



SKY'S RESPONSE TO FURTHER SUBMISSIONS BY THE COMPLAINANTS

Ofcom has provided Sky with redacted copies of the following documents (together, the “Further Submissions”):

- Joint response to Sky’s submission of April 2008 by BT, Setanta, TUTV and Virgin Media, 6 August 2008 (“**Joint Further Submission**”);
- BT Group plc submission on why a reference to the Competition Commission is fully justified, 6 August 2008 (“**BT’s Further Submission**”); and
- Virgin Media Limited supplementary submission, 15 August 2008 (“**Virgin Media’s Further Submission**”).

In general, none of the Further Submissions has anything new to say, and we have comprehensively dealt with many of the points made in our previous submissions. Accordingly, and in line with our usual approach to individual submissions, we are not providing a response to all of the points made in the Further Submissions. However, there are a number of discrete points contained in the Further Submissions that are misleading and/or inaccurate, and therefore warrant a response so as to avoid Ofcom and the market investigation process being misled. We address these points below. A lack of comment on any other points in the Further Submissions does not denote Sky’s acceptance of those points.

In addition, we propose to supplement this submission with a short paper prepared by CRA which responds to the key points in the Further Submissions relating to CRA’s previous reports.

The discrete points Sky addresses in this submission are as follows:

- (i) PwC’s study does not “*confirm the conclusion of LECG’s international Pay TV price comparison*”;
- (ii) The Complainants’ misleading allegations about Sky’s conduct;
- (iii) Virgin Media’s submissions in respect of VOD;
- (iv) Sky has not “*expressly acknowledged that the competitive pressure which Setanta is able to exert on Sky is limited*”; and
- (v) The Complainants’ allegations about switching costs and Sky’s incentives to supply.

We deal with each of these points in the sections below.

1. **PWC'S STUDY DOES NOT "CONFIRM THE CONCLUSION OF LECG'S INTERNATIONAL PAY TV PRICE COMPARISON"¹**
 - 1.1. In the time available,² we are not able to respond in full to LECG's critique of PwC's report entitled "*Outcomes for consumers in relation to pay TV in Europe*". That said, however, we would expect that the spurious, erroneous and highly tendentious nature of that critique should be self-evident to Ofcom. There is no force whatever in LECG's criticisms, and Ofcom should not rely on them. We will elaborate further on our reasons for this in an additional submission shortly.
 - 1.2. It is worth taking a step back from the detail of LECG's critique. Prior to their very late submissions of August 2008, the Complainants' principal allegation of harm to consumers from the way in which the UK pay TV sector operates was an allegation that UK consumers pay prices for pay TV services that are significantly above the average of prices paid for such services by consumers in other European countries (controlling for differences in demand and products offered). CRA have demonstrated conclusively, however, that the econometric study on which LECG relies in support of that proposition is fundamentally flawed and therefore cannot support such a proposition.³
 - 1.3. In the absence of any useful evidence on this matter from the Complainants, and due to the narrowness of the issues considered by them in terms of the relative position of UK consumers (being limited solely to a consideration of prices for pay TV services), Sky commissioned PwC to undertake a factual assessment of the products that are actually available to consumers in a range of European countries, including their prices. For purposes of price comparison, PwC took the main Sky pay TV packages that include premium sports and film channels and examined the prices paid by consumers in other countries for the nearest equivalent type of package provided by major suppliers in each of the countries considered.
 - 1.4. We do not claim (and nor did PwC) that the evidence on this matter is perfect. In our view, given the heterogeneous nature of the products under consideration, heterogeneity in tastes across countries, and the difficulties involved in obtaining relevant data on this matter, perfection would be an unrealistic benchmark to adopt. In the circumstances, we consider that the approach adopted by PwC is entirely sensible and provides the best available evidence – indeed at this point, due to the irrelevance of and flaws in the LECG econometric study, the only available evidence – on the issue of whether prices paid by UK consumers are significantly above those paid by consumers in other European countries on a like-for-like basis. The available evidence shows that they are not.
 - 1.5. Unfortunately, PwC was unable to obtain publicly available information on one of the key pieces of evidence relevant to this debate – the relative take-up by consumers of pay TV packages that include premium channels across countries in Europe. As set out in our response to Ofcom's consultation document, it is Sky's view that the UK would also be shown to be a leader in Europe on this very important measure of the relative position of consumers. Sky looks forward to any analysis of this important issue that Ofcom has carried out at its own initiative in its forthcoming consultation document.

