

OFCOM REVIEW OF THE PAY TV WHOLESALE MUST OFFER OBLIGATION

**NON-CONFIDENTIAL RESPONSE OF THE FOOTBALL ASSOCIATION PREMIER
LEAGUE**

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1. EXECUTIVE SUMMARY

1.1 This is the response of the Football Association Premier League ("**PL**" or "**Premier League**") to Ofcom's Review of the Pay TV wholesale must-offer obligation dated 19 December 2014 ("**WMO Review**").

1.2 As Ofcom is aware, the PL appealed against the original imposition of the wholesale must-offer obligation ("**WMO**") on a number of grounds. These included that Ofcom had failed properly to assess the proportionality of its intervention, including with respect to safeguarding sports rights and the virtuous circle of investment and benefits to consumers that flows from the sale of rights, and that Ofcom had failed to identify any, or any sufficient, unmet demand that warranted such intrusive (and potentially damaging) regulation.

1.3 The PL will not restate its position regarding the 2010 WMO in response to the WMO Review. That will be a matter for submission in the on-going appeals that have been remitted to the Competition Appeal Tribunal ("**CAT**"). This response to the WMO Review is, however, wholly without prejudice to the PL's right to continue to pursue all or some of the grounds of appeal relied upon by the PL, in the on-going proceedings before the CAT.

1.4 Nonetheless, the PL's position is and remains that there is no justifiable regulatory basis for Ofcom to intervene by maintaining the imposition of the WMO on Sky in 2015, including by way of any modification to it.

1.5 In summary:

1.5.1 Ofcom has failed to identify the relevant market in which to assess whether there are any practices which are limiting fair and effective competition. In the context of the 2010 WMO, Ofcom sought to justify its intervention as being necessary in order to ensure fair and effective competition in the downstream Pay TV only market. In the WMO Review, it has erroneously simply proceeded from the starting point that the relevant market is the **same** (Pay TV only) downstream retail market as that which was assessed in 2010. As explained below, the world has moved on substantially since 2010, and the sale of and nature of competition for bundles of services, including Pay TV, has developed significantly. It is, to say the very least, far from clear that Ofcom's starting point for its review of the need for the WMO, is correct and indeed on the face of the WMO Review itself it appears that it is wrong. Rather, the correct downstream retail market appears to the PL to be one for the sale of telecommunications bundles including a Pay TV component and in particular "*triple-play*" bundles. In any event (and without prejudice to the point summarised in paragraph 1.5.5 below) Ofcom cannot properly analyse the incentives and effects of any hypothetical and unproven lack of supply of Sky's premium sports channels (and hence the necessity of any continuing intervention) without considering the impacts of such competing triple and quad play bundles. Moreover, as Ofcom itself recognises, Sky's Sports channels are widely available at a retail level and on a wide range of platforms. The evidence to support the extent of the competitive constraint arising from such bundles is such that Ofcom is required to undertake a proper analysis as to how the retail market is working before commencing its analysis of whether regulation of Sky's sports channels is necessary. This is, however, work that has not been done. If Ofcom intervenes without having done so, its intervention will necessarily be unlawful.

1.5.2 Ofcom's over-arching analytical framework is therefore flawed; it is asking the wrong questions and, therefore, it has misdirected itself. Ofcom has

fundamentally erred in not recognising that even if there were a practice which restricts fair and effective competition (which the CAT did not find) then the competitive effects of any such practice cannot be understood without first analysing how the retail market is currently working. Therefore, Ofcom must start again and analyse the retail market properly.

- 1.5.3 Even leaving aside these fundamental errors in Ofcom's approach, the PL is troubled that Ofcom also appears to have erred so substantially in its approach to the identification of so-called "*key content*". The PL has very significant concerns about Ofcom's reliance on survey evidence that manifestly does not support the conclusions that Ofcom seeks to draw in the WMO Review as regards which content (if content is key at all) is considered key by consumers when deciding whether to purchase a Pay TV subscription. In particular, there is no adequate basis for Ofcom's conclusion from its survey evidence that PL content is key content in driving Pay TV subscriptions. The survey evidence shows precisely the opposite. In the alternative, even if this is not accepted by Ofcom, Ofcom's surveys suffer from several methodological shortcomings, the implications of which are not fully discernible from the materials that Ofcom has published, and which need to be explored and understood before any reliance could properly be placed upon them to support the conclusions suggested by Ofcom.
- 1.5.4 As a result of the above-summarised errors, Ofcom's analysis of the impact of any theoretical limited distribution of key content is fatally flawed. Ofcom has carried out its analysis without properly analysing the relevant retail market, and by reference to wrongly identified content.
- 1.5.5 However, and more importantly, Ofcom is not entitled to rely on a solely theoretical and unproven incentive of Sky (and to a lesser extent BT) to limit distribution of alleged key content. Ofcom has not alleged that there exists any practice of Sky that is prejudicing fair and effective competition. This is primarily a matter for Sky but without such a finding, intervention under Section 316 of the Communications Act 2003 (the "**CA 2003**") is not permissible. The Court of Appeal confirmed this in paragraph 87 of its Judgment in *BT v Ofcom, BskyB, The Football Association Premier League and Virgin Media*¹ where it restated the provisions of S.316 of the CA 2003 which require the finding of "**a practice**" which precludes "fair and effective competition". Ofcom's position now appears to be solely that Sky has a theoretical incentive to restrict distribution of "*core premium sports channels*". But in the absence of any indication that Sky is in fact acting on that incentive (or will so act if not constrained by a continued WMO), a merely theoretical risk cannot justify intervention. Ofcom failed to establish that Sky was acting on those alleged incentives before the CAT (a finding which has not been overturned) whilst disclaiming substantial reliance on the mere theoretical position. It cannot resurrect that failed case now.
- 1.5.6 Finally, if Ofcom is to continue to impose the WMO (in whatever form), it must undertake a thorough proportionality assessment. This is something that it failed to do in respect of the 2010 Pay TV Statement. Ofcom must undertake a full and proper consideration of the potential impact of the WMO (in any maintained

¹ [2014] EWCA Civ 133 at paragraph 87 and footnote 54.

form) on sports rights values and the consumer detriment that will result therefrom. The PL has seen no evidence that Ofcom has attempted to take this into account at all, or to reach out to sports rights bodies as to the impact such regulation and decrease in rights values will have. It must ensure that it does so prior to the maintenance of the WMO (in whatever form). It is categorically not the responsibility of Sky, the Premier League nor any other third party to prove that the WMO is not warranted. The burden is on Ofcom to make its case, and it has wholly failed to so do.

- 1.6 It will be apparent from the above summary that (leaving aside the substance of the WMO Review) the PL also has serious concerns about the manner in which Ofcom is conducting its review. It is (erroneously) proceeding on the basis of theoretical alleged incentives despite the fact that the CAT found that there was no actual limited distribution of Sky's sports channels. Furthermore, despite the length of time it has taken for Ofcom to issue the WMO Review document (following its announcement in April 2014 that it was intending to do so), a large volume of work appears not to have been done which the regulator would ordinarily be expected to complete. This includes, in particular, the conduct of a proper market analysis.
- 1.7 Ofcom will be well aware of the expense, delay, and uncertainty caused by the initial 2010 WMO. That uncertainty continues: in light of the CAT's findings (in respect of which there has been a remittal but not a reversal) it must at the very least be said that the initial decision was *prima facie* unlawful. There may well be protracted further litigation about the legality of the 2010 decision. In those circumstances, it is particularly incumbent upon Ofcom to ensure that its process is appropriately rigorous and analytical. The PL must fully reserve its position but at present it has real doubts about whether Ofcom's WMO Review could come close to the necessary standard.

2. MARKET DEFINITION: DEVELOPMENTS IN THE PAY TV SECTOR

- 2.1 In Section 3 of the WMO Review, Ofcom sets out various developments in the Pay TV "sector". By Question 3.1, it asks whether it has accurately represented the key developments. The PL's position is that whilst Ofcom has identified key developments, and in particular the increased importance of bundled products such as triple-play, it has failed to assess the impact that these developments have on the proper definition of the downstream market or on the work that Ofcom is required to undertake to ensure that its WMO Review proceeds on a valid footing.
- 2.2 Ofcom rightly recognises at Paragraph 2.6 of the WMO Review that it is necessary to re-assess the WMO's validity in light of "*a number of developments in the Pay TV sector*". These developments are rightly said to include the "*launch of BT Sport*"; "*the increasing importance of bundling of Pay TV services with broadband and telephony (known as 'triple-play')*"; "*an increased presence of OTT services (and new devices) which provide new means of accessing content; and that sports content is now more widely available than in 2010*". The PL would suggest that these developments are vitally important to the WMO Review and to the definition of the market in which it is alleged that any restriction on the supply of allegedly key sports content will have an effect on fair and effective competition.
- 2.3 However, despite multiple references to these developments, and the need to reassess the WMO's validity in light of these developments, Ofcom fails to do so. It fails to recognise that retail competition for customers has moved on and that the market has moved on significantly in terms of what consumers are purchasing (and why). Ofcom must consider carefully what the correct definition is of the relevant market and whether there is a need to intervene to

prevent practices that would be prejudicial to fair and effective competition *in that market*. This is particularly significant in order to be able to determine whether any intervention is justified or not.

