



# Review of the pay TV wholesale must-offer obligation

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Statement

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# About this document

This statement concludes our review of the 'wholesale must-offer' (WMO) obligation that required Sky to offer its Sky Sports 1 and 2 channels to other pay TV retailers on a wholesale basis.

We have considered whether providers of channels which carry key sports content might limit distribution to competing pay TV retailers and whether that would prejudice competition. We consulted on the first phase of our review in December 2014 and we issued a supplementary consultation in July 2015. We have considered stakeholder responses to both these consultations in concluding this review.

For the reasons set out in this statement, we consider that regulation of providers of key sports channels is not currently appropriate and we have therefore decided to remove the WMO obligation from Sky.

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## Section 1

# Executive Summary

- 1.1 In 2010, Ofcom concluded a review of the pay TV market. In that review, we conducted an analysis of the market conditions prevailing at the time and identified competition concerns arising from Sky's practices in the supply of premium sports content. We decided to impose a wholesale must-offer (WMO) obligation on Sky under section 316 of the Communications Act (the Act) to address those concerns.
- 1.2 The WMO obligation required Sky to offer to wholesale its Sky Sports 1 and 2 (SS1&2) channels to other pay TV retailers with certain prices and terms set by Ofcom. It was imposed to deliver benefits to consumers in the form of increased choice of pay TV provider and content, as well as innovation in platform services and retail service bundling, packaging and prices.
- 1.3 In 2014, we began a review to determine whether, in the light of today's market conditions, there are competition concerns such as to warrant the imposition of regulation. In light of that assessment, we have considered whether the WMO obligation should be maintained, modified or removed.

## **There have been a number of developments in pay TV since we imposed a WMO obligation in 2010**

- 1.4 In 2010 Sky supplied its Sky Sports channels on a wholesale basis to Virgin Media as a result of a commercial agreement reached in the early 1990s and following a decision in 2002 of the Director General of Fair Trading under the Competition Act 1998.<sup>1</sup> Consumers on other pay TV platforms (such as digital terrestrial television) could not access Sky's premium channels.<sup>2</sup> IPTV and video-on-demand were relatively recent developments and were not yet widely available. Sky also held a strong, vertically integrated, market position at both retail and channel levels of the supply chain and it had consistently held the majority of live Premier League rights.
- 1.5 Since 2010, existing pay TV providers have grown (BT and TalkTalk), and new providers have entered (e.g. EE), or plan to enter (e.g. Vodafone). In addition, providers are increasingly competing to provide bundles of pay TV services with other communications services (e.g. triple-play packages which include fixed telephony and broadband). Technological developments also mean this content is available through a number of different devices, particularly with the increasing presence of over-the-top (OTT) on-demand services, e.g. Netflix, Amazon Prime and NOW TV. Consumers therefore have greater choice in how they access pay TV content, with content provided in a variety of ways. A large group of consumers continue, nevertheless, to access pay TV content through a traditional pay TV service provider, with bundles of both on-demand and linear pay TV content provided via a set-top-box, and Sky is the largest of these providers.
- 1.6 There is also wider availability of sports content. As well as bundling its Sky Sports channels as part of its own pay TV service, Sky makes this content available on

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<sup>1</sup>CA98/20/2002, 17 December 2002. In addition, Sky had wholesale arrangements with a number of the smaller cable networks.

<sup>2</sup> Ofcom, *Pay TV statement*, 31 March 2010, ('the 2010 Pay TV statement'), paragraphs 1.28 and 1.31 - [http://stakeholders.ofcom.org.uk/binaries/consultations/third\\_paytv/statement/paytv\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/third_paytv/statement/paytv_statement.pdf)

wholesale terms to a number of pay TV providers and Sky's NOW TV service also makes this content available on a stand-alone basis across a range of platforms and devices. In addition, BT has launched its BT Sport channels and has invested over £2bn in building up a portfolio of sports content, which it makes available through a number of platforms and devices as well as bundled with its broadband service.

## **We have reviewed whether there are practices which may prejudice fair and effective competition in pay TV services**

- 1.7 When we imposed the WMO obligation in 2010 we said we would review it after three years to establish whether there had been any areas of material change. Our review was delayed, however, by ongoing appeals against our decision before the Competition Appeal Tribunal (CAT) and Court of Appeal.<sup>3</sup> In April 2014 we considered it appropriate to begin our review following the judgment of the Court of Appeal which confirmed Ofcom's jurisdiction to impose a condition such as the WMO obligation.
- 1.8 Our review has considered whether providers of channels which carry key sports content engage in practices that would be prejudicial to fair and effective competition. In light of that assessment, we have considered whether regulation (whether in the form of the WMO obligation or otherwise) is appropriate for ensuring fair and effective competition.
- 1.9 We published an initial consultation in December 2014 ('the December 2014 consultation')<sup>4</sup> in which we identified two types of practice which might give rise to concerns:
- i) non-supply of channels containing key content, i.e. key sports content not being supplied to certain pay TV retailers and/or platforms; and
  - ii) distribution of channels containing key sports content on terms which would not enable retailers to compete effectively in pay TV retailing or potentially other parts of the value chain.
- 1.10 We published a supplementary consultation in July 2015 ('the July 2015 consultation')<sup>5</sup> in which we further consulted with stakeholders about whether Sky's requirement for reciprocal supply of its key sports content (i.e. making supply of its key sports content conditional on a competitor supplying its own sports content to Sky) was a practice which may be prejudicial to fair and effective competition.
- 1.11 Our assessment has considered three main questions to determine the extent to which these practices may be prejudicial to fair and effective competition:

<sup>3</sup> In August 2012, the CAT issued its judgment allowing Sky's appeal. In that judgment, the CAT considered that, on the facts, the evidence of Sky's negotiations with other pay TV retailers at the time did not support Ofcom's interpretation that Sky was not a willing wholesaler of its sports content. (<http://www.catribunal.org.uk/238-6549/1158-8-3-10-British-Sky-Broadcasting-Limited.html>). The CAT's decision was subsequently appealed to the Court of Appeal and, following a decision by the Court of Appeal in February 2014 (<http://www.bailii.org/ew/cases/EWCA/Civ/2014/133.html>), the issue of whether Sky's wholesale pricing gave rise to specific competition concerns in their own right has been remitted back to the CAT for further consideration. This process is ongoing.

<sup>4</sup> Ofcom, *Review of the pay TV wholesale must-offer consultation*, 19 December 2014 - <http://stakeholders.ofcom.org.uk/consultations/wholesale-must-offer/>.

<sup>5</sup> Ofcom, *Review of the pay TV wholesale must-offer obligation – supplementary consultation*, 29 July 2015 - <http://stakeholders.ofcom.org.uk/consultations/wmo-supplementary/>

- i) What is key content, i.e. is there content which is important enough to influence the choice of pay TV provider for a significant number of consumers?
- ii) What is the impact of that content on the ability of pay TV retailers to compete effectively (taking account of the amount of content held and the market position of the content holders)?
- iii) What is the likelihood of content holders engaging in the practices identified, taking into account their incentives and current supply arrangements?

## **Live Premier League matches stand out as the most important content for consumer subscription decisions in pay TV**

- 1.12 Evidence shows that live Premier League coverage is capable of influencing the choice of pay TV provider for a significant number of consumers. The particular importance of live Premier League content, both to consumers and pay TV operators, is evident from consumer survey evidence, the amounts spent on the broadcast rights for live Premier League matches, and from statements made by pay TV providers and industry stakeholders. This importance was confirmed by respondents to our December 2014 consultation and was further illustrated in February 2015 when the live rights for the 2016/17-2018/19 seasons were sold for £5.1bn to Sky and BT (an increase of 70% on the previous auction).
- 1.13 Live Champions League content is also important in terms of consumer preferences and is reflected in the value of the broadcasting rights (BT paid £897m for the exclusive rights for the 2015/16-2017/18 seasons). Whilst a number of stakeholders argued in response to our December 2014 consultation that we have underestimated its importance, evidence indicates that it is less of a determinant to consumer subscription decisions than Premier League content. Nevertheless, the evidence shows that live Champions League content may be capable of influencing consumer subscription decisions, albeit to a lesser extent than Premier League.
- 1.14 We recognise that, as some stakeholders argued in response to the December 2014 consultation, consumers value access to a range of sports and that aggregating important sports content together can increase the attractiveness of a particular pay TV offering. However, we consider that it is still appropriate to focus on the supply of key sports content as this is the most important driver of consumer subscription decisions. Without access to live Premier League, and to a lesser extent, live Champions League coverage, pay TV retailers will be limited in their ability to attract high value subscribers.
- 1.15 In considering the impact on competition resulting from the distribution of this key content we have taken account both of the amount of key content held and the market position of the content holders – in this case Sky and BT. The impact of limited distribution of the key content held is likely to be greater where the holder has a strong market position, because it makes it more difficult for new or growing firms to enter and compete effectively, reducing competition both in the short term and in the long term.

## **Sky's strong market position means its content has the potential to impact competition**

- 1.16 Sky continues to hold the majority of the rights to broadcast live Premier League matches (following the 2015 Premier League auction it will continue to hold 75% of

the available matches for the 2016/17-2018/19 seasons). In addition it holds the rights to a number of other sporting competitions, for example major competitions in cricket and golf, which are important to some consumers in choosing their pay TV service. Our assessment shows overall that the content shown on Sky Sports channels remains important to a large group of pay TV subscribers and the evidence indicates this is predominantly driven by Sky's Premier League rights.

- 1.17 Sky has had a long standing strong position in the supply of retail pay TV services. Even when revenues and supply from the wider triple-play market are taken into account, Sky's share is still around 50%. Sky may also continue to benefit from incumbency advantages resulting from barriers to entry and expansion. These barriers include costs of acquiring new pay TV subscribers given subscriber inertia and low consumer switching.
- 1.18 In addition, Sky continues to maintain a strong market position in the supply of key sports channels – its share of these revenues is over 70% (albeit having fallen by around 10% since 2010) and its share of expenditure on sports rights is over 60%. Whilst Sky is facing increasing competition when competing for sports rights (in particular BT has won some rights previously held by Sky), we consider that Sky continues to benefit from a number of bidding advantages which help maintain its strong position. In particular these include the scale advantages arising from its large existing pay TV subscriber base willing to pay for sports content. Whilst we note some of Sky's competitors have large subscriber bases taking other communications services (e.g. BT's nearly 8m broadband subscribers and Vodafone's 18m mobile subscribers), these operators face uncertainty about the ability to monetise investment in sports content using these subscriber bases.
- 1.19 Because of the importance of Sky's content to a significant proportion of consumers we therefore consider that the way in which Sky's key content is distributed has the potential to have an impact on pay TV competition. In particular, without access to this content, competing retailers are likely to struggle to compete for a sizeable and valuable segment of the retail pay TV sector, and therefore would be less able to contest Sky's strong market position in pay TV. As a consequence those retailers' ability and incentives to compete, and to invest in new content and platform innovations, may be reduced. Consumers could be harmed through higher prices and reduced choice and innovation across pay TV services. In addition, other providers would struggle to be able to compete effectively for sports rights, which in turn would impact on their ability to develop their pay TV services.

### **BT's position has strengthened, but currently the importance of BT Sport appears unlikely to impact competition**

- 1.20 BT holds a minority of Premier League rights (it will hold 25% of the available live matches for the 2016/17-2018/19 seasons following the results of the latest Premier League auction). It also now has exclusive rights to broadcast live all Champions League matches until the 2017/18 season (these rights were previously held by Sky and ITV) and has built up a portfolio of other sports rights. We recognise that BT's acquisition of these rights has increased the attractiveness of BT Sport although it is uncertain to what extent the Champions League content will strengthen BT's sports channels.
- 1.21 Nevertheless, the evidence does not currently suggest that the content available on BT Sport is important to a large enough proportion of pay TV subscribers such that fair and effective competition between pay TV retailers would be prejudiced as a

result of non-supply. Moreover, whilst BT is continuing to invest in its pay TV service, with new exclusive content (e.g. its AMC channel) and its ultra HD offering, it does not, as yet, have a strong retail market position as a pay TV retailer, so limited distribution of its content is less likely to prejudice the emergence of effective competition than would be the case if BT had retail market strength. However, we will, as explained below, continue to monitor this market.

## **Sky is currently supplying its sports channels on commercial terms outside of the WMO obligation**

- 1.22 In view of our findings about the potential impact of Sky's key content on competition in pay TV, we consider that were Sky to not supply that content to other pay TV retailers it would prejudice fair and effective competition in pay TV services.
- 1.23 In line with our position in the December 2014 consultation, we continue to consider that, in principle, Sky could have incentives to withhold supply of its important sports content in order to protect its market position. Several stakeholders agreed with this assessment in response to our consultation.
- 1.24 However, with the exception of BT YouView (which is supplied under the WMO), all of Sky's main pay TV competitors have commercially agreed supply arrangements in place (which have been agreed outside the requirements of the WMO obligation), including:
- a wholesale arrangement with TalkTalk since 2012 for all Sky Sports channels [redacted];
  - a long term agreement with Virgin Media (running up until 2019) for all Sky Sports channels including HD [redacted];
  - a wholesale arrangement for the supply of SS1&2 to BT's legacy Cardinal platform; and
  - an agreement to retail its NOW TV service over the EE TV platform [redacted].
- 1.25 Sky is therefore supplying its content widely. The only current supply arrangement under the WMO obligation is to BT YouView, however, Sky has said it is willing to wholesale its Premier League content to BT subject to a requirement for reciprocal supply of BT Sport (which we discuss further below). Stakeholders argued that Sky's existing supply arrangements could not be used to inform what would happen in the absence of the WMO obligation and therefore regulation was necessary to ensure continued supply in future. However, given the evidence before us of Sky's existing supply arrangements, we do not consider that it would be justifiable or proportionate to impose regulation effectively as a backstop to address a potential concern. We will continue to monitor Sky's practices to determine whether regulation might be appropriate in the future.

## **We have also considered whether there are terms of supply which might be prejudicial to fair and effective competition**

- 1.26 In the December 2014 consultation we also identified that distribution of key sports content on terms that did not enable fair and effective competition could be an additional practice of concern. Following stakeholder comments, we have considered in particular: i) whether Sky is setting prices for wholesale supply of key content at a

level which does not enable fair and effective competition; and ii) whether Sky's requirement for reciprocal supply of channels containing key content would prejudice fair and effective competition. We have considered these terms in the context of Sky's existing supply arrangements as set out above. In particular our assessment is focussed on whether, in the context of commercial deals having been agreed, the evidence of a concern relating to the terms of those supply arrangements warrants intervention.

- 1.27 With respect to pricing, we note neither Virgin Media nor TalkTalk raised specific concerns about the current level of Sky's wholesale prices. Whilst BT submitted some additional evidence at a late stage, having considered that evidence, and in view of the other evidence available to us, we do not consider the evidence demonstrates that Sky's current, commercially agreed, wholesale pricing (outside of the WMO obligation) for access to its key sports content, is likely to prejudice fair and effective competition.
- 1.28 With respect to Sky's requirement for reciprocal supply, Sky and BT entered into commercial negotiations for the wholesale supply of the SS1&2 channels to BT's YouView platform following the 2012 Premier League auction. In those negotiations, Sky indicated that it would only supply Sky Sports channels to BT if BT agreed to supply BT Sport to Sky. BT claimed that Sky's requirement for reciprocal supply of Premier League content is a practice which prejudices fair and effective competition. Currently the issue of reciprocal supply only affects BT as the other holder of key sports content.<sup>6</sup>
- 1.29 We consulted on this issue in our July 2015 consultation. We indicated that concerns could arise if this requirement led to non-supply of Sky's key content, affected BT's incentives to invest and compete, or resulted in an agreement that restricted the ability of BT to compete. We have considered stakeholder responses to that consultation in reaching our decision.
- 1.30 In principle, there could be a concern where a vertically integrated operator in a strong market position such as Sky, makes the supply of its key content subject to a requirement which may condition the way in which its competitor chooses to supply its own content such that it prejudices fair and effective competition.
- 1.31 However, while Sky and BT engaged in some discussions surrounding the possibility of a reciprocal agreement in 2012/13, the negotiations were not concluded.<sup>7</sup> Overall, it is not clear from the available evidence what would have happened in practice in the negotiations between Sky and BT had they been concluded. Whilst it is possible that no agreement would have been reached, or that any deal that was agreed could have contained terms which would be prejudicial to fair and effective competition, it is also possible that a legitimate agreement might have been negotiated.
- 1.32 We also note that since its acquisition of sports rights, BT's strategy in pay TV has included a particular focus on monetising the BT Sport channels by bundling

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<sup>6</sup> [redacted].

<sup>7</sup> In May 2013 BT's submitted its Competition Act complaint against Sky ('BT CA98 Complaint'): [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01106/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01106/). In practice, BT YouView was therefore not supplied with Sky's key content until the CAT decision to extend the WMO to YouView in November 2014. <http://www.catribunal.org.uk/238-6095/1152-8-3-10-IR-British-Sky-Broadcasting-Limited-.html>

them with its broadband service, and distributing them over Sky's satellite platform.<sup>8</sup> The evidence does not suggest that this strategy has been affected by Sky's requirement for reciprocal supply.

- 1.33 Therefore, on the basis of the current evidence, and the fact that BT and Sky's negotiations were not concluded, it is not clear that the identified concerns would be borne out in practice. Ofcom has a duty to have regard to the need to act in a manner which is proportionate and targeted only at cases in which action is needed.<sup>9</sup> We do not consider the concerns relating to Sky's requirement for reciprocal supply warrant the imposition of regulation. Should future negotiations conclude in such a way as to suggest that Sky's practice is resulting in outcomes which are prejudicial to fair and effective competition, we may reassess this position.

### **On the basis of the available evidence we have not identified a practice which would justify regulation**

- 1.34 We expect competition in pay TV to deliver benefits to consumers in the form of choice, innovation and lower prices. In order for retailers to be able to compete in pay TV they need to be able to access content that consumers want to watch. We have identified the most important content to be live Premier League matches and, to a lesser extent, live Champions League matches. Our review has focussed on whether there are competition concerns arising from the supply of this key sports content. We recognise that in the context of our Strategic Review of Digital Communications,<sup>10</sup> some stakeholders have made reference to broader competition concerns within the pay TV sector in relation to Sky's market position. We will consider these submissions as part of that ongoing review.
- 1.35 For the reasons set out in this statement and on the basis of the available evidence, we do not consider that it would be appropriate to impose regulation in relation to the supply of channels containing key sports content at this time. Whilst there may be concerns in principle given Sky's strong position in the market, in practice the evidence shows that Sky is supplying widely and we have not seen evidence to show that the terms of this supply amount to practices prejudicial to fair and effective competition which warrant the imposition of regulation. We have therefore decided that it is appropriate to remove the WMO condition from Sky's broadcast licences.
- 1.36 We note Sky's current wholesale supply arrangements to Virgin Media, TalkTalk and BT Cardinal will remain in place for at least the duration of the agreed contracts. In the case of BT YouView, if appropriate, and any other retailers seeking supply, we would expect Sky and those retailers to engage willingly, constructively and in a timely manner in such negotiations. We already monitor the pay TV market closely and we will continue to do so, in particular with a view to determining whether the potential concerns identified in this statement arise in the future.
- 1.37 We will continue to monitor the availability and distribution of key sports content, technological developments in pay TV services, subscriber numbers for these services, commercial agreements and relationships between competing pay TV

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<sup>8</sup> Third-party channel operators can acquire access to Sky's digital satellite (DSat) platform on a fair, reasonable and non-discriminatory basis as long as they meet a set of requirements. This is governed by the Technical Platform Services guidelines -

<http://stakeholders.ofcom.org.uk/consultations/tpsguidelines/statement/>

<sup>9</sup> Section 3(3) Communications Act 2003.

<sup>10</sup> <http://stakeholders.ofcom.org.uk/telecoms/policy/digital-comms-review/>

retailers, retail packaging and pricing of key sports content, and the importance of particular content to subscribers in choosing their pay TV service.

- 1.38 Should evidence emerge that Sky was engaging in practices which are prejudicial to fair and effective competition, we will reassess the need for ex ante regulation. In particular our expectation is that consumers should continue to have access to, and a choice of, packages and services containing Sky's key content. We would be concerned if there was evidence of Sky withholding its key content from competing retailers. Similarly, we would be concerned if there was evidence of Sky introducing unreasonable terms into its supply contracts and/or it requiring an agreement which included conditions designed to restrict a retailer's ability to compete as aggressively as it otherwise would or where a requirement for reciprocal supply amounted to effective non-supply of Sky's key content.
- 1.39 This is an important market and we are concerned to ensure that fair and effective competition is delivered in the interests of citizens and consumers. We will therefore consider it a priority to intervene to address any concerns if they were to arise.

## Section 2

# Introduction and background

- 2.1 The WMO obligation imposed in 2010<sup>11</sup> required Sky to offer to wholesale its Sky Sports 1 and 2 (SS1&2) channels to other pay TV retailers, with certain prices and terms set by Ofcom.
- 2.2 We imposed the WMO obligation under section 316 of the Communications Act 2003 (the Act) by inserting condition 14A in the broadcast licences of each of the SS1&2 channels (and their high definition (HD) versions). At that time we said we would review the WMO obligation after three years.
- 2.3 We started our review in 2014 and in this document we set out our conclusions on whether, in light of current market conditions, there are competition concerns such as to warrant regulation. In light of that assessment we have considered whether a WMO obligation remains appropriate, or whether it needs to be modified or removed. For the reasons set out in this statement, we have concluded that the WMO obligation should be removed and it is not appropriate to include any alternative conditions in the licences for Sky Sports channels at this time.

## We consulted in December 2014 on the first phase of our review

- 2.4 The December 2014 consultation set out our assessment of whether providers of channels which carry key sports content may engage in practices which would be prejudicial to fair and effective competition in the retailing of pay TV services.
- 2.5 Our definition of key sports content included live coverage of the Premier League, and to a lesser extent Champions League, because they stood out as being sufficiently important to consumers that they could influence choice of pay TV retailer for a significant number of subscribers.<sup>12</sup>
- 2.6 We consulted on our view that limited distribution of this key sports content broadcast on Sky Sports to other pay TV retailers could prejudice fair and effective competition and that, absent regulation, Sky may face incentives to act in such a manner. We also considered the impact of limited distribution of BT's key content, however, we found that, based on its current sports rights holdings and its market position, it did not appear sufficient to give rise to concerns at the current time and we were therefore not minded to consider imposition of a remedy on BT.<sup>13</sup>
- 2.7 Our initial view was that regulation might be appropriate to address the concerns in relation to Sky. We also recognised, however, that the pay TV sector was continuing to evolve, and this might affect the extent to which limited distribution of key content was a cause for concern. We therefore also consulted on potential removal of the WMO obligation on Sky.<sup>14</sup>

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<sup>11</sup> The 2010 Pay TV statement - [http://stakeholders.ofcom.org.uk/consultations/third\\_paytv/](http://stakeholders.ofcom.org.uk/consultations/third_paytv/)

<sup>12</sup> December 2014 consultation, Section 5.

<sup>13</sup> December 2014 consultation, paragraphs 8.6-8.9 and 8.21-8.22.

<sup>14</sup> December 2014 consultation, paragraphs 8.18-8.20.

## We issued a supplementary consultation in July 2015

- 2.8 We received responses to our December 2014 consultation from BT, the Premier League ('the PL'), [§<], Real Digital, Sky, TalkTalk, and Virgin Media (as well as from three individuals).<sup>15</sup>
- 2.9 Having reviewed these responses, we identified Sky's requirement for reciprocal supply of channels containing key sports content (i.e. Sky making supply of its key sports content conditional on a competitor supplying its own sports content to Sky) as a specific practice on which it was appropriate to consult further and gather additional evidence. We therefore issued the July 2015 consultation on the extent to which this practice was prejudicial to fair and effective competition.
- 2.10 BT, Sky, [§<], and [§<] provided responses to the July 2015 consultation.<sup>16</sup> We have considered these responses, as well as the responses received to the December 2014 consultation, in reaching our decision in this statement.

## In this review we have considered whether it is appropriate to impose conditions under section 316 of the Act

- 2.11 As set out above, Ofcom imposed a WMO obligation on Sky in March 2010, in exercise of its powers under section 316 of the Act. This obligation was inserted into Sky's licences for Sky Sports 1, Sky Sports 2, Sky Sports HD and Sky Sports 2 HD as condition 14A of the licences.
- 2.12 Section 316 of the Act states that:
- (1) The regulatory regime for every licensed service includes the conditions (if any) that OFCOM consider appropriate for ensuring fair and effective competition in the provision of licensed services or of connected services.
- (2) Those conditions must include the conditions (if any) that OFCOM consider appropriate for securing that the provider of the service does not —
- (a) enter into or maintain any arrangements, or
- (b) engage in any practice,
- which OFCOM consider, or would consider, to be prejudicial to fair and effective competition in the provision of licensed services or of connected services.
- (3) A condition imposed under this section may require a licence holder to comply with one or both of the following —
- (a) a code for the time being approved by OFCOM for the purposes of the conditions; and

<sup>15</sup> All the non-confidential responses to the December 2014 consultation are published here: <http://stakeholders.ofcom.org.uk/consultations/wholesale-must-offer/?showResponses=true>

<sup>16</sup> All the non-confidential responses to the July 2015 consultation are published here: <http://stakeholders.ofcom.org.uk/consultations/wmo-supplementary/?showResponses=true>

(b) directions given to him by OFCOM for those purposes

(4) In this section—

“connected services”, in relation to licensed services, means the provision of programmes for inclusion in licensed services and any other services provided for purposes connected with, or with the provision of, licensed services; and

“licensed service” means a service licensed by a Broadcasting Act licence.

- 2.13 Ofcom’s decision to impose a WMO obligation was appealed to the CAT by Sky, BT, the PL and Virgin Media. During the conduct of those appeals, the CAT put in place interim arrangements under an interim relief order<sup>17</sup> (‘IRO’) which maintained the WMO obligation in place in respect of certain qualifying platforms (subject to certain modifications).<sup>18</sup> The IRO remains in place.
- 2.14 The CAT issued its judgment in respect of the appeal in August 2012 (‘the 2012 CAT Judgment’) and in March 2013, the CAT issued its Order allowing Sky’s appeal. The 2012 CAT Judgment found that, in principle, Ofcom was permitted to exercise its powers under section 316 of the Act to impose a WMO obligation as a licence condition for the purposes of preventing practices which may be prejudicial to fair and effective competition in the retail supply of licensed services. However, the CAT found that Ofcom had misinterpreted the evidence in concluding that Sky was not a willing wholesaler of its premium channels. The CAT also considered that Ofcom’s concerns that Sky was engaging in practices with regards to wholesale prices and the supply of new products to Virgin Media which were prejudicial to fair and effective competition were unfounded. The CAT therefore allowed Sky’s appeal.
- 2.15 The CAT’s decision was appealed to the Court of Appeal and, in February 2014, the Court of Appeal concluded that the CAT had failed to appreciate the importance of Ofcom’s conclusion that Sky’s wholesale rate-card price and the effect of the penetration discounts that were proposed by Sky gave rise to competition concerns in their own right. The Court therefore remitted to the CAT for further consideration, findings, and conclusions, the question of whether the WMO obligation was justified on the basis of such competition concerns.<sup>19</sup> Whilst this process is ongoing, both the CAT and the Court of Appeal confirmed Ofcom’s jurisdiction to impose a condition such as the WMO obligation in the licences of the Sky Sports channels.
- 2.16 This statement outlines the outcome of our review of the WMO obligation which we launched in April 2014. The focus of our assessment is whether, in light of the current market conditions, there are arrangements or practices which could be prejudicial to fair and effective competition in the supply of pay TV to consumers within the UK. In view of that assessment, we have considered whether regulation (whether in the form of the WMO obligation or otherwise) is appropriate for ensuring fair and effective competition in the retailing of pay TV services. This review has not sought to review

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<sup>17</sup> <http://www.catribunal.org.uk/237-6095/1152-8-3-10-IR-British-Sky-Broadcasting-Limited-.html>

<sup>18</sup> The IRO applies to BT (via Digital Terrestrial Television (DTT)) and Virgin Media (via DTT and cable), and was extended to Real Digital (via satellite) in November 2010 and to BT’s IPTV platforms (i.e. YouView) in November 2014 - <http://www.catribunal.org.uk/238-6095/1152-8-3-10-IR-British-Sky-Broadcasting-Limited-.html>

<sup>19</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2014/133.html>

whether the WMO obligation remains appropriate via a re-examination of the analysis and justification for imposing the WMO obligation in 2010.

- 2.17 A number of respondents made comments relating to the extent of our powers under section 316 of the Act and the test for intervening under this section. Given our conclusion in Section 7 of this document, we do not consider it necessary to address these comments in detail. In addition, BT made a number of comments about the effectiveness of the current WMO obligation.<sup>20</sup> Again, in view of our conclusions, we do not consider it necessary to respond to these comments.

## **We have maintained our three step analytical framework in this statement**

- 2.18 In the December 2014 consultation we approached our analysis on the basis of the following three steps:
- i) identifying key content (i.e. whether there is content that is capable of influencing the choice of pay TV retailer for a significant number of subscribers);<sup>21</sup>
  - ii) assessing the extent to which limited distribution of channels carrying key content could be prejudicial to fair and effective competition (i.e. the impact of limited distribution);<sup>22</sup> and
  - iii) assessing the extent to which holders of key content are likely to engage in limited distribution of such content.<sup>23</sup>
- 2.19 The PL and BT did not agree with our approach. They argued that we should adopt a framework of identifying a focal product to define markets and assessing competitive conditions within that market to establish market power.<sup>24</sup> BT considered that a focus on individual sporting competitions was at odds with this approach and did not reflect the reality of how products are bought and sold and consequently risked understating the market power enjoyed by Sky.<sup>25</sup>
- 2.20 We do not agree that, in considering the exercise of powers under section 316 of the Act, we are required to undertake a market definition and market power analysis in the manner suggested. Indeed, the CAT explicitly rejected this position in its judgment.<sup>26</sup> In any event, our assessment is carried out in consideration of these principles and incorporates much of the analysis that would normally be included within a formal competition law assessment.
- 2.21 We remain of the view that the framework for analysis set out in the December 2014 consultation is an appropriate framework for the assessment of practices in relation to the supply of sports content.<sup>27</sup> In our view, this framework allows for the identification and consideration of those practices which may be prejudicial to fair and

<sup>20</sup> E.g. BT response to the December 2014 consultation, paragraph 5.12 (v).

<sup>21</sup> See Section 5 of the December 2014 consultation for more details.

<sup>22</sup> See Section 6 of the December 2014 consultation for more details.

<sup>23</sup> See Section 7 of the December 2014 consultation for more details.

<sup>24</sup> BT response to the December 2014 consultation, Annex 1, paragraphs 3-7. The PL response to the December 2014 consultation, paragraph 3.2.

<sup>25</sup> BT response to the December 2014 consultation, paragraphs 3.4-3.14.

<sup>26</sup> See e.g. paragraph 155 of the 2012 CAT Judgment.

<sup>27</sup> We respond to BT's specific arguments about our approach to assessing key content in Section 4 and Annex 1.

effective competition and we therefore continue to approach our assessment on the basis of the three steps outlined above.

## **We have considered the impact and likelihood of two main practices**

- 2.22 In the December 2014 consultation we identified two practices (which we referred to collectively as limited distribution) that might, in certain circumstances, give rise to concerns:
- 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 on terms that would not enable other providers to compete effectively in pay TV retailing or potentially in other parts of the value chain.
- 2.23 In respect of the second practice, we identified that setting wholesale prices at a level which did not allow a sufficient margin to enable pay TV retailers to compete effectively was a form of limited distribution that could be prejudicial to fair and effective competition.<sup>28</sup>
- 2.24 As set out above, in light of stakeholder responses we consulted further in July 2015 on a practice involving a requirement for reciprocal supply of channels containing key sports content.
- 2.25 In Section 6 we set out our views on the extent to which the practices identified in both the December 2014 and July 2015 consultations may prejudice fair and effective competition.

## **Overview of the rest of this document**

- 2.26 The rest of this document is set out as follows:
- **Section 3** – presents an overview of the pay TV sector, highlighting some relevant developments that have taken place since 2010;
  - **Section 4** – sets out our conclusions on key content that drives consumer pay TV subscription decisions;
  - **Section 5** – sets out our assessment of the impact of that key content as held by Sky and BT, taking account of the importance of the content each of them holds, as well as their market positions;
  - **Section 6** – sets out our assessment of Sky’s practices in relation to that key content which we have identified as potentially concerning, including non-supply of key content, wholesale pricing that does not enable fair and effective competition, and Sky’s demand for reciprocal supply of key content; and
  - **Section 7** - sets out our conclusions and reasons for our decision to remove the WMO obligation.

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<sup>28</sup> December 2014 consultation, paragraph 7.3.

## Section 3

# Pay TV sector context

- 3.1 In Section 3 of the December 2014 consultation, we set out an overview of the pay TV sector in which we highlighted some of the major developments relevant to our review since we imposed the WMO obligation in 2010.
- 3.2 In this section we set out an updated overview of the sector, taking account of stakeholder responses to our December 2014 consultation. Our focus is on developments that are relevant to our review of the WMO obligation, and in particular those relating to the distribution of sports content.

## We highlighted a number of developments in pay TV since 2010 in our December 2014 consultation

- 3.3 In 2010 Sky supplied its Sky Sports channels on a wholesale basis to Virgin Media as a result of a commercial agreement reached in the early 1990s and following a decision in 2002 of the Director General of Fair Trading under the Competition Act 1998.<sup>29</sup> Consumers on other pay TV platforms (such as digital terrestrial television) could not access Sky's premium channels.<sup>30</sup> IPTV and video-on-demand were relatively recent developments and were not yet widely available. Sky also held a strong, vertically integrated, market position at both retail and channel levels of the supply chain, and it had consistently held the majority of live Premier League rights.<sup>31</sup>
- 3.4 The decision we took in 2010 to impose the WMO obligation was intended to deliver benefits to consumers in the form of greater choice of provider, a greater range of price options (e.g. through smaller, lower-priced TV packages, and a greater range of bundles), and to facilitate innovation (through new services and a wider range of package options).
- 3.5 In the December 2014 consultation, we noted the increased take-up of pay TV services (and associated revenue), the increased popularity of over-the-top (OTT) services, and the greater prevalence of pay TV services bundled with other communications services. We also noted that there had been a number of developments in the provision of sports content. In particular, we observed that sports content was now more widely available than in 2010, in part due to more wholesale deals between Sky and other pay TV retailers, as well as the launch of BT Sport.<sup>32</sup>
- 3.6 However, we also identified certain characteristics in the sector that had persisted since 2010. In particular, we noted that the cost of sports rights remained high, key rights holders are vertically integrated across wholesale provision and pay TV retailing, and Sky continues to have both the largest subscriber base and to hold the majority of major sports rights.

<sup>29</sup> CA98/20/2002, 17 December 2002. In addition, Sky had wholesale arrangements with a number of the smaller cable networks.

<sup>30</sup> 2010 Pay TV statement, paragraphs 1.28 and 1.31.

