



**BSKYB'S RESPONSE TO OFCOM'S CONSULTATION:
REVIEW OF SKY'S ACCESS CONTROL SERVICES REGULATION
EXECUTIVE SUMMARY**

1. In January 2013 Sky applied to Ofcom to remove the continuation notice that regulates Sky's provision of access control services, which was issued on a temporary basis by Oftel in 2003. Sky considers that such regulation is no longer necessary. Despite this principled position, however, Sky offered to provide Ofcom with commitments about its provision of access control services to third parties in the event that the continuation notice was removed without new regulation being put in place. Ofcom accepted commitments from BT in similar circumstances on three occasions previously.
2. Sky subsequently amended the commitments it had offered to reflect (i) concerns expressed by Ofcom, and (ii) concerns expressed by third parties in response to Ofcom's consultation on Sky's access control services in July 2013. The commitments now offered by Sky are of indefinite duration, and comprehensive, running to 18 separate commitments, and include caps on charges for all the types of services supported by Sky's AC services today, with a significant number of those caps set at zero.
3. Ofcom can have no reasonable basis for believing that Sky would not abide by those Commitments in future, whether in spirit or in reality. In Sky's view, they represent a pragmatic and proportionate means of addressing an issue that in practice does not raise significant consumer, competition or public interest issues. Above all, however, the commitments do not preclude Ofcom from deciding that regulation is required at any point in the future if the Commitments regime is found not to be working as desired.
4. Ofcom's current consultation on Sky's application, however, now proposes the imposition of new, formal access regulation on Sky instead of accepting the Commitments proposed by Sky. Ofcom asserts that the arguments in support of such regulation, rather than accepting Sky's Commitments, are "*finely balanced*".
5. This is not the case. The case put forward by Ofcom in support of imposing new access remedies on Sky is without merit.
6. Ofcom has a legal obligation to introduce new regulation only where it is shown to be necessary on the basis of cogent analysis and evidence capable of withstanding profound and rigorous scrutiny. Instead, the assertions put forward as reasons that such regulation may be necessary are without merit, and no evidence is put forward in support of them.
7. Ofcom's assertions in support of regulation are founded on the observation that Sky has "mixed incentives" in relation to the provision of access control services to third parties. On the one hand, as a platform operator and pay TV retailer, Sky benefits from third parties enhancing their services on its DTH satellite platform. On the other, as a broadcaster of television channels, it competes against third party broadcasters for example for audiences (and thereby advertising revenues) and sports rights. Enabling third parties to enhance their services on Sky's platform therefore potentially causes Sky

harm via lost advertising revenue, or higher prices for sports rights according to Ofcom's theory.

8. Ofcom's case for believing that formal regulation may be necessary rests on a belief that Sky has an overall incentive to withhold access control services from third parties, i.e., that the benefits to Sky's television channel businesses from withholding access control services would be greater than the detriments to Sky's platform and retail businesses from doing so. However it provides no evidence that this is the case. Ofcom's assertions on this matter are based entirely on submissions by two of Sky's key rivals, the BBC and BT, and speculation.

9. The reality is that Sky operates in a world of strong and growing platform competition. This is reflected in a recent independent report for Ofcom by Mediatique. Mediatique's report is littered with statements such as:

"The platform market in the UK is supplied by many players, across a range of distribution technologies; the propositions offered by these providers include a mix of free and pay services, breadth and depth of channels"

"These trends are creating complexity in the platform market, enabling new routes to market and reducing barriers to entry ... likewise, we have seen an acceleration in multi-platform and multi-device convergence"

10. In such a world Sky's dominant incentive in relation to this issue is to make its platform as attractive as possible to existing and potential customers. Enhanced services provided on Sky's DTH satellite platform by third parties are used predominantly by Sky subscribers, and therefore benefit Sky customers – whether that is the BBC's digital news and weather service, its Wimbledon app, or a BT Sport service that delivers additional live sports coverage on Sky's platform. There are many examples, including those set out in this response, of Sky seeking to include third party broadcasters' services in Sky's own non-regulated services, such as its catch-up TV service, NOW TV, and Sky+ app. Even in circumstances where supporting third party services may have an impact on viewing of Sky's own services, such as the red button service provided jointly by the BBC, Sky and Freesat during the Olympic games in 2012, Sky's clear behaviour demonstrates that it is willing to support such a service, in the interests of its own customer base.

11. In general, however, the downsides from supporting such services are *de minimis*. In relation to free to air television channels, the only significant user of Sky's access control services today (and for the foreseeable future) is the BBC. There is no evidence that suggests – as Ofcom asserts in the consultation – that the BBC's red button services have any discernable impact on viewing of Sky's television channels, and therefore Sky's advertising revenues, and it is wholly implausible that this is the case.

12. In relation to sports rights, [X] contrary to Ofcom's assertion in the Consultation, there is no evidence that an ability to provide a red button service on Sky's DTH satellite platform plays any role in broadcasters' ability to compete successfully for such rights. Indeed, it is not credible that this could be the case.

13. At the outset, Sky notes that Ofcom's proposition has no relevance to the most important sports rights available to all UK broadcasters; rights to broadcast English Premier League matches. This is because the rights made available are carefully structured by the Premier League so that (with the exception of the last day of the season) only one match is able to be broadcast at a time. In addition, because making events available via a red button service on Sky's platform has a significant negative impact on audiences (and therefore advertising revenues), no broadcaster would wish to make such expensive content available via a red button service.

14. The reality is that competition in bidding for sports rights is driven by a range of other factors, notably, in BT's case, the desire to drive take-up of its broadband and line rental services, which are worth hundreds of millions of pounds a year to BT. BT has been able to compete successfully for sports rights, and build a base of over five million subscribers to its sports channels, without to date offering an interactive application on Sky's DTH satellite platform. A proposition that, if BT were not able to provide coverage of a small range of sports events (in addition to those carried on its three linear television channels) via an interactive application on Sky's platform in future, it would abandon its investment in BT Sport, or significantly reduce its commitment to BT Sport, is not credible. In Sky's view, Ofcom has not been sufficiently rigorous in scrutinising BT's claims in this regard.
15. Sky would gain no material benefit in terms of lessened competition for sports rights if it were to refuse to provide access control services to competing broadcasters of premium sports channels, because doing so would have no discernable impact on such competition.
16. Accordingly, there is no sound basis for a view that Sky has, or may have, an overall incentive to withhold access control services from third parties, and, therefore, that Sky should be compelled by regulation to provide them.
17. Even if Ofcom were correct, however, that the arguments for regulation rather than accepting Sky's proposed Commitments are "*finely balanced*" (which they are not) two factors support forbearance from formal regulation. First, the type of regulation proposed by Ofcom is highly intrusive. It should only be adopted when the case for it is clear and compelling. Second, one of Ofcom's own regulatory principles is that it will "*operate with a bias against regulation*". Imposing intrusive regulation ([X]) would run directly against that principle. Both these factors should tip the balance firmly towards accepting the Commitments that Sky has proposed.
18. Despite Sky's principled view that no regulation of its provision of access control services to third parties is necessary, we have proposed in this response further amendments to the Commitments Sky has offered, to meet the residual concerns expressed by Ofcom in the Consultation. These include:
 - a commitment to provide all existing users of Sky's access control services with a right to extend their contracts for such provision for a further term each time those contracts expire, and the inclusion of such a right in Sky's standard terms;
 - a commitment to notify Ofcom each time a new request for the provision of access control services is received by Sky;
 - a commitment to ensure that Sky's terms and conditions for the supply of access control services to third parties (including charges) are fair, reasonable and not unduly discriminatory; and
 - a commitment to provide access control services to those who request them for the first time "*as soon as reasonably practicable*".
19. Sky considers that the Commitments it is now offering to Ofcom are manifestly reasonable and Ofcom can have no reasonable basis for preferring to impose regulation on Sky rather than accept these Commitments.
20. We note that in the Consultation Ofcom expresses concerns about the enforceability of the Commitments. In relation to this issue, as Ofcom observes in the Consultation, Ofcom has the ability at any time to return to proposals for imposing formal regulation on Sky, if the Commitments are found not to be working as intended.

21. In addition, there is significant doubt as to whether Ofcom has the necessary legal powers under sections 73(2) and 74 of the Act, interpreted consistently with the EU regulatory framework (in particular the requirements of Directive 2002/19/EC (the Access Directive) to impose the proposed *ex ante* access-related conditions on Sky's provision of AC services. Notwithstanding the foregoing, Sky has significant concerns with the way in which the formal regulation proposed by Ofcom has been drafted. In particular:
- (i) the definitions of access control services included in the draft conditions are overly broad. They would include many services that Ofcom states in the Consultation that it does not see a need for regulation to cover;
 - (ii) the approach adopted by Ofcom means that Sky would face an ongoing lack of clarity about whether a particular service was, or was not, covered by regulation. A desire to avoid this type of situation was one of Sky's key reasons for requesting removal of the Access Control Continuation Notice, and lay behind Sky's proposed approach of listing the specific services that Sky is required to support in the proposed Commitments;
 - (iii) the draft conditions would require Sky to provide access to third party interactive services via an interactive menu, where no such obligation exists today; and
 - (iv) certain other obligations under the draft conditions are more onerous than under the current AC Continuation Notice, contrary to Ofcom's statement that the proposed conditions "*do not seek to place a burden on Sky that is greater than that imposed by the obligations under the Continuation Notice*"¹
22. Sky's firm view is that this issue should now be drawn quickly and expeditiously to a close, via acceptance by Ofcom of the Commitments proposed by Sky.

¹ Paragraph 7.85.



**BSKYB'S RESPONSE TO OFCOM'S CONSULTATION:
REVIEW OF SKY'S ACCESS CONTROL SERVICES REGULATION**

1. Introduction

- 1.1 This document provides Sky's response to Ofcom's consultation entitled 'Review of Sky's Access Control Services Regulation' dated 23 July 2014 ("the Consultation").²
- 1.2 In January 2013 Sky applied to Ofcom to remove the continuation notice that regulates Sky's provision of access control ("AC") services, which was issued on a temporary basis by Oftel in 2003. Sky considers that such regulation is no longer necessary. Despite this principled position, however, Sky offered to provide Ofcom with commitments about its provision of AC services to third parties in the event that the continuation notice was removed without new regulation being put in place. Ofcom accepted commitments from BT in similar circumstances on three separate occasions previously.
- 1.3 Sky subsequently amended the commitments it had offered to reflect (i) concerns expressed by Ofcom, and (ii) concerns expressed by third parties in response to Ofcom's consultation on regulation of Sky's AC services in July 2013. The Commitments now offered by Sky are of indefinite duration, and comprehensive, running to 18 separate commitments, and include caps on charges for all the types of services supported by Sky's AC services today, with a significant number of those caps set at zero.
- 1.4 In the Consultation Ofcom now concludes that it may be necessary to impose formal access-related conditions, set under Section 73 of the Communications Act 2003 ("the Act"), in relation to Sky's AC services and that arguments for doing so rather than accepting the Commitments proposed by Sky are "*finely balanced*". This is not the case. There is no sound basis for imposing formal regulation on Sky's provision of AC services.
- 1.5 In addition, it is by no means clear that Ofcom has the necessary legal powers under sections 73(2) and 74 of the Act, interpreted consistently with the EU regulatory framework (in particular the requirements of Directive 2002/19/EC (the Access Directive)) to impose the proposed *ex ante* access related conditions on Sky's provision of AC services for the reasons set out in **Annex 1**.
- 1.6 Sky's firm view is that this issue should now be drawn quickly and expeditiously to a close, via the acceptance by Ofcom of the Commitments proposed by Sky.
- 1.7 The remainder of this response comprises the following sections:

Section 2: Regulation of Sky's AC services is unnecessary

Section 3: Proposals for intrusive regulation of the type considered by Ofcom must pass a high threshold

Section 4: Ofcom's arguments for regulation are not supported by evidence

² All paragraph references in this response are to the Consultation unless otherwise stated. Failure by Sky to comment on any matters raised in the Consultation cannot be taken to mean that Sky agrees with them.

Section 5: The appropriate counterfactual in this case

Section 6: Ofcom's analysis of Sky's incentives in relation to the provision of AC services to third parties: provision of enhanced services by broadcasters of FTA television channels on Sky's DTH satellite platform

Section 7: Ofcom's analysis of Sky's incentives in relation to the provision of AC services to third parties: provision of enhanced services by broadcasters of pay TV channels on Sky's DTH satellite platform

Section 8: Allegations that Sky has not engaged constructively in past negotiations for AC services

Section 9: Application of regulation to new generation set-top boxes

Section 10: Sky's proposed Commitments

Section 11: Ofcom's proposed conditions

Section 12: The way forward

Annexes:

1. Limitations in Ofcom's powers to impose access related conditions on Sky's AC services
2. Allegations about "protracted negotiations"
3. Sky's revised Commitments
4. Ofcom's Draft Conditions:

Appendices:

1. Article regarding satellite shuffling: Reducing BBC Red Button and expanding BBC One HD
2. Emails from the day of completion of deal with BBC to put iPlayer on Sky's platform
3. Screen shots of Sky services showing the prominence given to PSB services
4. Sky submissions to the BBC Trust
5. Extract from Sky Presentation: [X]
6. Announcement of deal between Sky, the BBC and Freesat in relation to the 2012 Olympic service on satellite
7. Post Implementation Review – Olympics project
8. Chart of viewing share of Sky channels in Sky DTH satellite households
9. Current version of Sky's standard Application Signing Agreement
10. Current version of Sky's standard Authentication Services Agreement

2. Regulation of Sky's AC services is unnecessary

2.1 Sky considers that interactive services provided on its DTH satellite platform are of benefit to consumers, whether provided by Sky or third parties. The fundamental point, however, is that intrusive regulation by Ofcom is not necessary for the benefits associated with the provision of interactive services by third parties to be realised. As set out in **Section 6**, below, the weight of evidence demonstrates that Sky is willing to support third parties' services on its platforms. Even absent the Commitments, third parties would continue to find it no more difficult to operate the services they desire on Sky's platform than they do in relation to the myriad of other unregulated platforms that they deal with today – such as Apple's, Google's, Microsoft's, Virgin Media's, YouView's and so on. The Commitments offered by Sky to Ofcom would be sufficient to protect their legitimate interests in offering interactive services via Sky's DTH satellite platform.

3. Proposals for intrusive regulation of the type considered by Ofcom must pass a high threshold

- 3.1 As noted above, there is significant doubt as to whether Ofcom has the necessary legal powers to impose the access-related conditions. We expand on the reasons for this in **Annex 1**. The remainder of this response is without prejudice to this position.
- 3.2 Ofcom's proposition that it may be necessary and appropriate to impose access-related regulation on Sky in relation to its AC services fails to have proper regard to a number of key issues.
- 3.3 First, the type of regulation now contemplated by Ofcom is highly intrusive. It involves interference in Sky's fundamental right freely to choose its trading partners in relation to capabilities in which Sky has invested and innovated. Although well recognised, such familiarity should not lead Ofcom to treat this issue lightly, or to disregard it.
- 3.4 Sky is not a former state monopoly, owning assets with long-lived natural monopoly characteristics which require significant regulatory oversight. It has created the platforms and services to which the Consultation relates through its own effort, risk taking and investment. Any proposal to impose regulation on Sky must be based on a compelling case that such action is justified.
- 3.5 As discussed in **Section 9**, below, these considerations should be given significantly greater weight in relation to innovative products and services [X].
- 3.6 Given the intrusive nature of the proposed regulation, the case for its introduction must be clear and compelling. If the arguments for and against it are, as Ofcom states, "*finely balanced*"³, Ofcom should forbear from regulation. Ofcom's stated principle of acting with "*a bias against intervention*" reinforces the fact that forbearance from regulation is appropriate if the arguments for and against it are considered to be "*finely balanced*".
- 3.7 Furthermore, the fact that regulation of this type already exists cannot be a good reason for maintaining it. Ofcom must approach this issue *de novo*.
- 3.8 Second, as recognised by Ofcom at paragraph 2.36 of the Consultation, Ofcom has a legal obligation to ensure that regulation is "*targeted only at cases in which action is necessary*". In determining whether or not this is a case in which action is necessary, the burden of proof rests with Ofcom; Sky is not required to prove that regulation is unnecessary.
- 3.9 Third, Ofcom must demonstrate that its proposals are necessary on the basis of cogent analysis and evidence capable of withstanding profound and rigorous scrutiny.

³ Paragraphs 7.2, 7.57, 7.133, and 7.144.

- 3.10 As explained further in the following sections, the case set out in the Consultation for imposing intrusive new regulation on Sky does not pass the required threshold. In particular, the reasons given by Ofcom for believing that regulation may be necessary are ill-founded, and Ofcom provides no evidence in support of them.
- 3.11 At paragraph 2.36 of the Consultation, Ofcom sets out its general regulatory principles relevant to its duty under Section 3(3) of the Act – which includes the duty cited above to ensure that regulation is “*targeted only at cases in which action is necessary*”. Ofcom states that its general regulatory principles in relation to the duty under section 3(3) include:
- *operating with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;*
 - *ensuring that our interventions are evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome;*
 - *always seeking the least intrusive regulatory mechanisms to achieve our policy objectives; and*
 - *intervening where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve.”*
- 3.12 Ofcom’s proposal to introduce new regulation of Sky’s AC services directly contradicts these principles. In particular:
- Ofcom believes that the case for imposing new regulation on Sky, rather than accepting the Commitments offered by Sky, is “*finely balanced*”. In such circumstances, if Ofcom were to act with a bias against intervention, it should accept the Commitments offered by Sky. Ofcom states that this does not preclude the option of intervening “*firmly, promptly and effectively*” in future, if it proves to be the case that such intervention is in fact demonstrated to be required⁴;
 - as discussed in **Section 4** below, Ofcom’s proposals are not evidence-based;
 - the regulation proposed by Ofcom is, plainly, not the least intrusive regulatory mechanism available to it; the Commitments offered by Sky are less intrusive; and
 - all available evidence supports a view that normal commercial incentives – “*markets alone*” – will deliver the public policy goals set out in the Consultation.

