 1<sup>st</sup> s.26 Response, Question 17.

<sup>32</sup> Virgin Media has advised its customers that ESPN will be available until the end of July 2013:  
[https://customer.virginmedia.com/forms/btsport/2?buspart=Tickles\\_18](https://customer.virginmedia.com/forms/btsport/2?buspart=Tickles_18).

## Section 4

# Framework for considering BT's application for interim measures

### Direction sought by BT

- 4.1 BT's Complaint contains an application for interim measures pursuant to section 35 CA98. BT submits that it is necessary for Ofcom to act urgently in this respect in order to prevent serious, irreparable damage to BT and to protect the public interest. BT has requested that Ofcom direct Sky, by 1 August 2013 at the latest, as follows:
- 4.1.1 not to refuse to enter into an agreement with BT for the wholesale supply of SS1&2 on BT's YouView platform by reason of the fact that BT is not prepared to wholesale BT Sport to Sky; or
  - 4.1.2 to enter into an agreement with BT for the wholesale supply of SS1&2 on BT's YouView platform on equivalent terms to those which Sky has agreed for certain other platforms.

### Legal and analytical framework

- 4.2 Ofcom may issue an interim measures direction where it has commenced an investigation (which is ongoing) and where it considers that it is necessary to act as a matter of urgency for one of the following purposes:
- 4.2.1 to prevent serious, irreparable damage to a particular person or category of persons;<sup>33</sup> or
  - 4.2.2 to protect the public interest.<sup>34</sup>
- 4.3 We refer in our assessment to the "interim period", which is the period until the completion of our investigation (i.e. the period over which any grant of interim measures would be in place pending a decision on the substance of BT's Complaint). For the purposes of our assessment we have assumed that the interim period will be at least one year.
- 4.4 If we consider that the test is met then we may grant interim measures at our discretion. In exercising this discretion, we consider that we should have regard to other relevant considerations including the impact on Sky of granting the proposed interim measures direction and any relevant third party interests.
- 4.5 We are also cognisant of the fact that, in exercising our power to grant interim measures under section 35 CA98, we are acting in our capacity as a competition authority, rather than in our capacity as sectoral regulator. Our duties under section 3 CA03 are explicitly disapplied when we are carrying out our competition law functions.<sup>35</sup> As such, when assessing public interest considerations, we have focussed on the prevention of harm to the public interest (in particular, harm to

<sup>33</sup> Section 43 of the Enterprise and Regulatory Reform Act 2013 replaces this requirement for "serious, irreparable damage" with a requirement for "significant damage", although the amendment is not yet in force. The Government has indicated its intention to bring this amendment into force on 1 April 2014.

<sup>34</sup> Section 35(1) and (2), CA98.

<sup>35</sup> Section 371(11), CA03.

competition or to consumers) which might otherwise result. This can be contrasted with our regulatory role where we seek to promote competition and consumer interests more widely when performing our duties.

4.6 BT made a number of statements which suggest that [redacted].<sup>36</sup> [redacted]<sup>37</sup> This suggests that the following outcomes are possible:

4.6.1 by its application for interim measures, BT is seeking to obtain wholesale supply of SS1&2 on its YouView platform, but without providing reciprocal wholesale supply of BT Sport to Sky for its DSat platform (for ease of reading, we refer to this below as “Scenario 1”); and

4.6.2 if we were to refuse BT’s application for interim measures, then BT may continue to reject the Grant-Back Condition, with the result that BT does not obtain wholesale supply of SS1&2 on its YouView platform, but it also does not provide wholesale supply of BT Sport to Sky for its DSat platform (we refer to this below as “Scenario 2”).

4.7 However, it is not clear whether BT is likely to continue to reject the Grant-Back Condition for the entirety of the period of its ownership of current PL rights, or if it would accept the Grant-Back Condition at some point during this period. [redacted]<sup>38</sup> [redacted].<sup>39</sup>

4.8 In assessing BT’s application, we therefore primarily consider the impact on BT and on the public interest if we were to refuse to grant interim measures and BT did not subsequently obtain wholesale supply of SS1&2 (i.e. Scenario 2).

4.9 Alternatively, if we were to refuse BT’s application for interim measures, then BT could accept the Grant-Back Condition, with the result that BT obtains wholesale supply of SS1&2 on its YouView platform, and Sky obtains wholesale supply of BT Sport on its DSat platform (we refer to this below as “Scenario 3”).<sup>40</sup> [redacted], we have also considered the impact of Scenario 3 in limited circumstances, where we consider this to be relevant to our analysis.

4.10 For ease of reference, Table 1 provides an overview of the wholesale supply arrangements that would result in each case:

**Table 1: Potential wholesale supply**

	SS1&2 wholesaled to BT?	BT Sport wholesaled to Sky?
Scenario 1 (interim measures)	Yes	No
Scenario 2 (no interim measures)	No	No
Scenario 3 (alternative scenario)	Yes	Yes

<sup>36</sup> BT’s 1<sup>st</sup> s.26 Response, paragraph 14(f) (overarching observations), paragraph 2.6 (Question 2), and paragraphs 7.1-7.3 (Question 7).

<sup>37</sup> BT’s 1<sup>st</sup> s.26 Response, paragraph 6.4.

<sup>38</sup> For example, BT’s 1<sup>st</sup> s.26 Response, Annex 9B.1.

<sup>39</sup> [redacted]. Clarification of Sky’s 1<sup>st</sup> s.26 Response from J Conyers (Sky) to D Gordon (Ofcom) of 2 July 2013.

<sup>40</sup> It is unclear what the final terms of the Grant-Back Condition would be as the negotiations were never completed. On the basis of the negotiations that we have seen, [redacted].



4.11 [REDACTED].<sup>41</sup> [REDACTED].<sup>42</sup>

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<sup>41</sup> BT's 1<sup>st</sup> s.26 Response, paragraph 6.1.

<sup>42</sup> BT's 1<sup>st</sup> s.26 Response, paragraph 6.4.

## Section 5

# Assessment of serious, irreparable damage

## Prevention of serious, irreparable damage

5.1 The OFT's Enforcement Guidance states that serious and irreparable damage are cumulative requirements. Serious damage may occur where a person may suffer considerable competitive disadvantage likely to have a lasting effect on their position. Serious damage is likely to include significant financial loss (assessed by reference to that person's size or financial resources as well as the proportion of the loss in relation to their total revenue) and may also include significant damage to goodwill/reputation. The requirement for irreparable damage will generally be satisfied where a person is threatened with insolvency. Less extreme forms of serious damage may also suffice where they cannot be remedied by later intervention. The serious, irreparable damage must be shown to result from the alleged anti-competitive behaviour.<sup>43</sup>

## BT's Complaint

5.2 BT states that, if it is denied wholesale supply of SS1&2, it will suffer a [X] (in particular subscribers with demand for premium sport) and [X].<sup>44</sup>

5.3 Notwithstanding these [X]. In particular:<sup>45</sup>

5.3.1 **downstream retail competition:** BT states that it is moving into channel provision for the first time and competing in the retail pay TV market on the basis of its new YouView platform. In order for these ventures to be successful, BT submits that it is [X]. BT states that this [X] will be both serious and irreparable; and

5.3.2 **upstream content rights:** BT states that the size of its retail subscriber base is [X]. BT states that the loss of this opportunity is both serious and irreparable.

5.4 BT submits that it is imperative that it is able to market and retail packages containing SS1&2 on its YouView platform as soon as possible. In particular, because:<sup>46</sup>

5.4.1 the period from July to September is [X];<sup>47</sup> and

5.4.2 the first year in which BT launches its new BT Sport channels will be [X].<sup>48</sup>

## Sky's Response

5.5 Sky submits that none of the harm that BT alleges is of a serious and irreparable nature and that there is no substantial difference in the prospects of BT Sport or BT's

<sup>43</sup> OFT, Enforcement Guidance, December 2004, paragraphs 3.5 – 3.6.

<sup>44</sup> BT's Complaint, paragraph 6.21.

<sup>45</sup> BT's Complaint, paragraphs 6.21-6.24.

<sup>46</sup> BT's Complaint, paragraphs 6.10 – 6.17.

<sup>47</sup> BT's Complaint, paragraph 6.14.

<sup>48</sup> BT's Complaint, paragraph 6.15.

YouView service as between Scenario 1 and Scenario 2.<sup>49</sup> Sky submits that the burden of proving serious and irreparable harm lies with BT and that it is an onerous burden, particularly in this case where the requested intervention involves interference with Sky's right to freely choose its trading partners in relation to licensing intellectual property rights on which it spends billions of pounds per annum. Sky states that BT has not come close to discharging this burden of proof.<sup>50</sup>

## Financial consequences

- 5.6 Sky states that the risk of serious and irreparable damage to BT is negligible. Even if we were to conclude that some damage to BT may occur, BT's size and financial resources, as well as the likely small scale of any losses as a proportion of BT's total revenue, mean that BT is well able to bear the consequences of a lack of supply of SS1&2. Sky also notes that BT has repeatedly stressed in its public statements that it is not "*betting the company*" on its pay TV investment.<sup>51</sup>

## Downstream retail competition

- 5.7 Sky states that BT has attempted to elide two separate arguments: (i) that the [redacted].<sup>52</sup>
- 5.8 With respect to the [redacted], Sky notes that BT Sport will be free to all BT broadband subscribers (of which Sky estimates there are over 5 million) and may also attract some paying subscribers on DSat. Sky states that "*the significant likelihood is that within a few months of launch, BT Sport will have millions of subscribers across the platforms via which BT has chosen to make its sports channels available*".<sup>53</sup> Sky states that BT has made [redacted].<sup>54</sup>
- 5.9 With respect to the [redacted]. [redacted].<sup>55</sup> Sky submits that the availability of SS1&2 is only one among many factors that influence households' platform choices.<sup>56</sup> Sky also states that the majority [redacted] of pay TV subscribers do not subscribe to Sky's premium sports channels [redacted]. In these circumstances, Sky considers it implausible that [redacted].<sup>57</sup>
- 5.10 Sky also submits that significant numbers of DSat Sky Sports subscribers are unlikely to switch to BT's YouView service in the short term, even if interim measures were granted. Sky states that BT has presented no evidence to support this and all available evidence points to the contrary: (i) BT's YouView service currently lacks features that Sky Sports subscribers on DSat are likely to value e.g. a broad range of linear channels and PVR functionality for pay TV channels; (ii) Sky's DSat subscribers are happy with their service and therefore unlikely to want to switch to an alternative platform; and (iii) if DSat subscribers have a demand for BT Sport, they are likely to subscribe whilst remaining on DSat (either paying for the channels or receiving them for free as BT broadband subscribers).<sup>58</sup>

<sup>49</sup> Sky's Response, paragraphs 22 – 24.

<sup>50</sup> Sky's Response, paragraphs 85 – 87.

<sup>51</sup> Sky's Response, paragraphs 79 – 84.

<sup>52</sup> Sky's Response, paragraphs 26 – 31.

<sup>53</sup> Sky's Response, paragraph 34.

<sup>54</sup> Sky's Response, paragraphs 32 – 36.

<sup>55</sup> [redacted]. See paragraphs 49 and 50 of the Sky Response.

<sup>56</sup> For example, availability of a platform where they live; range of other channels available; platform functionality; range of other services offered such as VoD, catch-up and off-platform services, familiarity, perceptions of reliability; customer service and marketing. See Sky's Response, paragraph 52.

<sup>57</sup> Sky's Response, paragraph 52.

<sup>58</sup> Sky's Response, paragraph 58.

