



Summary of discussions between Ofcom and Sky, late 2007 and early 2008

Annex 2 to Pay TV Statement

This is the non-confidential
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has been redacted. Redactions
are indicated by [X].

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Contents

Section		Page
1	Introduction	1
2	Summary of discussions between Ofcom and Sky	2

Section 1

Introduction

- 1.1 In late 2007 Sky approached Ofcom to discuss whether there were commitments that it could provide to Ofcom to enable an early resolution of our process. Ofcom's view was that the commitments, if accepted, would have acted as undertakings in lieu of a reference to the Competition Commission under EA02. Sky told us that it approached Ofcom "in an attempt to end the stasis arising from Ofcom's various reviews and investigations, which were causing Sky's plans to launch its 'Picnic' offering via DTT to be held up"¹. The outcome of this could have been to allow for early resolution of both our market investigation and Picnic processes.
- 1.2 A series of discussions took place between December 2007 and April 2008, during which we discussed a detailed set of pricing proposals and made significant progress on a number of different issues.
- 1.3 The commitments that Sky was willing to make included a commitment to supply Sky Sports 1 plus Sky's premium movies channels on a wholesale basis for retail to residential subscribers, subject to various eligibility criteria. High definition variants of qualifying channels would have been included in the offer, starting no less than [X] after the Picnic launch date.
- 1.4 The main reason that we were unable to reach agreement at the time was price. Sky stated at the start of the discussions that it expected the baseline wholesale prices for these channels to be those applicable to Virgin Media, and that this was not something that it was willing to discuss. This proved to be a material constraint on the scope of our discussions.
- 1.5 Sky was, however, prepared to offer the following discounts relative to the rate-card:
- 1.6 A discount based on the platform penetration of premium customers, designed to ensure that there was no discount for current Virgin Media subscribers. [X]. (see further below);
- 1.7 Where a capacity constrained platform is only able to take a single screen version of a movies package, a [X] discount would be applied to that element of the wholesale price that can be attributed to that movies package. [X]. (see further below);
- 1.8 [X].
- 1.9 However, for the reasons set out section 9 of the main document, we were not in a position to accept Sky's proposed commitments.
- 1.10 Section 2 is a direct reproduction of a summary of the negotiations which was drafted by Ofcom in February 2008. The summary was sent to Sky for comment, and reflects amendments made by Sky in March 2008.

¹ Sky response to Third Pay TV Consultation, paragraph 1.14.

Section 2

Summary of discussions between Ofcom and Sky

“This document sets out Ofcom’s understanding of the commitments that Sky might be willing to offer, and the context within which it might be willing to offer them, in order to address concerns that have been raised by Ofcom within its Pay TV market investigation and evaluation of Sky’s ‘Picnic’ proposal. For the avoidance of doubt, this document does not imply that Sky agrees that there is any valid basis for the concerns that have been raised by Ofcom, nor does it imply that Sky is offering these commitments. Also for the avoidance of doubt, this document does not imply that Ofcom has made any decision regarding its willingness to accept these commitments, or the contextual matters raised by Sky².

Section 1 – summary of possible commitments

1) Sky will offer on a wholesale basis for retail to residential subscribers:

i) Any linear Premium Sports pay TV channels which include full live coverage of FAPL matches³; and

ii) Any linear Premium Movies pay TV channels which include theatrically released films broadcast in the first subscription pay TV window which are exclusively licensed by Sky under output agreements with the major studios

2) Sky will make the following commitments in relation to those channels which are not caught by this commitment:

i) Not ‘unduly and unreasonably’ to transfer programming from Sky Sports 1 which is not live FAPL coverage on to other channels or services⁴

ii) Not ‘unduly and unreasonably’ to increase the level of in-programme cross promotion to other channels or services

iii) To provide a clean feed which excludes dedicated cross promotions within programme breaks

3) Sky will make the following transitional commitment in relation to those channels which are not caught by this commitment but which are currently supplied to cable:

² This is a summary only and excludes detail on the scope and application of the possible commitments in practice

³ Sky will ensure that only Sky Sports 1 is caught by this commitment. [X].