<sup>31</sup> In 2006 the European Commission adopted a decision in which it accepted a commitment from the Premier League that no single broadcaster would be allowed to buy all of the packages of live match rights from 2007 onwards - [http://europa.eu/rapid/press-release\\_IP-06-356\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-06-356_en.htm?locale=en)

<sup>32</sup> December 2014 consultation, paragraphs 3.48-3.50.

- 3.7 In response to the December 2014 consultation, both Sky and BT said that we had identified the main sector developments (at least insofar as they are relevant to the WMO review), but both argued that we had not correctly taken account of the impact of these developments.<sup>33</sup> BT suggested that we had overstated the significance of the developments in the sector since 2010, and that there is no more competition as a result of developments.<sup>34</sup> Conversely, Sky stated that we had failed to properly appreciate the significance of the developments and that competition is strong.<sup>35</sup> In particular, Sky argued that we should consider pay TV in the context of the wider audio-visual sector (and, indeed, the wider communications sector), because pay TV is only one way in which consumers meet their demand for audio-visual content, with other sources for meeting that demand (including on-demand, DVDs, and, in particular, free-to-view (FTV) TV) being as important to retail competition in this area.<sup>36</sup>
- 3.8 Many of these stakeholder comments relate to how we have taken account of these developments within our assessment of potential competition concerns. As above, the purpose of this section is to provide an overview of the sector and the developments that are relevant to our review of the WMO obligation. Our assessment in the rest of this document, in particular in Sections 5 and 6, takes account of the developments we have identified. We have also responded in more detail to stakeholder comments on sector developments relevant to our assessment in Annex 2.

### **Sky remains the largest pay TV provider, but other providers are growing and new providers are entering**

- 3.9 As we noted in the December 2014 consultation, developments in the delivery of pay TV have led to a wider range of retail pay TV services delivered using a variety of technologies (in particular the increasing use of pay services provided OTT via the open internet). Nevertheless, 58% of consumers take paid-for TV from either Virgin Media, Sky, BT, or TalkTalk.<sup>37</sup> These retailers offer both hardware (typically a set-top-box) and content packages through the provision of linear and on-demand television channels and services.
- 3.10 As in 2010, Sky remains the largest such pay TV provider in the UK. The table below compares the subscriber numbers in 2010 and 2015 for the four main traditional pay TV retailers on their TV platforms (and their market shares).

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<sup>33</sup> Virgin Media also commented on the sector developments but noted only that none of the developments we identified had undermined our original justification for a WMO obligation. Virgin Media response to the December 2014 consultation, paragraph 12.

<sup>34</sup> BT response to the December 2014 consultation, paragraphs 2.1-2.6.

<sup>35</sup> Sky response to the December 2014 consultation, paragraphs 2.2-2.3, and 1.10-1.15.

<sup>36</sup> Sky response to the December 2014 consultation, paragraphs 1.7-1.9.

<sup>37</sup> This is based on information from Ofcom's Technology Tracker, which places take-up of pay TV at 62% as it includes some additional pay TV services - Ofcom Technology Tracker, Half 2 2015 [http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015oct/Ofcom\\_Technology\\_Tracker\\_Half\\_2\\_2015\\_UK\\_data\\_tables.pdf](http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015oct/Ofcom_Technology_Tracker_Half_2_2015_UK_data_tables.pdf). QH1B. And which of these do you consider is your MAIN type of television? Base: All UK adults (16+).

**Table 3.1: Retail pay TV subscriber numbers and shares**

	Sky (DSat)	Virgin Media <sup>38</sup>	BT TV <sup>39</sup>	TalkTalk <sup>40</sup>
2010	9.7m (inc ROI)	3.7m	0.5m	50,000
2015	[x] <sup>41</sup>	3.7m	1.3m	1.4m
2015 share of subscribers (%)	55%-65% [x]	20%-30% [x]	5%-15% [x]	5%-15% [x]

Source: 2010 data – Ofcom, 2010 Pay TV Statement, paragraph 4.3; 2015 data – retailers’ published results (October-November 2015) and operator responses to the 3<sup>rd</sup> WMO information request, dated 16 October 2015 (in the case of BT the 4<sup>th</sup> WMO information request).

3.11 These four pay TV retailers offer a range of different content packages and services:

- **Sky** – Sky uses digital satellite (DSat) to distribute its TV services (it also retails its content separately via its NOW TV service on an OTT basis, which we discuss below). Sky is a vertically integrated pay TV retailer as it owns and operates a number of channels, which it retails directly to consumers as well as distributing on a wholesale basis. Sky’s basic TV package (the Original Bundle) is priced at £20 per month, and as well as FTV channels, includes over 35 entertainment channels (including Sky Atlantic,<sup>42</sup> Sky 1, and Sky Living). Sky also offers premium packages such as Sky Sports (£25.50 per month) and Sky Movies (£17 per month) purchased as an add-on to its Original Bundle. Sky provides its TV packages on a stand-alone alone basis, as well as bundled with its broadband and fixed-line services. In addition, its Sky GO service allows subscribers to watch content live or on-demand from a range of devices, including computers, tablets and mobile phones.
- **Virgin Media** (acquired by Liberty Global in June 2013) – Virgin Media offers a range of TV packages distributed via its digital cable network, which is currently available to 44% of UK premises (12m homes), with further expansion planned.<sup>43</sup> Its stand-alone TV packages range from £18 to £38 a month and can include a range of additional premium content, including the Sky Sports, BT Sport, and Sky Movie channels. Virgin Media also bundles its TV packages with broadband and fixed-line services and offers a ‘TV Anywhere’ service which allows subscribers to access their content from a range of internet-enabled devices.
- **BT TV** – since 2013, BT has become a vertically integrated provider as it owns and operates its BT Sport channels as well as its retail TV service. BT distributes

<sup>38</sup> <http://www.libertyglobal.com/pdf/fixed-income/Virgin-Media-Fixed-Income-Q3-2015-Release-FINAL.pdf>

<sup>39</sup> <http://www.btplc.com/Sharesandperformance/Quarterlyresults/index.htm>

<sup>40</sup> <http://www.talktalkgroup.com/press/press-releases/2015/demand-for-quad-play-drives-growth-for-talktalk.aspx>. TalkTalk’s Q3 2015 update did not publish its TV subscriber numbers

<sup>41</sup> Sky’s published results (12m subscribers) include NOW TV subscribers and subscribers in the Republic of Ireland (ROI), as well as subscribers taking broadband and telephony. Sky’s DSat UK only customer subscriber numbers provided in response to the 3<sup>rd</sup> WMO information request dated 16 October 2015.

<sup>42</sup> Sky Atlantic is exclusive to Sky.

<sup>43</sup> As of May 2015 – CMR 2015, Ofcom, Section 1.3.3. <http://about.virginmedia.com/press-release/9467/virgin-media-and-liberty-global-announce-largest-investment-in-uks-internet-infrastructure-for-more-than-a-decade>

its TV service primarily via IPTV through its YouView box, although a number of its subscribers are on its legacy Cardinal platform.<sup>44</sup> As of September 2015, [§<] of BT's TV subscribers had a YouView box. BT offers three TV packages, which are only available as part of a bundle with its broadband and fixed-line services. Its basic TV package (the Starter package) is free for its broadband and fixed line subscribers, and includes the BT Sport and AMC channels.<sup>45</sup> It also offers an Entertainment Plus package with additional premium channels (for £10 a month) and a recently launched 'Ultra HD' package (for £15 a month) - subscribers can also purchase add-ons to the bundles such as SS1&2, Sky Movies, and Netflix. BT also offers a 'TV Everywhere' service as part of its Entertainment Plus packages.

- **TalkTalk** – TalkTalk also distributes its TV service via IPTV using the YouView platform and only makes it available as part of a bundle with its broadband and fixed-line services. TalkTalk offers two TV packages (either a basic package at £10 a month or its Plus TV package at £20 a month)<sup>46</sup>, as well as a range of content bolt-ons that can be added on a month-by-month basis (including the Sky Sports, Sky Movies and several Sky entertainment channels).<sup>47</sup> TalkTalk has also recently introduced a TV2Go app.

### 3.12 More recently, new pay TV retailers have launched, or are due to launch:

- **EE** - launched its EE TV service in October 2014, which it distributes via IPTV. It offers a range of FTV channels, and some catch-up and on-demand content via its EE TV box.<sup>48</sup> The service is available to EE mobile customers (including T-Mobile and Orange customers) who take one of EE's broadband plans, with prices starting at £12.95 a month (in addition to line rental). EE also offers 'Fetch' app which enables consumers to move content from the TV to their mobile or tablet;
- **Vodafone** - having acquired the UK assets of Cable & Wireless in 2012, Vodafone recently launched a retail broadband service (it was made available nationwide in August 2015) and it is due to also launch an IPTV service early next year.<sup>49</sup> It currently offers some content (Sky Sports Mobile TV, NOW TV's Entertainment service, and Netflix) via its mobile service.<sup>50</sup>

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<sup>44</sup> BT no longer sells STBs for its Cardinal platform, and is looking to migrate its subscribers onto the YouView platform - <http://www.btplc.com/news/Articles/ShowArticle.cfm?ArticleID=81A969F4-BB68-44B1-98DC-820395D7085F> Because BT is signing no new customers to its Cardinal platform, we have focussed in this section on BT's YouView service.

<sup>45</sup> AMC is exclusive to BT.

<sup>46</sup> Prices correct as of November 2015.

<sup>47</sup> Sky's entertainment channels are included in TalkTalk's premium Plus TV package.

<sup>48</sup> <https://broadband.ee.co.uk/ee-tv/ee-tv-features>

<sup>49</sup> [http://www.vodafone.com/content/dam/vodafone/investors/financial\\_results\\_feeds/half\\_year\\_30september2015/dl\\_halfyear2015.pdf](http://www.vodafone.com/content/dam/vodafone/investors/financial_results_feeds/half_year_30september2015/dl_halfyear2015.pdf)

<sup>50</sup> <http://www.vodafone.co.uk/explore/music-tv-and-sports/index.htm>

## Consumers are also increasingly using OTT services to access pay TV content across a range of devices

- 3.13 In addition to the traditional pay TV retailers, there are now a number of standalone OTT services<sup>51</sup> (such as Netflix, Amazon Prime Instant Video, and NOW TV). These services have seen significant growth<sup>52</sup> and are therefore an increasingly important part of the competitive landscape for pay TV. Such services provide standalone content starting from £5.99 a month,<sup>53</sup> giving consumers a wider range of options for how to purchase pay TV services and at a range of price points.
- 3.14 The growing number, and increasing usage, of internet-enabled devices (including smart TVs and games consoles, as well as the set-top boxes provided by the main TV retailers) also offer consumers a range of options for accessing pay TV content and OTT services. For example by the end of 2014, 56% of UK homes had a TV connected to the internet, either via a set-top box or a smart TV, and this figure is likely to be higher when other third-party devices which can be used to connect TVs to the internet, such as games consoles or streaming devices (e.g. Chromecast) are included.<sup>54</sup>
- 3.15 Whilst to date these services have tended to focus on entertainment and film content (e.g. Netflix and Amazon Prime focus on this type of content), increasingly there are options for consumers wishing to access sports content on an OTT basis. In response to the December 2014 consultation, Sky pointed to its NOW TV service as a significant innovation and an important new means by which it is able to expand the number of subscribers to its sports channels. It noted that the service was targeted at consumers who had “*rejected ‘traditional’, fully-fledged pay TV subscriptions*”.<sup>55</sup>
- 3.16 Sky’s NOW TV service makes a wide-range of Sky’s pay TV content, including its Sports and Movie channels, available on a standalone basis. It offers month-by-month passes (or in the case of its sports channels, daily or weekly passes as well<sup>56</sup>) and access to that content either via its NOW TV box or a wide range of internet-enabled devices. The launch of the new monthly pass for its Sports content in July 2015 means that it is now possible for consumers to purchase standalone sports content for less than if they were to purchase Sky Sports and basic channels as part of a traditional Sky TV package.<sup>57</sup> BT also offers a BT Sport app and online player

<sup>51</sup> These are services that provide access to a range of content either on a pay-per-view basis or for a monthly subscription fee, without a requirement to buy-through from a basic TV package. Unlike the traditional pay TV retailers, OTT providers do not necessarily require a set-top box (STB) or dedicated content delivery platform (relying instead on the internet), and content can be purchased on a standalone basis.

<sup>52</sup> According to the 2015 Communications Market Report (section 1.5.2), Amazon Prime Instant Video has 1.2m subscribers, and Netflix 4.4m subscribers, as of Q1 2015.

<sup>53</sup> For instance, Netflix is available from £5.99 per month, a NOW TV entertainment pass costs £6.99 a month, and Amazon Prime Instant Video costs £79 per year.

<sup>54</sup> Ofcom, CMR 2015, Section 2.1.3, p.151.

<sup>55</sup> Sky response to the December 2014 consultation, paragraphs 2.18-2.19. Sky also commented on the impact of OTT services generally on our assessment, and other stakeholders also commented on the impact of Sky’s NOW TV. We address these comments in Annex 2 and we set out our position on how they relate to our assessment of competition in Section 5.

<sup>56</sup> The daily pass is priced at £6.99, the weekly pass at £9.99, and the monthly pass at £31.99

<sup>57</sup> While NOW TV’s monthly sports pass is more than the incremental cost of Sky Sports on DSat (£25.50), consumers can only get Sky Sports on Sky’s DSat platform by also subscribing to a basic TV package (taking the total cost to £45.50). In addition, consumers can subscribe on a month by month basis with no minimum contract term commitment.

which enables BT broadband subscribers to watch the BT Sport channels for £5 a month without subscribing to the BT TV service.

- 3.17 However, take-up of standalone content offerings for sports content represents a small proportion of all sports pay TV subscriptions (e.g. in September 2015, [3<] subscribers paid for a Sky Sports pass on NOW TV).<sup>58</sup> The evidence also indicates that consumers are currently more likely to take OTT services as an addition to their existing traditional pay TV service (e.g. 61% of homes with Netflix also have a Sky or Virgin Media cable subscription).<sup>59</sup> We discuss further in Section 5 (see paragraph 5.48) how OTT services relate to our analysis in this review.

## Developments in bundling have also given consumers more options

- 3.18 While the growth in OTT services is giving consumers more options for purchasing content on a standalone basis (e.g. separate from wider content bundles), at the same time there is now an increasing range of options for purchasing pay TV services as part of a wider bundle with other communications services (typically through triple-play bundles, where TV services are purchased alongside broadband and fixed-line telephony).
- 3.19 The take-up of bundles of communications services has continued to grow - 63% of consumers now purchase these services as part of a bundle and in particular 55% of pay TV subscribers receive their service as part of a bundle.<sup>60</sup> As shown in Figure 3.2 below, the most common bundle of two services is to purchase broadband and fixed-line telephony from the same provider (27%). However, triple-play packages are not far behind, with the most popular combination being fixed-line, broadband, and multi-channel TV (25%).

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<sup>58</sup> Sky response to the 3<sup>rd</sup> WMO information request dated 21 October 2015.

<sup>59</sup> See slide 45 here:

[http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/CMR\\_2015\\_Annex\\_Changes\\_in\\_TV\\_viewing\\_habits.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/CMR_2015_Annex_Changes_in_TV_viewing_habits.pdf). Along similar lines, our Technology Tracker (QH13, Wave 1 2015) found that, in Q1 2015, 15% of those with pay TV as their main TV platform watched content on demand through their TV service using a standalone subscription such as Netflix, compared to only 5% of those who have Freeview as their main TV platform.

<sup>60</sup> Ofcom Technology Tracker, Wave 1 2015 -

[http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015April/Ofcom\\_Technology\\_Tracker\\_Wave\\_1\\_2015\\_Data\\_Tables1.pdf](http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015April/Ofcom_Technology_Tracker_Wave_1_2015_Data_Tables1.pdf), QG1. Do you receive more than one of these services as part of an overall deal or package from the same supplier? Base: All UK adults (16+).

**Figure 3.2: reported take-up of bundled services**

Source: Ofcom Technology Tracker. Data from Q1

Base: All adults aged 16+ (2015 n=3756)

QG1. Do you receive more than one of these services as part of an overall deal or package from the same supplier?

3.20 BT, Sky, TalkTalk, and Virgin Media all offer triple-play packages. As noted above, BT and TalkTalk only offer their pay TV packages as part of a bundle with broadband and fixed-line.<sup>61</sup> Take-up of triple-play packages continues, however, to vary significantly between operators, as shown in Table 3.3 below.

**Table 3.3 – Triple-play subscribers as proportion of total subscriber base<sup>62</sup>**

	Sky	Virgin Media	BT	TalkTalk
August 2013	[X]	[X]	[X]	[X]
March 2015	[X] <sup>63</sup>	[X] <sup>64</sup>	[X]	[X] <sup>65</sup>

Source: Operator responses to the 2<sup>nd</sup> WMO information request dated 12 May 2015 (TalkTalk) and 13 May 2015 (Sky, Virgin Media, and BT)

3.21 Take-up of quad-play bundles (where mobile services are bundled with fixed-line telephony, broadband, and pay TV) remains low, with only 2% of households

<sup>61</sup> This is at least in part due to the fact that BT and TalkTalk's TV services are delivered over IPTV and therefore require an internet connection.

<sup>62</sup> This table presents the proportion of each providers' total subscriber base (i.e. customers taking any pay TV, broadband, or landline service, whether in a bundle or as a standalone service) taking a bundle of pay TV, broadband, and landline. We have taken a pay TV service to mean those subscribing to the providers' pay TV platform. Therefore, unless they are taking BT TV, we have not treated BT Sport customers as triple-play subscribers.

<sup>63</sup> Sky's published results report this percentage as 40% -

<https://corporate.sky.com/documents/investors/results/2015/q2-presentation-.pdf>

<sup>64</sup> Virgin Media's latest results report this percentage as 66% <http://www.libertyglobal.com/pdf/press-release/Liberty-Global-Fixed-Income-Q2-2015-Release-FINAL.pdf>

<sup>65</sup> TalkTalk's latest results report this as 39%:

<http://www.btplc.com/Sharesandperformance/Industryanalysts/Newsletter/Issue29/News2/index.htm>

reporting to take communications services in this way.<sup>66</sup> However, some pay TV providers have only recently introduced quad-play bundles. There is significant activity in the communications industry that gives consumers an increasingly wide range of choice of quad-play provider:

- Virgin Media has been offering quad-play packages for some time, and 17.8% of its customers take quad-play packages;<sup>67</sup>
- In 2012, TalkTalk began offering mobile services, which it makes available to its broadband and fixed-line customers;
- With the launch of EE's TV service in October 2014, it is also able to offer a quad-play package. Similarly Vodafone will also be able to offer quad-play packages when it launches its TV service (see paragraph 3.12 above);
- BT started offering a mobile service in March 2015 via an agreement to offer mobile services over EE's mobile network, and has also agreed a £12.5bn takeover of EE (a deal that was provisionally cleared on 28 October 2015 by the Competition and Markets Authority<sup>68</sup>); and
- In January 2015, Sky announced that it had reached a deal to provide a mobile service over O2's mobile network. It plans to launch this service next year.<sup>69</sup>

3.22 We have also seen examples of TV and other communications services being bundled together as a means of attracting (or retaining) customers. For instance, BT previously offered BT Sport for free to its broadband customers and in August last year Sky offered two years' free broadband if its existing TV customers activated the Sky Sports 5 channel. EE is currently offering a three-month NOW TV Entertainment pass, or two weekly Sports passes, for new EE TV subscribers.

3.23 We now turn to developments in sports rights and the availability of sports content, which is the focus of this review.

## **Both Sky and BT have acquired new sports rights since December 2014, but Sky continues to hold the majority of rights**

3.24 In the December 2014 consultation, we noted that, while BT had acquired some important sports rights, Sky continued to hold the majority of major sports rights.<sup>70</sup> Our assessment of the respective positions of Sky and BT in the supply of sports

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<sup>66</sup> Ofcom, CMR 2015, Section 1.3.6, p.34

<sup>67</sup> <http://www.libertyglobal.com/pdf/press-release/Liberty-Global-Fixed-Income-Q2-2015-Release-FINAL.pdf>

<sup>68</sup> [https://assets.digital.cabinet-office.gov.uk/media/56339544ed915d566a00000f/BT-EE\\_-\\_Provisional\\_findings\\_report.pdf](https://assets.digital.cabinet-office.gov.uk/media/56339544ed915d566a00000f/BT-EE_-_Provisional_findings_report.pdf)

<sup>69</sup> <http://www.bbc.co.uk/news/business-31042864>

<sup>70</sup> December 2014 consultation, paragraphs 3.25-3.32. In response to the consultation, BT and Sky disagreed with our characterisation of developments in sports rights ownership. Specifically, whilst BT argued that the most significant developments in sports rights ownership had served to consolidate and strengthen Sky's market position (BT response to the December 2014 consultation, paragraphs 2.8-2.40), Sky argued that we had downplayed the significance of BT's entrance given it holds a significant amount of valuable content. (Sky response to the December 2014 consultation, paragraphs 2.6-2.11).

channels is set out in Section 5.<sup>71</sup> In this section we highlight the main developments in sports rights ownership since our consultation.

- 3.25 In February 2015, the Premier League auctioned live TV broadcast rights for the 2016/17-2018/19 football seasons. As with the previous auction, Sky won five of the packages (the maximum number of packages it could buy), and BT won the remaining two. This gives Sky rights to 126 matches (75% of the total) and BT rights to 42 matches (25%).<sup>72</sup>
- 3.26 In November 2013 BT won exclusive rights to broadcast live Champions League matches for the 2015/16 to 2017/18 seasons. In August 2015 BT began broadcasting these matches on its newly launched channel, BT Sport Europe.<sup>73</sup> BT Sport has also continued to add additional rights to its portfolio of sports content, for example:
- it signed a five year deal in August 2015 with Cricket Australia, for a reported £80m.<sup>74</sup> The deal gives BT rights to all Australia's Test matches (including the 2017-18 Ashes series in Australia), one-day internationals, and Twenty20 games; and
  - earlier this year it agreed a four year extension on its rights for Premiership rugby (up to 2020-21),<sup>75</sup> as well as extensions to its rights for Serie A (the Italian top flight football league),<sup>76</sup> and the NBA.<sup>77</sup>
- 3.27 Since the December 2014 consultation, Sky has also agreed a number of contract extensions for its existing rights, as well as some new rights:
- Sky agreed contract extensions for its rights to English cricket (until 2019),<sup>78</sup> for the Football League (until at least 2017/18-19/20),<sup>79</sup> for rugby union from New Zealand, Australia, South Africa, and Argentina,<sup>80</sup> and for La Liga (the Spanish top flight football league) for a further three years;<sup>81</sup> and

<sup>71</sup> We also respond to stakeholder comments on the importance of BT and Sky's sports content in Annex 2.

<sup>72</sup> More matches were made available by the Premier League for broadcast as part of the 2015 auction (168 per season, compared to 154 per season in the previous auction).

<http://www.premierleague.com/en-gb/news/news/2014-15/feb/100215-premier-league-uk-live-broadcasting-rights-announced.html>

<sup>73</sup> BT has committed to show a minimum of 12 Champions League games (and 14 Europa League games) per season on FTV TV. <http://sport.bt.com/sport-football/champions-league/news/the-champions-league-on-bt-sport-everything-you-need-to-know-S11363984692816>

<sup>74</sup> <http://www.bbc.co.uk/news/business-34038149>

<sup>75</sup> <http://sport.bt.com/rugby-union-hub/rugby-union/bt-sport-extends-aviva-premiership-rugby-rights-deal-until-2021-S11363968499263>

<sup>76</sup> <http://sport.bt.com/sport-football/news/bt-sport-extends-serie-a-rights-deal-S11363964537628>

<sup>77</sup> <http://sport.bt.com/more-sport-hub/more-sport/bt-sport-announces-nba-partnership-expansion-S11418285390831>

<sup>78</sup> <http://www.skysports.com/cricket/news/12040/9636222/sky-sports-extends-partnership-with-england-wales-cricket-board-until-2019>

<sup>79</sup> <http://www.skysports.com/football/news/11095/9721439/sky-sports-extends-football-league-deal-for-further-season>

<sup>80</sup> <http://www.skysports.com/rugby-union/news/12321/10036472/sky-sports-secures-sanzar-rugby-exclusively-live-for-five-years>

<sup>81</sup> <http://www.telegraph.co.uk/sport/football/competitions/la-liga/11784805/Sky-Sports-snatch-La-Liga-TV-rights-from-BT-after-dramatic-u-turn.html>

- in February 2015 it also won exclusive rights (away from the BBC) for the Open Championship (one of the four major golf championships) for a reported £75m<sup>82</sup> and in rights to live coverage of Major League Soccer (the top-flight football competition in America),<sup>83</sup> away from BT Sport.

## The cost of sports rights has continued to increase

3.28 We noted in the December 2014 consultation that the cost of sports rights was increasing, with the majority of expenditure spent on football (and, particularly, live Premier League rights, which accounted for around 50% of total spending on sports rights).<sup>84</sup> This trend continued in 2014 with spending on sports programming by non-PSB commercial channels increasing by 21% year-on-year in nominal terms to reach £2,186m.<sup>85</sup>

3.29 In the most recent Premier League auction (in February 2015), the live rights for the 2016/17-2018/19 football seasons were sold for £5.136bn, which is a 70% increase on the rights for the 2013/14-2015/16 football seasons (sold for £3.018bn).<sup>86</sup> Sky will pay £1.392bn per season<sup>87</sup> and BT will pay £320m per season.<sup>88</sup> Figure 3.4 below demonstrates the overall trend of the increasing cost of sports rights.

### Figure 3.4: Total annual expenditure on sports rights, by broadcaster<sup>89</sup>

[X]

Source: data provided by broadcasters<sup>90</sup>

3.30 As shown in Figure 3.5 below, expenditure on rights for football continues to account for by far the largest proportion of total expenditure on sports rights. This is discussed in more detail in Section 5.

<sup>82</sup> <http://www.theguardian.com/sport/2015/feb/03/sky-sports-buys-open-championship-golf-bbc>

<sup>83</sup> <http://www.skysports.com/football/news/12096/9730519/sky-sports-wins-rights-to-broadcast-major-league-soccer>

<sup>84</sup> December 2014 consultation, paragraph 3.36.

<sup>85</sup> 2015 CMR, Ofcom, p.182. Note this does not include the commercial Public Service Broadcasting (PSB) channels (e.g. ITV), nor the commercial PSB portfolio channels (e.g. ITV4).

<sup>86</sup> <http://www.premierleague.com/en-gb/news/news/2014-15/feb/100215-premier-league-uk-live-broadcasting-rights-announced.html>

<sup>87</sup> <https://corporate.sky.com/media-centre/news-page/2015/sky-sports-wins-live-premier-league-rights>

<sup>88</sup> <http://www.btplc.com/news/Articles/ShowArticle.cfm?ArticleID=3396b02e-20ae-42b5-86f8-b834a1e4e0fd>

<sup>89</sup> Data for 2015/16 is based on broadcasters' forecasts as at May 2015. However, the vast majority of forecast expenditure was committed in existing agreements. The "other channels" category includes Channel 4, Five and Eurosport. As Eurosport acquires rights on a pan-European basis, we have included a proportion of its total rights expenditure, equal to the share of channel revenues which came from the UK. Expenditure by ESPN is approximate.

<sup>90</sup> Broadcasters responses to the 2<sup>nd</sup> WMO information request dated 5 May 2015 (ITV, Channel 4, Channel 5, BBC, and Eurosport), 13 May 2015 (BT and Sky); and our section 26 Notice (dated 23 August 2013 for BT, 28 August 2013 for Sky, 25 September 2013 for BBC, Channel 4, Eurosport and Channel 5 and 27 September 2013 for ITV) in respect of our investigation of BT's Complaint against Sky under the Competition Act 1998 ('the BT CA98 Complaint') about the wholesale supply of SS1&2 - [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01106/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01106/). Also Eurosport information provided to Ofcom on 11 November 2014. Setanta data is sourced from data underlying Figure 29 in the 2010 TV Statement and ESPN data is based on publicly available information.

### Figure 3.5: Breakdown of total expenditure on sports rights in 2015/16, by sport

[X]

Source: data provided by broadcasters<sup>91</sup>

### Sports content continues to be available across a number of platforms

- 3.31 We highlighted in the December 2014 consultation that the Sky Sports channels are more widely available than in 2010.<sup>92</sup> This has partly been due to an increase in the number of platforms and delivery methods capable of delivering Sky's live sports content, including the growth of IPTV delivery and internet-enabled devices.<sup>93</sup> The launch of BT Sport in August 2013 has also increased the options available to subscribers for consuming sports content. We set out the availability of the Sky Sports and BT Sport channels below.
- 3.32 We also recognise that there is a range of sports content also available on a FTV basis. For example, the 2015 Rugby World Cup was broadcast on ITV, Wimbledon is broadcast on the BBC (with a contract that runs to 2020<sup>94</sup>), horse racing is available on Channel 4, the BBC and ITV have rights to broadcast the 2018 and 2022 football World Cups,<sup>95</sup> and the BBC has rights to broadcast half of Formula 1 ('F1') races.<sup>96</sup> Recently Discovery (owner of the Eurosport channel) won the rights to broadcast the Olympics in the UK from 2022 (the BBC currently holds the rights).<sup>97</sup>

### Sky now makes its sports channels available across a number of platforms and devices on both a wholesale and a self-retail basis

- 3.33 The majority of Sky Sports subscribers take the channels over Sky's own DSat platform as part of a wider pay TV package (or communications package) from Sky for an additional £25.50 a month. In addition, for an extra £5.25 a month, customers can access high definition (HD) versions of these channels (and any other channels in their package).<sup>98</sup> The Sky Sports channels are also offered as part of its Sky Go service (discussed in paragraph 3.11 above) for free to its existing DSat subscribers.

<sup>91</sup> Based on the same data as for Figure 3.4.

<sup>92</sup> In particular we noted that, apart from Sky's DSat offering, Sky's sports content was available via Sky Player (over the internet), on cable (e.g. via Virgin Media), and on Tiscali's IPTV network (subsequently acquired by TalkTalk) but retailed by Sky. December 2014 consultation, paragraph 3.38. See also Ofcom, 2010 Pay TV statement, paragraph 7.34.

<sup>93</sup> In response to the December 2014 consultation, BT argued that we overstated the increase in the availability of sports channels since 2010 because the changes that had occurred in wholesale supply of the Sky Sports channels had either been due to enforced supply under the WMO, or on the basis of wholesale prices or terms which do not enable fair and effective competition (BT response to the December 2014 consultation, paragraphs 2.49-2.55). We discuss the wholesale supply and terms of Sky's current wholesale arrangements in Section 6.

<sup>94</sup> <http://www.bbc.co.uk/sport/0/tennis/34287920>

<sup>95</sup> <http://www.bbc.co.uk/sport/0/football/27750996>

<sup>96</sup> [http://news.bbc.co.uk/sport1/hi/motorsport/formula\\_one/9550930.stm](http://news.bbc.co.uk/sport1/hi/motorsport/formula_one/9550930.stm)

<sup>97</sup> <http://www.olympic.org/news/ioc-awards-all-tv-and-multiplatform-broadcast-rights-in-europe-to-discovery-and-eurosport-for-2018-2024-olympic-games/246462>

<sup>98</sup> <http://www.sky.com/shop/tv/original-bundle/>

- 3.34 Sky has a number of wholesale agreements in place with other pay TV retailers for the distribution of Sky Sports<sup>99</sup>, including:
- i) **Virgin Media** – Sky supplies all of its Sky Sports channels (including HD variants) to Virgin Media as part of a commercially agreed arrangement. Virgin Media retails all the Sky Sports channels for an additional £29.25 per month (on top of Virgin Media’s TV package prices), although it also offers them inclusive as part of some of its triple-play bundle packages.<sup>100</sup> In 2014, Virgin Media also offered a Sky Sports season ticket (where consumers could pay £140 upfront for 9 months access to all the Sky Sports channels).<sup>101</sup>
  - ii) **TalkTalk** - Sky also has a commercial agreement with TalkTalk for the supply of its full Sky Sports package (in SD only) for distribution over its YouView platform. TalkTalk’s standard price for these channels is an additional £30 a month, although it has recently been offering a discounted price of £15 a month (with the first month free).<sup>102</sup> TalkTalk offers the Sky Sports channels on a monthly contract, meaning that subscribers can opt in and out from month to month; and
  - iii) **BT TV** - Following an order from the CAT (see footnote 18 above), BT was supplied under the terms of the WMO obligation with SS1&2 on its YouView platform in SD in December 2014 and in HD in October 2015. BT currently charges £22 a month for both channels or £16.50 a month for one or the other of the channels.<sup>103</sup>
- 3.35 Sky also retails its sports content directly to consumers primarily via its NOW TV service (discussed in paragraph 3.16 above). As well as offering a NOW TV box,<sup>104</sup> Sky has arrangements in place for the supply of NOW TV over a range of platforms, including certain pay TV platforms (e.g. EE TV [§<]), games consoles (PlayStation, Xbox), LG Smart TVs, Apple TV, Chromecast, compatible mobile devices and computer operating systems. NOW TV’s Sports passes are not currently available on YouView. In its response to the July 2015 consultation, Sky stated that Sky Sports via NOW TV will be available on the YouView platform when encrypted unicast delivery of linear channels is enabled.<sup>105</sup> [§<].<sup>106</sup>
- 3.36 Finally, Sky also offers a Sky Sports mobile app, which is available to anyone with a compatible device. SS1&2 is available over Sky Sports Mobile TV for £4.99 per month, and all the Sky Sports channels are available for £9.99 per month.

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<sup>99</sup> [§<].

<sup>100</sup> The HD variants are available for an additional £7 per month. Some of Virgin Media’s bundles also come with Sky Sports included.

<sup>101</sup> <http://store.virginmedia.com/special-offers/sports-season-ticket.html>

<sup>102</sup> As of November 2015. TalkTalk TV packages are available from £10 per month (not including any introductory discounts), plus line rental costing £17.70 per month -

<https://sales.talktalk.co.uk/product/tv/plustv>

<sup>103</sup> Sky also has a commercially agreed wholesale deal with BT to supply Sky Sports 1, 2, and 5 over BT’s Vision boxes (BT’s legacy Cardinal platform). As noted in footnote 44 above, BT has stopped selling its Vision boxes and is migrating its customers over to its YouView platform.

<sup>104</sup> Sky launched a new NOW TV box on 6 August 2015, priced at £15.

<sup>105</sup> Sky’s response to the July 2015 consultation, paragraph 4.19.

<sup>106</sup> [§<].

**Table 3.6: Summary of Sky Sports channel availability**

	BT TV (YouView)	Sky (DSat)	Virgin Media	TalkTalk YouView	EE TV
Sky Sports 1&2	✓	✓	✓	✓ no HD	✗
Sky Sports 3, 4, 5 & F1	✗	✓	✓	✓ no HD	✗
NOW TV (Sky Sports passes)	✗	✗	✗	✗	✓

Source: Ofcom. Note this table does not include the range of internet-enabled devices which can be used to access Sky Sports channels via Sky Go and NOW TV as discussed in paragraphs 3.33 and 3.35.

