



**Annex 1: BT comments on third party responses to Ofcom's review of the pay
TV
wholesale must-offer obligation**

21 September 2015

NON CONFIDENTIAL VERSION



1. **EXECUTIVE SUMMARY AND INTRODUCTION**

1.1. BT has reviewed the third party responses¹ to Ofcom's wholesale must offer ("**WMO**") review consultation document². In order to assist Ofcom, BT provides these additional comments as Annex 1 to its response to Ofcom's supplementary consultation of 27 July 2015 to:

- (i) highlight those areas where third parties have made submissions based on factual inaccuracies which would render their analysis unreliable;³
- (ii) set out where evidence that BT has put forward clarifies the correct factual position; and,
- (iii) add fresh comment refuting the submissions of third parties that BT Sport should be regulated (based as it is on factual inaccuracy and conjecture).

1.2. BT strongly disagrees with Sky's assertions that a WMO obligation is not necessary on any of the Sky Sports channels. As BT explained in detail in its response to Ofcom's First Consultation Document ("**First Response**")⁴, access to the full Sky Sports proposition⁵ is required if Ofcom is to address the competition issues associated with Sky's entrenched market position across the pay TV value chain. As the evidence that BT provided in its First Response made clear⁶, it is evident that fair and effective competition ("**FEC**") in the pay TV sector has not emerged since Ofcom's intervention in 2010, and Sky's market position⁷ in the wholesaling and retailing of premium sports channels (and more widely) has become increasingly entrenched.⁸ FEC will

¹ In particular, the responses of the Football Association Premier League, Real Digital TV Limited, Sky, Talk Talk, and, Virgin Media available at: <http://stakeholders.ofcom.org.uk/consultations/wholesale-must-offer/?showResponses=true>. BT notes that it has not had the benefit of access to BT confidential versions of these responses and these comments are concomitantly limited.

² Ofcom's first consultation document: "Review of the pay TV wholesale must-offer obligation"; published on 19 December 2014. "**First Consultation Document**".

³ It is worth noting that BT has not sought to address all of the inaccuracies set out in third party responses, but has focused only on those that are most relevant to Ofcom's assessment. In particular, BT has not sought to address Sky's spurious analysis of developments in the sector over the past five years which it claims shows there were errors in Ofcom's analysis in 2010, set out in Annex 1 of Sky's response. Similarly, BT has not addressed the mischaracterisation in Sky's assertions around IPTV and OTT set out in its appendices.

⁴ BT's First Response, section 3.

⁵ BT agrees with FAPL (at paragraph 3.2 of FAPL's response to Ofcom's First Consultation Document) that Ofcom should focus on consumers' actual purchasing decisions. As set out in section 3 of BT's First Response, BT believes that this should lead to a consideration of channels and bundles of channels and that such a consideration would lead to the conclusion that regulated access to the whole Sky Sports proposition is required to ensure FEC in pay TV markets.

⁶ BT's First Response, section 2.

⁷ BT agrees with Virgin Media's position that Sky's market position has become stronger since 2010 (see for example paragraphs 5, 6 and 20 and 21 of Virgin Media's response to Ofcom's First Consultation Document).

⁸ BT's First Response Section 4.

[REDACTED]

not emerge unless and until there is effective wholesale regulation of the Sky Sports proposition.

- 1.3. Indeed, Sky itself acknowledges the importance of the full Sky Sports proposition to consumers and the market power that it holds in respect of premium sports channels:

*“[...] Ultimately though, customers choose Sky Sports **for the totality of what we offer**. In the next 18 months Sky Sports is the only place you can watch every ball of the Ashes, every F1 Grand Prix live, England’s autumn rugby internationals, three golf majors, plus the Open Championship exclusively live from 2017. **No other channel comes close.***

***The fact that we can invest in the best coverage for our customers is because of the performance of our business. While there was much speculation a couple of years ago about the potential impact of competition, we have gone from strength to strength.** In the two years since the launch of BT’s sports channel, Sky’s revenue in the UK and Ireland has grown by 11% and we recently reported our highest customer growth for 11 years.”⁹ [Emphasis added]*

- 1.4. In its First Response, BT has set out in detail that Sky has both the ability and incentive to limit wholesale distribution of Sky Sports, and that in practice this harms competition in pay TV markets to the detriment of consumers.¹⁰ Sky has presented no cogent evidence or fresh analysis to refute these conclusions in its response. Indeed, Sky has failed to engage with the key issues in Ofcom’s First Consultation Document: Sky erroneously frames Ofcom’s theory of harm and analysis as if it had not moved on materially since 2010 in light of evidence submitted by all parties in the five years of appeals since whilst, at the same time, overemphasising general market developments since 2010 which have no bearing on the competition issues arising from the wholesaling and retailing of its Sky Sports proposition. BT addresses these issues at section 3 of this submission.

- 1.5. The impact of BT’s market entry has been over-emphasised by many third party respondents to Ofcom’s First Consultation Document. In stark contrast to Sky’s market position, BT is a new market entrant in the wholesale provision of sports channels and has neither the ability nor incentive to limit the distribution of BT Sport in a way that would impede FEC¹¹. BT does not agree with those respondents who posit that it would be appropriate to regulate BT Sport. In Section 4 of this submission BT provides further evidence addressing the erroneous

⁹ Barney Francis, Managing Director Sky Sports, blog available at: <https://corporate.sky.com/media-centre/our-blog/2015/why-sky-sports-is-the-unrivalled-choice-for-sports-fans>

¹⁰ BT’s First Response Sections 5 and 6.

¹¹ See BT’s First Response paragraphs 6.22 to 6.30.

[REDACTED]

comments and factual inaccuracies made by third parties in respect of BT's market position and purported ability and incentives to limit the distribution of BT Sport. In particular, as set out at length in BT's First Response, the importance of Champions League content has been materially overstated by third parties¹²; third party submissions on this issue contain manifest errors and should not be relied upon by Ofcom to determine otherwise¹³.

- 1.6. In sum, Sky has both the incentive and ability to impede FEC through the limited distribution of its Sky Sports proposition and it should be regulated; BT does not have any such ability nor incentive and therefore there is no basis for the regulation of BT Sport. FAPL is incorrect that if one party is regulated it follows that the other should also be regulated: there is a clear legal basis and economic rationale for regulating the Sky Sports proposition whereas there is no such basis for regulating BT Sport.
- 1.7. Failure to ensure wholesale access to the full Sky Sports proposition on terms that allow effective competition will lead to a continued lack of FEC in pay TV markets to the ultimate detriment of consumers.

¹² Paragraphs 3.76 to 3.89 of BT's First Response.

¹³ This is in addition to BT's position set out in its First Response that: (i) Ofcom's analysis in singling out Champions League rights is inconsistent with its approach in assessing other sports; and, (ii) is disproportionate and unwarranted in light of the limited impact that Champions League could be expected to have on subscriber numbers to BT Sport and/or platform switching.

[REDACTED]

2. THE FACTUAL AND MARKET DEVELOPMENTS RELIED UPON BY THIRD PARTIES ARE NOT PERTINENT TO OFCOM'S ANALYSIS

2.1. In this section, BT explains that:

- (i) third party respondents' comments as to market developments are on the whole irrelevant to the issues for consideration in a review of the existing WMO remedy, or, where relevant, are overemphasized; and,
- (ii) contrary to Sky's claims, issues with the limited distribution of Sky Sports have not materially changed since Ofcom examined these issues in 2010.

General market developments cited by third parties are irrelevant to the issue under review

2.2. Ofcom's WMO review is focused on the specific issue of the wholesale and retail supply of premium pay TV sport channels. Sky side-steps these issues, making a number of broad and irrelevant statements regarding developments in the UK audio-visual sector, none of which detract from the conclusion that the limited distribution of the Sky Sports proposition impedes FEC. Indeed, Sky carries out very little specific analysis of the market context or developments in connection with the wholesale and retail supply of its premium sports channels, and the extent to which limited distribution of these channels impedes FEC:¹⁴

- (i) Nothing substantive has changed regarding the lack of constraint from free to air ("FTA") television services since 2010, when Ofcom examined the constraints on premium pay TV sports services in detail, and Sky has not provided any new evidence to suggest that this is the case. Instead, Sky seeks to rely on the same evidence it submitted in 2010¹⁵, which Ofcom rejected in reaching its conclusions on market definition, and the need to regulate Sky's sports channels.¹⁶ Contrary to Sky's assertions, all relevant evidence suggests that the constraint from FTA sports content is now weaker not stronger on Sky Sports (for example the movement of live Formula 1 content, US Masters and the British Open golf championship from FTA to Sky Sports all imply a weakening of the FTA constraint).

¹⁴ While BT notes that the regulation of Sky's basic and movies channels is not within the scope of the WMO Review, it is important that Ofcom recognises that Sky's market strength is also underpinned by the strength of its movies and basics propositions. As BT highlighted in its First Response, this is relevant to the issue of the contestability of sports subscribers at the retail level, especially where a subscription decision is a household purchase and thus encompasses heterogeneous preferences.

¹⁵ Paragraph 1.8 and 1.9 of Sky's response to Ofcom's First Consultation Document.

¹⁶ BT also notes that, despite the fact that Sky appealed Ofcom's 2010 Pay TV Statement on a myriad of issues, it did not appeal Ofcom's market definition.

[REDACTED]

(ii) Sky argues that there is no case for regulation, in part, given that “UK consumers are among the best served in the world for audiovisual services, with no obvious consumer detriment.”¹⁷ However, this assertion ignores the manifest evidence that there is a lack of FEC in the provision of premium sports channels at a wholesale and retail level, driven by Sky’s entrenched market position and limited distribution of the Sky Sports proposition.¹⁸ Sky’s references to content and services which are not premium sports content¹⁹ are irrelevant; consumers have a specific and distinct demand for live sports²⁰ and movies and catch up television are not a substitute for premium sports content.

