



Review of Sky's Access Control Services Regulation

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Statement

Publication date:

17 March 2015

About this document

This document is about regulation of access to Sky's satellite platform to enable third parties to provide interactive services to end-users, such as 'red button' services including alternative videostreams, voting and gaming. The current regulation is imposed by the Access Control Continuation Notice, which seeks to ensure that Sky offers access to its set-top boxes on fair, reasonable and non-discriminatory terms.

Following two consultations and revised commitments offered by Sky, in this statement we set out our final conclusions on whether or not we should impose new regulation when the Access Control Continuation Notice is removed. We also discuss our approach to on-demand services and new types of interactive services on TV platforms.

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Section 1

Executive Summary

Interactive services on Sky's satellite platform

- 1.1 Our duties require us to secure, among other things, the availability of a wide range of high quality TV services, in particular public service broadcasting (PSB). We therefore want to see an environment in which consumers are able to access the content they value on the TV platforms they choose.
- 1.2 Traditional broadcast TV is highly valued and continues to have enduring appeal, with UK consumers watching on average around three and a half hours per day. It also delivers important public policy objectives. The system of public service broadcasting is designed to secure economic, social, cultural and citizen benefits, for example the delivery of high quality, impartial news.
- 1.3 People watch these services via a range of TV platforms and Sky operates the largest pay TV platform in the UK, with around 10m subscribers. At present, Sky is subject to access regulation to ensure that other content providers can make their channels and related content directly available to viewers on its digital satellite platform, without being part of Sky's own pay TV retail packages.
- 1.4 In addition to traditional broadcast TV services, there are three further categories of services that may be provided on Sky's platform: (i) existing interactive services provided via satellite; (ii) existing on-demand services (such as the BBC iPlayer and other PSB Video On Demand (VOD) services); and (iii) future forms of interactive services, e.g. online or 'over the top' services that may be developed on new generations of Sky STBs.
- 1.5 The provision of existing services may require access to specific software services linked to Sky's STBs. This access is enabled by Access Control (AC) services. Provision of AC services is secured by a Continuation Notice ("the AC Continuation Notice"). The AC Continuation Notice carried over regulation made under transitional provisions of the Communications Act 2003 ("The Act").
- 1.6 This statement relates to the AC Continuation Notice. We are required to remove this existing regulation, but before doing so we are required to consider whether or not to set new replacement conditions under our Communications Act powers.
- 1.7 This statement discusses our approach relating to existing on-demand services and future services.
- 1.8 Existing interactive services broadcast by satellite include alternative videostreams, subtitling, and digital text services available via the 'red button'. These services remain very popular with consumers. The BBC's red button service for the London 2012 Olympics, for instance, offered access to up to 24 different simultaneous events and was used by 17.4m viewers on Sky's platform. The BBC also provides access to alternative videostreams for other sporting and non-sporting events (e.g. Wimbledon, Glastonbury), as does BT with its sports channels. Other types of interactive services available have traditionally included voting, gaming and betting services, as well as on-screen commercial watermarking (e.g. the pint glass symbol displayed in commercial premises).

- 1.9 Some traditional forms of interactive services broadcast by satellite, such as information services, gaming, and betting can now be made available using the internet through devices such as tablets and other mobile devices that do not rely on interaction with a set-top box (STB). But other interactive services, including some presented on the main TV screen, can still only be provided effectively by content providers if they have a direct relationship with the STB provider. We remain of the view that many of the existing interactive services for enhancing broadcasting content are valued by consumers and that there should be continued access for third parties in a way that secures benefits to these end-users.
- 1.10 In relation to on-demand services, Sky currently offers content delivered from Sky's servers via its Sky+HD STBs, including access to catch-up TV from the PSBs (e.g. the BBC iPlayer and ITV's on-demand service) as well as Sky Movies On Demand and Sky TV Box Sets. Access to certain of these on-demand services is available via a link accessed using the red button, e.g. the BBC iPlayer.
- 1.11 The scope and functionality of these on-demand services is defined by the technological capabilities of Sky's current STB. Looking forward, in future generations of Sky STB, such interactive services may be delivered using the internet. Respondents to our consultations indicated an interest in using new internet-enabled functionality that Sky may develop in future generations of STB to support new forms of interactive services and for the delivery of on-demand content.