## Upstream content rights

- 5.11 Sky states that BT's reference to its "*retail subscriber base*" [§<] must include BT's base of subscribers to its BT Sport channels across all platforms (and across both residential and commercial), as all of these subscribers contribute to the recoupment of BT's investment. Sky considers that BT faces no impediment to establishing a substantial retail subscriber base for BT Sport and that the ability for BT to retail SS1&2 on YouView would make little or no difference to the size of this base in the short term.<sup>59</sup> Accordingly, Sky submits that the absence of SS1&2 from BT's YouView service will not materially impact BT's ability to recoup its investment in sports rights. Sky also notes that BT's strategy [§<].<sup>60</sup>

## Urgency

- 5.12 Sky submits that BT's case for urgency rests entirely on an assertion that there is a [§<].<sup>61</sup> In particular, Sky states that BT has not provided evidence on [§<].<sup>62</sup> Sky considers that take-up of new platforms tends to follow a well established pattern of increasing sales over a period of years and that BT's expectation [§<] of all TV platforms in the UK. Sky also submits that the most significant disincentive to switch to BT's YouView service over the next few months is not the lack of availability of SS1&2 but the inferiority of that service compared to cable, satellite or TalkTalk's YouView service.<sup>63</sup>
- 5.13 Sky also states that any urgency in this case is entirely of BT's own making as BT had understood Sky's "*linkage*" between the supply of SS1&2 and the supply of BT Sport [§<] (Sky states that this is recognised in BT's Complaint).<sup>64</sup> Sky also submits that BT was aware of Sky's position on reciprocal supply [§<].<sup>65</sup> Sky submits that BT had delayed submission of its complaint "*to the eleventh hour*" and that delay is a factor that should weigh against the grant of interim measures in this case.<sup>66</sup>

## Assessment

- 5.14 We now assess the evidence available to us and consider whether there is an urgent need to grant interim measures now in order to prevent serious, irreparable damage to BT. As noted in Section 2, we have considered BT's Complaint, BT's 1<sup>st</sup> s.26 Response, BT's Representations and any further clarification of that information. In reaching our conclusions, we have also taken into account the comments provided by Sky.
- 5.15 We consider the effect on BT if interim measures are not granted in terms of the following:
- 5.15.1 financial consequences for BT;
  - 5.15.2 impact on BT's competitive position in retail pay TV; and

<sup>59</sup> Sky's Response, paragraph 77.

<sup>60</sup> Sky's Response, paragraphs 76 – 78.

<sup>61</sup> Sky's Response, paragraphs 59 – 72.

<sup>62</sup> Sky's response, paragraph 40. Sky does not dispute that most subscribers to the BT Sport channels are [§<] (Sky's Response, paragraphs 39 and 69).

<sup>63</sup> See, for example, paragraphs 46, 52, 58 and 65 of Sky's Response. In this respect, Sky also notes that the increased availability of catch-up services on other platforms means that this is no longer a compelling reason to switch to BT's YouView service.

<sup>64</sup> Sky's Response, paragraph 15 - [§<] (Annex 3.15 to BT's Complaint).

<sup>65</sup> Sky's Response, paragraph 16 – Sky refers in this respect to Annex 3.10 to BT's Complaint.

<sup>66</sup> Sky's Response, paragraph 17.

- 5.15.3 impact on BT's ability and incentive to bid in future sports rights auctions.
- 5.16 In each of these subsections, we first set out our assessment and the provisional conclusion that we reached in our Provisional Decision, we then summarise the parties' representations in response to the Provisional Decision, our assessment of these and, lastly, our final conclusion.
- 5.17 However, before doing so, we first consider the evidence that we have received from BT in relation to its commercial strategy as this is relevant to each of these aspects of our assessment.

### **BT's evidence of its commercial strategy**

- 5.18 BT's Complaint focuses on the effect of Sky's allegedly abusive conduct on its strategy for pay TV, [redacted].<sup>67</sup> BT states that [redacted].<sup>68</sup> BT submits that the launch of BT Sport [redacted].<sup>69</sup>
- 5.19 BT notes that subscribers switching to BT YouView will switch not only for their pay TV subscriptions, but also calls and broadband (i.e. triple-play). BT therefore argues that Sky's conduct distorts competition not just in pay TV, but also in relation to telephony and broadband, but does not elaborate on this.<sup>70</sup>
- 5.20 [redacted].<sup>71</sup>
- 5.21 We note that this is consistent with BT's briefings to investors and analysts.<sup>72</sup> There also seems to be consensus among City analysts that the BT Sport channels will benefit BT primarily in terms of increased retention and win-back of broadband subscribers.<sup>73</sup> Additional TV subscribers are considered to be significantly less important.
- 5.22 In assessing whether there is a need to act urgently in order to grant the interim measures requested by BT by 1 August 2013, we have therefore considered (i) BT's ability to acquire pay TV subscribers (in particular premium sports subscribers) to BT Sport and BT's YouView platform in the interim period, and (ii) BT's ability to acquire and retain broadband subscribers in the interim period.

### **Serious, irreparable financial damage**

#### Assessment set out in the Provisional Decision

- 5.23 We have considered the financial consequences for BT by reference to its size and financial resources, including its revenues and profits.
- 5.24 BT states that it would [redacted]. In order to understand the potential scale of the financial impact on BT we have sought to compare forecast performance both with and without a grant of interim measures. We therefore asked BT to provide us with any

<sup>67</sup> BT's Complaint, Section 2.B (page 14) and paragraph 3.1(c)(i).

<sup>68</sup> BT's Complaint, paragraphs 2.14 and 2.18.

<sup>69</sup> BT's Complaint, paragraph 6.3.

<sup>70</sup> BT's Complaint, paragraphs 3.1(c)(ii), 3.12 and 6.6.

<sup>71</sup> For example, Annexes 4.03a-d of BT's Complaint and Annexes 1 and 8 of BT's 1<sup>st</sup> s.26 Response.

<sup>72</sup> Slides and conference call with analysts and investors of 13 June 2012 (BT's 1<sup>st</sup> s.26 Response, Annexes 8.1(a)-(b)) and BT results and business update of 10 May 2013 (BT's 1<sup>st</sup> s.26 Response, Annexes 8.2(a)-(c)).

<sup>73</sup> See for example, the Barclays reports *Free sports – raising the stakes* (13 May 2013) and *Moving the goal posts* (27 June 2012), the Enders Analysys report *BT Sport: Not a game changer* (15 May 2013) and the Berstein report *Quick Take - BT FY13 Reassuring Across the Board* (10 May 2013).

internal documents (falling within specified categories) that set out forecast subscriber numbers, revenues, profits and/or losses for BT Sport, broken down by TV platform and whether the subscriber takes BT broadband, in respect of each of Scenarios 1, 2 and 3.<sup>74</sup>

- 5.25 We are also cognisant of the fact that the offer of BT Sport is likely to result in incremental broadband and voice revenues for BT as a result of its pricing of BT Sport (i.e. its offer of free BT Sport on YouView or on DSat for BT broadband subscribers). We therefore also asked BT to provide us with any internal documents (falling within specified categories) that set out forecasts of incremental broadband subscribers, revenues and/or profits as a result of offering BT Sport, in respect of each of Scenarios 1, 2 and 3.<sup>75</sup> Our intention was to take any such incremental revenues into account when assessing the financial consequences for BT if interim measures are not granted.
- 5.26 BT explained that it could only provide forecasts of limited scope because [REDACTED].<sup>76</sup>
- 5.27 As such, [REDACTED].<sup>77</sup> [REDACTED].<sup>78</sup>
- 5.28 We have therefore been unable to directly compare forecast financial performance if interim measures are granted (i.e. BT's "base case" business plan or our Scenario 1) with forecast performance in the event that BT's application is refused.
- 5.29 In light of this, we also considered whether the information we obtained from BT would enable us to carry out a higher level assessment of the harm BT might suffer (for example, the impact on BT's subscribers, revenues and/or profits under certain assumptions). However, [REDACTED], this was also not possible. In particular, the reliability of this exercise is limited for the same reasons set out by BT in its response to our information request:
- "In any event, much of the harm that BT will suffer as a result of Sky's insistence on the Grant-Back Condition is not easily captured within [BT's] financial planning models. [REDACTED]"*<sup>79</sup>
- 5.30 Therefore, BT has not been able to provide financial information that enables us to directly assess its claim that it [REDACTED].
- 5.31 Nevertheless, the information we obtained from BT contains some data which can be used to test BT's submissions in relation to financial consequences and to gain a sense of the scale of the potential financial impact for BT if interim measures are not granted. Specifically:
- 5.31.1 BT's "base case" forecasts provide information on the size and relative importance of different sources of revenue for BT Sport that BT is targeting, [REDACTED]<sup>80</sup> and (in conjunction with data relating to the existing BT TV subscriber

<sup>74</sup> BT's 1<sup>st</sup> s.26 Response, questions 2, 3 and 6.

<sup>75</sup> BT's 1<sup>st</sup> s.26 Response, questions 5 and 6.

<sup>76</sup> BT's 1<sup>st</sup> s.26 Response to Question 2, paragraph 2.6; and paragraph 14(f) under BT's "overarching observations".

<sup>77</sup> See also, BT's 1<sup>st</sup> s.26 Response to Questions 6(a) and 6(b).

<sup>78</sup> BT's 1<sup>st</sup> s.26 Response to Question 2, paragraph 2.4. [REDACTED].

<sup>79</sup> BT's 1<sup>st</sup> s.26 Response to Question 6, paragraph 6.1.

<sup>80</sup> We have added the text "for BT Sport" to that contained in our Provisional Decision by way of clarification in response to a comment in Annex A of BT's Representations.

base)<sup>81</sup> to test BT's submission that the lack of SS1&2 will result in a [redacted];  
and

5.31.2 we have obtained modelling carried out by BT to calculate the financial impact (relative to the "base case") of permitting Sky to exclusively retail BT Sport on the DSat platform, enabling us to estimate an upper bound on the financial impact that BT would suffer if interim measures are not granted.

5.32 We discuss these in turn below.

### *BT's base case forecasts*

5.33 As explained above, we obtained target forecasts from BT relating to its base case business plan.<sup>82</sup> BT explained that the forecasts it provided represent the "*official internal view of its BT Sport business case*" at an overall business level.<sup>83</sup>

5.34 BT said its base case forecasts [redacted]<sup>84</sup> [redacted].<sup>85</sup> We have analysed the target forecasts in BT's base case [redacted] to understand the relative importance of various types of subscriber. We have also analysed information on the sources of BT's target subscriber base to understand where BT expects customers to switch from.

5.35 [redacted]:

5.35.1 [redacted]

5.35.2 [redacted].

5.36 [redacted]<sup>86</sup>

5.37 [redacted]<sup>87</sup>

5.37.1 [redacted]

5.37.2 [redacted].

5.38 [redacted].

5.39 [redacted].<sup>88</sup>

5.40 [redacted].

5.41 [redacted]<sup>89</sup>:

5.41.1 [redacted];<sup>90</sup>

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<sup>81</sup> We have added the text "(in conjunction with data relating to the existing BT TV subscriber base)" to that contained in our Provisional Decision by way of clarification in response to a comment in Annex A of BT's Representations.

<sup>82</sup> BT's 1<sup>st</sup> s.26 Response to Question 2, paragraph 2.4.

<sup>83</sup> BT's 1<sup>st</sup> s.26 Response to Question 2, paragraph 2.3.

<sup>84</sup> BT's 1<sup>st</sup> s.26 Response, paragraph 2.10.

<sup>85</sup> BT's 1<sup>st</sup> s.26 Response, paragraph 2.10.

<sup>86</sup> [redacted].

<sup>87</sup> BT's 1<sup>st</sup> s.26 Response, Annex 2.1.