4. Ofcom’s arguments for regulation are not supported by evidence

- 4.1 Ofcom concludes that “*there is a case for imposing new access-related conditions on Sky*”⁵. Ofcom’s case for regulation rests on a proposition that, in relation to provision of AC services to third parties in relation to enhanced TV services, Sky faces “*mixed incentives*”⁶:
- 4.1.1 On the one hand, Sky has an incentive to facilitate the provision of enhanced TV services by third parties on its platform, as this attracts customers to that platform and therefore increases Sky’s profits;
- 4.1.2 On the other hand, as a television broadcaster, Sky competes against third parties’ services – *e.g.*, for content rights and audiences – and therefore potentially has an

⁴ Paragraph 7.143.

⁵ Paragraphs 7.57 and 7.68.

⁶ See, for example, paragraph 7.58.

incentive to withhold AC services, and/or provide AC services of a lower quality than Sky provides to its own TV channels.⁷

- 4.2 It is, however, well recognised that an argument that regulation is required cannot be based on the mere fact that a firm has such mixed incentives, nor on the mere *possibility* that the incentive to withhold outweighs the incentive to supply. Instead, there must be cogent evidence capable of withstanding profound and rigorous scrutiny that (i) the incentive to withhold does in fact outweigh the incentive to supply,⁸ and (ii) if this is the case, the consequences are sufficiently significant to justify the imposition of compulsory access to Sky's property.
- 4.3 Ofcom, however, has not adduced any evidence in relation to these matters. Ofcom's failure to undertake a proper market analysis of the issues addressed in the Consultation (discussed further below) means that it has not undertaken any of the standard types of information gathering exercises, such as information requests, consumer surveys, or discussion with well-informed experts, that would enable it to evaluate whether Sky's incentive to withhold AC services dominates its incentive to supply those services. Instead, Ofcom relies on a combination of assertions made by respondents to its first consultation, and speculation. This is reflected in Ofcom's conclusions, which are put predominantly as possibilities (for example, "*Sky may seek to restrict [the BBC's] access to its AC services for BBC Red Button*"), rather than evidence-based conclusions.⁹

Failure to undertake a market analysis

- 4.4 Ofcom's stated policy in relation to reviewing continuation notices is that a market analysis would be undertaken in order to determine whether the conditions they contained could be removed or should be replaced.¹⁰
- 4.5 Such an analysis is extremely important when considering proposals for new regulation. At a minimum, a market analysis provides a framework for ensuring that all relevant facts are properly considered. More generally, however, it ensures that the focus of analysis is not overly narrow, and that issues in relation to a particular product and service are considered in their relevant context. In this case, a robust market analysis is required in order to understand issues key to the current consultation, such as:
- the extent of inter-platform competition, particularly the incentives that inter-platform competition provides to Sky to attract third party services to its platform;

⁷ Sky set out this argument in its submission to Ofcom in January 2013.

⁸ These issues were well ventilated in the Pay TV case before the CAT. In that case, Sky was considered by Ofcom to have "*mixed incentives*" to supply Sky Sports 1 and 2 to third party pay TV retailers. Ultimately, Ofcom relied on extensive amounts of evidence of what it believed were failed negotiations for supply as evidence that the alleged incentive to withhold supply outweighed the gain to Sky from higher wholesale revenues and profits if it supplied.

⁹ See further **Section 6**, below.

¹⁰ For example, in explaining the basis for continuation notices under the Act, Ofcom stated: "*There were a number of specific conditions included in some licences which could not, however, be replaced by new conditions under the powers contained in the Act until a review of relevant markets had been completed and implemented.*" Paragraph 2.4 of 'Discontinuation of conditions and directions continued in July 2003 from licences made under the Telecommunications Act 1984, except for certain specific provisions', Ofcom, November 2004. (<http://stakeholders.ofcom.org.uk/binaries/consultations/Prop1984tele/statement/Discontinuation.pdf>). Similarly, the last review related to the AC Continuation Notice, began by Ofcom in 2006 but never completed, was clearly envisaged as a market review. For example: (i) paragraph 2.5 of the document announcing the review stated: "*This market review will consider competition between providers of CAS and CATS in all relevant wholesale platform markets.*" 'Review of wholesale digital television broadcasting platforms; Update of review', Ofcom October 2006. (Available at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/reviews-investigations/review.pdf>); (ii) Ofcom's July 2013 consultation on the AC Continuation Notice stated: "*In 2006 we consulted on TPS guidelines more broadly and indicated we would undertake a market review [in relation to platform services]"* (paragraph 2.19).

- consumer behaviour and preferences in relation to interactive services;
- the extent of consumer switching among platforms;
- the extent of firms' countervailing buyer power when dealing with Sky;
- the significance of interactive services to competition among television broadcasters, whether FTA or pay; and
- the preferences of rights owners when licensing rights.

4.6 Above all, a proper market analysis ensures that Ofcom obtains evidence on the issues before it.

4.7 Yet Ofcom has not undertaken a market analysis in this case. Ofcom's analysis has been focused narrowly on third party demand for Sky's AC services on its DTH satellite platform.

4.8 Ofcom's failure to undertake an analysis of this type is a fundamental cause of the errors in its conclusions about the potential need for regulation. In particular, this arises because Ofcom has not assessed, including via obtaining relevant evidence, the incentive facing Sky described at paragraph 4.1.1 above – the incentive to facilitate the provision of enhanced TV services by third parties on its platform, which is driven by competition at the platform level of the market. This includes not only competition from "traditional" broadcast platforms (such as Freeview, Freesat and Virgin Media)¹¹, but also newly-emerged hybrid platforms (such as YouView), well-established connected TV platforms (such as Xbox 360s and Sony Playstations), and the plethora of newer rapidly growing connected TV platforms or prospective platforms (such as Google's Chromecast, Apple TV, Xbox One, smart TVs and Amazon's Fire TV). In addition, mobile platforms such as Apple's enormous iOS platform, and Google's Android platform, enable end-users to watch video services on a wide variety of mobile devices, such as phones and tablets. (Further discussion of this issue is included in **Section 6**, below.)

4.9 The complete absence of an analysis of inter-platform competition by Ofcom in the Consultation means that it has no basis on which to make an assessment of the extent to which this affects Sky's incentives. In fact, readily available evidence demonstrates that inter-platform competition is a key driver of many elements of Sky's strategy and behaviour.

Ofcom places undue weight on Sky's vertical integration

4.10 Ofcom observes that Sky is a vertically integrated operator whereas other platform operators are not.¹² Even if this were correct (which it is not¹³), as Sky has pointed out to Ofcom previously, that cannot be a reason, *per se*, for regulation. It is well recognised that vertical integration generally does not lead to adverse consequences for consumers or competition. For example, a recent paper on this subject stated:

¹¹ In a recent consultation on another subject Ofcom recognised the role that competition from such platform plays in driving innovation by pay TV operators. Ofcom stated: "*The presence of strong free to view platforms can provide incentives for pay TV providers to innovate in terms of functionality, content investment and/or pricing structures.*" Paragraph 3.10 of 'The Future of Free to View TV; a discussion document', Ofcom May 2014.

¹² Paragraph 7.9.

¹³ In particular, Ofcom fails to recognise that BT is also a vertically integrated pay TV broadcaster, pay TV retailer, and platform operator. Ofcom also overstates the extent to which BT's YouView service is open to third party broadcasters. Whilst YouView itself is required by the terms of the BBC's involvement to operate an open platform, broadcasters are currently unable to deliver television channels via IPTV to that platform without a separate agreement with BT and/or TalkTalk for multicast capacity. Sky has been able to procure such capacity from TalkTalk; it has not been able to do so from BT.

*“The key policy issue is identifying and distinguishing the **few instances** where the conduct of a vertically integrated firm might harm consumers from the **typical case** where the effect is benign or positive.*

*We find that there is a strong presumption, both on theoretical and empirical grounds, that vertical integration is beneficial for consumers.... However, the economics literature also identifies a **limited number of circumstances** when vertical integration creates incentives for foreclosure that are anticompetitive. Anticompetitive foreclosure would occur if foreclosure harms consumers in the downstream market.”¹⁴ (Emphasis added.)*

- 4.11 It is equally well recognised that these propositions remain valid even if a firm has (or is considered to have) market power either at the upstream or downstream levels of the market. Again, a view that a firm (i) has market power at one or more levels of the market, and (ii) is vertically integrated, is not sufficient, on its own, to support a presumption that it has an incentive to engage in anticompetitive foreclosure.
- 4.12 In the Consultation Ofcom places undue weight on the fact that Sky is vertically integrated, and fails properly to investigate whether circumstances in relation to the provision of AC services are such that it falls into the *“limited number of circumstances when vertical integration creates incentives for foreclosure that are anticompetitive”*.

5. The appropriate counterfactual in this case

- 5.1 Any consideration of the necessity of regulation must occur against a counterfactual: what would happen, or is likely to happen, absent that regulation.
- 5.2 In the current case, Ofcom must assess the need for regulation against the following facts:
- 5.2.1 absent formal regulation, Sky would be operating under the Commitments it has offered to Ofcom – potentially amended to address some of the concerns now expressed by Ofcom in the Consultation; and
- 5.2.2 Ofcom has the ability – indeed has expressed an intent – to monitor developments in relation to these services closely. It has said that it would step in if a combination of the Commitments and Sky’s incentives to deal constructively with third parties are found not to be working effectively. Ofcom has now set out the types of conditions that it could seek to impose in such circumstances. This is a factor that Sky would not be able to ignore going forward.
- 5.3 In this regard, the analysis set out by Ofcom in the Consultation is the wrong way around. Ofcom seeks first to assess the need for regulation without any regard to the proposed Commitments (as Ofcom puts it: *“Sky’s incentives to provide access on fair and reasonable terms, absent regulation”*¹⁵), and only subsequently (having concluded that there is a case for regulation), turns to the *“potential impact of the proposed Commitments”*¹⁶. Ofcom must reverse this process and ask itself whether compulsory access obligations are needed in circumstances where Sky is acting under a Commitments regime and there is an on-going potential for Ofcom to intervene at any point in future.

¹⁴ The Competitive Effects of Vertical Integration: Content and New Distribution Platforms in Canada’, Jeffrey Church, Berkeley Research Group LLC, April 2011. Available at: <http://dwmw.files.wordpress.com/2011/06/bell-church-study.pdf>.

¹⁵ Heading preceding paragraphs 7.40 -7.68.

¹⁶ Heading preceding paragraphs 7.119 – 7.130.

6. Ofcom's analysis of Sky's incentives in relation to the provision of AC services to third parties: provision of enhanced services by broadcasters of free to air television channels on Sky's DTH satellite platform

- 6.1 Ofcom analyses Sky's incentives to provide AC services to enable broadcasters to provide enhanced TV services in relation to (a) free to air ("FTA") television channels, and (b) pay TV channels (principally pay TV sports channels). This **Section 6** addresses Ofcom's assertions in relation to broadcasters of FTA television channels. Ofcom's assertions in relation to broadcasters of pay TV sports channels are addressed in **Section 7** below.
- 6.2 Before going on to consider Ofcom's analysis of Sky's incentives, we consider first the framework of analysis that Ofcom has applied to the regulation of AC services in relation to public service broadcasters.

Issues in relation to public service broadcasting

- 6.3 Even if Ofcom has the power to impose access-related conditions, which is not accepted, Ofcom's overall approach overstates the importance of AC services to public service broadcasting and has resulted in Ofcom tipping the balance too far in favour of regulation. In a situation where Ofcom admits that the case for regulation is "*finely balanced*" it is all the more important that Ofcom approaches the case for regulation with absolute objectivity and does not place undue or unwarranted emphasis on issues in relation to public service broadcasting.
- 6.4 Ofcom states in terms that "*regulatory intervention to secure an environment in which [cultural diversity and media plurality] can flourish may be appropriate*"¹⁷ (emphasis added), referring to Recital 10 to the Access Directive. Recital 10 does not, however, say that access regulation may be appropriate to allow cultural diversity and media plurality to "*flourish*". It only contemplates the extension of access regulation to "*new gateways...such as application programme interfaces (APIs)*" "*to the extent that is necessary to ensure accessibility for end users to specified digital broadcasting services*"¹⁸.
- 6.5 Ofcom's framework of analysis is also flawed in respect of public service broadcasting insofar as Ofcom has "*been mindful of the extent to which access to Sky's AC services enables the PSBs to deliver their services in accordance with their responsibilities and whether regulation is required to enable them to continue to do so for the benefit of end-users*"¹⁹. This seems to assume that without access to Sky's AC services, the Public Service Broadcasters ("PSBs") would in some way be unable to meet their public service broadcasting responsibilities. Ofcom should not overstate the contribution of AC services to achieving the purposes of public service broadcasting. Enhanced TV services such as alternative videostreams make up a tiny part of the overall output of the PSBs, and Ofcom is at risk of giving disproportionate weight to their contribution. Indeed, the fact that, among the UK's main PSBs, only the BBC and S4C have an ASA with Sky is a strong indication of the limited role that being able to enhance services on Sky's DTH satellite platform plays in the delivery of public service broadcasting objectives.
- 6.6 Moreover, it is not the case (even assuming that Ofcom has the power to impose access-related conditions, which Sky does not accept) that section 73(2) of the Act allows Ofcom to impose access regulation simply to secure the greatest possible benefit for the end-users of public service broadcasting *per se*. As Ofcom correctly recognises this is but one objective and needs to be balanced against the need to secure efficient investment and innovation.

¹⁷ Paragraph 6.19.

¹⁸ Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive). See further **Annex 1**.

¹⁹ Paragraph 6.22.

- 6.7 Sky has made it very clear that it will continue, under the Commitments, to provide AC services to enable the provision by PSBs of alternative videostreams, subtitles, and so on. This does not mean that Sky accepts there is a lower hurdle for the imposition of access regulation as far as public service broadcasting is concerned.

Ofcom's analysis of Sky's incentives is flawed

- 6.8 Ofcom's proposition that Sky has (or, more accurately, "may have") an overriding incentive to withhold AC services that enable broadcasters of FTA television channels to enhance their services on Sky's DTH satellite platform does not withstand scrutiny.
- 6.9 As far as Sky can discern, the entirety of Ofcom's analysis of this issue consists of three short paragraphs in the Consultation (paragraphs 7.44, 7.54 and part of paragraph 7.55). In relation to the propositions set out in these paragraphs it is notable that:
- they are all expressed as possibilities, rather than evidence-based findings²⁰; and
 - no evidence is cited in support of them.
- 6.10 Contrary to Ofcom's conclusion, it is plainly the case that these paragraphs do not comprise an adequate basis for imposing intrusive access regulation on Sky.
- 6.11 Ofcom has not demonstrated that Sky has an overriding incentive to withhold AC services from broadcasters of FTA television channels. As discussed below, Sky has a strong incentive to make the platforms it operates, including its DTH satellite platform, as attractive as possible to consumers. This leads it to seek to ensure that the platforms offer as broad a range of services as possible, with attractive functionality. Sky is a market leader in this respect, both in the UK and internationally.
- 6.12 Plainly, the types of services that appeal to consumers are not limited to those that Sky provides itself. From the outset, Sky's platforms have always carried third party services – whether they are provided directly to end-users on Sky's platforms by their operators, or licensed to Sky for retail to its customers. As the examples set out below indicate, Sky has always sought to include PSB content and services in its propositions.

Ofcom fails to give appropriate weight to the significance of platform competition and Sky's strategy

- 6.13 The reality of the landscape in which Sky operates today is that there is strong and increasing competition among an ever-increasing range of platforms and services. A good, independent view of this reality is provided in the report for Ofcom prepared by Mediatique, entitled 'The development of free-to-view television in the UK by 2024'. This report contains numerous statements of the following type:
- *"The legacy FTV landscape faces challenges in a crowded, complex and competitive market"*²¹

²⁰ Paragraph 7.44 states: "Sky **may** have countervailing incentives.... Sky **may** seek.... This **may** also be the case for other content...." Paragraph 7.54 states: "There **could be** demand for access in the future. If access to AC services is not mandated for FTA channels, providing red button services **may be** more problematic. Indeed, a lack of mandated access to AC services **could** operate as a disincentive for FTA channels...." Paragraph 7.55 states: "There are a number of cases where Sky's incentives **may** lead to access not being available (or only available on disadvantageous terms), for example: i) As Sky's own channels compete with FTA channels for viewers and advertising, there **may** be some incentive to seek to reduce the quality of service of other channels to distort competition.... If new third party FTA channels approached Sky to provide interactive TV services and Sky felt the proposed services were either of little value to its subscribers or conversely could draw viewers away from its own channels, it **may** not have the incentive to provide access to its AC services." (Emphasis added.)

- “Platform competition will intensify”²²
 - “The platform market in the UK is supplied by many players, across a range of distribution technologies; the propositions offered by these providers include a mix of free and pay services, breadth and depth of channels”²³
 - “These trends are creating complexity in the platform market, enabling new routes to market and reducing barriers to entry ...likewise, we have seen an acceleration in multi-platform and multi-device convergence”²⁴.
- 6.14 Indeed, Ofcom itself has recently recognised the fact that we now live in a world of platform proliferation.²⁵
- 6.15 Yet Ofcom gives only cursory consideration to the impact of such competition on Sky’s incentives, and is somewhat dismissive of its impact.
- 6.16 A key part of Sky’s strategy for many years has been to ensure that, among the range of platforms available to consumers, Sky’s is the most attractive. This is critical to attracting and retaining customers to its pay TV services, from which Sky earns the majority of its revenues and profit. The attractiveness of Sky’s platform is determined not only by the services and functionality that Sky itself provides, but also the services provided by third parties – particularly the UK’s PSBs, whose television channels continue to dominate households’ television viewing, even in Sky homes.
- 6.17 On the other hand, any potential detriment to Sky from enabling third parties to enhance their services on Sky’s platform via the use of Sky’s AC services is *de minimis*.