- 2.4 Ofcom appears, however, to have simply ignored these developments and proceeded to undertake its analysis on the basis that it only needs to look at what drives retail competition in the standalone provision of Pay TV services. It has (implicitly) assumed that the market definition adopted by Ofcom in its Pay TV Statement in 2010 remains the relevant market downstream five years later. It has done so without having undertaken any (even preliminary) analysis of whether the right market is in fact broader.
- 2.5 Ofcom concluded in 2010 that the relevant markets were:
- 2.5.1 A retail market: the provision in the UK of packages (of channels) including Sky Sports 1 and/or Sky Sports 2 and/or ESPN;² and
- 2.5.2 A wholesale market: the wholesale supply in the UK of Core Premium Sports Channels, comprising: (i) wholesale bundles including high definition and/or standard definition and/or interactive versions of Sky Sports 1 and/or Sky Sports 2 and (ii) wholesale bundles including ESPN2.³
- 2.6 It was the perceived need to ensure fair and effective competition in the former only of these markets that was said to justify the imposition of the WMO in 2010. However, there have been significant developments in the retail market since 2010 which would strongly indicate that a wider market has emerged, and which in any event are relevant to any assessment of whether the WMO continues to be necessary.
- 2.7 At the retail level, broadcasters are clearly offering and competing on the basis of a "*bundle*" of packages which include a Pay TV subscription, broadband, and phone line (known as a "*triple-play*" bundle); some bundles also include a mobile phone service (known as a "*quad-play*" bundle).⁴ As Ofcom itself acknowledges, six in 10 households buy their communications services as part of a bundle and 53% of Pay TV subscribers take their TV service as part of a bundle. At the very least, the market for the sale of triple or quad-play telecommunications bundles is such an obvious *candidate* market on the basis of Ofcom's own statements in the WMO Review, that Ofcom is obliged to undertake a proper consideration as to whether the parameters of the 2010 market definition remain valid in respect of dynamic and fast developing technology and broadcasting sectors. It appears to have done no such analysis.
- 2.8 This is so despite *inter alia* the following statements in the WMO Review itself:
- 2.8.1 "*The Pay TV sector continues to evolve with the development of new services and distribution methods in such a way that the impact of limited distribution of the key sports content shown on Sky Sports on competition in Pay TV services may be reduced.*"⁵

² [2014] EWCA Civ 133 at paragraph 87 and footnote 54.

³ Paragraph 5.359, Ofcom's Pay TV Statement, 31 March 2010.

⁴ See paragraphs 2.10 and 2.11 of this Response

⁵ WMO Review, paragraph 1.25

- 2.8.2 *"There have also been a number of developments in the Pay TV sector since 2010 which may have affected the operation of competition, including an increase in take-up of Pay TV services, the development and entry of OTT services, the launch of BT Sport and the increasing importance of bundling of Pay TV services with broadband and telephony (known as 'triple-play')."*⁶
- 2.8.3 *"Bundles are becoming increasingly prevalent when purchasing communications services, with six in ten households now buying their communications services as part of a bundle. 53% of Pay TV subscribers take their TV service as part of a bundle. Indeed, BT and TalkTalk only offer their Pay TV packages as part of a bundle with broadband and/or phone."*⁷
- 2.8.4 *"While dual-play bundles are most popular (28% of households take landline and broadband services from the same provider), 23% of households report having a triple-play bundle of broadband, telephone and multi-channel TV (up from 17% in 2010). BT, Sky, TalkTalk, and Virgin Media all offer triple-play packages, although take-up varies significantly between operators."*⁸
- 2.8.5 *"More recently there has been a focus on quad-play packages - Virgin Media has been offering such packages, which bundle mobile services together with landline, broadband and TV, for some time (and 17% of its customers take up these packages). In 2012, TalkTalk also implemented a quad-play strategy with the launch of a mobile handset and SIM only contracts for customers taking its broadband and fixed line services. EE has also recently launched a quad-play package Take-up of quad-play in the UK generally is still low, however, with only 1% of consumers claiming to receive their mobile, fixed line, broadband and TV in a bundle. This may increase in future, however, particularly given BT is due to launch a consumer mobile business in 2015, and Vodafone's recent announcement that it is moving into consumer broadband and Pay TV in 2015."*⁹
- 2.8.6 *"Bundling of services is also increasingly relevant in relation to sports content on Pay TV - BT offers BT Sport for free to customers who take broadband services, and Sky previously offered two years' free broadband to customers when it launched its Sky Sports 5 channel."*¹⁰
- 2.8.7 *"... the majority of BT Sport subscribers get the channels as part of a bundle of other services, either as part of the XL package on Virgin Media or bundled with BT's broadband packages."*¹¹
- 2.8.8 *"... bundling of Pay TV with other communications services is more prevalent, and has become increasingly important, with sports content being bundled with other services."*¹²

⁶ WMO Review, paragraph 2.6

⁷ WMO Review, paragraph 3.17

⁸ WMO Review, paragraph 3.18

⁹ WMO Review, paragraph 3.19

¹⁰ WMO Review, paragraph 3.20

¹¹ WMO Review, paragraph 3.45

¹² WMO Review, paragraph 3.48

- 2.9 It is evident therefore, that Pay TV subscriptions are being supplied to consumers as one component of these triple or quad-play bundled packages. Sky, BT and Virgin Media offer and compete on the basis of a variety of triple-play packages. In particular, BT's offer of BT Sport for free when customers opt for BT's broadband service (whether they take other Pay TV from BT or not) clearly indicates that BT is using its sport content to drive subscriptions to its broadband service.
- 2.10 Indeed, it can be seen from recent public statements by BT that it considers competition in the retail market to be driven by at least triple-play bundles (emphasis added):
- 2.10.1 *"It's why we've invested and will continue to invest in ... BT TV and BT Sport, because **the trend in the market is clear - our customers want packages of voice, broadband and TV**. I'm delighted that in less than one year, we have around 3m direct BT Sport customers and our service is in around 5m homes"*¹³;
- 2.10.2 *"Triple-play bundles of TV, broadband and fixed-voice continue to grow in importance for customers"*¹⁴;
- 2.10.3 *"We are **winning new customers and retaining existing customers through bundled packages and the appeal of BT Sport. Around 98% of our broadband sales are now bundled with other products and 91% of our broadband customer base takes a bundle of services**"*¹⁵; and
- 2.10.4 *"The launch of BT Sport was our largest investment this year. It:*
Increases customer loyalty. More than 1m of our broadband and BT Sport customers take a Pay-TV service from another service provider. BT Sport makes them less likely to change their broadband provider;
Allows us to grow our customer base among sport-centric UK households; and
*Provides us with a new revenue stream - we charge consumers who do not take our broadband packages and we charge pubs and clubs for a commercial licence. We also make money from advertising and sponsorship."*¹⁶
- 2.11 Sky has also publicly commented on this developing trend and consumer preference for triple-play bundles (emphasis added):
- 2.11.1 *"Sky is also the UK's fastest-growing home communications company and **favourite "triple-play" provider of TV, broadband and home phone**"*¹⁷ (emphasis added); and
- 2.11.2 *"Over the last 12 months our triple-play offering has gone from strength to strength as we've continued to invest in delivering great quality TV to customers*

¹³ Page 14, BT Group PLC Annual Report 2014

¹⁴ Page 17, BT Group PLC Annual Report 2014.

¹⁵ Page 40, BT Group PLC Annual Report 2014.

¹⁶ Page 41, BT Group PLC Annual Report 2014.

¹⁷ http://corporate.sky.com/media/press_releases/2014/every_premier_league_club_on_demand_with_sky_sports

across multiple platforms alongside great-value unlimited broadband and home phone services."¹⁸

2.12 The European Commission and other competition bodies have also commented on the convergence of broadcasting and telecoms, in particular in relation to the implications of triple and quad-play bundles for market definition:

2.12.1 The European Commission's contribution to the Organisation for Economic Cooperation and Development's ("**OECD**") Global Forum on Competition Report on Competition Issues in Television and Broadcasting, dated 12 February 2013¹⁹ ("**OECD Report**") states:

*"Over the last few years the telecommunications sector has experienced the development of bundled offers, notably triple-play offers (including internet access, fixed telephony and TV) and quadruple-play offers (which tend to include fixed voice, fixed broadband, TV and mobile services). These bundled offers now coexist alongside the separate offers for each of these products. The development of these bundled offers varies significantly between Member States."*²⁰

2.12.2 The European Commission also noted to the OECD that it had, at that time, left open the question of whether a separate market for triple-play or multi-play products exists, but that some National Competition Authorities ("**NCA**s") had already examined the issue and, for example, the French NCA has recognised the existence of a distinct retail market for multiple-play offers²¹; and the Portuguese NCA came to the conclusion that there was a relevant market for triple-play products.²²

2.12.3 The European Commission also stated to the OECD that "*[i]t seems that the development of bundled offers in the telecommunications sector is a growing trend in the EU and it is necessary for competition authorities to take account of the impact it may have on telecommunications markets*".