<sup>88</sup> [redacted].

<sup>89</sup> [redacted].

<sup>90</sup> [redacted].

- 5.41.2 [redacted];
- 5.41.3 [redacted].
- 5.42 [redacted].<sup>91</sup> [redacted].<sup>92</sup> [redacted].<sup>93</sup> [redacted].<sup>94</sup> [redacted].<sup>95</sup>
- 5.43 [redacted].<sup>96</sup>
- 5.44 [redacted].<sup>97</sup> [redacted].
- 5.45 [redacted].<sup>98</sup> [redacted].<sup>99</sup> However, public statements made by BT suggest that its YouView proposition is currently primarily targeted at Freeview households upgrading to pay TV and existing basic-only pay TV households switching, rather than existing premium pay TV subscribers (including existing subscribers to SS1&2).<sup>100</sup>
- 5.46 This is consistent with Sky's view that [redacted].<sup>101</sup>
- 5.47 As noted above, BT has submitted that, without supply of SS1&2, it will suffer a [redacted]. However, in summary, our analysis of BT's base case business plan and the other documents referred to above suggests that:
- 5.47.1 [redacted].<sup>102</sup> [redacted];
- 5.47.2 [redacted];
- 5.47.3 [redacted]; and
- 5.47.4 [redacted].
- 5.48 [redacted] Sky doesn't expect BT to attract many premium subscribers now, it recognises that the proposition will improve significantly.<sup>103</sup>
- 5.49 However, on the evidence currently available to us, we do not consider that the absence of SS1&2 will have a large adverse impact on BT's ability to build its YouView subscriber base in the interim period.

### *BT modelling of [redacted]*

- 5.50 [redacted].

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<sup>91</sup> [redacted].

<sup>92</sup> [redacted].

<sup>93</sup> [redacted].

<sup>94</sup> [redacted].

<sup>95</sup> [redacted].

<sup>96</sup> At paragraph 3.4 of BT's Complaint, BT states that research commissioned into the likely addressable market for the BT Sport channels shows that [redacted] However, the research relates to demand for the BT Sport channels, rather than for BT's YouView service.

<sup>97</sup> [redacted].

<sup>98</sup> BT's Complaint, paragraph 3.6.

<sup>99</sup> BT's Complaint, paragraph 2.14.

<sup>100</sup> BT Group plc Q4 2012/13 Results Presentation Transcript – Part 2, 10 May 2013 (BT's 1<sup>st</sup> s.26 Response, Annex 8.2(c), page 15). See also BT Group plc Q4 2012/13 Results Presentation Transcript – Part 1, 10 May 2013 (BT's 1<sup>st</sup> s.26 Response, Annex 8.2(b), page 14).

<sup>101</sup> Sky's Response, paragraphs 54-58.

<sup>102</sup> In our Provisional Decision, [redacted].

<sup>103</sup> Sky's Response, paragraph 45.



- 5.51 BT has, however, modelled a scenario which resembles Scenario 3. In these circumstances, we consider that it is informative to assess the impact on BT of accepting the Grant-Back Condition (i.e. Scenario 3) [redacted]<sup>104</sup> [redacted].
- 5.52 [redacted].<sup>105</sup> We recognise that if BT were to accept the Grant-Back Condition (Scenario 3), both Sky and BT would retail BT Sport on Sky's DSat platform. As such, [redacted]. Nevertheless, of the evidence provided to us, [redacted] scenario appears to be the best means we have of assessing the potential impact on BT if it were to accept the Grant-Back Condition.<sup>106</sup>
- 5.53 Under its base case, BT calculated the total EBITDA contribution from BT Sport would equal £[redacted] over three years. [redacted].
- 5.54 [redacted].<sup>107</sup> [redacted].<sup>108</sup> [redacted].
- 5.55 Whilst a figure of £[redacted], it is very much an "upper bound" on the financial consequences that BT might suffer if interim measures are not granted, because:
- 5.55.1 [redacted];<sup>109</sup>
- 5.55.2 [redacted];
- 5.55.3 [redacted].
- 5.56 In any event, it is necessary to consider the financial impact on BT if interim measures are not granted in the context of BT's overall size and financial resources as well as BT's total revenue. As at 31 March 2013, BT reported £18,017m revenue and £2,501m pre-tax profit.<sup>110</sup> Therefore, even without taking into account the points in the previous paragraph, the available evidence suggests that the financial impact on BT is likely to represent around [redacted]% of revenue and [redacted]% of pre-tax profit at the level of BT.<sup>111</sup>

### Provisional conclusion on serious, irreparable financial damage

- 5.57 In our Provisional Decision we stated that, on the basis of the evidence available to us, we were not satisfied that a failure to grant interim measures would result in financial consequences for BT that amount to serious, irreparable damage.

### Representations of the parties

- 5.58 BT considers that we have drawn adverse inferences from the absence of contemporaneous BT documents modelling the projected impact of Sky's conduct. BT states that these inferences are misplaced, in particular given that there are good business reasons why this data does not exist, that BT does not prepare its plans or

<sup>104</sup> [redacted].

<sup>105</sup> "Scenario (A) On Sky" in slide 16 of *BT Sport, ESG Update, 6<sup>th</sup> Feb 2013* (BT's 1<sup>st</sup> s.26 Response, Annex 9B.3).

<sup>106</sup> BT clarified that [redacted]. Meeting between Ofcom and BT, 26 June 2013.

<sup>107</sup> Meeting between Ofcom and BT, 26 June 2013. [redacted]. [redacted] - BT's 1<sup>st</sup> s.26 Response, paragraph 9.1.

<sup>108</sup> [redacted] (attachment "*Modelling follow up – confidential*" within email from BT "CW/01106/05/13 - Complaint to Ofcom by BT against Sky - Additional questions for BT", received 27 June 2013).

<sup>109</sup> [redacted] (BT's Complaint, Annex 3.31). [redacted] (BT's Complaint, Annex 3.32).

<sup>110</sup> After specific items. BT plc Annual Report 2013, page 102.

<sup>111</sup> Calculated as the average annual reduction in EBITDA contribution from BT Sport ([redacted]) as a proportion of British Telecommunications plc revenue and pre-tax profit for the financial year 2012/13 (in the absence of forecast figures). In BT's modelling, the reductions in EBITDA contribution from BT Sport [redacted].

forecasts in the way that the Provisional Decision appears to envisage and that [redacted]. BT states that, in any event, the absence of such modelling does not mean that Sky's conduct [redacted].<sup>112</sup>

- 5.59 BT also states that it is clearly important that Ofcom requires evidence to support its interim measures decision, but that the quality and extent of that evidence must reflect the features of the case before it and that we should not impose excessive demands. BT also notes that it would have been happy to produce forecasts, estimates or bespoke modelling specifically for the purposes of assessing interim measures, if Ofcom had informed BT that this was required, but that BT appears to have been penalised because such modelling did not exist prior to its application being made.<sup>113</sup>
- 5.60 BT submits that Ofcom has [redacted]. In addition BT believes that Ofcom relies heavily on this calculation in concluding that the absence of SS1&2 will not have a [redacted].<sup>114</sup>
- 5.61 BT submits that Ofcom's estimation of a [redacted] of [redacted]% of BT's TV subscriber base should be expressed instead as [redacted]% of BT's "*relevant addressable subscriber base*", since this illustrates [redacted]. BT criticises Ofcom's measure since it includes all BT Vision subscribers, including [redacted].<sup>115</sup>
- 5.62 BT also considers that it is likely that the [redacted].<sup>116</sup>
- 5.63 BT submits that the [redacted] £[redacted], as set out in paragraph 5.52 to 5.54 of the Provisional Decision,<sup>117</sup> "*substantially underestimates*" the impact of the Grant-Back Condition.<sup>118</sup> [redacted].<sup>119</sup> [redacted] £[redacted].
- 5.64 Also with respect to the same EBITDA calculation, Sky submits that [redacted].<sup>120</sup>
- 5.65 BT also submits that we should not assess the financial consequences for BT (i.e. British Telecommunications plc), but instead assess the financial consequences at the BT Vision business level or, at the very least, at the BT Retail business level.<sup>121</sup>

### Ofcom's response to Representations

- 5.66 BT submitted in its application for interim measures that it would [redacted]. We issued a request for information to BT that included a request for relevant internal financial information and invited BT to provide us with any other evidence that it wished us to take into account. We have considered carefully all of the information that BT provided to us.
- 5.67 Contrary to BT's assertion, we did not draw any adverse inferences from the absence of contemporaneous BT documents modelling the projected impact of Sky's conduct. We accept BT's submissions as to why certain of the data that we requested could

<sup>112</sup> BT's Representations, paragraphs 2.2(a), 3.8-3.12

<sup>113</sup> BT's Representations, paragraph 3.9 and Annex A in relation to paragraphs 5.25, 5.29 and footnote 88 of the Provisional Decision.

<sup>114</sup> BT's Representations, paragraphs 3.15-3.17

<sup>115</sup> BT's Representations, paragraph 3.17

<sup>116</sup> BT's Representations, paragraph 3.18.

<sup>117</sup> See paragraphs 5.53 to 5.55 above.

<sup>118</sup> BT's Representations, paragraph 2.2(c).

<sup>119</sup> BT's Representations, paragraph 2.2(c) and 3.22 – 3.23.

<sup>120</sup> Sky's Representations, comment in relation to paragraph 5.54 of the Provisional Decision.

<sup>121</sup> BT's Representations, paragraphs 2.2(d), 3.24-3.32.

not be provided. Contrary to BT's assertion, we also did not conclude on the basis of the absence of such modelling that Sky's conduct would [REDACTED].

- 5.68 More substantively, BT has assumed that we place greater reliance than we actually do on the calculation that its TV subscriber base would potentially be a [REDACTED]. This was one of a number of pieces of evidence we took into account in reaching our provisional conclusions (for example, see paragraph 5.47). In any event, our calculation was intended to be indicative of the [REDACTED]. As such, we consider that the total number of paying subscribers is an appropriate base for the calculation.<sup>122</sup> We recognise that [REDACTED].<sup>123</sup> [REDACTED] these are paying subscribers which represent an ongoing revenue stream and source of cost recovery for BT's TV service, and are therefore relevant to our analysis.
- 5.69 In addition, there are a number of reasons why the [REDACTED] figure represents an upper bound for the [REDACTED]:<sup>124</sup>
- 5.69.1 [REDACTED];
- 5.69.2 [REDACTED];
- 5.69.3 [REDACTED]; and
- 5.69.4 finally, as explained in paragraphs 5.113 and 5.114 below, we continue to believe that the figure would be lower if subscribers took a Cardinal STB instead of a YouView STB.<sup>125</sup>
- 5.70 With respect to BT's comments on the significance of a [REDACTED], we do not consider that this evidence supports a conclusion that the absence of SS1&2 would result in serious, irreparable [REDACTED] damage [REDACTED] during the interim period, such that we need to grant interim measures as a matter of urgency. BT's view appears to be based on the fact that every subscriber is important [REDACTED].<sup>126</sup> We recognise that every subscriber contributes to the recoupment of BT's investment in sports rights. However, we note that BT can monetise its investment in sports rights in a number of ways in addition [REDACTED]. BT did not comment substantively on this part of our analysis.<sup>127</sup>
- 5.71 In response to BT's comments regarding the potential reduction in EBITDA, [REDACTED] we did not consider BT's modelling of the [REDACTED] scenario to be "equivalent" to Scenario 3.<sup>128</sup> However, the [REDACTED] scenario modelled by BT represented the best means we had of assessing the potential "upper bound" financial impact on BT if it were to accept the Grant-Back Condition. We note that this was one of a number of pieces of evidence we considered as part of our assessment of the financial consequences for BT if interim measures are not granted. In addition, the differences between the [REDACTED]

<sup>122</sup> In BT's representations, it comments that the relevant base is not the totality of BT's existing customer base, as [REDACTED]% of BT's customer base take either an entry level pay TV pack or no subscription at all. For the avoidance of doubt, Ofcom did not use the totality of BT's existing customer base (around 810,000). Ofcom used the totality of BT's existing subscriber base (around [REDACTED]) and so did not include in its base customers that take no subscription at all.