Ofcom’s proposition is without merit

- 6.18 As noted above, Ofcom concludes that Sky “*may have*” an overall incentive to withhold AC services that enable broadcasters of FTA television channels to enhance their services on Sky’s DTH satellite platform.
- 6.19 Before addressing the merits of Ofcom’s proposition, we set out a number of salient facts in relation to use of Sky’s AC services by third party FTA television broadcasters:
- the only major broadcaster of FTA television channels that uses Sky’s AC services today is the BBC;
 - the BBC is the UK’s most powerful television broadcaster. It has substantial bargaining power with Sky, which derives from a combination of a range of factors, including the immense popularity of its services, the strength of inter-platform competition and the BBC’s influence. Regulation is not needed to protect the interests of the BBC;
 - there is virtually no prospect of any new significant FTA users of Sky’s AC services emerging in the future. This is simply a function of the fact that interactive services on Sky’s DTH satellite platform are expensive to develop and operate, and the cost cannot be justified by commercially funded broadcasters. They prefer to

²¹ Page 2, ‘The development of free-to-view television in the UK by 2024’ a report for Ofcom by Mediatique, May 2014. Available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/700MHz/discussion/Mediatique.pdf>.

²² Page 3, *Ibid*.

²³ Page 15, *Ibid*.

²⁴ Page 19, *Ibid*.

²⁵ See for example paragraph 4.12 and accompanying chart in ‘The Future of Free to View Television, A discussion document’, Ofcom May 2014.

allocate their resources to developing services for other platforms, notably IP-based platforms, such as the internet, and, in the case of the PSBs, those in which they have an ownership stake (Freeview, Freesat and YouView). Even the BBC significantly scaled back its enhanced TV services on Sky's platform less than two years ago, on the basis that their cost could not be justified^{26,27};

- Sky has never impeded or sought to deny the provision of AC services to the BBC or any other broadcaster of FTA channels; and
- Sky is more than happy to provide AC services to broadcasters of FTA television channels. The Commitments would fully protect their legitimate interests.

6.20 Ofcom's theory about Sky's incentives in relation to FTA broadcasters is undermined entirely by Sky's consistent behaviour in relation to their services. If there were any merit in Ofcom's theory, it should be expected that Sky would be averse to delivery of FTA broadcasters' services via the range of new platforms and services that Sky offers, or the provision of unregulated enhanced functionality in relation to FTA broadcasters' services.

6.21 The reality is the opposite. Sky always seeks to include the PSBs' channels and services in its propositions, and to ensure that new functionality that Sky develops is available to PSBs' services. The reason for this is straightforward. The PSBs' services are used and valued by Sky subscribers. If their services are not included in new services or functionality developed by Sky, they will be seen by Sky's customers as being incomplete, and not particularly attractive.

6.22 We cite here six among many examples of Sky's real-world behaviour in relation to this issue²⁸:

(i) Catch-up TV services

6.22.1 All the UK's PSBs have now developed catch-up TV services – services that enable consumers to access their content on demand, including services that can be accessed on viewers' television sets. Sky is under no regulatory obligation to deliver such services to households on its platform. According to Ofcom's theory Sky should have been actively opposed to those services being launched on its platform.

6.22.2 Instead, Sky made strenuous efforts to persuade the PSBs to enable those services to be provided on its platform – in some cases in the face of a very high level of reluctance on the part of PSBs [redacted]. Eventually Sky was successful in persuading all the PSBs to launch their catch-up TV services on its platform, which was regarded by Sky as a significant, highly positive achievement.²⁹ Among other things, in order to persuade the PSBs to supply their catch-up services via Sky's platform, Sky had to:

- [redacted]³⁰; and

²⁶ See further the BBC's discussion of this reduction at **Appendix 1**.

²⁷ Indeed, Sky itself closed down its Sky News red button service in June 2014.

²⁸ Screen shots of (i) Sky web sites related to catch-up TV services on its DTH satellite platform, and NOW TV, and (ii) the Sky+ application on an iPad, each of which shows the prominence given to PSB services, are included at **Appendix 3**.

²⁹ See, for example, the e-mails sent once agreement with the BBC to put its iPlayer service on Sky's platform had been concluded included at **Appendix 2**.

³⁰ [redacted]

- agree to customise the technology used to deliver those services to ensure that the BBC's service has the look and feel of its iPlayer service.

6.22.3 Agreement was reached with the PSBs to deliver their catch-up services on Sky's platform purely as a result of commercial negotiation, with firms acting on normal commercial incentives. It did not require regulatory intervention either in relation to compelling Sky to carry such services, or in relation to the terms on which Sky agreed to do so.

(ii) NOW TV

6.22.4 NOW TV is a linear, over the top video service launched by Sky in July 2013. Accordingly to Ofcom's theory, Sky should have no incentive at all to include FTA broadcasters' services within the NOW TV proposition. On the contrary, however, Sky has negotiated with the PSBs, and obtained the right to make their online catch-up services - BBC iPlayer, ITV Player, 4oD and Demand 5 - available via the NOW TV box. The availability of such services via NOW TV features prominently in its advertising.

(iii) Remote recording

6.22.5 In 2006 Sky launched a service that enables Sky subscribers to programme their Sky+ set-top box to record a television programme from locations outside the home, for example via their mobile phone, PC or a tablet device. This service is known as remote recording (or remote record). Such a service is of value to consumers for many reasons - for example, when they have forgotten to set their Sky+ box to record a particular programme and will not be home at the time that it is broadcast. Sky is under no regulatory obligation to enable such functionality in relation to third parties' services, including those of the PSBs.

6.22.6 According to Ofcom's theory, Sky should be limiting remote recording functionality to its own television channels - for example, to boost their viewing. On the contrary, however, Sky has always enabled consumers on its DTH satellite platform to use remote record in relation to all channels available via its set-top boxes.

(iv) The Sky+ application

6.22.7 Sky's "Sky+" app, which is available on iPad, iPhone and certain Android devices, allows users to browse a replica of the EPG. It would have been open to Sky only to include its own channels within the Sky+ programme guide, if Sky had been operating under the type of incentive posited by Ofcom, to favour its own channels over those of third parties. In fact Sky has included all channels available via its EPG (including the PSB channels) within this application (as well as in its online Planner) because, as correctly noted by Ofcom, it wishes to "provide the best experience for its retail customer base"³¹.

(v) Submissions to the BBC Trust

6.22.8 In a world of intense platform competition, decisions by the UK's most powerful broadcaster, the BBC, to favour one platform over another have the ability to distort competition among them. One of Sky's concerns over the past few years in relation to its platform has been the propensity of the BBC to favour other platforms (including Virgin Media's cable platform) over Sky's DTH satellite platform. According to Ofcom's theory, Sky should be indifferent to such discrimination. On the contrary, however, Sky has been engaged in a dialogue with the BBC Trust to attempt to ensure that services developed by the BBC are not

³¹ Paragraph 7.56.

withheld from Sky's platform. **Appendix 4** contains submissions by Sky to the BBC Trust that set out its concerns on this issue.

(vi) Future generations of set-top boxes

6.22.9 As explained further in **Section 9**, below, [REDACTED].³²

6.22.10 [REDACTED].³³

6.23 Furthermore, if Ofcom's theory were correct it would be expected that there would have been constant tensions with such broadcasters in relation to their interactive services in the past – for example, as a result of Sky attempting to undermine their efforts to provide interactive services on Sky's DTH satellite platform. Instead, as explained in Sky's response to Ofcom's July 2013 consultation, no regulator – either Ofcom or Oftel before it – has been called upon to resolve a dispute between Sky and a customer of its AC services, (or indeed a complaint by such a customer) since those services were first provided over 13 years ago.

Ofcom's theory in relation to the BBC's services

6.24 Ofcom's broad theory in relation to FTA television services focuses, appropriately, on the BBC. Ofcom posits that Sky may have an incentive to withhold AC services from the BBC principally in order to increase Sky's advertising revenue. Ofcom's theory is that, if the BBC were not able to provide enhanced versions of its channels on Sky's DTH satellite platform, the time that households spend using those services would be spent instead watching television channels, including Sky's, and this increased viewing would therefore result in higher advertising revenues for Sky.

6.25 This proposition is entirely theoretical. Despite the fact that it is implausible on its face, no evidence or analysis is provided in support of it.

6.26 Ofcom refers to two specific examples – BBC News and sports services provided by the BBC. In the following sub-sections we first address these specific examples, before turning to the more general proposition put forward by Ofcom.

BBC News

6.27 Ofcom states:

"As Sky's own channels compete with FTA channels for viewers and advertising, there may be some incentive to seek to reduce the quality of service of other channels to distort competition. For example, Sky News has a red button (and is FTA). Sky may see some advantage in not providing similar services to other, similar, FTA channels."³⁴

6.28 The implication drawn by Ofcom appears to be that Sky's incentive to withhold AC services from broadcasters of FTA channels is strongest where Sky provides "similar" channels to FTA channels, the clearest example of which is Sky News.

6.29 A proposition that "Sky may see some advantage" in withholding AC services cannot be a reasonable basis for the imposition of intrusive access remedies.

6.30 It is surprising that when discussing the provision of AC services to S4C Ofcom cites the fact that were Sky to withdraw AC services it would "carry a risk of reputational damage", but does not consider this risk in relation to a proposition that Sky may seek to prevent the BBC enhancing BBC News on Sky's DTH satellite platform. Given the enormous

³² [REDACTED].

³³ [REDACTED].

³⁴ Paragraph 7.55(i). As noted above, Sky has now closed its Sky News red button service.

influence of the BBC, and the recent prominence of media plurality issues – focused on news provision – the risk of reputational damage to Sky from being seen to attempt to undermine BBC News would, plainly, be substantial.

6.31 On the other hand, a proposition that, if no red button services were available behind the BBC News channel on Sky's DTH satellite platform, Sky News would gain materially in viewers and advertising revenues, is wholly implausible for the following reasons:

- only around half of viewing of Sky News occurs on Sky's DTH satellite platform;
- although no data is publicly available, it is likely that the total amount of time spent using the BBC News red button service available on Sky's platform is small. Viewing of the BBC News channel itself accounts for less than one per cent of TV viewing in satellite homes. Time spent using the BBC News red button service would be smaller still; and
- it is highly unlikely that many consumers would substitute time spent looking at red button services behind BBC News with viewing of Sky News.

Sport

6.32 Ofcom states:

*"as a provider of premium sports channels, Sky may seek to restrict access to its AC services for BBC Red Button, notably in relation to interactive services which enhance the BBC's coverage of sporting events."*³⁵

6.33 The mechanism by which Ofcom believes this incentive operates is not clear. We presume that is the one set out in paragraph 7.55 of the Consultation, namely via an impact on viewing and advertising revenue. In other words, we presume that Ofcom believes that Sky may have an incentive not to provide the BBC with AC services that enable it to offer services such as its Wimbledon sports application, in order to increase Sky Sports' viewing and advertising revenues.

6.34 This proposition has all the flaws discussed above in relation to BBC News: it is not a proper conclusion based on analysis of evidence; it ignores the likely reputational damage to Sky that would arise if Sky were to act in this way; and it presumes, without foundation that Sky would choose to breach the Commitments provided to Ofcom.

6.35 Given the prominence of sports to Sky's brand and consumer proposition, a significant number of households on Sky's platform have a strong interest in sport. (This includes both subscribers to Sky's sports channels, and those that do not subscribe to those channels.) As Ofcom is well aware, the core of the BBC's sports offering is Group A Listed Events, events that cannot be shown exclusively live on Sky channels. Such events – events such as football World Cups, FA Cup finals, Olympics (Summer and Winter), and Wimbledon – are clearly of interest both to dedicated sports fans and a broad range of households more generally.

6.36 If the BBC is prepared to invest in, and operate, interactive services that enhance its coverage of sports events, Sky therefore has an interest in supporting those services, particularly if there is a prospect of those services being offered on other platforms but not Sky's.

6.37 Ofcom's theory is belied in particular by the recent example of the agreement between Sky and the BBC in relation to the 2012 Olympic Games. Ofcom cites data on the success of the BBC's 2012 Olympic red button service on Sky's DTH satellite platform, and notes that:

³⁵ Paragraph 7.44.

“the average weekly reach of BBC’s Red Button (sic) on Sky’s platform.... increased to about 60% of Sky’s subscribers over the 2012 Olympic period, showing the potential for demand to increase further during high-profile broadcast events of this nature.”³⁶

6.38 The 2012 Olympic service on satellite was provided as a result of an agreement between Sky, the BBC and Freesat, with Sky making a significant financial and technical contribution to that service. This agreement was announced by Sky and the BBC in April 2012. For the BBC, Roger Mosey stated:

“the BBC, Sky and Freesat have announced today that they’ve come to an agreement that will deliver the 24 channels to all Sky and Freesat homes. Sky will also pick up the costs of satellite distribution.”³⁷

6.39 Sky’s press release announcing the deal stated:

“The innovative agreement will mean that Sky homes will have access to comprehensive coverage of this summer’s Olympics, with up to 24 live dedicated HD and SD channels running simultaneously at peak times during the games. The 48 brand new channels, which are being created specifically for the Olympics, will launch into Sky’s Electronic Program Guide (EPG) and will show every sport from cycling to archery, swimming to wrestling, tennis to the 100 metre final. Alongside coverage on the existing BBC channels, Sky homes will be able to enjoy 2,500 hours’ worth of live BBC coverage throughout the Games.”³⁸

6.40 As set out in Sky’s announcement, the Olympic Games service supported by Sky enabled a huge number of hours of live coverage of events from the games to be broadcast in the UK. In addition, the agreement enabled all the additional channels to be listed in Sky’s EPG (as well as being made available via an interactive application) thus enhancing the discoverability and viewing of the events being broadcast.

6.41 Such an enormous addition to BBC-originated sports programming was almost bound to have an impact on viewing of Sky’s television channels during this period (and those of all other broadcasters). Indeed, there is evidence that this is the case. After the Olympics Sky carried out a post-implementation review of its decision to carry the 48 Olympic channels. This included a share of viewing analysis showing that viewing to all Sky channels dropped [36%] over the period of the Olympics – see **Appendix 7**. It can be assumed that there would not have been such a large decrease in viewing if Sky had not made the decision to support the BBC’s 48 Olympics channels, and in particular to make them available via the EPG, rather than just an interactive application.

6.42 The slide deck summarising the conclusion of the review also sets out the objectives of investing in the Olympic service, as follows: [36].

6.43 Sky considers that its support for this service is sufficient, on its own, to undermine entirely Ofcom’s unsupported theory about Sky’s incentives in relation to enabling the BBC to enhance its broadcasting of sports events on Sky’s DTH satellite platform, as well as Ofcom’s theoretical propositions about Sky’s incentives more generally.

Ofcom’s theory more generally

6.44 Ofcom’s proposition in relation to broadcasters of FTA television channels is that Sky may have an incentive to withhold AC services from them because enabling them to enhance

³⁶ Paragraph 7.41.

³⁷ See **Appendix 6**.

³⁸ Also included at **Appendix 6**.

their channels reduces the viewing of Sky's television channels, and therefore advertising revenue earned by Sky. Ofcom states:

"As Sky's own channels compete with FTA channels for viewers and advertising, there may be some incentive to seek to reduce the quality of service of other channels to distort competition."³⁹

- 6.45 This proposition may be intended by Ofcom to have more general applicability than the specific examples discussed above. If this is the case, it is equally without merit.
- 6.46 Other than specific, unique examples, such as the 2012 Olympics – which, particularly in view of the fact that they were held in the UK, achieved very high levels of viewing – the impact of use of enhanced TV services on viewing of Sky's television channels is too insignificant to be a determining factor in Sky's decision-making. It is simply not the case that Sky would seek to deny or impede the provision of AC services to a broadcaster wishing to enhance their FTA television channel (or channels) out of fear of the impact of doing so on viewing of Sky's television channels. The reality is that, in practice, any "mixed incentives" are of no effect in relation to broadcasters of FTA television channels enhancing those channels on its platform because Sky does not face any material harm to its own television services from such enhancements.
- 6.47 For Ofcom's hypothesis to be a realistic consideration the following conditions would need to be met:
- the amount of time that households spend using third parties' enhanced TV services on Sky's platform would need to be significant;
 - if those services were not available (because Sky refused to support them) the time people spend using them would be spent on watching TV instead; and
 - Sky would need to be confident that a significant proportion of that transferred viewing would be captured by its own channels, rather than the more than 500 other television channels available via its set-top boxes.
- 6.48 Ofcom has not adduced any evidence on these issues. Sky considers that it is not credible that they are valid.
- 6.49 If Ofcom was in fact inclined to attempt to verify this proposition, the BBC's substantial reduction of its red button services on Sky's platform less than two years ago, in October 2012, provides an ideal opportunity for investigation. According to Ofcom's proposition, the 80% reduction of the BBC's red button services, from five broadcast streams to one stream, should have resulted in a significant gain to Sky in terms of audiences to its channels and advertising revenues at this time.
- 6.50 A chart of the viewing share of Sky's channels in DTH satellite homes is included at **Appendix 8**. In practice, identifying the impact on viewing of Sky's channels of the reduction of the BBC's red button service is difficult, given other influences on viewing share (notably seasonality, changes in programming on Sky's channels, and changes in programming on other broadcasters' channels). Nevertheless, given the significant permanent reduction in the scale of the BBC's red button service, if Ofcom's theory were correct it might be expected that some permanent increase in the viewing share of Sky's television channels would be discernable. Plainly, no such increase is discernable.

Other issues in relation to FTA broadcasters

- 6.51 At paragraph 7.44 of the Consultation Ofcom asserts:

³⁹ Paragraph 7.55(i).

“a lack of mandated access [to Sky’s AC services] could operate as a disincentive for FTA channel operators from [sic] investing in certain broadcast rights (e.g. sports rights, noting that, for example, ITV shows various events on its non-PSB FTA channels such as ITV4.”

6.52 Again, this assertion is unaccompanied by evidence – for example in relation to the likelihood of ITV wishing to broadcast sports events via a red button service on Sky’s DTH platform. **Section 7**, below, explains that an inability to provide red button services on Sky’s DTH satellite platform would not have any material impact on incentives to bid for sports rights on the part of broadcasters’ of premium pay TV channels. That proposition is even stronger in relation to broadcasters of FTA television channels in the UK – particularly in view of the fact that only a minority of the viewing of their channels occurs via Sky’s DTH satellite platform.