2.12.4 The OECD report makes clear the significance of the development of multi-play products for the competition authorities in respect of market definition as follows: "*Product market definition in television and broadcasting has become a serious challenge due to technological changes and convergence. To properly define the relevant market, NCAs must have a clear understanding of demand and supply side substitutions along the entire value chain. The market analysis must also take into account the different variables specific to audiovisual products and service markets, like high fixed costs, low marginal costs, bundling, non-price competition, two-sided or multi-sided nature of markets, vertical integration or rapid technological development. Convergence has led to situations of triple-play, with telecommunications, cable TV and the Internet, or even*

¹⁸ Lyssa McGowan, Director of Communications Products at Sky, Press Release - 24 January 2014 - Sky wins best 'triple-play' provider at uSwitch Awards 2014

(http://corporate.sky.com/media/press_releases/2014/sky_wins_best_triple_play_provider_at_uswitch_awards)

¹⁹ <http://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf>

²⁰ OECD Report, European Commission Contribution, paragraph 17

²¹ Letters of the minister in cases C2004-4 and C2007-181; Opinions 05-A-03 and 11-A-05; Decision 08-D-10

²² Supra, Note 17

quadruple-play, with telecommunications, cable TV, Internet and mobile industry".²³

- 2.12.5 More recently, the OECD Competition Committee has published a further report "*Defining the Relevant Market in Telecommunications*"²⁴ in which it considers the issue of defining markets which involve bundled products. The report states:

*"With respect to triple and quadruple-play services, regulatory and competition authorities generally consider the relevant market at the level of individual services. However, as the take up of bundles increase the question of how bundling at the retail level might affect market definition at both the retail and wholesale levels becomes of essential importance"*²⁵; and

*"... in the light of the increasing popularity of bundled offers it has to be stressed that even if conditions of competition in a given market do not support the existence of a separate relevant market for such offers, competition and regulatory authorities should consider that such markets may eventually emerge. When they do, competition analysis may change considerably."*²⁶

- 2.12.6 Moreover, the European Commission has undertaken market definition assessments in respect of multi-play products in a number of its recent merger decisions in this sector. Whilst on the facts of those cases, the European Commission has left open the question of whether multi-play products constitute distinct markets, this is because it has not been required to review a transaction which would raise competition concerns on any such market. However, it has considered whether competition might be affected on such candidate markets in a number of recent cases, including *Vodafone/Kabel Deutschland*²⁷, *LGI/KBW*²⁸, *Liberty Global Europe/Unitymedia*²⁹, *Vodafone/Cable&Wireless*³⁰ and, most recently in *Vodafone/ONO*³¹. The Commission is also currently conducting a Phase II in-depth investigation of Orange's proposed acquisition of Jazztel, focusing on *inter alia*, the impact on competition of the proposed transaction on the possible market for triple-play offers (comprising fixed voice, fixed internet and mobile internet).³²

- 2.13 In light of these recent developments, Ofcom's apparent failure to undertake a proper analysis of the relevant retail market is starkly out of line with the position taken by the European Commission, other NCAs and the OECD.

²³ OECD Report, Executive Summary, point 2

²⁴ OECD Competition Committee, "*Defining the Relevant Market in Telecommunications*", 2014 http://www.oecd.org/daf/competition/Defining_Relevant_Market_in_Telecommunications_web.pdf

²⁵ *ibid*, page 40 (emphasis added)

²⁶ *ibid*, page 65

²⁷ Commission decision in case COMP/M.6990 - *Vodafone/Kabel Deutschland*

²⁸ Commission decision in case COMP/M.5900 - *LGI/KBW*

²⁹ Commission decision in case COMP/M.5734 - *Liberty Global Europe/Unitymedia*

³⁰ Commission decision in case COMP/M.6584 - *Vodafone/Cable&Wireless*

³¹ Commission decision in case COMP/M.7231 - *Vodafone/ONO*

³² European Commission Press Release IP/14/2367, 4 December 2014

- 2.14 Without prejudice to these points on the correct market definition framework for assessing competition, it is also clear that competition in terms of pricing, innovation and quality is actually occurring across bundles. It is notable in this respect that Virgin Media's response to the publicity surrounding Sky and BT's recent acquisition of PL rights for the 2016/2017 – 2018/2019 seasons was to announce an investment of £3bn in its broadband network.³³
- 2.15 It is plain from the above that on any basis the downstream markets are now considerably wider than Ofcom's previous analysis of them in the Pay TV Statement. It also follows from this that broadcasters are competing to offer consumers bundled services and the core premium sports channels (and *a fortiori* Premier League content within such channels) are just one small input into the total offering made available to consumers at the retail level.
- 2.16 Despite Ofcom considering this trend in the Pay TV Statement of 31 March 2010 (emphasis added):
- "The Pay TV sector is characterised by bundling at both the wholesale and retail levels. Core Premium Sports channels are included in a range of bundles alongside products such as basic channels, movie channels, broadband and telephony. In principle this could significantly complicate our analysis"* (paragraph 5.73).
- it has shied away from the necessary and principled analysis, perhaps on the basis that it is "*complicate[d]*". Moreover, it has shied away despite the compelling evidence that should have lead Ofcom to undertake a fuller market definition analysis driven by at least triple-play bundles. Without properly analysing the markets as they should be defined today, there can be no basis for any suggestion that Sky is engaging in any actual (or even theoretical) practices impacting on fair and effective competition in any relevant market (such that consumers are suffering harm) that necessitates Ofcom's intervention.
- 2.17 For this reason, the PL does not accept that Ofcom has accurately represented developments in the Pay TV market (Question 3.1) because it has failed to appreciate the necessary implications of the noted developments with regard to bundling. These developments clearly impact on the correct definition of the downstream market and require Ofcom to undertake the necessary work to define the relevant market. This failure to accurately represent the market developments and assess the market, is a fundamental error from which it follows that Ofcom's entire WMO Review is being undertaken on a faulty premise. Ofcom must correct this before proceeding further.
- 2.18 The PL does not respond more generally to Question 3.1 as to whether Ofcom has accurately represented the Pay TV market or whether there are other relevant developments. Ofcom will no doubt receive responses from broadcasters on this matter.
- 2.19 The PL must, however, object to the throwaway description of sports rights values as being "*still high*" and that this is somehow relevant to the necessary analysis of the impact of the market developments.³⁴
- 2.20 The PL's rights are, as Ofcom knows, the subject of a competitive auction that is structured so as to maximise uncertainty and to create the potential for new entrants. That the PL's rights values have increased from auction to auction is simply a reflection of the competitive tension in the auction and the fact that broadcasters value those rights highly because of the quality of

³³ <http://www.bbc.co.uk/news/business-31451174>

³⁴ WMO Review, paragraph 3.50

the product they are purchasing. The PL is regarded by many as the best football league in the world and delivers competitive and compelling football throughout its 380 matches. It is broadcast into 645 million homes worldwide and out of the 2 billion football fans across the world, over half (1.163 billion) are PL fans. Domestic stadium occupancy statistics (95.9% in the 2013/2014 season) and live match viewers increase across all domestic broadcasters emphasize this point. Furthermore, last season saw 1,052 goals scored and the league leaders change 25 times, statistics which establish the PL's standing in world football.

- 2.21 Ofcom has separately opened an investigation into the collective selling arrangements for PL rights effected by the PL Rules, prompted by a complaint from Virgin Media. The PL's position as to the process of its rights sales has been made clear within the context of that complaint. It will not repeat those matters here. Ofcom is however referred to paragraph 6.6 and its subparagraphs of the PL's Initial Comments Regarding the Virgin Media Complaint dated 13 October 2014. The PL there summarises the large consumer benefits that arise out of the on-payment by the PL of large sums from its rights sales, not just to PL Clubs, but to the Football League, the Football Conference, the Professional Footballers Association, and more generally to grassroots football and charitable organisations connected with the game.

3. ANALYTICAL FRAMEWORK

- 3.1 In Section 4, Ofcom sets out its intended analytical framework for the WMO Review. By Question 4.1, it asks whether respondents agree with that framework. The PL does not.

- 3.2 In the first instance, Ofcom is not in a position to assess whether there are any practices that are precluding fair and effective competition in relation to channels containing PL content, by just assessing how important PL content is in the abstract. Rather, it must make this assessment by reference not only to how its importance compares with other TV content; but also to how its importance compares to the telephony and broadband components of the wider bundles that consumers are purchasing. Ofcom has not done this. Moreover, the errors set out in Section 2 above renders Ofcom's analytical framework flawed. It has asked itself the wrong questions:

3.2.1 the necessary first step in analysing whether any practices are precluding fair and effective competition is to define what is key to consumers when they are making their purchasing decisions;

3.2.2 Ofcom must define the relevant market in which competition is occurring. Ofcom has not done this. It has simply assumed a definition that it viewed as correct in 2010, despite the extensive developments in the market since 2010 and the statements evidencing both broadcaster behaviour and customer preference set out above;

3.2.3 by failing to assess properly the extent to which recent developments mean that a broader market definition than that adopted in 2010 is appropriate, Ofcom has artificially limited the consideration of the reasons why consumers are purchasing whatever they are purchasing; such that potential key reasons will be missed and content will be ascribed key status when it might not deserve it because of the narrow field of focus.

- 3.3 These key errors in Ofcom's analytical framework render the entire approach in the WMO Review, and the conclusions, unsound.

- 3.4 Therefore, Ofcom cannot on rely on its conclusions in Sections 2 and 3 of the Review when moving to the next steps of its analysis. It must start again in order properly to assess whether

there still are concerns about practices restricting fair and effective competition in any relevant market that might necessitate remedial action.