<sup>123</sup> We note that BT does not provide evidence to support its view [REDACTED].

<sup>124</sup> These reasons apply to the same or lesser extent to BT's figure of [REDACTED].

<sup>125</sup> In addition, we note that [REDACTED] of the existing [REDACTED] SS1&2 subscribers have a Cardinal STB and can continue to receive SS1&2 on that platform.

<sup>126</sup> BT's Representations, paragraph 3.20. BT also refers to the fact that the pay TV sector is characterised by substantial fixed and sunk costs related to other items in addition to sports rights acquisition, but focuses on its ability to recoup its investment in sports rights. See paragraphs 3.20(b) to 3.20(c).

<sup>127</sup> BT noted [REDACTED]. We disagree, as commercial revenues represent another means of recouping its investment in sports rights.

<sup>128</sup> See paragraph 5.52 above.

were reflected in the weight we placed on this evidence in reaching our provisional conclusion. In particular, we did not seek to place weight on the precise financial impact predicted. We considered that the order of magnitude of the financial impact was sufficient to support our provisional conclusion. We note that BT has not provided any additional evidence to support its view that [REDACTED].

- 5.72 In relation to BT's statement [REDACTED],<sup>129</sup> BT does not elaborate on the costs and benefits not captured in this calculation.
- 5.73 In relation to BT's comment that the [REDACTED] scenario was underpinned [REDACTED].<sup>130</sup> [REDACTED].<sup>131</sup>
- 5.74 In any event, even if the [REDACTED] scenario includes the benefit from having additional Sky channels, it does not follow that the £[REDACTED] figure is necessarily [REDACTED]. For the reasons set out in paragraph 5.55 above, the £[REDACTED] figure [REDACTED]. In respect of the first of those reasons – [REDACTED].<sup>132</sup> Therefore, the financial impact on BT in the [REDACTED] scenario once wholesale revenues from Sky are taken into account could be [REDACTED].
- 5.75 We remain of the view that it is appropriate to assess the financial consequences for BT (i.e. British Telecommunications plc), rather than at the BT Vision or BT Retail business levels, for the following reasons:
- 5.75.1 BT is the complainant and the applicant for interim measures. Its application submitted that “BT” (which it defined as “British Telecommunications plc”)<sup>133</sup> would suffer serious, irreparable harm, [REDACTED].<sup>134</sup> We have therefore assessed the application and submissions that were made to us;
- 5.75.2 in any event, we consider that it is correct to assess the financial consequences for BT (i.e. British Telecommunications plc) in light of the statutory scheme, which empowers us to grant interim measures where necessary to prevent serious, irreparable damage to “*a particular person or category of person*”.<sup>135</sup> A “person” is defined for these purposes as including a body of persons corporate or unincorporate, including any undertaking.<sup>136</sup> In light of the statutory test, we do not consider it appropriate to assess serious, irreparable damage by reference to BT business units that do not have legal personality (i.e. BT Vision or BT Retail); and
- 5.75.3 in addition, [REDACTED].<sup>137</sup> [REDACTED].<sup>138</sup>
- 5.76 Whilst we consider that it is appropriate to assess the financial consequences for BT (i.e. British Telecommunications plc), we do not in any event consider that the BT

<sup>129</sup> BT's Representations, paragraph 3.22(b).

<sup>130</sup> BT's 1<sup>st</sup> s.26 Response to Question 9, paragraphs 9.1 to 9.6.

<sup>131</sup> See Annex 9B.2 “Wholesale worksheet”, rows 91 to 112. In addition, in a meeting between BT and Ofcom on 26 June 2013, [REDACTED].

<sup>132</sup> Sky's Representations on paragraph 5.54 of the Provisional Decision.

<sup>133</sup> BT Complaint, page 2.

<sup>134</sup> BT Complaint, paragraph 6.21.

<sup>135</sup> Section 35(2)(a), CA98.

<sup>136</sup> Section 59, CA98 and section 5 and Schedule 1, Interpretation Act 1978.

<sup>137</sup> *BT Group plc – Project Thomas, presentation by Gavin Patterson, CEO BT Retail, 31 May 2012* (Annex 4.03(c) to BT's Complaint), slide 3.

<sup>138</sup> In fact we have assessed the financial consequences for BT (i.e. British Telecommunications plc), which is a wholly owned subsidiary of BT Group plc, but which encompasses virtually all of the business and assets of BT Group plc.

Retail business unit would suffer serious, irreparable damage if we do not grant interim measures now.<sup>139</sup>

5.77 Finally, the internal and external BT documents that we have reviewed [redacted].

### Final conclusion on serious, irreparable financial damage

5.78 Having carefully considered all of the evidence and submissions provided to us by both parties and their representations in response to the Provisional Decision, we remain of the view that BT will not suffer financial consequences that amount to serious, irreparable damage if we do not grant interim measures now.

5.79 We now go on to consider whether it is necessary as a matter of urgency to issue an interim measures direction to Sky in order to prevent serious, irreparable damage to BT's competitive position in relation to: (i) downstream retail pay TV competition; and/or (ii) upstream competition for the acquisition of premium sports content rights.

### **Serious, irreparable damage to BT's competitive position: retail pay TV competition**

#### Assessment set out in the Provisional Decision

5.80 BT's arguments in relation to its competitive position as a pay TV retailer [redacted]. As discussed above, the available evidence indicates that [redacted]. In fact, BT recognises that even if [redacted].<sup>140</sup> We elaborate on this below.

#### *Effect on BT if interim measures are not granted*

5.81 [redacted]. In this event BT would not obtain wholesale supply of SS1&2 on its YouView platform. BT submits that this will make YouView [redacted], thereby causing serious, irreparable damage to [redacted].

5.82 As explained in paragraph 5.43 above, BT's Complaint does not comment explicitly on how many premium sports subscribers it hopes to attract to YouView in the interim period, or how significant these will be in terms of the overall base of YouView subscribers in this period. However, as noted in paragraph 5.45 above, public statements made by BT suggest that its YouView proposition is primarily targeted at Freeview households upgrading to pay TV and existing basic-only pay TV households switching, rather than existing premium pay TV subscribers (including existing subscribers to SS1&2).

5.83 BT has not presented evidence that indicates that the propensity of Freeview users to [redacted]. We note however that for Freeview households upgrading to a pay TV package, the price increment for a package containing premium sports channels, such as SS1&2, is significant, suggesting that the availability of SS1&2 on BT's YouView platform [redacted].

5.84 To the extent that BT expects to attract existing Sky Sports subscribers in the interim period, we accept that the [redacted].

<sup>139</sup> We base this view on the figures reported in BT's Representations (at footnotes 68 and 69), which state that BT Retail had annual revenues of £6,672 million and annual profits of £1,545 million in the year to 31 March 2013. However, we also note that BT's Complaint cites a turnover figure of £7,228 million for BT Retail for the same period (paragraph 2.3(a)).

<sup>140</sup> BT's Complaint, paragraph 6.22.

- 5.85 We do not have reliable information which we could use to estimate with any accuracy the reduction in the number of BT subscribers resulting from the absence of SS1&2 on YouView in the interim period. However, we consider that, in static terms, this would represent a limited number of subscribers.
- 5.86 We note the link that BT makes with the launch phase of BT Sport<sup>141</sup> [§]. BT's evidence indicates that take-up of premium sports channels with football content is [§] and Sky does not dispute this.<sup>142</sup> In addition, whilst evidence on [§], we note that Sky does not dispute that [§].<sup>143</sup>
- 5.87 BT links the take-up of the BT Sport channel and the take-up of its YouView platform, arguing that take-up of its YouView platform [§]. Whereas Sky argues that these are “*entirely different*” issues,<sup>144</sup> BT states that the launch of BT Sport represents [§]. In particular, [§].<sup>145</sup>
- 5.88 We appreciate the opportunity BT has when a customer calls BT to subscribe to BT Sport. However, in the event that BT refuses the Grant-Back Condition, it maintains an ongoing retail relationship with all BT Sport subscribers, providing them with BT Sport and possibly broadband (which has a 12 month minimum contract period). In the event that BT obtains SS1&2 at some point in the future, it could contact BT Sport subscribers not taking BT's YouView service and try to persuade them to take its YouView service, informing them of the availability of SS1&2.<sup>146</sup>
- 5.89 [§].<sup>147</sup> It seems intuitive that inbound calls are likely to have a higher conversion rate than outbound calls. However, this does not in itself demonstrate that BT's ability to build its subscriber base [§]. For example, BT has not demonstrated that more outbound calls in the future would be uneconomic; [§]. Nor has BT demonstrated that it would be unable to generate significant numbers of inbound calls from these subscribers in the future, for example, through above-the-line or below-the-line marketing campaigns.<sup>148</sup>
- 5.90 More fundamentally, whilst the launch of BT Sport provides an opportunity for BT to acquire an initial core group of subscribers to its pay TV service on YouView, as Sky notes, evidence from the development of pay TV platforms suggests that the subscriber base of a platform is likely to be built up more gradually [§].<sup>149</sup> Indeed it is plausible that where a strategy is aimed at attracting new subscribers to the market (e.g. upgrading free to air viewers to pay TV) the growth of that subscriber base may be gradual. In addition, BT has not presented evidence to support the claim that subscribers that [§].

### *Use of Cardinal to offset any harm*

- 5.91 To the extent that the absence of SS1&2 [§], then BT may be able to mitigate that impact by offering those subscribers who wish to have SS1&2 a Cardinal box instead of a YouView box.

<sup>141</sup> BT's Complaint, Section 3.A. In BT's Representations, it submits that the significance of year one is evidenced in Annexes 4.3(c), 4.6, 4.10 and 4.19 to BT's Complaint.

<sup>142</sup> Sky's Response, paragraph 70.

<sup>143</sup> Sky's Response, paragraph 40.

<sup>144</sup> Sky's Response, paragraph 40.

<sup>145</sup> BT's Complaint, paragraphs 3.6-3.7, 3.12, 6.14.

<sup>146</sup> [§]

<sup>147</sup> BT's Complaint, paragraph 3.6 and BT's 1<sup>st</sup> s.26 Response to Question 23, paragraphs 23.2(d) to 23.5.

<sup>148</sup> Above-the-line marketing campaigns would also generate inbound calls from non-BT customers.

<sup>149</sup> Sky's Response, paragraph 62.

- 5.92 [redacted]<sup>150</sup>. [redacted]<sup>151</sup> [redacted].<sup>152</sup>
- 5.93 We believe that use of Cardinal may at least partially mitigate any impact on BT's [redacted]. Indeed, information we have obtained from BT suggests that Cardinal will be used even if we grant interim measures. In addition, we consider that Cardinal could be used more extensively if required:
- 5.93.1 [redacted]<sup>153</sup> and BT has recently made an announcement that SS1&2 will only be available to Infinity customers over Cardinal (see paragraph 3.5.2 above). [redacted].<sup>154</sup> [redacted]<sup>155</sup> [redacted];<sup>156</sup>
- 5.93.2 there are over [redacted] paying subscribers currently served by BT's Cardinal platform.<sup>157</sup> [redacted].<sup>158</sup> [redacted];
- 5.93.3 [redacted].<sup>159</sup> [redacted].<sup>160</sup> [redacted].
- 5.94 [redacted].<sup>161</sup> [redacted].<sup>162</sup> Therefore, BT would be able to use BT Sport as competitive differentiator vis-a-vis TalkTalk's YouView offering.<sup>163</sup>
- 5.95 [redacted].<sup>164</sup> [redacted].