6.53 At paragraph 7.55(iii) of the Consultation Ofcom asserts:

“If new third party FTA channels approached Sky to provide interactive TV services and Sky felt the proposed services were either of little value to its subscribers or conversely could draw viewers away from its own channels, it may not have the incentive to provide access to its AC services.”

6.54 This assertion is flawed for the following reasons:

- above all, it appears to envisage that Sky would choose flagrantly to breach the proposed Commitments. That is not the case;
- the first part of this assertion relates to a service that Sky considers to be *“of little value to its subscribers”*. Elsewhere in the Consultation, Ofcom concludes that the burden of supporting third party services on Sky’s DTH satellite platform is low. It is therefore difficult to see why Sky would refuse to provide AC services to a broadcaster wanting to develop and operate an interactive application on Sky’s DTH satellite platform in such circumstances. Whilst such an application, in Ofcom’s scenario, provides little benefit to Sky, it also does no harm; and
- the last part of this assertion (*“could draw viewers away from [Sky’s] channels”*) is flawed for the reasons discussed above.

Summary and conclusion: Ofcom’s analysis of Sky’s incentives in relation to the provision of AC services to third parties: provision of enhanced services by broadcasters of FTA television channels on Sky’s DTH satellite platform

6.55 In summary, contrary to Ofcom’s view set out in the Consultation, Sky does not have an overall incentive to prevent third party broadcasters of FTA television channels (currently principally the BBC) developing enhancements to those channels on its DTH satellite platform. On the contrary, because such services enhance Sky’s platform and cause Sky little or no detriment, Sky has an overall incentive to support those services. Ofcom cites no evidence in support of its conclusions, which are implausible. On the other hand there are many, readily observable, examples of Sky’s actual behaviour that contradict Ofcom’s conclusions.

6.56 Accordingly, the propositions set out by Ofcom in relation to Sky’s incentives to withhold AC services from third party broadcasters of FTA television channels are ill-founded and cannot be relied upon. In particular, they offer no support for a view that it is necessary to impose formal regulation on Sky in relation to its provision of AC services.

7. Ofcom’s analysis of Sky’s incentives in relation to the provision of AC services to third parties: provision of enhanced services by broadcasters of pay TV channels on Sky’s DTH satellite platform

7.1 The central element of Ofcom’s case for new regulation compelling Sky to supply AC services to third parties concerns an alleged potential for such supply to affect competition in the supply of premium sports channels (and/or retailing of pay TV channels⁴⁰), principally via a potential effect on bidding for sports rights. Ofcom’s case essentially adopts assertions put to it by BT in its response to Ofcom’s consultation document issued in July 2013, with Ofcom stating that it accepts BT’s assertions⁴¹.

7.2 BT’s assertions are without merit. They do not withstand even the most cursory scrutiny. It would be irrational to believe that an ability to deliver enhanced TV services on Sky’s DTH satellite platform plays a significant role in determining the success or otherwise of a premium sports channel (or, even less, another pay TV retailer) in the UK. By accepting BT’s flawed submissions Ofcom elevates enhanced TV services in relation to premium sports channels to a role in competition in providing such channels for which there is no reasonable basis.

7.3 Ofcom’s views on this issue are not accompanied by any evidence. In particular:

- (a) Ofcom has sought no evidence from Sky on its view of the importance of red button enhancements to its sports channels, or the importance of such services to competition between broadcasters of premium sports channels, including in bidding for content rights;
- (b) Ofcom does not appear to have sought any evidence from rights owners on their view of the importance (or otherwise) of enhanced TV services on Sky’s DTH satellite platform; and
- (c) Ofcom does not appear to have obtained any evidence from BT about the role that provision of red button services on Sky’s DTH satellite platform has played in the development of its premium sports channel business – for example, internal documents discussing BT’s bids for Premier League and Champions League football rights, and its long term plans in relation to distribution of its sports channels on Sky’s platform.

7.4 This **Section 7** comprises the following sub-sections:

- Sky has an incentive to enable third party broadcasters of premium sports channels to enhance their channels on its DTH satellite platform;
- Ofcom’s rights bidding theory is without merit;
- Red button services on Sky’s platform do not play a significant role in competition among UK providers of premium sports channels;
- BT’s assertions in relation to the role of red button services on Sky’s DTH platform in competition among UK pay TV broadcasters are without merit;

⁴⁰ The concepts of competition among (i) pay TV retailers and (ii) broadcasters of pay TV channels, are somewhat confused in the consultation. For example, paragraph 7.35, which sets out Ofcom’s analysis of Sky’s incentives in relation to providing AC services to third party broadcasters of premium sports channels, describes BT as “a well-resourced retailer of premium pay TV sports channels with a demonstrable ability to acquire new rights in order to expand its retail offering”. Similarly, at paragraph 7.38 Ofcom states: “continued access to Sky’s AC services for the provision of red button services and commercial watermarking will contribute to securing sustainable competition in the supply of retail pay TV services”.

⁴¹ Paragraph 7.38.

- UEFA Champions League rights;
- The position of new entrants;
- Commercial watermarking and subscriber management services; and
- The credibility of BT's allegations more generally.

Sky has an incentive to enable third party broadcasters of premium sports channels to enhance their channels on its DTH satellite platform

- 7.5 As explained in **Section 6**, a large number of households on Sky's DTH satellite platform have an interest in sport. Sky's brand is strongly associated with sport, and its strategy for many years has been to ensure that its customers are fully served – whether that is via services provided by Sky or third parties. In this respect, it is critical to note that experience indicates that most subscribers to third party pay TV services on Sky's DTH satellite platform are also Sky subscribers. For example, Sky estimates that around [X]% of subscribers to BT Sport on Sky's DTH satellite platform are also Sky subscribers. This means that, if a third party such as BT is willing to invest in and support an interactive sports application on Sky's DTH platform it is, in effect, delivering that application to a large number of Sky subscribers. Plainly, in these circumstances, Sky has a good incentive to enable it do so.
- 7.6 We do not overstate the strength of this incentive. As explained below, interactive services are not a significant determinant of consumers' subscription decisions, and we consider that very few consumers would select a particular platform for receiving TV services solely or principally on the basis that they offered an interactive service that was not available on other platforms. The key point, however, is that Sky does not consider there to be a downside to supporting such services on its platform. Accordingly, to the extent that households on Sky's platform place value on such services (having adopted Sky's DTH satellite platform), there is an overall benefit to Sky to supporting those services.

Ofcom's rights bidding theory is without merit

- 7.7 Ofcom's assertion that Sky sees a significant downside from supporting enhanced services provided by rival broadcasters of premium sports channels rests on a proposition that withdrawing the provision of AC services to third parties would diminish the strong competition that Sky faces when bidding for sports rights.
- 7.8 Despite being a core part of Ofcom's proposal to impose intrusive access remedies on Sky, Ofcom's reasoning in relation to premium sports channels is cursory. In practice, Ofcom's theory appears to be as follows:
- 7.8.1 the ability to provide coverage of sports events via an interactive application on Sky's DTH satellite platform plays a significant role in, or is critical to, bidders' likelihood of winning auctions for important sports rights in the UK; and either:
- (a) in BT's case, if Sky's behaviour was constrained only by the Commitments, BT faces a risk that if it bids for and wins important sports rights, Sky will then subsequently choose flagrantly to breach those Commitments and refuse to supply BT with AC services by refusing to renew its ASA when that agreement expires. This will either deter BT from bidding for such rights entirely, or cause it to bid less aggressively than it would if it were certain that it would be able to provide interactive services on Sky's DTH satellite platform beyond the term of its existing ASA; or

- (b) in the case of potential bidders without an ASA with Sky, they face a risk that if they bid for and win important sports rights, Sky will then subsequently choose flagrantly to breach the Commitments and refuse to supply the new entrant with AC services. This will either deter them from bidding for such rights entirely, or cause them to bid less aggressively than they would if they were certain that they would be able to provide interactive services on Sky's DTH satellite platform.
- 7.9 Properly set out, this theory is wholly implausible, and it would be irrational to place any weight on it. Ofcom cannot do so unless it has evidence capable of withstanding profound and rigorous scrutiny that it is correct.
- 7.10 As explained further in the sections below, this theory is flawed and cannot be relied on. [X] (discussed in further below), the ability to provide coverage of sports events via an interactive application on Sky's DTH satellite platform plays no significant role in bidders' likelihood of winning auctions for important sports rights in the UK.
- 7.11 Furthermore, in BT's case as matters currently stand (together with the Commitments set out in **Section 10** below) BT could have long-term guaranteed contractual supply of AC services on Sky's DTH satellite platform. To the extent that there is any plausibility in a concern that BT would bid less aggressively or not at all for sports rights as a result of issues linked to an ability to provide interactive services on Sky's DTH satellite platform (which Sky refutes), this guaranteed contractual right to provide such services on Sky's DTH satellite platform eliminates that concern entirely.
- 7.12 The position in relation to potential entrants is discussed further below. We note, however, that even in their case an argument that the risk of not being able to procure AC services from Sky is capable of distorting their bidding for sports rights depends on a proposition that the ability to provide coverage of sports events via an interactive application on Sky's DTH satellite platform is critical to bidders' likelihood of winning auctions for important sports rights in the UK. This is not the case.

Red button services on Sky's platform do not play a significant role in competition among UK providers of premium sports channels

- 7.13 Ofcom's core hypothesis in relation to pay TV services is that Sky may seek to prevent rival broadcasters of pay TV sports channels (whether existing or prospective) from providing enhanced TV services on its platform in order to reduce the competition that Sky faces for sports rights. That proposition is without merit.
- 7.14 In practice, Ofcom's focus in the Consultation in relation to pay TV services is on ensuring effective competition among broadcasters of premium sports channels. A range of factors affect the competitiveness of such broadcasters – for example, their brand, reputation, experience, the quality of their service, and so on. However, as Ofcom has recognised previously, the content actually carried by such broadcasters is the most significant factor. Accordingly, the ability of broadcasters of premium sports channels to compete effectively for content rights is a central determinant of their competitiveness. And whilst a range of factors is likely to determine firms' competitiveness in bidding for premium sports rights, their ability to monetise those rights is central.
- 7.15 Sky considers that the evidence that premium sports rights are contestable is now overwhelming. BT's ability to embark on a strategy of building a premium sports channel business, without any prior experience in television broadcasting, and to implement that strategy with such extraordinary success in a very short period of time provides compelling evidence that this is the case. BT's success includes the acquisition of all UK live rights (including both the rights currently held by Sky, and those currently held by ITV) to Champions League and UEFA league matches for the 2015/16 – 2017/18 football seasons, the first time that UEFA has ever licensed all such rights to a single UK broadcaster.

- 7.16 The ability to provide enhanced TV services on Sky's platform does not play a significant role in competition among broadcasters of premium sports channels. Even if Sky refused to provide AC services to third parties to enable them to provide enhanced versions of their sports channels on Sky's platform, this would be incapable of having any material effect on their incentives to bid for sports rights, or otherwise place them at a significant competitive disadvantage to Sky.
- 7.17 The reasons for this are straightforward. As Ofcom is aware, many of them were set out in the third witness statement provided to the CAT by Sky's then Chief Operating Officer, Mike Darcey in the pay TV case ("Third Darcey").⁴²
- 7.18 Red button services play only a minor role in consumers' decisions about whether to subscribe to a premium sports television channel (or package of channels), and therefore pay TV broadcasters' ability to attract subscribers and viewers in order to monetise content rights. It is the content that is actually broadcast on those channels that is the key determinant of subscription decisions.
- 7.19 This is strongly evidenced by the fact that BT has been able to build a subscriber base to its premium sports channels of around five million subscribers (including, it is estimated, over one million paying subscribers on Sky's DTH satellite platform⁴³) in less than a year, without providing any interactive enhancements to those channels on Sky's platform. By contrast, it took Sky over ten years to achieve this number of subscribers.
- 7.20 As explained in Third Darcey:

*"the interactive options available on Sky's Sports channels are not used as a selling point for those channels. In my view, interactive services add only modest value and are too complicated to explain to potential subscribers before they subscribe to the channels. Rather, it is something they learn about after they subscribe, by pressing the red button and seeing what enhancements can be viewed. For this reason, Sky has not promoted interactive services using 'above the line' marketing since at least 2003."*⁴⁴

- 7.21 The other key reason that red button services are not a significant determinant of competition among broadcasters of premium sports channels is because those broadcasters have a strong preference not to use red button services to provide important content to consumers. Many subscribers do not use those services, and the content they carry is not typically listed in Sky's EPG. This has a significant detrimental impact on viewing of events carried on an interactive service. As explained in Third Darcey:

"The following three examples show the impact of putting content behind the 'red button' compared to similar events on one of Sky's Sports channels:

a. Live Spanish Football – Real Madrid v Valencia on 4 December 2010, which was shown behind the 'red button', averaged 66,000 viewers. This compares

⁴² Mr Darcey was responding to assertions by Virgin Media and Ofcom that an inability to offer subscribers services similar to Sky Sports' red button service inhibited Virgin Media's effectiveness as a competitor to Sky. The CAT considered this matter at length in its judgment. The CAT concluded:

"Attaching due weight to Ofcom's reasoning and its decision, and mindful that the Tribunal should not interfere unless satisfied that the decision is wrong, we have nevertheless concluded in the light of our findings above that the non-availability of interactive services on cable is not liable to prejudice fair and effective competition in the retailing of those channels, or to make any significant contribution to such an effect in combination with other factors, and we are satisfied that Ofcom was wrong to find otherwise." (Paragraph 630, Judgment of the Competition Appeal Tribunal in cases 1156-1159/8/3/10, British Sky Broadcasting Limited & Ors v Office of Communications, [2012] CAT 208, August 2012.)

⁴³ 'BT Sport vision and reality', Enders Analysis, December 2013.

⁴⁴ Paragraph 630.

to an average of 199,000 viewers for Real Madrid matches shown on Sky Sports 3 and Sky Sports 4;

b. Live World Grand Prix Darts – Day 5 of the World Grand Prix on 8 October 2010 was shown behind the ‘red button’ and averaged 30,000 viewers. This compares to an average of 189,000 viewers for the rest of the tournament that was shown on Sky Sports 3 and Sky Sports 4;

c. Live Grand Prix Speedway – The Nordic leg of the Grand Prix Speedway series on 11 September 2009 was shown behind the ‘red button’ and averaged 30,000 viewers. This compares to an average of 73,000 viewers for the rest of the series, shown on Sky Sports 3 and Sky Sports 4.”

- 7.22 A key reason for this is that broadcasters of premium sports channels have a strong interest in maximising advertising revenue. As making a sports event available via an interactive application diminishes its audience, relative to what it would achieve if it was carried on a television channel, this diminishes the advertising revenue that can be earned from that event. As explained in Third Darcey:

“It is also important for Sky to ensure that its sports channels (rather than any services behind the ‘red button’) achieve the highest share of viewing possible so as to boost Sky’s advertising revenue. It is therefore not in Sky’s interest to put valuable content that significant numbers of viewers want to watch behind the ‘red button’ unless Sky has no other choice given the number of live events, highlights or other programming that Sky needs to schedule simultaneously.

... Sky is realistic about the ‘red button’. Sky knows that this is not an effective means of optimising viewing and so Sky makes a real effort to avoid putting attractive content behind it.”

The position of BT

- 7.23 Ofcom’s analysis in relation to pay TV channels focuses on BT. As Ofcom recognises, BT is a (relatively) recent entrant into the provision of pay TV service, both as a pay TV retailer, but also significantly as a broadcaster of premium sports TV channels. Ofcom appears to believe that if BT was not able to provide interactive enhancements to its sports channels on Sky’s DTH satellite platform, BT would not be able to compete effectively against Sky for sports rights, potentially causing it to refrain from bidding for rights in future, or potentially to withdraw from broadcasting premium sports channels altogether. If this is the case, there is no reasonable basis for such a belief.
- 7.24 BT is a substantial organisation, fully capable of negotiating with other firms from a position of strength. BT is one of the largest firms operating in the UK (in addition to around 170 other countries), with a turnover of over £17 billion per annum.
- 7.25 As Ofcom has recognised elsewhere, BT’s strategy in developing premium sports channels is aimed at bolstering its already strong market position in the provision of fixed line telephony and broadband services, particularly high speed broadband services, on which it earns high profits. It is a long term strategy and one that BT has publicly stated it considers to be working extremely well. For example, in its press release for the year to 31 March 2014, BT stated:

“BT Sport has proved very popular and we are delighted the service is now in around five million homes. For BT Consumer it underpinned a record 9% growth in revenue in

*the fourth quarter and the lowest line losses in over five years. We achieved an excellent 79% share of broadband market net additions in the quarter.*⁴⁵

- 7.26 These benefits are worth hundreds of millions of pounds a year to BT. BT has invested over £1 billion in its premium sports channel business, and has indicated publicly that it intends to make BT Sport “an immovable part of the UK broadcasting landscape”⁴⁶.
- 7.27 In these circumstances, a proposition that BT might be prepared to exit that business, or to decline to bid for important content rights in future, on the basis that it was not able to offer some content via an interactive service on Sky’s platform, is manifestly untenable.

BT’s assertions in relation to the role of red button services on Sky’s DTH platform in competition among UK pay TV broadcasters are without merit

- 7.28 In view of Ofcom’s unquestioning acceptance of BT’s submissions to it, the following sections address the assertions set out in BT’s submission to Ofcom in 2013.