2.3. Sky argues that rapid and unpredictable changes are likely to occur in pay TV, particularly in terms of new platform development, and hence this precludes the imposition of ex ante regulation by Ofcom.²¹ Sky argues that such changes should inform an assessment of Sky’s dynamic incentives²² in a manner that means that Sky would not be able to rely on the types of strategic advantages espoused by Ofcom if Sky were to limit the distribution of its Sky Sports channels. This is not the case:

(i) Even assuming Sky is correct about the likely future pace of technological change (which, appears merely to be a restatement of its position in 2010, when Ofcom originally imposed the WMO remedy)²³ this is not a reason for Ofcom not to impose essential regulation to ensure FEC. Moreover, Sky does not appear to have similar concerns about the fast moving nature and hence detrimental impact of ex ante regulation in telecommunications markets more widely since it is a material beneficiary of the ex ante regulation of BT’s wholesale broadband products.²⁴

(ii) Sky has previously raised the historic pace of change in pay TV markets in its evidence to the CAT, yet despite all of the developments that Sky has highlighted a lack of FEC persists.²⁵ This is because the competition issues that the WMO is intended to address cannot be addressed by the emergence of new technologies. The problems stem from Sky’s entrenched incumbency advantages at the retail and wholesale level and hence in the acquisition of sports rights. The emergence of new technologies has

¹⁷ Paragraph 1.6 of Sky’s response to Ofcom’s First Consultation Document.

¹⁸ BT has provided detailed evidence on the lack of FEC in pay TV markets, particularly as compared to other markets within Ofcom’s regulatory ambit, in Section 2 of its First Response.

¹⁹ See for example paragraphs 1.16 to 1.21 of Sky’s response to Ofcom’s First Consultation Document.

²⁰ See section 3 (and paragraphs 3.2 and 3.3 in particular) of BT’s First Response.

²¹ Paragraphs 1.29 to 1.42 of Sky’s response to Ofcom’s First Consultation Document.

²² See section 3 below.

²³ See for example Darcey 1 in the WMO appeal, paragraph 132 and following.

²⁴ See BT’s First Response, Section 2.

²⁵ See for example Darcey 1 in the WMO appeal, paragraph 132 and following.

[REDACTED]

no impact on the emergence of FEC in circumstances where acquiring the necessary content rights required to become an effective competitor remains impossible given Sky's market strength and material incumbency advantages²⁶.

- (iii) Neither the increase in broadband uptake and improvements in broadband speeds nor the emergence of IPTV that Sky cites²⁷ have addressed this issue in respect of access to the underlying premium sports content. On the contrary, such technological changes have for the most part led to a strengthening of Sky's market position (in particular through the launch of its NOW TV service), as a result of the fact that Sky controls the underlying content, and access to the essential channels containing that content.²⁸ Indeed, Sky's statements about the significance of NOW TV and growth of broadband as a delivery mechanism merely serve to underline the concerns expressed in BT's First Response about NOW TV and Sky's expansion into broadband markets.²⁹

2.4. Sky exaggerates the extent of the decrease in barriers to entry for over the top ("OTT") providers. While it is the case that there are now many new and different ways for consumers to access content which may reduce barriers in respect of how content may be delivered, this does not address the fact that OTT operators face the same structural barriers when bidding for sports rights as traditional pay TV retailers in terms of the "time to build" a large enough base of sports subscribers with a sufficient willingness to pay when acquiring perishable rights. As such, consistent with the "vicious circle", Sky will on average and in general be able to outbid OTT providers for sports rights.³⁰

2.5. FAPL asserts that broadcasters are competing on the basis of triple play and quad play bundles and that this strongly indicates a wider market than Ofcom found in the 2010 pay TV Statement.^{31 32} Whilst there has been an increase in the uptake of triple play bundles over time, Ofcom has to date consistently found across its telecoms and broadcasting market reviews that separate product markets continue to be the relevant focus of any economic analysis of market power (in the telecoms sectors) and of fair and effective competition (in

²⁶ See Section 4 of BT's First Response.

²⁷ Paragraphs 1.23, 2.12 to 2.15 of Sky's response to Ofcom's First Consultation Document.

²⁸ Virgin Media also supports this view (see paragraphs 5 and 6 of Virgin Media's response). As BT highlighted in its First Response, incremental revenues from NOW TV sales of day and week sports passes provide Sky with an increased ability to defray the fixed cost associated with pay TV, and sports rights acquisition in particular, further reinforcing Sky's bidding advantages, whilst managing the cannibalisation risk to Sky's primary DSat retail offering.

²⁹ See for example paragraph 1.1 (iv) and section 2 of BT's First Response.

³⁰ See BT's First Response, paragraphs 2.60 to 2.64 for more detail.

³¹ At paragraphs 2.6 to 2.15 of its response to Ofcom's First Consultation Document.

³² Sky also argues that triple-play has now become more important and competition for triple-play customers has become one of the key focal points of competition (See paragraphs 2.20 to 2.23 of Sky's response).

[REDACTED]

the broadcasting sector). It would be entirely inappropriate for Ofcom to adopt an approach of assessing whether Sky's wholesale inputs require regulation by assessing Sky's market position by reference to a wider triple-play market, while simultaneously assessing the necessity of regulation of BT's wholesale inputs by reference to narrow, product-specific markets.³³

- 2.6. Moreover, as Ofcom recognises in its Strategic Review of Digital Communications,³⁴ *“there is evidence that, for many consumers, TV content is the most important part of their bundle. So if a retail provider cannot offer attractive content, this is likely to reduce competition across all services in the bundle.”* As BT explained in its First Response, as a result of stringent wholesale regulation in the broadband sector, and the limitations resulting from Sky not being effectively regulated in pay TV, the shift towards increased take-up of bundles has merely meant that the distortions in the pay TV sector have now spilled over into adjacent markets, allowing Sky to grow to become the largest provider of triple-play bundles and the UK's second largest broadband retailer.³⁵
- 2.7. FAPL argues that what consumers want is access to more content in general (including, for example, entertainment and movies)³⁶ and that there is no evidence to suggest that consumers view sports content as being of particular importance.³⁷ However, whilst other content is also important in underpinning Sky's market power³⁸, the availability of premium sports channels, specifically the full Sky Sports proposition, remains an essential driver in consumers' choice of pay TV retailer for a very large number of households.³⁹

Issues with the limited distribution of Sky Sports have not been ameliorated

- 2.8. Contrary to Sky⁴⁰ and FAPL's⁴¹ assertions, Sky has not materially expanded its wholesale distribution of Sky Sports, other than where it has been mandated to do so by Ofcom or the CAT. In fact, other than its wholesale agreement with TalkTalk (which, BT understands, itself followed on from previous arrangements with Tiscali) Sky has not agreed wholesale supply with **any** new party since 2010. All of the new parties with whom Sky has agreed terms (such

³³ It would also be inconsistent with the approach Ofcom took in the Fixed Access Market Review (Approach to the VULA margin), where it consistently underlined its view that it wanted to consider the competition issues in pay TV and broadband separately. See for example, Ofcom's Final Statement on the Fixed Access Market Review: Approach to the VULA margin, 19 March 2015, e.g. paragraphs 7.60 to 7.62.

³⁴ Strategic Review of Digital Communications Discussion document, issued 16 July 2015, paragraph 1.61.

³⁵ See, for example, BT First Response paragraphs 1.1 (iv), 2.3 (x), 2.4 – 2.5 and 4.18.

³⁶ Paragraph 4.13 of FAPL's response to Ofcom's First Consultation Document.

³⁷ Paragraphs 4.21 to 4.32 of FAPL's response to Ofcom's First Consultation Document.

³⁸ See, for example, paragraph 1.3 of BT's First Response.

³⁹ See section 3 (and paragraphs 3.2 and 3.3 in particular) of BT's First Response.

⁴⁰ Paragraphs 4.9 to 4.37 of Sky's response to Ofcom's First Consultation Document.

⁴¹ Paragraphs 5.5 and 6.7 of FAPL's response to Ofcom's First Consultation Document.

[REDACTED]

as Microsoft, Sony and Apple) have been for the self-retail supply of Sky's NOW TV service. BT has explained in detail in its First Response how Sky self-retailing does not resolve the issue of Sky limiting the distribution of the Sky Sports proposition on a wholesale basis and does nothing to contribute to increased competition in the retailing of premium sports services⁴².

2.9. Moreover, as discussed in detail in section 3 below, Sky has failed to engage with Ofcom's substantive concerns as to the limited distribution of Sky Sports: Sky only provides information on whether or not platforms or providers have some form of access to Sky Sports, while ignoring whether such supply is on terms which would enable rivals to compete effectively. BT has addressed this issue in detail in its First Response.⁴³

2.10. In addition, contrary to Sky's assertions, it has not made '*strenuous efforts*' to make Sky Sports available on BT's platforms.⁴⁴ Despite repeated requests, BT does not have supply of the full Sky Sports proposition on either of its pay TV platforms, and until the CAT ruling updating the Interim Relief Order (which Sky actively resisted before the Tribunal)⁴⁵, Sky had prevented BT from having wholesale access to any Sky Sports channels on BT's YouView platform⁴⁶ by seeking to impose the anti-competitive grant back condition as a pre-requisite for wholesale supply. BT has provided detailed evidence of Sky's limited distribution of its Sky Sports proposition to BT in its First Response⁴⁷, and has set out in detail the concerns with Sky's imposition of the grant back condition in the main body of this submission, as well as in its outstanding Competition Act complaint⁴⁸.

⁴² See paragraphs 2.60 to 2.64 of BT's First Response.

⁴³ See, for example, paragraphs 2.49 to 2.56.

⁴⁴ Sky response, paragraphs 4.23 et seq.

⁴⁵ 1152/8/3/10 (IR) British Sky Broadcasting Limited v Office of Communications (Interim relief) [2014] CAT 17 (the *IRO*).

⁴⁶ BT also notes Sky's attempts to downplay its limited distribution to BT's YouView platform, by implying that there is a single YouView 'platform', with different variants offered by BT and TalkTalk (Sky response, paragraph 4.16(ii)). In fact, as is clear from Ofcom's own definition of a platform, and specific analysis of IP based distribution, that the BT YouView platform and the TalkTalk YouView platform are two distinct platforms, and Sky has limited the distribution of its Sky Sports proposition to BT's YouView platform. (See Pay TV Statement paragraphs 9.188 to 9.191).

⁴⁷ Paragraph 2.50.