### BT also makes its BT Sport channels available in a number of different ways

3.37 Following the launch of its BT Sport Europe channel (in August 2015), BT now offers two BT Sport packages:

- **BT Sport Lite:** this gives access to BT Sport 1 only (on which BT broadcasts all its live Premier League matches); and
- **the BT Sport Pack:** this contains the full range of BT Sport channels, including BT Sport 1&2, ESPN and the recently launched BT Sport Europe channel.

3.38 BT offers the BT Sport Pack for free to its BT TV customers (provided they renew their TV and broadband contract for 12 months).<sup>107</sup> BT provides access to HD versions of the channels for an additional £4 a month and it also recently launched an 'Ultra HD' package which includes the BT Sport channels.<sup>108</sup> Similarly Plusnet customers can get the BT Sport Pack (as well as a YouView box) for £5 per month on top of their broadband and phone line subscription.

3.39 BT also makes the BT Sport channels available separately to its broadband and mobile customers (as well as Plusnet broadband subscribers) via the BT Sport app and online player, as well as retailing the channels as a standalone pay TV product across Sky's DSat platform. In particular:

- i) BT broadband customers (including those receiving a TV service from Sky on DSat) and BT mobile customers can either:
  - access the BT Sport Lite pack for free; or
  - pay £5 a month for BT Sport Pack.
- ii) Plusnet broadband subscribers with a Sky TV service can get the BT Sport Pack for £9.99 (or £12.49 for HD) per month; and
- iii) other Sky DSat customers (without BT or Plusnet broadband) can purchase the BT Sport Pack for £19.99 (or £23.99 for HD) per month.

<sup>107</sup> After the minimum term on a broadband customer's contract expires, the BT Sport pack then costs £11.75 unless the minimum term is renewed -

[http://bt.custhelp.com/app/answers/detail/a\\_id/53767/~/\\_/manage-my-bt-sport-options](http://bt.custhelp.com/app/answers/detail/a_id/53767/~/_/manage-my-bt-sport-options)

<sup>108</sup> <http://sport.bt.com/sport-football/news/bt-sport-launches-ultra-hd-package-S11363991113985>

- 3.40 Finally, BT also has a wholesale arrangement in place with Virgin Media (agreed in August 2013), for the supply of the BT Sport channels. BT and Virgin Media recently agreed an extension to this agreement (in June 2015) to enable Virgin Media to also show the BT Sport Europe channel.<sup>109</sup> Virgin Media offers the BT Sport channels (including HD) for free as part of its XL package. For non-XL customers, the BT Sport pack (including the HD variants) can be purchased for £18 per month.

**Table 3.7: Summary of BT Sport channel availability**

	BT TV	Sky	Virgin Media	TalkTalk
BT Sport Pack	✓	✓ (retailed by BT)	✓ (with TV XL)	✗
BT Sport Lite	✓	✗	✗	✗

Source: Ofcom

## Both Sky and BT continue to maintain large sport subscriber bases

- 3.41 The table below sets out the data we have received from Sky and BT on the number of subscribers to their sports channels on different pay TV platforms. [§]. BT Sport subscribers have grown by [§] since September 2014.

**Table 3.8: Number of Sky Sports and BT Sport customers on different platforms in September 2015 (thousands)**

	Sky Sports	BT Sport Lite	BT Sport Pack	
		Free	Bought in bundle	Bought as stand-alone
Sky (DSat)	[§]	-	-	-
Virgin	[§]	-	[§]	[§]
BT	BT TV	[§]	[§]	-
	DSat	-	[§]	[§]
	App	-	[§]	-
TalkTalk	[§]	-	-	-
Plusnet	-	[§]	[§]	-
<b>Total</b>	[§]		[§]	

Source: 3<sup>rd</sup> WMO information request and BT response to the 4<sup>th</sup> WMO information request dated 16 October 2015<sup>110</sup>

- 3.42 Overall, BT Sport and Sky Sports [§]. However, a total of [§] of BT Sport subscribers, (which is [§] of all pay TV subscribers) are paying £5 or more to access BT Sport. A significant proportion (around [§] of BT Sport subscribers representing [§] of all pay TV subscribers) receive BT Sport for no incremental charge either because it was included in their broadband package or as part of their TV package. This difference in the nature of subscribers to these channels is also reflected in consumer's own reported take-up - our consumer survey data indicates that 29% of

<sup>109</sup> <http://about.virginmedia.com/press-release/9474/virgin-media-signs-bt-sport-europe-line-up>

<sup>110</sup> The table is calculated based on the content available to each customer group and the way they access BT Sport. This approach is slightly different to calculating number of subscribers based on the retail price they pay due to the existence of irregular customer groups. For example, [§].

consumers with a pay TV service report that they receive the Sky Sports channels, compared to 10% for the BT Sport channels.<sup>111</sup>

- 3.43 Table 3.9 below, sets out the share of sports subscribers on different pay TV platforms.<sup>112</sup>

**Table 3.9: Number and share of pay TV sport subscriptions in September 2015**

	Sports subscribers	
	Number (k)	Share (%)
DSat (Sky's platform)	[<]	60%-70% [<]
Virgin Media	[<]	20%-30% [<]
BT TV	[<]	5%-15% [<]
TalkTalk	[<]	0-10% [<]

Source: Sky, TalkTalk, Virgin Media responses to the 3<sup>rd</sup> WMO information request and BT response to the 4<sup>th</sup> WMO information request dated 16 October 2015.

- 3.44 As the table above shows, the majority of subscribers to pay TV, and to premium sports content, are on Sky's DSat platform. Sky's share of sports subscribers has, however, decreased since 2010 [<].<sup>113</sup>

## Summary

- 3.45 In this section, we have set out the continuing developments in the pay TV sector, particularly with reference to sports content. We have highlighted that new pay TV providers have entered, and are growing, and, alongside the growth of OTT services and different internet-enabled devices, consumers have a greater choice over how they consume pay TV content. Pay TV is now also available in a wider range of packages at a range of different prices, from basic standalone propositions to premium services bundled with other communications services (e.g. fixed line telephony and/or broadband). The majority of consumers continue to subscribe to a traditional pay TV service (i.e. a complete TV package with bundled linear and on-demand content, over a managed platform), and Sky remains the largest pay TV provider.
- 3.46 There have also been developments in the how sports content in particular is made available, with entry level and standalone sports content beginning to emerge, including BT Sport being provided for free, or at a low price, and the availability of different pricing options for Sky Sports via NOW TV. The cost of sports rights has continued to increase, and Sky continues to hold the majority of major sports rights.

<sup>111</sup> Ofcom Technology Tracker W1 2015 - [http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015April/Ofcom\\_Technology\\_Tracker\\_Wave\\_1\\_2015\\_Data\\_Tables1.pdf](http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015April/Ofcom_Technology_Tracker_Wave_1_2015_Data_Tables1.pdf) QH9 (QH68) - Which of the following channels do you subscribe to through your pay TV service? Base: those with any paid-for TV services.

<sup>112</sup> Because these estimates have been calculated across platforms only, we have not included customers that take BT Sport via the app or online player only. To estimate the number of sports customers on the Sky DSat platform we have used information from our October 2014 survey to estimate the number of customers that take both Sky Sports and BT Sport.

<sup>113</sup> 2010 Pay TV Statement, Figure 22, p.81.

## Section 4

# Identifying key content

- 4.1 In this section we identify what constitutes 'key content' by which we mean content that is capable of influencing the choice of pay TV provider for a significant number of consumers. This builds on the analysis presented in Section 5 of the December 2014 consultation, stakeholder comments on our analysis and new evidence that has become available to us since that consultation. Annex 1 sets out our response to stakeholder comments on our analysis in more detail.
- 4.2 In Section 5 we assess the impact that limited distribution of channels carrying this key content may have on competition.

## Sports content continues to be important to consumers

- 4.3 In the December 2014 consultation, we said that live sports content continues to be an important driver in the choice of pay TV services. This was because:
- survey evidence showed that sport was among the most popular genres;
  - sport has a high degree of exclusivity to pay TV, is most attractive when broadcast live, and major sporting events cannot be replicated;
  - Sky and BT spend significant amounts on sports content compared with other genres. For example, Sky's spending on sports rights accounted for around half of its total programming costs in 2013/14; and
  - substantial numbers of UK consumers are prepared to pay premiums above their basic TV service to acquire sports channels.<sup>114</sup>
- 4.4 The majority of respondents to the December 2014 consultation agreed with our assessment that sports content is an important driver of choice in pay TV services. Only the PL disagreed with this view, arguing that the evidence did not support our assessment.<sup>115</sup> We respond to the PL's specific comments in Annex 1.
- 4.5 We consider that there is clear evidence to show that sports content stands out from other content genres in terms of its importance to competition in pay TV. Moreover, as discussed in Section 3 (see paragraph 3.28), since our December 2014 consultation, there has been a further increase in industry spending on sports rights with sports content now representing 62% of the non-PSB commercial channels' total content spend across the eight mainstream genres.<sup>116</sup>
- 4.6 We therefore remain of the view that sports content is an important driver of choice in pay TV services.

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<sup>114</sup> December 2014 consultation, paragraphs 5.5-5.14.

<sup>115</sup> The PL response to the December 2014 consultation, paragraphs 4.32-4.38.

<sup>116</sup> 2015 CMR, Ofcom, p.182.

## **We have identified individual sporting competitions that are important to a large number of consumers**

4.7 In the December 2014 consultation, we assessed the importance of individual sporting competitions and identified content that may be capable of influencing the choice of pay TV provider for a significant number of consumers as key content. We concluded that:

- i) live Premier League coverage was key content on the basis that it stood out as being particularly important to a large number of consumers compared with live coverage of other football competitions and other sporting events;<sup>117</sup>
- ii) live Champions League coverage was key content, although to a lesser extent than the Premier League. This was on the basis that it was important to a large number of consumers, albeit less important to those consumers than the Premier League;<sup>118</sup> and
- iii) other sports and sporting events were not key content, as none were capable of influencing a significant number of consumers' choice of pay TV provider on their own.<sup>119</sup>

4.8 Below we set out our final conclusions on the importance of individual sporting competitions. Our assessment takes account of stakeholder responses to our December 2014 consultation, as well as new evidence including more recent rights values and documentary evidence from broadcasters.

### **The Premier League is the most important sporting competition to a large number of consumers**

4.9 In our December 2014 consultation we pointed to a variety of evidence which demonstrated that live football coverage is by far the most highly valued sports content on TV and that the Premier League stood out as being the most important sporting competition to a large number of pay TV consumers. This included evidence that:

- 60% of sports channel subscribers considered Premier League content to be essential to their TV service – this was higher than any other sport or competition. In addition 43% of Sky Sports subscribers said Premier League content was a reason for their subscription;<sup>120</sup>
- over 75% of all spending on sports rights was on live football rights, and around 50% was on live Premier League rights in 2013/14;<sup>121</sup> and
- internal documents from both Sky and BT which illustrated the value placed on football, and in particular live Premier League content.<sup>122</sup>

<sup>117</sup> December 2014 consultation, paragraph 5.33.

<sup>118</sup> December 2014 consultation, paragraphs 5.34.

<sup>119</sup> December 2014 consultation, paragraph 5.35.

<sup>120</sup> December 2014 consultation, paragraph 5.19 and Figure 5.3.

<sup>121</sup> December 2014 consultation, paragraphs 5.29 to 5.30.

<sup>122</sup> December 2014 consultation, paragraph 5.32.

- 4.10 In general stakeholders agreed with our assessment of the importance of football, and in particular live Premier League content.
- 4.11 Only the PL disagreed with our assessment of the importance of Premier League coverage. The PL said we relied heavily on consumer survey evidence, and that evidence in fact showed that viewers value access to a range of sports. It also argued that no sport or sporting event stands apart from any others. We respond to PL's arguments in detail in Annex 1. While we agree that the evidence suggests consumers value access to a range of sports, it is also clear that the Premier League stands out as being the most important sporting competition to the largest number of consumers. The survey evidence, rights costs and stakeholder internal documents all support this view.
- 4.12 Moreover, since our December 2014 consultation, there is now additional evidence which strengthens our view that live Premier League content is the most important sporting competition for consumers:
- following the Premier League auction in February 2015 which we described in Section 3, broadcasting rights values for live Premier League games will increase from around £1bn to £1.7bn per year.<sup>123</sup> We estimate that as a result, live Premier League rights will account for around 60% of total spending on sports rights from 2016/17;<sup>124</sup> and
  - further documentary evidence from Sky confirms the value consumers place on Premier League content in particular.<sup>125</sup>
- 4.13 We consider the evidence demonstrates that live Premier League stands out from other football content and other sporting competitions as being particularly important to a large number of consumers.

### **The Champions League is also important to a large number of consumers, but not as important as Premier League**

- 4.14 In the December 2014 consultation we concluded that live Champions League coverage was important to a high proportion of consumers, but that the vast majority of these consumers were likely to prefer Premier League over Champions League content. Given the number of consumers for whom Champions League coverage is important, however, we also considered that Champions League was key content (albeit to a lesser extent than Premier League).<sup>126</sup>
- 4.15 We reached this view on the basis of survey evidence, the Champions League auction results and internal documents from Sky and BT. The evidence included:
- 47% of sports channel subscribers considered Champions League content to be essential to their TV service – this was higher than any other competition apart from Premier League;

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<sup>123</sup> We have set this out in more detail in paragraph 3.29.

<sup>124</sup> This estimate is based on broadcasters' actual or forecast sports rights costs for 2015/16, but with live Premier League rights costs at their 2016/17 level.

<sup>125</sup> [3<]. Sky response to the 2<sup>nd</sup> WMO Review information request dated 13 May 2015.

<sup>126</sup> December 2014 consultation, paragraphs 5.26-5.28, 5.31-5.32 and 5.34, and footnote 131.

- 28% of Sky Sports subscribers said that the Champions League was a reason for subscribing to Sky Sports. Of these, 98% said that Premier League was also a reason and 60% went on to say that Premier League was the main reason;<sup>127</sup>
- spending on live Champions League rights would increase significantly in 2015/16 to around 17% of spending on football rights;<sup>128</sup> and
- internal documents from both Sky and BT illustrated the value placed on Champions League content.<sup>129</sup>

#### We have considered stakeholder comments on our assessment of the importance of Champions League

- 4.16 We received a range of comments from stakeholders on our assessment of Champions League content. [§<], Sky and TalkTalk argued that we had understated the importance of Champions League and suggested it could increasingly become of similar importance to the Premier League.<sup>130</sup> On the other hand, BT said our focus on Champions League was disproportionate, and that further analysis would show that it is as attractive as other second-tier rights such as cricket, rugby and golf.<sup>131</sup>
- 4.17 We summarise our additional analysis in light of these responses below. We set out and respond to them in more detail in Annex 1.

#### The evidence continues to demonstrate that Champions League is important, but to a lesser degree than Premier League

- 4.18 We remain of the view that Champions League is important to a large number of consumers and that it stands out from other sporting competitions, on the basis of the survey evidence and rights values we presented in the December 2014 consultation. The same evidence showed that live Champions League coverage is less important to consumers than live Premier League coverage.
- 4.19 The amounts committed by Sky and BT in the recent Premier League auction further emphasise that Champions League is less important than Premier League. Specifically, in the December 2014 consultation we noted that the cost of Champions League rights would increase from around £130m to around £300m (for both Champions League and Europa League rights) per year.<sup>132</sup> Although this is a large increase, it does not appear as substantial in light of the increase in Premier League rights costs from £1bn to £1.7bn per annum (as set out above – paragraph 4.12). Therefore whereas live Premier League rights will account for around 60% of total

<sup>127</sup> December 2014 consultation, paragraph 5.19, Figure 5.3 and footnote 130.

<sup>128</sup> December 2014 consultation, paragraph 5.30. Following the December 2014 consultation we received broadcasters' forecasted expenditure on sports rights for 2015/16. Our analysis of this suggests live Champions League now accounts for around 16% of spending on football rights and around 12% of total expenditure on sports rights.

<sup>129</sup> December 2014 consultation, paragraph 5.32.

<sup>130</sup> [§<]; TalkTalk response to the December 2014 consultation paragraphs 2.13 – 2.19; Sky response to the December 2014 consultation, paragraphs 5.7-5.12.

<sup>131</sup> BT response to the December 2014 consultation, paragraphs 3.75 – 3.88.

<sup>132</sup> December 2014 consultation, paragraph 3.37.

spending on sports rights, live Champions League (and live Europa League) rights will account for around 10% from 2016/17.<sup>133</sup>

- 4.20 Moreover, the fact that Champions League matches are broadcast less often and less regularly than Premier League matches also supports our view. Unlike in the Premier League, Champions League matches are generally broadcast simultaneously, with up to eight matches broadcast within one match slot.<sup>134</sup> This means that although there are 145 Champions League matches, these are broadcast in just 33 match slots. In comparison, 154 Premier League matches were broadcast within 152 match slots in 2014/15.<sup>135</sup> With substantially fewer match slots, the Champions League is likely to have less influence on consumers' choices of pay TV provider than the Premier League.
- 4.21 We acknowledge that some Champions League matches – particularly those featuring Premier League teams – can be as popular as some Premier League matches. Our analysis of viewing figures from the Broadcasters' Audience Research Board (BARB) shows that Champions League matches on Sky Sports which involve Premier League teams can draw as many viewers as Premier League matches on Sky Sports.<sup>136</sup> However, matches that do not feature Premier League teams have lower audiences.<sup>137</sup> Therefore, as we stated in the December 2014 consultation, the overall attractiveness of the competition can fluctuate depending on how successful Premier League teams are. This further reduces the likely influence of the Champions League on consumers' choices of pay TV provider.

### **Other sports and sporting competitions are important to relatively few consumers**

- 4.22 In the December 2014 consultation we concluded that no other individual sports or sporting competitions were capable of influencing a significant number of consumers' choice of pay TV provider.<sup>138</sup> We reached this view using survey evidence and sports rights costs, and by assessing their characteristics. For example:

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<sup>133</sup> These estimates are based on broadcasters' actual or forecast sports rights costs for 2015/16, but with live Premier League rights costs at their 2016/17 level.

<sup>134</sup> By match slot we mean the time period in which a match is broadcast. We assume that all Champions League matches broadcast in the same evening are broadcast within the same match slot.

<sup>135</sup> Premier League matches are broadcast in different time slots, except on the final day of the season when all of the matches are played at the same time.

<sup>136</sup> For comparable analysis of Champions League and Premier League matches, we have analysed viewing figures across match slots in which all matches are broadcast on Sky Sports. For example, in 2013/14 the average reach of a Premier League match slot on Sky Sports was 1.65m individuals (aged 4+). The average reach of a Champions League match slot which included a match featuring a Premier League team, and in which all of the matches were shown on Sky Sports, was 1.78m (there were 14 such slots). We have calculated the average reach of each match slot by counting the total number of individuals watching at least 30 consecutive minutes of a match within the match slot as it was broadcast live, and taking an average across the match slots.

<sup>137</sup> For example, in 2012/13 the average reach of a Champions League match slot from the group stage onwards which included a match featuring a Premier League team, and in which all of the matches were shown on Sky Sports, was 1.84m (there were eight such slots). The average reach of a Champions League match slot from the group stage onwards which did not include any matches featuring a Premier League team, and in which all of the matches were shown on Sky Sports, was 1.15m (there were six such slots, each within the quarter-finals or semi-finals).

<sup>138</sup> December 2014 consultation, paragraph 5.35.

- i) in terms of other football competitions, we noted that over 40% of the sports channel subscribers we surveyed in 2013 considered the FA Cup and international football matches to be essential to their TV service. However, as the popular matches do not happen frequently and many are broadcast FTV, we reached the view that these football competitions were not capable of influencing a significant number of consumers' choice of pay TV provider. No other football competition was considered to be essential by more than 30% of sports subscribers;<sup>139</sup> and
- ii) no other sport was considered to be essential by more than 25% of sports subscribers. In addition, no other sport was a reason for subscribing to Sky Sports for more than 20% of Sky Sports subscribers.<sup>140</sup>

#### We have considered stakeholder comments on our assessment of the importance of other sports and sporting competitions

4.23 In response to the December 2014 consultation, some stakeholders argued that other sports and sporting competitions are also important, particularly when aggregated together. In particular:

- TalkTalk told us that other competitions featuring Premier League clubs, including Europa League, FA Cup, and potentially the League Cup, were likely to represent key content;<sup>141</sup>
- BT argued that there are second-tier rights to sports such as cricket, rugby, motorsports, golf and tennis that are essential, both individually and collectively, to sufficiently large numbers of subscribers.<sup>142</sup> Virgin Media also told us that access to other sports content remained important;<sup>143</sup> and
- BT also argued that our approach to assessing other sporting events was inconsistent with our approach to assessing Champions League content. It noted we had found Champions League content alone was unlikely to drive pay TV provider choice for a material group of customers but that it could when combined with Premier League content. BT argued that we had not assessed the importance of other sports content when it is aggregated with Premier League content in the same way.<sup>144</sup>

#### The evidence continues to demonstrate other sports and sporting competitions are not important to a large number of consumers

4.24 We remain of the view that other football competitions are not capable of influencing a significant number of consumers' choice of pay TV provider, given the rights values, consumer survey evidence and the characteristics and FTV availability of the more popular competitions. We respond to TalkTalk's arguments in more detail in Annex 1.

<sup>139</sup> December 2014 consultation, paragraphs 5.19 and 5.27.

<sup>140</sup> December 2014 consultation, paragraphs 5.19 and Figure 5.3.

<sup>141</sup> TalkTalk response to the December 2014 consultation, paragraphs 2.20-2.39.

<sup>142</sup> BT response to the December 2014 consultation, paragraph 3.17.

<sup>143</sup> Virgin Media response to the December 2014 consultation, paragraphs 44-45.

<sup>144</sup> BT response to the December 2014 consultation, paragraphs 3.23-3.27.

- 4.25 We recognise that there are sports or competitions that are important to some consumers, but we consider the evidence shows that no other sports are important to a large share of consumers:
- i) although rugby union, cricket, F1 and golf are more important than football for some groups of consumers, our surveys suggested these groups of consumers are relatively small. For example, in our 2014 consumer survey, F1, rugby union and cricket were each the main reason for subscribing to Sky Sports for 4% subscribers; golf was the main reason for 3%. In contrast, 27% said that Premier League was the main reason for subscribing to Sky Sports,<sup>145</sup> and
  - ii) as set out in Figure 3.5, we estimate that cricket, golf, motorsports and tennis will each account for around 5% or less of total spending on sports rights in 2015/16. Although rugby union rights account for a higher proportion of total spending on sports rights, around half of this will be on competitions that are broadcast on FTV channels (including the 2015 World Cup), and therefore will not affect consumers' choices of pay TV retailer.
- 4.26 We disagree with BT that our approach to assessing other sports is inconsistent with our approach to assessing the importance of live Champions League content. The purpose of this stage of our analysis is to identify individual sports and sporting competitions that constitute key content. In doing so, we have assessed, amongst other things, the value of live Champions League content for consumers. Our conclusion on the ability of this content to influence consumer choice is based on its relevance as the second most important sporting competition and the fact that it is important to a large number of consumers. We consider the impact of including other sports content with key content when we assess the importance of channels that carry key content in Section 5.

### **We have concluded that Premier League and to a lesser extent Champions League are key sports content**

- 4.27 We remain of the view that live Premier League coverage stands out from other sporting events as being particularly important to a large group of consumers. The evidence we have reviewed suggests that it is capable of influencing the choice of pay TV provider for a significant number of consumers. This evidence includes:
- the stated importance of Premier League coverage and stated influence on consumer choices in our consumer surveys;
  - the amount broadcasters spend on live Premier League matches in comparison to other sports rights and as a proportion of sports expenditure as a whole; and
  - statements and internal documents from stakeholders.
- 4.28 We consider that live Champions League is important to a large number of consumers, but for most of these consumers it is less important than live Premier League coverage. This is evident from:
- the stated importance of the Champions League in our consumer surveys and the stated influence of the Premier League for those consumers;

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<sup>145</sup> A further 16% said football in general was the main reason for subscribing, rather than specifying a specific football competition. December 2014 consultation, Figure 5.3.

- the amount broadcasters pay for Champions League in comparison to other sporting competitions;
- broadcasters' internal documents; and
- the structure of the competition and popularity of the matches in comparison to the Premier League.

4.29 In relation to other sports and sporting competitions, none are important enough to influence the choice of pay TV retailer for a large number of consumers. This is evident from:

- the stated importance of other sports and sporting competitions in our consumer surveys;
- the amount broadcasters spend on other sports and sporting competitions; and
- the structure and FTV availability of the more popular sports and sporting competitions.

4.30 We therefore conclude that live Premier League and to a lesser extent live Champions League represent key content.

## Section 5

# The impact of key content channels on pay TV competition

- 5.1 In this section we assess the impact that Sky Sports and BT Sport may have on competition in pay TV.<sup>146</sup> Our assessment is based on the sports content that the channels carry (building on the evidence presented in Section 4), evidence on the influence of Sky Sports and BT Sport on consumers' pay TV subscription decisions and the market positions of Sky and BT.
- 5.2 Our conclusions in this section take account of the analysis we presented in Section 6 of the December 2014 consultation, stakeholder responses to that consultation, and new evidence that has since become available. We provide more detailed responses to stakeholder comments on our assessment of this issue in Annex 2.

## Key sports content is currently shown on Sky Sports and BT Sport

### Sky holds the majority of live Premier League rights, as well as rights to a range of other sporting competitions.

- 5.3 In Section 4 we concluded that the Premier League is the most important sporting competition and capable of influencing the choice of pay TV retailer for significant number of consumers. Sky currently has exclusive rights to broadcast 116 of the 154 Premier League matches that are made available for live broadcast on TV (equivalent to 75% of the available matches). Sky's rights include 20 of the 38 'first picks'.<sup>147</sup>
- 5.4 As noted in Section 3 (paragraph 3.25), from next season (2016/17), a total of 168 Premier League matches will be broadcast live on television and Sky has exclusive rights to broadcast 126 (75%) of these. The number of 'first picks' held by Sky will increase to 26 (out of 38).<sup>148</sup>
- 5.5 Sky also holds rights to other sporting competitions that we have not identified as key content but which are important to some consumers including:

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<sup>146</sup> As in the December 2014 consultation, we have focussed our assessment on Sky Sports and BT Sport given that live Premier League and live Champions League content is currently broadcast on these channels. We do not assess the impact other sports channels may have on competition as they do not carry key content (e.g. At The Races, BoxNation, Chelsea TV, Eurosport, Eurosport 2, Extreme Sports Channel, LFC TV, Motors TV, MUTV, Premier Sports TV, Racing UK).

<sup>147</sup> The live Premier League rights are split into a number of packages, and each package is assigned "picks" (1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, etc.) which determine the order in which broadcasters can select matches from each round of fixtures. In the 2012 auction, both Sky and BT were awarded packages with "first picks" in the weekend rounds. BT was also awarded the package with 'first picks' in the mid-week and bank holiday rounds. <http://www.premierleague.com/en-gb/news/news/2012-13/jun/premier-league-announces-audio-visual-rights.html>

<sup>148</sup> Both Sky and BT were again awarded packages with "first picks" in the weekend rounds. Sky was awarded the package with 'first picks' in the bank holiday rounds and BT was awarded the package with 'first picks' in the mid-week rounds. <http://www.premierleague.com/en-gb/news/news/2014-15/feb/100215-premier-league-uk-live-broadcasting-rights-announced.html>

- exclusive rights to the Football League and League Cup, some Scottish Premier League, and La Liga;
- almost all important cricket competitions (excluding certain rights held by BT as listed in paragraph 5.9 below);
- in golf, the Ryder Cup and US Open, and it will also hold rights to broadcast the Open Championship from 2017;
- all F1 races including exclusive rights to nine races (the BBC has non-exclusive rights to broadcast 10 races);
- in rugby union, Sky holds joint rights to the European Champions Cup and Challenge Cup with BT; and
- in tennis, Sky holds rights to the US Open<sup>149</sup> and ATP Masters.

### **BT holds the minority of live Premier League rights and rights to all live Champions League matches**

- 5.6 BT has exclusive rights to broadcast 38 of the 154 Premier League matches (25%) that are broadcast live on television. This includes 18 of the 38 'first picks'.
- 5.7 From the 2016/17 season, BT will continue to show 25% of all live Premier League matches shown on television, but the number of 'first picks' it holds will fall to 12.
- 5.8 BT also has exclusive rights to broadcast live all 145 Champions League matches until 2017/18, which we found in Section 4 to be the second most important sporting competition. Previously these rights were held by Sky (who had rights to broadcast 128 matches) and ITV (who had rights to broadcast 16 matches).<sup>150</sup>
- 5.9 BT also holds rights to other sporting competitions that we have not identified as key content but which are important to some consumers, including:
- joint rights (with the BBC) to FA Cup matches, including 25 exclusive matches, and 30 live Scottish Premier League matches until 2019/20, as well as exclusive rights to the Europa League, Bundesliga and Serie A;
  - exclusive rights to all Premiership rugby matches until 2020/21 and half of all European Rugby Champions Cup matches; and
  - some cricket rights, including Australia's Test matches, one-day internationals and Twenty20 games from 2017/18.<sup>151</sup>

<sup>149</sup> Eurosport also holds rights to live matches until the quarter finals.

<sup>150</sup> The rights were exclusive, with the exception of the final which was broadcast on both Sky and ITV.

<sup>151</sup> <http://sport.bt.com/more-sport-hub/more-sport/bt-sport-wins-rights-to-show-2017-18-ashes-series-when-england-defend-urn-in-australia-S11363999728418>

## Sky Sports is important to a significant proportion of pay TV subscribers

5.10 In December 2014 we set out evidence that the content shown on Sky Sports is important to a sizeable and valuable segment of pay TV subscribers. In summary, we said that:

- Sky Sports subscribers represented [X] of all pay TV subscribers and we estimated that these accounted for around [X] of pay TV revenues (in September 2014);
- subscribers to Sky Sports paid between around £16 and £25 per month, on top of the other payments they make for their TV and communications services;
- documentary evidence from BT suggested it would find it difficult to compete for this high value segment without offering Sky Sports; and
- our survey evidence suggested that between 12% and 24% of pay TV subscribers would not consider a platform that did not offer Sky Sports.<sup>152</sup>

5.11 A number of stakeholders (including Virgin Media, BT, and [X]) agreed with our assessment of the importance of Sky Sports.<sup>153</sup>

5.12 The PL, however, argued that we could not draw any reliable conclusions from the survey evidence about the importance of Sky Sports.<sup>154</sup> We have responded to these comments in more detail in Annex 2. We remain of the view that our survey evidence demonstrates the importance of Sky Sports. In any event, our assessment is not based on our consumer survey evidence alone but also the amounts consumers spend on this content, the proportion of subscribers willing to pay additional amounts, the importance of the sporting competitions Sky broadcasts, the value of the rights and stakeholder documents.

5.13 In July 2015, coverage of live Champions League matches moved from Sky Sports (and ITV) to BT Sport for the next three seasons (2015/16 to 2017/18). Our provisional assessment in December 2014 took account of the potential impact of this change, albeit we recognised that it was uncertain what impact it would have. On the basis of the available evidence, we considered it was unlikely that the loss of live Champions League content would have a significant impact on the importance of Sky Sports to pay TV subscribers.<sup>155</sup> More recent evidence supports this assessment and our overall view on the importance of Sky Sports:

- i) Since September 2014 the number of Sky Sports subscribers [X] of all pay TV subscribers and around [X] of pay TV revenues. Sky's headline retail prices have increased; the incremental price of the Sky Sports and the Sky Basic

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<sup>152</sup> December 2014 consultation, paragraphs 6.4-6.11.

<sup>153</sup> Virgin Media response to the December 2014 consultation, paragraph 35, [X], BT response to the December 2014 consultation, paragraphs 2.3 and 2.8-2.40. TalkTalk also agreed that Sky Sports was important, although it made a number of comments on our approach to assessing key content which we respond to in Annexes 1 and 2.

<sup>154</sup> The PL response to the December 2014 consultation, paragraphs 4.58-4.75.

<sup>155</sup> December 2014 consultation, paragraphs 6.20-6.28.

package both increased in June 2015.<sup>156</sup> Revenue data collected from Sky suggests the ARPU (average revenue per user) of Sky Sports subscribers on DSat has [redacted].<sup>157</sup>

- ii) Even with the loss of live Champions League coverage, Sky continues to account for a large proportion of total expenditure on sports rights by broadcasters – and this has remained relatively stable over time (see paragraph 5.37 below).<sup>158</sup>

5.14 As the loss of live Champions League rights does not appear to have had a material impact on the importance of Sky Sports, and Sky has retained the same proportion of live Premier League rights in the auction, we do not consider it necessary to revise our assessment of the proportion of pay TV subscribers that consider Sky Sports a critical element of their pay TV bundle.

5.15 Therefore, we continue to consider that Sky Sports is important to a large group of pay TV subscribers. Without access to this content, pay TV retailers will therefore struggle to compete for a sizeable and valuable segment of the pay TV market.

### **The Premier League content on Sky Sports is the main driver of its importance**

5.16 As we noted in the December 2014 consultation, we assessed the impact of the Sky Sports package on consumers' subscription decisions, rather than the impact of particular Sky Sports channels. This is because consumers usually purchase the full package of Sky Sports channels and the evidence available to us reflected this.<sup>159</sup> However, evidence on sports rights expenditure and our consumer survey evidence suggests that live Premier League coverage is the most important content within the Sky Sports portfolio and contributes to a large proportion of the value of Sky Sports to consumers:

- i) Sky spends substantially more on live Premier League rights than all other sports rights. In 2015/16, [redacted] of Sky's forecasted sports expenditure will be on live Premier League rights. Given the increase in live Premier League rights costs following the recent auction, we estimate that live Premier League coverage could account for up to [redacted]<sup>160</sup> of Sky's total expenditure on sports rights from 2016/17.
- ii) Consumer survey evidence suggests that even when other sports and sporting competitions are combined, they are likely to influence fewer subscribers than live Premier League coverage. In our October 2014 survey, 18% of Sky Sports subscribers cited cricket, F1, rugby union, golf or some other sport as their main reason for subscribing. In contrast, 27% cited Premier League as their main reason for subscribing to Sky Sports, and a further 16% cited football in general.<sup>161</sup>

<sup>156</sup> In June 2015, Sky increased the incremental price of Sky Sports from £24.50 per month on top of the Sky basic package (available from £20 per month) to £25.50 per month.

<sup>157</sup> Sky's response to the 3<sup>rd</sup> WMO information request dated 16 October 2015.

<sup>158</sup> This figure assumes that spending on all sports rights other than live Premier League rights will remain at 2015/16 levels.

<sup>159</sup> December 2014 consultation, footnote 141 to paragraph 6.3.

<sup>160</sup> This figure assumes that spending on all sports rights other than live Premier League rights will remain at 2015/16 levels.

<sup>161</sup> December 2014 consultation, Figure 5.3.