BT’s alleged cost disadvantage if it is unable to exploit content via a red button service on Sky’s DTH satellite platform

- 7.29 BT’s first assertion is that if it were unable to exploit content via an interactive service on Sky’s DTH satellite platform, due to fixture clashes, then it would operate at a cost disadvantage against Sky when bidding for content rights. BT asserted:

*“if regulation is removed such that Sky is in a position to withhold from BT the ‘red button’ functionality necessary to manage clashes, it would have a strong incentive to do so in order to raise its main competitor’s costs for bidding for sports rights.”*⁴⁷

- 7.30 Ofcom states that it accepts this assertion.⁴⁸
- 7.31 At the outset, Sky notes that this proposition is badly specified; it is entirely unclear how an inability to exploit rights that a broadcaster has acquired raises its costs. Two potential interpretations of this proposition suggest themselves, neither of which has been expressed either by Ofcom or BT.
- 7.32 First, BT and Ofcom may be alleging that, if BT is not able to provide red button services on Sky’s platform in order to broadcast programming that it has acquired, which clashes with other programmes being aired, it must therefore use alternative, higher cost methods if it wishes to broadcast that programming. This issue is raised elsewhere in BT’s response, but, unlike the proposition related to increased costs, does not appear to have been adopted by Ofcom. For completeness, however, we address this assertion below.
- 7.33 Second, BT and Ofcom may be alleging that if BT is not able to provide red button services on Sky’s DTH satellite platform (and therefore risks not being able to broadcast some events the rights for which it is bidding) it must somehow increase its bids in order to ‘compensate’ rights holders for the fact that their events may not be broadcast on Sky’s platform in the UK.
- 7.34 Such a proposition would be absurd. By definition, the events that are not broadcast in the event of a schedule clash are those that a broadcaster judges to be of least importance to its subscribers. In BT’s case, these comprise events that it is unable to

⁴⁵ ‘BT Group plc, Results for the fourth quarter and year to 31 March 2014’, May 2014. Available at: <http://www.btplc.com/news/articles/showarticle.cfm?ArticleID=b37789ab-6ae4-4dbf-861d-ef6f8e07f8e0>.

⁴⁶ See: <http://www.rts.org.uk/rts-cambridge-convention-2013-sport-game-changer-cc>.

⁴⁷ Paragraph 24 of BT’s submission.

⁴⁸ Paragraph 7.33.

show on its three satellite channels – so the fourth most attractive event occurring at a particular time to which BT has rights. It is implausible that the owners of rights to such content would, in effect, require compensation for a risk that their events may not be broadcast via satellite in the UK – particularly in circumstances where, if their events were broadcast via satellite, they would be accessed via an interactive application (and would therefore enjoy limited viewing).

- 7.35 In the annex to its submission BT provides a table that lists the types of events that it was not able to broadcast in August and September 2013 via its DTH satellite service (or its services on all other platforms) because it had not yet chosen to develop an interactive application for use in Sky's set-top boxes. These comprise foreign football matches (from the German, Brazilian and French leagues), French rugby matches, and a US WTA tennis event. It is highly unlikely that BT's ability (or otherwise) to deliver these events to subscribers on Sky's DTH satellite platform via an interactive application played any part at all – including in relation to the level of bid BT had to make – in BT's success in acquiring these rights. Nor is it likely that the owners of these rights have any concerns about the fact that BT did not broadcast the events listed in the table via satellite in the UK.
- 7.36 Presumably, given BT's assertions, it would be a straightforward matter for BT to provide evidence in relation to the role that its ability to provide interactive services on Sky's platform played in its acquisition of rights to German, French and Brazilian football, French rugby and WTA tennis. In the alternative, such evidence could be sought from rights owners themselves.
- 7.37 More generally, two further points are notable. First, neither Ofcom nor BT asserts that any purported cost differences would be material. Plainly, unless they were significant, higher costs borne by a rival would be unlikely to have any effect on competition against Sky for sports rights.
- 7.38 Second, it is unclear why cost differences between competitors in the provision of premium sports services matter. The provision of premium sports channels is not a business where, for example, prices are determined by firms' marginal costs; it is to all intents and purposes a fixed cost business. If a firm in that business has higher costs than another this will simply mean that it is less profitable. It is plainly the case that firms can compete strongly with each other even if they have different levels of profitability. That is the case in all markets.

Use of red button to manage fixture clashes as a factor in competitiveness of bidding for sports rights

- 7.39 BT's second assertion is that if red button services on Sky's platform were not available to it, it may not be in a position fully to exploit rights due to fixture clashes. BT asserts that because rights owners are interested in the exposure of their content, such an inability fully to exploit rights will place it at a competitive disadvantage against Sky when bidding for sports rights.
- 7.40 BT's submission on this issue stated:

"many sports rights holders do not simply sell their rights to the highest bidder. Many other factors are considered as part of the bid process such as programming plans, distribution and the level of exposure of their content in terms of likely audience/subscriber numbers. In the event of similarly sized financial bids, a pay TV retailer with the ability to offer wider exposure by broadcasting all of a rights holder's rights live across multiple platforms is likely to be favoured, ceteris paribus, over a pay TV retailer that was unable to broadcast all of the rights live across multiple pay TV platforms."⁴⁹

⁴⁹ Paragraph 25 of BT's submission.

- 7.41 Again, Ofcom states that it accepts this assertion.⁵⁰
- 7.42 Sky notes that the phrasing of this part of BT's submission is extremely unusual, referring to (i) the ability of pay TV retailers to bid for sports rights, and (ii) their ability to operate across multiple pay TV platforms. The first is erroneous (given that it is broadcasters that bid for sports rights, not pay TV retailers), and it is difficult to see how the second is intended to relate to a consultation about the provision of AC services on Sky's DTH satellite platform. In these circumstances, Ofcom's interpretation of BT's submission, set out in paragraph 7.33 of the Consultation, is charitable. Nevertheless, we assume that Ofcom is correct that BT intended this argument to relate to the impact on its ability to bid for sports rights from potentially not being able to show events via a red button service on Sky's DTH satellite platform due to rights owners' interest in "exposure of their content".
- 7.43 BT's assertion is flawed for the following reasons (among others):
- the issue of clash management is not relevant to English Premier League rights;
 - its characterisation of the process by which sports rights are auctioned is erroneous;
 - rights owners are unlikely to view access to their events via interactive services as comprising valuable "exposure".
- 7.44 Each of these issues is discussed further in the sections below.

Clash management is not a relevant issue for English Premier League rights

- 7.45 It is notable that Ofcom specifically identifies English Premier League and Champions League rights in its discussion of the potential for withholding of AC services to affect competition among broadcasters of premium sports channels. Ofcom states:

*"As rights are offered periodically (typically on a three year cycle for the Premier League and UEFA Champions League), Sky's actions could impact competitors for significant periods of time. Therefore, the risk to competition of Sky acting on commercial incentives not to offer access to certain access seekers could have a significant impact on competition."*⁵¹

- 7.46 It is critical to recognise that "clash management" is, to all intents and purposes, not a relevant issue in relation to bidding for the most important sports rights available to UK pay TV broadcasters - live rights to English Premier League football.
- 7.47 This is because those matches that are available for broadcast are carefully scheduled by the Premier League so that only one match is broadcast at the same time.⁵² Such an approach is, plainly, in the interests of both the Premier League, and broadcasters; broadcasting multiple matches at the same time risks significantly reducing the audience to each match broadcast.

⁵⁰ Paragraph 7.38.

⁵¹ Paragraph 7.67. This reflects Ofcom's findings in its 2010 Pay TV Statement, which concluded: "by far the most highly-valued TV sport content in the UK (and elsewhere) is football. Among football content, Premier League content is the most important, followed by the UEFA Champions League, FA Cup and the UEFA European Football Championships." Paragraph 5.92, 'Pay TV Statement', Ofcom, March 2010.

⁵² In the 2013/14 - 2015/16 seasons, these slots are 12.45 Saturdays, 17.30 Saturdays, Sundays 13.30 - 14.05, Sundays 4pm, Mondays 20:00 and a number of midweek evening and bank holiday slots. The majority of matches each season are played on Saturdays at 3pm and are not available for broadcast on television.

- 7.48 The only exception to this is on the last day of each season, when there are potentially a number of matches that are critical to determining the winner of the season, or teams' relegation from the Premier League. However, due to the impact on audiences of making events available behind the red button, and given the significant financial cost of Premier League rights, Sky has in the past used its red button service only as a last resort in these cases. Sky has only made Premier League matches available via the red button three times in the past ten years on the last day of a season.
- 7.49 As a result, "*clash management*" in relation to broadcasting Premier League football matches is not a relevant issue, and therefore the ability to provide red button services on Sky's DTH satellite platform has no impact on broadcasters' ability to compete for the most important sports rights available to pay TV broadcasters in the UK.

BT's characterisation of the process by which sports rights are auctioned is erroneous

- 7.50 BT's proposition is that, if two broadcasters' financial bids for sports rights were "*similarly sized*", a rights owner would determine the outcome of the auction based on other factors (including whether the broadcasters were able to show events via an interactive application on Sky's DTH satellite platform in the UK). That is a flawed description of the way sports rights are sold. If broadcasters' financial bids for rights are evenly matched during the sales process the normal outcome is that the rights owner will continue the auction or negotiation process until one broadcaster offers sufficiently more than the other. That is certainly the case in relation to the types of key rights cited by Ofcom, namely Premier League and Champions League rights.
- 7.51 In the unlikely event that a rights owner curtailed that process and decided between two broadcasters whose financial bids were evenly matched, a proposition that their ability to offer subscribers access to events via an interactive service on Sky's DTH satellite platform would be a key deciding factor between the two broadcasters is far-fetched.⁵³

Rights owners are unlikely to view access to their events via interactive services as comprising valuable "*exposure*"

- 7.52 As explained above, making sports events available via an interactive application significantly diminishes their exposure. Accordingly, if a rights owner has a preference for a high degree of exposure of its events, that rights owner would be extremely unhappy if a bidder intended to make a significant number of its events available via an interactive application. Their key interest is in having their events broadcast on a linear television channel, listed in an EPG.
- 7.53 In relation to the most important and most expensive sports rights, the alignment of interests of rights owners and broadcasters ensures that this will be the case. It would not make commercial sense to spend millions of pounds on acquiring rights to broadcast a particular sports event and then make it accessible via the red button on Sky DTH satellite platform.
- 7.54 In relation to more minor rights, in the first instance they are plainly of far less significance to the key focus of Ofcom's attention in relation to pay TV services of securing sustainable competition among the providers of such services.
- 7.55 Notwithstanding this, if the owners of such rights were interested in a high degree of exposure for their events, as discussed above their key interest would be in having their events broadcast on linear EPG-listed channels. They are likely to have little or no interest in whether or not some of their events are available via an interactive application, or not broadcast at all.

⁵³

[3<].

- 7.56 By way of example, if the owners of the rights listed in the annex to BT's submission (the Bundesliga, La Ligue, CBF and WTA) had a strong interest in the exposure of their events in the UK (a proposition for which no evidence has been provided), they would be highly satisfied with the extent of live coverage their sports receive via BT's three linear sports channels. They are likely to be entirely indifferent to the fact that a small number of events from their competitions are not broadcast live in the UK by BT (on Sky's platform or any other platform), particularly so when the alternative is merely exposure behind the red button via satellite.
- 7.57 Accordingly, BT's assertion that, unless it is able guarantee rights owners that it will be able to make events available behind the red button on Sky's DTH satellite platform in the UK, it will not be able to offer them the exposure for their content that they value, and as a result BT will not be able to compete effectively for content rights, is ill-founded and cannot be relied on by Ofcom.

Alternatives to use of a red button service for clash management

- 7.58 The heart of BT's submission to Ofcom is an assertion that in order to be able to bid competitively for sports rights it must be able to be able to broadcast multiple events simultaneously ("*clash management*") on Sky's DTH satellite platform. In itself, this proposition is without merit. BT also asserts, however, that it has "*no viable alternatives to AC services for clash management*". This is a gross exaggeration.
- 7.59 Before addressing BT's flawed assertions about the alternatives available to it, we note the following points:
- BT's assertions rest on an implicit proposition that alternatives must be perfect substitutes to a red button service to be a "*viable alternative*". That proposition is without merit;
 - BT does not attempt to explain why it is of such critical importance to bidding for sports rights that it is able to engage in "*clash management*" in relation to its service on DTH satellite, but no other platform⁵⁴; and
 - in evaluating BT's assertions, as explained above it must be borne in mind that the content for which clash management is required is, by definition, almost invariably content that has limited appeal to UK viewers, and for which rights owners are unlikely to have a strong preference in relation to whether or not some of their events are not broadcast in the UK.

(i) Additional television channels

- 7.60 Until relatively recently the principal alternative to a red button service for clash management has been to develop a new part-time television channel (with such a channel potentially developing over time into a full-time television channel). As Ofcom is aware, this approach is one that Sky itself has adopted in the past. In particular, Sky Sports 3 began as a part-time "overflow" channel – i.e., used principally for managing fixture clashes. It is difficult to see how this was a viable approach for Sky but allegedly completely unviable for BT.⁵⁵
- 7.61 BT's submission emphasises the disadvantages of such an approach, particularly in relation to obtaining EPG slots and alleged difficulties in marketing overflow channels.

⁵⁴ Sky notes that BT has around three times as many subscribers to its sports channels on Virgin Media's cable platform as it has on Sky's DTH satellite platform.

⁵⁵ BT states: "*presumably, if it were more commercially viable, or created a better consumer experience, Sky would already be offering Sky Sports 5, 6, 7 and 8 [in order to manage schedule clashes]*" (paragraph 42 of BT's submission). The obvious reason that Sky has not needed to develop this number of Sky Sports channels is that the number of channels that Sky already operates is broadly sufficient to manage schedule clashes effectively.

Neither of these arguments is compelling. The former is certainly not insurmountable, and the latter fails to recognise that broadcasters regularly market the programming on their television channels, in order to drive viewing to programmes (and hence the channel), as well as more general marketing of channel brands. BT's assertions appear to envisage a need for a significant number of additional channels ("*multiple additional BT Sport channels, scattered across the EPG*"⁵⁶). It is evident, however, that a single additional channel would be sufficient to address the types of schedule clashes set out in BT's submission to Ofcom.

7.62 BT's submission sets out only the potential downsides of operating additional television channels, without noting any of the advantages from this approach – for example:

- the content available via that channel would be far more visible to subscribers – by being more likely to be listed in the EPG, and viewable while channel surfing. It would also be more likely to be able to be recorded using Sky+. And it is likely to gain far greater audiences (and therefore "exposure" and advertising revenue) than if that programming were accessible only via an interactive application; and
- this approach means that the channel can be made available across multiple platforms, notably Virgin Media's, thereby potentially earning additional wholesale revenues, particularly if, over time, it were to develop into a more fully developed channel.

(ii) Online services

7.63 As BT notes, another alternative would be to use an online service to deliver events that could not be broadcast on one of BT's three existing channels due to fixture clashes.⁵⁷ As Ofcom is aware, delivery of BT Sport online is a key part of BT's strategy in relation to its sports service, and it would be straightforward for BT to deliver additional content via that type of service.

7.64 Again, BT's approach to its submission to Ofcom is to assert only the potential downsides of such an alternative. BT asserts that its experience of using an online service to deliver sports content is that it is not attractive to many users. This is directly contradicted by its public statements. For example, a BT press release, issued shortly after BT's submission to Ofcom, entitled 'BT Sport proving a major hit with app users', stated:

"The BT Sport App is proving a major hit with customers it was announced today by Marc Watson, CEO of BT TV. Watson, who was making a keynote speech at the Royal Television Society, said that huge numbers of BT customers had downloaded the App and that the million milestone was due to be passed in the next month."

"The BT Sport App has proved to be a great success with our customers. More than a million homes will have soon downloaded the App and, whilst many of those can also watch via their TVs, there are literally hundreds of thousands of people who have chosen to watch exclusively online."⁵⁸

7.65 Similarly, when announcing BT's deal to make BT Sport available via Chromecast, Pete Oliver, managing director of BT's Consumer Commercial and Marketing, said:

⁵⁶ Paragraph 41.

⁵⁷ Paragraph 30.

⁵⁸ 'BT Sport proving a major hit with app users', BT press release, 12 September 2013. <http://www.btplc.com/news/articles/showarticle.cfm?articleid=%7B478023a7-4fdf-4b75-8ad1-0602d55de3f9%7D>

"We are already delivering BT Sport via our App and we are seeing some impressive viewing figures, which demonstrates that customers appreciate this option."⁵⁹

- 7.66 More generally, BT's assertions fail to have any regard to the rapid growth of consumers' use of online services, and their propensity to view content on a large and expanding variety of screens.
- 7.67 BT states that delivering sports content via an online app is an inadequate substitute for a broadcast service because *"consumers prefer to watch live sports content on a large (living-room) screen."*⁶⁰ It is, however, increasingly straightforward for consumers to view content delivered online via their television screens. Indeed, BT Sport can be watched on television screens via Google's Chromecast service and Apple TV, and it would be highly surprising if BT were not already seeking to make that service available via other connected TV platforms (such as Microsoft's Xbox platform).
- 7.68 BT also states that *"only approximately [redacted]% of its BT Sport base use its online application to watch major live sports content"*⁶¹. However, the types of events shown on an overflow service are not *"major live sports content"*. By definition, they are events that have relatively limited appeal to viewers. This can be seen clearly in the list of events set out in the table attached to BT's submission. BT cannot reasonably claim that a league football match between AS Monaco and Lorient, or St Etienne and Toulouse falls into the category of *"major live sports content"* broadcast in the UK.
- 7.69 BT asserts that *"from a consumer perspective an online application is a complementary experience to watching live sport on the main television set, not a substitute."*⁶² That does not make sense. First, it is plainly possible to watch live sport on *"the main television set"* via an online application. Second, many consumers use online applications to watch live sport on other devices (such as tablets or PCs) as a substitute for watching it on their main television set – for example, if they are not at home, or if the main television set is being used by other members of their family. Finally, if an online application were used to provide additional live sport for those viewers who wished to watch those events, by definition those events would be substitutes for the events being shown on BT's television channels, rather than complementary.
- 7.70 It is also notable that BT's assertions about consumers' preferences are based implicitly on a comparison between watching a sports event (i) broadcast on a linear television channel and (ii) via an online service. The relevant comparison for the current purposes, however, is consumer preferences in relation to watching a sports event (i) accessed via a red button service on Sky's DTH satellite platform, and (ii) available via an online service.
- (iii) Delayed or highlights coverage
- 7.71 Finally, Sky understands that delayed and highlights rights are normally sold together with live rights for the types of competitions described in BT's annex. This means that it is probable that BT has the option of broadcasting delayed coverage, or highlights, of the matches from competitions such as the Bundesliga and Serie A, for those matches that it is unable to broadcast live. Such an option may well be regarded as a reasonable alternative for the relatively small number of consumers in the UK interested in watching those matches – again, having regard to the fact that the events that a broadcaster decides not to broadcast live will, by definition, be those that it regards as least attractive to its subscribers.