¹ Paragraph 6 of the Executive Summary, Section 6 and Annex 1 of the Complainants' Further Submission. See also Annex 3 of BT's Further Submission.

² [CONFIDENTIAL].

³ See CRA "*Average Pay TV Revenues per Subscriber across Europe: a review of LECG's empirical study*" (Annex 3 to Sky's Response to the Complaint, October 2007), and CRA "*Average Pay TV Revenues per Subscriber across Europe: A review of LECG's response of 29 February 2008*", 30 June 2008.

- 1.6. Moreover, in spite of the contrived attempts by LECG to claim otherwise, the PwC report showed clearly that the UK pay TV sector is among the leaders in Europe in terms of the introduction and take up by consumers of innovative new technologies, a key measure of benefits to consumers. The Complainants' answer to this incontrovertible evidence is that the UK would be even further ahead of the pack if the Complainants were given the regulatory assistance they seek. Such a hypothetical conjecture – which on its face is manifestly implausible – should be treated with due caution by Ofcom.
- 1.7. In view of the extensive interaction between Ofcom and LECG in relation to LECG's econometric study, the only conclusion that we can draw from the absence of any request from Ofcom to speak to PwC about their report (which Ofcom received in March this year), or to question them further about it, is that Ofcom recognises its validity, and the irrelevance of and flaws in LECG's 'critique'. Again, we look forward to confirmation of this in Ofcom's forthcoming consultation document.
- 1.8. [CONFIDENTIAL].

2. THE COMPLAINANTS' MISLEADING ALLEGATIONS ABOUT SKY'S CONDUCT

- 2.1. The Complainants continue to repeat the allegations made in the Complainants' July 2007 submission (the "**Complaint**") about Sky's conduct, as though continual repetition may somehow provide them with some foundation in truth, or turn them into compelling evidence supporting the Complainants' "*vicious circle*" construct. Unfortunately for the Complainants, their continued repetition achieves neither goal. As Sky has indicated on numerous previous occasions,⁴ the allegations are false or misleading.
- 2.2. Sky sees no benefit to be gained from responding yet again to the laundry list of accusations presented by the Complainants. We merely comment that, for example, we simply do not recognise the Complainants' bald descriptions of "*refusals to wholesale at all to certain competitors*" and the "*onerous terms imposed on Virgin Media which prevent it from competing effectively on either price or quality*". We have provided Ofcom with detailed factual explanations (including relevant correspondence) in respect of these allegations and trust that Ofcom, as an objective, impartial regulator, is able to separate fact from the fiction.
- 2.3. We, therefore, propose to save any further comments on these conduct allegations for Ofcom's forthcoming consultation. To the extent that the Complainants' conduct allegations do not form part of Ofcom's consultation, we trust that these issues can finally be put to rest.

3. VIRGIN MEDIA'S SUBMISSIONS IN RESPECT OF VOD

- 3.1. Two aspects of Virgin Media's Further Submission are particularly notable: the first is Virgin Media's portrayal of itself as being able to provide "*a range of services and innovations... if the pay TV industry were competitive*".⁵ We note the inevitable disclaimer that the possible innovations mentioned are "*by way of example only and that the commercial viability of any new products and services depends upon the market conditions at the time*".⁶ The dangers of relying on a firm's claims as to what they

⁴ See Sky's Response to the Complaint, October 2007 (particularly Part D and Confidential Annex 5) and Sky's Response to Ofcom's Third Information Request of December 2007, May 2008.