#### *Self-retail by Sky on YouView*

- 5.96 Sky has stated that it is keen to self-retail its Sky Sports channels (through NOW TV) to YouView customers (including BT's customers), but that this is dependent on: [redacted].<sup>165</sup> Sky therefore suggests that SS1&2 could be made available to BT's YouView subscribers (via a Sky self-retail model) [redacted].<sup>166</sup> However, BT states that a Sky self-retail model would enable Sky to price SS1&2 on YouView in such a way as to render the YouView platform less attractive than Sky's own platform.<sup>167</sup>
- 5.97 We have considered whether Sky's self-retail offering on YouView would be sufficient to attract subscribers for whom the availability of SS1&2 is important (primarily existing pay TV subscribers taking SS1&2), thereby reducing any potential impact on BT's [redacted].

<sup>150</sup> BT's Complaint, paragraphs 2.9-2.13.

<sup>151</sup> For example, see BT's Complaint, paragraphs 2.12-2.13.

<sup>152</sup> BT's Complaint, paragraph 6.25(b).

<sup>153</sup> Email from Ben Bleicher (BT) to Martin Hill (Ofcom), dated 27 June 2013, responding to clarificatory questions on BT's submissions.

<sup>154</sup> BT's 1<sup>st</sup> s.26 Response to Question 14. BT customers in non-fibre areas can still take a YouView box, but will not be able to access BT Sport on their YouView box. These customers can access BT Sport either online or via the BT Sport app. Email from BT (Ben Bleicher) to Ofcom (Martin Hill) dated 27 June 2013.

<sup>155</sup> Our understanding from the evidence provided by BT is that [redacted].

<sup>156</sup> ESG Presentation, 26 July 2012, page 12 (BT's 1<sup>st</sup> s.26 Response, Annex 1A.7). BT estimates that within the next three to four years there is a possibility that [redacted]% of UK homes will be reached (BT's 1<sup>st</sup> s.26 Response to Question 14, paragraph 14.2). This is subject to an acceptable investment and regulatory environment (Slides for BT's Q4 and full year 2012/13 results, 10 May 2013, page 75: Annex 8.2(a) to BT's 1<sup>st</sup> s.26 Response).

<sup>157</sup> BT's Complaint, paragraph 2.3(a).

<sup>158</sup> BT's 1<sup>st</sup> s.26 Response, paragraph 15.3.

<sup>159</sup> BT's Complaint, paragraph 2.11(b) and BT's 1<sup>st</sup> s.26 Response to Question 16. [redacted].

<sup>160</sup> BT 1<sup>st</sup> s.26 Response to Question 16, paragraph 16.4 and BT's Complaint, footnote 17. [redacted].

<sup>161</sup> BT's Complaint, paragraph 6.25(b).

<sup>162</sup> BT 1<sup>st</sup> s.26 Response to Question 17, paragraph 17.3.

<sup>163</sup> In response to the Provisional Decision, [redacted].

<sup>164</sup> BT's Complaint, paragraph 6.25(b).

<sup>165</sup> Sky submission, 7 June 2013, paragraph 30 and footnote 5.

<sup>166</sup> Sky's Response, paragraphs 105-110.

<sup>167</sup> BT's Complaint, paragraph 6.25(a).

5.98 Clearly this depends in large part on the nature of Sky's retail proposition (for example, the periodicity of subscription and the retail price), and the time it would take to launch a NOW TV proposition on BT's YouView platform.<sup>168</sup> We consider that a rational commercial proposition offering Sky Sports on NOW TV on YouView would be designed by Sky to minimise cannibalisation of Sky's existing Sky Sports subscriber base on its satellite platform. Therefore, the extent to which this would limit any negative impact on BT's YouView subscriber base in the interim period is likely to be limited:

5.98.1 Sky currently offers a day pass for the Sky Sports channels on NOW TV, for £9.99 per day. Whilst this proposition might be attractive to some existing subscribers to Sky Sports who watch the channels very occasionally (for example, key sporting events), we hypothesise that it is unlikely that many existing subscribers would find it attractive at that price point; and

5.98.2 [redacted].

### *Accepting the Grant-Back Condition*

5.99 Sky argues that BT could also accept the Grant-Back Condition in order to be able to offer SS1&2 on its YouView platform (i.e. Scenario 3). If BT accepts the Grant-Back Condition, it will be able to offer SS1&2 on its YouView platform, which BT submits will [redacted].

5.100 BT submits that it will have forfeited the opportunity to use BT Sport as a point of differentiation vis-a-vis Sky in order to attract subscribers.<sup>169</sup> In particular:

5.100.1 [redacted];<sup>170</sup> and

5.100.2 [redacted].<sup>171</sup>

5.101 We do not have sufficient evidence to assess the impact on BT's [redacted]. Given that it [redacted], we don't believe that it is necessary for us to consider this further.

### Provisional conclusion on serious, irreparable damage to BT's competitive position: downstream retail competition

5.102 BT submitted that, whether it accepts or rejects the Grant-Back Condition, [redacted].

5.103 However, in our Provisional Decision we stated that, for the reasons set out above, we were not satisfied on the evidence before us that [redacted]:

5.103.1 we were not satisfied on the evidence before us that the absence of SS1&2 [redacted];

5.103.2 to the extent that there is [redacted], we considered that BT could (at least partially) mitigate this by offering such subscribers a Cardinal box. BT could also permit Sky to self-retail on its YouView platform, although the extent of

<sup>168</sup> [redacted].

<sup>169</sup> Accepting the Grant-Back Condition primarily affects [redacted].

<sup>170</sup> BT's Complaint, paragraphs 2.53 and 3.1(b)(ii).

<sup>171</sup> BT's Complaint, paragraphs 2.53 [redacted].



any mitigation would depend on the nature of Sky's retail proposition (and in particular, the price);<sup>172</sup> and

5.103.3 Sky argued that BT could also accept the Grant-Back Condition in order to be able to offer SS1&2 on its YouView platform. [REDACTED].

5.104 Consequently, we were not satisfied that it is necessary to grant interim measures as a matter of urgency in order to prevent serious, irreparable damage to BT's competitive position in relation to pay TV retailing.

### Representations of the Parties

5.105 BT states that our Provisional Decision appeared to be largely focussed on detailed analysis of the potential financial consequences for BT and that our assessment of [REDACTED]. BT infers from this that we have accorded most weight to financial damage in our assessment.<sup>173</sup>

5.106 BT disagrees with Ofcom's provisional conclusion that [REDACTED]. BT submits that Ofcom should reconsider its Provisional Decision, taking into account evidence previously submitted by BT, specifically:<sup>174</sup>

5.106.1 [REDACTED];

5.106.2 [REDACTED]; and

5.106.3 [REDACTED].

5.107 In addition, BT disagrees with Ofcom's assumption in the Provisional Decision that [REDACTED]. BT restates its view that this mitigation will be limited because:

5.107.1 [REDACTED];

5.107.2 [REDACTED];

5.107.3 [REDACTED]; and

5.107.4 [REDACTED].<sup>175</sup>

5.108 In its representations on paragraph 5.79 of the Provisional Decision,<sup>176</sup> Sky submits<sup>177</sup> that it is not appropriate for Ofcom to conclude that it is unnecessary to consider the impact of BT's acceptance of the Grant-Back Condition on the basis that [REDACTED]. In Sky's view, this conclusion is only appropriate in circumstances where Ofcom has established that a lack of supply of SS1&2 would not have a material impact on BT during the interim period.

<sup>172</sup> We recognise that the self-retail of Sky Sports by Sky may be unattractive to BT for other reasons, such as customer relationship management.

<sup>173</sup> BT's Representations, paragraphs 3.6, 4.3-4.4.

<sup>174</sup> BT's Representations, paragraph 4.20.

<sup>175</sup> BT's Representations, paragraph 3.19.

<sup>176</sup> See paragraph 5.101 above.

<sup>177</sup> In Sky's Representations, it makes similar comments on paragraphs 4.6 and 4.7 of the Provisional Decision.

## Ofcom's response to Representations

- 5.109 We do not accept BT's assertion that we have accorded most weight to financial damage in our assessment. We have carefully considered each issue raised by BT on its merits - both [REDACTED].
- 5.110 With respect to BT's second comment, we accept that BT has a continuing interest in existing premium pay TV subscribers, [REDACTED]. We also accept that such subscribers are a part of BT's motivation for investing in sports rights. The relevant question is how critical these subscribers are likely to be during the interim period.
- 5.111 BT's Representations contain no new evidence that the absence of SS1&2 on YouView in the interim period [REDACTED]. [REDACTED].<sup>178</sup>
- 5.112 We also note that, in BT's Representations, it does not comment on the discussion in paragraphs 5.65 to 5.68 of the Provisional Decision<sup>179</sup> relating to whether [REDACTED].
- 5.113 [REDACTED]. [REDACTED] Representations do not provide any new evidence to the contrary, beyond that which we considered in reaching our provisional conclusion. Specifically:
- 5.113.1 BT has not provided any additional reasoning or evidence to show that [REDACTED]. In this regard, see paragraph 5.93.2;
- 5.113.2 BT does not challenge our understanding that, in any event, it will still need [REDACTED] (see paragraphs 5.93.1 and 5.93.3 above). [REDACTED]; and
- 5.113.3 [REDACTED].<sup>180</sup>
- 5.114 [REDACTED].<sup>181</sup> [REDACTED].
- 5.115 We note Sky's comments on the circumstances in which we should consider both Scenario 2 and 3 in our assessment. With respect specifically to paragraph 5.103 above, we recognise that this should properly have read that we did not consider it necessary to assess Scenario 3 given that we had not identified serious, irreparable damage under Scenario 2.

### Final conclusion on serious, irreparable damage to BT's competitive position: downstream retail competition

- 5.116 Having carefully considered all of the evidence and submissions provided to us by both parties and their representations in response to the Provisional Decision, we remain of the view that it is not necessary to grant interim measures as a matter of urgency in order to prevent serious, irreparable damage to BT's competitive position in relation to pay TV retailing.

<sup>178</sup> BT's Representations, paragraph 2.3(b)(i) and 4.20(a).

<sup>179</sup> See paragraphs 5.87 to 5.90 above.

<sup>180</sup> BT's Representations, paragraph 3.19(c).

<sup>181</sup> [REDACTED]. BT's 1<sup>st</sup> s.26 Response. Question 15.

## Serious, irreparable damage to BT's competitive position: upstream content rights

### Assessment set out in the Provisional Decision

- 5.117 In this sub-section, we consider whether it is necessary for us to grant interim measures as a matter of urgency in order to prevent serious, irreparable damage to BT's competitive position in relation to upstream sports rights. [REDACTED].
- 5.118 BT submits that [REDACTED].
- 5.119 However, we note that BT can monetise its investment in sports rights in a number of additional ways, [REDACTED]:<sup>182</sup>
- 5.119.1 residential subscribers to its sports channels across all platforms (wholesale and retail);
  - 5.119.2 incremental (i.e. new and retained) broadband (and telephony) subscribers (irrespective of pay TV platform); and
  - 5.119.3 commercial subscribers to its sports channels (e.g. pubs, clubs, hotels, etc.).<sup>183</sup>
- 5.120 BT submits it has [REDACTED]. That is, BT's future bidding plans are said to be [REDACTED]. BT submits that if its [REDACTED].<sup>184</sup>
- 5.121 Information provided by BT suggests that [REDACTED].<sup>185</sup> [REDACTED]. Therefore, we consider below whether the success of BT Sport [REDACTED] (Scenario 2).<sup>186</sup> In particular, we consider the possible effect on BT's ability, during the interim period, [REDACTED].