4. OFCOM'S ERRORS IN IDENTIFYING KEY CONTENT

- 4.1 In section 5 of the WMO Review, Ofcom purports to identify "*what constitutes key content*", which it defines as "*content that is capable of influencing the choice of Pay TV provider for a significant number of consumers.*"³⁵ Ofcom's stated purpose of this (alleged) identification of "*key content*" is to assess "*the extent to which the presence of particular content on Pay TV platforms may drive consumers' decisions in choice of Pay TV service*".³⁶

Ofcom does not properly analyse "*key content*" that is capable of influencing choice

- 4.2 Ofcom's approach to defining "*key content*" is to analyse content that is "*capable of influencing choice of Pay TV provider*". However, there are a number of flaws in this approach that renders Ofcom's entire analysis in Section 5 flawed from the outset.
- 4.3 Firstly, Ofcom proceeds (as it does throughout the WMO Review) on the basis that all consumers are only buying Pay TV subscriptions on a standalone basis and are, therefore, making choices about Pay TV providers only. Ofcom entirely ignores the question of what drives the purchasing decisions of those consumers who are buying bundles of services that include Pay TV. For those customers, 69% of respondents to the 2013 Survey,³⁷ access to content per se may not be primarily (or even on a secondary basis) influencing their choice; let alone access to sports content.
- 4.4 Consequently, Ofcom's approach in Section 5 proceeds on a false premise and (subject to all the points below on the survey evidence) cannot contain representative evidence on what is driving consumer choice of provider.
- 4.5 Secondly, and without prejudice to the points in paragraphs 4.2 to 4.4 above, it is not clear what is meant by "*capable of influencing choice*". Ofcom does not provide any explanation for what criteria it has applied to determine when content is capable of influencing consumer choice, or not.
- 4.6 In fact, a range of possibilities arise. For instance, a high threshold criterion could apply such that only that content which is capable, *alone*, of driving pay TV subscription is taken to be capable of influencing choice. Alternatively, a lower threshold could apply such that content which is the main reason, or one of the main reasons, for a consumer's decision to subscribe to a particular Pay TV service is capable of influencing consumer choice. A lower threshold still would be to say that any content which is *a* reason that a consumer takes into consideration when deciding to subscribe to a particular Pay TV service is capable of influencing consumer choice of Pay TV provider.
- 4.7 Ofcom appears to adopt all of these possible criteria described above in various points in its analysis. Ofcom also refers to content as being "*important*" and "*particularly important*" to consumers' choice of Pay TV retailer. It is also unclear whether Ofcom considers that "*important*" and/or "*particularly important*" content is content capable of influencing consumer choice for the purposes of defining key content.

³⁵ WMO Review, paragraph 5.1

³⁶ WMO review, paragraph 5.6

³⁷ Question A8A of the 2013 Survey

- 4.8 Clearly, and as Ofcom recognises, consumers value a range of genres,³⁸ and as regards sports content, they value a range of different sports and sporting competitions.³⁹ In principle, any and all valued content is potentially capable of influencing consumer choice. Ofcom cannot, therefore, conclude that live PL coverage (and to a lesser extent live UEFA Champions League coverage) "*appear capable of influencing a significant number of consumers' choices... we have therefore identified them as key content in competition for Pay TV services*". Even if the PL accepted that this was the correct question in the first place (which it does not) Ofcom must explain the criteria applied by it to determine which content is valued *to such an extent* that it is capable of influencing choice of Pay TV platform. Obviously, the approach taken will determine the proportion of consumers for whom certain content is taken as being "*capable of influencing choice*".
- 4.9 Moreover, Ofcom also fails to define or explain what it considers to be a "*significant number of consumers*" in this context. It goes without saying that is impossible to determine whether content is capable of influencing choice "*for a significant number of consumers*" without first deciding what that means. Ofcom has not done this.
- 4.10 Instead, Ofcom uses a variety of terms to describe the size of relevant groups of consumers, including "*high proportion*", "*significant group*", "*large proportion*", "*sizeable group*", "*substantial numbers*" and "*large number*" in its analysis, but nowhere does it explain what number or proportion it considers to be "*high*" or "*significant*" or "*large*". Therefore, Ofcom's approach is not capable of being relied upon; let alone being capable of objective justification. On any basis, Ofcom's reference to 23% of respondents to a question as being a "*sizeable group*";⁴⁰ cannot be sustained and demonstrates that Ofcom's analysis of the actual evidence before it is flawed.
- 4.11 Without prejudice to the fatal lack of a proper market definition analysis, Ofcom does not undertake any objective analysis of what the decision making practice of what proportion of the consumers of Pay TV might have an appreciable effect on competition, for these purposes. This is a serious flaw in Ofcom's analysis. From the outset, the question that Ofcom seeks to determine in Section 5 is ill-defined and unclear.
- 4.12 As to Ofcom's analysis of the survey evidence on which it seeks to rely in Section 5, the PL considers that it is very clear that the survey evidence, taken as a whole, does not support Ofcom's findings, and in some cases, Ofcom's conclusions are directly contradicted by the survey evidence on which it purports to rely. Ofcom's analysis is discussed in more detail below.

Ofcom's claim that consumers identify sports content as important in their choice of Pay TV supplier is unsupported and weak

Consumer decisions to take out Pay TV are driven by a desire to access more content in general, not content of a particular type

- 4.13 As a preliminary statement, in Paragraph 5.6 of the WMO Review, Ofcom states that "*[t]he survey evidence suggests that consumers' choice of Pay TV service continues to be driven **primarily** by a desire to access **particular** content*". This is simply not correct. The survey

³⁸ WMO Review, paragraph 5.10

³⁹ WMO Review, paragraph 5.4 and 5.24

⁴⁰ WMO Review, paragraph 5.20

evidence, in fact, shows that (of those surveyed) consumers subscribed to a Pay TV service (rather than just relying on FTA provision) in order to access more content *in general*.

- 4.14 Ofcom finds that 71% (unprompted) and 78% (prompted) of respondents to its 2013 Survey stated that one of the reasons that they got Pay TV was to access more content, either generally or by reference to a specific genre or channel. The survey first asked respondents (Question A12A) the open question "*What were the reasons your household got a TV service that you Pay for your main set rather than having free TV channels only*". The answers to that question (the unprompted answers) were then coded to the closest answer in a list provided, which included the following:

"1: To get more channels in general

2: To get more channels of a specific genre / type of programming

3: To get specific kids channels

4: To get specific sports channels

5: To get specific film channels

6: To get other channels"

- 4.15 The list also included a further 13 non-content reasons. Respondents were then shown the list and asked (Question A12B) whether any of these reasons applied when they chose to get a Pay TV service and asked them to include any answers already given (prompted answers).
- 4.16 The 71% (unprompted) / 78% (prompted) cited by Ofcom, therefore, aggregates several different types of response, including access to both *specific* content and more channels *in general* (i.e. non-specific content). The relevant questions were, in fact, structured so as to allow respondents to distinguish between a desire for more content *in general* and a desire for *specific* content of a particular type; together with other non-content related reasons. When the actual responses provided are analysed, these clearly show that, in direct contradiction to Ofcom's assertion at paragraph 5.6 of the WMO Review, that access to a range of additional content, *in general*, is far more important than access to a *specific* type of content.
- 4.17 By far the most popular answer to this question, given by 54% (unprompted) and 63% (prompted) was to get more channels *in general*. The next most popular answer - 12% (unprompted) and 19% (prompted) was to get more channels of a specific genre, other than the types specifically listed (i.e. sports, kids and films) so this would include drama, documentary, adult, music etc.
- 4.18 The third most popular answer was to gain access to sports channels. Ofcom reports that 11% (unprompted) and 18% (prompted) said access to sports channels was *one* of the reasons that they subscribed to Pay TV; 6% (unprompted) and 12% (prompted) said access to kids channels; and 3% (unprompted) and 6% (prompted) said access to film channels was a reason.
- 4.19 Respondents also gave a range of non-content reasons for taking out Pay TV, for example: 4% (unprompted) / 16% (prompted) said the ability to pause, rewind and record live programming; 3% (unprompted) / 15% (prompted) said on-demand or catch up services; 2% (unprompted) / 11% (prompted) said access to HD channels.

4.20 The survey evidence is clear, therefore, that for the majority of consumers, access to more content *in general* was the reason for subscribing Pay TV. Only a significantly smaller proportion of consumers subscribed to Pay TV in order to access a specific genre of content and/or specific sports content. Moreover, similar numbers of consumers subscribed in order to have access to non-content services and products. Therefore, it is not, as Ofcom seeks to conclude, that consumer choice is driven primarily by a desire to access particular content; let alone a desire to access only sports content.

There is no evidence to support Ofcom's view that consumers identify sports content (in general) as being particularly important

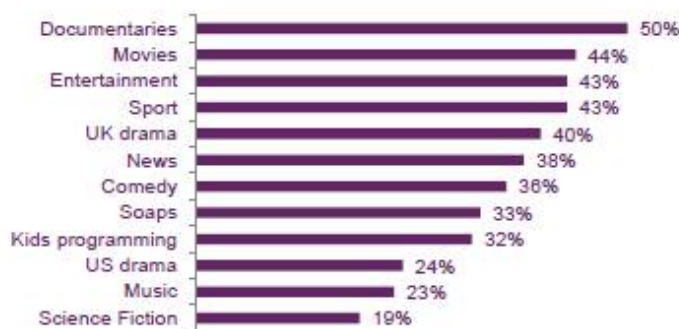
4.21 As set out above, only 11% (unprompted) / 18% (prompted) of respondents cited access to sports content as *one* of their reasons for taking out Pay TV, when asked to list *any* of the reasons in the list that applied to them. Respondents to this question were able to provide multiple reasons for their decision to subscribe to Pay TV and were expressly asked to include any and all reasons which applied to them. Accordingly, for the very large majority of respondents, **89%** (unprompted) / **82%** (prompted), access to sports channels was categorically **not** a reason that featured in their decision to take out a Pay TV subscription.