⁵ See Footnotes 4 and 9 of Virgin Media's Further Submission.

⁶ See Paragraph 4.1 of Virgin Media's Further Submission.

'could' offer if they were provided with regulatory assistance are all too obvious, and we assume that this is not a route that Ofcom is about to follow.

- 3.2. The second particularly notable aspect of Virgin Media's Further Submission is the sudden emphasis on VOD.⁷ Virgin Media firstly makes much of its unique position to meet the growing demand for VOD services, and then alleges that Sky is stifling its ability to provide VOD (and in particular, SVOD) movie services to its customers, through the impact of Sky's "first pay" exclusivity and Sky's alleged ability to threaten to "punish" the studios.
- 3.3. In relation to the existence of Sky's rights in the first pay window (see paragraph 5.33 of Virgin Media's Further Submission), we note that Ofcom has been provided with the relevant contracts with the major studios,⁸ as well as with information on the dates and durations of Sky's contracts that include the right to broadcast theatrically released movies going into the subscription pay TV window.⁹ We note that Ofcom has not sought any clarification on that information or sought to discuss that information with Sky at any time subsequently. Since Virgin Media makes no new points in this paragraph we make no further comment.
- 3.4. In paragraph 5.34 of its Further Submission, Virgin Media alleges that Sky "leverages" its first pay window exclusivity to "restrict the ability of Virgin Media (and other third parties) to deal with the premium movie rights holders to develop alternative SVOD movie offerings for UK customers." Once the emotive language and hyperbole is removed, what is left is no more than a statement that Sky has exclusive rights to broadcast movies in the first pay TV subscription window, including subscription VOD rights.
- 3.5. There is, however, no question of "leverage". Any licensee of valuable rights needs to ensure that it is getting the rights it is paying for. When acquiring exclusive rights to broadcast movies in the first pay window, Sky accordingly seeks to ensure that it is indeed the first and (during the currency of the first pay TV window) only subscription movie service in the UK. Were movies to be offered on a subscription VOD service before or during the first pay TV window, Sky would not be acquiring the right to be the first and (during the currency of the first pay TV window) only broadcaster of subscription movie content.
- 3.6. Virgin Media goes on to suggest that Sky "employs a deliberate strategy of denying its competitors content".¹⁰ Sky employs the well-known strategy in the broadcasting industry of acquiring exclusive rights. The grant of exclusive rights means that competitors cannot acquire and exploit the same content at the same time and in the same manner. Depicting the acquisition of exclusive rights as a "deliberate strategy [to] deny... competitors content" is simply not worthy of a response. (We note that Virgin Media has redacted numerous paragraphs in this section of its Further Submission (paragraphs 5.37 onwards) and would comment (as we have previously) that if this information relates to Sky's alleged conduct, it cannot be confidential from Sky; nor can we comment properly on allegations that are not disclosed in full to us.)

⁷ See Section 5 of Virgin Media's Further Submission.

⁸ See Sky's Response to Ofcom's First Information Request of July 2007, August-September 2007 (Question 1).

⁹ See Sky's Response to Ofcom's Third Information Request of December 2007, May 2008 (Question 1).

¹⁰ Paragraph 5.66 of Virgin Media's Further Submission.