⁵⁹ 'BT Sport announces Chromecast partnership', BT press release, 3 April 2014. <http://sport.bt.com/watchnow/programmes/bt-sport-announces-chromecast-partnership-S11363890277685>

⁶⁰ Paragraph 30.

⁶¹ *Ibid.*

⁶² Footnote 15.

UEFA Champions League rights

7.72 [REDACTED].⁶³

7.73 [REDACTED].

7.74 [REDACTED].

7.75 [REDACTED].

The position of new entrants

7.76 Ofcom also expresses concern about the potential ability of new entrants to broadcasting premium sports channels to obtain supply of Sky's AC services. Ofcom states:

*"In the absence of regulation, new entrants may not be able to secure contractual terms and would not have certainty about their ability to secure access prior to discussion with Sky. Where they are bidding for rights that also hold an interest for Sky, this could, in turn, dis-incentivise new entrants from bidding, if they consider they would only be able to offer a less feature-rich service than Sky itself provides. Imposing new access-related conditions would ensure that new third party entrants were able to secure access to Sky's AC services to provide enhanced TV services."*⁶⁴

7.77 Above all, this concern rests on a proposition that Sky would choose flagrantly to breach the Commitments given to Ofcom in the event that a broadcaster (other than BT or Setanta, who already have application signing agreements with Sky) won sports rights and subsequently sought supply of AC services from Sky. Sky objects to that proposition in the strongest possible terms. Ofcom has no justifiable reason to believe that Sky would behave in such a blatantly unprincipled manner.

7.78 Second, it rests on a proposition that an ability to provide interactive services on Sky's DTH satellite platform is a significant factor in either (i) bidding for sports rights, or (ii) competition among broadcasters of premium sports channels. As explained above, that is not the case.

7.79 Third, if new operators were to compete for sports rights against Sky (and BT) in future, they are likely to be large well-resourced businesses. By way of example, Al Jazeera has previously been considered to be interested in bidding for Premier League rights.⁶⁵ Al Jazeera is owned by the government of Qatar and operates a global network of sports channels. Among many other rights, Al Jazeera currently holds the rights to broadcast UEFA Champions League and English Premier League matches in the Middle East and North Africa, and UEFA Champions League matches in France.

7.80 There is also a significant likelihood that potential entrants have a strong online presence (such as one of the large global tech companies) and may view red button services as an unattractive way of delivering content to consumers. Both types of firms are more than capable of either dealing with Sky (if they wish to) without regulatory assistance, or adopting alternatives to the use of Sky's AC services.

7.81 Fourth, Ofcom's proposition relies on an exaggerated view of firms' attitudes to risk. For large companies making significant investments, or entering new markets, dealing with risk

⁶³ See: COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League, Commission decision of 23 July 2003, OJ L 291, 8.11.2003.

⁶⁴ Paragraph 7.65.

⁶⁵ See, for example, 'Al Jazeera 'could challenge Sky' for Premier League rights', The Independent, 28 February 2012. Available at: <http://www.independent.co.uk/sport/football/news-and-comment/al-jazeera-could-challenge-sky-for-premier-league-rights-7461851.html>.

is a fact of life. Such firms are well-used to dealing with uncertainty, and adjusting their plans as circumstances change. A proposition that a large, well-resourced firm contemplating bidding substantial amounts for sports rights would be deterred from doing so on the basis of a risk that Sky might renege on the Commitments given to Ofcom, and deny it the ability to develop red button services for managing scheduling clashes, is simply not credible.

7.82 Finally, Ofcom's proposition relies on an implausible sequencing of events. Ofcom's proposition envisages that a potential entrant would prefer not to agree a contract with Sky for AC services before bidding for sports rights, for fear of alerting Sky to the fact that it faced additional competition for those rights. Subsequently, Ofcom envisages that Sky may renege on its Commitments, and refuse to provide that operator with AC services, or fail to engage constructively in discussions for their provision. In this context, it is important to bear in mind that:

- (i) rights owners normally auction important rights a significant period ahead of the start of new rights contracts in order to enable new entrants to arrange the plethora of activities needed to begin exploiting those rights – from arranging distribution and transmission capacity, hiring production staff and acquiring production facilities, through to purchasing advertising airtime. In the unlikely event that if it became evident that the broadcaster had a strong desire to develop interactive services on Sky's DTH satellite platform and Sky, in breach of its Commitments, was refusing to provide AC services or not engaging constructively in negotiations for their provision, then there would be likely to be plenty of time available to Ofcom to take steps to address that situation; and
- (ii) the experience in relation to BT, as the most recent new entrant to premium sports broadcasting in the UK, belies a proposition that a great deal of urgency would be required in relation to supply of AC services. BT acquired Premier League rights in June 2012, and began broadcasting its BT Sport channels over a year later, in August 2013. Yet it was not until May 2014 – almost two years after acquiring Premier League rights – that BT turned to developing an application which enabled subscribers to access additional video feeds behind the red button on Sky's DTH satellite platform.

Commercial watermarking and subscriber management services

7.83 The discussion set out above focuses on genuine enhanced television services provided via the use of Sky's AC services. BT's submission to Ofcom, however, also raised issues concerning two other types of services: commercial watermarking and subscriber management services. We address these issues below without prejudice to Sky's general position on Ofcom's ability to impose access-related conditions, as set out in **Annex 1**.

Commercial watermarking

7.84 Commercial watermarking refers to a service via which an on-screen icon is displayed on video feeds delivered to commercial premises. It assists inspectors employed by a pay TV operator to ensure that commercial premises are paying a commercial subscription, rather than simply paying for, and exhibiting, a residential service.

7.85 In the first instance, it is inappropriate for Ofcom to classify such a service as an enhanced television service. Ofcom defines enhanced television services as services that *"provide access to additional information and/or videostreams that complement the broadcast linear TV programme"*⁶⁶. It is plain that commercial watermarking neither *"provides access to additional information"*, nor *"additional videostreams"* in order to *"complement the broadcast*

⁶⁶ Paragraph 3.6.

linear TV programme'. It is simply a revenue protection mechanism for pay TV operators, [X].

- 7.86 Second, commercial watermarking is not capable of being included within the scope of access related conditions imposed under sections 73(2) and 74(2) of the Act as further explained at **Annex 1**.
- 7.87 Third, it is not necessary to use Sky's AC services to protect revenues associated with commercial subscribers on Sky's DTH satellite platform; there are good alternatives available to a third party retailing pay TV services on Sky's DTH satellite platform. In particular, they have options such as use of [X], or more standard options, such as inspectors comparing information about particular premises found to be exhibiting BT Sport against a database of commercial customers.
- 7.88 Finally, Ofcom's case for including commercial watermarking in the scope of services to which compulsory access regulation may be applied rests on an argument that an inability on the part of third parties to procure Sky's AC services has the "*potential to influence competition*"⁶⁷. Ofcom goes on to accept "*BT's submissions that the provision of red button services [including commercial watermarking] will have important implications for its competitiveness*"⁶⁸. Such an approach, of accepting assertions put by BT without investigation or consideration of relevant evidence cannot comprise a reasonable basis for the inclusion of commercial watermarking in the scope of the compulsory access regulation proposed by Ofcom.
- 7.89 For BT's assertion to have any validity, it must be the case that, if it were not able to use Sky's AC services to undertake commercial watermarking: (i) this would have a material adverse effect on its revenues from commercial subscribers, or that alternative methods of protecting revenues would have substantially higher costs, and (ii) any such impacts would, in turn, significantly undermine BT's competitiveness as a broadcaster and/or retailer of premium pay TV channels. Ofcom is not in a position to determine this matter. Accordingly its acceptance of BT's assertion has no foundation, and cannot be relied upon.
- 7.90 In practice, a proposition that an inability to undertake commercial watermarking using Sky's AC services would have a significant detrimental impact on its competitiveness as a pay TV broadcaster or retailer is implausible. We believe that revenues from commercial subscribers comprise a relatively small proportion of the revenues of BT Sport, particularly if imputed benefits from those who are provided the channels for free are taken into account. In this case, Sky estimates that commercial revenues comprise less than [X]% of BT Sport's overall revenue. Accordingly, even if BT had to rely on alternative means to discourage commercial premises paying for the cheaper residential feeds of its channels, this is highly unlikely to be capable of having a significant detrimental impact on BT's competitiveness in relation to its premium sports channels.

Subscriber management services

- 7.91 The same arguments apply to BT's submissions that it would like to use an interactive application on Sky's DTH satellite platform to enable households to subscribe to its pay TV service, or to upgrade their subscription: (i) this is plainly not an enhanced television service as defined by Ofcom; (ii) as explained at Annex 1, it is not a service that is capable of being regulated under sections 73(2) and 74(2) of the Act, and (iii) regulation of Sky is not necessary, because BT has many viable alternatives to use of a red button service to enable new subscribers to subscribe to its service, or existing subscribers to upgrade their service.

⁶⁷ Paragraph 7.36

⁶⁸ Paragraph 7.37.

- 7.92 In relation to the last of these matters, the fact that BT has been able to establish a substantial base of subscribers to BT Sport on Sky's DTH satellite platform without the use of an interactive application provides strong evidence that such an application is not necessary to ensure BT's competitiveness as a broadcaster and/or retailer of premium pay TV services.

The credibility of BT's assertions more generally

- 7.93 As discussed below, BT has been found in the past to seek to game Ofcom by making regulatory submissions that are at odds with commercial reality.
- 7.94 In addition, there is a remarkable similarity between BT's assertions about the critical importance of access to Sky's AC services to its future success as a pay TV broadcaster and the assertions it made to Ofcom in 2013 when Sky declined to carry advertisements for BT Sport on Sky's sports channels. For example, BT's complaint to Ofcom on this matter stated:

*"Sky's refusal to carry BT Sports advertising is therefore likely to reduce the number of subscribers to the BT Sports channel and is likely to have a detrimental impact on BT's ability to monetise its existing sports rights. This, in turn, will reduce BT's ability to compete effectively in the long term for sports rights. The refusal to allow BT Sports advertising on the Sky Sports channels threatens to weaken competition between branded sports channels, ultimately reducing choice, value and innovation for consumers."*⁶⁹

- 7.95 Having investigated BT's exaggerated assertions, however, Ofcom stated:

*"We are not able to reach a definitive conclusion on the likely additional cost but we consider on the basis of the information provided by BT that any additional cost to BT from purchasing ABC1 Men impacts as a result of the inability to advertise on Sky Sports channels is likely to be limited."*⁷⁰

- 7.96 Following Ofcom's decision there was, as anticipated, no discernable impact on the number of subscribers to BT's sports channels, or its ability to monetise its existing sports rights. And, far from "reducing BT's ability to compete effectively in the long term for sports rights", despite Ofcom's rejection of its complaint later in 2013 BT successfully outbid Sky and ITV for Champions League and UEFA league rights.
- 7.97 In these circumstances, Sky considers that BT's assertions in relation to the significance of access to AC services on Sky's DTH satellite platform should be treated more sceptically by Ofcom than they have been to date.

Summary and conclusion: Ofcom's analysis of Sky's incentives in relation to the provision of AC services to third parties: provision of enhanced services by broadcasters of pay TV channels on Sky's DTH satellite platform

- 7.98 In summary, contrary to Ofcom's view set out in the Consultation, Sky does not have an overall incentive to prevent third party broadcasters of premium sports channels developing enhancements to those channels on its DTH satellite platform. On the contrary, because such services enhance Sky's platform and cause Sky little or no

⁶⁹ Paragraph 38 of BT's Complaint, 26 February 2013.

⁷⁰ Page 65, Ofcom Broadcast Bulletin, Issue number 233, 1 July 2013. BT's public response to Ofcom's conclusion was to state: "With regulation, you win some and you lose some." See, for example, 'Ofcom backs Sky Sports ad ban', Broadcast, 20 June 2013. (Available at: <http://www.broadcastnow.co.uk/news/broadcasters/ofcom-backs-sky-sports-bt-ads-ban/5057585.article>.)

detriment, Sky has an overall incentive to support those services. Ofcom cites no evidence in support of its conclusions, which are implausible.

- 7.99 Competition for sports rights among broadcasters is driven by a range of other factors, notably, in BT's case, the desire to drive take-up of its broadband and line rental services, which is worth hundreds of millions of pounds a year to BT. Such a strategy is not dependent in any way on the ability to offer interactive services on Sky's DTH satellite platform. A proposition that, if BT were not able to provide coverage of a small range of sports events (in addition to those carried on its three linear television channels) via an interactive application on Sky's platform in future, it would abandon its investment in BT Sport, or significantly reduce its commitment to BT sport, is not credible.
- 7.100 In practice, the ability to enhance television channels on Sky's DTH satellite platform via the use of Sky's AC services plays no meaningful role in competition for sports rights. That is certainly the case in relation to the most important sports rights available to broadcasters of premium sports channels in the UK, live rights to broadcast English Premier League matches.
- 7.101 Accordingly, the propositions set out by Ofcom in relation to Sky's incentives to withhold AC services from third party broadcasters of FTA television channels are ill-founded and cannot be relied upon. In particular, they offer no support for a view that it is necessary to impose formal regulation on Sky in relation to its provision of AC services.

8. Allegations that Sky has not engaged constructively in past negotiations for AC services

- 8.1 Ofcom notes in several places in the Consultation that third parties have made allegations that negotiations in relation to AC services from Sky have been "*protracted*". Whilst Sky notes that Ofcom has not explicitly accepted these allegations, the Consultation also does nothing to dispel the impression created by their repetition that Sky does not engage constructively in negotiations for AC services. Further, Ofcom cites as a reason for its draft condition requiring Sky to provide AC services to third parties "*as soon as reasonably practicable*" "*a potential concern related to the timeliness of negotiations*"⁷¹. These concerns are without foundation.
- 8.2 Sky considers that allegations by Sky's rivals should be treated with a significant degree of caution, particularly in the case of BT in view of the fact that it has been found previously to have "gamed" Ofcom via allegations of this type that were proven to be unfounded.⁷²
- 8.3 Above all, Ofcom cannot place any weight at all on these allegations without properly investigating them. Sky staff responsible for dealing with third parties in relation to AC services operate at all times professionally, constructively and in a timely manner. Sky is confident that proper investigation would show this to be the case.
- 8.4 Ofcom reports allegations made by BT and the BBC under the heading of "*Protracted negotiations*" at paragraphs 4.17 – 4.21.⁷³ These allegations are discussed in greater detail at Annex X. The key points are as follows.

⁷¹ Paragraph 7.96.

⁷² See, for example, paragraph 323 of the judgment of the Competition Appeal Tribunal in the pay TV case, and the heading "*Further evidence of regulatory gaming by BT*" on page 164 of the judgment, *op. cit.*

⁷³ Ofcom refers again to the fact that these allegations have been made at paragraphs 7.45, 7.50, 7.64 and footnote 223. The contents of paragraph 4.21 have not been disclosed to Sky. Sky considers that, if this paragraph contains allegations about Sky's behaviour, Ofcom cannot place any weight on those allegations until Sky has had a reasonable opportunity to respond to them.

8.5 Somewhat ironically, the first of the paragraphs setting out these allegations (paragraph 4.18) begins by stating “it took less than three months for BT to conclude terms with Sky for the provision of AC services”. (In fact, the majority of that period was spent waiting for responses from BT.) The paragraph goes on to make it clear that in fact it has nothing at all to do with “protracted negotiations”; instead, it is a complaint by BT that Sky takes an intransigent stance in such negotiations. Although a different allegation, this is equally unfounded.⁷⁴

8.6 Paragraph 4.19 contains two allegations:

8.6.1 [REDACTED]; and

8.6.2 [REDACTED].

8.7 These examples do not support a view that negotiations with Sky in relation to the provision of AC services can be protracted. In relation to the first of them, the fact is that [REDACTED]. This has nothing at all to do with negotiations.

8.8 [REDACTED].

8.9 [REDACTED].

8.10 [REDACTED].⁷⁵

8.11 [REDACTED].

8.12 [REDACTED].

8.13 [REDACTED].

8.14 [REDACTED].

8.15 Accordingly, there is no reasonable basis for a view that Sky’s past behaviour in negotiations with third parties in relation to AC services provides grounds for believing that, absent formal regulation, Sky would not engage constructively in commercial negotiations for such services. It is telling that there is no merit at all in the small number of examples raised by BT and the BBC to attempt to justify their allegations. On the contrary, proper examination of Sky’s conduct in dealing with such third parties (for example based on analysis of correspondence with third parties over a reasonable period of time) would provide grounds for believing that Sky deals with those third parties in a professional and efficient manner, and would be likely to continue to do so without formal regulation.

9. Application of regulation to new generation set-top boxes

9.1 [REDACTED].

9.2 [REDACTED].

9.3 [REDACTED].

9.4 [REDACTED].

10. Sky’s proposed Commitments

⁷⁴ The reasons that it is unfounded are discussed at **Annex 2**.

⁷⁵ [REDACTED].