#### *YouView subscribers*

- 5.122 As set out above, [REDACTED].

#### *Incremental broadband subscribers*

- 5.123 BT's Complaint contains limited information on its strategy to use BT Sport and its investment in sports rights to acquire/retain broadband subscribers, and therefore [REDACTED]. We have nevertheless gone on to consider whether the lack of supply of SS1&2 on YouView [REDACTED].
- 5.124 We consider it unlikely that the absence of SS1&2 on YouView will affect BT's ability to retain or acquire broadband subscribers that continue to subscribe to Sky's DSat platform.
- 5.125 We recognise that there may be an adverse impact on BT's ability to acquire broadband subscribers [REDACTED].<sup>187</sup> [REDACTED].

<sup>182</sup> Sky noted that BT can also monetise its investment in rights through advertising and sponsorship. Sky's Representations on paragraph 5.93 of the Provisional Decision.

<sup>183</sup> BT explained how it intends to generate revenues from BT Sport in its Q4 2012/13 Results Presentation: page 42 (BT's 1<sup>st</sup> s.26 Response, Annex 8.2(a)). See also page 16 of BT Group plc's Q4 2012/13 Results Presentation Transcript – Part 2, 10 May 2013 (BT's 1<sup>st</sup> s.26 Response, Annex 8.2(c)) and page 14 of BT Group plc's Q4 2012/13 Results Presentation Transcript – Part 1, 10 May 2013 (BT's 1<sup>st</sup> s.26 Response, Annex 8.2(b)).

<sup>184</sup> BT's Complaint, paragraphs 3.1(d), 3.15(b) and 3.16-3.18.

<sup>185</sup> BT's 1<sup>st</sup> s.26 Response, Annex 1A.11 and Annex 28.5.

<sup>186</sup> There is a lack of evidence to quantify [REDACTED].

5.126 We therefore do not consider that [redacted].

Provisional conclusion on serious, irreparable damage to BT's competitive position: upstream content rights

5.127 In our Provisional Decision we stated that, to the extent that take-up of YouView may be affected in the interim period by a lack of supply of SS1&2, [redacted].<sup>188</sup> However, BT's evidence did not, in our view, demonstrate that the [redacted].

5.128 In light of the evidence we obtained from BT, we also went on to consider BT's strategy in relation to broadband acquisition and retention. [redacted].

5.129 Therefore, we were not satisfied that BT would suffer serious, irreparable damage in the interim period to its ability to compete for further sports rights as a result of the lack of supply of SS1&2.<sup>189</sup>

Representations of the Parties

5.130 BT submits that, in the Provisional Decision, Ofcom failed to have regard to the evidence submitted by BT on this issue and understated the effect that the [redacted].<sup>190</sup>

5.131 BT also submits that Ofcom did not have regard [redacted].<sup>191</sup>

5.132 In BT's view, platform subscribers are [redacted] than other types of subscriber to BT Sport as they [redacted] (for example, compared to BT Sport subscribers on Sky's DSat platform).<sup>192</sup> BT also submits that platform subscribers who are also willing to purchase SS1&2 are [redacted].<sup>193</sup>

5.133 BT submits that, as a result, the loss of platform subscribers, [redacted].<sup>194</sup>

5.134 In addition BT does not accept that its ability to monetise its investment in sports rights in a number of ways [redacted].<sup>195</sup>

5.135 BT also submits that the Provisional Decision incorrectly characterises the relationship between BT's pay TV and broadband businesses.<sup>196</sup>

5.136 In Sky's Representations, it submits that Ofcom should not limit its consideration to the possible effects on BT's retail distribution of BT Sport (still less retail distribution via YouView). Sky submits that, as Ofcom acknowledged at paragraph 5.85 of the Provisional Decision,<sup>197</sup> all subscribers to BT's sports channels (retail and wholesale) contribute to BT's monetisation of its investment. Sky adds that BT's decision as to whether it should bid for further sports rights will depend on BT's success in monetising its investment in rights via the methods that are identified in paragraphs

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<sup>187</sup> As suggested by BT in paragraph 3.1.c.ii of BT's Complaint.

<sup>188</sup> We note that the [redacted].

<sup>189</sup> In light of this conclusion, [redacted].

<sup>190</sup> BT's Representations, paragraphs 4.6 to 4.18.

<sup>191</sup> BT's Representations, paragraphs 4.7(a) and 4.7(b).

<sup>192</sup> BT's Representations, paragraph 4.8.

<sup>193</sup> BT's Representations, paragraph 4.9.

<sup>194</sup> BT's representations, paragraph 4.12.

<sup>195</sup> BT's Representations, paragraph 4.13.

<sup>196</sup> BT's Representations, paragraph 4.25.

<sup>197</sup> See paragraph 5.119 above.

5.84 and 5.85 of the Provisional Decision (to which advertising and sponsorship revenues should be added – see paragraphs 5.118 and 5.119 above).<sup>198</sup>

### Ofcom's response to Representations

- 5.137 We accept that a platform subscriber may be [X] to BT than another type of subscriber (for example, a channel-only subscriber or a channel and broadband subscriber) in terms of [X]. This is all the more true to the extent that [X]. We also recognise that TV subscribers who take SS1&2 have a proven demand for premium sports content.
- 5.138 It may be that [X]. However, on the evidence provided to us, we do not consider that the [X] will be sufficiently large in the interim period to justify us taking urgent action now on the basis that BT will suffer serious, irreparable damage if interim measures are not granted.<sup>199</sup> In particular:
- 5.138.1 even if a premium sports YouView subscriber may be [X] than all other types of subscriber, BT has not provided us with sufficient evidence to show how significant this group of subscribers is overall, relative to the other groups of subscriber. [X]; and
- 5.138.2 we also note paragraphs 5.122 to 5.126 above, [X].<sup>200</sup> We considered that BT's evidence had not demonstrated why it would [X]. We note that BT does not comment on these paragraphs in its Representations.
- 5.139 Consequently, BT's Representations do not contain any new reasoning or evidence that causes us to change our provisional conclusion in respect of whether there is serious, irreparable damage to its ability and incentive to bid for further sports rights.
- 5.140 In relation to BT's comment that the Provisional Decision conflates the issues of building a subscriber base with a proven demand for sport and the monetisation strategy ultimately deployed, we do not agree. [X].
- 5.141 Contrary to BT's submissions, we do not consider that BT's pay TV business is "*merely an adjunct*" to BT's broadband business.<sup>201</sup> However, for the purposes of assessing the impact on BT if interim measures are not granted [X], we consider it relevant to take into account the interrelationships with BT's broadband business for the reasons set out in paragraphs 5.18 to 5.22).
- 5.142 In relation to Sky's comment that we should not limit our consideration to the possible effects on BT's retail distribution of BT Sport via YouView, we agree that BT can monetise its investment in a number of ways, as set out in paragraph 5.119 above. However, the relative importance of these different sources of revenue to BT's ability and incentive to bid for sports rights is unclear. We note that our focus on the [X].

<sup>198</sup> Sky's Representations on paragraph 5.85 of the Provisional Decision.

<sup>199</sup> We note that, in BT's representations, it appears to refer to [X] (see, for example, paragraphs 2.3(a) and 4.26(a)). However, BT does not elaborate on why [X].

<sup>200</sup> In BT's Representations, BT suggests that in reaching our Provisional Decision, we did not take into account evidence on the importance of the [X] (paragraph 4.6(e)). Contrary to BT's Representations, we did comment on this evidence in our Provisional Decision (see paragraphs 5.86 to 5.90). We noted that BT's evidence indicated that [X] and that Sky also did not dispute this. However, we were not persuaded by BT's submissions regarding the link between the take-up of the BT Sport channel [X]. [X].

<sup>201</sup> BT's Representations, paragraph 4.25.

Final conclusion on serious, irreparable damage to BT's competitive position:  
upstream content rights

5.143 Having carefully considered all of the evidence and submissions provided to us by both parties and their representations in response to the Provisional Decision, we remain of the view that [X] is not such that it is necessary for us to take urgent action and grant interim measures in order to prevent serious, irreparable damage to BT.

**Final conclusion on serious, irreparable damage**

5.144 As a result, we are not satisfied on the evidence available to us that it is necessary to grant interim measures as a matter of urgency in order to prevent serious, irreparable damage to BT.

## Section 6

# Public interest assessment

## Protection of the public interest

- 6.1 Ofcom may issue an interim measures direction where it has commenced an investigation (which is ongoing) and where it considers that it is necessary to act as a matter of urgency to protect the public interest. Accordingly we consider in this section whether there is a need to act urgently to protect the public interest as a result of the impact that the absence of SS1&2 from BT's YouView service will have during the interim period.
- 6.2 The OFT's guidance states that it may issue an interim measures direction for a public interest purpose "*to prevent damage being caused to a particular industry or to consumers as a result of the suspected infringement*" or "*[to] take action to prevent damage to competition more generally.*"<sup>202</sup>
- 6.3 Key issues driving potential public interest concerns are the importance of live sports rights as a driver of uptake and competition in pay TV and that much of the sport which is important for consumers is broadcast on SS1&2. BT's entry into sports rights acquisition is notable as an attempt, and therefore willingness, to challenge Sky's strength in the provision of premium sports channels. We might be concerned if the absence of SS1&2 now reduces the extent of competition from BT.
- 6.4 Moreover we recognise that the absence of SS1&2 from its YouView platform might [redacted] give rise to public interest concerns.

## BT's Complaint

- 6.5 BT submitted that we should issue interim measures in order to protect the public interest for the following three reasons:
- 6.5.1 **consumer interest:** BT states that, if it does not obtain wholesale supply of SS1&2, then consumers will be unable to obtain an attractive package comprising SS1&2 and BT Sport on BT's YouView platform. [redacted];<sup>203</sup>
- 6.5.2 **downstream retail competition:** BT states that the unavailability of SS1&2 on its YouView platform will distort competition in the retailing of packages containing premium sports channels (either on a standalone basis or bundled with additional pay TV channels or communications services). BT highlights in this respect the positions of BT and TalkTalk on their respective YouView platforms. BT also states that it will further reduce the limited competitive constraints that Sky faced at the retail level;<sup>204</sup>
- 6.5.3 **upstream content rights:** BT states that there is a clear public interest in seeking to encourage more viable bidders for upstream content rights in competition with Sky, and that BT's acquisition of sports rights gives rise to

<sup>202</sup> OFT, Enforcement Guidance, December 2004, paragraph 3.7.

<sup>203</sup> BT's Complaint, paragraph 6.28.