- 5.17 In response to the December 2014 consultation, BT argued that access to the full Sky Sports proposition is necessary to ensure fair and effective competition.<sup>162</sup> BT referred to a number of pieces of evidence to support its argument, including:<sup>163</sup>
- i) the fact that some content shown on SS2, SS3, SS4, SS5 and SSF1 frequently performs better than some content available on SS1 on the basis of viewing figures;<sup>164</sup>
  - ii) the fact that Sky's approach to marketing has focussed on promoting a single Sky Sports proposition rather than specific channels within Sky Sports, coupled with the fact that content can, and does, move between the Sky Sports channels;<sup>165</sup> and
  - iii) BT's own consumer survey evidence, including a survey conducted as part of the 2010 Pay TV appeal [3<] as well as a more recent survey carried out by Compass Lexecon which found [3<].<sup>166</sup>
- 5.18 We recognise that other sporting competitions are valuable to some pay TV subscribers, that consumers often value access to a range of sports and that there may be complementarities between channels. However, in our view the evidence shows that Premier League content on Sky Sports is, by some distance, the most important driver of the ability of Sky Sports to influence the subscription decisions of a significant proportion of pay TV subscribers.<sup>167</sup> Consequently, we have not seen evidence to show that, in the event that Sky's channels that carry key content were widely available, the Sky Sports channels that do not carry Sky's Premier League content would influence the subscription decisions of a sizeable and valuable proportion of pay TV subscribers.
- 5.19 In our view, retailers do not need to offer identical products in order to compete effectively with each other and we note that some degree of exclusivity and product differentiation is a normal part of many competitive markets. In addition, BT's arguments regarding the range of Sky Sports channels that retailers need to access ignore an important aspect of competition. Effective competition must be considered both in terms of the current intensity of rivalry in the market, but also in terms of competition over time through firms investing and innovating in order to improve their own retail offers. As such, we are concerned with ensuring that retailers have access to what is necessary to compete effectively. A wider scope in terms of regulated access may have a negative effect on dynamic competition in terms of the potential impact on retailer's incentives to invest and innovate in sports content.<sup>168</sup>

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<sup>162</sup> BT response to the December 2014 consultation, paragraphs 3.39 – 3.58.

<sup>163</sup> We respond to BT's points in more detail in Annex 1.

<sup>164</sup> BT response to the December 2014 consultation, paragraphs 3.44.

<sup>165</sup> BT response to the December 2014 consultation, paragraphs 3.45–3.53.

<sup>166</sup> BT response to the December 2014 consultation, paragraphs 3.54–3.58.

<sup>167</sup> Sky typically schedules all of its live Premier League matches on Sky Sports 1, except on the final day of the season when multiple matches are broadcast at the same time (and therefore have to be scheduled on other Sky Sports channels).

<sup>168</sup> This was acknowledged by the Competition Commission in its 2012 Movies on pay TV market investigation. The CC said that "... even with regard to traditional pay-TV, we did not assume that effective competition necessarily required all pay-TV retailers to offer the same content; indeed, we recognised that competing to acquire content was in principle an aspect of competition between pay-TV retailers." paragraph 5.129 -

- 5.20 Furthermore, if the channels that carry Sky's live Premier League coverage are made available on a wide range of platforms, it is open to competing retailers to assemble their own sports content and bundle this with Sky's channels. In that regard we note that BT has a range of attractive sports rights that it can bundle with parts of Sky Sports. There are also other providers of sports channels that have attractive sports rights that could form part of a package of channels that includes channels containing Sky's key content.

## **BT Sport is also important, but to a smaller proportion of consumers**

- 5.21 In our December 2014 consultation we concluded that the content on BT Sport was important to a relatively small segment of pay TV subscribers. In summary, we said that:
- in September 2014 there were [X] BT Sport subscribers (excluding online only subscribers), representing [X] of all pay TV subscribers;
  - a large proportion of subscribers received BT Sport at no incremental charge as part of a BT TV or BT broadband subscription, or received it as part of the Virgin Media XL TV package for no additional charge above the existing XL package price;
  - subscribers without BT TV or BT broadband paid between £6.75 and £15 per month to access the BT Sport channels. This group accounted for around [X] of the pay TV market;
  - survey evidence suggested that around 5% of pay TV subscribers would not consider a pay TV service that did not offer BT Sport, which could grow to up to 8% when BT started showing Champions League content. However, we noted that this estimate was uncertain.<sup>169</sup>
- 5.22 A number of stakeholders commented on our assessment of the importance of BT Sport in response to the December 2014 consultation. We have set out and responded to these comments in more detail in Annex 2, but the key points raised were as follows:
- BT argued we had overstated the impact that BT Sport is likely to have on platform switching, because our consumer survey had not asked respondents directly about their propensity to switch and we had no evidence that [X];<sup>170</sup>
  - other stakeholders, including Sky and TalkTalk, argued that we underestimated the importance of BT Sport. These comments largely related to stakeholder views on the importance of BT's Champions League content. We have set out our position on the importance of this content in paragraphs 4.18 to 4.21; and
  - Virgin Media provided an analysis of its own consumer research which it said indicated that it could expect to lose up to [X] if it lost access to BT Sport.<sup>171</sup>

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[http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main\\_report.pdf](http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main_report.pdf)

<sup>169</sup> December 2014 consultation, paragraphs 6.12 to 6.19.

<sup>170</sup> BT response to the December 2014 consultation, paragraphs 3.65-3.67.

## **We have gathered new evidence on the importance of BT Sport since the December 2014 consultation**

- 5.23 In addition to the comments we received from stakeholders in response to our December 2014 consultation on the importance of BT Sport, new evidence is available as a result of market developments. This includes the changes to BT's pricing, subsequent changes in BT Sport subscriber numbers and the results of sports rights auctions during the course of 2015.
- 5.24 As set out in Section 3 (see paragraphs 3.37-3.40), following the launch of its BT Sport Europe channel, BT adopted a new pricing model for its channels, with two separate sports packs (BT Sport Lite and the BT Sport Pack, which includes BT Sport Europe). BT introduced a monthly charge of £5 to most BT broadband customers who subscribe to the BT Sport Pack and increased the price for customers without BT broadband on the DSat platform to £19.99. In addition, following the extension of its wholesale agreement with BT to include the BT Europe channel, Virgin Media increased its standalone price for BT Sport to £18, and its XL package (which includes the BT Sport Pack) increased in price by £3 a month.
- 5.25 The number of BT Sport subscribers has increased since our December 2014 consultation. In September 2015 there were [redacted] BT Sport subscribers<sup>172</sup>, representing [redacted] of pay TV subscribers (and [redacted] of all pay TV revenues).
- 5.26 It remains the case that some subscribers pay to access BT Sport and some do not; but the proportions have changed and there are fewer subscribers that receive BT Sport for no additional charge. In particular there are approximately:
- i) [redacted] subscribers that pay a price of between £9.99 and £24.99 per month. Most of these customers take BT Sport on the DSat platform without BT broadband, however this also includes some BT TV and Plusnet customers, as well some Virgin Media customers without the XL package.
  - ii) [redacted] subscribers that pay £5 per month (including DSat subscribers with BT broadband, some BT TV subscribers, and subscribers that only have access to BT sport via the online app/player).
  - iii) [redacted] subscribers that receive BT Sport for no incremental charge either because it was included in their BT broadband package (and whether they access the channels via DSat or via the online app/player) or part of their TV package (i.e. either BT TV customers or Virgin Media subscribers with the XL package).<sup>173</sup>
- 5.27 In December 2014 we noted that [redacted] of all pay TV subscribers paid more than £5 as an incremental charge for accessing BT Sport. As noted in Section 3 (paragraph 3.42) this has now increased, with a total of [redacted] of all pay TV subscribers paying £5 or more to access BT Sport (which is approximately [redacted] of all BT Sport subscribers). Nevertheless, a significant proportion (around [redacted] of BT Sport subscribers representing [redacted] of all pay TV subscribers) receive BT Sport for no incremental charge either because it was included in their broadband package or as part of their TV package.

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<sup>171</sup> Virgin Media response to the December 2014 consultation, paragraph 48.

<sup>172</sup> Excluding online only subscribers that receive BT Sport for no incremental charge as part of their BT broadband package. BT response to the 4<sup>th</sup> WMO information request dated 16 October 2015.

<sup>173</sup> BT response to the 4<sup>th</sup> WMO information request dated 16 October 2015.

- 5.28 The number and makeup of BT Sport subscribers is subject to some uncertainty given that BT has only relatively recently introduced its new pricing model and its proposition is evolving. As of November 2015 the group stage of the Champions League competition was only part way through. Because many BT Sport subscribers buy it as part of a bundle and pay a relatively small amount specifically to access the BT Sport channels it is difficult to infer from this data what proportion of BT Sport subscribers value BT Sport such that it will influence their choice of pay TV retailer. For those subscribers that do not pay an incremental charge, there is some evidence to suggest that a relatively small proportion value BT Sport highly enough for it to affect their choice of retailer.<sup>174</sup>
- 5.29 Our estimate in December 2014 that BT Sport would influence the choice of retailer for around 5% of pay TV subscribers (representing around [3%] of pay TV revenues), increasing to 8% with Champions League, was based on consumer survey evidence from 2013/2014.<sup>175</sup> We recognise that the proportion of consumers that consider BT Sport as important may have increased since then. However, because BT has only recently started broadcasting Champions League content the importance and impact of this content on consumer subscription decisions is subject to some uncertainty.
- 5.30 Nevertheless, BT continues to hold a minority of Premier League rights (25%), as well as fewer important sports rights than Sky. Whilst it also now broadcasts exclusive Champions League rights, our evidence indicates this is less important to subscriber choice of pay TV retailer than live Premier League content (see Section 4). BT will continue to account for a smaller proportion of industry spend on sports rights from 2016/17 (see paragraph 5.38 below).
- 5.31 On the basis of the evidence set out above, whilst we recognise that BT Sport may influence the choice of retailer for some pay TV subscribers, we consider it unlikely that it will influence the subscription decisions for a significant proportion of pay TV subscribers at this time

## **Sky maintains a strong market position in the supply of sports channels and in pay TV retail**

- 5.32 In this section we assess the market position of the holders of important content: Sky and BT. We also assess the relative positions of the four main pay TV retailers: Sky, BT, Virgin Media and TalkTalk. This provides a broader understanding of the impact limited distribution of Sky Sports or BT Sport could have on competition. We consider limited distribution of important channels will have a greater impact on competition if the content holder has a strong market position in pay TV retail and is able to use its position to restrict a competing retailers' ability to grow. The analysis of market positions also informs our understanding of content holders' incentives to limit distribution, which we look at in Section 6.

## **Sky maintains a strong market position in the supply of key sports channels**

- 5.33 In December 2014 we set out evidence that showed Sky had a strong position in the wholesale supply of key sports channels, with a share of supply revenues of over 80%. This was further supported by Sky's share of expenditure on sports rights, a

<sup>174</sup> For example [3%] - Virgin Media's response to December 2014 consultation, page 1. We note that this represents [3%] of Virgin Media's BT Sport subscribers and less than [3%] of pay TV subscribers.

<sup>175</sup> See paragraphs 6.17-6.18.

primary input for channel supply, which was over 60% of all sports rights expenditure in 2013/14.<sup>176</sup>

- 5.34 In contrast we noted that BT's position was relatively modest. Its share of channel revenues was less than 20% and its expenditure on sports rights was around 15%.<sup>177</sup>
- 5.35 Since September 2014, BT Sport has attracted an additional [redacted] channel subscribers. In addition, as discussed in paragraph 5.24 above, in August 2015 BT changed its pricing for the BT Sport channels and signed a new wholesale deal with Virgin Media. As a result BT's revenues from channel supply have increased, the impact on shares of channel supply revenues is shown in the table below. We explain our updated methodology for calculating these shares in Annex 3.

**Table 5.1: Share of channel supply revenues from the provision of Sky Sports, BT Sport or ESPN since August 2009**

	Sky (%)	ESPN (%)	BT (%)
2009/10	90%-100% [redacted]	0%-10% [redacted]	-
2010/11	90%-100% [redacted]	0%-10% [redacted]	-
2011/12	90%-100% [redacted]	0%-10% [redacted]	-
2012/13	90%-100% [redacted]	0%-10% [redacted]	-
2013/14	80%-100% [redacted]	-	0%-20% [redacted]
2014/15	80%-100% [redacted]	-	0%-20% [redacted]
August - September 2015	70%-90% [redacted]	-	10%-30% [redacted]

Source: Ofcom calculations

- 5.36 Sky has maintained a strong position in the supply of key sports channels for many years. As we noted in December 2014, between 2009 and 2013 Sky's share of supply of key sports channels was broadly constant and above 90%. Since BT Sport entered the market Sky's share has declined by around 10%.<sup>178</sup> However, Sky's share remains high at over 70%.
- 5.37 We estimate that Sky's share of industry expenditure on sports rights (including FTV) will be between 50% and 70% [redacted] for the 2015/16 season, which marks a reduction from the 2010/11 season when Sky accounted for between 60% and 80% [redacted]. However, we expect Sky's share to increase again to between 60% and 80% [redacted] for the 2016/17 season to reflect increased spending on Premier League content following the 2015 auction.
- 5.38 In contrast, BT's position in channel supply has grown quickly and its share of channel supply revenues has nearly doubled since its launch in 2013. However, its share of channel revenues remains between 10% and 30%. While BT's share of expenditure on sports rights has increased to between 20% and 40% [redacted] for the

<sup>176</sup> December 2014 consultation, paragraphs 6.30-6.34.

<sup>177</sup> December 2014 consultation, paragraph 6.35.

<sup>178</sup> Sky's share of wholesale revenues declined by [redacted] between 2012/13 (i.e. prior to BT Sport) and 2014/15 (the latest full year for which we have data). We interpret the figures for August and September 2015 with some caution as these figures represent only two months of data. The decline in Sky's share in August and September 2015 appears to be largely driven by an expansion in the size of the market. For example wholesale revenue for Sky Sports and BT Sport combined was [redacted] higher in September 2015 than in September 2014.

2015/16 season, this is expected to decline to between 10% and 30% [§<] in 2016/17 when the new Premier League rights costs take effect.<sup>179</sup>

### **Sky still has a significant advantage when bidding for sports rights**

- 5.39 In December 2014 we set out evidence that Sky appeared to have some significant advantages when bidding for sports rights. In particular we noted that:
- i) Sky won the maximum rights available to a single broadcaster in the 2012 and 2009 auctions for live Premier League rights; and
  - ii) there were a number of factors that could explain Sky's bidding advantages. We said these included the time it takes to build a subscriber base and the advantage of being vertically integrated with the largest platform operator and thereby able to bundle key sports channels with other pay TV services.
- 5.40 In response to the December 2014 consultation the PL argued that Sky did not have an inherent advantage when bidding for sports rights. Sky acknowledged it did benefit from bidding advantages when competing for sports rights but it argued that these derived from legitimate, pro-competitive factors such as its brand and its sector experience (not the factors identified by Ofcom) and it argued that these advantages did not insulate Sky from effective competition for those rights.<sup>180</sup> Both BT and Virgin Media argued that Sky continued to benefit from material bidding advantages.<sup>181</sup>
- 5.41 As noted in Section 3, the outcome of the 2015 Premier League auction for the 2016 to 2019 seasons resulted in considerable inflation in the amount Sky will pay for Premier League broadcast rights from 2016/17.<sup>182</sup> [§<]:
- i) [§<];<sup>183</sup>
  - ii) [§<]; and
  - iii) [§<].<sup>184</sup> [§<],<sup>185</sup> [§<].
- 5.42 Nevertheless, BT has recently won some important rights that were previously held by Sky (for example as well as the live Champions League rights, it has recently won some cricket rights (as discussed in paragraph 5.9 above). We therefore recognise that Sky is facing increasing competition when bidding for sports rights, in particular from BT. In addition, [§<].<sup>186</sup>

<sup>179</sup> This figure assumes that spending on all sports rights other than live Premier League rights will remain at 2015/16 levels.

<sup>180</sup> The PL response to the December 2014 consultation, paragraph 5.7. Sky response to the December 2014 consultation, Annex 2, paragraph A2.5.

<sup>181</sup> BT response to the December 2014 consultation 4.49-4.89, Virgin Media response to the December 2014 consultation, paragraph 22.

<sup>182</sup> <http://www.premierleague.com/en-gb/news/news/2014-15/feb/100215-premier-league-uk-live-broadcasting-rights-announced.html>

<sup>183</sup> <https://corporate.sky.com/media-centre/news-page/2015/sky-sports-wins-live-premier-league-rights>

<sup>184</sup> [§<].

<sup>185</sup> [§<].

<sup>186</sup> [§<].

- 5.43 In particular BT, and other providers in this sector, already have large subscriber bases taking into account other communications products (e.g. BT has nearly 8m broadband subscribers, Vodafone has over 18m mobile customers) which could provide an alternative means of monetising investment in sports rights.
- 5.44 As we discuss further in response to BT and Sky's arguments in Annex 2, and as we noted in the December 2014 consultation, these subscribers do not have a proven willingness to pay for sports content in the same way as Sky's established pay TV base and therefore operators with subscriber bases taking other communications services face uncertainty about the ability to monetise investment in sports content., We therefore remain of the view that the factors we identified in December 2014 continue to contribute to Sky's bidding advantages.

### **Sky maintains a strong position in the retailing of pay TV**

- 5.45 In December 2014 we considered the retail market position of traditional pay TV retailers (Sky, Virgin Media, BT and TalkTalk). We found that Sky's share of supply was in excess of 50% regardless of the measure of retail revenues. While BT's share of supply was sensitive to whether or not we included revenues associated with the supply of BT Sport on DSat and through the app and online player, in all cases it was below 25%.<sup>187</sup>
- 5.46 We did not include OTT services in our assessment of competition in pay TV retailing because we noted that these services had not, to date, typically offered the full range of services provided by traditional pay TV retailers (e.g. most focus on general entertainment and movie content rather than sport). In addition we noted that most pay TV consumers still receive their channels through a traditional pay TV retailer, rather than an OTT service, and most consumers tended to take OTT services as an add-on to other TV services rather than substituting it for their existing pay TV service.<sup>188</sup>
- 5.47 In response to the December 2014 consultation, the PL and Sky both commented on the importance of the wider triple-play market. In particular the PL argued that triple-play bundles was the relevant market which Ofcom should be assessing.<sup>189</sup> Sky said our assessment did not fully appreciate that competition between Sky, BT, Virgin Media and TalkTalk was focussed on winning triple-play customers. It argued that we had missed the importance of this 'intense' competition and our analysis did not properly reflect the complexity of how competition in retail pay TV operates.<sup>190</sup> BT, however, argued that we had underestimated Sky's market position and overestimated its own position.<sup>191</sup> We have considered these arguments as part of our updated assessment below (and we respond to them in more detail in Annex 2).

### **Our updated assessment continues to show Sky has a strong position**

- 5.48 As we set out in Section 3, availability and take-up of OTT services has continued to grow and we consider that this is an indication that barriers to entry continue to reduce for OTT supply. However, for the majority of traditional pay TV customers OTT services remain an add-on service and we have seen no evidence yet of a

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<sup>187</sup> December 2014 consultation, paragraphs 6.46-6.53.

<sup>188</sup> December 2014 consultation, paragraphs 6.41-6.43.

<sup>189</sup> The PL response to the December 2014 consultation, paragraphs 2.7-2.17.

<sup>190</sup> Sky response to the December 2014 consultation, paragraphs 2.21-2.22, 2.27 and 3.29(iii).

<sup>191</sup> BT response to the December 2014 consultation, paragraphs 4.1-4.30.

decline in traditional pay TV subscriptions. In addition we have no evidence that retailers are planning to supply key sports content primarily on an OTT basis at this time. Therefore, we continue to focus our assessment of the retail level on the traditional pay TV retailers.

- 5.49 As in December 2014, we have assessed the market position of BT and Sky by looking at the following shares of supply:
- i) for key sports subscribers only (i.e. customers that take bundles of pay TV services including key sports channels);
  - ii) for all pay TV<sup>192</sup> subscribers (whether or not they subscribe to key sports channels); and
  - iii) including the communications services they supply (i.e. including broadband and fixed-line services, in addition to pay TV). For this category we have set out our calculations separately for each of the subscriber groups in i) and ii) above as well.<sup>193</sup>
- 5.50 The table below shows retail shares for Sky and BT in September 2015 when the revenues from the sale of BT Sport on Sky DSat and the app only are included.<sup>194</sup>

**Table 5.2: Share of retail revenues in September 2015 including revenues from the sale of BT Sport on Sky DSat and the BT Sport app**

Customers included	Revenues included	Sky's share of supply	BT's share of supply
Customers that take BT Sport and/or Sky Sports	TV only revenues	60%-80% [X]	0%-10% [X]
	TV, broadband and voice revenues	40%-60% [X]	10%-30% [X]
All pay TV customers	TV only revenues	60%-80% [X]	0%-10% [X]
	TV, broadband and voice revenues	40%-60% [X]	10%-30% [X]

Source: Ofcom calculations.

- 5.51 Sky's share of TV only revenues has broadly remained at the same level both for key sports subscribers and for all pay TV subscribers since our December 2014 consultation.
- 5.52 Sky's share of revenues for pay TV customers (both sports subscribers only and all pay TV customers) is lower when revenues from all communications services are

<sup>192</sup> To estimate TV only revenues we subtract an estimate of the communication revenues for all customers that take pay TV from the total retail revenues provided by operators. This is based on the number of subscribers on different voice and broadband packages and the standalone price of the associated package, i.e. the price when broadband and voice is taken as part of a bundle excluding TV. As Virgin Media offers significant discounts when bundling TV and broadband and both BT and TalkTalk only offer TV as part of a triple-play bundle the TV only shares should be viewed as an approximation and are subject to some uncertainty.

<sup>193</sup> We do not include BT broadband packages where subscribers did not take BT Sport. That subscribers could take BT Sport (but choose not to) makes no difference to the strength of competition for sports pay TV customers.

<sup>194</sup> Our calculation of Sky's retail revenues does not include revenue from NOW TV. NOW TV represents [X] of Sky's Sports channels retail revenues and would increase Sky's share by approximately [X].

included. Again, this has stayed broadly the same since our December 2014 consultation and even on this measure Sky's share continues to be around 50%.

- 5.53 BT TV's position has also remained broadly the same since our December 2014 consultation. Its share of TV only revenues (both for sports subscribers and for all pay TV subscribers) remains below 10%. BT has a higher share when we incorporate revenues from other communications services although its share is still below 30%.
- 5.54 As we set out in Section 3, we recognise there has been a gradual shift to greater take-up of triple-play bundles. However, as also indicated in that section (see paragraphs 3.18-3.20) there are still a significant proportion of consumers (nearly 50%) that purchase pay TV on a stand-alone basis.<sup>195</sup> Therefore, we consider that our approach above in setting out revenue shares across all TV customers (i.e. both pay TV only and triple-play subscribers) is appropriate for assessing Sky and BT's market positions in the retail supply of pay TV. In any event Sky also retains a high share of supply in the triple-play segment.<sup>196</sup>
- 5.55 Overall, Sky continues to maintain a strong position in the supply of retail pay TV services. On each of the measures we have presented it has a supply of around 50% and in some cases over 70%. BT's share has grown, and we recognise that it may continue to grow in future, however currently on all measures it remains under 30%. Therefore we remain of the view that BT has a modest position in the retailing of pay TV services at this time.

### **Sky may have incumbency advantages in pay TV retailing**

- 5.56 In December 2014 we identified that there may be barriers to setting up and expanding a pay TV platform which provide Sky with an incumbency advantage. In doing so, we considered the barriers which the Competition Commission ('CC') found existed in relation to pay TV in its movies investigation<sup>197</sup>: the high cost of acquiring new subscribers; the likelihood of a competitive response by existing platforms; and the high fixed costs of setting up a pay TV platform.
- 5.57 In response to the December 2014 consultation, BT said that Sky's incumbency advantages have persisted. It said that Sky's relative scale gives it substantial advantages with regard to the high fixed costs associated with operating and developing a pay TV platform<sup>198</sup>, the high cost of acquiring new subscribers created

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<sup>195</sup> Between May 2014 and April 2015 [§<] of new Sky pay TV customers subscribed to a TV only service.

<sup>196</sup> If we break Sky's share of supply down into sales to all triple-play customers Sky's share remains over 40% (specifically it is between [§<] (including revenues from all services) and [§<] (looking only at pay TV revenues).

<sup>197</sup> Competition Commission, *Movies on pay TV market investigation*, August 2012, -

[http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main\\_report.pdf](http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main_report.pdf)

<sup>198</sup> BT suggested that, because of its scale, Sky is better placed to pay more for content, is better able to spread the costs of rights acquisitions, and can more easily recoup the costs of infrastructure investment. BT noted a number of infrastructure investments made by Sky (e.g. HD, Sky Go, and NOW TV), and stated that competing pay TV retailers are required, despite their smaller scale, to follow Sky's lead in these investments or risk losing relative retail market share. BT response to the December 2014 consultation, paragraphs 4.31-4.40.

difficulties for pay TV retailers in attracting customers away from Sky<sup>199</sup> and Sky's relative size in pay TV enables it to respond strongly to competitors.<sup>200</sup>

- 5.58 [§] similarly argued that, because Sky already has a large subscriber base and holds broadcasting rights, it only needed to cover the costs of maintaining its existing infrastructure, whereas a new entrant would need to both acquire rights and incur infrastructure and marketing costs to acquire customers.<sup>201</sup>
- 5.59 Sky, on the other hand, stated that the growth of OTT has reduced barriers to entry, as firms no longer have to invest in full pay TV platforms in order to compete at the retail level – it pointed to the rapid expansion of Netflix as an example.<sup>202</sup> Sky also argued that the growth of OTT has opened up the UK to international competition, in which large international operations can leverage global scale.<sup>203</sup>
- 5.60 As we set out in Section 3 (paragraph 3.17) most consumers continue to take OTT services as an add-on to traditional pay TV services and OTT providers have not, to date, focussed on provision of sports content. Therefore as discussed above (paragraph 5.48) these services do not currently appear to be in a position to act as an effective substitute for traditional pay TV services. However we note that developments in OTT provision mean that the need to invest in costly set-top boxes is reduced and it is possible that in the future OTT providers may expand into the provision of sports content.<sup>204</sup>
- 5.61 We further note that although retailers may be able to enter pay TV and expand their business by relying on their existing brand and established subscriber bases to sell pay TV services, they face uncertainty about the ability to monetise pay TV investments in this way. However this approach has been adopted by BT to develop its sport channels. In particular BT has used its fixed voice and broadband customer base to monetise its investment in sports rights (albeit BT has relied on distributing its sports channels through other pay TV platforms to achieve this) and it may be possible that other pay TV retailers will also adopt similar strategies over time.
- 5.62 Technological developments and new approaches to monetising investment in content may therefore mean that barriers to entry and expansion are lower than when we last reviewed the market and may be reducing further. As a result the potential for competitors to challenge Sky's market strength may grow in future, though the nature and scale of any changes are uncertain.
- 5.63 In addition we consider that the low switching rates in the sector may indicate that new entrants will continue to face high costs in acquiring new subscribers. In its assessment of movies on pay TV, the CC concluded that retail competition was affected by barriers to consumers switching their pay TV retailer and that these barriers were associated with the perceived inconvenience of changing retailer and with subscriber inertia. The CC found that there were significant barriers to large-

<sup>199</sup> BT response to the December 2014 consultation, paragraphs 4.41-4.45.

<sup>200</sup> BT provided a number of examples that it considered illustrate this point. For example, it noted that, based on Nielsen data, Sky's marketing expenditure on Sky Sports between May and September 2013 increased by 100% compared to the previous year (BT Sport launched in May 2013). BT response to the December 2014 consultation, paragraphs 4.47.

<sup>201</sup> [§].

<sup>202</sup> Sky response to the December 2014 consultation, paragraphs 1.12-1.13

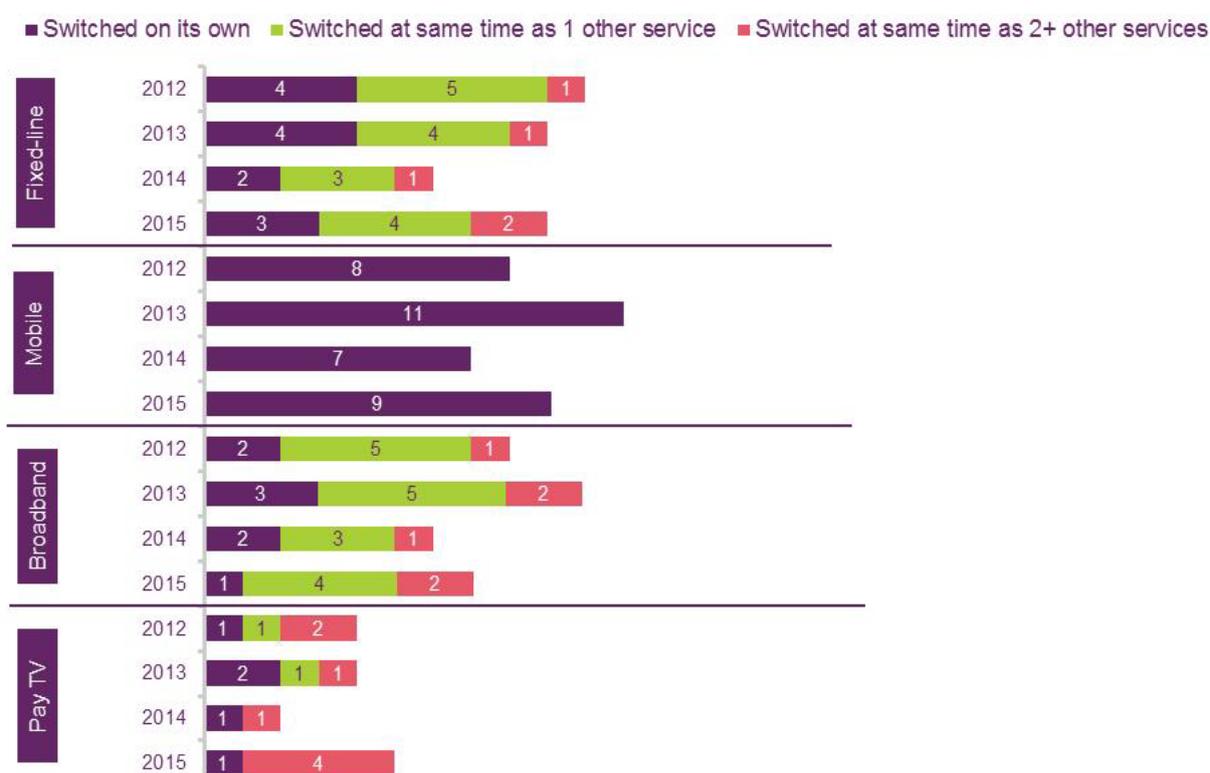
<sup>203</sup> Sky response to the December 2014 consultation, paragraphs 2.12-2.15

<sup>204</sup> We note that Sky and BT provide sports content on an OTT basis via NOW TV and the BT Sport app/online player, although most viewing is through the linear service.

scale entry and expansion for a traditional pay TV retailer offering packages of pay TV, including substantial sunk costs both in setting up a new platform and in marketing to acquire subscribers (associated with the need to overcome the barriers to switching, in particular subscriber inertia), and the threat of a competitive response from existing players.<sup>205</sup> We note however that barriers to entry and expansion associated with establishing a new platform and marketing may not be as significant as previously identified for a triple-play provider of communications services.

5.64 As set out in Table 5.3 below, recent evidence from the 2015 Ofcom switching tracker suggests that switching remains low; 5% of pay TV subscribers switched between pay TV providers over the 12 months prior to fieldwork (July – August 2015). This is lower than in the other communications markets: 9% in fixed-line telecoms, 10% in mobile, and 8% in broadband.<sup>206</sup>

**Figure 5.3: Switching multiple services in communications markets in the past 12 months, by total market**



Source: Ofcom decision-making survey carried out by Saville Rossiter-Base in July to August 2015  
 Base: All adults aged 16+ who are the decision-maker for fixed line (2015, 2199) mobile (2015, 2609), broadband (2015, 1877), Pay TV (2015, 1302)

5.65 These switching rates do not take account of subscribers that switch from a pay TV to a free-to-view TV<sup>207</sup> service and therefore they may underestimate the level of

<sup>205</sup> Competition Commission, *Movies on pay TV market investigation*, August 2012, paragraph 19.

<sup>206</sup> Ofcom’s switching tracker is available at [http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015oct/Switching\\_Tracker\\_2015\\_data\\_tables\\_for\\_publication\\_20150925.pdf](http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015oct/Switching_Tracker_2015_data_tables_for_publication_20150925.pdf)

<sup>207</sup> The results are representative of consumers who switch between pay TV providers, and those who switch from free-to-air TV to pay TV.

customer movement (e.g. Sky's published churn rate is 9.8%).<sup>208</sup> Nevertheless, evidence from the length of time customers remain with their pay TV provider are consistent with subscriber inertia. In particular:

- our 2013 consumer survey showed that 46% of Sky's customers and 42% of Virgin Media customers have been with their provider for longer than 6 years;<sup>209</sup> and
- more recently, Ofcom's 2015 switching tracker shows that 63% of pay TV subscribers have been with their current provider longer than six years.<sup>210</sup>

5.66 The switching data which we have therefore indicates that new entrants may face increased costs in acquiring subscribers and this may act as a barrier to entry. Ofcom has an ongoing project which has been considering consumer experiences of switching processes across communication services. In particular we have commenced a review of consumers' experiences of switching triple-play services, including undertaking consumer research to examine the nature and scale of any consumer harm.<sup>211</sup> We will be exploring whether there are reform options to help address any consumer difficulties we may identify in a proportionate way.

5.67 In addition we recently opened a monitoring and enforcement programme to assess the cancellation and termination arrangements of communications providers and the impact these have on consumers' ability to exit their communication service contracts quickly, conveniently and without error. As part of this programme we also have opened a specific investigation into Sky's compliance with rules about cancellation and termination arrangements.<sup>212</sup> Our ongoing programme of work in addressing consumer experiences in this area may therefore also help to address barriers pay TV providers may face in trying to attract subscribers to their retail platform.

5.68 Technological and commercial developments since 2010 may result in lower barriers to entry and expansion. However, Sky has continued to maintain a strong position in retail pay TV and retains a large retail subscriber base with a proven willingness to pay for content. Sky is therefore still likely to have incumbency advantages in pay TV retailing. A new pay TV retailer or an existing retailer looking to expand may be required to incur significant costs in acquiring new subscribers and this may act as a barrier to entry. The potential for competitors to challenge Sky's market strength may

<sup>208</sup> <https://corporate.sky.com/documents/investors/results/2016/kpi-table.pdf>. This churn rate represents the number of total customers over a given period who terminated their subscriptions (net of former customers who reinstated their subscription within 12 months of terminating their original subscription) expressed as a percentage of total average customers. Sky's churn rate is noticeably lower than other operators, for example Virgin Media's is 14.8% (Virgin Media's churn rate is also based on the number of customer disconnects i.e. customers terminating all products with Virgin Media and no longer receiving any services) <http://www.libertyglobal.com/pdf/press-release/Liberty-Global-Fixed-Income-Q2-2015-Release-FINAL.pdf>

<sup>209</sup> Ofcom 2013 pay TV survey, QA5.