- 10.1 As Ofcom is aware, in January 2013 Sky originally offered to commit to continue to provide those AC services currently used via Sky's current generations of set-top boxes to broadcasters until the end of 2016.⁷⁶ Sky offered such a commitment in line with a number of previous cases in which Ofcom was prepared to discontinue continuation notices on receipt of commitments.⁷⁷ Sky has since developed this original undertaking into a detailed and comprehensive set of Commitments. The Commitments have been discussed at length with Ofcom⁷⁸ and incorporate numerous changes to address (i) points raised by Ofcom in the course of these discussions, and (ii) concerns expressed by respondents to Ofcom's July 2013 consultation.
- 10.2 In this **Section 10** we propose a number of additional amendments to the Commitments in order to address further potential issues highlighted by Ofcom in the Consultation (which Ofcom had not previously raised with Sky). We now consider the proposed Commitments (as set out at **Annex 3**) to be fully sufficient to address the reasonable concerns of third parties, particularly in view of the fact that there is no sound basis for continued regulation in this area.
- 10.3 Ofcom states that "*the proposed Commitments, if effective, offer largely the same outcome as the conditions we have proposed*"⁷⁹. However, Ofcom's Consultation goes on to raise a number of outstanding concerns regarding Sky's proposed Commitments.
- 10.4 Ofcom's key concern in relation to the Commitments appears to be that they are not legally binding or enforceable and third parties have no recourse in the event of non-compliance by Sky, other than under private contract law.⁸⁰ As we have previously made clear to Ofcom, this concern is misplaced for the following reasons:
- Sky would suffer reputational damage if it were to renege on its Commitments. There is no question of Sky departing from them;
 - the lack of enforceability or recourse to Ofcom would have little practical impact on existing or prospective customers of Sky's AC services, as, in Ofcom's view, it would always be able to consider imposing conditions in the event that Sky was not complying with the Commitments. As Ofcom states:

*"although the proposed Commitments lack enforceability and there may be concerns related to discrimination, a third party could still raise their concerns with Ofcom and we would be able to consider the case for imposing access-related conditions under sections 45 and 73 of the Act based on an updated assessment of the effectiveness of the Commitments and examination of existing market conditions. The time it would take to complete the analysis required and to impose conditions under the Act would be somewhat dependent on the issue in question, but there may be cases where it would not take substantially longer than the enforcement process."*⁸¹
 - there are several previous instances of Ofcom accepting informal commitments – as outlined in Sky's response to Ofcom's 2013 consultation. Ofcom has not provided any justification for now departing from this past approach in this case; and

⁷⁶ Paragraph 43 of Sky's submission to Ofcom in January 2013.

⁷⁷ See further Paragraphs 4.9 to 4.17 of Sky's response to Ofcom's July 2013 consultation.

⁷⁸ [3<]

⁷⁹ Paragraph 7.135.

⁸⁰ Paragraph 7.139.

⁸¹ Paragraph 7.143.

- Sky has an unblemished compliance record in relation to the provision of AC services. Not a single complaint or dispute in relation to the provision of such services has been presented to Oftel or Ofcom for resolution. And Sky has never been found by Ofcom or Oftel to have been in breach of any other regulation applicable to Sky's platform services.

10.5 Ofcom also indicates a number of further potential concerns with Sky's Commitments, though it is not clear that Ofcom considers these concerns to be of such importance as to render regulation preferable to the Commitments. Further, the majority of these concerns appear to relate to the fact that third parties would not have recourse to a regulatory process to resolve any issues, rather than a concern with the specific content of the Commitments. We deal with each of these concerns in turn below.

(i) Expiry of existing agreements

10.5.2 Although it is not explicitly raised in the Consultation, implicit in Ofcom's discussion of BT's ability to bid for sports rights is a concern that its ASA with Sky may expire part-way through a rights agreement, potentially leaving it vulnerable to Sky refusing to renew that agreement. To address this concern, we propose to offer all existing AC agreement holders the option to include in their contracts a right to extend their agreement on expiry for a further three years on either (i) Sky's then-current standard terms or (ii) the same terms as their existing agreement except that Sky would reserve the right to vary the agreement's terms where it had reasonable justification for doing so (for example in order to reflect any changes to the functionality, underlying technology, or any necessary operational changes to the AC services). The same provision would be included in Sky's standard terms of supply for AC services, and therefore would also be available to prospective users of Sky's AC services.

10.5.3 Sky considers that this is a highly significant further elaboration of its Commitments.

(ii) Potential unduly to favour Sky

10.5.4 Ofcom states:

"there is no explicit commitment in relation to discrimination between internal supply by Sky and supply to external third parties within the proposed Commitments [...] to the extent that Sky could seek to set terms, conditions, charges or technical requirements that unduly favour its own retail operations, the proposed Commitments would not provide a safeguard".⁸²

10.5.5 To address this concern Sky proposes to amend the Commitments to include a requirement for Sky to provide services on terms that are not unduly discriminatory.⁸³ Sky considers that this is a highly significant further elaboration of its Commitments.

(iii) The date of determination of Sky's standard terms and conditions

10.5.6 Ofcom states:

"the fact that Sky's standard terms and conditions would only be determined on the date of the proposed Commitments, and that there is scope for

⁸² Paragraph 7.142.

⁸³ Sky would interpret this obligation consistent with the AC Continuation Notice.

*change, could give rise to uncertainty for third parties seeking to enter into new or renewed contracts with Sky*⁸⁴; and

*“[u]nder both the Commitments and the conditions, Sky would be able to update its standard terms and conditions, impacting the access available to third parties when they renew contracts and to new access seekers. Where regulation is in place, third parties would be able to raise concerns about updated terms and conditions with Ofcom.”*⁸⁵

10.5.7 Sky proposes to address these concerns as follows:

- to amend the Commitments so that it is clear that the standard terms and conditions that will apply in respect of current generations of Sky set-top box are the standard terms and conditions as at a specific date to be agreed with Ofcom prior to entering into the Commitments. For Ofcom’s information, Sky’s current standard terms for the provision of AC services are attached at **Appendices 9 and 10**.⁸⁶ This would eliminate the somewhat fanciful concern that Sky could seek to game the current process by making substantial changes to its terms and conditions between now and the date at which the Commitments come into force, which Sky has no intention of doing;
- to amend the Commitments to state that, in respect of both current and future generations of Sky set-top box, Sky will only change its standard terms if it has “*reasonable justification*” (as opposed to “*good reason*”, as currently proposed in respect of current generations of set-top box).

10.5.8 Sky considers that these changes fully address the concerns expressed by Ofcom in the Consultation in relation to potential changes to Sky’s standard terms and conditions for the supply of AC services.

(iv) Potential uncertainty for new entrants

10.5.9 Ofcom states:

*“in the absence of regulation, new entrants may not be able to secure contractual terms and would not have certainty about their ability to secure access prior to discussion with Sky... We anticipate that providers that seek to bid for sports rights will be particularly concerned with gaining speedy resolution of issues relating to gaining access to Sky’s platform.”*⁸⁷

10.5.10 In order to address this concern we propose to amend the Commitments as follows:

- to include a requirement for Sky to provide AC services to third parties as soon “*as reasonably practicable*” after receiving a request. This mirrors condition 1.3 of Ofcom’s proposed conditions; and

⁸⁴ Paragraph 7.121.

⁸⁵ Paragraph 7.140(ii).

⁸⁶ We note that Sky has not supplied authentication services to a third party for a number of years and that the draft Authentication Services Agreement appended to this submission is dated February 2011. The agreement will therefore need to be updated before being appended to any final commitments.

⁸⁷ Paragraphs 7.65 – 7.66. In relation to new entrants’ access to AC services, see also Sky’s comments at **Section 7** above.

- to include an obligation for Sky to inform Ofcom on receipt of any request for AC services from a potential new customer. This would alert Ofcom to the fact that Sky had been approached and would enable Ofcom to request information from Sky on the progress of negotiations.

10.5.11 Again, we consider that these are significant extensions of the existing proposed Commitments, which fully address Ofcom’s stated concern in relation to new entrants.

(v) Confidentiality of Sky’s technical requirements

10.5.12 Ofcom states:

“under the proposed Commitments, third parties would have to meet Sky’s technical requirements in order to secure access on Sky’s standard terms. The nature of these technical requirements would not be publicised for reasons of commercial confidentiality. Whilst Sky would be able to take a similar approach under the conditions ...the lack of transparency about the technical standards that must be met gives rise to a degree of uncertainty and does potentially allow scope for Sky to delay or restrict third party access.”⁸⁸

10.5.13 Sky does not consider this to be a valid reason for preferring formal access-regulation to the Commitments proposed by Sky. As Ofcom notes, the technical standards will not be publicly available for reasons of commercial confidentiality under both the conditions and the Commitments. Again, ultimately this concern appears to relate to an issue of an ability of third parties to raise concerns with Ofcom.

10.5.14 Sky notes further that this issue is of relevance only to new users of Sky’s AC services; existing users already have access to the technical requirements. Sky considers that the new proposal to commit to provide AC services to new users “as soon as reasonably practicable”, as discussed above, eliminates any concern in relation to potential delays to provision of such services associated with access to Sky’s technical requirements.

(vi) Interpretation of “reasonable” terms

10.5.15 Ofcom states:

“The commitment to provide access on “reasonable” terms would give Sky some flexibility to interpret what it considered was “reasonable” particularly in the absence of any published guidance. This flexibility could also give rise to uncertainty for stakeholders, particularly given that these terms have not yet been determined”.⁸⁹

10.5.16 Sky does not consider this to be a valid concern. The current regime, and any “FRND” regulatory regime, already provides Sky with “some flexibility” to interpret what it considers to be “reasonable terms”. Moreover, Sky considers that this statement ignores the significant certainty that Sky has provided to users of its AC services by committing to caps on charges for the types of services covered by the Commitments. In practice, we consider that the level of uncertainty facing broadcasters associated with seeking to provide interactive services on Sky’s platform, derived from Sky’s interpretation of what are reasonable terms, would be no greater than that associated with seeking to provide interactive services on a

⁸⁸ Paragraph 7.140(ii).

⁸⁹ Paragraph 5.115.

myriad of other platforms – for example, Apple’s iOS platform, or the BT YouView platform.⁹⁰

(vii) Sharing of costs for authentication services

10.5.17 Ofcom states:

*“Whilst Sky has committed to a maximum charge reflecting shared costs for authentication services, how this share is calculated would be at Sky’s discretion to determine (particularly without a reference to charges being FRND in the proposed Commitments). Further, not all aspects of these charges can be determined without further knowledge of the specific service in question and therefore there is some scope for uncertainty”.*⁹¹

10.5.18 Sky considers this to be an extremely minor concern. Currently there are no third party users of authentication services, and the likelihood of new users emerging in the future is remote.

10.5.19 Nevertheless, Sky considers that the proposal to amend the Commitments to include a requirement for Sky to provide services on terms (including charges) that are fair, reasonable and not unduly discriminatory addresses Ofcom’s concern.

(viii) Interpreting the scope of the Commitments

10.5.20 Ofcom states:

*“Where new functionality is made available on Sky’s platform (for example, via a new STB), it may be possible to provide enhanced TV services in new and better ways. Under both Commitments and conditions there may be a difference of opinion on whether these constitute new services (that are excluded from the scope of the Commitments and/or conditions). Under the draft conditions, third parties could seek review by Ofcom in the case of disagreement”.*⁹²

10.5.21 Again, this concern is essentially around lack of recourse as the same concern arises under both the proposed conditions and the proposed Commitments. Therefore Sky does not consider this to be a valid reason for preferring formal access-regulation to the Commitments proposed by Sky.

10.6 **Annex 3** contains a revised set of Commitments proposed by Sky incorporating the changes set out in this **Section 10**.

10.7 Sky notes that in their responses to Ofcom’s 2013 consultation, both BT and BBC alleged that, because Sky’s proposed Commitments originally had an end-date of 2016, it was Sky’s intention to withdraw from the provision of AC services after this date. As Sky explained to Ofcom⁹³, such allegations were misconceived, and it is therefore surprising to see Ofcom repeat this misconception in the Consultation⁹⁴. Under Sky’s original proposal, whilst the Commitments would have expired at the end of 2016 (originally intended by Sky to be a reasonable, three year period for the Commitments to apply), it does not follow that this means that Sky intended to withdraw supply of AC services from third parties after that

⁹⁰ By way of example, in seeking to deliver its services via the YouView platform, [3&].

⁹¹ Paragraph 5.10.4 and 7.140(iv).

⁹² Paragraph 7.140(iii).

⁹³ Sky’s letter to Ofcom of 31 October 2013.

⁹⁴ Paragraph 7.116, where Ofcom states: “[Sky’s initial offer of commitments] said it would offer third parties access to its platform for interactive services only until 2016.”

date. Sky had no such intention. Accordingly, Sky was perfectly willing to extend the duration of the proposed Commitments when it became clear that such erroneous inferences were being drawn from Sky's proposal to attach an expiry date to those Commitments.

11. Ofcom's proposed conditions

11.1 As set out above, and in **Annex 1** to this response, Sky's principled position is that regulation of Sky's AC services is unnecessary, and that Ofcom lacks the necessary legal powers under sections 73(2) and 74 of the Act to impose the proposed *ex ante* access-related conditions on Sky. In any case, the Commitments would fully protect the legitimate interests of third party users of Sky's AC services.

11.2 Without prejudice to this position, this Section 11 sets out Sky's comments on the new regulation proposed by Ofcom. Sky has a number of significant concerns with the proposed conditions. In summary, Sky's key concerns with the draft conditions are as follows:

- the scope of the draft conditions is too wide and would require Sky to support third party interactive services which either (i) Ofcom has specifically stated in the Consultation are not intended to be caught because there is no demand for those services or alternatives exist or (ii) which Ofcom has not considered at all as part of the Consultation. This results in ambiguity and continued legal uncertainty as to the interpretation of the conditions;
- the draft conditions would require Sky to provide access to third party interactive services via an interactive menu, where no such obligation exists today; and
- certain other obligations under the draft conditions are more onerous than under the current AC Continuation Notice, contrary to Ofcom's statement that the proposed conditions "*do not seek to place a burden on Sky that is greater than that imposed by the obligations under the Continuation Notice*"⁹⁵.

11.3 These are discussed in more detail below.

11.4 **Annex 4** sets out Sky's proposed amendments to the draft conditions, which are intended to address these concerns, and Sky's commentary on these proposed amendments. Sky has also suggested some amendments to address a small number of inaccuracies and ambiguities in the drafting.

The scope of the draft conditions is too wide

11.5 Ofcom states that "[o]ur view is that these obligations [*i.e.*, the draft conditions] are targeted only at those areas we have identified above [*i.e.*, in the Consultation]"⁹⁶. However, as currently drafted, the definition of "AC services" is very wide. The definition covers "Application Signing Services", "Authentication Services" and "any other service which SSSL may provide for equivalent purposes".

11.6 In summary, the draft definition of "Application Signing Services" captures the following services:

- services that enable third parties to provide "Commercial Watermarking"; and

⁹⁵ Paragraph 7.85.

⁹⁶ Paragraph 7.85.

- services that enable third parties to provide “Specified Programme Services” selected by means of an interactive application available via an on screen symbol or listing in an interactive menu.

11.7 “Specified Programme Services” are widely defined and include:

- satellite-delivered linear services;
- subtitling/assistance for disabled people in relation to some or all of the programmes included in the linear service;
- a service (apart from advertising) which is not an electronic programme guide but relates to the promotion or listing of programmes included in a linear channel; and
- any other service which is ancillary to a programme included within a linear channel and directly related to its contents.

11.8 “Authentication Services” are defined as services which enable the operation by a third party of a return path for the transmission of communications between that third party and end-users in connection with:

- the provision of Specified Programme Services to end-users; or
- the provision of Pay TV Subscriber Services to end-users.

11.9 The very broad definition of “Specified Programme Services” would require Sky to support third party interactive services which either (i) Ofcom has specifically stated in the Consultation are not intended to be caught or (ii) which Ofcom has not considered at all as part of its Consultation. As a consequence, such definition results in uncertainty for Sky (and third parties) as to which third party services Sky would be required to support under the draft conditions. It is precisely this type of uncertainty that Sky was seeking to avoid when it requested that Ofcom remove the AC Continuation Notice. For example:

- Ofcom states that “commercial contextual services, [and] navigation and discovery services ...are not within the scope of the draft condition”⁹⁷ and that there is currently no demand for these services. Ofcom describes “contextual commercial services” as “services developed to exploit the TV channel or programme”⁹⁸ and cites interactive advertisements and purchasing functionality on home shopping channels as examples. However, under the proposed definition of “Specified Programme Service”, any type of contextual commercial services would be caught, where such services are ancillary to a linear programme and directly related to its contents. This could include interactive advertisements and purchasing functionality on a home shopping channel, contrary to Ofcom’s stated intention.
- In Ofcom’s July 2013 consultation Ofcom considered betting services under the heading of contextual commercial services, but now goes on to say that:

*“we think this is an example of a service where there could be an overlap between enhanced TV and contextual commercial services. We discuss betting here on the basis that it is offered as an enhancement to the linear programme”.*⁹⁹

⁹⁷ Paragraph 7.95.

⁹⁸ Paragraph 3.3.

⁹⁹ Paragraph 3.35.

Ofcom has provided no guidance or explanation of the circumstances in which betting is offered as an enhancement to the linear programme and therefore its approach will result in uncertainty for Sky as to whether the conditions apply to a particular interactive betting and gaming service. In fact, Ofcom's approach appears to be that all betting and gaming "*enhances*" the linear programme, irrespective of whether it is also a contextual commercial service, thus meaning that the intention to exclude contextual commercial services is meaningless in the context of betting and gaming. Where the interactive service is offered with the primary aim of encouraging viewers of the programme to enter into a commercial transaction from which the provider derives revenue, such as a bet or a premium rate phone call, that should be outside the scope of the conditions. There is currently very little demand for these services and Ofcom has not demonstrated that it is necessary for third parties to have access to these services on regulated terms.¹⁰⁰

- Ofcom describes "*Navigation and Discovery*" services as:

*"services that provide alternative ways to discover and navigate to TV content, other than navigation via the standard EPG or links accessible via the red button (such as those described above as enhanced TV services)."*¹⁰¹

The red button links Ofcom is referring to here is the ability to access alternative videostreams. Ofcom cites search of programme metadata and recommendations from social networks as examples. Sky understands that Ofcom does not intend to impose conditions in respect of those services on the basis that Ofcom has not identified any demand for those services. However, the draft definition of "*Specified Programme Services*" would capture these types of services where such services could be described as ancillary to a linear programme and directly related to its content. For example, a recommendation from a social network recommending a programme on the broadcaster's linear channel would fall within the definition. This appears to be contrary to Ofcom's stated intention.

- Ofcom states:

*"It is our view that where catch-up content is already available via the STB, red button access to this content appears to be a valuable navigation tool for viewers and there is likely to be demand for the service (that is, in this case, we consider **the navigation via the red button to be the relevant AC service rather than the provision of the content itself**, which we discuss under standalone services)"*¹⁰² (emphasis added).