4.22 On this basis, therefore, the PL considers that the responses to Questions A12A - C lead to the opposite conclusion to Ofcom's, that access to just sports content is not especially important to consumers. Rather, what is important to consumers is range and volume of content *in general*.

4.23 Ofcom also refers to the responses to question B2 of the 2013 Survey, which asked consumers what content genres were important to their household.

4.24 Ofcom sets out the results of this question in Figure 5.1, reproduced below:

Figure 5.1: TV genres important to household



B2: Which of the following types, or genres, of TV programming are important to your household?
 Source: Ofcom November 2013 survey. Base: All with Pay TV on main set who are personally or jointly responsible for TV service (2252).

4.25 Ofcom suggests that this data shows that sports content is of value to a *"high proportion of Pay TV subscribers"*. It is doubtful whether 43% of respondents can be characterised as a *"high"* proportion, but in any event, as is clear from Figure 5.1 above, a greater or similar proportion of consumers also said that documentaries, movies, entertainment, UK drama, news, comedy, soap and kids programming were important. Figure 5.1, therefore, indicates that sports content is about as important as all these other types of content.

- 4.26 This is consistent with the survey evidence from the responses to Questions A12A - C discussed above, that consumers value a *range* of different content. Ofcom recognises that "*consumers clearly value a range of genres*" at paragraph 5.10 of the WMO Review, but also suggests that sports content "*stands apart in having a high degree of exclusivity to Pay TV*". It appears that Ofcom is, therefore, seeking to conclude that as a consequence of this alleged high degree of exclusivity that this somehow supports its view that sports content is so important to "*a large number of consumers*" that it is, in itself, an "*important*" driver of choice in Pay TV services.⁴¹
- 4.27 Firstly, the degree of exclusivity of live sport to Pay TV is irrelevant in light of the survey responses. As Figure 5.1 shows, 44% of respondents considered movies to be important. Whilst it is unclear whether this is primarily looking at Hollywood Studio films/new releases etc. it could equally be argued that movies have a high degree of exclusivity on Pay TV. Ofcom ignores this and erroneously tries to draw conclusions about the importance of sports content from the alleged unavailability of live sports content on FTA.
- 4.28 Secondly, and in any event, the PL does not accept that it is necessarily correct to assert that live sports content is primarily a Pay TV product. Ofcom says that "*the majority of sports coverage is shown (exclusively) on Pay TV channels*", but it provides no evidence to support this contention and no explanation of any analysis it has undertaken. For example, is it Ofcom's assertion that there is a greater volume of sports coverage available on Pay TV than FTA by air time, or on the basis of some other measure?
- 4.29 Furthermore, Ofcom's position in the WMO Review is not consistent with statements made in the 2010 Pay TV Statement, for example, that "*a considerable amount of high quality sports content is available free to air*"⁴² and that consumers "*have access to a wide range of other [sports] content from FTA and basic channels*"⁴³.
- 4.30 Ofcom also seeks to argue, at paragraph 5.13 of the WMO Review, that there are "*substantial*" numbers of consumers who pay a premium to access sports channels and that this is consistent with the view that "*sports content is likely to be important for a significant group of Pay TV subscribers*".⁴⁴
- 4.31 However, this does not (in and of itself) tell Ofcom anything about whether sports content alone is an important driver in consumers choosing to subscribe to Pay TV in the first place. It simply demonstrates that for those who have subscribed (for whatever reason) they also value access to sports content. It does not assist Ofcom in analysing the questions it asks itself in Section 6 of the WMO Review about whether the content on Sky Sports and BT Sports alone influences choice of provider.

There is no evidence to support Ofcom's view that access to sports content is a driver in the choice of Pay TV retailer - quite the reverse

- 4.32 The Premier League notes that throughout its analysis of the importance of sports content as a driver of Pay TV subscriptions, Ofcom refers largely to the responses to Questions A12A & B of its 2013 Survey. These questions asked respondents about their reasons for subscribing to

⁴¹ WMO Review, paragraph 5.14

⁴² 2010 Pay TV Statement, paragraph 5.95

⁴³ 2010 Pay TV Statement, paragraph 5.115

⁴⁴ Ofcom refers to Figure 3.13 in Section 3 of the WMO Review, but there appears to be no Figure 3.13 in the WMO Review, and so this claim is unsupported.

Pay TV. Ofcom does not refer at all to the responses to Questions A12D & A12E of the 2013 Survey which asked respondents for their reasons for choosing their *specific* Pay TV provider. The Premier League finds this surprising given that this question is clearly of greater relevance to Ofcom's analysis.

- 4.33 When asked the open (unprompted) question, the most popular answer respondents gave, 15%, was that their provider was the cheapest price. The second most popular answer, 13%, was that it gave them more channels than other providers. This is consistent with the Premier League's submission that consumer choice is driven by a desire for a range and volume of content, rather than a desire for specific types of content.
- 4.34 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 - the fourteenth most popular choice.
- 4.35 Even when promoted and invited to include as many reasons which applied to them, only 10% of the respondents said they chose their specific Pay TV provider to access more specific sports channels and only 6% said that they did so in order to access Sky Sports.
- 4.36 The PL submits that this data can only be interpreted as showing that, contrary to Ofcom's position, sports content alone does not drive subscriptions for the majority of consumers and that only a small proportion of consumers said that access to Sky Sports alone was the reason that they chose their specific Pay TV provider.
- 4.37 Despite the very clear evidence to the contrary, at paragraph 5.14 of the WMO Review, Ofcom sets out its conclusion that *"the evidence suggests that live sports content continues to be important to a large number of consumers. In addition, live sports content differs from other genres of content in that it has a high degree of exclusivity to Pay TV. On the basis of these two characteristics we remain of the view that sports content is an important driver of choice in Pay TV services"*.
- 4.38 For the reasons explained above, the PL considers that this conclusion is entirely unsupported and, indeed, is contradicted by Ofcom's own survey evidence. Rather, the PL considers that the evidence shows that sports content on its own does not stand apart as being especially important to consumers as compared to other types of content - what is primarily important to consumers is access to a range and volume of content *in general*.

Ofcom's conclusion that Premier League content is particularly important to consumers purchasing decisions is unsupported

- 4.39 Ofcom states that it has assessed *"the extent to which particular sports or competitions may have an impact upon consumers purchasing decision in respect of Pay TV services"*. In other words, whether any particular sports content is a driver of competition for Pay TV subscriptions.
- 4.40 Ofcom concludes, apparently on the basis of its survey evidence, that Premier League content *"stands apart from other sports content in terms of the number of consumers who consider it important"*. This is unsupported by the detail of the evidence.
- 4.41 Ofcom seeks to rely heavily on the responses to Questions C2 and C7A from its November 2013 Survey to support this conclusion. First, (Question C2), subscribers to sports channels were shown a list of 17 different sports and asked which were watched by members of their household. Subsequently respondents were asked (Question C7A) which of those sports

identified did they consider "essential", defined to mean content which makes a Pay TV service "worth having".

- 4.42 In the first instance, the question states "*Thinking about the sports TV channels you receive, which of the following does your household consider essential to have access to as part of your TV service*". However, the list of sports and sporting competitions shown to respondents contains content which is shown FTA rather than on any Pay TV sports channels. For example, 18% of respondents to this question said that the Six Nations is essential to have as part of their Pay TV service, and 16% of respondents to this question said that Wimbledon tennis is essential to have as part of their Pay TV service. This is clearly meaningless given that neither of these sporting events is available on any Pay TV service and so cannot, by definition, be essential to it.
- 4.43 Furthermore, the list of sports and sporting competitions shown to respondents potentially includes 38 different items; clearly a very long list. Moreover, it is not clear whether the list of sporting events has been randomised. In the event it was not, for all respondents who said they watch football, the first eight items were all football and for football, the first item was the Premier League. This is very likely to lead to results with a potentially skewed emphasis on football; and on the Premier League.
- 4.44 It also seems likely that many respondents did not understand the meaning of the question, given their answers. This is clear from the fact that Ofcom itself disregards these survey results (at Paragraph A6.26 and at Footnote 222 of the WMO Review) and states that "*It is possible that some respondents may have identified content as essential when in reality they might be prepared to consider a Pay TV service that could not offer this content*". However, remarkably, despite this statement, Ofcom nevertheless relies heavily the results from Question C7A to support its conclusions. This approach clearly cannot be sustained and the Premier League considers that the responses to Question C7A should be disregarded in their entirety.
- 4.45 In any event, the results of this question do not support Ofcom's contention that Premier League content is of essential importance to consumers' purchasing decisions. As set out in paragraph 5.20 of the WMO Review, in fact, only 23% of respondents only identified football as being essential. Ofcom suggests that this supports its argument, but very clearly, the reverse is true - 77% of consumers stated that access to multiple sports was essential to make their Pay TV service worth having. Again, it is very clear that what consumers value when purchasing Pay TV, and what therefore drives competition for subscribers to sports channels, is a range of sports content.
- 4.46 Ofcom also seeks to rely⁴⁵ on the results of Questions 10 & 11 of its October 2014 survey in which it asked subscribers why they took out subscriptions to Sky Sports and/or BT Sports. However, again, the results do not support Ofcom's conclusions. Only 27% of Sky Sports subscribers (so around 9% of all Pay TV subscribers) said that access to Premier League content was their main reason for getting Sky Sports. Ofcom describes this 27% as a "*sizeable proportion*" of respondents and ignores the fact that for 73% of Sky Sports subscribers, access to Premier League football was **not** their main reason for subscribing.
- 4.47 It is simply not possible for Ofcom to rely on these results to suggest that Premier League content alone is particularly important as a driver of competition for subscribers to sports channels, let alone Pay TV more broadly. Ofcom's claim that Premier League content "*stands*

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WMO Review, paragraph 5.22

apart from other sports content in terms of the numbers of consumers who consider it important" is the wrong conclusion to draw from the survey evidence. Rather, it is clear that there is no single sport or sporting event that "stands apart", rather (to the extent that sport is valued at all) what viewers very clearly value is access to a range of sports and competitions.