<sup>204</sup> BT's Complaint, paragraph 6.29.

the possibility of greater upstream competition in the long run. BT states that, [§<].<sup>205</sup>

## Sky's Response

- 6.6 Sky states that BT has not made out any harm to the public interest from the maintenance of the status quo.<sup>206</sup> In particular:<sup>207</sup>
- 6.6.1 **consumer interest:** Sky notes that, whilst BT complains that its YouView subscribers will be unable to access an attractive package comprising SS1&2 and BT Sport, [§<].<sup>208</sup> Sky considers this latter harm to be more severe than the harm which BT complains of, [§<]. Sky submits that it would be [§<];
- 6.6.2 Sky considers that BT's second consumer interest argument does not make sense. BT argues that there may be some Sky DSat subscribers who cannot afford the minimum monthly charge of £12 per month for BT Sport but do not want to take BT's broadband in order to get the channels for free. Sky states that BT has not explained why, if interim measures were granted (Scenario 1), these subscribers would then be willing to take BT's broadband and telephony services, which is a requirement for receiving pay TV services via BT's YouView service,<sup>209</sup> and
- 6.6.3 **downstream retail competition / upstream content rights:** Sky states that BT has not made out its claim that the status quo will lead to any competitive distortion and that, in its view, BT is in fact seeking entry assistance from Ofcom. Sky considers that the public interest would be damaged by a grant of interim measures as it will result in an unwarranted marketing advantage for BT (which BT would never enjoy under normal competition), resulting in a distortion of competition and the risk of harm to Sky and third parties.<sup>210</sup>
- 6.7 Sky also states that it has updated us on its wholesale negotiations with BT on several occasions and made clear that it would not wholesale SS1&2 to BT without reciprocal supply of BT Sport. [§<].<sup>211</sup>

## Assessment

- 6.8 We first consider upstream competition for sports rights, then retail pay TV competition and finally BT's arguments in relation to consumer harm. In relation to each of these sub-sections, we first set out our assessment and the provisional conclusion that we reached in our Provisional Decision, we then set out the parties' representations in response and, lastly, our final conclusion.

<sup>205</sup> BT's Complaint, paragraph 6.30.

<sup>206</sup> Sky's Response, paragraph 89.

<sup>207</sup> Sky's Response, paragraphs 88 – 96.

<sup>208</sup> Sky notes that whilst DSat subscribers are able to subscribe to BT Sport without changing TV platform (albeit they cannot purchase the channels in a bundle with Sky Sports), Virgin Media and TalkTalk subscribers must switch their TV platform in order to obtain BT Sport – their ability to do so being dependent on any minimum contract period with their existing provider.

<sup>209</sup> Sky's Response, paragraph 36.

<sup>210</sup> Sky's Response, paragraph 96.

<sup>211</sup> Sky's Response, paragraph 97. [§<].



## Upstream competition for content rights

### Assessment set out in the Provisional Decision

- 6.9 In this sub-section, we consider whether there is a need to grant interim measures in order to prevent harm to upstream competition for content rights in the interim period.
- 6.10 The CC found that competing to acquire content was in principle an aspect of competition between pay TV retailers.<sup>212</sup> We recognise that the ability to offer live premium sports is important to the success of developing a pay TV business given the significance of this content to consumers. BT's acquisition of [redacted] in sports rights is notable as an attempt, and therefore willingness, to challenge Sky's strength in the provision of premium sports channels.<sup>213</sup> BT may have plans to bid for further sports rights to maintain and strengthen its portfolio of content in order to compete with Sky.
- 6.11 We may have concerns if BT's continued participation in the upstream market was largely contingent on the success of BT's YouView platform in the interim period, for example in terms of subscriber numbers or revenues, and BT's incentive to bid is adversely affected by the absence of SS1&2 from that platform.
- 6.12 BT states that its ability and incentive to [redacted] as a result of Sky's insistence on the Grant-Back Condition.<sup>214</sup>
- 6.13 If BT's submissions are accepted, then this could have adverse effects for the public interest by damaging competition provided by BT. In particular:
- 6.13.1 until now, the minority PL rights have not been won by a pay-tv platform operator. The acquisition of these rights by a competitor with a pay TV platform supports competition with Sky at both levels of the value chain (i.e. pay TV retailing and channel provision) through the "virtuous circle".<sup>215</sup> Accordingly, to the extent that Sky's conduct harms BT's at the channel provision level, this has the potential to harm BT as a retail operator.
- 6.13.2 both Virgin Media and TalkTalk appear to have ruled themselves out of acquiring sports rights in the short term.<sup>216</sup>
- 6.14 [redacted]<sup>217</sup> [redacted]<sup>218</sup> [redacted]:

<sup>212</sup> Competition Commission, *Movies on pay TV market investigation: A report on the supply and acquisition of subscription pay-TV movie rights and service*, August 2012.

<http://www.competition-commission.org.uk/media-centre/latest-news/2012/Aug/cc-confirms-views-in-pay-tv-movies> ("CC Movies Final Report").

<sup>213</sup> [redacted], page 8 (Annex 4.3(c) to BT's Complaint).

<sup>214</sup> See paragraph 6.24 of BT's Complaint.

<sup>215</sup> In the Provisional Decision we noted that the minority rights had always been won by standalone channel providers. In Sky's Representations, it notes that Setanta was a vertically integrated operator, which retailed its sports channels on open platforms in the UK (Sky's DTH satellite platform, TopUpTV and the internet). We have therefore clarified our language in light of this comment.

<sup>216</sup> BT refers to the fact that Virgin had sold its programme making arm, Virgin Media Television, to Sky (see <http://corporate.sky.com/page.aspx?pointerid=6123cbfe61d648e38fb10a1e7a2024e5>). We also note the recent statement of Liberty Global CEO, Mike Fries, when discussing TV content: "But I don't think that you have to own it. I don't believe that at this stage we need to make a big investment in content." (interview with The Daily Telegraph, 8 June 2013. BT notes that TalkTalk has described its approach as being "a market place for content NOT a content rights owner" (<http://www.talktalkgroup.com/~media/Files/T/TalkTalk/pdfs/presentations/2012/strategy-update-pres.pdf>).

<sup>217</sup> Although the paper is dated February 2013, we understand that it was presented at the BT Board meeting of 5 March 2013.

<sup>218</sup> BT's 1<sup>st</sup> s.26 Response, Annex 1A.11, pages 5-10. [redacted] page 1 (BT's 1<sup>st</sup> s.26 Response, Annex 28.5).

- 6.14.1 [redacted];<sup>219</sup>
- 6.14.2 [redacted].<sup>220</sup>
- 6.15 [redacted].<sup>221</sup> [redacted].<sup>222</sup>
- 6.16 [redacted]<sup>223</sup> [redacted].<sup>224</sup>
- 6.17 [redacted].
- 6.18 In addition we considered the target subscriber numbers and revenues BT has modelled, in order to assess its incentives to bid for future sports rights. In Section 5 we considered whether BT's [redacted]. We concluded that we are not satisfied on the evidence before us that BT's ability and incentive to bid for future rights will be materially affected in the interim period if interim measures are not granted. We also consider that there is insufficient evidence to conclude that the risk of [redacted], is high.

### Provisional conclusion on upstream competition for content rights

- 6.19 In our Provisional Decision we stated that, in light of the internal governance papers and the modelling provided by BT, we were not satisfied that it is necessary for us to act urgently to grant interim measures in order to protect the public interest by preventing harm to upstream competition for content rights.

### Representations of the Parties

- 6.20 BT submits that Ofcom's public interest findings in relation to upstream content rights should be reconsidered because:
- 6.20.1 evidence referred to by Ofcom in the Provisional Decision - a Board meeting presentation from February 2013 of BT Group plc,<sup>225</sup> and the minutes of this meeting of March 2013,<sup>226</sup> - "*pre-dates BT's awareness that Sky had adopted an entrenched position in relation to the Grant-Back Condition*" [redacted];<sup>227</sup>
- 6.20.2 Ofcom fails to acknowledge that the same evidence states that in all circumstances [redacted];<sup>228</sup>
- 6.20.3 the reference in the Board minutes to the incremental increase in broadband subscribers [redacted];<sup>229</sup>
- 6.20.4 the success of both the BT Sport channel and the BT YouView platform subscriber base [redacted];<sup>230</sup>

<sup>219</sup> BT's 1<sup>st</sup> s.26 Response, Annex 1A.11, page 5.

<sup>220</sup> BT's 1<sup>st</sup> s.26 Response, Annex 1A.11, page 6.

<sup>221</sup> Pages 2 and 6.

<sup>222</sup> BT's 1<sup>st</sup> s.26 Response, Annex 1A.11, page 2.

<sup>223</sup> Non-executive Director.

<sup>224</sup> Minutes of the Board meeting of BT Group plc, 5 March 2013, page 1 (Annex 28.5 to BT's 1<sup>st</sup> s.26 Response).

<sup>225</sup> BT's 1<sup>st</sup> s.26 Response, Annex 1A.11.

<sup>226</sup> Annex 28.5 to BT's 1<sup>st</sup> s.26 Response.

<sup>227</sup> BT's Representations, paragraph 5.9(b)(i).

<sup>228</sup> BT's Representations, paragraph 5.9(b)(ii).

<sup>229</sup> BT's Representations, paragraph 5.9(b)(iii).

<sup>230</sup> BT's Representations, paragraph 5.9(c).

- 6.20.5 Ofcom's Provisional Decision does not address other evidence provided by BT, including BT documents and analysis by Enders Analysis,<sup>231</sup> and
- 6.20.6 Ofcom's findings mirror the findings on competitive impact and Ofcom should revise these.<sup>232 233</sup>

### Ofcom's response to Representations

- 6.21 For the avoidance of doubt, our provisional view [redacted] was based on all of the documentary evidence provided by BT and not just the February 2013 BT Group plc Board paper and minutes from that Board meeting.<sup>234</sup>
- 6.22 In relation to the February 2013 Board paper and minutes, we note BT's statement that the Board presentation pre-dates its awareness that Sky would insist on the Grant-Back Condition as a condition of supplying SS1&2 to BT's YouView platform. However, BT does not explain why it thinks that the interpretation we drew from this evidence is wrong. Specifically, it is not clear to us [redacted].
- 6.23 In addition, we do not accept that our assessment of this evidence is misplaced. In particular, we recognised that BT's future bidding plans were subject to a number of factors, of which [redacted].<sup>235</sup> Moreover, we did not interpret the minutes of the Board meeting to mean that [redacted]. [redacted].
- 6.24 In relation to BT's comment that [redacted]. Noting that BT has not provided any new evidence in its representations, we still [redacted].

### Final conclusion on upstream competition for content rights

- 6.25 Having carefully considered all of the evidence and submissions provided to us by both parties and their representations in response to the Provisional Decision, we remain of the view that it is not necessary for us to act urgently to grant interim measures now in order to protect the public interest by preventing harm to upstream competition for content rights.

<sup>231</sup> BT's Representations, paragraph 5.10.

<sup>232</sup> BT's Representations, paragraph 5.9(a).

<sup>233</sup> BT also infers from paragraph 6.11 of the Provisional Decision that "...the test posited by Ofcom is that BT's investment strategy need only be "largely" contingent on the success of the YouView platform..." (BT's Representations, paragraph 5.9(c)). It is unclear if BT is suggesting that the test for the grant of interim measures is as set out in this quote. If so, then this is not the appropriate test (and we have not suggested that it is). We have the power to grant interim measures where we consider it necessary to act as a matter of urgency to protect the public interest. In accordance with the OFT's guidance, we have considered in this case whether such a need arises in order to prevent damage to competition or to consumers. We also note and agree with Sky's comments that, in order to grant interim measures for the purpose of protecting the public interest, it would be appropriate to consider the extent to which any impact on BT gives rise to damage to competition or consumers (i.e. not just to BT's private interests) (Sky's Representations, comments in relation to paragraphs 6.4 and 6.11 of the Provisional Decision).

<sup>234</sup> In its representations, BT states that the Provisional Decision does not deal with analysis by Enders Analysis (BT's Representations, paragraph 5.10). We did take this evidence into account, but did not consider it to change our provisional conclusions. In particular, we do not dispute that [redacted]. However, we consider this evidence to be less relevant to understanding [redacted] than BT's internal documents.

<sup>235</sup> [redacted].