We understand from this statement that the conditions are not intended to require Sky to provide AC services which would enable third parties to provide catch-up or other on-demand content to end-users via an interactive application. However, as currently drafted, the definition of "*Specified Programme Services*" would capture a catch-up/on-demand service (or indeed an IP-delivered linear service) if such a service could be described as being ancillary to a linear programme and directly related to its content. We understand this to be contrary to Ofcom's intentions.

¹⁰⁰ At The Races ("ATR") is the only third party on the Sky digital satellite platform which offers an interactive betting service. It does so through an interactive application which is part of the Sky Bet interactive service. [3<].

¹⁰¹ Paragraph 3.54.

¹⁰² Paragraph 3.25.

- The definition of a “*Specified Programme Service*” extends to any service which is ancillary to a programme included within a linear channel and directly related to its content. This definition is so wide as to potentially include services which Ofcom has not considered as part of its AC review (and which may not even exist yet), and, accordingly, in relation to which Ofcom has not established whether it is necessary to impose conditions (or even that there is any third party demand for AC services in respect of such services). It is disproportionate for Ofcom to impose access-related conditions in relation to such services in the absence of any justification or analysis, particularly in a situation where the case for imposing new conditions is, as Ofcom believes, “*finely balanced*”.
- 11.10 Nevertheless, without prejudice to Sky’s position that Ofcom does not have the power to impose access-related conditions at all, in order to avoid the ambiguity and regulatory uncertainty highlighted above, and to reflect Ofcom’s stated intentions in the Consultation, Sky has proposed amendments to the draft conditions such that the conditions set out a specific list of third party services. This mirrors Sky’s approach under its proposed Commitments, as well as Ofcom’s approach in its Consultation, which considers specific demand for particular services.
- 11.11 The services which Ofcom concludes in the Consultation should be caught by the draft conditions are “*enhanced TV services*”, which Ofcom describes as services that “*provide access to additional information and/or videostreams that complement the broadcast linear TV programme*”¹⁰³. The specific types of “*enhanced TV service*” that Ofcom considers in the Consultation and concludes should be caught by the draft conditions are as follows:
- alternative videostreams;
 - information services;
 - betting and gaming services;
 - sub-titling and audio-description services;
 - commercial watermarking; and
 - pay TV subscriber services.
- 11.12 Sky notes that under its proposed Commitments, Sky has offered to support all of the services in the above list. In addition, under the Commitments Sky would also support the following services where they are directly related to the content of a programme:
- alternative audio soundtracks;
 - gaming services; and
 - voting services.
- 11.13 Accordingly, and without prejudice to Sky’s position outlined above, we have suggested amendments to the proposed conditions at **Annex 4** to create a positive obligation on Sky to provide AC services in order to enable third parties to provide all of the interactive services listed at paragraphs 11.11 and 11.12 above.
- 11.14 Finally, as noted above, under the heading of “*alternate videostreams*” Ofcom states:
- “It is our view that where catch-up content is already available via the STB, red button access to this content appears to be a valuable navigation tool for viewers and there*

¹⁰³ Paragraph 3.6.

is likely to be demand for the service (that is, in this case, we consider the navigation via the red button to be the relevant AC service rather than the provision of the content itself, which we discuss under standalone services).¹⁰⁴

- 11.15 Sky considers that such navigation services should not be included in the proposed list of services to be covered by the conditions, as this service relates to navigation to content within Sky's On Demand service, which is not subject to *ex ante* regulation. Sky currently provides services to the BBC enabling red button access to the BBC's catch-up content within Sky's On Demand service pursuant to a commercial arrangement. There is no justification (and Ofcom has not put forward any justification) for imposing new access regulation in respect of such a navigation service. Where Sky has willingly entered into a commercial deal to include third party catch-up content within Sky's On Demand service, Sky clearly does not have any incentive to withhold a service which would provide end-users with a means of navigating to that content via an interactive application.

The draft conditions would require Sky to provide access to third party interactive services via an interactive menu

- 11.16 The definition of "Application Signing Services" specifically refers to the listing of a third party interactive application via an interactive menu. However, Ofcom has not put forward any evidence to suggest that it is necessary or proportionate to require Sky to provide access to third party interactive applications via an interactive menu, or even that there is any third party demand for such access. Indeed, there is no consideration whatsoever of this requirement within Ofcom's Consultation. The Interactive Main Menu available via Sky set-top boxes does not currently include any third party interactive services, and we are not aware of any third party plans to launch such a service. Further, the current AC Continuation Notice, does not require Sky to provide access to third party interactive services via an interactive menu. Accordingly, we propose that the words "*or listing in an interactive menu*" are deleted from the definition of "Application Signing Services".

Certain obligations under the draft conditions are more onerous than under the current AC Continuation Notice

- 11.17 At paragraph 7.85 of the Consultation Ofcom states that the draft conditions "*do not seek to place a burden on Sky that is greater than that imposed by the obligations under the Continuation Notice*". However, a number of draft conditions place a greater burden on Sky than the current regime. Accordingly, we have proposed amendments to these conditions at **Annex 4**.

12. The way forward

- 12.1 Sky considers that the process in relation to consideration of its application to Ofcom to remove the AC Continuation Notice has been unduly protracted. We consider that in the interests of regulatory certainty for Sky, it is important that the process is now brought to a close.
- 12.2 Sky considers that the appropriate way forward is clear. In a world of significant and increasing platform competition, it is unnecessary to compel Sky to provide third parties with AC services, on terms regulated by Ofcom. Accepting the Commitments that Sky has offered, with the amendments and the contractual changes set out above, would meet fully the concerns expressed by Ofcom and third parties. It would be a pragmatic and proportionate response to an issue that does not in reality raise significant competition,

¹⁰⁴ Paragraph 3.25.

consumer, or public interest concerns. It is also consistent with Ofcom's practice in relation to the removal of continuation notices in the past.

- 12.3 Sky recognises that accepting Commitments requires a degree of trust on Ofcom's part. In this regard, Sky notes that Ofcom has no justifiable reason to believe that Sky would behave in an unprincipled manner in relation to the Commitments. Sky treats its regulatory obligations – whether formal or informal – with the utmost seriousness. Above all, however, Sky has a culture of dealing with both competitors and partners professionally, fairly and reasonably. Sky considers that all these considerations provide Ofcom with significant assurance that it would not act in breach of the Commitments, either in practice or in spirit.
- 12.4 Notwithstanding this, Ofcom states that it has the ability to return to proposals to regulate Sky's provision of AC services to third parties at any time in the future. Accepting the Commitments would give Ofcom an opportunity to monitor Sky's compliance with them, as well as broader market developments, over the next 2-3 years. In the unlikely event that it was found to be the case that Sky was acting contrary to the Commitments, either directly or against their spirit, it would be open to Ofcom at any point to seek to resurrect proposals to impose access-related conditions on Sky.

Sky

September 2014

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Annex 1

Limitations in Ofcom's powers to impose access-related conditions on Sky's access control services

1. Introduction

- 1.1 For the reasons outlined in this Annex, Sky maintains that sections 73(2) and 74 of the Communications Act 2003 ("**the Act**"), interpreted consistently with the relevant provisions of the Common Regulatory Framework ("**CRF**"), in particular those of Directive 2002/19/EC ("**the Access Directive**"), do not give Ofcom a general power to impose ex ante access-related conditions on Sky's provision of access control services ("**AC services**") absent a finding that Sky has significant market power ("**SMP**") in the provision of those services. At most, Ofcom might potentially be able to impose ex-ante access conditions only in limited circumstances; but it has not explained in the Consultation a proper legal basis supporting the imposition of access-related conditions in respect of each of the AC services discussed in the Consultation.

2. Domestic law

- 2.1 Sections 73 and 74 of the Act set out Ofcom's powers to impose access-related conditions on communications providers absent a declaration of SMP. These provisions are intended to implement, and must be interpreted consistently with, the obligations on Member States and national regulatory authorities ("**NRAs**") imposed under Article 5(1) and Part II of Annex I to the Access Directive: see Explanatory Notes to the Communications Act 2003, Note 190 and C-106/89 *Marleasing* ECLI:EU:C:1990:395.
- 2.2 In light of the above, the remainder of this Annex examines the scope of the powers conferred by the CRF on NRAs, such as Ofcom, to impose access-related conditions on communications providers, focusing on Article 5(1) of the Access Directive – which, as explained in the Explanatory Notes, is implemented by sections 73(2) and 74 of the Act which are in turn the domestic powers on which Ofcom relies in section 3 of the Consultation.

3. Scheme of the CRF

- 3.1 Before undertaking a detailed analysis of the terms of Article 5(1) of the Access Directive it is important to appreciate the wider context of the Directive (and, indeed, the CRF) as a whole.
- 3.2 Recital (1) to the Framework Directive (Directive 2002/21/EC) recognises that the previous European regulatory framework for communications had "*been successful in creating the conditions for effective competition in the telecommunications sector during the transition from monopoly to full competition*". Against that background, recital (27) to the Framework Directive states that, going forward:

"It is essential that ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem."

- 3.3 Thus, as the Supreme Court recently acknowledged in *BT plc v Telefonica O2 UK Ltd (O8x numbers)* [2014] UKSC 42 at [5], "*subject to ex ante regulation in circumstances where there is not effective competition, the scheme of the Directives is permissive*" (that is, 'permissive' of operators' commercial freedom, and thus 'restrictive' of regulation of that freedom).
- 3.4 For example, recital (5) to the Access Directive emphasises the importance of freedom of negotiation in the development of the common market for telecommunications, stating:

“In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the Treaty. In the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith.”

3.5 Similarly, Article 3(1) of the Access Directive provides:

“Member States shall ensure that there are no restrictions which prevent undertakings in the same Member State or in different Member States from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection, in accordance with Community law...”

3.6 Thus, in the absence of SMP, the CRF envisages that unfettered commercial negotiation of access terms should be the norm. Any deviation from that norm must find its basis in an express derogation, as is recognised in Article 8(3) of the Access Directive, which provides as follows:

“Without prejudice to:

– the provisions of Articles 5(1) ...

– the provisions of Articles 12 and 13 of Directive 2002/21/EC (Framework Directive), Condition 7 in Part B of the Annex to Directive 2002/20/EC (Authorisation Directive) as applied by virtue of Article 6(1) of that Directive, Articles 27, 28 and 30 of Directive 2002/22/EC (Universal Service Directive) and the relevant provisions of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) containing obligations on undertakings other than those designated as having significant market power, or

– the need to comply with international commitments,

national regulatory authorities shall not impose the obligations set out in Articles 9 to 13 on operators that have not been designated [as having SMP on a relevant market].” (emphasis added)

3.7 Article 12, Access Directive deals with access-related obligations for providers that have been found to have SMP on a relevant market.

3.8 It follows from Articles 8(3) and 12 of the Access Directive that Ofcom may not impose access-related obligations on a communications provider that has not been declared to have SMP (e.g. Sky on the market for AC services) unless it can rely on one of the specific CRF provisions enumerated in Article 8(3). As noted above, the provision of potential relevance in this case is Article 5(1) of the Access Directive, which is considered below.

3.9 The Court of Justice of the European Union (“CJEU”) has acknowledged that the provisions of the CRF allowing NRAs to impose specific access-related obligations on communications providers amount to exceptions from the general freedom to negotiate access and interconnection terms provided for in the CRF and, therefore, fall to be “*interpreted strictly*”: see Cases C-192/08 *TeliaSonera* ECLI:EU:C:2009:696 at [39], concerning an obligation to negotiate in good faith in relation to interconnection under Article 4(1), Access Directive. to similar effect and C-16/10 *The Number* ECLI:EU:C:2011:92 at [31], concerning the imposition of obligations under the Universal Service Directive (Directive 2002/22/EC).

4. **Article 5(1), Access Directive does not permit Ofcom to impose ex ante access-related obligations on Sky's provision of AC services in the absence of SMP**

4.1 Article 5(1), Access Directive provides in relevant part:

"1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, efficient investment and innovation, and gives the maximum benefit to end-users.

In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose:

(a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;

(ab) in justified cases and to the extent that is necessary, obligations on undertakings that control access to end-users to make their services interoperable;

(b) to the extent that is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State, obligations on operators to provide access to [application program interfaces (APIs) and electronic programme guides (EPGs)] on fair, reasonable and non-discriminatory terms. (emphasis added)

Article 5(1), Access Directive is to be construed narrowly

4.2 The first indent of Article 5(1) is only a preamble to the conferral of specific powers in the second indent of the Article – i.e. the specific powers set out in Article 5(1)(a), (ab) and (b). It does not itself confer on NRAs any additional or broader powers to regulate beyond the specific ones set out in the second indent.

4.3 This construction of Article 5(1) is supported by the following considerations:

4.3.1 The CJEU case law calling for a strict interpretation of exceptions to the general freedom of communications providers to negotiate access and interconnection terms;

4.3.2 The generally permissive character of the CRF in the absence of SMP. Indeed, a broad construction of Article 5(1) – whereby the first indent is read to confer on NRAs free-standing regulatory powers to “ensure adequate access” – would effectively give Ofcom free reign to impose on any non-SMP provider more or less the same obligations that it is able to impose under Article 9-13, Access Directive, but without undertaking the careful and detailed market analysis required by Article 16, Framework Directive as a precursor to SMP regulation, and moreover without making a finding of SMP. This would seriously undermine the scheme of SMP regulation under the CRF; and

4.3.3 Its consistency with the language of Article 5(1), namely:

(a) The vague, aspirational language used in the first indent – that NRAs shall “encourage and where appropriate ensure...” is more consistent with a statement of regulatory objectives than with the conferral of a specific power; and

(b) The fact that the first indent of Article 5(1) specifies that NRAs shall take action “*in accordance with the provisions of this Directive*” is again consistent with a statement of broad regulatory objectives to be achieved using the powers conferred by the other “*provisions of [the Access] Directive*” to which cross-reference is made.

4.4 As Ofcom explains at §2.13 of the Consultation Document, Sky’s AC services are essentially a package of software and security services “*that enable [third party providers using the Sky platform] to access [APIs] in Sky’s STB*”.

4.5 On the narrow construction outlined above, Article 5(1), Access Directive permits Ofcom to impose an ex ante obligation on Sky to provide FRAND access to APIs only “*to the extent that is **necessary to ensure accessibility for end-users to digital radio and television broadcasting services** specified by the Member State*” (emphasis added): see Article 5(1)(b).

Sky’s AC services are not in general necessary to provide “television broadcasting services” to end users

4.6 “*Television broadcasting services*” as referred to in Article 5(1)(b) of the Access Directive are not defined anywhere in the CRF.

4.7 “*Television broadcasting*” is, however, defined in Directive 2010/13/EU (“**the Audiovisual Media Services Directive**” or “**AVMS Directive**”). Sky notes that recital (5) to the Framework Directive refers to the precursor to the AVMS Directive - Council Directive 89/552/EEC. In light of that reference and given the need to ensure a coherent interpretation of the EU acquis, Sky contends that the definition of “*television broadcasting*” contained in the AVMS Directive should be read across into the CRF.

4.8 Article 1(e) of the AVMS Directive defines “television broadcasting” as “*an audiovisual media service provided by a media service provider¹⁰⁵ **for simultaneous viewing of programmes on the basis of a programme schedule***” (emphasis added).

4.9 It defines “programme” in Article 1(b) as “*a set of moving images with or without sound constituting an individual item within a schedule... Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama*” (emphasis added).

4.10 Many of Sky’s AC services are plainly not necessary to enable end-users of Sky’s STB to access “television broadcasting services” as defined in the AVMS Directive. For example:

4.10.1 Sky’s authentication services essentially allow individual interaction between a Sky STB user and the online version of an interactive service provided by a third party (e.g. voting, betting, shopping, pay TV subscriber services). The interactive services provided using Sky’s authentication services do not consist in the “*simultaneous viewing of programmes on the basis of a programme schedule*” and, accordingly, do not constitute “television broadcasting” for the purposes of the AVMS Directive; and

4.10.2 Textual information services, pay TV subscriber services and commercial watermarking services, provided by third parties using Sky’s application signing services, do not involve the provision of “programmes” as defined in Article 1(b), AVMS

¹⁰⁵ “Media services provider” is defined at Article 1(d), AVMS Directive as “*the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organized*”. “Editorial responsibility” is defined in Article 1(c), AVMS Directive as “*the exercise of effective control both over the selection of the programmes and **over their organisation either in a chronological schedule, in the case of television broadcasts, ...***” (emphasis added)

Directive – being “a set of moving images with or without sound constituting an individual item within a schedule or a catalogue”. For example, it is plain that the ability to display a pint glass symbol overlaid on the video in the corner of a television screen cannot be considered to fall within this definition. These services, therefore, also fall outside the scope of “television broadcasting” as defined in the AVMS Directive.

- 4.11 Given that the AC services described above are not used – and are certainly not necessary – to provide end-users with access to television broadcasting services, Article 5(1), Access Directive does not permit Ofcom to impose ex ante access-related obligations on Sky in respect of them absent a finding of SMP.
- 4.12 Further, Ofcom would have no power to extend AC services in the context of Video on Demand (“**VoD**”). VoD services fall within the definition of “on-demand audiovisual media services” set out in Article 1(g) of the AVMS Directive; as such, they are distinct from the “television broadcasting” services described in Article 1(e) and, indeed, are regulated differently from television broadcasting services under the substantive provisions of that Directive. Consequently, AC services necessary to enable access to VoD services fall outside the scope Article 5(1)(b) of the Access Directive. This means, for example, that it would be unlawful to require Sky to provide ‘red button’ access to VoD from linear channels.
- 4.13 Given these conclusions in respect of the Access Directive and the points made at paragraphs 2.1 and 2.2 above in respect of the need to interpret domestic law consistently with European law, sections 73(2) and 74 of the Act similarly give no power to Ofcom to regulate any of the services described above as falling outside the scope of Article 5(1) of the Access Directive.
- 4.14 Sky reserves its position more generally in relation to any services that Ofcom might seek to argue *are* necessary to ensure accessibility for end-users to digital radio and television broadcasting services.

Annex 2
Allegations about “protracted negotiations”

1. This annex provides further details in relation to the allegations discussed in Section 8 of Sky's main response.



Annex 3

Sky's revised commitments

Annex 4

Ofcom's draft conditions