Ofcom's analysis of the importance of UEFA Champions League content is inconsistent and superficial

- 4.48 As regards UEFA Champions League content, Ofcom suggests that *"it seems unlikely that Champions League football alone could drive Pay TV retailer choice for a material group of customers. That is, if a Pay TV retailer was able to offer Champions League football but not Premier League football, it seems unlikely that Champions League coverage would drive material take-up"*.
- 4.49 However, the relevant question is not whether UEFA Champions League content is *alone* capable of influencing consumer choice, but rather whether it could do so when combined with other attractive content.
- 4.50 Ofcom's analysis of the value and importance of UEFA Champions League is overly-simplistic and its conclusions understate the value of the UEFA Champions League and Ofcom's own recognition that UEFA Champions League *"could increase the degree to which a sports proposition which included Premier League coverage could influence consumers' Pay TV retailer choice"*. Ofcom ignores the survey evidence referred to in paragraph 4.70 below which appears to demonstrate that BT will gain significant customer subscriptions when UEFA Champions League content switches to BT for the 2016/17 season.
- 4.51 The Premier League, therefore, considers that Ofcom has no basis on which to reach its conclusion set out at paragraph 4.48 above.
- 4.52 Moreover, the survey evidence in relation to the importance of UEFA Champions League renders it illogical for Ofcom to conclude that it is only Sky that should be subject to any WMO. If the correct analysis is that UEFA Champions League content is essential to a significant proportion of subscribers (whether on its own or in conjunction with PL content), then Ofcom should reconsider whether BT (which will be the only retailer of both UEFA Champions League and PL content from next season) should also be subject to regulatory control.

Ofcom's conclusion that Premier League and UEFA Champions League content is key content in driving purchasing decisions is wholly unsupported by the evidence

- 4.53 At paragraph 5.36 of the WMO Review, Ofcom states its conclusion that *"on the basis of the evidence presented in this section, we consider that live Premier League coverage and to a lesser extent live Champions League coverage appear capable of influencing a significant number of consumers' choices of Pay TV provider. We have therefore identified them as key content in competition for Pay TV services"*.
- 4.54 The Premier League disagrees with this conclusion, which is not supported by the survey evidence and is, indeed, contradicted by that evidence. Ofcom makes an unjustified leap from the uninteresting observation that some consumers enjoy watching football, especially Premier League and UEFA Champions League, to the conclusion that this content alone is a driver of competition for Pay TV subscriptions.
- 4.55 The survey evidence does not support this:

- 4.55.1 **82%** of Pay TV subscribers expressly do not say that access to sports content was a reason that featured in decision to take out Pay TV, even when invited to do so;⁴⁶
- 4.55.2 **90%** of pay TV subscribers expressly do not say that access to sports content was a reason that featured in their specific choice of Pay TV retailer;⁴⁷
- 4.55.3 even more strikingly, only **11%** of respondents said that *one* of the three main reasons that they took out Pay TV was to access specific sports channels (and only **6%** said specifically Sky Sports);⁴⁸
- 4.55.4 only **6%** said that a reason that they chose their specific Pay TV retailer was to access Sky Sports.⁴⁹
- 4.55.5 only a minority - 27% and 2% respectively - of **sports subscribers** say that access to the Premier League or the UEFA Champions League was their main reason for subscribing to a **sports channel**. This is a very small proportion - **less than 10%** - of Pay TV consumers.⁵⁰
- 4.56 These are Ofcom's own survey results and they very clearly **do not** support the conclusion that sports content per se, let alone Premier League and UEFA Champions League content, is a major driver (or the key driver) of choice of Pay TV provider.
- 4.57 Consequently, there is no basis for Ofcom's conclusion set out at paragraph 5.36 of the WMO Review and, accordingly, the entire basis of its Consultation is fundamentally flawed.

Ofcom's analysis of the importance of Sky Sports in Annex 6 is also seriously flawed

- 4.58 Ofcom's stated aim in Annex 6 of the WMO Review is to try to determine what proportion of Sky Sports subscribers value those channels to such an extent that they would be unlikely to consider a Pay TV service that does not offer those channels.
- 4.59 Ofcom identifies an upper bound to that group of the total number of Sky Sports subscribers less those subscribers who say that they only take Sky Sports because they already take Sky Movies and it does not cost much more. This represents a upper maximum of 30% of all Pay TV consumers.
- 4.60 As a lower bound, Ofcom takes the 6% (unprompted); 10% (prompted) who said that access to Sky Sports was *one* of their reasons for taking out Pay TV. However, Ofcom cannot conclude that "*it seems likely that Sky Sports is very important to these respondents*" as that question indicates nothing about the relative weight of the three reasons given. The relevant Questions A12A & B of the 2013 Survey allowed respondents to provide multiple reasons and, when prompted, invited respondents to list all those reasons that applied to them. Accordingly, all that can be inferred from the responses to those questions is that for 6% (unprompted) and 10% (prompted) of respondents, access to Sky Sports featured in their

⁴⁶ 2013 Survey questions A12A & B

⁴⁷ 2013 Survey questions A12D & E

⁴⁸ 2013 Survey question A12C

⁴⁹ 2013 Survey questions A12D & E

⁵⁰ 2014 Survey question 11

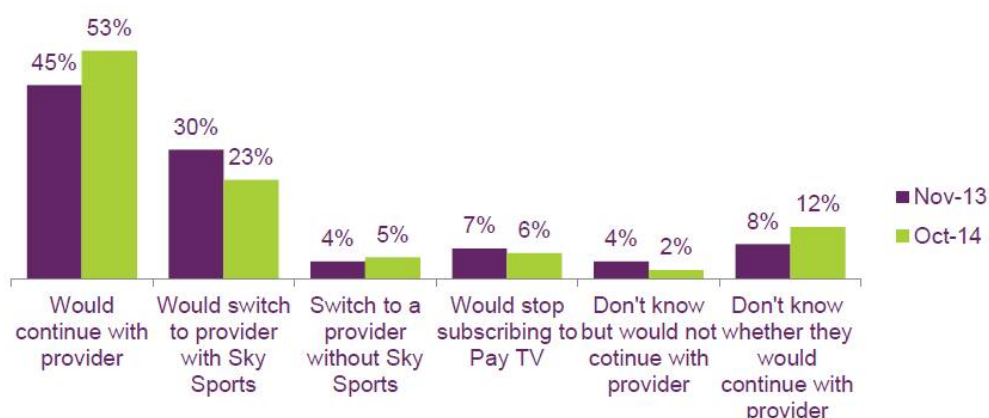
decision making when choosing to subscribe to Pay TV. It simply does not follow that those consumers would necessarily not choose a provider that did not offer Sky Sports.

- 4.61 Moreover, those consumers for whom access to Sky Sports is *"very important"* might well be expected to provide this answer spontaneously as a reason for choosing their specific Pay TV provider. However, only 3% of respondents gave that reason without prompting.⁵¹
- 4.62 Ofcom also refers, in footnote 216, of the WMO Review to the fact that only 6% of respondents said that access to Sky Sports was *one* of their three main reasons. Clearly, therefore, it cannot be correct to say that Sky Sports is necessarily very important to 10% of Pay TV viewers, as not all of them even listed it as *one* of their three main reasons for taking out Pay TV. Furthermore, it cannot be assumed even for those that did state that access to Sky Sports was one of their three main reasons; that those respondents would not consider a Pay TV service that did not carry Sky Sports. The survey responses indicate nothing about the relative importance of respondents' reasons. In other words, Ofcom cannot even be sure of the relevance of the 6% of respondents that said that access to Sky Sports was *one* of their three main reasons.
- 4.63 Furthermore, the Premier League considers that Question A12C was not well understood by respondents and that it should not be relied upon as evidence. The second most popular reason given was *"don't know"*, by 18% of respondents. Ofcom itself disregarded responses to question 28 in the October 2014 survey due to, among other things, the relatively high proportion of *"don't know"* responses at 21%. The same approach should be applied to question A12C and its results should be disregarded.
- 4.64 In addressing the question of how many Sky Sports subscribers would not consider a Pay TV provider that did not offer those channels, Ofcom recognises the weaknesses of its survey evidence at paragraph A6.5 of the WMO Review where it states that *"[a]certaining a more precise figure based on the survey evidence is difficult."*
- 4.65 Ofcom appears to accept, therefore, that it has no basis on which to assess what proportion of Sky Sports subscribers would not consider a provider that did not carry Sky Sports. Given this admission, the Premier League considers that Ofcom has entirely failed to assess properly the question of whether the continued imposition of the WMO is necessary.
- 4.66 Nevertheless, Ofcom proceeds to the conclusion, at paragraph A6.13 of the WMO Review that it *"think[s] it is likely that between 12% and 24% (around 20%) of Pay TV subscribers"* view access to Sky Sports as a critical element of their Pay TV package.
- 4.67 This conclusion is tenuous in the extreme and Ofcom's reasoning and analysis of the survey evidence draws a series of unjustified inferences.
- 4.68 In order to arrive at its conclusion, Ofcom seeks to rely on responses to the survey questions as to what content viewers consider essential, Question C7A of the 2013 Survey, to reach the conclusion that a range of 61-73% of Sky Sports subscribers are unlikely to consider a Pay TV services that cannot offer Sky Sports. Although it is not particularly clear, it appears that Ofcom reaches this conclusion by including in that group all those Sky Sports subscribers who identified content shown on Sky Sports as essential.