⁴⁸ Case CW/01106/05/13

3. SKY HAS AN INCENTIVE TO LIMIT THE WHOLESALE DISTRIBUTION OF SKY SPORTS

3.1. In its response, Sky seeks to argue that it does not have an incentive to limit the wholesale distribution of Sky Sports and that it is not likely to limit its distribution of these channels in practice. However, Sky does have the clear ability and incentive to limit the distribution of its Sky Sports proposition which renders the effective wholesale regulation of Sky Sports necessary. As set out in more detail below:

- (i) Sky has failed to engage with Ofcom's actual theory and analysis of limited distribution;
- (ii) Sky has limited the wholesale distribution of Sky Sports in practice;
- (iii) Sky misrepresents Ofcom's theory of harm and analysis and seeks to position its arguments as if there had not been substantial evidence presented on appeal and important judicial findings since 2010;
- (iv) Sky misrepresents Ofcom's analysis as to the trade-offs channel providers face when making decisions about key content; and,
- (v) Sky incorrectly asserts that BT's entry into pay TV broadcasting disproves the vicious circle.

Sky has failed to engage with Ofcom's actual theory and analysis of limited distribution

3.2. Ofcom defines 'limited distribution' as: "*i) non-supply of key content, i.e. key content not being supplied to certain pay TV retailers and /or platforms; and, ii) distribution of key content **but on terms which would not enable rivals to compete effectively in pay TV retailing or potentially other parts of the value chain.**"⁴⁹ Sky states in its response that it adopts Ofcom's definition of 'limited distribution'⁵⁰. However, Sky has failed to engage with Ofcom's definition in respect of the limited distribution of its Sky Sports proposition on wholesale terms which would not allow FEC and, instead, misleadingly seeks to frame Ofcom's concerns as relating solely to the withholding of wholesale supply of Sky Sports from third parties⁵¹.*

3.3. Ofcom's analysis throughout the First Consultation Document thus relates to two types of practice (as set out above). Sky argues that Ofcom's second concern (the terms of wholesale

⁴⁹ Paragraph 1.6 of Ofcom's First Consultation Document.

⁵⁰ Sky's response to Ofcom's First Consultation Document, footnote 1.

⁵¹ See, for example, paragraphs 3.11, 3.23 to 3.27, 4.43 to 4.46 and, 4.49 to 4.58 of Sky's response to Ofcom's First Consultation Document.

[REDACTED]

supply) is not particularised, that Ofcom has not identified a practice, and, that therefore it is: *“impossible for Sky to respond properly to such a non-specific concern⁵²”*.

- 3.4. Sky is demonstrably incorrect. Ofcom has identified a specific practice prejudicial to FEC and has set out this concern in detail.⁵³ BT has also provided extensive and compelling evidence that, in practice, the wholesale terms of supply for the Sky Sports proposition are hampering the development of FEC.⁵⁴
- 3.5. As Ofcom (and Sky) will be aware, the Court of Appeal⁵⁵ has also concluded that it is legitimate for Ofcom to be concerned about the wholesale terms of supply and the extent to which such terms may in themselves give rise to competition concerns (for the purposes of section 316 of the Communications Act 2003):

“[...] both the rate-card price itself and the proposed basis of discounts were ‘competition concerns’ of Ofcom because they would not allow other competitors to build a viable business in this market. Although the Ofcom Statement does not expressly use the statutory terminology, Ofcom’s phraseology in the Statement is only consistent with a conclusion by it that these were “practices” of Sky that Ofcom considered were prejudicial to ‘fair and effective’ competition in the Pay TV market, within the meaning of section 316(2) of the CA 2003.” [Paragraph 84]

“Thus, in my view, the CAT has not dealt with Ofcom’s finding that the rate-card price is, in itself, an impediment to “fair and effective competition”. Furthermore, the CAT did not address at all the issue of whether Ofcom was right to conclude that the penetration discount method of lowering the price for the wholesale supply of CPSCs to competitors by Sky raised a “competition concern”.” [Paragraph 96]

“The CAT therefore lacked any solid foundation for holding that Ofcom’s concern on rate-card prices and penetration discounts was unsound” [Paragraph 99]

“I am quite satisfied that in the judgment the CAT misconstrued the Statement by failing to appreciate the importance of Ofcom’s conclusion that the rate-card price and the effect of the penetration discounts that were proposed by Sky themselves gave rise to ‘competition concerns’.” [Paragraph 100]⁵⁶

⁵² Paragraph 3.24 of Sky’s response to Ofcom’s First Consultation Document.

⁵³ See for example Section 7, paragraph 7.3 and footnotes 185 and 186 of Ofcom’s First Consultation Document.

⁵⁴ See Section 5 and 6 of BT’s First Response.

⁵⁵ Paragraphs 81 to 101 of The Court of Appeal’s judgment of 17 February 2014 in Case C3/2013/0443 *British Telecommunications PLC v Office of Communications, British Sky Broadcasting Ltd, The Football Association Premier League, Virgin Media Inc* [2014] EWCA Civ 133.

⁵⁶ The additional remarks from Lord Justice Vos at paragraphs 118 to 120 further reinforce this point.

- [REDACTED]
- 3.6. Similarly, Ofcom has also particularised the grant back condition as a second limb practice, on which it is now expressly consulting⁵⁷ and the Competition Appeal Tribunal has provided support that such terms are problematic to competition.⁵⁸
- 3.7. Sky has not been precluded from engagement with the substantive issues as to second limb practices by any lack of detail on Ofcom’s part, as demonstrated by BT’s First Response.⁵⁹ It has merely chosen not to address these points in its submission.

Importance of examining actual behaviour: Sky has limited the distribution of Sky Sports in practice

- 3.8. Sky asserts that Ofcom should assess whether *“in practice, a) it is plausible that Sky has particular incentives and/or disincentives to distribute its ‘key sports channels’ and b) the overall balance of those incentives”* as *“theory alone cannot determine those matters”*⁶⁰. Similarly, FAPL⁶¹ states that it considers that *“Ofcom’s whole case on potential consumer harm is thus entirely theoretical. This is not and cannot be an adequate basis for intervention”*⁶². BT agrees that Ofcom needs to have regard to whether Sky has limited the wholesale distribution of Sky Sports in practice⁶³. However, as set out below, it is disingenuous to argue that Ofcom’s case in respect of Sky’s behaviour is entirely theoretical or unsubstantiated. BT has provided ample evidence that Sky has limited the distribution of its Sky Sports proposition in practice.
- 3.9. Sky argues that, on an allegedly “evidence based approach”, it does not limit the distribution of its key sports channels and that it distributes its channels widely⁶⁴. Contrary to Sky’s assertions, objective and observable market outcomes demonstrate that the limited distribution of the Sky Sports proposition is occurring and has had an impact on fair and effective competition in pay TV markets. For the avoidance of doubt this is not about Sky’s subjective intent.
- 3.10. As the evidence in Section 2 of BT’s First Response demonstrated limited wholesale distribution of the Sky Sports proposition has occurred (and continues to occur) in various forms.⁶⁵ Sky limits distribution by: (i) charging wholesale prices that are too high to allow rivals to compete effectively; (ii) imposing terms and conditions for wholesale supply that are anti-

⁵⁷ BT sets out its detailed comments on the issue of the grant back condition in the main body of this submission.

⁵⁸ See paragraph 3.28 of the main body of this submission.

⁵⁹ See, for example, paragraphs 5.4 to 5.6 of BT’s First Response.

⁶⁰ Paragraph 4.59 of Sky’s response to Ofcom’s First Consultation Document.

⁶¹ We note that FAPL also asserts at paragraph 1.6 that *“the CAT found that there was no actual limited distribution of Sky’s sports channels”*. This statement is erroneous. The CAT only addressed the question as to whether or not Sky was a willing wholesaler. The question of whether Sky limits distribution remains open.

⁶² Paragraph 6.3 of FAPL’s response to Ofcom’s First Consultation Document.

⁶³ See paragraphs 6.17 to 6.20 of BT’s First Response.

⁶⁴ Paragraphs 4.3 to 4.22 of Sky’s response to Ofcom’s First Consultation Document.

⁶⁵ See in particular paragraphs 2.48 – 2.56, as well as Section 6 of BT’s First Response.

[REDACTED]

competitive and/or limit a retailer's ability to compete effectively either at the retail level, or in other parts of the value chain (such as in bidding for rights through the imposition of the grant back condition); and (iii) by reducing the value of the Sky Sports proposition it wholesales by restricting the range of channels it makes available and by not supplying essential additional services such as HD versions of the channels, and other highly profitable add-ons (such as Sky Go) that consumers view as important and which augment Sky's competitive advantage and help to underpin its market-leading ARPU and customer churn rate. It is observable that any incentives for retailers with wholesale supply of Sky Sports to extensively market and sell the Sky Sports proposition are clearly muted given the limited penetration rates on other platforms.

- 3.11. The commercial 'deals' that Sky has entered into, for example the 2013 wholesale agreement between Sky and Virgin Media, do not undermine Ofcom's analysis of limited distribution.⁶⁶ Sky states that: *"Ofcom's proposition that it 'cannot rule out the possibility' that Sky will withdraw supply of its 'key sports channels' from Virgin Media in the foreseeable future is at best purely hypothetical and in reality verging on the risible"*⁶⁷. However, these commercial agreements have been concluded with the backstop of the WMO remedy in place. As noted above, Ofcom's concern of limited distribution relates **both** to the non-supply of the Sky's sports channels and the terms of supply of those channels. Sky does not address the real risk that withdrawal of the WMO remedy would lead to it materially altering the terms on which it supplies the Sky Sports proposition to Virgin Media or other parties. Sky does not, therefore, offer any evidence to challenge the probability that, absent the WMO remedy, limited distribution (in some form) by Sky of its channels is likely to be exacerbated. Virgin Media supports this position, expressing concern that: *"it is not valid to make inferences about Sky's incentives with reference to Virgin Media by looking at the existing supply arrangements. Sky's incentives are influenced by previous regulatory interventions and the existence of the WMO obligation"*⁶⁸. BT strongly endorses this view.
- 3.12. In respect of the grant back condition, BT has addressed this issue in detail in the main body of this submissions.
- 3.13. In summary, an appreciation of the importance of the Sky Sports proposition, Sky's market position, the observable fact of limited distribution of the Sky Sports proposition and the observable fact of a lack of fair and effective competition in pay TV markets provides a more than sufficient basis for Ofcom to intervene.

⁶⁶ See also Sky's comments at paragraph 4.76 of its response to Ofcom's First Consultation Document.

⁶⁷ Paragraph 4.22 of Sky's response to Ofcom's First Consultation Document.

⁶⁸ Paragraph 50 of Virgin Media's response to Ofcom's First Consultation Document.