<sup>210</sup> Ofcom Switching Tracker, QT3 How long has (TV SERVICE PROVIDER) been providing your home television service? Ofcom's switching tracker is available at [http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015oct/Switching\\_Tracker\\_2015\\_data\\_tables\\_for\\_publication\\_20150925.pdf](http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015oct/Switching_Tracker_2015_data_tables_for_publication_20150925.pdf)

<sup>211</sup> We expect to consult on this project in 2016 -

<http://stakeholders.ofcom.org.uk/binaries/consultations/mobile-switching/summary/consumer-switching.pdf> (see paragraph 6.11).

<sup>212</sup> See: [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01163/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01163/) and [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01158/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01158/).

grow in future, though the nature and scale of any changes are uncertain. We will continue to monitor developments in this area as OTT providers and new entrants further develop their offerings.

## Limited distribution of Sky Sports may harm competition

- 5.69 In the December 2014 consultation we found that limited distribution of Sky's key content may prejudice fair and effective competition between pay TV retailers. We said pay TV retailers which were unable to offer the key sports content available on Sky Sports may face difficulties in competing for a sizeable proportion of subscribers due to the importance attributed by consumers to Sky Sports and because of Sky's market position.<sup>213</sup>
- 5.70 In this section, we have confirmed our view on the importance of Sky's key content. Sky continues to hold a portfolio of important sports content and in particular it holds the majority of the broadcast rights to the Premier League which as set out in Section 4 stands out as being the most important to consumers. Evidence on the value of rights, consumer research and internal documents show that Sky Sports is a key influence in the choice of retailer for a sizeable and valuable proportion of pay TV subscribers (in particular current Sky Sports subscribers who represent [3<] of all pay TV subscribers and around [3<] of pay TV revenues). The evidence shows that the loss of the Champions League from Sky's portfolio is unlikely to mean that Sky Sports is no longer important for retail platform choice for customers with a strong interest in sports.
- 5.71 We have also confirmed our assessment of Sky's strong market position, both as a supplier of key sports channels and as a pay TV retailer. This strong market position makes it more difficult for other pay TV providers to compete with Sky at both the wholesale and retail levels without access to its key content:
- i) the significance of Sky's key content is such that it could prejudice the effectiveness of a pay TV retailers' ability to compete overall within the supply of retail pay TV services. In particular without Sky's key content the reduced number of subscribers a retailer is able to contest is likely, over time, to constrain the growth of a pay TV retailer's subscriber base and as a result they may be less likely to make investments in improving their services (including investing in new content and platform innovations); and
  - ii) If Sky retains its strong position in retail pay TV, this may give it continued advantages when bidding for sports rights. Other suppliers could therefore struggle to compete effectively for those rights, which in turn might impact on their ability to develop their pay TV services.
- 5.72 BT, Virgin Media and [3<] all agreed that the inability to offer Sky Sports would have a negative impact on a pay TV retailer's ability to retain current subscribers as well as to acquire new ones and that limited distribution of Sky Sports would be prejudicial to fair and effective competition.<sup>214</sup>
- 5.73 Sky and the PL disagreed with our assessment of Sky's market position and said sector developments showed that pay TV was competitive. Sky also said that we had

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<sup>213</sup> December 2014 consultation, paragraphs 6.57-6.65.

<sup>214</sup> BT response to the December 2014 consultation, paragraphs 5.1-5.13; Virgin Media response to the December 2014 consultation, paragraphs 46-47; and [3<].

not provided concrete evidence on the effects of limited distribution of Sky Sports.<sup>215</sup> We respond to these comments in more detail in Annex 2. We consider the evidence set out above on the importance of that content to a significant and valuable proportion of subscribers, and on Sky's market position, is clear. Therefore we consider that is sufficient to indicate that limited distribution of Sky Sports could prejudice fair and effective competition between pay TV retailers.

- 5.74 We therefore remain of the view that without access to Sky's key content, pay TV retailers will be unable to compete effectively for the sizeable and valuable proportion of pay TV subscribers that value Sky's key content and, in view of Sky's strong market position both in retail pay TV and in the supply of key sports channels, limited distribution of Sky Sports may prejudice fair and effective competition between pay TV retailers.

### **Limited distribution of BT Sport is unlikely to prejudice fair and effective competition**

- 5.75 In the December 2014 consultation we found that the content on BT Sport was important to the subscription decisions for a relatively small segment of pay TV subscribers (around 5 %) and that once BT Sport started showing Champions League content this could increase to up to 8% of pay TV subscribers. Because of this and BT's modest market position both in the supply of sports channels and as a pay TV retailer, we concluded that the impact on competition of limited distribution of BT's content was less clear.<sup>216</sup>
- 5.76 Whilst several stakeholders have argued that we had understated the importance of BT Sport, as set out above, the evidence available continues to suggest that BT Sport is likely to influence the choice of retailer for a small proportion of pay TV subscribers. We recognise that there may still be some uncertainty regarding the impact of BT's acquisition of Champions League rights. Nevertheless, BT Sport shows only 25% of Premier League matches alongside the Champions League (which is less important to subscribers than the Premier League), and will represent less than 30% of industry spending on sports content from 2016/17. In our view current evidence suggests that BT Sport is unlikely to influence the choice of retailer for a significant proportion of pay TV subscribers at this time.
- 5.77 In addition, our assessment above confirms that BT continues to have a modest position in both the supply of retail pay TV services and the supply of key sports channels. Therefore limited distribution of its content is less likely to prejudice the emergence of effective competition than would be the case if it had a strong market position.
- 5.78 Consequently we do not believe that the evidence shows that limited distribution of BT Sport would prejudice fair and effective competition between pay TV retailers at the current time.

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<sup>215</sup> Sky's response to the December 2014 consultation paragraph 3.29(ii).

<sup>216</sup> December 2014 consultation, paragraphs 6.66-6.69 and 6.72.

## Section 6

# Assessment of practices

- 6.1 In this section we assess the following practices:
- i) non-supply of key content; and
  - ii) supply of key content but on terms that do not allow fair and effective competition.
- 6.2 Within the second practice (terms) we have considered in particular whether setting prices for wholesale supply of key content at a level which does not enable fair and effective competition, and whether Sky's requirement for reciprocal supply of channels containing key content may amount to practices which are prejudicial to fair and effective competition.
- 6.3 We conclude on the impact and likelihood of Sky engaging in each of these practices, taking account of our conclusions in Section 5.
- 6.4 We also received a number of comments from stakeholders regarding BT's incentives to supply BT Sport. However, as set out in Section 5, we have concluded that limited distribution of BT Sport is unlikely to prejudice fair and effective competition between pay TV retailers at the current time. As a result, we consider that it is not necessary to assess whether or not BT has incentives to limit the distribution of BT Sport.

## We have considered whether Sky is engaging in non-supply of its key content

### Non-supply of Sky's key content would be prejudicial to fair and effective competition

- 6.5 We concluded in Section 5 that the distribution of channels containing Sky's key content was important for the ability of pay TV retailers to compete for the sizeable and valuable segment of the pay TV market that values Sky's key sports content. Non-supply of this key content would therefore limit the ability of a retailer to compete effectively and would make it difficult for competitors to grow their subscriber base. This may also affect a competitor's incentives to invest and innovate – in particular their ability and incentives to invest in new content and platform innovations may be reduced, and as a result they may grow more slowly and exert less competitive pressure on Sky.
- 6.6 We consider that were Sky to engage in non-supply to one or more of its existing pay TV competitors, or to a new entrant, this would be prejudicial to fair and effective competition.

### We previously identified that Sky may have incentives to limit distribution

- 6.7 In the December 2014 consultation, we set out the view that there may be a risk that Sky has incentives to limit distribution of its key content in the absence of regulation. In particular, in respect of the supply of key sports content to competitors with relatively small numbers of subscribers, we said there may be benefits for Sky from

limiting distribution of its content where such a strategy could slow the growth of those pay TV retailers and help protect Sky's position.

- 6.8 We noted that Sky is currently supplying its Sky Sports channels to a wide range of competing retailers and that existing contractual arrangements might restrict Sky's ability to act on any incentives it might have to withdraw supply. We said that these existing supply arrangements may be of little value in determining the extent to which Sky would or would not supply its key sports channels in the absence of an obligation to supply because they were concluded against the backdrop of existing regulation (i.e. the WMO obligation).<sup>217</sup>

## **Stakeholders made a number of comments on our analysis of incentives and Sky's current supply arrangements**

### Several stakeholders argued that Sky does have incentives to withhold supply

- 6.9 BT,<sup>218</sup> Real Digital,<sup>219</sup> Virgin Media,<sup>220</sup> TalkTalk<sup>221</sup>, and [X] <sup>222</sup> all considered that Sky had both static and dynamic incentives to withhold supply of its key content.
- 6.10 On our assessment of Sky's static incentives, Virgin Media said that attempting to reach a robust view on Sky's static incentives to supply Virgin Media was problematic and its own analysis showed that changing one assumption about Sky's success in attracting Virgin Media's subscribers could alter the view about Sky's incentives.<sup>223</sup> Virgin Media also said that NOW TV increases the pay-off to Sky from restricting wholesale supply as it enables Sky to re-capture more revenue at the retail level.<sup>224</sup> BT pointed to a number of factors which it considered meant Sky's static incentive to supply was likely to be low, including the low revenue upside for Sky supplying to smaller platforms, the risk of Sky's subscribers switching to any other pay TV platform it supplied, and the introduction of NOW TV which enabled Sky to capture those additional subscribers who were not willing to subscribe to Sky Sports as part of a wide pay TV bundle.<sup>225</sup>
- 6.11 On Sky's dynamic incentives to supply, stakeholders argued that, firstly, Sky was seeking to protect its market position and weaken competitive pressure from its downstream competitors, and, secondly, that it was preventing those competitors becoming viable bidders for sports rights. On the latter point BT said that "the self-reinforcing nature of the vicious circle" allowed Sky to keep its entrenched bidding advantages for upstream sports rights.<sup>226</sup> BT<sup>227</sup> and Real Digital<sup>228</sup> also pointed to Sky having incentives to protect its current 'buy-through' model for its Sky Sports channels.

<sup>217</sup> December 2014 consultation, paragraphs 7.28-7.35.

<sup>218</sup> BT response to the December 2014 consultation, paragraphs 6.1-6.21.

<sup>219</sup> Real Digital response to the December 2014 consultation, pages 3 and 12.

<sup>220</sup> Virgin Media response to the December 2014 consultation, paragraphs 50-54.

<sup>221</sup> TalkTalk response to the December 2014 consultation, paragraph 4.9.

<sup>222</sup> [X].

<sup>223</sup> Virgin Media response to the December 2014 consultation, paragraph 51.

<sup>224</sup> Virgin Media response to the December 2014 consultation, paragraphs 5-6.

<sup>225</sup> BT response to the December 2014 consultation, paragraphs 6.1, 6.6-6.11.

<sup>226</sup> BT response to the December 2014 consultation, paragraphs 6.12-6.14.

<sup>227</sup> BT response to the December 2014 consultation, paragraph 6.14.

<sup>228</sup> Real Digital response to the December 2014 consultation, page 3.

- 6.12 Virgin Media highlighted a number of factors it considered would increase the benefits to Sky of withdrawing content from Virgin Media's platform: (i) the benefit to Sky of attracting bundled switchers (including mobile when launched by Sky), (ii) the possibility of customers unbundling to take NOW TV and (iii) the threat posed by Virgin Media's expansion.<sup>229</sup>
- 6.13 BT said that Sky's dynamic incentives would necessarily vary with respect to different competitors and that Sky was likely to view BT in particular as a more serious threat to its market position, as a result of BT's considerable investment in BT Sport.<sup>230</sup> [§<].<sup>231</sup> BT said that Sky's conduct in practice supported this view, as Sky limited its distribution of Sky Sports to BT more than other operators and also targeted a competitive response to BT's development of its Sky Sports offering.<sup>232</sup>

### Sky and the PL disagreed with our assessment of Sky's incentives

- 6.14 Sky and the PL said that our assessment of incentives was purely theoretical and was not grounded in evidence.<sup>233</sup>
- 6.15 Sky said it was open to new opportunities to distribute its sports channels and said it had always engaged constructively with those opportunities it judged were (a) secure, and (b) would deliver sufficient incremental subscribers to those channels to make pursuit of that opportunity worthwhile. It added that its preference remained to retail its channels directly to consumers particularly where it could deliver its NOW TV service via IP, however, it was also open to wholesale deals.<sup>234</sup> Sky said it attached significant value to the additional, certain revenue streams derived from new deals for the distribution of its key sports channels.<sup>235</sup>
- 6.16 Sky argued that Ofcom's proposition that Sky was prepared to forgo the immediate, tangible ongoing revenues and profits from supply of its key sports channels in the hope of achieving some, uncertain and hypothetical, benefits to its business at some point in the future was not realistic. It pointed to the rapidly changing nature of the sector in which it operated which it said meant, even if those benefits were feasible, they would be too uncertain, and too far in the future, for Sky to rely on them.<sup>236</sup> In addition it said that the cost of supplying a pay TV platform with Sky Sports which is associated with an increase in retail competition is normally captured as a cost within the assessment of (net) static incentives. Including it *in addition* as a dynamic disincentive to supply would mean that it was double-counted.<sup>237</sup>
- 6.17 In addition, Sky argued that Ofcom's assessment that Sky may have incentives not to supply smaller platforms ignored the cost to Sky of forgoing revenues and profits from platforms that were growing over time. It said it was implausible that in practice it would have a sufficient degree of confidence in its assessment of the threat a

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<sup>229</sup> Virgin Media response to the December 2014 consultation, paragraphs 52-54.

<sup>230</sup> BT response to the December 2014 consultation, paragraph 6.15.

<sup>231</sup> [§<].

<sup>232</sup> BT response to the December 2014 consultation, paragraph 6.15.

<sup>233</sup> The PL response to the December 2014 consultation, paragraphs 6.1-6.8.

<sup>234</sup> Sky response to the December 2014 consultation, paragraph 4.10.

<sup>235</sup> Sky response to the December 2014 consultation, paragraphs 4.38-4.42.

<sup>236</sup> Sky response to the December 2014 consultation, paragraphs 4.39-4.42, and 4.72.

<sup>237</sup> Sky response to the December 2014 consultation, paragraphs 4.79-4.80.

particular platform might pose in future in order to justify forgoing revenues available now.<sup>238</sup>

- 6.18 In relation to the impact on competition for future sports rights, Sky said that withholding its key sports channels was actually likely to reduce its chances of winning future rights auctions, because the amount it was willing to pay for the rights was a function of the total number of subscribers to its channels, not purely those to whom Sky retailed the channels. It argued that most pay TV retailers would prefer supply of Sky's sports channels rather than bearing the risks and costs associated with developing their own sports channels, making it considerably more likely that a competitor at the retail level would bid against Sky for sports rights if Sky refused to supply them with its sports channels.<sup>239</sup> In any case, Sky said the proposition had been "*fatally undermined*" by BT's success in winning sports rights despite having a relatively small retail base of pay TV subscribers. It argued that supply of Sky's key sports channels to BT made no material difference to its threat as a bidder for sports rights.<sup>240</sup> It added that even if it was able to eliminate the competition it faced when bidding for rights from such operators, it would still face competition from broadcasters that are not vertically integrated (e.g. ESPN).<sup>241</sup>

#### Stakeholders also commented on the relevance of Sky's existing supply arrangements

- 6.19 Virgin Media and another respondent ([redacted]) considered that existing supply arrangements could not be used to make inferences about Sky's incentives to supply or as a counterfactual for what would happen in the absence of the WMO obligation.<sup>242</sup>
- 6.20 BT considered that, without the WMO obligation, wholesale supply would be even more limited than it is at present. BT noted wider availability of Sky Sports since 2010 through self-retailing arrangements, but said that this did not represent increased competitive choice for pay TV consumers.<sup>243</sup> It argued that our analysis should focus on the objective, observable market outcome that limited distribution of the Sky Sports proposition was occurring in practice and had had an impact on fair and effective competition in pay TV markets.<sup>244</sup> Real Digital said that correspondence with Sky showed that Sky has refused to contemplate the supply of SS1&2 without the WMO remedy.<sup>245</sup>
- 6.21 Sky and the PL said that Ofcom should have due regard to the CAT's finding in 2012 that Sky was a 'willing wholesaler' during its negotiations with other potential pay TV retailers.<sup>246</sup> Sky argued that we should focus on what it was likely to do in reality absent regulation, and the best evidence on that was what it had done in the past, and what it did now. Sky highlighted the range of supply agreements currently in place that were not concluded under the auspices of the WMO obligation, in

<sup>238</sup> Sky response to the December 2014 consultation, paragraphs 4.80-4.82.

<sup>239</sup> Sky response to the December 2014 consultation, paragraphs 4.83-4.92.

<sup>240</sup> Sky response to the December 2014 consultation, paragraphs 4.93-4.100.

<sup>241</sup> Sky response to the December 2014 consultation, paragraphs 4.101-4.103.

<sup>242</sup> Virgin Media response to the December 2014 consultation, paragraph 50. [redacted].

<sup>243</sup> BT response to the December 2014 consultation, paragraph 6.11.

<sup>244</sup> BT response to the December 2014 consultation, paragraph 6.17-6.20.

<sup>245</sup> Real Digital response to the December 2014 consultation, page 13.

<sup>246</sup> Sky response to the December 2014 consultation, paragraphs 4.56 and the PL response to the December 2014 consultation, paragraphs 6.5-6.6.

particular its agreements with TalkTalk and Virgin Media.<sup>247</sup> It also noted its agreement to supply NOW TV over TalkTalk's YouView box, as well as an increasing number of third party platforms (e.g. Xbox and LG Smart TVs) and most recently EE TV [X].<sup>248</sup> Sky noted that each of these agreements required considerable effort on Sky's part and in some cases significant investment in order to be able to deliver NOW TV to these platforms.<sup>249</sup>

- 6.22 Sky noted that supply to BT appeared to be the focus of Ofcom's concern but on this point it argued that the documentary record showed that Sky had consistently made significant efforts to deliver its key sports channels via BT's platforms, both via wholesale and self-retail arrangements.<sup>250</sup> Sky noted that the situation in relation to supply to BT's YouView platform was the result of (a) BT having developed premium sports channels and (b) BT withholding supply of these channels to Sky. Sky said a proposition that the situation with respect to BT could justify the imposition of a WMO obligation that included a range of other parties was without merit.<sup>251</sup>

### **We continue to consider that Sky may have incentives to limit distribution of its key content, however, it is currently supplying**

- 6.23 In the December 2014 consultation we recognised that it was difficult to conclude definitively on the likely conduct of Sky with regard to the supply of Sky Sports because it depended on a complex commercial trade-off which could be affected by a number of factors that were inherently uncertain. However, we considered that there were risks that Sky might have incentives to not supply other retailers' platforms. Having considered stakeholder comments we remain of the view that this is the case. However, in considering the likelihood of Sky acting on these incentives, we have further considered Sky's existing supply arrangements, as we discuss in more detail below.
- 6.24 With respect to Sky's incentives to supply Virgin Media, we continue to consider that, because of the significant wholesale revenues from subscribers to Sky Sports on Virgin Media, and because of the relatively low proportion of customers on that platform that Sky might expect to win back at the retail level, Sky may have static incentives to supply Virgin Media on a wholesale basis. We recognise that there are possible reasons why Sky might have a dynamic incentive to withdraw supply of Sky Sports to Virgin Media, as Virgin Media describes above. However, in our view it is still not clear as to whether any dynamic incentives to Sky as a result of limited distribution would overcome its likely static incentive to supply. In any case, as we discuss further below, Sky has a long-term supply agreement in place with Virgin Media.
- 6.25 For other pay TV platforms, Sky's static incentives to supply or not supply will still depend on the amount of subscribers who might switch, the additional subscribers to whom Sky could not otherwise retail Sky Sports, and the relative margins earned by wholesaling or retailing.<sup>252</sup> We recognise that factors such as NOW TV might make it

<sup>247</sup> Sky response to the December 2014 consultation, paragraphs 4.5-4.8. 4.17-4.22 and 4.52-4.56.

<sup>248</sup> [X].

<sup>249</sup> Sky response to the December 2014 consultation, paragraphs 4.16-4.17.

<sup>250</sup> Sky response to the December 2014 consultation, paragraphs 4.23-4.37.

<sup>251</sup> Sky response to the December 2014 consultation, paragraph 4.37.

<sup>252</sup> For instance, while we agree with BT that the revenue upside from wholesaling is likely to be low, due to the low number of potential Sky Sports subscribers on these platforms, this means that the countervailing potential benefits to Sky from causing subscribers to switch would also be low. Similarly, we recognise that there could be a potential revenue loss from supplying to other platforms,

relatively more attractive to withhold supply, as Sky may be able to continue earning revenues from some subscribers on other pay TV platforms.<sup>253</sup> However, we also recognise that wholesale deals with newer platforms create opportunities for new revenue streams for Sky. In December 2014 we concluded that because of the relatively small numbers of Sky Sports subscribers on TalkTalk and BT TV the magnitude of any static incentives was likely to be small. We note subscriber numbers remain relatively small on these platforms and therefore we remain of the view that the magnitude of Sky's static incentives to supply these platforms is likely to be small.<sup>254</sup>

- 6.26 Sky's overall commercial incentive to supply its key content will be driven by the net impact of its static and dynamic incentives. In the December 2014 consultation we set out that Sky had a strong position both as a pay TV retailer and in the supply of key sports channels. We said that increased competition from competing suppliers could reduce Sky's profits both as a pay TV retailer and as a supplier of sports channels. If limited distribution of Sky Sports can prevent or slow the erosion of Sky's future profitability then Sky could have an incentive to limit distribution of its key content. Whilst we recognise that Sky is likely to place less weight on benefits which are not immediate and which are uncertain, we do not consider this means those potential benefits are irrelevant. If the dynamic benefits which potentially accrue from withholding supply are sufficiently large, even if this prospect is uncertain and distant, they might still be an important consideration for Sky in its assessment of whether or not to supply Sky Sports channels.<sup>255</sup>
- 6.27 We also recognise that Sky could earn future profits from wholesaling to platforms which are growing over time, but it is the ability to weaken competition (and in doing so keep prices higher) which creates the possibility that future profits could be higher under a scenario where Sky Sports is not supplied, and competing platforms remain small. In that regard we note our conclusion in Section 5 that the supply of Sky Sports is important to the ability of other retailers to compete effectively and grow their subscriber base.
- 6.28 One of the possible strategic benefits to Sky of limited distribution we set out in December 2014 was that limited distribution could reduce competition for future sports rights. We still consider that platforms with fewer subscribers may be less able to monetise rights and consequently less effective when competing for sports rights. However, BT has been able to acquire a number of sports rights packages, including in the 2015 Premier League auction, the Champions League and range of other rights using a strategy that to date has had a particular focus on monetising its sports rights investment by bundling BT Sport with its broadband service and providing it over DSat.<sup>256</sup> BT may change its focus in the future, however based on its current

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if existing Sky customers switch to these platforms, but if this occurred Sky would then earn larger wholesale revenues as a result.

<sup>253</sup> [redacted].

<sup>254</sup> In September 2015, TalkTalk had [redacted] Sky Sports subscribers and BT had [redacted], an increase from [redacted] and [redacted] respectively in September 2014.

<sup>255</sup> In this respect, we disagree with Sky that we have double-counted the cost of retail competition. In our static analysis, we assume that retail prices and margins are the same in either scenario (i.e. supplying Sky Sports or withholding supply). The disincentive to supplying a competing platform is limited to the margin made on additional retail subscribers (including the margins made on other related services), all other things being equal. We only consider the possibility of increased retail competition, and the disincentives that are associated with this, as part of our dynamic analysis (e.g. paragraph 7.17 of our December 2014 consultation).

<sup>256</sup> For example [redacted]. BT's response to the 2<sup>nd</sup> WMO information request dated 13 May 2015.

strategy limiting distribution of Sky Sports to BT TV would appear to have a relatively modest impact on the ability of BT Sport to bid for sports rights.

- 6.29 We have identified circumstances above where, in principle, Sky may have incentives to withhold supply of its key sports content. We therefore consider that there may be a risk that Sky might not supply its key sports content to other pay TV retailers. However, we have further considered the relevance of existing supply arrangements for Sky's key content in assessing whether Sky is engaging in a practice of non-supply.
- 6.30 The majority of Sky's current supply arrangements have been agreed outside the scope of the WMO obligation<sup>257</sup> and these arrangements will remain in force for a period even if the WMO obligation were removed. In particular Sky has:
- an agreement with TalkTalk for all Sky Sports channels (in SD) which runs until 2016,<sup>258</sup> [redacted]<sup>259</sup>;
  - an agreement with Virgin Media for the supply of all Sky Sports channels (in SD and HD) which runs until 2019<sup>260</sup>; and
  - an agreement with BT for the supply of the Sky Sports 1, 2 & 5 channels via IPTV to BT's Cardinal platform. [redacted].
  - In respect of other pay TV retailers, Sky self-retails its Sky Sports channels (through its NOW TV service) on a number of other third party platforms, including those provided by Sony, Apple and Google amongst others. More recently Sky reached an agreement to supply NOW TV on EE's pay TV service.<sup>261</sup> [redacted].<sup>262</sup> Whilst these deals are on a self-retail basis only, we are not aware of any evidence that Sky has been unwilling to enter into negotiations for wholesale access to Sky's key sport channels.
- 6.31 This evidence suggests that whilst, in principle, there may be circumstances in which Sky has incentives to withhold supply, it is not currently engaging in such a practice.
- 6.32 We further note that the risk of Sky withdrawing supply from Virgin Media, TalkTalk and BT's Cardinal platform in practice is limited by the contractual provisions [redacted]. Under normal circumstances, those arrangements will therefore continue for a fixed period, terminating in:
- [redacted] in the case of BT's Cardinal platform;
  - [redacted] 2016 in the case of TalkTalk; and
  - [redacted] 2019 in the case of Virgin Media.

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<sup>257</sup> With respect to Real Digital's comments, we disagree with Real Digital's interpretation of its correspondence with Sky. [redacted].

<sup>258</sup> Sky and TalkTalk originally agreed commercial terms for wholesale supply of Sky's key sports channels via TalkTalk's YouView Box in 2012. This agreement was then renewed in 2014.

<https://corporate.sky.com/media-centre/news-page/2014/sky-talktalk-wholesale-agreement>  
<sup>259</sup> [redacted].

<sup>260</sup> <https://corporate.sky.com/media-centre/news-page/2014/sky-and-virgin-media-strike-major-new-channel-distribution-agreement>

<sup>261</sup> <http://ee.co.uk/our-company/newsroom/2015/03/11/now-tv-available-on-the-ee-tv-smart-box>

<sup>262</sup> [redacted].

- 6.33 The only current supply arrangement which has been agreed under the scope of the WMO obligation is supply of Sky Sports 1&2 to BT's YouView platform. As we discuss in more detail later in this section, Sky entered into commercial negotiations with BT for wholesale supply of these channels to BT YouView following the 2012 Premier League auction. In those negotiations, Sky required either reciprocal wholesale supply of the BT Sport channels or for both parties to be able to self-retail their channels on the other's platform.<sup>263</sup> BT brought a complaint to Ofcom under the Competition Act 1998 and negotiations did not conclude. Following an application by BT, in November 2014 the CAT agreed to extend the interim WMO arrangements to include BT's YouView platform.<sup>264</sup>
- 6.34 We consider Sky's requirement for reciprocal supply of its key content separately in paragraphs 6.65 to 6.91 below.

### **We have not identified that Sky is engaging in non-supply of its key content**

- 6.35 Our conclusions on Sky's incentives remain the same as in December 2014, which is that because of its strong market position and the ability of Sky Sports to affect the development of competition, that Sky may have an incentive to limit distribution, particularly where the competitor concerned is relatively small but represents a strategic threat to Sky's position and its future profitability.
- 6.36 However, with the exception of BT YouView, all of Sky's main pay TV competitors have current supply arrangements in place which were agreed outside of the scope of the WMO obligation. There is no evidence at this time to suggest that Sky will not be able to agree supply arrangements both in respect of new platforms and in the renewal of existing arrangements.
- 6.37 We discuss in Section 7 that we expect Sky to continue to supply its key content widely and that if Sky were to withhold supply of its content in future we would reconsider the need for regulation to address this concern.

### **We have also considered Sky's terms of supply**

- 6.38 In the December 2014 consultation we also identified that distribution of key sports content but on terms that did not enable fair and effective competition could also be a potential concern.
- 6.39 In response to the consultation BT in particular pointed to specific terms of supply of Sky's key content which it considered were prejudicial to fair and effective competition, including pricing, Sky's requirement for reciprocal supply of key content, as well as a number of other terms. We have considered each in turn below.

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<sup>263</sup> BT is already able to self-retail its BT Sport channels on Sky's DSat platform. Sky noted in its consultation response that it is unable to self-retail the Sky Sports channels via its NOW TV service on BT's YouView platform because this requires either (a) the provision of multicast capacity by BT or (b) YouView upgrading the capabilities of set top boxes so that they can receive linear channels via unicast delivery. Sky response to the December 2014 consultation, paragraph 4.30.

<sup>264</sup> See Section 2, paragraph 2.13 - <http://www.catribunal.org.uk/238-6549/1158-8-3-10-British-Sky-Broadcasting-Limited.html>

## **We have considered whether Sky's wholesale pricing is likely to prejudice fair and effective competition**

### BT argued that wholesale prices are set too high to enable fair and effective competition

- 6.40 In its response to the December 2014 consultation, BT argued that the wholesale rate-card<sup>265</sup> prices set by Sky were too high to enable fair and effective competition and this is another example of a practice of limited distribution.<sup>266</sup> BT said it was important to note that in light of Sky's significant scale relative to other pay TV retailers and its entrenched retail incumbency advantages, the wholesale price Sky could charge might pass a 'traditional' margin squeeze test under competition law, but it would still be too high to allow a pay TV retailer of much smaller scale to compete effectively.<sup>267</sup>
- 6.41 In this respect, BT considered it notable that TalkTalk's "Sky Sports Boost" was more than 20% more expensive than Sky's headline price for its "Sky Sports pack" (£30 per month compared to £24.50 per month (in February 2015)) and that the number of Sky Sports subscribers on TalkTalk was low. BT said this underpinned its view that the terms of wholesale supply to TalkTalk meant it had no incentive to compete effectively against Sky.<sup>268</sup> In addition BT pointed to a lack of growth in Virgin Media's subscriber base, as suggestive of terms of supply that are insufficient to enable competition.<sup>269</sup>
- 6.42 BT considered the evidence of Sky's practice in negotiating its wholesale deals, both prior to the WMO obligation, and in subsequent negotiations outside of the WMO obligation, highlighted Sky's unwillingness to depart from wholesale rate-card prices.<sup>270</sup> BT said Sky had only appeared willing to deviate from rate-card prices with BT on the basis of a penetration discount arrangement. BT pointed to Ofcom's previous conclusions in the 2010 Pay TV statement that such penetration discounts were insufficient to address the competition concerns identified.<sup>271</sup>
- 6.43 Sky said it was critical for Ofcom to note that, with respect to wholesale pricing, in its 2012 Judgment the CAT found that the rate-card price had not been found to obstruct, or contribute to the obstruction of, fair and effective competition by Virgin Media. [§].<sup>272</sup>
- 6.44 Other stakeholders did not comment directly on current wholesale prices in response to the December 2014 consultation.
- 6.45 In an additional submission made on 14 October 2015, BT submitted a model which it said indicated that a pay TV retailer of BT's scale would be unable to profitably

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<sup>265</sup> 'rate-card' refers to the wholesale price set by Sky for access to its Sky Sport channels. [§].

<sup>266</sup> BT also argued that the regulated WMO price was too high because of a number of flaws in the current WMO methodology (BT's response to the December 2014 consultation, paragraph 5.12(v)). However, as set out in Section 2, we do not consider these comments are relevant here because they relate to the effectiveness of the current WMO, not the likelihood of Sky engaging in a practice of setting high wholesale prices.

<sup>267</sup> BT response to the December 2014 consultation, paragraph 6.10(i).

<sup>268</sup> BT response to the December 2014, paragraphs 2.51 and 5.12.

<sup>269</sup> BT response to the December 2014 consultation, paragraph 2.52.

<sup>270</sup> [§].

<sup>271</sup> BT response to the December 2014 consultation, paragraphs 6.19-6.20.

<sup>272</sup> Sky response to the December 2014 consultation, paragraph 4.45.

retail Sky's sports channels at Sky's wholesale rate-card prices, and therefore Sky was engaging in a practice prejudicial to fair and effective competition.<sup>273</sup> BT modelled the costs of a hypothetical standalone pay TV retailer that distributes pay TV via YouView over fibre but does not supply telephony and broadband services. This model was based on BT's own retail costs, the wholesale price for SS1&2 currently paid by BT for its Cardinal platform and Sky's retail prices as of July 2015. BT made a number of adjustments to Sky's retail prices to account for the differences between Sky's and BT's basic TV packages, and to account for the difference between Sky's Max Sports product and SS1&2. As a sensitivity, BT also modelled a supplier of a triple-play service [redacted].

6.46 BT submitted that Ofcom needed to reach a conclusion as to whether the level or nature of Sky's wholesale pricing for Sky Sports has so fundamentally changed since our findings in 2010 that we could safely conclude that the competition concern we identified in 2010 about Sky's wholesale pricing was no longer justified. BT said that Ofcom could not reasonably reach a conclusion on this matter without undertaking detailed economic/financial modelling based on up to date data.<sup>274</sup>

6.47 [redacted].<sup>275</sup>

6.48 [redacted].<sup>276</sup>

#### We have considered the evidence on wholesale pricing in light of stakeholder comments

6.49 In the 2010 Pay TV statement, we identified concerns that Sky was exploiting its market power by limiting the wholesale distribution of its premium channels, with the effect of restricting competition from retailers on other platforms.<sup>277</sup> In particular, we considered that the evidence from negotiations showed a "strong reluctance on Sky's part to negotiate a wholesale deal".<sup>278</sup> In that context, we conducted a review of Sky's pricing and concluded that, to the limited extent that Sky entered into discussions on wholesale pricing, the wholesale rate-card price would not allow pay TV retailers to compete effectively.<sup>279</sup>

6.50 In the 2012 CAT Judgment, the CAT approached the question of pricing on the basis that Sky was complying with a margin squeeze test under the abuse of dominance provisions of competition law in setting its wholesale rate-card price.<sup>280</sup> Contrary to Ofcom's finding, however, the CAT considered that the rate-card price did allow Virgin Media to compete effectively with Sky.<sup>281</sup> The CAT noted effective competition did not require symmetry between retailers and that whilst Sky had certain scale advantages in pay TV, Virgin Media had its own set of advantages.<sup>282</sup> The CAT also found that Sky's cost advantages over Virgin Media by reason of the two platforms'

<sup>273</sup> BT, *Additional evidence on why Sky's rate-card pricing for Sky Sports is prejudicial to fair and effective competition* ('BT additional pricing submission'), 14 October 2015.