- 3.7. Virgin Media's special pleading for "*improved availability and access to VOD movie content*",¹¹ does not take account of the legitimate requirements of the studios in managing and protecting the value of their rights throughout the entire period in which such rights can be exploited. The studios, conscious of the myriad ways consumers have to view the same movies, are keen to limit over-exposure and the resulting diminution in value in the long term. Even in the later library windows therefore, the rights owners have incentives not to grant multiple licences and risk over-exposing their movies, as evidenced by Sky's restricted licence period.¹²
- 3.8. Virgin Media claims that Sky is able to threaten to "*punish*" the studios if they were to make SVOD rights available to Virgin Media.¹³ This punishment would come from "*paying sufficiently less for the linear rights such that the aggregate sum achieved by the movie studio from selling the linear rights to Sky and the SVOD rights to Virgin Media would be less than selling both on an exclusive basis to Sky*".¹⁴ This theory is simply ludicrous. First, it assumes that the studios have no bargaining power and that Sky could dictate the price it pays for the "*linear rights*", which is not the case. Second, Sky would not know Virgin Media's valuation of the SVOD rights and therefore could not know how much less to pay for the "*linear rights*" - although based on Virgin Media's claims to be "*the company with the greatest potential to innovate and lead the way in developing consumer VOD offerings*",¹⁵ Virgin Media might be supposed to value them very highly, which in this example would mean that Sky would have to slash the price it was prepared to offer for the linear rights, thus placing in jeopardy its very acquisition of those rights. Such a theory is far-fetched and not worthy of a proper response.
- 3.9. Equally unworthy of a considered response is the description of Sky as a "*compulsory trading partner*", (a phrase used throughout Virgin's Further Submission as if it has some magical qualities) of the movie studios. The studios are entirely at liberty to negotiate with any pay TV operator or broadcaster in the UK and, we understand, they regularly do so. For example, it is public knowledge that during current negotiations for the renewal of Sky's output agreement, Warner Brothers has been in discussions with other operators including Virgin Media and BT Vision at the same time as dealing with Sky.¹⁶ [CONFIDENTIAL]
- 3.10. Sky also disputes Virgin Media's bald assertion that it is the company with the greatest potential to innovate and lead the way in developing consumer VOD offerings. It is in all operators' interests to meet consumers' needs by innovating and developing new offerings and Sky has been doing so for years. Virgin Media describes some of these innovations in its Further Submission (e.g., push-VOD, near-VOD through Sky+) and Sky's future innovations, [CONFIDENTIAL], will only go further towards meeting customers' needs. Sky has continually been at the forefront of innovation and will continue to be so.
- 3.11. Finally, we note that Virgin Media claims that "*in contrast to the situation in the UK, innovative movie VOD services are being developed elsewhere in collaboration with pay TV*

¹¹ Paragraph 5.7 of Virgin Media's Further Submission.

¹² [CONFIDENTIAL]

¹³ Paragraph 5.44 of Virgin Media's Further Submission.

¹⁴ Ibid.

¹⁵ Paragraph 5.30 of Virgin Media's Further Submission.

¹⁶ New Media Markets "*BSkyB takes tough line in Warner Brothers movie deal*", 5 November 2008, p.1. [CONFIDENTIAL]

operators". Of course it is not the case that "innovative movie VOD services" are not being developed in the UK, and there is a very innovative and competitive range of movie VOD services available at present. Moreover, Sky notes that Virgin Media does not provide any actual evidence that there is greater innovation in VOD outside the UK.

- 3.12. Virgin Media's belated focus on VOD services in its Further Submission to Ofcom (which were barely mentioned in its original complaint) serves to emphasise the somewhat desperate 'casting around' on the part of the Complainants generally for evidence to support a market investigation reference to the Competition Commission.

4. SKY HAS NOT "EXPRESSLY ACKNOWLEDGED THAT THE COMPETITIVE PRESSURE WHICH SETANTA IS ABLE TO EXERT ON SKY IS LIMITED"¹⁷

- 4.1. The Joint Further Submission argues, at paragraph 2.8, that Sky has expressly acknowledged that "the competitive pressure which Setanta is able to exert on Sky is limited" by virtue of the fact that Sky "had seen no fall off in its football audience as a result of regulatory intervention, saying that subscriber numbers for its sports packages had grown". Contrary to what the Complainants may think, Sky has not acknowledged this.

- 4.2. The performance of Sky's sports channels, and the number of subscribers to the channels, is due to a number of factors, including, for example, the content that is broadcast, the quality of the production,¹⁸ the marketing associated with the channel and the competitive pressure from other channels. The Complainants fail to acknowledge the complexity of the situation by simply linking the number of Sky Sports subscribers to the amount of competitive pressure Setanta places on Sky.