[REDACTED]

Sky misrepresents Ofcom’s theory of harm and seeks to position its arguments as if there had not been substantial evidence presented on appeal and important judicial findings since 2010

3.14. Sky significantly mischaracterises Ofcom’s theory and analysis of incentives throughout its response. Sky adopts an inconsistent and selective approach to the substantial evidence submitted on appeal by all parties since 2010, as well as specific findings by the CAT and the Court of Appeal, choosing to ignore the evidence that is inconsistent with its generalised and un-particularised claims. In particular:

- (i) Sky takes umbrage with Ofcom’s consideration of Sky’s dynamic incentives to limit the distribution of Sky Sports stating that:

“Focusing on propositions about Sky’s incentives derived from speculation or hypothetical theories about Sky’s motivations, however, is an inapt approach to the assessment of the issues raised in the Consultation. This is because, while the so-called ‘static incentive’ to distribute Sky’s ‘key sports channels’ widely (associated with their high fixed cost base) is clear-cut, attempting to discern what other incentives Sky faces is extremely difficult”⁶⁹.

There is nothing “inapt” about Ofcom’s approach. Firstly, it is entirely appropriate for Ofcom to assess hypothetical / dynamic incentives to limit distribution, where it believes such incentives may have bearing on a competition assessment. This is part of its legitimate functions as a regulator. Simply because dynamic incentives may in certain circumstances be difficult to quantify does not mean that they do not exist, nor that they are not important; they should still be subjected to scrutiny.

Secondly, Sky does not have a ‘clear-cut’ static incentive to supply. Indeed, whilst BT recognises that Sky might have a static incentive to supply some pay TV platforms, it cannot be assumed that Sky is likely to have a static incentive to wholesale its Sky Sports proposition to additional pay TV retailers (especially where those retailers are smaller scale or are considered by Sky to be potential competitors).⁷⁰

- (ii) Sky incorrectly asserts that Ofcom elevates an analysis of Sky’s incentives above its actions in the market and that this ‘reverses’ Ofcom’s approach in 2010 (citing various passages from the CAT’s judgement).⁷¹ This is not, however, an accurate assessment of what Ofcom has done. As set out above, there is ample evidence that Sky limits the wholesale distribution of its Sky Sports proposition, and it is clear on the basis of

⁶⁹ Paragraph 4.5 of Sky’s response to Ofcom’s First Consultation Document.

⁷⁰ See Paragraphs 6.6 to 6.11 of BT’s First Response.

⁷¹ Paragraph 4.7 of Sky’s response to Ofcom’s First Consultation Document.

[REDACTED]

objective, observable market outcomes, that this has resulted in lack of FEC in pay TV markets. The fact that Ofcom has chosen not to look at detailed correspondence between parties – which would tell it nothing about whether the terms on which Sky wholesales the Sky Sports proposition impedes FEC – is irrelevant.

- (iii) Contrary to Sky’s assertions, Ofcom does not formally characterise the dampening of future retail competition as a dynamic mechanism,⁷² it is Sky that has made this characterisation. Indeed, Ofcom has merely sought to set out a range of trade-offs (both static and dynamic) that Sky is likely to face.⁷³
- (iv) Moreover, it is uncontroversial that the future growth of rivals which may lead to the erosion of Sky’s existing scale advantages is likely to increase pressure on Sky’s retail prices and margins relative to Sky’s unchallenged position of market power today. It is also a reasonable conclusion that Sky would seek to prevent such a situation from occurring if it is within its gift to do so by limiting the wholesale distribution of its Sky Sports proposition. There is ample evidence that this is precisely what Sky has sought to do by, for example shifting content from its regulated Sky Sports channels to non-regulated Sky Sports channels, seeking to impose the grant-back condition on BT as a condition for supply of Sky Sports 1 and 2 on BT’s strategic YouView platform, and seeking to impose such clauses in its wholesale agreements as a matter of course thereby reducing the incentives of competitors to seek to acquire premium sports content. As highlighted above, Sky’s terms of supply for Sky Sports are also problematic as evidenced by the limited incentives of third parties to actively promote these channels and the limited penetration rates of these channels on platforms other than Sky’s own platforms.⁷⁴
- (v) Sky has said that Ofcom has neglected economic evidence and arguments that are relevant to these issues⁷⁵ and re-submits, at Annex 7 of its response, reports of Professor Van Reenan and excerpts from the witness statements of Mike Darcey. However, Sky itself has ignored critical relevant evidence which has been submitted to the CAT and Court of Appeal on these issues since 2010, not least the economic and factual evidence provided by third parties such as BT⁷⁶ profoundly undermining the evidence provided by Professor Van Reenan and Mr Darcey. Sky therefore seeks

⁷² As Sky suggests at paragraph 4.63(i) of its response to Ofcom’s First Consultation Document.

⁷³ See also paragraph 4.78 where Sky erroneously implies that Ofcom is ‘double counting’ when in fact it is just setting out a range of different types of static and dynamic incentives and the likely trade-offs between them.

⁷⁴ See BT’s First Response and the main body of this submission.

⁷⁵ Paragraphs 4.66 and 4.67 of Sky’s response to Ofcom’s First Consultation Document.

⁷⁶ Including the witness statements of Marc Watson in the pay TV appeals and the expert reports of Dr Jorge Padilla.

[REDACTED]

to evaluate Ofcom's theory and analysis of dynamic incentives from a flawed starting point. As set out above, as the Court of Appeal has definitively upheld it is clear that Ofcom was concerned in 2010 with the limited wholesale distribution of Sky's sports channels beyond the mere withholding of supply. Moreover, although Ofcom's concerns today are similar, it is right that Ofcom's analytical starting point has evolved given the continuing failure of the existing WMO remedy to deliver FEC.

- (vi) Sky asserts that Ofcom has ignored the 'unchallenged finding' of the CAT "*on this issue*"⁷⁷. Despite not stating with clarity what 'this issue' is, BT understands that Sky is seeking to imply that there is an unchallenged finding that Sky does not have a dynamic incentive to limit the distribution of its Sky Sports proposition. This is not the case.

As Ofcom (and Sky) are aware, the CAT made a factual finding only based on its examination of the commercial negotiations between Sky and third parties as to whether or not Sky engaged constructively in those particular negotiations. While the CAT concluded that Ofcom had "*to a significant extent, misinterpreted the evidence of these negotiations, which does not support Ofcom's conclusion,*"⁷⁸ as highlighted above, the Court of Appeal has since found that the CAT also "*misconstrued the Statement by failing to appreciate the importance of Ofcom's conclusion that the rate-card price and the effect of the penetration discounts that were proposed by Sky themselves gave rise to 'competition concerns'.*"

As such, the Court of Appeal has very clearly found that the CAT failed to address other aspects of Ofcom's concerns as to the limited wholesale distribution of Sky Sports, which are consistent with the dynamic incentives described by Ofcom in its First Consultation Document.

Sky misrepresents Ofcom's analysis as to the trade-offs channel providers face when making decisions about key content

- 3.15. Sky asserts that it has: "*always engaged constructively with new opportunities for the distribution of its sports channels that it judges are a) secure, and b) will deliver sufficient incremental subscribers to those channels to make pursuit of an opportunity worthwhile,*"⁷⁹ and hence dismisses Ofcom's analysis as to the trade-offs it is likely to face.

⁷⁷ Heading at 4.68 of Sky's response to Ofcom's First Consultation Document.

⁷⁸ Paragraph 28 of the CAT's judgment of 8 August 2012.

⁷⁹ Paragraph 4.10 of Sky's response to Ofcom's First Consultation Document.

- [REDACTED]
- 3.16. As set out in BT’s First Response, the vast majority of sports subscribers with a high willingness to pay for premium sports channels at current retail prices most likely already subscribe to Sky Sports (the vast majority of the subscribers will be on Sky’s DSat platform, with a smaller proportion on Virgin Media’s cable platform).⁸⁰ As such, the likelihood that new opportunities for distribution would deliver “*sufficient incremental subscribers*” to make a wholesale deal “*worthwhile*” for Sky is low. Therefore, even Sky’s own statement reinforces that Ofcom is correct to be concerned that Sky’s dynamic incentives to limit wholesale distribution to smaller platforms will outweigh any purported static incentives to supply⁸¹ and that “*it would only take a small short or long term benefit to render limited distribution profitable*”⁸². Moreover, because such near-market saturation at current prices would essentially entail Sky losing retail customers (and hence retail revenues) in order to obtain wholesale revenues which would result in a net loss for Sky, it cannot be presumed (as Sky does) that Sky has a static incentive to wholesale Sky Sports to any new pay TV retailers⁸³.
- 3.17. Sky’s suggestion that it is not willing to forgo immediate revenues in the hope of achieving future benefits (which Sky states would “*arise too far in the future for Sky to rely on them given the fast moving nature of the sector in which it operates*”⁸⁴) is without sound foundation. In acting on its dynamic incentives to limit the wholesale distribution of the Sky Sports proposition to third parties, Sky is protecting its revenues, profits and market power **today** and every day going forward by stymying the emergence of FEC. Sky benefits today from its entrenched dominant position in a myriad of ways⁸⁵ and, as such, the ‘trade off’ that Sky is making is not about a nebulous future benefit that has “*no hope of being realised*” but rather is realised today in light of Sky’s market position.
- 3.18. Similarly Sky incorrectly argues that Ofcom’s consideration of dynamic incentives, in relation to a platform which is small today but if supplied with Sky Sports could grow to be a significant competitor to Sky in the future, is flawed. Sky puts forward two reasons in support of its position (i) the risk that Sky is forgoing revenues and profits that are growing over time; and (ii) that Sky would need to have confidence that the long-term benefits of non-supply would outweigh the present value cost of not doing so.⁸⁶ However, both of these arguments are

⁸⁰ See BT’s First Response Section 2 and Section 4.

⁸¹ Paragraph 7.14 of Ofcom’s First Consultation Document.

⁸² Paragraph 7.20 of Ofcom’s First Consultation Document.

⁸³ See section 6 of BT’s First Response.

⁸⁴ Paragraph 4.72 of Sky’s response to Ofcom’s First Consultation Document.

⁸⁵ See Section 5 of BT’s First Response.

[REDACTED]

misplaced, and far from supporting Sky's position, these supposed 'flaws' only serve to prove Ofcom's analysis.