⁵¹ 2013 Survey questions A12D & E

- 4.69 This analysis is deeply flawed. By Ofcom's own admission, the responses to Question C7A cannot be relied upon. At footnote 222 of the WMO Review Ofcom states "*i[t] is possible that some respondents may have identified content as essential when in reality they might be prepared to consider a Pay TV service that could not offer this content*". In light of this statement, Ofcom simply cannot rely on the responses to that question.
- 4.70 As noted above, 47% of respondents stated that they considered UEFA Champions League essential to their Pay TV service. If reliable and correct, then the importance of UEFA Champions League content when it moves to BT in 2015 has been significantly understated by Ofcom. Respondents also reported a wide range of sporting events as essential to their Pay TV service, including various events that are shown on FTA. Clearly, the results of this question are unreliable as evidence. Accordingly, Ofcom's conclusions that 61-73% of Sky Sports subscribers (or 20-24% of all Pay TV subscribers) would be unlikely to consider a provider that did not carry Sky Sports cannot be sustained.
- 4.71 Ofcom also refers to the hypothetical question put to respondents asking them what they would do if Sky Sports were not available on their current provider. Ofcom considers that the responses to this question suggest that for 35-46% of Sky Sports subscribers, Sky Sports is "*likely to be a significant factor in the choice of Pay TV provider*". This conclusion is, however, not justified. Ofcom includes in this group, not only those respondents who say that they would switch to another provider with Sky Sports in the event that Sky Sports was no longer offered on their current Pay TV platform, but also those respondents who said that they did not know what they would do, and those respondents who said they would switch to another provider *without* Sky Sports.
- 4.72 For example, of the 35% of Sky Sports subscribers in the 2014 Survey that Ofcom cites as considering Sky Sports to be a significant factor in their choice of Pay TV provider, close to one third would actually either switch to a provider without Sky Sports, stop subscribing to Pay TV or "Don't know". This is shown in the reproduced version of Figure A6.1 below, which demonstrates that the 35% cited by Ofcom comprises:
- 4.72.1 23% who would switch to a provider *with* Sky Sports;
 - 4.72.2 5% who would switch to a provider *without* Sky Sports;
 - 4.72.3 6% who would stop subscribing to Pay TV; and
 - 4.72.4 2% who don't know but would not continue with provider.

Figure A6.1: Action taken if Sky Sports wasn't available on current TV service



Ofcom November 2013 survey: D7. If <TV SERVICE> stopped offering Sky Sports channels would your household continue to get your TV service with them? D8. If you cancelled your TV service with <A2 SERVICE> do you think your household would...? Base: All with Sky Sports (800)
 Ofcom October 2014 survey: Q.17 If for some reason Sky Sports was no longer available on [INSERT] but you could still get it on other pay TV services, would you continue to get your TV service from [INSERT 2]? Q.19 If you cancelled your TV service with [INSERT 2] do you think your household would...? Base all with Sky Sports (612)

- 4.73 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.
- 4.74 Furthermore, this question does not appear to have been well understood as a significant number of respondents gave "don't know" answers - 12% in the 2013 Survey and 14% in the 2014 Survey, and a further proportion gave counter-intuitive responses - 4 % (2013) and 5% (2014) saying that they would switch to a provider without Sky Sports, in response to Sky Sports no longer being available on their current platform.⁵² Together, 16% (2013) and 19% (2014) gave either "don't know" or counter-intuitive answers to this question. These factors, taken together with the inherent weakness in hypothetical questions make these questions unreliable, and Ofcom can place no evidential weight on these results.
- 4.75 In conclusion, therefore, Ofcom cannot 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. Very clearly, therefore, its assessment of the on-going need for the WMO is seriously flawed.

Ofcom's surveys do not conform with best practice

- 4.76 Without prejudice to the points made above at paragraphs 4.12 to 4.75, that the survey evidence does not support Ofcom's conclusions in the WMO Review and, in fact, lead to the opposite conclusion, the PL considers that there are, in any event, serious doubts as to reliability of the survey results as evidence. Thus, it is not clear to what extent the survey results can be relied upon to support any conclusions at all.
- 4.77 In order for surveys to provide robust and reliable evidence, they must be appropriately structured and based on sound survey methodology. However, Ofcom's surveys suffer from

⁵² Ofcom recognises that these responses make little sense at footnote 226 "We do not know the reasons why some respondents who said that they would switch their TV service would switch to a service without Sky Sports or FTA"

several methodological shortcomings, the implications of which are not fully discernible from the materials that Ofcom has published, and which need to be explored and understood before any reliance could properly be placed upon them to support the conclusions suggested by Ofcom. The Premier League has not set out all of these shortcomings in this submission but would be happy to share the detail of its concerns in this regard should Ofcom wish to discuss them in more detail.

- 4.78 As Ofcom will be aware, the CMA has published survey evidence guidelines, "*Good practice in the design and presentation of consumer survey evidence on merger inquires*"⁵³ and the considerations set out in that guidance are equally applicable to Ofcom's approach to survey design and reliance on the survey outcomes. However, Ofcom has ignored all the key principles in these Guidelines.

5. THE IMPACT OF LIMITED DISTRIBUTION OF KEY CONTENT

- 5.1 In section 6 of the WMO Review, Ofcom purports to set out its analysis as to the effect of the limited distribution of key content. By Question 6.1, it asks whether respondents agree with its assessment that limited distribution of Sky Sports may be prejudicial to fair and effective competition. By Question 6.2, it asks whether respondents agree with its assessment that limited distribution of BT Sports is unlikely to be prejudicial to fair and effective competition. The PL makes the following points.

- 5.2 First, Ofcom's analysis is fundamentally flawed because it is not conducted by reference to the actual parameters of retail competition, and is, therefore likely to have been based on an incorrect market definition. This has been explained in detail above. If it is right that Ofcom has adopted too narrow a definition of the downstream market, as the PL suggests it plainly is, then it follows that Ofcom will almost certainly have materially over-stated the likely effects on competition of limited distribution of either Sky Sports or BT Sports. Ofcom must go back and redo the analysis by reference to the correct market (and see the point made immediately below).⁵⁴

- 5.3 Second, Ofcom's analysis is fundamentally flawed for the further reason, explained in the previous section of this response, that Ofcom has manifestly erred in its assessment of what constitutes key content and the importance of that content to subscribers. Thus the statements at paragraphs 6.4 to 6.10 that the "*content on Sky Sports is important to a significant number of subscribers*" and that such subscribers "*place a high value*" on such content are overstated. Again, the effect of this is that Ofcom will almost certainly have materially over stated the likely effects on competition of limited distribution of either Sky Sports or BT Sports. Indeed, these two errors compound each other.

- 5.4 These two errors are of sufficient magnitude as to render irrelevant and inappropriate any more detailed comment on Ofcom's analysis in section 6, as this analysis must in any event be redone. Without prejudice to this, the PL makes the following points.

- 5.5 In fact there is no evidence to suggest Sky's Sports Channels are not widely available. Ofcom's own analysis in Section 3 of the WMO Review demonstrates that Sky's sports channels are, in fact, widely available from a range of retailers and on a range of platforms.⁵⁵ Sky Sports channels are available to retail customers of Sky, Virgin Media, BT TV and Talk

⁵³ Mergers consumer survey evidence design and presentation: CC2com1/OFT1230, "**Survey Guidelines**"

⁵⁴ This renders fundamentally flawed all the analysis at paragraphs 6.29 to 6.73.

⁵⁵ WMO Review paragraphs 3.38 to 3.43

Talk. The channels are available over satellite, cable, IPTV, mobile telephony, and are also available to consumers on a standalone basis by their purchase of a Now TV day / month pass.

- 5.6 As explained in the previous section, Ofcom has ignored the relevance of the UEFA Champions League, or has at the very least undervalued it, contrary to the survey evidence. This has the result that Ofcom has given insufficient weight to BT's acquisition of UEFA Champions League rights and the impact this may have in the relevant downstream market from around the start of 2015/2016 season.
- 5.7 Fifth, the PL disputes the suggestion that Sky has an inherent advantage when bidding for sports rights and in particular PL rights and/or any advantage that has an effect on competition in the downstream market (as properly defined and in any event).
- 5.8 Past auction results are not a useful guide to the future or the existence of any "*in-built advantage*" for Sky. The current market position is that BT has emerged as a serious player in the purchasing of sports rights. It has had back-to-back success in securing very valuable PL rights packages, first in the 2012 auction and in the very recent 2015 auction. It has also obtained all UEFA Champions League rights from 2015/2016. BT's success in becoming a serious competitor to Sky is obvious from its press release issued after the 2015 auction for PL rights:

"John Petter, BT Consumer CEO said:

"I am pleased we will be showing Premier League football for a further three years and that we have secured the prime Saturday evening slot. These new rights will enhance our existing schedule of football, rugby and other international sport, including all the live footballing action from the UEFA Champions and Europa Leagues starting this summer.