<sup>274</sup> BT additional pricing submission, 14 October 2015, paragraphs 2.3-2.4.

<sup>275</sup> [redacted].

<sup>276</sup> [redacted].

<sup>277</sup> 2010 Pay TV Statement, paragraph 1.6.

<sup>278</sup> 2010 Pay TV Statement, paragraph 7.191.

<sup>279</sup> 2010 Pay TV Statement, paragraphs 7.192 and 7.193.

<sup>280</sup> 2012 CAT Judgment, paragraph 767.

<sup>281</sup> 2012 CAT Judgment, paragraphs 810 to 815.

<sup>282</sup> 2012 CAT Judgment, paragraphs 809 to 810.

difference in scale were not substantial enough to have a material impact on the ability of Virgin Media to provide effective competition.<sup>283</sup>

- 6.51 The CAT did not consider the issue of rate-card pricing to new entrants (i.e. entrants other than Virgin Media) in the 2012 CAT Judgment. As set out in Section 2 (paragraph 2.15), in February 2014 the Court of Appeal found that the CAT had failed to deal with the rate-card price issue in relation to new entrants.<sup>284</sup> The Court of Appeal therefore remitted this issue to the CAT for further consideration and this process is currently ongoing.
- 6.52 In this review, we have considered whether there appear to be concerns relating to the wholesale price charged by Sky which would warrant an independent consideration of pricing issues in circumstances where Sky has agreed a number of wholesale supply arrangements. We are mindful of the need to be cautious in examining commercially agreed prices unless there are good reasons for doing so.
- 6.53 The wholesale prices set in the WMO obligation in 2010 are currently set at £17.01 for SS1 alone, £16.80 for SS2 alone and £25.34 for SS1&2.<sup>285</sup> [redacted]. The table below summarises Sky's current wholesale pricing.

**Table 6.1: Sky Sports (SD) wholesale pricing per subscriber per month (excl. VAT) from 1 June 2015**

[redacted]

Source: Sky's response to the 2<sup>nd</sup> WMO information request dated 13 May 2015

- 6.54 As discussed earlier, the only current supply arrangement which is subject to the requirements of the WMO obligation is supply to BT's YouView platform.<sup>286</sup> The price for SD versions of SS1&2 to BT YouView is set at the regulated WMO price.
- 6.55 In respect of arrangements with all other operators, [redacted].<sup>287</sup> [redacted].
- 6.56 [redacted].
- 6.57 Neither Virgin Media nor TalkTalk have suggested that the wholesale prices they currently pay are set at a level which does not enable them to compete. [redacted]. We note BT made comments about TalkTalk's retail pricing, however as above, TalkTalk itself did not identify any concerns with the wholesale price it currently pays.
- 6.58 We have reviewed the modelling exercise submitted by BT. We note in advance that it is difficult to determine what the wholesale price of Sky Sports channels in respect of BT's YouView platform would be in the absence of regulation. The prices which BT is currently paying result from BT being granted the benefit of the WMO obligation in respect of its YouView platform and it is by no means certain that those wholesale charges would continue in the absence of the WMO obligation. As set out above, [redacted].

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<sup>283</sup> 2012 CAT Judgment, paragraphs, 807, 808 and 812. The CAT's assessment was premised on Ofcom's finding that Sky's rate-card prices passed the margin squeeze test.

<sup>284</sup> CoA February 2014 Judgment, paragraphs 100-101.

<sup>285</sup> <http://media.ofcom.org.uk/analysts/regulated-prices/>

<sup>286</sup> In accordance with the CAT's decision to extend the interim WMO to supply via IPTV over BT's YouView platform in November 2014. See footnote 18 in Section 2.

<sup>287</sup> Sky's response to the WMO information request dated 31 October 2014.

- 6.59 We consider there are a number of methodological issues with BT's submission. BT has attempted to replicate the approach which Ofcom adopted in the 2010 Pay TV statement. For example, BT makes an adjustment to try and reflect the scale advantages Sky had, which we considered at that time were unmatched by a standalone pay TV entrant that would need to grow its subscriber base. The approach to those adjustments was informed by market conditions at that time. However, if we were to undertake a new price squeeze analysis we would need to consider what adjustments were now appropriate in the light of current market circumstances, for example, the emergence of competing providers offering triple-play products with their own advantages.
- 6.60 An evaluation of whether Sky was imposing a price squeeze would likely focus on whether Sky's retail prices were sufficient to cover Sky's retail costs,<sup>288</sup> potentially with adjustments. However, whilst we recognise BT has used the information it has available to it, BT's analysis is necessarily dependent upon BT's own retail costs and because there are very large differences between the retail pay TV operations of BT and those of Sky, they may provide little assistance.<sup>289</sup> In particular,<sup>290</sup> Sky's retail pay TV platform uses a quite different technology to BT (DSat),<sup>291</sup> Sky deploys different in home equipment, has a different customer base (in that it is likely to have a much higher proportion of customers taking premium channels than BT), and the services Sky offers vary significantly from those that BT offers (e.g. the range of basic channels on Sky, differences in the types of add-on services available etc.). All these factors are examples of important differences that will have an impact on retail costs and mean that BT's retail costs are unlikely to be a reliable indicator of Sky's retail costs.<sup>292</sup>
- 6.61 Even on its own terms (and addressing any methodological issues) there are reasons to believe that BT's model overstates the scale of any potential price squeeze. BT's

<sup>288</sup> In our pricing work in 2010, and in our assessment of VULA margin we assessed the possibility of a margin squeeze with reference to retail costs of the incumbent (with adjustments as necessary to reflect unmatched advantages of the incumbent firm). See paragraphs 10.59-10.60 of the 2010 Pay TV statement paragraphs and paragraphs 5.12 to 5.33 of the VULA margin statement (<http://stakeholders.ofcom.org.uk/consultations/VULA-margin/statement/>). That would be the natural starting point if we were to undertake an exercise again as part of this review i.e. we would base the test on Sky's retail costs, the products sold by Sky, Sky's retail prices and any adjustments that are warranted.

<sup>289</sup> A further question raised by BT's approach is whether BT's costs, as reflected in its model, represent the retail costs of an efficient operator.

<sup>290</sup> This is not intended to be an exhaustive list. An exercise of attempting to fully reconcile BT's costs to Sky's prices and services would be extremely complex in practice. BT itself has recognised that its modelling is indicative and is not a substitute for undertaking a direct examination of Sky's retail costs (BT additional pricing submission, paragraph 2.7).

<sup>291</sup> BT's preferred model is based on a standalone provider that delivers pay TV over fibre. This is not the distribution technology used by Sky, nor is it the distribution model used by Virgin Media, TalkTalk or BT itself and it necessitates a series of arbitrary assumptions regarding the allocation of costs.

<sup>292</sup> BT attempts to deal with some of the differences between BT and Sky products. It attempts to deal with BT's less extensive range of basic channels and the fact that it supplies only SS1&2 (and not all of Sky's sports channels) by making an adjustment to reflect the "value" of these channels. It also attempted to account for Sky's lack of BT Sport. However, making adjustments of this sort is far from straightforward. As a matter of methodology, Ofcom has elsewhere expressed doubts about using "value" as a basis for undertaking price squeezes (see Fixed Access Market Reviews: Approach to the VULA margin March 2015, paragraphs 6.257 to 6.261). [3<].

modelling focuses on a pay TV only customer, but in practice all of BT's pay TV customers are triple-play, [redacted]. [redacted].<sup>293</sup>

6.62 In the December 2014 consultation we identified Sky's terms of supply as a potential practice of concern and sought evidence to determine whether or not there were indications of a concern with respect to this practice (including pricing) such as to warrant continued regulation. We have considered stakeholder responses to that consultation in assessing whether or not the evidence provided demonstrates a concern which would justify undertaking a detailing pricing analysis. We do not consider that the analysis which BT subsequently provided provides sufficient grounds to demonstrate that Sky's wholesale pricing amounts to a practice which is prejudicial to fair and effective competition, particularly given the context of the existing commercial supply arrangements. We therefore do not consider it appropriate to undertake a more detailed pricing analysis.

6.63 [redacted].

6.64 Accordingly, having undertaken a careful appraisal of BT's evidence on Sky's pricing and all of the other evidence available to us, we do not consider that Sky's current, commercially agreed, wholesale pricing (outside of the WMO obligation) is set at a level which prejudices fair and effective competition. As discussed in Section 7 if evidence emerges in future that Sky is setting terms which prejudice fair and effective competition then we will reassess this position.

### **We have also considered Sky's requirement for reciprocal supply**

6.65 Sky and BT entered into commercial negotiations for the wholesale supply of the SS1&2 channels to BT's YouView platform following the 2012 Premier League auction. In those negotiations, Sky indicated it would only supply Sky Sports channels to BT if BT agreed to reciprocal supply of BT Sport to Sky.<sup>294</sup>

6.66 In its response to the December 2014 consultation, BT pointed to Sky's requirement for reciprocal supply (which it described as 'anti-competitive') as an example of a practice which was prejudicial to fair and effective competition.<sup>295</sup>

6.67 Sky, however, said it was fair and reasonable that, given BT's position as a vertically integrated player with its BT Sport channels, either (a) there was reciprocal wholesale supply of each other's key sport channels or (b) that each firm should be able to self-retail their channels on the other's platform.<sup>296</sup> Sky said a one-way

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<sup>293</sup> [redacted].

<sup>294</sup> See in particular Section 3 of our decision on BT's request for interim measures under BT's CA98 Complaint: [http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01106/IM\\_decision.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01106/IM_decision.pdf)

<sup>295</sup> BT refers to Sky's requirement for reciprocal supply as 'the Grant-Back Condition' in its consultation responses, arguing that this is a more appropriate description because Sky is demanding a non-essential input (BT Sport) in return for an essential input (Sky Sports). BT's response to the December 2014 consultation, paragraphs 2.50, 5.4, 6.15(ii) and 6.16 and BT's response to the July 2015 consultation, paragraphs 2.1-2.3.

<sup>296</sup> BT is already able to self-retail its BT Sport channels on Sky's DSat platform because it is a platform on which third-party channel operators can acquire access on a fair, reasonable and non-discriminatory basis as long as they meet a set of requirements. This is governed by the Technical Platform Services guidelines - <http://stakeholders.ofcom.org.uk/consultations/tpsguidelines/statement/>. See footnote 267 above for why Sky is currently unable to self-retail on the BT YouView platform.

wholesale arrangement would provide BT with a significant commercial advantage over Sky and it would not be commercially rational for Sky to enter into an agreement of that type.<sup>297</sup>

- 6.68 Sky has indicated that its concern about reciprocity of supply is not a recent development and is not linked to BT's emergence as a significant competitor to Sky in the past few years.<sup>298</sup> [§].

We issued a supplementary consultation on Sky's requirement for reciprocal supply in July 2015

- 6.69 In our July 2015 consultation we invited further submissions on whether Sky's requirement for reciprocal supply of key content as a condition for supply of Sky's key content is a term of supply that would prejudice fair and effective competition. In particular, we sought evidence on the extent to which a requirement for reciprocal supply of channels containing key content:

- i) may in effect amount to non-supply of Sky's key content;
- ii) may prejudice fair and effective competition at different levels of the value chain, e.g. by neutralising the competitive differentiators of other pay TV retailers and/or undermining their incentives or ability to compete in other parts of the value chain (particularly, channel development); or
- iii) has led to competing retailers being forced to change their behaviour in considering whether or not to bid for sports rights.

- 6.70 We received responses from BT and Sky ([§]). We have summarised the main points raised below. We have considered the comments stakeholders made and have taken them into account in reaching our conclusions.

Stakeholders commented on the extent to which Sky's requirement for reciprocal supply would lead to non-supply

*BT argued that non-supply was the logical outcome of Sky's demand*

- 6.71 BT argued that it would not be economically rational for BT to accept a reciprocal supply arrangement with Sky and therefore the only "logical outcome" of this practice was non-supply of Sky's key content to BT.<sup>299</sup> [§] also considered that Sky's demand for reciprocal supply in effect circumvented the spirit of the WMO obligation by placing a caveat on the supply of Sky Sports that BT was unable to meet, and which sought to undermine a rival's incentive and ability to compete.<sup>300</sup>
- 6.72 BT pointed to a report it commissioned from Compass Lexecon<sup>301</sup> in support of its position. It said the modelling in this report demonstrated that if BT were to accept Sky's demand for reciprocal supply, BT's profitability would be reduced relative to a

<sup>297</sup> Sky's response to the December 2014 consultation, paragraph 4.33.

<sup>298</sup> Sky's response to the December 2014 consultation, paragraph 4.36.

<sup>299</sup> BT's response to the July 2015 consultation, paragraphs 3.5-3.10.

<sup>300</sup> [§].

<sup>301</sup> Compass Lexecon report to BT "Modelling static and dynamic competition in the retail CPSC market" 20 April 2014. BT commissioned Compass Lexecon to develop these models in the context of the BT CA98 Complaint.

situation where it rejected the reciprocal supply arrangement and continued to self-retail BT Sport on DSat (i.e. relative to the status quo). BT argued that Sky's demand was therefore "merely tactical" and intended to entrench the status quo.<sup>302</sup>

- 6.73 As additional evidence in support of the findings of the Compass Lexecon model, BT also pointed to (i) Sky's own statements to BT,<sup>303</sup> (ii) BT's willingness to forego access to SS1&2 rather than accept Sky's demands and its spending on court proceedings in seeking the extension of the interim WMO obligation to YouView; (iii) [redacted]; and (iv) data on consumer preferences from a choice modelling exercise also undertaken by Compass Lexecon, which BT said proved that the effects predicted by the economic model were correct in practice.<sup>304</sup>

*Sky disagreed that its demand would necessarily lead to non-supply, but in any case argued that an absence of wholesale supply would not prejudice BT*

- 6.74 Sky argued that BT's position during its negotiations with Sky over the supply of SS1&2 was inconsistent with the idea that BT was implacably opposed to a reciprocal supply agreement. Sky pointed to the history of the negotiations between Sky and BT, and highlighted as an example BT's proposal [redacted] that would have provided wholesale supply of BT Sport to Sky [redacted]. It said the course of those negotiations demonstrated that it was reasonable for Sky to take the view that there was a genuine prospect of a reciprocal wholesale supply agreement with BT. In addition, Sky argued it was not possible for to know how BT would have approached negotiations in an environment "undistorted" by the regulatory backdrop, nor for either Sky or Ofcom to know now whether BT would enter into such a reciprocal arrangement in the future.<sup>305</sup>

- 6.75 [redacted].<sup>306</sup>

- 6.76 Furthermore, Sky argued that it was incorrect to characterise the alternative to a reciprocal supply arrangement as 'non-supply' because even if there was no wholesale supply of Sky Sports channels to BT, BT's YouView customers would still be able to subscribe to Sky's sports channels via its NOW TV service (either on an OTT basis or via YouView once encrypted unicast delivery was enabled on that platform).<sup>307</sup>

- 6.77 Finally, Sky also argued that in order to compete effectively BT did not need to be able to differentiate its retail offering against Sky's by being put in a position where it was able to retail all live Premier League matches, whereas Sky could not. Sky said there were many other ways that BT could, and did, differentiate its retail offering.<sup>308</sup> Sky pointed to the low take-up of the Sky Sports channels on the BT TV service, the marginal impact of BT's inability to retail Sky Sports when considered against its broader triple-play proposition, and the fact that wholesale supply of Sky Sports

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<sup>302</sup> BT response to the July 2015 consultation, paragraphs 3.9-3.10.

<sup>303</sup> [redacted].

<sup>304</sup> BT response to the July 2015 consultation, paragraphs 3.14-3.22.

<sup>305</sup> Sky response to the July 2015 consultation, paragraphs 4.4-4.16.

<sup>306</sup> [redacted].

<sup>307</sup> See paragraph 3.35 in Section 3. [redacted]. Sky response to the July 2015 consultation, paragraphs 4.17-4.20.

<sup>308</sup> As examples Sky pointed to BT's other content (e.g. other sports such as Champions League, or non-sport content such as its new AMC channel), its advantages in the supply of broadband and telephony, as well as hardware and technical features, such as the new BT Sport Ultra HD channel. Sky's response to the July 2015 consultation, paragraph 5.7.

would make no difference to BT's ability to monetise its sports channels (given a large proportion of BT Sport customers are either on the Virgin Media or Sky platforms), as evidence that an absence of wholesale supply of Sky's Premier League content would not prevent BT from competing effectively.<sup>309</sup>

- 6.78 Sky also noted that its insistence on reciprocal supply in its negotiations with BT was already the subject of an ongoing Competition Act investigation by Ofcom. It said that if Ofcom was now considering the use, instead, of section 316 to address the same matter, we should make that clear. Sky considered that it would be difficult for Ofcom to justify why it would not be more appropriate to proceed under the Competition Act (as we are required to do under section 317 of the Act), because the issue under concern related solely to a single set of bilateral negotiations between Sky and BT.<sup>310</sup>

Stakeholders also set out differing views on the extent to which a reciprocal agreement would be prejudicial to fair and effective competition

- 6.79 BT argued that, whilst it was theoretically possible that it could agree a reciprocal agreement with Sky, the net result of any such deal would also be prejudicial to fair and effective competition. In particular it argued that Sky's demand enables it to appropriate the investment of a new entrant and ensures that Sky can maintain a relative competitive advantage, as a result BT is precluded from ever '*catching up*' with Sky and [§]. BT argued that, as a consequence, its incentives to invest and innovate would be neutralised.<sup>311</sup>
- 6.80 In addition, BT argued that even if Sky did compensate BT for the static and dynamic losses that BT would suffer as a result of agreeing to the reciprocal supply requirement, this would lead to higher retail prices. It also said it should be a cause for concern to Ofcom that Sky would seek to '*buy off*' BT from competing strenuously and noted that in any case [§].<sup>312</sup>
- 6.81 Sky argued that even where BT and Sky had cross-supply of each other's Premier League content, this would not prevent BT from differentiating its retail service from Sky's as there were a number of other ways it could do this (see paragraph 6.77 above). It also noted that the CAT's 2012 Judgment had indicated Virgin Media was an effective competitor to Sky despite there being no difference in the range of live Premier League football carried by Sky and Virgin Media.<sup>313</sup> Sky also argued that there was no basis for the proposition that BT would be dis-incentivised from bidding for sports rights by the knowledge that Sky would require it to wholesale its own sports channels with Premier League content to Sky. It noted that wholesale supply to Sky could be an attractive and effective means of monetising investment in sports content at scale.<sup>314</sup>

Whilst we have concerns in principle with Sky's requirement for reciprocal supply, in practice the current impact is unclear

- 6.82 Sky's requirement for reciprocal supply makes supply of its Premier League content to a competing retailer conditional on the outcome of another transaction with that

<sup>309</sup> Sky response to the July 2015 consultation, paragraphs 5.8-5.16.

<sup>310</sup> Sky response to the July 2015 consultation, paragraphs 2.1-2.7.

<sup>311</sup> BT response to the July 2015 consultation, paragraphs 3.24-3.28.

<sup>312</sup> BT response to the July 2015 consultation, paragraph 3.29.

<sup>313</sup> Sky response to the July 2015 consultation, paragraphs 5.24-5.26.

<sup>314</sup> Sky response to the 2015 July consultation, paragraphs 5.27-5.30.

retailer. We have set out in Section 5 our view on the importance of Sky's key content, as well as its strong market position (both in channel supply and in retail pay TV) where may benefit from a number of incumbency advantages.

6.83 In light of that view, we believe that, in principle, there is potential for concern where a vertically integrated operator in a strong market position such as Sky, makes the supply of its key content subject to a requirement which may condition the way in which its competitor chooses to supply its own content to the detriment of effective competition. In particular, as identified in our July 2015 consultation, we would have concerns if Sky was able to use its requirement for reciprocal supply to achieve any of the following:

- i) to appropriate the benefit of an investment or an innovation made by a competitor. Such practice would likely risk reducing the competitor's incentives to invest and innovate, thereby prejudicing competition in the long run;
- ii) to unduly restrict the competitive strategy of another provider, for example by forcing them to give up an important differentiator, by inducing them to stop competing in certain areas or by inducing them to raise their prices, then competition could be prejudiced; and
- iii) to prevent Sky's key content from being supplied to a competing platform, rendering that platform less effective as a competitor.

6.84 We note that in practice the issue of reciprocal supply currently only affects BT as the only other holder of key content.<sup>315</sup> Our analysis therefore focusses on the impact and likelihood of Sky requiring reciprocal supply in any agreement with BT.

6.85 We have considered BT's arguments in light of its behaviour during its negotiations with Sky and evidence from its internal documents. [redacted].<sup>316</sup>

6.86 We consider that the Compass Lexecon models submitted by BT do not substantiate BT's claim that Sky's requirement for reciprocal supply will necessarily lead to non-supply:

- i) the report contains assumptions which do not necessarily match real world conditions and it is not clear to us that the results of the modelling exercise would be the same if these assumptions were changed to reflect market conditions;<sup>317</sup>
- ii) notwithstanding these concerns we noted that the report itself only shows that non-supply will be the outcome if there are no wholesale payments for the parties' sports channels. In our view this is not realistic;<sup>318</sup> and
- iii) the models do not take sufficient account of potential efficiencies that may result from Sky being able to retail BT Sport directly to its customers (for example because Sky is able to use its knowledge of its own DSat customer base to better target potential customers interested in BT Sport), [redacted].<sup>319</sup>

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<sup>315</sup> [redacted].  
<sup>316</sup> [redacted].  
<sup>317</sup> [redacted].  
<sup>318</sup> [redacted].  
<sup>319</sup> [redacted].

- 6.87 We do not consider that these models can be relied on as evidence of BT's arguments that Sky's requirement for reciprocal supply would necessarily lead to non-supply nor can they be relied on as evidence that all reciprocal arrangements would necessarily lead to consumer harm.
- 6.88 In addition, [§<].<sup>320</sup> We also consider it is relevant that BT's negotiations with Sky took place before BT had acquired exclusive Champions League rights. Sky has indicated that its requirement for reciprocal supply is focussed on Premier League content and therefore it is not clear whether BT's acquisition of Champions League rights could have reduced the potential impact on BT of a reciprocal supply arrangement.
- 6.89 In practice the negotiations between Sky and BT were not concluded.<sup>321</sup> As a consequence, BT did not have access to SS1&2 on its YouView platform until the CAT decision in November 2014 to extend the interim WMO obligation to YouView. Prior to that decision, however, BT continued to invest heavily in its BT Sport channels (for example in November 2013 it paid £897m for exclusive Champions League rights over three seasons) despite not having access to SS1&2 on YouView. Furthermore, BT's pay TV strategy to date has had a particular focus on monetising its sports investment by bundling BT Sport with its broadband service on DSat (using regulated access to DSat), as well as using wholesale revenues from Virgin Media and more recently BT has continued to invest in its pay TV proposition (including acquiring exclusive rights to broadcast the AMC channel in the UK, as well as launching an ultra HD service – see Section 3 paragraph 3.38).<sup>322</sup> It is therefore not clear that BT's broader strategy to date has been materially affected by Sky's requirement for reciprocity.
- 6.90 Because the negotiations between Sky and BT over reciprocal supply were not concluded, we do not consider that it is possible to rely on the negotiating positions or offers made during those negotiations as evidence of what would have happened in practice. Therefore we do not consider those negotiations provide evidence that any deal agreed would have contained terms prejudicial to fair and effective competition.
- 6.91 For the reasons set out above we have concluded that whilst there may be concerns in principle with Sky's requirement for reciprocal supply of key content, it is not clear from the currently available evidence that these concerns would be borne out in practice. We discuss in Section 7 situations which might lead us to reassess this position should evidence emerge that Sky is acting in a manner prejudicial to fair and effective competition.

### **We have not seen any evidence of other terms of supply which are likely to prejudice fair and effective competition**

- 6.92 In its response to the December 2014 consultation, BT also argued that Sky was engaging in a practice of limited distribution through its terms of supply which it said provided a substandard or partial product to its competitors. In particular as examples it pointed to Sky only wholesaling a sub-set of Sky Sports channels (i.e. Sky Sports

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<sup>320</sup> [§<].

<sup>321</sup> BT submitted its CA98 Complaint against Sky in May 2013:

[http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01106/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01106/)

<sup>322</sup> See paragraph 6.28 above.

1&2), excluding other additional features (interactivity or multi-room services), only supplying the SD versions of channels or placing restrictions on marketing of the Sky Sports channels.<sup>323</sup> [§<].<sup>324</sup>

- 6.93 However, in view of our conclusions on the evidence of current supply arrangements (and noting that other competitors do have access to some of the products/channels BT has highlighted), as well as the specific circumstances in relation to the negotiations between Sky and BT (which relate to the issue of Sky's requirement for reciprocal supply in particular), we do not consider there is sufficient evidence to point to these as standalone practices of concern.

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<sup>323</sup> BT's response to the December 2014 consultation, paragraphs 6.10-6.11, 6.17-6.18 and 8.11-8.17.

<sup>324</sup> [§<].

## Section 7

# Conclusions and decision to remove the WMO obligation

7.1 In this section we set out a summary of our conclusions in this statement and our overall decision to remove the WMO obligation on the basis of those conclusions.

## Access to Sky's key content is important to pay TV retail competition

7.2 In Section 4 we have concluded that live Premier League coverage is the most important sporting competition and is capable of influencing the choice of pay TV retailer for a significant number of consumers. We have also identified that Champions League content may be capable of influencing consumers subscription decisions, albeit to a lesser extent than Premier League. Without access to this content, pay TV retailers may be limited in their ability to attract high value subscribers.

7.3 This key content is currently shown on the Sky Sports and BT Sport channels. In Section 5 we have assessed the impact of the key content held by Sky and BT and their market positions. We conclude that the evidence does not currently suggest that the content available on BT Sport is important to a large enough proportion of pay TV subscribers to strongly influence competition between pay TV retailers. Furthermore, BT does not yet have a strong retail market position as a pay TV retailer, and therefore we consider that limited distribution of its content is unlikely to prejudice the emergence of effective competition at this time.

7.4 Our assessment indicates that Sky's key content remains important to a significant proportion of consumers and without access to this content competing pay TV retailers are likely to struggle to compete for a sizeable and valuable segment of the retail pay TV sector. In addition, Sky has a long standing strong position in the supply of retail pay TV services, as well as in the supply of key sports channels. Competitors without access to its key content will therefore be less able to contest Sky's strong market position and their incentives and ability to invest in new content and platform innovations may be reduced.

## We have considered whether Sky is engaging in practices prejudicial to fair and effective competition

7.5 In view of our findings about the impact of Sky's key content on competition in pay TV, we have assessed in Section 6 the likelihood, and impact, of Sky engaging in the following practices:

- i) non-supply of key content; and
- ii) supply on terms which would not enable fair and effective competition. In particular we have considered:
  - o setting prices for wholesale supply of key content at a level which does not enable fair and effective competition; and

- a requirement for reciprocal supply of channels containing key content.
- 7.6 We continue to consider that Sky could, in principle, have incentives to withhold supply of its key content, and to set prices which do not enable fair and effective competition, in order to protect its market position. However, on the basis of the available evidence we consider that Sky is not currently acting on these incentives.
- 7.7 In particular with the exception of BT YouView, all Sky's main pay TV competitors have commercial agreed supply arrangements in place. We therefore have not identified that Sky is engaging in the practice of non-supply.
- 7.8 Furthermore, and given the context of that wide supply, we have not identified that Sky is engaging in a practice of setting terms of supply which prejudice fair and effective competition. In particular, we consider that the evidence provided to us does not show that pay TV retailers are unable to compete effectively on the basis of Sky's current wholesale pricing (outside of the WMO obligation) for access to its key content. In addition, with respect to Sky's practice of requiring reciprocal supply of key content, whilst we consider there may be concerns in principle, it is not clear from the currently available evidence that these concerns would be borne out in practice.

### **We consider it is appropriate to remove the WMO obligation**

- 7.9 In the December 2014 consultation we said that our initial view was that maintaining regulation on Sky might be appropriate to address the concern that Sky may have incentives to engage in practices prejudicial to fair and effective competition. However, we also recognised that our assessment was dependent on a number of considerations and the pay TV sector was continuing to evolve. We therefore also consulted on removing the WMO obligation from Sky.<sup>325</sup>
- 7.10 For the reasons set out in this document, we do not consider that it would be appropriate to impose regulation in relation to the supply of channels containing key sports content at this time. Whilst we recognise that there may be concerns in principle given Sky's strong position in the market, in practice the evidence shows that Sky is supplying widely and we do not consider that the available evidence shows that terms of this supply may be prejudicial to fair and effective competition..
- 7.11 We have therefore decided that it is appropriate to remove the WMO obligation. We will be removing Condition 14A which contains the WMO obligation from each of Sky's TLCS (television licensable content services) licences for Sky Sports 1, Sky Sports 2, Sky Sports HD and Sky Sports 2 HD.
- 7.12 Under section 3(4)(b) of the Broadcasting Act 1990, Ofcom is required to provide Sky with the opportunity to make representations on a variation to its licences. As our consultations to date have not included any specific details of variation to Sky's licences, we have written to Sky today to advise it of our decision to remove Condition 14A from the TLCS licences for each of Sky Sports 1, Sky Sports 2, Sky Sports HD and Sky Sports 2 HD and to ask if Sky wants to make representations on this variation.
- 7.13 Our review has focussed on whether there are competition concerns arising from the supply of key sports content. We recognise that in the context of our Strategic

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<sup>325</sup> December 2014 consultation, paragraphs 1.22, 1.24 and 8.5-8.8.

Review of Digital Communications<sup>326</sup>, some stakeholders have made reference to broader competition concerns within the pay TV sector in relation to Sky's market position. We will consider those submissions as part of that ongoing review.

## **We expect Sky's key content to be supplied widely, on reasonable terms**

- 7.14 We expect competition in pay TV to deliver benefits to consumers in the form of choice, innovation and lower prices. In order for retailers to be able to compete in pay TV they need to be able to access content that consumers want to watch. We have identified the most important content to be live Premier League matches and, to a lesser extent, live Champions League matches.
- 7.15 We note Sky's current wholesale supply arrangements to Virgin Media, TalkTalk and BT Cardinal will remain in place for at least the duration of the agreed contracts. In the case of BT YouView, if appropriate, and any other retailers (e.g. new entrants) seeking supply, we would expect Sky and those retailers to engage willingly, constructively and in a timely manner in such negotiations. We already monitor the pay TV market closely and we will continue to do so, in particular with a view to determining whether the potential concerns identified in this statement arise in the future. We will continue to monitor the availability and distribution of key sports content, technological developments in pay TV services, subscriber numbers for these services, commercial agreements and relationships between competing pay TV retailers, retail packaging and pricing of key sports content, and the importance of particular content to subscribers in choosing their pay TV service.
- 7.16 Should evidence emerge that Sky was engaging in practices which are prejudicial to fair and effective competition, we will reassess the need for ex ante regulation. In particular our expectation is that consumers should continue to have access to, and a choice of, packages and services containing Sky's key content. We would be concerned if there was evidence of Sky withholding its key content from competing retailers. Similarly, we would be concerned if there was evidence of Sky introducing unreasonable terms into its supply contracts and/or it requiring an agreement which included conditions designed to restrict a competitor's ability to compete as aggressively as it otherwise would or where a requirement for reciprocal supply amounted to effective non-supply of Sky's key content.
- 7.17 This is an important market and we are concerned to ensure that fair and effective competition is delivered in the interests of citizens and consumers. We will therefore consider it a priority to intervene to address any concerns if they were to arise.

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<sup>326</sup> <http://stakeholders.ofcom.org.uk/telecoms/policy/digital-comms-review/>

## Annex 1

# Stakeholder comments on key content

A1.1 In this Annex we set out and respond to comments we received on our assessment of key content in the December 2014 consultation. Our final assessment, which takes account of the comments in this Annex, is set out in Section 4.

## Approach to assessing key content

### Stakeholder comments

A1.2 The PL said that Ofcom had not provided any explanation for what criteria it had applied to determine when content was valued to such an extent that it was capable of influencing consumer choice or not. It noted that we appeared to adopt a number of different criteria, referring to content being either '*important*' or '*particularly important*', without being clear about whether this content was capable of influencing consumer choice for the purpose of our definition. The PL said that, in principle, all valued content was potentially capable of influencing consumer choice.<sup>327</sup>

A1.3 In addition, the PL said we had failed to define or explain what we considered to be a "*significant number of consumers*" in this context. It noted that we had used a variety of terms to describe the size of relevant groups but because we had not explained what proportion we considered to be "high", "significant" or "large" our approach was not capable of objective justification.<sup>328</sup>

A1.4 The PL said the consumer survey evidence we had used in our assessment suffered from several methodological shortcomings, the implications of which were not fully discernible from the materials that Ofcom had published. It said these shortcomings needed to be explored and understood before any reliance could be properly placed on the survey results. The PL pointed to the CMA's published guidelines on survey evidence, and claimed Ofcom had ignored all the key principles in these guidelines.<sup>329</sup>

### Our response

A1.5 As part of this review, we are seeking to identify content which is sufficiently important to be capable of influencing the choice of pay TV provider for a significant number of consumers. The concern which underpins this approach is that there is certain content which, if withheld from other pay TV retailers, could influence subscriber platform choice to the extent that it materially raises barriers to entry and expansion for these pay TV retailers.

A1.6 Inevitably there is a degree of judgement involved in identifying such content. In practice, we approach this by considering how content compares *relative to* other content in terms of its importance taking into account all the relevant evidence available to us. As the PL noted, we do not identify a precise threshold for the

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<sup>327</sup> The PL response to the December 2014 consultation, paragraphs 4.5-4.8.

<sup>328</sup> The PL response to the December 2014 consultation, paragraphs 4.9-4.10.

<sup>329</sup> The PL response to the December 2014 consultation, paragraphs 1.5.3 and 4.76-4.78.

number of consumers that would be sufficient to prevent a pay TV retailer from competing effectively as we do not consider it would be feasible to do so.<sup>330</sup>

- A1.7 We have responded to some of the PL's specific criticisms of our survey methodology in the rest of this annex where relevant. More generally, we do not agree that respondents to our consumer survey were provided with incomplete or inadequate information, nor that the survey ignored the CMA's published guidelines; these guidelines place emphasis on transparency of the research, representativeness of sample, soundness of method and disclosure of results, while also acknowledging that judgement and skill need to apply in any particular research. Ofcom has carried out robust research through experienced independent research agencies. We have published technical appendices and data tables that include the questionnaire, methodology and the full set of data.