## Retail pay TV competition

### Assessment set out in the Provisional Decision

- 6.26 We now consider whether there is a need to grant interim measures in order to prevent harm to retail pay TV competition in the interim period.
- 6.27 Pay TV retailers compete with each other to acquire subscribers across a range of features of their services, including price, the quality and range of content offered, standards of service and other facilities.
- 6.28 In August 2012 as part of its investigation of Movies on pay TV<sup>236</sup> the CC found that competition in the retail market for pay TV was ineffective.<sup>237</sup>
- 6.29 As noted above, live sport<sup>238</sup> is a key driver of demand for pay TV. We recognise that SS1&2 might continue to be important drivers for a pay TV business given the live sport content they contain. In principle therefore we recognise that [§<]. If it were clear that competition in the retail pay TV market would be weakened in the longer term as a result of BT not retailing SS1&2 over YouView during the interim period then this might be a concern for the public interest.
- 6.30 In considering whether Sky's conduct may damage competition from BT, we have considered the extent of competition from BT, and whether harm to BT might further diminish competition:
- 6.30.1 through becoming a provider of premium sport channels, BT has expanded into a vertically integrated pay TV retailer rather than just a pay TV retailer. This has the potential to reinforce BT's competitive position at both levels of the value chain (i.e. pay TV retailing and channel provision) i.e. content attracts subscribers, which in turn enables greater access to content;
- 6.30.2 BT's expansion as a pay TV retailer is also motivated by the linkage to the retail broadband market, which provides BT with an additional payoff which a pay TV-only entrant would not benefit from. This gives BT a stronger incentive to compete to acquire pay TV subscribers;
- 6.30.3 although BT is not the only rival to Sky in this respect,<sup>239</sup> arguably BT will be a [§<] rival over the longer term, especially in competing for the large number of customers with a strong interest in premium sport, because it is also active as a premium sport channel provider; and

<sup>236</sup> CC Movies Final Report: <http://www.competition-commission.org.uk/media-centre/latest-news/2012/Aug/cc-confirms-views-in-pay-tv-movies>.

<sup>237</sup> The CC cited a number of factors, including: (i) competition was affected by barriers to switching, particularly with respect to switching between traditional pay-TV retailers; (ii) significant barriers to expansion for existing smaller traditional pay TV retailers offering packages of pay TV; (iii) Sky's large number of existing subscribers deriving from its historical position; and (iv) the restricted coverage of Virgin Media. With respect to the retail pay TV market, the CC also noted that (i) BT and TalkTalk had so far made a limited impact on the market; (ii) pay TV retailers were differentiated by the quality/range of content they offer; (iii) the ability to access content was among the factors relevant to entry and expansion; (iv) however, competing to acquire content was in principle an aspect of competition between pay TV retailers and effective competition does not necessarily require all pay TV retailers to offer the same content. (CC Movies Final Report, section 5). We have amended this text since our Provisional Decision in response to a comment from Sky.

<sup>238</sup> Pay TV Statement, Section 4.

<sup>239</sup> For example, Virgin Media and TalkTalk also benefit from linkages to the retail broadband market. In Sky's Representations, it also notes that BT, Virgin Media and TalkTalk (and Sky) also benefit from telephony revenues.

- 6.30.4 in addition, we note that even though Sky considers that BT's YouView service is a [redacted]<sup>240</sup> (see also paragraph 5.10 above), it also states that "[t]here is little doubt that, over time, BT's YouView service will improve significantly."<sup>241</sup>
- 6.31 BT submits that whether it accepts or rejects the Grant-Back Condition, [redacted].
- 6.32 In considering whether Ofcom should intervene on an urgent basis to protect the public interest to prevent potential harm to competition in retail pay TV we must have particular regard to the evidence we have as to the extent [redacted]. We observe from Section 5 in that respect, that [redacted].
- 6.33 In the context of the linkage to the retail broadband market, we also note that [redacted].
- 6.34 We also take into account in this assessment:
- 6.34.1 the availability of SS1&2 to consumers on retail pay TV platforms other than those operated by Sky and BT. We expect those alternatives to continue to exist through the interim period; and
- 6.34.2 that the effect of granting interim measures would be the commencement of retailing by BT of SS1&2 over its YouView platform. This is not a situation which involves the potential withdrawal of existing services from consumers.

#### Provisional conclusion on retail pay TV competition

- 6.35 In our Provisional Decision we stated that we may give directions under section 35 CA98 where it is necessary to act as a matter of urgency to protect the public interest. Taking into account all the above factors, and the available evidence, we did not consider it necessary to act as a matter of urgency to protect the public interest by preventing potential harm to retail pay TV competition.

#### Representations of the Parties

- 6.36 BT submits that, in light of evidence submitted, Ofcom's public interest findings should be reconsidered given that public interest is "*based on and driven by its competitive impact analysis*".<sup>242</sup>

#### Ofcom's response to Representations

- 6.37 We have considered the evidence and submissions provided to us and do not believe we have sufficient evidence to change our provisional conclusion. We note also, in response to BT's submission, that we have not changed our provisional conclusion on competitive impact.

#### Final conclusion on retail pay TV competition

- 6.38 Having carefully considered all of the evidence and submissions provided to us by both parties and their representations in response to the Provisional Decision, we remain of the view that it is not necessary to act as a matter of urgency to protect the public interest by preventing potential harm to retail pay TV competition.

<sup>240</sup> Sky's Response, paragraphs 44 to 45.

<sup>241</sup> Sky's Response, paragraph 46.

<sup>242</sup> BT's Representations, paragraph 5.6.

## Consumer interest

### Assessment set out in the Provisional Decision

- 6.39 Finally, we consider BT's arguments in relation to the consumer harm that would result if interim measures are not granted. We assess the potential consumer harm if BT rejects the Grant-Back Condition (Scenario 2 [redacted]), if its application for interim measures is not granted.
- 6.40 BT argues that, if it rejects the Grant-Back Condition and does not obtain supply of SS1&2 (i.e. Scenario 2), then consumers who would otherwise have subscribed to BT's YouView service, would be harmed. Specifically, BT identifies harm to:
- 6.40.1 consumers that would nevertheless still subscribe to BT's TV service; and
- 6.40.2 consumers that would subscribe to Sky instead.<sup>243</sup>
- 6.41 BT does not provide any estimate of the likely number of subscribers that fall into either of these categories, nor can we derive this information from the internal modelling that we obtained from BT (see paragraphs 5.23 to 5.28).
- 6.42 For consumers that would still subscribe to BT's TV service in Scenario 2, BT submits that [redacted].
- 6.43 We have considered this issue in static terms, by reference to the consumers affected in the interim period. BT has not provided any estimate of the relative numbers of subscribers that are likely to take a Cardinal box or forgo SS1&2. Notwithstanding this:
- 6.43.1 [redacted]; and
- 6.43.2 [redacted].
- 6.44 BT states that for those subscribers that choose to remain on the Sky DSat platform due to the unavailability of SS1&2 on BT's YouView platform, [redacted].
- 6.45 [redacted]. As Sky notes, BT broadband is a requirement to receive BT's YouView service, suggesting that these subscribers are willing and able<sup>244</sup> to take BT's broadband service (as BT presents them as consumers who would otherwise have switched to BT YouView if SS1&2 were available on that platform). It is possible that some subscribers have a very strong preference for triple play bundles, but no evidence suggesting this is significant has been provided by BT. In any event, BT has not provided any evidence to suggest that [redacted].<sup>245</sup>
- 6.46 In addition, we note that to the extent that BT accepts the Grant-Back Condition or permits Sky to self-retail on YouView, this particular theory of harm to consumers may at least be partially offset.

<sup>243</sup> BT does not refer to consumers that would subscribe to another TV platform (for example, Virgin Media or TalkTalk). These subscribers would be unable to subscribe to BT Sport unless BT reaches an agreement to make BT Sport available on these platforms.

<sup>244</sup> Meaning that the subscriber is not within a minimum contract period for another broadband service.

<sup>245</sup> For example, if the affected consumers place a low value on BT Sport (i.e. they would only subscribe to BT Sport on BT's YouView platform in Scenario 1 because it is free), the amount of consumer harm can be expected to be small.

### Provisional conclusion on consumer harm

6.47 In our Provisional Decision, we stated that we were not satisfied on the evidence available that it was necessary for us to grant interim measures as a matter of urgency in order to protect the public interest for the reasons that BT had advanced in relation to consumer harm.

### Representations of the Parties

6.48 BT submits that whilst the Provisional Decision considered potential harm to competition, it failed “*to accord equal significance to the impact of Sky’s conduct on consumers*”.<sup>246</sup> In BT’s view, Ofcom substantively addressed only one of BT’s submissions on consumer harm and therefore failed to properly address the potential consumer harm that would arise as a result of BT’s new propositions being impeded.<sup>247</sup>

6.49 With respect to the potential harm to consumers that remain on the Sky platform due to the unavailability of SS1&2 on BT’s YouView platform (the point that, according to BT, Ofcom did substantively address), BT states that Ofcom declined to consider the point further on the basis that no evidence is presently available. However, BT also states that such evidence is not available “*in the form Ofcom would prefer, given the forward-looking nature of the case*”, and Ofcom should therefore take a view based on evidence that is available, in particular BT’s submissions.

### Ofcom’s response to Representations

6.50 In assessing whether there is an urgent need to grant interim measures in order to protect the public interest, we have considered each issue raised by BT on its merits – both the potential harm to competition (both upstream and downstream) and the potential harm to consumers (see also our response at paragraph 5.109 to a similar point made by BT in relation to our assessment of serious, irreparable damage).

6.51 In the Provisional Decision, we considered each of BT’s submissions in relation to consumer harm (see paragraphs 6.5.1 and 6.40 to 6.46). We do not consider that BT has provided any new evidence in relation to consumer harm in response to the Provisional Decision, nor has it demonstrated there will be substantive consumer harm if interim measures are not granted.

6.52 With respect to BT’s second point, we do not accept BT’s characterisation of our assessment. We did not decline to consider the point further on the basis that no evidence is presently available. We identified that BT’s argument was premised on the affordability of BT Sport on the DSat platform, but noted that: (i) affordability could only be a potential issue for customers who chose not to take BT broadband; and (ii) BT’s own line of argument suggested that the subscribers it had identified as being potentially harmed were willing and able to take this service.<sup>248</sup>

### **Final conclusion on consumer harm**

6.53 Having carefully considered all of the evidence and submissions provided to us by both parties and their representations in response to the Provisional Decision, we remain of the view it is not necessary for us to grant interim measures as a matter of

<sup>246</sup> BT’s Representations, paragraph 5.12.

<sup>247</sup> BT’s Representations, paragraphs 5.12-5.15.

<sup>248</sup> In this respect, see paragraph 6.45.

urgency in order to protect the public interest for the reasons that BT has advanced in relation to consumer harm.



## Section 7

# Decision

- 7.1 Ofcom may issue an interim measures direction where we consider that it is necessary to act urgently for either of the purposes assessed above (to prevent serious, irreparable damage to BT or to protect the public interest).
- 7.2 For the reasons discussed in Section 5 and 6, we are not satisfied on the basis of the evidence before us that it is necessary for us to grant the interim measures requested by BT as a matter of urgency in order to prevent serious, irreparable damage to BT or to protect the public interest.
- 7.3 In light of this, we have not needed to consider the impact that a grant of interim measures would have on Sky and third parties.
- 7.4 In light of our assessment, we therefore conclude that we should refuse BT's application for interim measures.
- 7.5 This document contains Ofcom's decision on BT's application for interim measures. Ofcom is continuing to investigate whether Sky has abused a dominant position by making the wholesale supply of SS1&2 to BT's YouView platform conditional on BT wholesaling its BT Sport channels to Sky for retail on Sky's DSat platform.