- 4.3. The Complainants go on to state that "there are limited opportunities for Setanta to obtain additional content and thereby increase the competitive pressure which it exerts on Sky." This is at odds with reality. Over the course of the last six months, Setanta has purchased the following sports content:

- In May, Setanta announced that it had acquired the rights to broadcast coverage of the One Day 2008 Asia Cricket Cup, which featured a number of test match teams including India, Pakistan and Sri Lanka.¹⁹
- In June, Setanta announced that it had secured a three year exclusive deal to broadcast over 30 live UEFA Cup matches, including approximately 18 matches each season featuring British teams.²⁰
- In June, Setanta also announced "the largest television rights deal in Scottish football history" at the cost of £125 million, when it purchased the right to broadcast Scottish Premier League football until the end of the 2013/14 season.²¹

¹⁷ Paragraph 2.8 of the Complainants' Further Submission.

¹⁸ See Appendix 9 to Annex 2 of Sky's Response to the Complaint, October 2007.

¹⁹ <http://www.setanta.com/en/UK/News/Setanta-boosts-Cricket-coverage-with-Asia-Cup/>

²⁰ <http://www.setanta.com/en/UK/News/Setanta-snaps-up-UEFA-Cup-Rights/>

²¹ <http://www.setanta.com/en/UK/News/Setanta-Sports-agree-Record-TV-Deal-for-SPL-Coverage/>

- In August, Setanta announced that it had acquired live and exclusive rights for the “*super-fight*” between Joe Calzaghe and Roy Jones Jr²² and also the “*mouth-watering clash between Kelly Pavlik and Bernard Hopkins*”.²³

4.4. It is clear from the above that Setanta has had both the opportunity to purchase additional content and has in fact purchased content to the point where it now boasts of its “*burgeoning portfolio of live football*”.²⁴ The claims of the Complainants are therefore entirely without justification.

5. THE COMPLAINANTS’ ALLEGATIONS ABOUT SWITCHING COSTS AND INCENTIVES TO SUPPLY THIRD PARTY RETAILERS

5.1. The Complainants collectively, and BT individually, attempt to build a case that (a) Sky’s own arguments demonstrate that it has an incentive to withhold channels from other retailers, and (b) Sky has advanced contradictory positions with respect to switching costs which undermines Sky’s credibility.

Switching costs and incentives to supply additional retailers

5.2. Both the Complainants collectively, and BT individually, seek to argue that a combination of Sky’s arguments that (a) broadcasters are unlikely to wish to supply additional retailers among whom switching costs are low, and (b) switching costs among retailers are low:

“constitutes direct evidence from Sky of its lack of incentives to supply third parties”.²⁵

5.3. In the first instance, the Complainants’ approach is based on a selective quotation of Sky’s argument – it fails to take into account the fact that Sky’s argument on this matter was made in the context of the ability of consumers to switch between retailers *on different platforms*. The full version of the quotation from Sky’s Response to Ofcom’s consultation document, which was deliberately truncated in the Complainants’ Joint Submission to omit the final four words, was:

*“Low switching costs make it less likely that there is licensing on to multiple retailers **on the same platform**”*.²⁶

5.4. It is correct that Sky’s view is that the costs to consumers of switching between retailers on different platforms are, in general, modest. It does not automatically follow, however, that this demonstrates that Sky has no incentive to wholesale its channels to retailers on other platforms as alleged by the Complainants. On the

²² <http://www.setanta.com/en/UK/News/Setanta-secures-Joe-Calzaghe-Fight/>

²³ <http://www.setanta.com/en/UK/News/Pavlik-v-Hopkins-to-be-broadcast-live-on-Setanta/>

²⁴ In a press release announcing that it had acquired the rights to the UEFA Cup, Setanta stated “*UEFA Cup coverage will sit alongside Setanta’s burgeoning portfolio of live football which includes World Cup 2010 away qualifiers featuring England, Ireland, Northern Ireland, Scotland and Wales. England home friendlies, FA Cup, Barclays Premier league, Clydesdale Bank Premier league, Blue Square Premier and action from the top European leagues.*”

<http://www.setanta.com/en/UK/News/Setanta-snaps-up-UEFA-Cup-Rights/>

²⁵ Paragraph 2.4 of the Complainants’ Further Submission. Virtually the same wording appears in the fourth bullet point on page 11 of BT’s further submission.