## Importance of sport content

### Stakeholder comments

- A1.8 BT<sup>331</sup>, Virgin Media, Real Digital<sup>332</sup> and [X] agreed that sports content was important to consumer choice in pay TV services. Virgin Media said this was so widely recognised, and evidenced, as to be uncontroversial.<sup>333</sup> [X] pointed to the specific features of sport content, including its propensity to lose value after live broadcast, its degree of exclusivity to pay TV, and the amounts invested in the broadcast rights, as reasons why sports content stood apart from other content types.<sup>334</sup>
- A1.9 Only the PL disagreed as it argued there was no evidence to support Ofcom's view that access to sports content is an important driver of choice in pay TV services. In particular, the PL argued that Ofcom's own survey evidence showed that sports content on its own does not stand apart as being especially important to consumers as compared to other types of content, and that what is primarily important to consumers is access to a range and volume of content in general (one example it pointed to was that 54% of respondents stated that the reason for subscribing to pay TV was access to more content in general, compared to 11% for sport content).<sup>335</sup>
- A1.10 The PL noted our argument that sport has a high degree of exclusivity to pay TV, but said that: i) we provided no evidence to support this view; ii) we said in the 2010 Pay TV statement that sports content was widely available on free-to-view TV; and iii) movies also had a high degree of exclusivity on pay TV. It also argued that the fact that there are a substantial numbers of consumers who pay a premium to access sports channels only demonstrated that those subscribers valued sports content, not that sports content is an important driver of pay TV provider choice in the first place. The PL also considered that the evidence did not show that sports

<sup>330</sup> Moreover, whether content is capable of affecting competition depends on both the number and value of subscribers whose platform choice is influenced by the availability of that content.

<sup>331</sup> BT response to the December 2014 consultation, paragraph 3.2-3.3.

<sup>332</sup> Real Digital response to the December 2014 consultation, page 11.

<sup>333</sup> Virgin Media response to the December 2014 consultation, paragraph 33.

<sup>334</sup> [X]

<sup>335</sup> November 2013 survey, Question A12A: "What were the reasons your household got a TV service that you pay for on your main set rather than having free TV channels only?". The PL also pointed to Figure 5.1, December 2014 consultation which showed that sports content was as important as other genres such as documentaries, movies and kids programming.

content was important in the choice of pay TV provider. Finally, the PL noted that when respondents were asked about their choice of specific pay TV provider, only 6% of respondents (the fifth most popular choice) said that they chose their specific pay TV provider in order to access specific sports channels and even fewer, only 3%, said that they did so in order to have access to Sky Sports.<sup>336</sup>

## Ofcom's response

- A1.11 We recognise that consumers have a strong preference for accessing more content in general and this is indicated in the survey evidence highlighted by the PL. However, as set out in Section 4 there are also a number of pieces of evidence which point to consumers having strong preferences for specific types of content, in particular sport content. In any case, we also note that in the case of the example highlighted by the PL, among unprompted responses, access to specific sport channels was significantly more popular than other answers (i.e. nearly double the next most popular answer, which was access to kids channels).<sup>337</sup>
- A1.12 We also recognise that there is a range of sports content available on a FTV basis. Our observation that live sports content is primarily a pay TV product is reflected by the fact that free-to-view broadcasters accounted for just [3%] of total sports rights expenditure in 2015/16.<sup>338</sup> We also note that a number of live sporting events that are currently shown on FTV channels are scheduled to move to pay TV in the future (e.g. the Open Championship moves from the BBC to Sky Sports in 2017). This is consistent with our position in the 2010 Pay TV statement where we also noted that sport stood out as having a high degree of exclusivity to pay TV.<sup>339</sup> Finally, we do not consider the presence or otherwise of movie content on FTV TV is relevant in the context of this review and given that we have relied on a number of other evidence sources which point to the importance of sports content in particular.<sup>340</sup>
- A1.13 We recognise that substantial numbers of UK consumers that are prepared to pay a premium specifically to acquire premium sports channels does not, by itself, demonstrate that these channels are capable of influencing consumers' choice of pay TV provider. However, it does show that a substantial number of consumers place a non-trivial value on this content, and we believe it is relevant to consider this alongside the other evidence we set out in Section 4.
- A1.14 As regards choice of individual pay TV provider, we note that sports channels are currently widely available across pay TV platforms. We would not therefore expect respondents to cite particular sports channels as a reason for choosing their specific pay TV provider (as opposed to pay TV access in general), even if they are very important to subscribers, as such sports channels are available from multiple pay TV providers.

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<sup>336</sup> The PL response to the December 2014 consultation, paragraphs 4.23-4.38.

<sup>337</sup> In addition, given the wording of the survey question, we did not expect respondents to focus on the specific types of content which are important to them when answering such a general question.

<sup>338</sup> Based on data provided by broadcasters in response to the 2<sup>nd</sup> WMO information request dated 5 May 2015 or 13 May 2015.

<sup>339</sup> See paragraph 4.111, Ofcom, Pay TV Statement (March 2010),

[http://stakeholders.ofcom.org.uk/binaries/consultations/third\\_paytv/statement/paytv\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/third_paytv/statement/paytv_statement.pdf)

<sup>340</sup> In any event, the Competition Commission looked at movies in its Movies on Pay TV market investigation and found that first subscription pay TV window movie content was not significant to consumers in their choice of traditional pay TV retailer. Final Report, paragraph 33, [http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main\\_report.pdf](http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main_report.pdf).

A1.15 We therefore remain of the view that pay TV subscribers value specific content, and that sports content is a particularly important driver of choice in pay TV services for a significant number of consumers. We note that, other than the PL, other respondents agreed with this view.

## Importance of live Premier League content

### Stakeholder comments

- A1.16 TalkTalk, Real Digital<sup>341</sup>, Virgin Media and [X]<sup>342</sup> agreed that live Premier League matches were key content. TalkTalk said there was overwhelming evidence in support of this.<sup>343</sup> Virgin Media said the importance of Premier League sports content was widely recognised and was supported by its own consumer survey data, as well as the amounts that broadcasters were prepared to pay for exclusive live rights in the auction.<sup>344</sup>
- A1.17 BT agreed that Premier League rights stood out in terms of their strength in driving consumer decision-making, but argued that having a minority of Premier League rights was not comparable to having the majority Premier League of rights [X].<sup>345</sup>
- A1.18 On the other hand, the PL said our conclusion that Premier League content was a key driver of pay TV subscriptions was unsupported by the evidence. It argued that we had relied heavily on the survey evidence in coming to this conclusion, but considered that survey evidence in fact showed no single sport or sporting event stood apart as viewers clearly valued access to a range of sports and competitions.<sup>346</sup> In particular the PL noted that:
- in the November 2013 survey, just 23% of respondents identified only football as being essential, which it considered implied that 77% of consumers considered access to multiple sports to be essential. In any case it argued that the results of this question (Question C7A) should be disregarded in its entirety, because i) some of the responses included sports which were shown on FTV channels rather than pay TV and ii) it was not clear whether the “very long” list of sports which were shown to respondents was randomised,<sup>347</sup> and
  - in the October 2014 survey, only 27% of Sky Sports subscribers (around 9% of all pay TV subscribers) said that access to Premier League content was their main reason for getting Sky Sports. The PL disagreed with our description of this as a “sizeable proportion” of respondents.<sup>348</sup>

### Ofcom’s response

A1.19 In response to BT’s arguments, we recognise that there is a distinction between ownership of the majority of live Premier League rights compared to having a minority of live Premier League rights. We take into account the differences in the

<sup>341</sup> Real Digital response to the December 2014 consultation, point 10 and Q5.2.

<sup>342</sup> [X].

<sup>343</sup> TalkTalk response to the December 2014 consultation, paragraphs 2.9-2.12.

<sup>344</sup> Virgin Media response to the December 2014 consultation, paragraphs 38-41.

<sup>345</sup> BT response to the December 2014 consultation, paragraphs 3.69-3.74.

<sup>346</sup> The PL response to the December 2014 consultation, paragraph 1.5.3, 4.40 and 4.47.

<sup>347</sup> The PL response to the December 2014 consultation, paragraphs 4.41-4.45.

<sup>348</sup> The PL response to the December 2014 consultation, paragraph 4.46.

Premier League rights holdings of BT and Sky in Section 5, when discussing the likely impact that limited distribution of their channel propositions may have on competition.

- A1.20 Turning to the PL's arguments, our assessment of the importance of the Premier League is based on a range of evidence, including evidence from rights costs and internal stakeholder documents. Notwithstanding this point, our view remains that the survey evidence itself supports our assessment and we note that all other stakeholders agreed with our assessment of the importance of Premier League content.
- A1.21 Firstly, we disagree that the responses to Question C7A should be disregarded, for the following reasons:
- the question included sports events that are only shown on FTV TV because its purpose was to ask about importance of all sports shown on TV (rather than the pay TV element specifically);
  - as explained in footnote 118 of the December 2014 consultation, we only asked respondents about sports (or competitions within sports) which they had indicated (in response to a previous question) that they watched on TV in response to an earlier question, in order to keep the exercise manageable;
  - whilst the list of sports and competitions presented to respondents was not randomised, we do not agree that this would have a material effect in terms of skewing answers in favour of football competitions. We note that there is other survey evidence based on spontaneous responses which reinforces the findings of this question on the importance of football content (e.g. Figure 5.3 of the December 2014 consultation).
- A1.22 Secondly, our view remains that the number of survey respondents singling out the Premier League as important stands out from other competitions. For example, although a number of respondents said multiple competitions were essential, 23% cited only football competitions as essential, whereas 3% or fewer said that only competitions within another particular sport were essential.<sup>349</sup> Similarly, 27% of respondents said Premier League was their main reason for subscribing to Sky Sports whereas 4% or fewer said that another sport or competition was their main reason.<sup>350</sup> This clearly indicates that Premier League coverage stands out as being the most important sporting competition to the largest number of consumers.

## Importance of live Champions League content

### Stakeholder comments

- A1.23 A number of stakeholders argued that we had underestimated the importance of Champions League content. In particular stakeholders pointed to a range of different evidence which they considered indicated that Premier League and Champions League could increasingly become of similar importance to consumers as the Premier League.

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<sup>349</sup> Question C7A. November 2013 survey.

<sup>350</sup> Question 11, October 2014 survey.

- A1.24 Real Digital said Champions League matches were of equal importance to fans of top clubs because they included the top Premier League teams.<sup>351</sup> Sky pointed to the rights costs and argued that there was no material difference between the cost of individual live Champions League and live Premier League games (on a per match basis). It also said that the most viewed live Champions League games attract similar audiences to equivalent live Premier League games.<sup>352</sup>
- A1.25 TalkTalk argued that the stated importance of the Premier League, compared to the Champions League and other competitions, appeared to largely be a consequence of the greater number of Premier League matches shown on Sky Sports (114 Premier League matches compared to 30 Champions League matches featuring Premier League teams).<sup>353</sup>
- A1.26 [redacted] pointed to evidence from our October 2014 survey evidence which it said indicated that 11.2% of Sky Sports subscribers cited the Champions League as a reason to subscribe to Sky Sports, but did not cite the Premier League as their main reason. For this group of people, [redacted] considered that Champions League content was at least on a par with Premier League content, if not more so, as a driver of pay TV retailer choice and it said this was a substantial group of customers, [redacted].<sup>354</sup>
- A1.27 Virgin Media considered that it would be unable to compete effectively with packages which included both Premier League and Champions League content, compared with a package which included only Premier League content. It pointed to its own survey evidence which showed that [redacted] of its customers with access to Sky Sports always or usually watched live Champions League at home.<sup>355</sup>
- A1.28 The PL said that the relevant question was not whether Champions League content alone was capable of influencing consumer choice, but rather whether it could do so when combined with other attractive content. It also argued we had ignored survey evidence which appeared to demonstrate that BT would gain significant subscriptions when the Champions League content switched to BT (i.e. 47% of respondents said Champions League was essential to their pay TV service).<sup>356</sup>
- A1.29 In contrast, BT argued that the Champions League should not be singled out as key content, even to a lesser extent. It pointed to a range of evidence in support of its arguments:<sup>357</sup>
- the Champions League was quoted in our survey evidence as a reason for subscribing to pay TV by far fewer respondents than the Premier League, with response levels comparable to sports like cricket, F1 and rugby. BT also said that our assessment had ignored the most relevant survey evidence which showed that only very few subscribers plan to switch channels as a result of Champions League moving to BT Sport;
  - BT said that it was misleading to consider the amount spent on Champions League rights as an indicator of key content, because it argued [redacted];

<sup>351</sup> Real Digital response to the December 2014 consultation, page 4.

<sup>352</sup> Sky response to the December 2014 consultation, paragraphs 5.7-5.9.

<sup>353</sup> TalkTalk response to the December 2014 consultation, paragraphs 2.13-2.19.

<sup>354</sup> [redacted].

<sup>355</sup> Virgin Media response to the December 2014 consultation, paragraphs 42-43.

<sup>356</sup> The PL response to the December 2014 consultation, paragraphs 4.48-4.51.

<sup>357</sup> BT response to the December 2014 consultation, paragraphs 3.75-3.88.

- public statements made by Sky which revealed that live Champions League programming accounted for less than 3% of viewing on Sky Sports, and that there was a limit to how much people would pay for Champions League content;
- the total number of live Champions League matches featuring Premier League clubs will typically be between 35 and 40 which is substantially less than the number of live Premier League matches. Moreover, it noted that as live Champions League matches are played simultaneously, the number of match slots is significantly less than the number of actual matches; and
- the average audience for Champions League games is much lower than for Premier League games, even when a Premier League team is playing, and is also lower than for F1 races. BT also said that the Champions League's unique audience reach and incremental unique reach, based on pay TV audiences, is lower than for F1 or cricket.

### Ofcom's response

- A1.30 As set out in Section 4, we recognise that there is some uncertainty about the importance of live Champions League content to subscribers given that it has only recently started broadcasting exclusively on BT Sport. Nevertheless, there is a range of evidence, including consumer survey evidence, rights values and internal stakeholder documents, that points to live Premier League coverage being capable of influencing more consumers than live Champions League content. The same evidence suggests that Champions League is important to a large number of consumers, to a greater degree than other sports or sporting competitions. We therefore remain of the view that live Champions League may influence pay TV provider choice for a material group of consumers, albeit to a lesser degree than the Premier League.
- A1.31 Turning to stakeholder comments, we consider the evidence does not support the arguments put forward by stakeholders that live Premier League and live Champions League matches are comparable on a per-match basis:
- BT is paying £299m per season for 350 Champions League and Europa League matches. We consider that it is not clear how much of this cost should be attributed to Champions League games involving Premier League teams. However, even if the cost of a Champions League match involving a Premier League team was comparable to a Premier League match, there are far fewer of these matches than there are Premier League matches. As the importance of a particular sporting competition is influenced by the regularity of matches, this means the Champions League is likely to have less influence on consumers' choices of pay TV provider than the Premier League;
  - we do not consider a simple comparison of audience figures for the most popular games in each competition to be informative. As explained in paragraph 4.21, Champions League matches that do not feature Premier League teams appear to be much less attractive and the overall attractiveness of the competition can fluctuate depending on how successful Premier League teams are; and
  - TalkTalk's measure of per-match importance (set out in Table 2.1 of its response)<sup>358</sup> assumes the value of each game can be calculated by dividing the

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<sup>358</sup> TalkTalk response to the December 2014 consultation, paragraphs 2.13-2.19.

percentage of subscribers for whom a competition is essential by the number of games within that competition. We believe it is highly unlikely that the importance of each match can be calculated in this way.<sup>359</sup> In any case, we are assessing the importance of the competition as a whole, rather than importance on a match-by-match basis, and the total number of games is an important factor in this assessment.

A1.32 [redacted]'s inference that Champions League content is at least on a par with Premier League content for 11.2% of subscribers was made on the basis that 28% of Sky Sports respondents cited access to Champions League as a reason for subscribing to their pay TV retailer, but only 60% of these also said that the Premier League was the main reason.<sup>360</sup> However, we can only say with certainty that live Champions League content is more important than live Premier League content for the 2% of respondents who said that Champions League was their main reason, against 27% for Premier League. As set out in paragraph A1.22, we consider this indicates that Premier League coverage stands out from Champions League content.

A1.33 In relation to Virgin and the PL's arguments, we consider the impact of the BT Sport package, and therefore the impact of Champions League in combination with BT's other sports rights, in Section 5.<sup>361</sup>

A1.34 In terms of BT's arguments that live Champions League should not be singled out as key content, even to a lesser extent, as noted above we consider there is a range of evidence which points to this content being more important to consumers than other sports:

- i) the consumer survey evidence, taken as a whole, indicates live Champions League is the second most important sporting competition. In particular, responses to Question C7A show it is considered essential by a higher proportion of subscribers than anything else other than the Premier League. We did not rely on the evidence about the impact of Champions League moving to BT Sport, because we had specific reservations about the robustness of this question which we set out in footnote 252 of the December 2014 consultation. We respond to BT's arguments on this in more detail in paragraph A2.49 below;
- ii) BT's acquisition of Champions League rights has increased spending in 2015/16 to around 16% of the total amount spent on football rights<sup>362</sup>, which is substantially higher than the amounts spent on other football (and other sports) rights. BT said that [redacted].<sup>363</sup> [redacted];
- iii) we recognise that average viewing figures for live Champions League matches might be similar to other sporting competitions. However, as BT acknowledges in paragraph A1.29, the importance of a particular sporting competition is influenced by the regularity of matches or races, as well as the popularity of each individual

<sup>359</sup> As footnote 5 of TalkTalk's response reveals, it is mathematically impossible for the Premier League to achieve comparable importance to the FA Cup under this methodology.

<sup>360</sup>  $28\% - (28 \times 0.6) = 28\% - 16.8\% = 11.2\%$ .

<sup>361</sup> Regarding the PL other argument, we also consider the impact of Champions League content moving to BT Sport in Section 5, as well as in response to stakeholder comments below in paragraphs A2.44-A2.50 (in addition we considered this as part of the December 2014 consultation in paragraphs A6.25 to A6.31).

<sup>362</sup> As explained in Section 4, footnote 128.

<sup>363</sup> [redacted].

match or race. Sky Sports only show 9 F1 races, and around 14 England test matches exclusively per year.<sup>364</sup> As a result, even if average viewing figures for these individual events are comparable with the Champions League, this does not mean that the competition as a whole is equally important to consumers' pay TV choice; and

- iv) finally, we place less weight on the public statements made by Sky about the alleged lack of importance of the Champions League as these were made shortly after Sky had lost the rights to televise Champions League games.

## Importance of other sports and aggregation of content

### Stakeholder comments

A1.35 TalkTalk argued that other competitions featuring Premier League clubs, regardless of the competition in which they are played (and including the Europa League, FA Cup, and potentially the League Cup), were likely to represent key content. It argued that public statements by BT were consistent with this position.<sup>365</sup> In particular it argued that:

- i) our consumer survey evidence would not have picked up the importance of Europa League because it was previously held by ITV rather than a pay TV provider (and it noted that viewing figures for Europa League were broadly comparable with ratings for Premier League and Champions League content on Sky Sports);
- ii) there was some evidence from our consumer surveys that a meaningful proportion of sports subscribers might consider FA Cup matches to be key content; and
- iii) the League Cup competition was not listed as a prompt in our consumer survey and there was a lack of publicity for rights costs, which meant there was insufficient evidence to determine whether it was key content or not.<sup>366</sup>

A1.36 Virgin Media said access to other sports content remained important and pointed to its own survey evidence in support of this. Whilst it recognised that access to a broader range of content was less important than live Premier League and live Champions League as stand-alone drivers of subscriptions, it said consumers would favour packages that include key content bundled with other sports content over those which only offer key content.<sup>367</sup> Real Digital also argued that the combination of other attractive sports content, in particular niche content that was not available on other channels, was more valuable when packaged into a small number of channels than as individual sporting programmes.<sup>368</sup>

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<sup>364</sup> Based on the 2015 calendar year.

<sup>365</sup> TalkTalk response to the December 2014 consultation, paragraphs 2.37-2.39. In particular it pointed to a statement BT made following the 2015 Premier League auction in which BT stated "BT Sport currently shows around 50 live matches each season featuring Premier League clubs. It will show around 115 of these matches from the 2015/16 season onwards when all competitions featuring Premier League clubs are taken into account".

<sup>366</sup> TalkTalk response to the December 2014 consultation, paragraphs 2.20-2.36.

<sup>367</sup> Virgin Media response to the December 2014 consultation, paragraphs 44-45.

<sup>368</sup> Real Digital response to the December 2014 consultation, paragraph 10 and Q5.4.

- A1.37 BT argued that our approach of identifying individual sporting events that consumers may or may not consider to be key content was “divorced from reality” and failed to capture a proper, comprehensive picture of the key drivers of sports subscriptions. It argued that in circumstances where Sky could offer an important sporting event (such as the Premier League) in conjunction with the vast breadth and depth of second-tier sporting events that Sky also held, whereas a competitor could only offer the one “important” event, and a much sparser number of second-tier events, any potential premium sports subscriber would be highly unlikely to choose to subscribe to (or to switch to) Sky’s competitor.<sup>369</sup>
- A1.38 BT said that this view is supported by Ofcom’s own survey evidence, which shows that 69% of respondents consider two or more sports to be essential, and 77% of respondents considered at least one sporting event other than the Premier League to be essential. Moreover, it said 50% of respondents in our October 2014 survey made no mention of football as their main reason for subscribing to Sky Sports. BT said these results showed that consumers’ decision making is more sophisticated than simply being driven by the individual sporting event that is perceived to be “most” important”, and that we must consider sporting events in aggregate to fully understand subscription decisions.<sup>370</sup>
- A1.39 BT argued that we had recognised the importance of content aggregation elsewhere, including in the 2010 Pay TV statement and in our analysis in Section 6 of the December 2014 consultation where we focused on Sky and BT Sport’s channels (and packages of channels). It argued that we had not explained why we now believed that aggregation across “second-tier” content rights is not an important factor that warrants consideration.<sup>371</sup>

### Ofcom’s response

- A1.40 Firstly in response to TalkTalk’s arguments about other competitions featuring Premier League clubs, we recognise that matches featuring Premier League teams typically attract a large number of viewers. However, we consider that evidence shows that live Premier League matches in particular stand out from other football content and other sporting competitions as being particularly important to a large number of consumers. The combination of evidence from our consumer surveys (which, where included, show that these competitions are less important than Premier League and Champions League), the rights costs for these competitions (which in the case of each of the competitions highlighted by TalkTalk, are considerably lower than the Premier League and Champions League<sup>372</sup>), and the lack of any other evidence about the importance of these competitions (e.g. internal statements from stakeholders), does not demonstrate that the competitions TalkTalk refers to are capable of influencing a significant number of consumers’ choice of pay TV provider. We do not consider that the public statement made by BT and which TalkTalk refers to suggests otherwise.
- A1.41 Virgin, Real Digital and BT all said that consumers value access to a range of sports content. We agree that this is the case. We also recognise that in practice consumers purchase channels, and packages of channels, rather than individual

<sup>369</sup> BT response to the December 2014 consultation, paragraphs 3.7-3.8 and 3.16.

<sup>370</sup> BT response to the December 2014 consultation, paragraph 3.16.

<sup>371</sup> BT response to the December 2014 consultation, paragraphs 3.23-3.35.

<sup>372</sup> For example we note that ITV paid [ $\gg$ ] for its 2013/14 Europa League coverage than for Champions League coverage (based on data from broadcasters as set out in Figure 3.5 in Section 3).

sporting events. Accordingly, as BT acknowledges, in Section 5 we consider the importance of packages of content (i.e. channels or bundles of channels) to consumers' subscription decisions. This assessment takes into account all content on each channel package, not only the content we have found to be capable of influencing the choice of pay TV provider for a significant number of consumers. We therefore consider that our analytical framework is appropriate because takes account of the fact that consumers' actual purchasing decisions are based around such packages of content. We remain of the view that certain content within these packages is particularly important to such decisions, as we have described in paragraphs 5.16 to 5.20.

## Annex 2

# Stakeholder comments on impact of key content on pay TV competition

A2.1 In this Annex we set out and respond to comments we received on our assessment of the impact of channels containing key content on pay TV competition in the December 2014 consultation. Our final assessment, which takes account of the comments in this Annex, is set out in Section 5.

## Importance of Sky Sports and impact of limited distribution

### Stakeholder comments

- A2.2 BT<sup>373</sup>, TalkTalk<sup>374</sup>, Virgin Media and [X] agreed with our assessment of the importance of Sky Sports and its impact if Sky limited distribution. [X] said that a large group of customers place considerable value on the Premier League content carried by Sky Sports, and that, given the investment required to purchase these rights, retailers would find it impossible to compete for these customers if they cannot offer this content.<sup>375</sup>
- A2.3 Virgin Media cited its own research from December 2014 which showed that [X] of Virgin Media customers rank access to Sky Sports as very important or extremely important.<sup>376</sup> Virgin Media also [X].<sup>377</sup>
- A2.4 BT pointed to the model developed by Compass Lexecon as evidence that limited distribution of Sky Sports [X].<sup>378</sup>
- A2.5 On the other hand, the PL argued that our analysis of the importance of the importance of Sky Sports as set out in Annex 6 of the December 2014 consultation was “*seriously flawed*” and said Ofcom could not draw any reliable conclusions about what proportion of Sky Sports subscribers would be unlikely to consider a pay TV provider that could not offer Sky Sports. The PL also made a number of more detailed comments on our interpretation of the survey evidence.<sup>379</sup> In particular, it noted that our central case estimate based on Figure A6.1 included respondents who did not know that they would do, and respondents who would switch to a provider without Sky Sports, if Sky Sports wasn’t available on their current service. The PL said that “*it is clearly absurd*” to suggest that Sky Sports is a significant factor in the choice of pay TV provider for even those consumers who expressly say that they would drop Sky Sports if it was no longer available on their current platform.<sup>380</sup>

<sup>373</sup> BT response to the December 2014 consultation, paragraphs 5.7-5.9.

<sup>374</sup> TalkTalk response to the December 2014 consultation, paragraph 5.1.

<sup>375</sup> [X]

<sup>376</sup> Virgin Media response to the December 2014 consultation, paragraph 35.

<sup>377</sup> Virgin Media response to the December 2014 consultation, paragraph 47.

<sup>378</sup> BT response to the December 2014 consultation, paragraphs 5.7-5.10.

<sup>379</sup> The PL response to the December 2014 consultation, paragraphs 4.58-4.75.

<sup>380</sup> The PL response to the December 2014 consultation, paragraph 4.73.

## Ofcom's response

- A2.6 We said in the December 2014 consultation that arriving at a precise estimate of how many pay TV subscribers would not consider a pay TV provider that did not offer Sky Sports was difficult. Instead, we attempted to identify a range based on a number of different survey questions which we identified as being relevant, though we also noted (in paragraph 6.11) a possible reason why the range could still understate the true proportion of subscribers who consider Sky Sports to be important. Given the different sources of survey evidence available to us, we consider that this is a reasonable approach to the question. We note that the CC adopted a similar approach in its Movies on Pay TV Market Investigation.<sup>381</sup>
- A2.7 Regarding the PL's specific criticism of our central case estimate, we remain of the view that Sky Sports is a significant factor in the choice of pay TV provider for respondents who said that they would switch to a provider without Sky Sports, or did not know what they would do, as the removal of Sky Sports causes them to stop subscribing to their current provider. In respect of the first group, their responses may indicate that they chose Sky because it offered Sky Sports, and that if Sky Sports was not available they would choose an alternative pay TV retailer that did not offer Sky Sports. In addition, some responses may have reflected a view that Sky Sports was unattractive when sold via other providers. In respect of the second group, just 8% in November 2013 and 12% in October 2014 answered "don't know" in response to the first part of the question, and a further 4% and 2% answered "don't know" in response to the second part of the question. For some of these respondents, this may have reflected a genuine uncertainty as to what they would do.
- A2.8 We set out our conclusions on the impact of limited distribution of Sky's key content in Section 5.

## Sky's market position

### Stakeholder comments

- A2.9 BT argued that our analysis did not properly reflect the degree of continuity between Sky's position now and its position in 2010, and pointed to analysts' reports, which it argued indicate strong confidence in the position of Sky Sports, with BT Sport having had no impact on Sky's market position.<sup>382</sup> As evidence of Sky's strong market position BT pointed to:
- i) Sky continuing to hold the majority of sports rights (and it considered recent developments had in fact served to strengthen and consolidate Sky's position despite BT's entry) and Sky's position with respect to Premier League rights was no different to 2010 as it continued to hold the maximum number of matches. It argued that BT's acquisition of 'first pick' matches did not alter Sky's market position, [38];<sup>383</sup> and

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<sup>381</sup> Competition Commission, *Movies on pay TV market investigation*, August 2012, paragraphs 6.35-6.45 - [http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main\\_report.pdf](http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main_report.pdf)

<sup>382</sup> BT response to the December 2014 consultation, paragraphs 2.9 and 2.25.

<sup>383</sup> BT response to the December 2014 consultation, paragraphs 2.3, 2.6, and 2.8-2.40.

- ii) since 2010, Sky has continued to hold a high share of pay TV revenues, as well as having increased its subscriber numbers ([><]) increased its profitability, and strengthened its market position.<sup>384</sup> In particular, BT pointed to Sky having the largest subscriber base of paying sports subscribers. It suggested that, compared to 2010, Virgin Media represented even less of a competitive constraint on Sky.<sup>385</sup>

A2.10 BT argued that our assessment of Sky's wholesale market shares were likely to be an underestimate because of: i) the wide availability of BT Sport and hence a higher volume of imputed wholesale charges (due to BT's business model); and ii) Ofcom had not imputed a charge for wholesale supply by Sky for its self-retailing activities on NOW TV or Vodafone (through the Sky mobile app). It argued that when Ofcom corrected for these factors it would account for the decline in Sky's market share.<sup>386</sup>

A2.11 BT also argued that an assessment of Sky's expenditure on sports rights provided limited insight to its market position, given Sky has a number of material bidding advantages and therefore a simple statement of expenditure was likely to overstate BT's market position and understate Sky's position. It also said our assessment was flawed because we had included expenditure on rights held by FTV broadcasters and if these were removed, Sky's share of expenditure was similar to its share of wholesale revenues.<sup>387</sup>

A2.12 Sky, on the other hand, stated that [><].<sup>388</sup> It argued that, even looking narrowly at the pay TV sector, there was strong competition, with 50% of the country having a choice of four pay TV retailers (which Sky considered to likely be unique in the world). At the wholesale level, Sky argued that the rising cost of content rights (including for sport) is a clear indicator of strong competition.<sup>389</sup>

## Our response

A2.13 As we set out in Section 5 we recognise the strength of Sky's market position in both the supply of key sports channels and the retail supply of pay TV. Whilst we note that the specific level of Sky's market position is sensitive to which revenues we incorporate, our conclusion is clear that on all measures, Sky has a strong market position.

A2.14 However, although still strong, in our view Sky's market position is facing greater challenges than it did 2010, in particular since the launch of BT Sport. This is supported by:

- i) BT has acquired over [><] BT Sport subscribers, significantly more than either Setanta or ESPN (e.g. Setanta had approximately [><] subscribers in 2008 and ESPN had [><] subscribers in 2009);<sup>390</sup>

<sup>384</sup> In paragraphs 4.3-4.28 of BT's response to the December 2014 consultation, BT set out its reasons for believing that Sky has a strong market position across a range of measures (wholesale revenues, expenditure on sports rights, retail market position, and subscriber numbers).

<sup>385</sup> BT response to the December 2014 consultation, paragraph 2.3 and 2.59.

<sup>386</sup> BT response to the December 2014 consultation, paragraphs 4.5-4.7.

<sup>387</sup> Sky response to the December 2014 consultation, paragraphs 4.9-4.12.

<sup>388</sup> Sky response to the December 2014 consultation, paragraph 4.11.

<sup>389</sup> Sky response to the December 2014 consultation, paragraphs 1.10-1.15.

<sup>390</sup> Information provided by Setanta and ESPN during our 2007-2010 Pay TV investigation.

- ii) Sky's wholesale revenue share has declined by around 10% since BT Sport entered the market. Prior to the launch of BT Sport, Sky's share of wholesale supply was stable at 90-100% between 2009 and 2013;

A2.15 We recognise that there is some uncertainty over the wholesale share of supply figures presented in Table 5.1 because for a number of supply arrangements no contractual rate exists (see Annex 3 for how we have calculated these rates). However we do not think that this uncertainty is sufficient to alter our conclusion that Sky has a strong market position as a wholesale supplier of key sports channels. As set out in Section 5, although sports passes through NOW TV are a growing source of revenue, including this revenue would not have a material impact on our calculations of market shares as it represents [redacted] of Sky's sports channels retail revenues and would increase Sky's share by approximately [redacted].<sup>391</sup>

A2.16 We do not agree with BT that the value of Sky's bids for sports rights provided limited insight to its market position or that the inclusion of FTV spending on sports rights causes us to understate Sky's position. The share of spending of FTV broadcasters is informative as it also gives an indication of the degree to which sports rights are concentrated on pay TV, and in any event the exclusion of FTV spend would make only a small difference to the shares.<sup>392</sup>

A2.17 As Sky points out 50% of the country now have access to four pay TV platforms. However, as we discuss in Section 5 (paragraphs 5.64-5.65), switching in the pay TV market remains low and Sky has continued to maintain a strong position in the market for several years. In addition, we consider shares of revenue provide a better indication of market position than the number of competitors.

## Bidding advantages

### Stakeholder comments

A2.18 BT and Virgin Media<sup>393</sup> considered that Sky continued to benefit from bidding advantages and argued that Sky continues to benefit from the 'vicious circle' which Ofcom identified in 2010.<sup>394</sup> BT suggested that Sky is able to systematically outbid its competitors for rights because of its incumbency advantages (which BT argued enables Sky to extract value from rights that are only awarded for fixed, limited periods). It said that the Premier League rights auction demonstrated Sky's bidding advantages (for instance by looking at the sums that Sky is able and willing to pay), and that only targeted wholesale regulation could unwind this vicious circle.<sup>395</sup>

A2.19 BT also argued that the vicious circle applies to all sports rights, not just high value rights like the rights for the Premier League. Indeed, BT claimed that Sky's bidding advantage may be greater for 'second-tier' rights. BT argued that, unlike with the Premier League, other sports consist of multiple events of more or less equal importance. It therefore suggested that, because the rights for these events are sold

<sup>391</sup> See footnote 194 in Section 5.

<sup>392</sup> For example, in 2015/16 Sky's spending on sports rights as a proportion of spending on sports rights by pay TV broadcasters was [redacted], whereas as a proportion of total spending on sports rights it was [redacted].

<sup>393</sup> Virgin Media response to the December 2014 consultation, paragraph 22.

<sup>394</sup> Namely that a firm with an established base of traditional pay TV subscribers downstream enjoys a competitive advantage when bidding for content as it can monetise its investments in content faster. For example see Appendix 4 to Annex 8 of the 2010 Pay TV statement.