BT sport has got off to a strong start, reaching more than five million households and commercial premises, by making itself far more affordable and accessible to sports fans";

and the press release goes on to state that:

"The launch of BT sport has supported the financial performance of BT Consumer by reducing churn, attracting new customers and encouraging existing customers to take more BT products. BT Consumer has now grown its revenue and profit for four consecutive quarters, following the launch of BT Sport."

- 5.9 One reason that BT has been able to achieve this is that it has a very large subscriber base, not necessarily of Pay TV subscribers, but of users of its *bundled services* and in particular its broadband offering. It has a huge established broadband subscriber base, as Ofcom recognises.⁵⁶ In the PL's submission, Ofcom has materially undervalued the extent to which this enables BT to compete aggressively with Sky (and/or over other bidders) in terms of bidding and retailing. This error may partly be attributable to Ofcom's too narrow market definition, which fails to take into account the increasing importance of bundles. In any event Ofcom rightly notes that "*BT Sport now competes directly with Sky for sports customers*".⁵⁷ However, it fails to take this key finding into account.

⁵⁶ E.g. WMO Review at paragraph A8.12(b).

⁵⁷ WMO Review, paragraph 7.16.

- 5.10 In light of the flaws identified above and in particular the two fundamental flaws summarised in paragraphs 5.2 to 5.4 above any response by the PL is necessarily provisional pending sight of a properly conducted analysis that remedies those deficiencies. Nonetheless:
- 5.10.1 the PL disagrees with Ofcom's assessment that limited distribution of Sky Sports may be prejudicial to fair and effective competition (Question 6.1);
 - 5.10.2 the PL agrees with Ofcom's assessment that limited distribution of BT Sports is unlikely to be prejudicial to fair and effective competition (Question 6.2).

6. ALLEGED INCENTIVES TO LIMIT DISTRIBUTION OF KEY CONTENT

- 6.1 In section 7 of the WMO Review, Ofcom sets out its purported analysis of the alleged incentives faced by retailers – that is by Sky and BT – to limit the distribution of key content. By Question 7.1, Ofcom asks whether respondents agree with their assessment of Sky's alleged incentives to limit distribution of its key content. By Question 7.2, the same question is asked vis-à-vis its assessment of BT's alleged incentives.
- 6.2 The PL does not respond to this section of the WMO Review in detail. That is something that will no doubt be done by Sky and BT.
- 6.3 Nonetheless, the PL is seriously troubled by the approach that Ofcom has taken in section 7 and as a result across the WMO Review as a whole. That is, Ofcom makes no case that Sky or BT *have* actually limited distribution of key content. Nor does Ofcom go so far as to conclude that they *will* do so. Ofcom's whole case on potential consumer harm is thus entirely theoretical. This is not and cannot be an adequate basis for intervention.
- 6.4 The position is set out clearly in S. 316(1) and S. 316(2)(b) of the CA 2003 which only permits Ofcom to impose licence conditions that prevent a licensed service provider from engaging in "**any practice**" which is (or could be) prejudicial to fair and effective competition. The CA 2003 does not permit Ofcom to intervene on the basis of alleged theoretical incentives. This was endorsed by the CAT and the Court of Appeal.⁵⁸
- 6.5 In this respect it is also highly relevant that the CAT dismissed Ofcom's claims that Sky was acting upon strategic incentives and concluded that Sky was in fact acting for ordinary commercial purposes. The CAT could not find "*from the material put before [it] that the alleged incentives were conditioning Sky's conduct*".⁵⁹ Similarly, Ofcom's other competition concerns were "*also unfounded*" and the Tribunal had "*found no evidence to justify Ofcom's finding that Sky has (or has acted upon) an incentive to weaken VM or its corporate predecessors as competitors*". Thus there was no empirical case that there had been an attempt to limit distribution of key conduct.
- 6.6 Whilst Ofcom now appears to accept this position (as follows from the matters set out at paragraph 6.3 above), it cannot be right that Ofcom can seek to make up for the lack of any empirical case, by relying entirely on one that is theoretical. This is particularly so given that Ofcom did not pursue a claim before the CAT that the mere theoretical existence of a strategic incentive was sufficient. Indeed, Ofcom's position was that this was not essential to its conclusion, as the CAT made clear.⁶⁰ These findings are left wholly undisturbed by the judgment of the Court of Appeal. It is thus particularly troubling that Ofcom seeks to resurrect a purely theoretical case based on alleged incentives to limit distribution.
- 6.7 Moreover, as set out in paragraph 5.5 above, Ofcom's own analysis in Section 3 of the WMO Review demonstrates that Sky's sports channels are, in fact, widely available from a range of retailers and on a range of platforms.⁶¹

⁵⁸ See Pay TV Judgment at paragraph 84 and the Court of Appeal Judgment at paragraph 87.

⁵⁹ Pay TV Judgment at paragraph 829.

⁶⁰ Pay TV Judgment, at paragraphs 166, 167 and 829 ("*...there is no need for the Tribunal to resolve the issues debated before us at some length as to the plausibility or otherwise as a matter of economic theory of the alleged strategic incentives on which Sky was said by Ofcom to be acting in its conduct of the various negotiations. As we have said, Ofcom's position at the hearing was that its findings relating to the strategic incentives were not essential to the existence of its core competition concern.*")

⁶¹ WMO Review paragraphs 3.38 to 3.43

6.8 For these reasons, in response to Questions 7.1 and 7.2, the PL does not agree with Ofcom's assessment of Sky's or BT's incentives.

7. NEED FOR INTERVENTION/PROPORTIONALITY

7.1 For all the reasons set out in this response, it will be apparent in response to Questions 8.1 and 8.3 that the PL does not consider that the WMO Review establishes that it is appropriate to maintain any form of regulation on Sky to ensure fair and effective competition in the provision of Pay TV. In particular, Ofcom has erred in its analytical framework definition of the market, its assessment of key content, and in its application of its (flawed) conclusions as to key content.

7.2 The PL considers that Ofcom must redo its review and that once it does it will be apparent that there is a vibrant bundled/triple-play-based market in which there is healthy competition and in respect of which there is no basis for intervening in Sky's wholesale supply of its sports channels.

7.3 Similarly, as there is no justification for the regulation of Sky, there is none for the regulation of BT (Question 8.4).

7.4 As to Question 8.2, the PL does not comment on the precise form of regulation; its position is that the need for regulation has not been made.

7.5 Finally, it must be stressed that if Ofcom were to proceed with its WMO Review and its proposal to continue the WMO then it is incumbent upon Ofcom to undertake a proper assessment of the proportionality of any intervention. For the reasons submitted in the PL's appeal against the 2010 Pay TV decision, Ofcom manifestly failed to undertake a proper proportionality assessment in particular as regards to the potential effect on sports rights values (including the PL's rights values) of its intervention and the resulting detrimental effect this would have on consumers.

8. CONCLUSIONS

8.1 The WMO Review contains no sound analytical or evidential basis for Ofcom's conclusion⁶² that "*there may be circumstances in which Sky has incentives to engage in ... practices [that would be prejudicial to fair and effective competition]*"; and that "*...it may be appropriate to maintain regulation on Sky*".

8.2 Ofcom has approached the WMO Review without carrying out a necessary (and thorough) analysis as to how the retail market, in which Sky operates, is actually working in 2015. Ofcom has failed to identify the relevant market and has ignored the significant retail developments since 2010 in the sale of bundles of services.

8.3 Ofcom's overreaching analytical framework is, consequently, flawed. It has misdirected itself by asking the wrong questions.

8.4 Ofcom's analysis of what constitutes "key content" is fatally undermined by its reliance on survey evidence that manifestly does not support its conclusions.

8.5 Ofcom cannot rely on theoretical incentives of Sky to limit distribution. Under the CA 2003 (as confirmed by the CAT and Court of Appeal) Ofcom can only intervene and impose

⁶² WMO Review, paragraph 8.8

licence conditions on Sky to prevent actual "practices" that impact fair and effective competition. Ofcom failed in establishing this before the CAT and has provided no new evidence of any such practices. It is not entitled to now seek to rely on theoretical, unproven allegations of incentives to act.

- 8.6 Ofcom itself recognises that Sky's Sports Channels are widely available at the retail level; from different retailers and over a wide range of distribution methods. However, Ofcom ignores this when alleging that Sky has theoretical incentives to limit distribution. This is a serious error in its approach.
- 8.7 For all these reasons Ofcom is, therefore, not entitled to conclude that continuing regulation is necessary. Moreover, even if Ofcom decides to proceed, before doing so it must undertake a thorough proportionality assessment, taking into account the very serious risks of continued intervention on sports rights holders. Ofcom failed to do this in the 2010 Pay TV statement and must not repeat that error again.
- 8.8 In conclusion, the PL strongly objects to Ofcom's proposed continued intervention. It has no basis for such intervention and the time has come for Ofcom to stop pursuing any artificial market engineering objective. Consequently, it should conclude that there is no basis for any continued imposition of a WMO on Sky.

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