²⁶ Paragraph 10.26(ii).

contrary, it has been Sky's consistent position that, while the costs of switching between cable and DTH satellite pay TV services are modest overall, there are considerable numbers of cable subscribers who are unable or unwilling to take pay TV services via DTH satellite.²⁷ Given the closed nature of Virgin Media's cable platform, the only way of reaching such households is by wholesaling pay TV services to Virgin Media. In principle, the same is likely to be true in relation to retailers on newly emerging platforms, such as new IPTV platforms which have significant advantages over DTH satellite in being able to reach consumers in multiple dwelling units, for example.

- 5.5. Accordingly, the Complainants arguments on this issue are without foundation and no weight can be given to them.
- 5.6. It is also important to recognise the context for the argument cited by the Complainants. Sky's argument is that any broadcaster of premium pay TV channels will wish to wholesale to retailers who reach a significant number of potential subscribers that other retailers are unable to serve. It appears that Virgin Media shares this view. In its submission to the Competition Commission on Project Kangaroo Virgin Media stated:

"...vertically integrated organisations typically have an incentive to make content available to third parties if those third parties are able to access a range of additional customers which the content supplier would not itself be able to reach (or would be able to reach only at considerably greater expense or less efficiently) through its own retail operation".²⁸

- 5.7. Concomitantly, no broadcaster of premium pay TV channels is likely to wish to wholesale its channels to retailers who serve essentially the same addressable base of customers.
- 5.8. Moreover, such incentives are not specific to Sky, which is indicated clearly by the fact that Setanta has never offered its premium sports channels to Sky to retail via DTH satellite.

Alleged contradictions in Sky's views of switching costs

- 5.9. The Complainants also seek to make much of alleged contradictions in Sky's views on switching costs, arguing that such alleged contradictions "*undermine Sky's credibility*" and even, in BT's submission, "*reinforce concerns about Sky's incentives to foreclose*". In Sky's view, the facile nature of these allegations says a great deal about the strength of the Complainants' case.
- 5.10. BT's allegation as to Sky's contradictory views on levels of switching costs is as follows:

²⁷ The reasons for this include those set out at paragraph 64 of CRA's October 2007 submission, such as having no line of sight to the satellite, or being unable to obtain planning or landlord's permission to install a satellite dish. Other people do not want to install a satellite dish on their property.

²⁸ Project Kangaroo: 'video-on-demand' joint venture between BBC Worldwide Limited, Channel 4 Television Corporation and ITV plc, main submission to the Competition Commission from Virgin Media, 24 July 2008, para. 6.14 It should be noted, however, that both vertically integrated and non-vertically integrated broadcasters have the incentive cited by Virgin Media. Accordingly, it plays no part in the Complainants' fictitious vicious circle. http://www.competition-commission.org.uk/inquiries/ref2008/kangaroo/pdf/third_party_submission_virgin_media.pdf

“In its latest submission, Sky argues that the costs of switching between platforms are “modest” and “Sky considers that Ofcom’s assertion that the costs of switching between pay TV services provided by different pay TV retailers are “high” cannot be supported.” (Annex 2, para. 3.47 Sky response)... Sky’s position on the matter may now have settled, after having made claims of both high and low switching costs previously. For previous contradictions, see for instance: “Sky’s “Incentives” to Foreclose Competition in the UK Pay TV Industry”, prepared by CRA and submitted as Annex 4 of Sky’s original response to the complaint (October 2007), at paragraphs (sic) 98 (low switching costs) and paragraph 64 (high switching costs – CRA refers to factors “which discourage switching to Sky, and in some cases render it impossible”).”²⁹

5.11. It is evident, therefore, that the source of BT’s allegation that Sky has “*made claims of both high switching costs and low switching costs*” is CRA’s discussion of issues related to switching costs in its October 2007 paper.