- 3.19. As discussed above, there is unlikely to be a large group of potential subscribers who do not yet have supply of Sky Sports and are willing to pay current market prices. As such, if Sky's wholesale revenues are growing over time, this would indicate that either (i) Sky Sports subscribers are switching from Sky's platform to the new platform because they prefer this new platform or (ii) the new entrant has grown the subscriber pool by reducing retail prices, which would ultimately lead to subscribers switching away from Sky's platform. In these circumstances, it is not at all implausible that the dynamic costs arising from such a competitive threat would significantly outweigh the costs of limited wholesale distribution in present value terms (and indeed this accords with Sky's actual practice as discussed above).
- 3.20. Finally, Sky makes clear that it has a general preference for self-retailing over providing wholesale supply to third parties⁸⁷ and that this preference extends to supply on BT's YouView platform⁸⁸. Sky also makes clear that (absent the WMO obligation) it is not willing to supply to BT on a wholesale basis absent the anti-competitive grant back condition (see main body of this submission). Sky claims that Ofcom's view that Sky's concern about 'reciprocity' of supply is linked to BT's emergence as a competitor is *"demonstrably incorrect and underrates Sky's commercial sophistication"*⁸⁹. However, Sky then goes on to state that: *"the situation in relation to BT's YouView platform is the result of a) BT having developed premium sports channels, and b) its withholding those channels from Sky."*⁹⁰ It is, therefore, unclear on what basis Ofcom's view is incorrect: Sky admits that it limits the distribution of Sky Sports to certain competitors, specifically those who have invested in developing their own premium sports channels and who, therefore, may be more likely to become a competitive threat and undermine its dominance in the future.

Contrary to Sky's assertions, the vicious circle is not undermined

- 3.21. Sky seeks to argue that BT's vicious circle theory of dynamic incentives⁹¹ is no longer valid and, inter alia, that BT's entry into pay TV broadcasting and acquisition of certain sports rights undermines the vicious circle proposition. On the contrary, as set out below, the vicious circle

⁸⁷ Paragraph 4.10 of Sky's response to Ofcom's First Consultation Document.

⁸⁸ Paragraphs 4.33 to 4.37 of Sky's response to Ofcom's First Consultation Document.

⁸⁹ Paragraph 4.36 of Sky's response to Ofcom's First Consultation Document.

⁹⁰ Paragraph 4.37 of Sky's response to Ofcom's First Consultation Document.

⁹¹ See paragraph 4.49 et seq. of BT's First Response for a summary of the vicious circle proposition.

[REDACTED]

is more relevant today than ever as Sky retains material incumbent bidding advantages in respect of bidding for live sports rights.

3.22. Firstly, Sky mischaracterises the vicious circle model. Sky states that BT's model posits that it is the *total size of the broadcaster's retail base* that is relevant to bidding for sports rights, and argues that such a metric is irrelevant. Instead Sky argues that it is the total number of subscribers or potential subscribers to a broadcaster's *channels* – across all platforms – that is most relevant when bidding for rights.⁹² Sky's assertions are incorrect for a number of reasons:

- (i) BT's model does not posit that it is the *total size of the broadcaster's retail base* that is relevant to bidding for sports rights. Sky's systemic bidding advantages stem from the absolute number of subscribers to Sky's *sports channels* with a high willingness to pay for premium sports channels, which is materially higher than its competitors.
- (ii) Within that total base, it is a potential bidder's own retail subscribers which are the most important (over wholesale subscribers) in the context of advantages in bidding for sports rights.⁹³ This is because a retailer, such as Sky, controls the price and packaging for its own retail sports subscribers and, as such, has certainty over the revenues it can seek to attain from those subscribers. By contrast, whilst wholesale subscribers reinforce such structural bidding advantages, they are less 'important' than retail subscribers because a broadcaster does not have certainty over how much revenue it will achieve in a wholesale context (over and above any minimum revenue guarantees for the duration of the existing contract) as it does not control the pricing or packaging of the channels on the alternative platform. Wholesale revenues will be a function of how well the retailer with access to the wholesale sports channels markets those channels, the price they set for them, and how they bundle them with other offers – none of which the broadcaster who wholesales the channels (and bids for the rights) controls.
- (iii) Likewise, it is retail *sports* subscribers that the vicious circle addresses not retail subscribers in general (BT recognises that, for example, Sky's retail movie subscribers, who do not also take Sky Sports will have a more limited impact on Sky's ability to bid for sports rights).
- (iv) Sky references previous BT submissions in respect of the number of pay TV subscribers with a high propensity to pay for premium sports channels on Sky's

⁹² Paragraphs 4.84 to 4.90 of Sky's response to Ofcom's First Consultation Document.

⁹³ See paragraph 4.51 of BT's First Response.

[REDACTED]

platform.⁹⁴ Sky seeks to argue that any bidder for sports rights has access to these subscribers by virtue of the fact that Sky is under a regulatory obligation to provide conditional access services and EPG listings for third parties who wish to access its subscriber base and, by implication, that it does not, therefore, matter that these subscribers reside with Sky. However, this misses the point (and stems from Sky's mischaracterisation of the vicious circle described above): even with access to the Sky platform, a rival bidder faces a time to build problem in building its own retail subscriber base **to its own channels**. Even with access to the Sky platform, on day one after acquiring rights and launching a sports channel, a rival bidder still has to persuade Sky's Sky Sports subscribers to subscribe to its channels, in contrast to Sky who already has those subscribers in contract.

- (v) Sky therefore misses the point in stating that *"Consumers do not have to switch to the platform operated by the potential entrant to premium sports channel broadcasting to gain access to its sports channels. This fact further undermines the proposition that a firm's propensity to bid for sports rights depends to a significant extent on the size of the retail subscriber base on its own platform."*⁹⁵ In the context of the ability of an entrant to extract revenues from rights acquired over the rights period, it is not an entrant's **potential access** to subscribers that matters but rather the number of subscribers that are **actually paying** that entrant money on day one where Sky has an inherent advantage. Owing to the size and high willingness to pay of Sky's existing installed Sky Sports subscriber base, Sky will always be able to recoup more value from its rights over the rights period than a rival bidder. Absent effective regulation, Sky will thereby retain its bidding advantages (Sky can bid more money because it has the certainty that it will always be able to recoup more value from the rights acquired than a rival).

- 3.23. Secondly, Sky seeks to argue that withholding supply of its sports channels would, in fact, reduce Sky's chances of winning future rights auctions and that, therefore, the hypothetical incentives posited by Ofcom, and set out in the vicious circle, are wrong.⁹⁶ Sky states that: (i) the amount it is willing to pay for rights is a function of the total number of subscribers to its channels - wholesale revenues are an important consideration for it in its assessment of bidding for rights; (ii) that a potential rival would rather accept wholesale supply of Sky's quality channels than the risks of developing their own channels and (iii) that the failure of Sky to wholesale might change such a potential competitor's strategy to make it decide to bid

⁹⁴ Paragraph 4.88 of Sky's response to Ofcom's First Consultation Document.

⁹⁵ Paragraphs 4.89 and 4.90 of Sky's response to Ofcom's First Consultation Document.

⁹⁶ Paragraphs 4.91 and 4.92 of Sky's response to Ofcom's First Consultation Document.

[REDACTED]

for sports rights directly (and so Sky has an incentive to provide wholesale supply to prevent such action):⁹⁷

- (i) In respect of Sky's first point, as set out above BT does not deny that wholesale revenues have some relevance in bidding for sports rights but, for the reasons set out above, retail subscriber revenues are of far greater importance.
- (ii) It is irrelevant whether, in the abstract, Sky's behaviour might be disciplined by the fact that a rival might choose to bid for sports rights and set up its own channel if that potential competitor would not be able to successfully acquire those rights in the first place. Owing to the vicious circle, it is a fiction that there is any real risk to Sky in limiting the wholesale distribution of Sky Sports for fear of increased competition at the rights level from a rival setting up its own channel due to Sky's limited distribution of its channels. A rival would be unable to outbid Sky and win the rights in the first instance (absent exceptional circumstances), and hence creating its own channel would not be an option in response to Sky limiting the distribution of Sky Sports.

3.24. Thirdly, BT's entry into the pay TV sector does not disprove the vicious circle as Sky asserts.⁹⁸ Sky still retains significant incumbent bidding advantages and will always be in a position to outbid BT and other rivals for sports rights, other than in exceptional circumstances:

- (i) Sky suggests that BT has *"successfully competed head to head with Sky for sports rights over a number of years"*, that *"its success was most evident in relation to its acquisition of rights to the UEFA Champions League and Europa League, outbidding Sky by a substantial margin"* and that *"this fact is sufficient to undermine entirely the proposition that there is a positive relationship between the size of a firm's retail pay TV subscriber base and the likelihood of it a) competing for, and b) winning auctions for sports rights"*. However, BT's success in acquiring sports rights (particularly head to head against Sky) has been limited as evidenced by the relative portfolio of rights that BT, versus Sky, has secured (including in the most recent FAPL auction).⁹⁹ BT's success in the Champions League rights auction, which was as a result of the exceptional circumstances [REDACTED] categorically does not demonstrate that Sky's bidding advantages have been eroded, as addressed in detail at paragraphs 4.83 to 4.88 of BT's First Response.

⁹⁷ Paragraph 4.91 of Sky's response to Ofcom's First Consultation Document.

⁹⁸ Paragraphs 4.93 to 4.97 of Sky's response to Ofcom's First Consultation Document.

⁹⁹ See Sections 2 and 3 of BT's First Response.

- [REDACTED]
- (ii) Sky also argues that BT is able to monetise its rights from broadband subscribers and that this also undermines the vicious circle.¹⁰⁰ As set out at paragraphs 4.66 to 4.82 of BT's First Response, this model of monetisation does not overcome Sky's bidding advantages. In addition, Sky does not address the fact that it too can indirectly monetise its sports rights as well as its superior ability to directly monetise them. Sky chooses not to do so, but instead offers broadband services for free.
 - (iii) Sky makes much of BT's rationale for becoming a broadcaster with BT Sport (including highlighting linkages to BT's broadband business) and the fact that BT intends to remain a player in the UK broadcasting landscape¹⁰¹. This is beside the point; it does not redress Sky's entrenched bidding advantages nor does it have any impact upon BT's ability to be an *effective* competitor. In this regard, Virgin Media notes that: "*BT's purchase of rights has not resulted in wholesale competition between BT and Sky...*"¹⁰²
 - (iv) In a similar vein, Sky also argues that the increasing cost of content rights is evidence of healthy wholesale competition¹⁰³. Whilst the cost of sports rights has increased over time, this is not indicative of effective wholesale competition. It is the outcome of content rights auctions which matters; the fact remains that Sky will always win such auctions (absent exceptional circumstances) given its inherent bidding advantages.