<sup>395</sup> BT response to the December 2014 consultation, paragraphs 4.49-4.55.

individually (and at different times), competitors are not incentivised to bid because they would need to win a number of these rights in order to be able to attract sufficient customers to compete (particularly if Sky retains enough of the other rights).<sup>396</sup>

- A2.20 BT said that whilst it is better able to monetise rights than an entrant without a broadband subscriber base, its ability to monetise rights by providing BT Sport for free to its broadband subscribers does not overcome Sky's bidding advantages captured in the vicious circle. BT noted that Sky also has a large broadband base, and argued that Sky's behaviour to date suggested that a strategy of pure direct monetisation had been more profitable for Sky than a strategy of indirect monetisation and that [redacted]. Further, BT argued that [redacted].<sup>397</sup>
- A2.21 BT argued that its winning the rights for the Champions League does not provide evidence that Sky's bidding advantages have been eroded. [redacted].<sup>398</sup>
- A2.22 BT also argued that Sky derives material bidding advantages from its commercial subscriber base and that Sky uses the revenue stream from this to underpin its bids for sports rights. BT pointed to the fact that Sky achieves [redacted].<sup>399</sup>
- A2.23 BT suggested that the development of NOW TV has further consolidated Sky's position, as the incremental revenues from NOW TV provide Sky with an increased ability to defray the fixed costs associated with pay TV and acquiring sports rights. BT argued that this further reinforces the bidding advantages that it considered Sky to have, while also managing the cannibalisation risk to Sky's primary DSat offering.<sup>400</sup> It also stated that NOW TV has enabled Sky to corner different market segments through effective price discrimination.<sup>401</sup>
- A2.24 Sky, however, said there was no obvious reason why having a large *retail* base of pay TV subscribers (many of whom do not take Sky Sports) was beneficial when bidding for sports rights. It argued that it was a pay TV broadcaster's *total* number of subscribers to its channels that mattered and it said in its case, the [redacted] Sky Sports subscribers on Virgin Media's platform are more important than the [redacted] Sky subscribers who do not take Sky Sports. It suggested that what matters is the number of potential subscribers and, because Sky is required to provide access to its platform on fair, reasonable, and non-discriminatory terms, content can be made available to consumers without them having to switch to the platform operated by a competing rights holder.<sup>402</sup>
- A2.25 Sky said it did not contest that it has bidding advantages when competing for sports rights, but it said that these derived from "legitimate, pro-competitive factors", including its brand, its reputation, and its experience in the sector. Further, Sky considered that BT has advantages of its own, which enable it to compete for sports rights.<sup>403</sup> The PL, however, argued that Sky does not have inherent bidding

<sup>396</sup> BT response to the December 2014 consultation, paragraphs 4.57-4.60.

<sup>397</sup> BT response to the December 2014 consultation, paragraphs 4.66-4.82.

<sup>398</sup> BT response to the December 2014 consultation, paragraph 4.83-4.88.

<sup>399</sup> BT response to the December 2014 consultation, paragraphs 7.1-7.7.

<sup>400</sup> BT response to the December 2014 consultation, paragraph 2.3.

<sup>401</sup> BT response to the December 2014 consultation, paragraph 2.55.

<sup>402</sup> Sky response to the December 2014 consultation, paragraphs 4.84-4.90.

<sup>403</sup> Sky response to the December 2014 consultation, paragraphs A2.5 and A2.8-A2.10.

advantages for sports rights and that past auction results are not a useful guide for this.<sup>404</sup>

- A2.26 Sky also suggested that, even if it were able to eliminate competition from pay TV retailers, it would still face competition from broadcasters that are not vertically integrated, in particular major international broadcasters like BeIN Sports.<sup>405</sup> Moreover it argued that its behaviour when bidding in auctions for sports rights and the outcome of rights auctions in the UK (for example increasing rights costs) are inconsistent with the idea that there are significant barriers to entry, and also pointed to BT outbidding Sky to win exclusive rights for Champions League content as evidence of this.<sup>406</sup>

### Our response

- A2.27 As we set out in Section 5 we remain of the view that Sky has advantages when bidding for sports rights.<sup>407</sup>
- A2.28 We note BT's arguments about secondary rights, however, we do not consider it is necessarily clear that Sky has greater advantages when bidding for secondary sports rights than it has when bidding for Premier League rights. We note that BT already has other sports rights (including all Champions League matches and a range of other rights) and BT has been able to win the rights to the Champions League and more recently Australian Cricket from Sky (see paragraph 5.9).
- A2.29 We agree that BT's ability to bundle sports content with broadband is not necessarily sufficient to overcome Sky's other advantages when bidding for rights. In December 2014 we noted that BT's established broadband subscriber base may give it an advantage compared to other new entrants that do not have an established subscriber base.<sup>408</sup> However, we considered that this did not give BT an advantage over Sky which already has an established pay TV subscriber base and we pointed to two reasons for this:
- i) Sky also has a large broadband business and is able to bundle sports content with broadband; and
  - ii) It is not clear that the advantage of bundling broadband and sports content is as effective a way of monetising rights as bundling wider pay TV products (e.g. basic and movies) with sport.
- A2.30 However, it is not clear that Sky's decision not to bundle sports content with broadband [§<]. In a growing market with uncertainty over future take-up it is reasonable that competing firms would pursue different strategies to monetise content. With regards to the Champions League auction we note that it is difficult to draw inferences about bidding advantages from a single auction. [§<].
- A2.31 We do not agree with BT that [§<] shows that Sky has a bidding advantage from its sales to commercial premises. This fact does not in itself tell us whether BT (or any other bidder) could expect to monetise the rights currently held by Sky more or less effectively via commercial premises.

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<sup>404</sup> The PL response to the December 2014 consultation, paragraphs 5.7-5.8.

<sup>405</sup> BT response to the December 2014 consultation, paragraph 4.102.

<sup>406</sup> Sky response to the December 2014 consultation, paragraphs A2.6-A2.7 and A2.11-A2.16

<sup>407</sup> See Section 5, paragraph 5.44.

<sup>408</sup> December 2014 consultation, paragraph A8.12.

- A2.32 It is also not clear that NOW TV reinforces Sky's bidding advantages as other bidders could also sell sports content through an OTT service. We note that [X].
- A2.33 We agree with Sky that it is the volume of sports subscribers that is important in determining Sky's bidding advantage. But this does not change the analysis set out in December 2014, as the majority of sports subscribers are on the DSat platform ([X] in September 2015). A new entrant will still face two significant disadvantages in monetising these subscribers compared to Sky:
- i) it will face a delay in attracting sports subscribers to its own platform (where it may be able to monetise rights as successfully as Sky on the DSat platform); and
  - ii) on the DSat platform it will be unable to bundle sports content with other pay TV content and therefore it will face difficulties in extracting the full value sports subscribers place on sports content.
- A2.34 As we set out in Section 5 there are a number of factors that could explain Sky's bidding advantages. As Sky points out some of these factors are the result of Sky's success in the pay TV market and are not necessarily enduring. However, we remain of the view that the factors we identified in December 2014 continue to contribute to Sky's bidding advantages.
- A2.35 While we recognise the potential for major international sports broadcasters to enter the UK market and compete for rights, it is likely that these broadcasters would face the same disadvantages as identified previously.

## Impact of BT Sport on pay TV competition

### Importance of BT Sport and impact of limited distribution

#### Stakeholder comments

- A2.36 Sky, TalkTalk, Real Digital and Virgin Media and [X] argued that we had underestimated the importance of BT Sport and the impact of it limiting distribution.
- A2.37 In terms of the importance of BT Sport to consumer subscription decisions, stakeholders made a number of arguments:
- Real Digital said our survey evidence showed that 90% of BT Sport content from the 2015/2016 season onward is considered essential by sports subscribers. It argued that it is just as important for other pay TV retailers to be able to offer the BT Sport channels;<sup>409</sup>
  - TalkTalk said that we had underestimated the lower bound of the proportion of subscribers for whom BT Sport is likely to be essential by ignoring people who did not need to switch to get BT Sport, because they already subscribed to BT TV, Sky's DTH platform (on which BT self-retail) or Virgin Media (on which BT wholesale). TalkTalk considered that it is unlikely that less than 40% of BT Sport subscribers would see BT Sport as essential;<sup>410</sup>

<sup>409</sup> Real Digital response to the December 2014 consultation, pages 9-10.

<sup>410</sup> TalkTalk response to the December 2014 consultation, paragraphs 4.19-4.24.

- Virgin Media cited its own research from December 2014 which showed that [redacted] of Virgin Media customers rank access to BT Sport as very important or extremely important.<sup>411</sup> [redacted];
- A2.38 Stakeholders also commented specifically on the importance of BT's Premier League and Champions League content:
- [redacted] argued that we had underestimated the value of BT's Premier League content. It said BT's Premier League matches were more likely to be of higher quality than Sky's because BT has proportionally more 'first picks',<sup>412</sup> and
  - Sky, TalkTalk and [redacted] also argued that we had undervalued BT's Champions League proposition because our assessment was based on a time where Sky and ITV shared the rights and the perceived value of the content would be impacted by consumers' knowledge that a proportion of the content was available FTV.<sup>413</sup> TalkTalk also suggested that BT's FTV commitments should not be seen to reduce the importance of these rights as BT may pick the worst games to show FTV.<sup>414</sup>
- A2.39 [redacted] also argued that our assessment had only taken account of the value from consumers' explicitly viewing content, whereas it argued that the availability of that content of itself (whether or not it was viewed) played a significant role in guiding consumer choice. [redacted] therefore argued that we had not adequately considered how many customers may value the availability of BT Sport on a pay TV platform.<sup>415</sup>
- A2.40 In terms of the impact of BT limiting distribution of BT Sport, Sky suggested that we did not properly consider the potential future impact on Virgin Media or on triple-play competition, and that TalkTalk (to whom Sky argued BT was limiting distribution) should not be seen as a minor player in pay TV.<sup>416</sup> [redacted] argued that, while reduced static competition resulting from BT limiting distribution may lead to increased price competition between BT and Sky, this would reinforce a duopoly between Sky and BT in Premier League broadcasting, which would increase the need for a WMO obligation on both.<sup>417</sup> TalkTalk argued that [redacted].<sup>418</sup>
- A2.41 BT, however, argued that the presence or absence of BT Sport was not a sufficient driver of pay TV subscribers' decisions to have an impact on the competitive process. It made a number of detailed comments on our interpretation of survey evidence in particular, arguing that we had overestimated the proportion of subscribers who would be unlikely to consider a pay TV provider that could not offer BT Sport.<sup>419</sup>
- A2.42 BT also disagreed with our analysis of the impact of Champions League coverage moving to BT Sport. BT argued that Questions 28 and 29 of our October 2014 survey showed that very few subscribers plan to switch channels as a result of Champions League moving to BT Sport, and questioned our reasons for not relying

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<sup>411</sup> Virgin Media response to the December 2014 consultation, paragraph 35.

<sup>412</sup> [redacted].

<sup>413</sup> [redacted].

<sup>414</sup> TalkTalk response to the December 2014 consultation, paragraph 4.14-4.18.

<sup>415</sup> [redacted].

<sup>416</sup> Sky response to the December 2014 consultation, paragraphs 5.20-5.24.

<sup>417</sup> [redacted].

<sup>418</sup> TalkTalk response to the December 2014 consultation, paragraphs 3.24-3.29.

<sup>419</sup> BT response to the December 2014 consultation, paragraphs 3.65-3.66.

on this question.<sup>420</sup> Moreover, it said that these figures could overstate the true impact on channel switching, as the question implied that Champions League coverage would only be available on pay TV.<sup>421</sup> It also said that the number of subscribers who might be willing to switch platforms/pay TV providers would be far lower than the number who might be willing to switch channels.

- A2.43 BT argued that even if it were it to limit distribution of BT Sport in practice, this would be unlikely to have any impact on competition on the basis that it does not have a strong enough market position to act independently of competitive pressure from Sky; and it faced other disadvantages when compared to competitors (such as not being able to offer Sky Movies in HD or any Sky basic channels).<sup>422</sup>

### Ofcom's response

- A2.44 We have set out our conclusions on the importance of BT Sport in Section 5. For the reasons set out there, whilst we recognise that BT Sport is likely to be important to some subscribers, we do not consider it is important to the choice of pay TV retailer for a significant proportion of pay TV subscribers such as to strongly influence competition between pay TV retailers. In response to the specific points raised:

- Real Digital's 90% figure is based on an incorrect aggregation of responses from the consumer survey (because many subscribers considered more than one of the competitions in response to this question to be essential);
- We identified 10% of respondents taking BT Sport had taken positive action solely in order to get BT Sport and are therefore likely to place some value on BT Sport. We make no comment on the value that the remaining BT Sport subscribers place on BT Sport and as a result use this figure as a lower bound for the proportion of subscribers whose choice of platform is influenced by BT Sport. This was one of several sources of evidence that informed our estimate that BT Sport, as it stood in December 2014, would influence the choice of retailer for around 5% of pay TV subscribers.
- Virgin Media's estimate of the proportion of customers with BT Sport in their TV package who consider it to be very important or extremely important is [redacted].
- With respect to [redacted] argument that BT's Premier League matches were more likely to be of higher quality than Sky's because BT has proportionally more 'first picks', we do not agree with this assessment [redacted].

- A2.45 We recognise that BT's Champions League rights may have somewhat more influence on consumers' choice of pay TV retailer than the rights previously held by Sky, when ITV also had rights to broadcast live Champions League:

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<sup>420</sup> BT response to the December 2014 consultation, paragraphs 3.82-3.85. Specifically, BT said that (i) none of the questions that we have relied upon make pricing assumptions; (ii) a large proportion of 'don't knows' might indicate ambivalence as to the importance of Champions League content rather than confusion with the question; (iii) potentially counter-intuitive responses are the nature of research surveys; and (iv) a 3% "error rate" is not sufficiently high to place no weight on responses that go to an important issue.

<sup>421</sup> BT response to the December 2014 consultation, paragraph 3.84.

<sup>422</sup> BT response to the December 2014 consultation, paragraphs 5.14-5.18.

- i) before the 2015/16 season, ITV had exclusive rights to 16 matches and non-exclusive rights to show the final match (alongside Sky Sports). ITV showed one match each match week on a Tuesday evening, and had first pick of the matches played on that evening. BT has committed to showing at least 12 Champions League matches on a FTV basis each season, [X]. This suggests a slightly lower number but similar quality of matches will be available FTV. However, [X].
  - ii) BT broadcasts FTV Champions League coverage in different ways depending on the platform consumers access it from. For example, it is broadcast on BT Sport Showcase to Freeview customers. Awareness of the availability of FTV Champions League coverage is unlikely to be as high as it was when ITV had rights to live Champions League content, although it is likely to improve over time.<sup>423</sup>
- A2.46 As the number of live Champions League matches broadcast FTV will be lower [X] than in previous seasons, we are of the view that the Champions League could have somewhat more influence on consumer decisions now BT has exclusive rights to it, though the evidence to date is not sufficient to conclude that the difference is likely to be large. We have taken this into account in our assessment in Section 5.
- A2.47 Regarding [X]'s argument that we had not adequately considered consumers who value the availability of BT Sport, we recognised in the December 2014 consultation that some consumers that do not currently take BT Sport may value the option of taking up BT Sport at some point in the future, and might therefore be more inclined to subscribe to a platform which offers BT Sport.<sup>424</sup> However, we are not aware of any reliable evidence about the size of this group of consumers or the extent to which this influences their choice of retailer. [X].
- A2.48 In relation to BT's comments on our survey methodology, we consider that the inferences drawn from our survey evidence as to the importance of BT Sport are reasonable. The methodology we used is consistent with best practice and we note that the CC used a similar approach in its Movies Investigation.
- A2.49 We continue to hold reservations about the reliability of the results of Questions 28 and 29 of our October 2014 survey. In particular, we have no credible explanation for the responses from some participants. Notwithstanding these reservations, we note that, even if we placed some weight on this evidence, it would not lead us to significantly change our overall conclusion about the importance of BT Sport.
- A2.50 We note the comments from Sky and TalkTalk on the potential trade-off between static and dynamic competition. However, given our conclusion in Section 5 that BT Sport does not influence the choice of retailer for a significant number of pay TV subscribers, this issue does not arise.

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<sup>423</sup> If awareness of where Champions League coverage is shown is lower now than when it was shown on Sky Sports and ITV, BT's Champions League rights could actually have less influence on consumers' choice of pay TV retailer than the rights previously held by Sky.

<sup>424</sup> December 2014 consultation, paragraph 6.19.

## BT's market position

### Stakeholder comments

- A2.51 Sky, TalkTalk, the PL and Virgin Media argued that we had understated BT's market position. The PL argued that BT has emerged as a serious player in the purchasing of sports rights, having won rights for the Premier League in two successive auctions, and having won exclusive rights for the Champions League.<sup>425</sup> [§].<sup>426</sup>
- A2.52 Sky stated that BT's sports rights holdings should not be seen as modest. It argued that BT holds a significant amount of key content, and that this content is valuable. For example, Sky noted that BT will hold around 40% of key content between 2015-2017, and that the most viewed Champions League match had a similar number of viewers (2.4m) to the most watched Premier League match (2.7m).<sup>427</sup>
- A2.53 More generally, Sky argued that we had downplayed the significance of BT's entrance to the market, and suggested BT's entry was the most important development of relevance to our review given the speed of its development over the last three years. Sky argued that BT's established brand, its broadband subscriber base (which provides it with an *"innovative model for financing rights"*), and its revenues provide it with a number of strengths that have helped it to expand into sports broadcasting.<sup>428</sup>
- A2.54 BT, however, argued that we had mischaracterised its position in pay TV (and TalkTalk's position) as *"significant"*, noting that neither BT nor TalkTalk have even a tenth of Sky's subscriber base. Indeed, BT noted that, despite [§] since 2007, BT has only acquired [§].<sup>429</sup>
- A2.55 BT argued that our starting point for analysing the position of BT Sport should be how it compares to ESPN/Setanta in 2010, and contended that BT Sport has not exerted a materially stronger competitive constraint on Sky.<sup>430</sup> It suggested that we had overstated the value of its rights and that it has proportionally fewer live Premier League rights than ESPN. BT argued that the only difference between it and ESPN is that it is vertically integrated, but that this does not change the competitive conditions [§].<sup>431</sup>
- A2.56 Nevertheless, BT argued that its market share was such that its actions could not be expected to have any impact on competition and therefore it was not necessary for Ofcom to a final view on its specific market share.<sup>432</sup>

### Our response

- A2.57 In the December 2014 consultation we stated that *"BT and TalkTalk have both emerged as a more significant presence in the pay TV market since 2010"*.<sup>433</sup>

<sup>425</sup> The PL response to the December 2014 consultation, paragraph 5.8.

<sup>426</sup> TalkTalk response to the December 2014 consultation, paragraphs 3.13-3.23.

<sup>427</sup> Sky response to the December 2014 consultation, paragraphs 5.4-5.9.

<sup>428</sup> Sky response to the December 2014 consultation, paragraphs 2.6-2.11.

<sup>429</sup> BT response to the December 2014 consultation, paragraph 2.3.

<sup>430</sup> BT response to the December 2014 consultation, paragraph 2.10.

<sup>431</sup> BT response to the December 2014 consultation, paragraphs 2.26-2.31.

<sup>432</sup> BT response to the December 2014 consultation, paragraphs 4.8-4.14.

<sup>433</sup> December 2014 consultation, paragraph 3.6.

However, we have not characterised BT's, or TalkTalk's, position in the retail supply of pay TV as significant. As we set out in Section 5, BT's share of retail supply is, in all cases, below 30%, and in some cases below 10%.

- A2.58 However, we disagree that BT's current position is comparable to ESPN or Setanta. Now that BT has acquired Champion's League rights it holds more valuable content than either Setanta or ESPN. In addition, as set out above, BT has successfully acquired more subscribers than ESPN or Setanta which at their peak had approximately [redacted] subscribers each, compared to BT's current subscriber base of [redacted]. Furthermore, compared to ESPN, BT exerts a greater competitive constraint on Sky as it directly competes for sports customers on the DSat platform and competes for triple-play customers through its YouView offering.
- A2.59 Nevertheless, BT's position in the market should not be overstated. As we set out in Section 5, BT has 25% of the rights to live Premier League matches, whereas Sky has 75%. As illustrated in Section 4, although BT also has exclusive rights to broadcast live Champions League matches, the Champions League comprises substantially fewer match slots than the Premier League and matches that do not feature Premier League teams have lower audiences than Premier League matches.
- A2.60 In response to [redacted], we note that consumers do not purchase individual matches. Instead consumers purchase a bundle of content including matches of varying attractiveness featuring Premier League teams alongside other sports content. Therefore, we consider it is more appropriate to look at the share of pay TV revenues to assess Sky and BT's market positions.

## The significance of triple-play and bundling

### Stakeholder comments

- A2.61 Stakeholders set out a number of comments about the relevance of the wider triple-play market to our analysis.
- A2.62 With respect to our approach to assessing key content, TalkTalk said our definition of key content was too narrow because it only considered that sports rights might influence consumers' choice of pay TV provider whereas the market was increasingly moving towards triple-play and quad-play bundles and therefore our definition should be amended to reflect that.<sup>434</sup>
- A2.63 The PL argued that we had ignored the question of what drives the purchasing decisions of those consumers who are buying bundles of services that include pay TV. It pointed to our survey evidence which it said indicated that, for 69% of bundled customers, access to content per se may not be primarily influencing their choice, let alone access to sports content.<sup>435</sup>
- A2.64 Sky and the PL argued that we missed the importance and impact of bundling and triple-play competition. Sky said our analysis did not properly reflect the complexity of how competition in retail pay TV operates.<sup>436</sup> Sky stated that competition for triple-play consumers is intense, and primarily takes the form of trying to switch

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<sup>434</sup> TalkTalk response to the December 2014 consultation, paragraphs 2.2-2.5.

<sup>435</sup> The PL response to the December 2014 consultation, paragraph 4.3.

<sup>436</sup> Sky response to the December 2014 consultation, paragraph 3.29.

consumers. It noted that [§<].<sup>437</sup> The PL argued that we undervalued the extent to which BT was able to compete with Sky by failing to take into account the increasing importance of bundles.<sup>438</sup>

- A2.65 Virgin Media, however, argued that the increase in bundling is significant for our analysis because it increased the pay-off from restricting the supply of sports content because the ARPU for bundled customers would be higher than for pay TV customers only. It suggested that, were it to lose access to Sky's content, more customers than previously would switch suppliers (to one retailing Sky's sports channels), and, due to the increase in bundling, would switch the whole bundle of services. In this context, it considered that its customers would be particularly attractive to competitors, as 65.9% of homes taking Virgin Media are triple-play customers. Virgin Media also argued that our research in the Consumer Experience report that switching amongst bundle purchasers had declined did not provide reliable evidence as to what would happen if sports content was unavailable as it was carried out in the context where customers have a choice of providers that do carry Sky Sports.<sup>439</sup>
- A2.66 TalkTalk argued that, when considering the impact of BT limiting distribution, we should take into account the relevant downstream markets which are, or could be, directly impacted. It suggested that, as BT's pay TV product is tied to its broadband product, there is a direct relationship between refusal to supply BT Sport and BT's broadband market share.<sup>440</sup> [§<] made similar arguments about the impact on broadband markets.<sup>441</sup>

## Our response

- A2.67 We discuss Sky and the Premier League's comments on triple-play packages and bundling in Section 5. While we recognise the increasing importance of triple-play competition we are of the view that an assessment of the market as a whole, i.e. including TV only customers, is most appropriate. This is particularly the case given that there are a still a significant proportion of consumers (nearly 50%) that purchase their pay TV service on a stand-alone basis.
- A2.68 Our analysis in Sections 4 and 5 of this document identifies content which is capable of influencing the choice of pay TV provider for a significant number of subscribers. All pay TV subscribers, including those who take pay TV as part of a wider bundle of services, are relevant and included within our assessment. We consider this is an appropriate approach to assessing key content in this sector.
- A2.69 In response to the PL's comments about what drives the purchasing decisions of consumers purchasing pay TV as part of a bundle, we consider is not clear that the inclusion of the telephony and broadband elements in a triple-play bundle significantly dilute the importance of content in their purchasing decision for the bundle. While there is a degree of differentiation in the broadband and telephony elements that providers include in their triple-play bundles (in particular, broadband speeds), content is still one of the most important ways in which triple-play providers differentiate their bundle from competing providers. This is generally

<sup>437</sup> Sky response to the December 2014 consultation, paragraphs 2.20-2.22.

<sup>438</sup> The PL response to the December 2014 consultation, paragraph 5.9.

<sup>439</sup> Virgin Media response to the December 2014 consultation, paragraphs 8-10.

<sup>440</sup> TalkTalk response to the December 2014 consultation, paragraph 4.30.

<sup>441</sup> [§<].

borne out by our survey evidence, which shows that triple-play consumers consider content-based reasons to be similarly important as a reason for choosing pay TV provider.<sup>442</sup> We therefore consider our analysis has taken into account the question of what drives purchasing decisions of consumers purchasing pay TV as part of a bundle.

- A2.70 We agree with Virgin that a significant increase in bundling may increase Sky's incentives to limit distribution of key content. However, our analysis already includes customers that take a bundled product today. Over the review period we do not think a gradual increase in take-up of triple-play bundles is likely to significantly change Sky's static incentives to limit distribution.
- A2.71 In response to Virgin's arguments about the decline in switching amongst bundle customers, we note that our analysis of Sky's incentives to limit distribution is based on the pay TV survey evidence published alongside the consultation<sup>443</sup> rather than the survey evidence in Ofcom's Consumer Experience report. The pay TV surveys asked subscribers (including current triple-play subscribers) how they would react to the withdrawal of Sky Sports on their platform.<sup>444</sup>
- A2.72 With respect to stakeholder comments on the potential impact on other markets, in this review we are considering the impact of sports content on competition in pay TV. We have not considered the impact of sports content on any other markets. We recognise that stakeholders have made reference to broader competition concerns in pay TV in the context of our Strategic Review of Digital Communications. As noted in Section 7, we will consider those submissions as part of that ongoing review.

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<sup>442</sup> For example, in response to Question 12D of our October 2013 survey (Spontaneous reasons for having their specific pay TV provider), 9% of triple-play customers cited more channels, and 4% cited getting specific sports channels – compared with 11% and 5% respectively for all pay TV consumers.

<sup>443</sup> <http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/pay-tv-research/>

<sup>444</sup> See Figure A6.1 in Annex 6 of the December 2014 consultation.

## Annex 3

# Approach to estimating revenues from the supply of key sports channels

- A3.1 This Annex sets out the approach to estimating revenues we use for calculating share of wholesale supply of key sports channels in Section 5.
- A3.2 In order to estimate the revenue-based shares of the wholesale supply of key sports channels we estimate the revenues associated with Sky Sports and BT Sport respectively. To do this we need to determine the appropriate channel rates to use.
- A3.3 Where there is a contractual rate in place we use this [X]. However, in practice, Sky does not set a charge in respect of the subscribers that take Sky Sports on the Sky DSat platform. In addition, BT does not set a charge in respect of subscribers that take BT Sport Pack or BT Sport Lite on Sky's DSat platform, via BT TV, via the BT app/online player or those that take BT Sports from Plusnet. We determine the wholesale rate of Sky's and BT's self-supply using information available from commercially agreed wholesale contracts.

## Modelling wholesale revenue of Sky Sports

- A3.4 We model Sky's wholesale revenue from distributing Sky Sports to TalkTalk, BT TV and Virgin Media using the commercially agreed pricing. To model Sky's self-supply of Sky Sports we use Sky's wholesale pricing [X].<sup>445</sup> This pricing is summarised in the table below (Table A3.1).
- A3.5 Sky wholesales Sky Sports on a stand-alone basis or as part of a bundle alongside Sky Movies. To attribute revenues to Sky Sports when sold as part of a bundle including movies we have used the following method:
- Where Sky Sports is taken on a stand-alone basis (i.e. without movies) we have assigned all subscribers the appropriate commercially negotiated price that was in effect in that period.
  - Where Sky Sports and Sky Movies are taken in a bundle we allocate the revenue associated with the resulting tariffs between Sky Sports and Sky Movies based on consumer preferences.<sup>446</sup>
- A3.6 We also include HD revenues for Sky based on the rates agreed between Sky and Virgin Media.

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<sup>445</sup> [X].

<sup>446</sup> This is a weighted average price based on responses to our November 2013 survey. The survey revealed that 45% of sports customers were primarily interested in sports, 21% were primarily interested in movies and 21% cared about both. To calculate the reference price we assigned the standalone price, i.e. the price of Sky Sports if purchased without Sky Movies, to customers who cared about sport, the incremental price, i.e. the difference between the bundled price of Sky Sports and Sky Movies and the standalone price of Sky Movies, to customers who primarily cared about movies and a weighted price (the bundled price multiplied by the ratio of the standalone sports element to the standalone movies element) to customers who cared about both.

**Table A3.1: Sky monthly wholesale price per retail customer from September 2015 (excl. VAT)<sup>447</sup>**

	Single sports	SS1&2	SS1,2,3,4 & F1
Sports only	[X]	[X]	[X]
Sports and single movies	[X]	[X]	[X]
Sports and dual movies	[X]	[X]	[X]
Single movies only		[X]	
Dual movies only		[X]	
Estimated price range of sports only <sup>448</sup>	[X]	[X]	[X]

Source: Sky's response to Question 7 of the 3<sup>rd</sup> WMO information request dated 13 May 2015.

## Modelling wholesale revenue of BT Sport

- A3.7 For the supply of BT Sport to Virgin Media, we use the commercial terms defined in their wholesale contract. We use the contractual wholesale price of [X] per month for BT Sport sold to non-XL customers as an incremental channel. For XL customers, we use a price of [X] per month which is an average price Virgin pays per XL customer [X].
- A3.8 BT also sells BT Sport directly to consumers by self-retailing to subscribers on Sky's DSat platform and through BT TV. We use the wholesale rates from the Virgin contract as the appropriate rate for these sales as the Virgin Media contract provides the only commercially negotiated wholesale price available to us.
- A3.9 BT sells BT Sport in a range of different packages which vary in terms of the content offered (e.g. the BT Sport Pack or BT Sport Lite) and other services that are bundled with it. We use the following rates for these subscriber groups:
- where BT Sport Pack is retailed on DSat at £19.99 a month we use the rate for standalone subscribers in the Virgin Media contract – namely [X] per month;
  - where the BT Sport Pack is retailed: (i) for £5 on DSat alongside BT broadband; (ii) for free on the BT TV platform; (iii) for £5 via the BT app; or (iv) for £9.99 on DSat alongside Plusnet broadband we use the rate Virgin Media pays for customers that take the BT Sport Pack as part of the XL bundle [X]; per month; and
  - where BT Sport Lite is retailed (i) for free on DSat alongside BT broadband or (ii) for free via the BT app, we use a rate of [X] per month. This is the same rate we used when modelling the wholesale rate for BT Sport before the availability of Champions League content.<sup>449</sup>

<sup>447</sup> The rates in this table are Sky's wholesale rates [X].

<sup>448</sup> The bottom of the range is the difference between a package containing sports and movies, and a package only containing movies; and the top of the range is the incremental price for sports alone (on top of basic).

<sup>449</sup> The [X] per month rate slightly overstates the value of BT Sport Lite proposition as it is based on BT Sport before August 2015. BT Sport Lite has slightly less content compared to the BT Sport

- A3.10 Some DSat customers taking BT broadband alongside their BT Sport Pack are on a rolling contract (i.e. without a specific contract period). BT charges these customers higher retail prices compared to the standard £5 per month price.<sup>450</sup> However, the content available to these customers is the same as the content available to customers with contract paying £5 per month. For that reason, we apply the same wholesale charge of [X] to these customers as we apply to customers paying £5 per month for the BT Sport Pack.
- A3.11 We have not included additional HD revenues for BT as BT Sport HD is supplied for no additional charge on the Virgin Media platform [X].

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proposition before August 2015. We do not consider that decreasing the rate to account for this would result in a material change the resulting shares of supply.

<sup>450</sup> BT broadband customers on Sky DSat that are out of contract pay £11.75 for BT Sport SD and £16.75 for HD.

## Annex 4

# Glossary

**2010 Pay TV statement:** [http://stakeholders.ofcom.org.uk/consultations/third\\_paytv/](http://stakeholders.ofcom.org.uk/consultations/third_paytv/)

**ARPU: Average revenue per user.** A measurement used by pay-television or mobile companies to indicate the average monthly revenue earned from a subscriber.

**BT Sport:** the TV channels BT Sport 1, BT Sport 2, BT Sport Europe and ESPN.

**BT CA98 Complaint:** Our investigation of BT's complaint against Sky under the Competition Act 1998 about the wholesale supply of SS1&2 to BT's YouView platform – details at: [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01106/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01106/)

**BT Cardinal:** BT's legacy platform, used along with YouView, to deliver its BT TV service.

**The Act: Communications Act 2003**

**CAT: Competition Appeal Tribunal**

**CA98: Competition Act 1998**

**CC: Competition Commission.** The CC has now closed and its functions have been transferred to the Competition and Markets Authority

**CMR: Communications Market Report.** Ofcom's annual statistical survey of developments in the communications sector.

**CoA: Court of Appeal**

**December 2014 consultation:** <http://stakeholders.ofcom.org.uk/consultations/wholesale-must-offer/>

**DSat: Digital satellite.** A term used in the UK to refer to the distribution of digital content via satellite.

**DTT: Digital Terrestrial Television.** A digital distribution technology using terrestrial transmitters.

**HD: High Definition.** A technology that provides viewers with better quality, high-resolution pictures.

**FTV: Free-to-view.** Broadcast content that consumers can watch or listen to without having to pay a subscription

**IPTV: Internet Protocol Television.** The term used for television and/or video signals that are delivered to subscribers or viewers using Internet Protocol (IP), the technology that is also used to access the Internet. Typically used in the context of streamed linear and on-demand content, but also sometimes for downloaded video.

**July 2015 consultation:** <http://stakeholders.ofcom.org.uk/consultations/wmo-supplementary/>

**October 2014 survey** - <http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/pay-tv-research/>

**OTT: Over-the-top.** Refers to audio-visual content that can be delivered on the 'open' internet rather than requiring a managed IPTV architecture.

**Premier League.** The Premier League relates to both the football competition (currently the Barclays Premier League) and the organising body of the Barclays Premier League. References in this document are to the competition itself, rather than the organising body, which we refer to as 'the PL'

**PSB: Public Service Broadcasting, or Public Service Broadcaster.** The Communications Act in the UK defines the PSBs to include the BBC, ITV1, Channel 4, Five and S4C.

**November 2013 survey** - <http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/pay-tv-research/>

**Self-retail.** Where a content provider makes its content available to subscribers on another provider's platform, but has a direct billing relationship with the subscriber rather than making its content available to the platform provider on a wholesale basis.

**Sky Sports:** the TV channels Sky Sports 1, Sky Sports 2, Sky Sports 3, Sky Sports 4, Sky Sports 5, and Sky Sports F1.

**SD: Standard Definition.** As opposed to high definition.

**SS1&2:** the Sky Sports 1 and Sky Sports 2 channels.

**STB: set-top box.**

**WMO: wholesale must-offer.** The WMO obligation was imposed on Sky in the 2010 Pay TV statement requiring it to offer to wholesale its SS1&2 channels (SD and HD) with certain prices and terms set by Ofcom.

**UEFA: Union of European Football Associations.** The governing body of football in Europe.

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