5.12. One of the CRA paragraphs cited by BT (paragraph 98) is part of a broader discussion of the incentives facing an incumbent in bidding for content rights in the circumstances that (a) the costs of its subscribers moving to another pay TV retailer in the event that it were to lose rights are low, or (b) it has a significant number of “locked-in” subscribers. The discussion concludes:

“in the absence of detailed analysis there cannot be a presumption that even a significant installed base gives Sky a “leg up” in bidding for content rights...”

In other words, CRA did not undertake the detailed analysis required to determine whether in fact there is a significant locked-in base of subscribers – i.e., whether switching costs are low or high. BT appears to be incapable of recognising the ‘in principle’ nature of such an argument.

5.13. Paragraph 64 of CRA’s report states that:

“Some VM subscribers would not be able to subscribe to Sky’s DSat retail offer at all (no line of sight to the satellite, need for planning permission and/or landlord’s permission, etc.)” (Emphasis added)

5.14. In this context, BT appears to overlook entirely the fact that CRA state that **some** Virgin Media subscriber face high (indeed infinite) costs of switching to Sky.

5.15. Clearly, therefore, BT’s proposition that Sky has “*made claims of both high and low switching costs previously*” is (a) not well founded, and (b) appears deliberately to distort the discussion of issues related to switching costs in CRA’s October 2007 paper. It is abundantly clear that BT’s statement that “*the fact that Sky presents conflicting arguments regarding switching costs simply undermines Sky’s credibility and should reinforce concerns about Sky’s incentives to foreclose*”³⁰ is pure hyperbole and should be disregarded by Ofcom.

5.16. In their Joint Further Submission the Complainants take a different line, citing a difference between paragraph 10.50 of Sky’s Response to Ofcom’s consultation document, and paragraph 10.26 (ii) of that Response. This difference is readily explicable, being the result of a typographical error in paragraph 10.50, which should

²⁹ Footnote 4 of BT’s Further Submission.

³⁰ BT Further Submission, p.11.

have read: “*high levels of switching **costs** also increase the incentives of a channel provider to license content to all*” (emphasis added). This is evident from the fact that the quotation in question was reporting CRA’s analysis, which stated: “*high levels of switching costs would in fact increase a channel provider’s incentive to license premium content to all.*” Once this (obvious) typographical error is taken into account the “*contradiction*” alleged by the Complainants disappears.

- 5.17. In general, it is therefore evident that there is no merit in the Complainants’ allegations about contradictions in Sky’s arguments on switching costs, and their attempt to make so much of either minor drafting errors, or ‘in principle’ arguments, bears all the hallmarks of clutching at straws.

We conclude by noting that the tenor of the Complainants’ Further Submissions has become rather shrill, and that they are now reduced to using emotive language, selective quotation, repetition of allegations as fact, and threats of judicial action in order to persuade Ofcom to refer Sky to the Competition Commission. The depths to which the Complainants are prepared to stoop are clearly demonstrated by footnote 37 of the Joint Further Submission, which states that “*it is notable that ITV Sport.....was not at any stage during its brief existence wholesaled to Sky*”, in support of the proposition that Sky would be unlikely to assist a rival by entering into wholesale arrangements, and thus clearly suggesting that it was Sky’s strategy not to retail ITV Sport. [CONFIDENTIAL].³¹

This example³² serves as a further stark reminder to Ofcom, that it should not take at face value the submissions and allegations of the Complainants. The approach adopted by the Complainants in their Further Submissions serves only to undermine their credibility and to highlight the paucity of their arguments.

Sky

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³¹ [CONFIDENTIAL].

³² Similar points could, for example, be made in relation to footnote 19 of the Complainants’ Further Submission and we do not present in this submission an exhaustive list of all such examples.