3.25. Finally, Sky argues that the set of potential competitors for sports rights is not limited to vertically integrated UK players and that most pay TV retailers have no desire to become pay TV broadcasters¹⁰⁴. Even if it is accepted that most vertically integrated operators do not wish to become broadcasters, this does not undermine Sky's existing bidding advantages and indeed its incentives to limit the distribution of Sky Sports in order to maintain those advantages, as well as its broader advantages at the wholesale and retail level. Moreover, in respect of other types of sports channel providers, history has shown that they were equally unable to compete *effectively* against Sky in bidding for sports rights (as ESPN and Setanta's market exits amply demonstrate). Sky's argument also does nothing to address the fact that it clearly has incentives to limit the wholesale distribution of Sky Sports to BT's platforms

¹⁰⁰ In a similar vein, FAPL seeks to argue that BT is a "*serious player in the purchasing of sports rights*" and that past auction results are not indicative of any in-built advantage for Sky. It goes on to say that BT's success with BT Sport is as a result of its large subscriber base in bundled services (paragraphs 5.7 to 5.10 of FAPL's response to Ofcom's First Consultation Document).

¹⁰¹ Paragraphs 4.98 to 4.100 of Sky's response to Ofcom's First Consultation Document.

¹⁰² Paragraph 14 of Virgin Media's response to Ofcom's First Consultation Document.

¹⁰³ Paragraph 1.14 of Sky's response to Ofcom's First Consultation Document.

¹⁰⁴ Paragraphs 4.101 to 4.103 of Sky's response to Ofcom's First Consultation Document.



which, as a result of BT's considerable investment in BT Sport, is likely to be viewed by Sky as a greater threat to its market position.

[REDACTED]

4. **THE IMPACT OF BT SPORT HAS BEEN OVERSTATED BY THIRD PARTIES**

- 4.1. A number of third parties have argued that BT's entry into the provision of premium pay TV sports channels has had a material impact on competition in pay TV, with some going so far as to argue for the regulation of BT Sport on the basis of spurious analysis. BT addresses these points in this section.

BT is not in a materially different position to ESPN before it

- 4.2. In its response, Sky argues that BT's decision to launch BT Sport "*is the most important development of relevance to Ofcom's review to have occurred over the past five years*"¹⁰⁵. Such hyperbole is misplaced – BT's entry has not changed the underlying competitive conditions in the market. While Sky argues that BT has strengths such as "*deep pockets*" and "*a strong brand*" it is unclear how this differs from ESPN before it.¹⁰⁶ As BT highlighted in its First Response, in the case of BT Sport and ESPN, the underlying parent companies are of comparable scale and alongside Sky Sports ESPN is perceived to be one of the most valuable sporting brands in the world.¹⁰⁷
- 4.3. The only difference is that, in the UK, ESPN is not a vertically integrated pay TV channel and retail platform operator, and is not present in wider communications markets. However, the fact that BT is vertically integrated cannot, in itself, be expected to lead to a change in the competitive conditions [REDACTED].
[REDACTED] As the evidence in BT's First Response shows, [REDACTED]
[REDACTED] it has no greater ability to constrain Sky's freedom to act independently of others.
- 4.4. Sky also highlights BT's "*innovative model*" for financing the acquisition of sports rights. BT has addressed this issue in detail in Section 5 of its First Response.

BT Sport does not contain key sports content

- 4.5. A few respondents to the First Consultation Document suggest that BT Sport contains a substantial amount of valuable content such that BT has 'market power' and argue for the

¹⁰⁵ Paragraph 2.6 of Sky's response to Ofcom's First Consultation Document.

¹⁰⁶ BT also notes that 'deep pockets' should not be a pre-requisite to be able to compete in a given market.

¹⁰⁷ ESPN's estimated value as a stand-alone company is approximately \$51bn (see, Forget Mickey Mouse: This Once Overlooked Asset Is What Makes Disney Great, Fool, 2 August 2014, <http://www.fool.com/investing/general/2014/08/02/forget-mickey-this-is-the-real-walt-disney.aspx>) and, alongside Sky Sports, is perceived to be one of the most valuable sporting brands in the world (Most Valuable Sports Brands 2014 (Nike, ESPN, SKY, TSM Plug, 28 May 2014, <http://www.tsmplug.com/richlist/valuable-sports-brands/>)). BT's market capitalisation is approximately £55bn as at 11 February 2015.

[REDACTED]

regulation of BT Sport as a result. These assertions are based on erroneous assumptions and flawed calculations, which ignore the true factual position. BT addresses these points below.

4.6. In respect of Champions League, a number of parties suggest that Champions League content is equivalent to FAPL content – this is clearly not the case, as the evidence in BT’s First Response demonstrates.¹⁰⁸

4.7. In particular:

(i) Sky states that: *“in terms of attractiveness for viewers again there is no material difference between popular individual Champions League and Premier League Matches.”*¹⁰⁹ This is unsubstantiated and entirely at odds with Sky’s public statements on the level of importance of Champions League.

(a) In a May 2015 blog post, Barney Francis, Sky Sports Managing Director stated [Emphasis added]: *“[...]In football, it’s **the intense rivalry of our domestic competitions that matters most to customers. You only have to look at the viewing figures to see the evidence.***

*Over the last five seasons we have seen Champions League audiences fall 36%. Last season, we saw our lowest ever average match audience and **not a single European game appeared in our top 40 football matches. Overall, Champions League accounts for just 2.5% of Sky Sports viewing, while the Premier League is seven times bigger.***

*Meanwhile, football fans continue to show an overwhelming preference for our Premier League coverage. **Once again, 49 of the top 50 most watched Premier League matches were on Sky Sports last season.***

*Success in the recent Premier League auction means we’ll show **the matches that matter for at least four more years.** From 2016, we will have even more games with 126 live fixtures, up from 116. That’s three times more than any other broadcaster. We’ll also have more first picks of the best matches and for the first time, Friday night games. We’ll show every club live at least four times and, if you are a fan of one of the top four clubs, then you’ll see them around 20 times a season on Sky Sports. [...]”*¹¹⁰

¹⁰⁸ Paragraphs 3.75 to 3.88 of BT’s First Response.

¹⁰⁹ Paragraphs 5.9 of Sky’s response to Ofcom’s First Consultation Document.

¹¹⁰ Barney Francis, Managing Director for Sky Sports in his blog available at: <https://corporate.sky.com/media-centre/our-blog/2015/why-sky-sports-is-the-unrivalled-choice-for-sports-fans>

- (b) Mr Francis’ comments are echoed by a Sky investor relations email released on 8 June 2015, which provided the following further information in respect of Champions League content directly to Sky’s investors:

“[...] 2. Champions League audiences are in decline

Average audience for live Champions League (millions):

	<i>2010/11</i>	<i>2011/12</i>	<i>2012/13</i>	<i>2013/14</i>	<i>2014/15</i>	<i>% change over period</i>
<i>Sky Sports</i>	<i>0.63</i>	<i>0.52</i>	<i>0.48</i>	<i>0.54</i>	<i>0.40</i>	<i>-36%</i>
<i>ITV</i>	<i>5.8</i>	<i>5.1</i>	<i>4.8</i>	<i>5.1</i>	<i>4.3</i>	<i>-26%</i>

2013/14 and 2014/15 figures for Sky Sports exclude Sky 1 simulcasts. Figures with Sky 1 simulcasts are 0.62m (13/14) and 0.47m (14/15)

Based on all matches from Group Stage onwards.

The Champions League did not feature in Sky Sports’ top 40 football audiences this season”

- (ii) TalkTalk similarly asserts that: *“UCL content is likely to be roughly equally important to consumers as PL content”¹¹¹*, but provides no cogent evidence to substantiate this assertion. TalkTalk even goes so far as to suggest that UCL and the FA Cup are more important than Premier League¹¹². TalkTalk seeks to support this risible assertion by dividing the percentage of survey respondents who considered Premier League or Champions League (and the FA Cup) to be ‘essential’ by the number of live matches featuring Premier League teams. Indeed, Champions League is less important to viewers (and therefore broadcasters) precisely because there are fewer games featuring British teams than the Premier League, factoring this out by creating a highly questionable ‘importance by game’ figure where Premier League teams are featured is simply a spurious statistic designed to achieve a particular answer that can provide no indication of the importance of individual sports content.
- (iii) Sky argues that on a like-for-like basis there is no material difference in the cost of individual Champions League and Premier League games.¹¹³ However, BT notes that this calculation is not based on the most recent FAPL auction data. In fact, when data

¹¹¹ Paragraph 2.13 of TalkTalk’s response to Ofcom’s First Consultation Document.

¹¹² See footnote 5 of TalkTalk’s response to Ofcom’s First Consultation Document. See also section 2.3.3 which seeks to argue that FA Cup content may be key content.

¹¹³ Paragraph 5.8 of Sky’s response to Ofcom’s First Consultation Document.

from the most recent FAPL auction is considered the cost of the rights has increased from an average of £6.53m per game (2013/14-2015/16) to £10.19m per game (2016/17-2019/20), an increase of 56%. Sky's calculation is also misleading even on the basis of the out-dated data as, whilst Sky states that there is no material difference in the cost of individual Champions League and Premier League games, Sky only carries out its calculation using the cost of rights held by BT (which in respect of Premier League are a minority of the available rights) and ignores the higher cost of Premier League games held by Sky.

- (iv) Champions League rights remain in a second tier in terms of attractiveness alongside a variety of other sports (largely controlled by Sky) and this is confirmed by a proper analysis of average audiences, unique reach data and Ofcom's own research. BT sets out in full the reasons why this is the case at paragraphs 3.80 to 3.88 of its response to the First Consultation Document and it does not propose to repeat that here.
- (v) Sky suggests that past observations in respect of Champions League are an unreliable guide to the future on the basis that BT now has exclusive rights to all Champions League football matches. TalkTalk similarly argues that there is no evidence presented as to BT's FTA commitment nor whether viewers would be satisfied with the 'partial coverage' available on FTA. As Ofcom is aware, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- (vi) Sky states that BT can be expected to "*leverage those [Champions League] rights heavily in its marketing and scheduling strategy*"¹¹⁴. It is unclear what Sky means with this statement. It is standard commercial practice and unsurprising that BT would seek to market its Champions League rights given the investment it has made. Sky also heavily markets rights which it acquires, and given the scale of Sky's marketing budget is able to do so to a far greater extent than BT. This has no bearing whatsoever on BT's ability to compete effectively, nor on Sky's inherent bidding advantages. Equally, it has no bearing on whether or not BT Sport is essential content for third parties to be able to compete effectively. Unlike Sky Sports, this is not the case. In line with

¹¹⁴ Paragraph 5.12 of Sky's response to Ofcom's First Consultation Document.