⁴ [X]

- i) To continue to supply those other sports channels (Sky Sports 2 / 3 / Xtra) that are currently supplied to cable for a transitional period of [X].
- 4) In relation to enhanced services, Sky will:
- i) Provide high definition variants of qualifying channels provided by Sky (if any), but only from a date [X] after the Picnic launch date
- ii) Provide effective access to those services provided via the 'red button' from Sky Sports 1 which allow viewing of supplementary video-streams, so that retailers on those platforms which are technically capable of carrying these services are able to do so
- iii) Engage with eligible retailers with a view to providing access to other interactive services provided by the 'red button'
- iv) [X]:
- (a) [X]
- (b) [X]⁵, [X].
- [X]⁶.
- 5) This offer is subject to the following eligibility criteria:
- i) The offer is not available to other retailers on Sky's own platforms (DSAT, Picnic, or other future platforms which are developed primarily as a result of investment by Sky)
- ii) The offer is available to other platforms based on the following transmission technologies: digital satellite, cable, DTT, IPTV, mobile broadcast. The offer is not available to platforms based on the 'open internet'.
- iii) The offer is available to a single retailer on each eligible platform. The identity of that retailer is determined by the platform operator
- iv) The offer is subject to various conditions relating to technical compatibility and security⁷.
- 6) The pricing for this offer is subject to the following principles:
- i) Base wholesale prices for content, for all retailers, are those currently applicable to Virgin Media

⁵ [X].

⁶ [X].

⁷ [X].

ii) Future changes in these prices will be linked to changes in the prices for relevant packages retailed on Sky's DSAT platform.

[X].⁸

iii) [X]

iv) A discount will be provided based on platform penetration.

[X]⁹

v) Where a capacity constrained platform is only able to take a single screen version of a movies package, a [X] discount will be applied to that element of the wholesale price that can be attributed to that movies package. [X].

vi) A high definition service access fee of [X] per month per subscriber will be charged for each subscriber receiving high definition transmissions of any qualifying channels

vii) Sky would be able to enter into bespoke arrangements with individual retailers covering marketing support and other financial terms not covered by these principles

7) Sky will make the following commitments specifically in relation to the transmission of qualifying channels on DTT:

i) Qualifying channels which are carried using DTT capacity controlled by Sky will be made available to retailers on other DTT platforms using simulcrypt. [X].

ii) Qualifying channels which are made available to retailers on other DTT platforms, and which are carried using DTT capacity which is not controlled by Sky, will only be made available on the basis of a reciprocal simulcrypt arrangement, whereby these channels can also be made available on Picnic.¹⁰

iii) [X]

iv) [X]

i) [X]

ii) [X]

iii) [X]

8) [X]:

i) [X]

⁸ [X].

⁹ The actual effect of this commitment depends to a material extent on the definition that is adopted for 'platform' and for 'platform penetration'.

¹⁰ [X]

ii) [REDACTED]

iii) [REDACTED]

iv) [REDACTED] i) [REDACTED]; ii) [REDACTED]; iii) [REDACTED]

9) Sky will make the following commitments in relation to ‘buy-through’

i) Sky will cease to retail premium channels only as a ‘buy-through from a basic TV package.. [REDACTED].¹¹

ii) [REDACTED]

[REDACTED]

10) The commitments would be subject to review after three years, with the possibility of earlier review based on various triggers. The specific commitments relating to sports and movies premium channels would cease to apply if Ofcom at any time determines that Sky is not in a dominant position in relation to the supply of these channels. The commitments would be offered on the basis that they removed any grounds upon which Ofcom might otherwise consider making a reference to the CC in relation to their subject matter. Sky would expect provisions to be included in any commitments to govern a situation in which a reference to the CC was nevertheless made

Section 2 – context

1. Sky does not intend these commitments to address the following matters:

(i) [REDACTED]

(ii) [REDACTED]

(iii) [REDACTED]

(iv) [REDACTED].

2. [REDACTED]

3. Sky would offer these commitments in order to seek to resolve those competition issues which Ofcom has identified associated with its Picnic proposal, and would therefore allow the Picnic proposal to proceed. Sky’s expectation is that this would allow Picnic to launch on or before [REDACTED].

4. [REDACTED].”

¹¹ [REDACTED].