[REDACTED]

Sky's own public position, and contrary to Sky's arguments to the regulator, [REDACTED]

[REDACTED]¹¹⁵. This view is supported by Enders Analysis:

*“the BT Sport Pack is **unlikely to gain major traction, largely due to the modest levels of popularity surrounding European football compared with PL football, where Sky is so strong.** While PL has a wider following and broad fan base, and the nature of the competition encourages year-round support, the CL draws most of its appeal from fans of the top teams while they are in the competition. And here we note that a number of the most popular games in the early group stages will be available FTA. The pricing structure implies that BT is keen to drive take up of BT TV, and, much like British teams in recent CL tournaments, **we expect success to be limited. The base of customers willing to pay for European football using BT TV – but who don't already subscribe to Sky Sports – is small**”.*
[Emphasis added]

- (vii) FAPL argues that the relevant question is not whether UEFA Champions League alone is capable of influencing consumer choice but whether it could do so when combined with other attractive key content. FAPL is partially correct, what matters is the aggregation of all sports content into the product that is actually sold to consumers i.e. channels and packages of channels (not just the aggregation of Champions League and FAPL content) in driving consumer choice, as set out in detail in Section 3 of BT's First Response. However, as is clear from BT's response, while the full Sky Sports proposition is necessary to ensure FEC, none of the BT Sport channels individually or in aggregate are necessary to ensure fair and effective competition in pay TV markets.
- (viii) Analyst's reports [REDACTED] indicate that the impact of BT's acquisition of UEFA Champions League and Europa League content will be modest, that Champions League content is one of a number of second tier rights and, that BT's overall portfolio of rights falls well short of Sky's. Enders Analysis, for example states:

*“[...] viewing figures paint another picture. CL audiences on ITV (home to 16 games per tournament) have fallen by 26% over the last five seasons, and Sky Sports (home to all other games) have fallen by 36% over the same period. If we look at total time spent viewing the Sky Sports channels in 2014 [...] **viewing to European club football accounts for merely 8% of total viewing, and CL just half that, surpassed by viewing***

[REDACTED]

*to cricket, golf, F1 and rugby. Games featuring British teams attract higher audiences, so total viewing is highly dependent on their success. The last four tournaments, where British teams have fared less well than in previous seasons, have seen lower audiences than those in the latter half of the last decade. **If British teams fail to progress past the group stages of either tournament, demand for BT Sport Europe could tail off in the New Year.*** [Emphasis added]

“Leaving European football to one side, the previous two charts highlight the importance of second tier sports. Sports like cricket, F1 and gold help shore-up churn over the football-light summer months, while giving sports fans a fuller offering. Sky has a long broadcast partnership with a number of these sports, and have re-signed a number of long term deals in the past couple of years. It has also captured new rights, including the gold Open Championship.

Given the relatively low viewing for European football, we do not think there will be substantial subscriber movements between TV providers. Even with the addition of European football BT’s sports offering still falls well short of Sky in terms of overall quantity of top second tier sports rights. [Emphasis added]

- (ix) FAPL’s conclusion that: *“If the correct analysis is that UEFA Champions League content is essential to a significant proportion of subscribers [...], then Ofcom should reconsider whether BT (which will be the only retailer of both UEFA Champions League and PL content from next season) should also be subject to regulatory control”*¹¹⁶ is flawed on the basis that Champions League is not key content. As set out above, and in detail in BT’s First Response, Champions League content is [REDACTED] one of a number of second-tier rights, and, as such, there is no sound basis for the regulation of BT Sport. Moreover, even if this were not the case, and Champions League was ‘key content’ there would still be no basis for regulating BT Sport in light of BT’s market position vis-à-vis Sky. BT also notes that FAPL did not make similar arguments when Sky was the only retailer of both UEFA Champions League and FAPL content over the past decade, so it is unclear why it believes this should now be the case with respect to BT, notwithstanding the fact that BT has considerably less FAPL content than Sky.

- 4.8. TalkTalk makes a number of dubious market share calculations. It seeks to argue that BT has a ‘market share’ of 45% for 2015/16 based on ‘key content’ defined to be the number of matches contained in the Premier League, Champions League and the FA Cup.¹¹⁷ This calculation is spurious. Firstly, the ‘market’ TalkTalk seeks to define is not a market. Secondly,

¹¹⁶ Paragraph 4.52 of FAPL’s response to Ofcom’s First Consultation Document.

¹¹⁷ Section 3 of TalkTalk’s response to Ofcom’s First Consultation Document.

[REDACTED]

number of matches takes no account of the quality of matches (despite TalkTalk's assertion that it does); including as to the fact that BT only holds minority Premier League rights [REDACTED]

[REDACTED]. Thirdly, TalkTalk does not include any other secondary rights (such as F1, cricket, golf or rugby) which are key in establishing the true necessity of third party access to a given sports channel.

- 4.9. At the same time, TalkTalk itself (irreconcilably with its views on BT's 'market power' – let alone a position of dominance) argues that BT is not a competitive constraint upon Sky: *"BT's pay TV offering has failed – it is currently the fourth largest pay-TV platform in the UK (well behind TalkTalk's third place) and is one of the slowest growing platforms (TalkTalk is the fastest growing), falling further behind its competitors each quarter. BT TV becoming the 'home of football' is a contention which should only be found in BT's press releases".*¹¹⁸ As such, it is clear that TalkTalk's fundamentally inconsistent position is entirely unsustainable.¹¹⁹
- 4.10. Sky similarly argues that BT will have rights to around 40% of 'match slots' for Premier League and Champions League¹²⁰. Like TalkTalk's market share calculation above, this is an equally meaningless statistic, seemingly designed to reach a figure of 40%. It is notable, that Sky did not believe that such calculations were relevant to the case for regulation of Sky when it held the Champions League rights, and ignores the fundamental inconsistency with Sky's own public arguments that Champions League is now **less** important than previously, see paragraph 4.7(i) above.
- 4.11. In light of the above, Sky's assertion that Ofcom has erroneously downplayed the importance of BT Sport¹²¹ (and equivalent assertions from TalkTalk) is manifestly incorrect.

BT does not engage in limited distribution of BT Sport (and even were BT to do so it would not impede fair and effective competition)

- 4.12. Sky asserts that Ofcom acknowledges that BT engages in the limited distribution of BT Sport vis-à-vis TalkTalk. This is not the case. Ofcom merely points out that if BT **were** to limit the distribution of its BT Sport channels to TalkTalk (which it does not do), *"The small impact on static competition from limited distribution of BT's key sports content could therefore be offset if BT is able to establish itself as a more effective competitor [to Sky]."*¹²² BT has addressed

¹¹⁸ Paragraph 4.8 of TalkTalk's response to Ofcom's First Consultation Document.

¹¹⁹ Real Digital's suggestion that BT has significant market power is likewise completely erroneous.

¹²⁰ Paragraph 5.5 of Sky's response to Ofcom's First Consultation Document.

¹²¹ Paragraphs 5.13 to 5.14 of Sky's response to Ofcom's First Consultation Document.

¹²² First Consultation Document, paragraph 8.21.

[REDACTED]

both its (lack of) ability and incentive to limit distribution of BT Sport to TalkTalk at paragraphs 6.22 to 6.30 of its First Response.

- 4.13. It is erroneous to suggest that BT is refusing to provide access to BT Sport to TalkTalk in order that BT can increase its market share in broadband markets (as Sky¹²³ and TalkTalk¹²⁴ suggest). BT has addressed both its incentives to provide BT Sport to TalkTalk and the background to negotiations to date in its First Response. [REDACTED]

- 4.14. TalkTalk also argues that Ofcom has failed to consider why BT has not provided wholesale access of BT Sport to Sky and suggests that BT has weak incentives to supply Sky's platform.¹²⁶ Firstly, as explained at paragraph 6.25 of BT's First Response, and as Ofcom recognises, BT does have a strong incentive to supply Sky's DSat platform, as evidenced by the fact that it is already doing so, and BT Sport was available on the DSat platform from launch. Secondly, and more importantly, the fact that BT has availed itself of the regulated access to Sky's platform and chosen to self-retail on that platform sheds no light on BT's incentives to wholesale on that platform if Sky were not required to provide regulated access to third parties. Finally, [REDACTED]

- 4.15. Contrary to Sky's assertions, Ofcom has not underestimated the potential impact of limited distribution of BT Sport whether at the level of the pay TV sector or in respect of competition for triple play bundles¹²⁷, indeed, Ofcom has overstated any such impact¹²⁸. Ofcom is clearly not seeking to strengthen BT's market position nor would it be a breach of Ofcom's duty to regulate consistently in not regulating BT. Given Sky's market position, regulating Sky and not BT would be perfectly appropriate and proportionate: exactly as in other markets, regulation must be targeted at competitive harm and BT has neither the incentive nor ability to impede fair and effective competition through the limited distribution of BT Sport.

- 4.16. Virgin Media implies that Premier League rights are improperly split suggesting that this impedes effective competition at the wholesale level in pay TV¹²⁹. As such, Virgin Media

¹²³ Paragraph 5.15 of Sky's response to Ofcom's First Consultation Document.

¹²⁴ Inter alia at paragraph 4.30 of TalkTalk's response to Ofcom's First Consultation Document.

¹²⁵ BT/Ofcom commercial update meeting, 7 September 2015.

¹²⁶ Talk Talk response to Ofcom's First Consultation Document, section 4.2.3.

¹²⁷ Paragraphs 5.19 to 5.24 of Sky's response to Ofcom's First Consultation Document.

¹²⁸ See paragraphs 5.14 to 5.18 of BT's First Response.

¹²⁹ Virgin Media also points out that the greater prevalence of consumers' acquisition of bundled services means that these issues will lead to increased problems with respect to bundles as well (Paragraphs 7 to 10 of Virgin



suggests that BT Sport is a complement to Sky Sports and not a substitute for it¹³⁰. However, Virgin Media is conflating issues across investigations. To the extent that FAPL's auction mechanism has not allowed for the creation of a sufficiently strong competitive downstream FAPL offering this should be dealt with in the context of Virgin Media's complaint in relation to FAPL by amending the auction rules. As BT explained in detail in Section 3 of its First Response, it is not correct for Ofcom to consider the on-going importance and scope of the WMO by focusing on Premier League content in isolation. Instead Ofcom needs to assess those channels and packages of channels for which wholesale access is necessary to ensure FEC. This means regulating the full Sky Sports proposition, and not regulating BT Sport.

Media's response to Ofcom's First Consultation Document). While BT disagrees that competition issues in pay TV stem from BT Sport, it does agree that the competition issues resulting from Sky's limited distribution of its sports channels are now spilling out and infecting bundled services. See Section 2 of BT's First Response.

¹³⁰ See paragraphs 15 to 21 of Virgin Media's response to Ofcom's First Consultation Document.



5. LEGAL ANALYSIS AND OFCOM'S TREATMENT OF BT

5.1. Ofcom is not seeking to use ex ante regulation in order to strengthen BT's position as Sky suggests,¹³¹ but rather to impose regulation that would lead to fair and effective competition. Sky argues that:

- (i) Ofcom cannot use section 316 of the Communications Act 2003 to promote the competitive position of BT.¹³²
- (ii) Ofcom has not identified a practice under section 316 of the Communications Act 2003.¹³³

5.2. As set out below, in both cases Sky is incorrect and in both cases the findings of the Court of Appeal in the pay TV appeals support that Sky is in error.

Ofcom is entitled to promote competition through section 316 of the Communications Act 2003 and, in any event, is not seeking to 'strengthen' BT's position as Sky claims

5.3. As the Court of Appeal has recognised, Ofcom has a general duty to further the interests of consumers in relevant markets, where appropriate by promoting competition. Lord Justice Vos stated in the Court of Appeal judgement¹³⁴:

"[...] Section 3(1)(b) of the 2003 Act, however, refers to Ofcom's general duties that include the duty "to further the interests of consumers in relevant markets, where appropriate by promoting competition". Section 3(2)(c) requires Ofcom to secure the availability throughout the UK of a wide range of television services." And that:

"In my judgment, therefore, it is clear that section 316 is not limited in the way Sky and FAPL suggest¹³⁵. It allows Ofcom to impose conditions so as to ensure fair and effective competition in the wholesale and retail provision of licensed services to consumers generally."

5.4. Despite Sky's numerous points of appeal in respect of Ofcom's jurisdiction, both at the Court of Appeal and the Competition Appeal Tribunal, Sky did not take issue with the fact that Ofcom has a general duty to further the interests of consumers in relevant markets, where

¹³¹ See paragraphs 3.21 to 3.22 and 5.25 to 5.32 of Sky's response to Ofcom's First Consultation Document.

¹³² See paragraphs 5.25 to 5.32 of Sky's response to Ofcom's First Consultation Document.

¹³³ See paragraph 3.23 to 3.27 of Sky's response to Ofcom's First Consultation Document.

¹³⁴ Paragraphs 110 to 116 of The Court of Appeal's judgment of 17 February 2014 in Case C3/2013/0443 *British Telecommunications PLC v Office of Communications, British Sky Broadcasting Ltd, The Football Association Premier League, Virgin Media Inc* [2014] EWCA Civ 133.

¹³⁵ In this regard, both Sky and FAPL were seeking to argue that Ofcom's powers to regulate competition did not extend to the activity of providing TLCS to the public i.e. at the retail level.

[REDACTED]

appropriate by promoting competition. The Court of Appeal was very clear that pay TV was one of the relevant markets covered by Ofcom's general duty and, moreover, that Ofcom's section 316 powers extended to regulating Sky's TLCs licences in order to ensure FEC at both the wholesale and retail levels:

*“One of Ofcom’s principal duties in carrying out its functions is ‘to further the interest of consumers in relevant markets, where appropriate by competition.’ **One of those ‘relevant markets’ must be pay TV, which is within the scope of the things which Ofcom is required to secure under section 3(2) of the CA 2003, which include ‘the availability throughout the UK of a wide range of television and radio services...’.** Of course, under section 211 Ofcom is to regulate TLCs, on which see further below. **Ofcom can only further the interest of consumers by examining the market that affects TLCs, which must include the availability of TLCs on various television platforms and services and at what prices.**”¹³⁶ [Emphasis added]*

There is therefore no basis for Sky's claims that Ofcom is not entitled to use its powers under s316 to promote competition in pay TV markets, following the Court of Appeal's judgment.

- 5.5. In any case, Ofcom is not seeking to promote the interests of BT specifically, or favour BT in its regulatory approach as Sky suggests¹³⁷. Ofcom's WMO review is legitimately seeking to address the serious impediments to competition that arise in respect of the wholesale supply of premium sports channels, and is considering the regulation that is required to address these impediments. Moreover, Ofcom has consulted on the possibility of regulating BT Sport, which is clearly not Ofcom favouring BT.
- 5.6. As set out in detail in BT's First Response, Sky has a strong market position equivalent to dominance, it has material bidding advantages, and the incentive and ability to impede FEC through the limited wholesale distribution of its channels (which it undertakes in practice). In contrast, BT is a new entrant with neither the ability nor incentive to impede FEC. It is therefore both necessary and appropriate for Ofcom to regulate Sky Sports but not BT Sport. As noted above, Sky is a material beneficiary of the ex ante regulation of BT's wholesale broadband products but is not itself subject to the same level of constraint in pay TV markets where it holds significant market power.
- 5.7. TalkTalk similarly seeks to infer that Ofcom is willing to accept a reduction in competition in broadband markets to achieve a constraint on Sky's pay TV business¹³⁸. Aside from the fact that TalkTalk is conflating broadband and pay TV issues, this proposition is incorrect, with

¹³⁶ *Ibid.* Paragraph 75. See also paragraph 79.

¹³⁷ See, for example paragraph 3.21 and 3.22 of Sky's response to Ofcom's First Consultation Document.

¹³⁸ See paragraph 3.25 of TalkTalk's response to Ofcom's First Consultation Document.

[REDACTED]

TalkTalk seeking to argue that BT should be doubly-regulated for any impact on broadband markets resulting from its investment in BT Sport. Ofcom's VULA margin regulation regards BT Sport as an acquisition and retention tool with respect to the associated broadband product.¹³⁹ While BT set out in detail in the course of the VULA consultation (and in its appeal of Ofcom's decision to impose the test in its current form to the Competition Appeal Tribunal) why Ofcom's approach of including BT Sport costs in the VULA margin test is inappropriate, TalkTalk's suggestion that such issues should **also** be considered in the WMO review is highly opportunistic and inconsistent with Ofcom's more general approach to consider competition issues on the relevant market in which they occur.¹⁴⁰

Ofcom has identified a practice that is prejudicial to fair and effective competition

- 5.8. Sky is also incorrect in its assertion that Ofcom has not identified a practice that is prejudicial to fair and effective competition. As set out above, Ofcom has: a) clearly identified a practice (limited distribution in the form of withholding wholesale supply or supply on terms which do not allow fair and effective competition); and, b) in respect of Sky, that such a practice is or would be prejudicial to fair and effective competition in the provision of a licensed or connected service.
- 5.9. As set out in section 3 above, the Court of Appeal was clear that Ofcom is permitted to take a forward looking approach in conducting its analysis and that it is legitimate for Ofcom to be concerned about the wholesale terms of supply for Sky Sports (including the fact that setting prices at a rate-card price that is too high to allow for effective competition is a relevant practice under section 316 of the Communications Act 2003).¹⁴¹ Sky seeks to ignore the judgement of the Court of Appeal whilst at the same time trying to extend the CAT findings beyond what was actually examined.

Ofcom's legal basis for intervention

- 5.10. Elsewhere, Sky makes a number of comments to suggest that Ofcom has not adequately established a legal basis for regulatory intervention.¹⁴² However, the arguments that Sky makes in this regard refer to aspects of Ofcom's analysis which would not generally be expected to have been addressed at the stage of a first consultation, where Ofcom is seeking to gather evidence around concerns that it has initially identified, and consult on those

¹³⁹ Ofcom's Statement on the Fixed Access Market Review: Approach to the VULA margin.

¹⁴⁰ See footnote 33 above.

¹⁴¹ Paragraphs 81 to 101 of The Court of Appeal's judgment of 17 February 2014 in Case C3/2013/0443 *British Telecommunications PLC v Office of Communications, British Sky Broadcasting Ltd, The Football Association Premier League, Virgin Media Inc* [2014] EWCA Civ 133.

¹⁴² See Sky's Response to Ofcom's First Consultation Document, Section 3.



concerns. As such, Sky is premature in seeking to argue that Ofcom has insufficient foundation to seek the continued regulation of Sky Sports. Had Ofcom addressed the points that Sky has raised, and set out a firm view on those issues in its first consultation, Sky would no doubt then have argued that Ofcom was not sufficiently open-minded in conducting its consultation.



6. CONCLUDING REMARKS

6.1. As BT set out in detail at paragraphs 8.27 to 8.29 of its First Response:

- Since Ofcom has been working on pay TV issues in 2007, the regulatory regime in pay TV has been proven to be ineffective and unbalanced relative to regulation in telecommunications markets. Despite regulatory intervention, BT's retail subscribers to Sky's regulated sports channels have gone from zero to [REDACTED] over the period 2010 to 2015.
- Sky is permitted systematically to limit the wholesale distribution of its Sky Sports proposition, to price it in a manner that restricts retail competition, and to discriminate between rivals, particularly to BT's disadvantage. Sky's wholesale and retail market positions have become increasingly entrenched as a result.
- As a result of stringent wholesale regulation in the broadband sector, distortions in the pay TV sector have now spilled over into adjacent markets, where Sky has been able to use its supernormal profits in pay TV to heavily discount its broadband products, resulting in Sky becoming the largest provider of triple-play bundles, and the UK's second largest broadband retailer.
- It is imperative that this situation is resolved in order to ensure the best outcome for competition and, ultimately, for consumers. Ofcom must act now to ensure the effective regulation of Sky in pay TV markets.