Securing access for interactive services

- 1.12 Sky has requested that we remove the AC Continuation Notice. As a matter of our legal obligations relating to the transitional nature of the AC Continuation Notice, we are required to remove the existing regulation, but before doing so we are required to consider whether or not to set new replacement conditions under our Communications Act powers.
- 1.13 Sections 73 and 74 of the Act, which provide us with a power to impose access-related conditions (relating to the provision of network access and service interoperability), together with our general duties, provide the relevant legal framework for the assessment of whether new conditions are required. Any such conditions must be appropriate to secure the objectives specified in section 73(2) of the Act (including efficiency, sustainable competition, investment and innovation, and benefit to end-users).
- 1.14 We have therefore considered Sky's request to remove the AC Continuation Notice, the implications for each of these categories of important services, and whether new regulation is required.
- 1.15 Our first consultation sought to gain a better understanding of the use of AC services, both now and over the next few years, including in particular the importance of access for interactive services on Sky's platform. Having established that access remains important, particularly for interactive services which enhance linear TV, our second consultation sought views on how best to secure such access. In the course of this review, Sky proposed, and subsequently developed, a set of voluntary commitments under which it would continue to provide existing AC services (i.e. those AC services used to provide interactive services supporting linear channels delivered via satellite broadcast) following the removal of the AC Continuation Notice. In our second consultation we sought views on whether Sky's proposed commitments would be sufficient, or whether replacement access-related conditions (which we presented in draft form) would be appropriate.

1.16 The key elements of the commitments now proposed by Sky are:

- **Unlimited duration:** The commitments would be of unlimited duration once adopted (until Ofcom notify Sky that they are no longer required). Third parties have the right to renew existing contracts on their current terms, effectively protecting current supply indefinitely.
- **Services:** The commitments list a set of named interactive services, which cover all services currently or recently used¹ by third parties including the BBC, BT and S4C to deliver interactive services via satellite (without excluding that other services could be provided on request).²
- **Terms and conditions:** Sky commits to provide services on fair, reasonable and non-discriminatory terms.
- **Pricing:** The commitments set a cap of £100,000 per annum for access to the current services on the current and any future STB, though additional charges apply for some services.³
- **Transparency:** Sky commits to publish a set of standard terms and conditions for all existing and prospective customers to see on its corporate website. The commitments would be public and would be signed by Sky's CEO.
- **Monitoring:** The commitments provide for the provision to Ofcom on written request of all information that it would require in order to monitor adherence to the commitments, including notifying Ofcom of requests from new customers.

1.17 For those interactive services broadcast by satellite that are currently available on Sky's platform, Sky's revised commitments will provide existing third party providers with a right to renew their contracts, in effect creating indefinite contractual supply for current services on existing STBs. The current contracts are based on the AC Continuation Notice and reflect its regulatory requirements. Sky also commits to making these services available on new STBs.⁴ For prospective providers of these interactive services, there are no contracts currently in place. However, Sky has committed to notify us each time a new request for the provision of AC services is received, and the publication of standard terms and conditions on its website would facilitate the process of agreeing contracts.

1.18 Having considered Sky's revised commitments and in light of the responses to our consultations, we have decided not to impose replacement conditions on the removal of the AC Continuation Notice. We consider that contractual supply supported by

¹ These services are: alternative videostreams broadcast via digital satellite; alternative audio soundtracks; digital text services; subtitling; voting, gaming and betting services; commercial watermarking; and (not currently used by third parties) pay TV customer services.

² New TV services that use the same functionality as existing services on current STBs are also included (as Sky's commitments reflect the current contracts which are based on the AC Continuation Notice), but on future generations of STBs only existing named services are explicitly covered.

³ This matches the current approach under the AC Continuation Notice. The £100k charge covers the majority of services (and all the services currently being provided). Services that use additional capabilities such as authentication features would be charged based on the costs of providing these additional features; services such as betting would have an additional charge per transaction.

⁴ While current contracts do not cover new STBs (since the functionality and services are not yet available), we consider Sky has an incentive to ensure that the set of services on its new STBs is not less attractive than on its current STBs.

Sky's commitments is sufficient to secure access for existing interactive services delivered via satellite and therefore, at this stage, it would not be proportionate to impose new regulatory conditions on the removal of the AC Continuation Notice. Once steps have been taken to implement Sky's commitments as proposed in Section 5, the AC Continuation Notice will be removed.

- 1.19 We note concerns raised by respondents about the enforceability of Sky's voluntary commitments and Ofcom's ability to monitor Sky's conduct. While we have determined at this time that imposing replacement conditions covering existing interactive services broadcast via satellite would not be proportionate, we will be monitoring Sky's adherence to the commitments closely. Parties will be able to enforce their contractual rights before the courts and we have dispute resolution functions that may be used in appropriate circumstances. Moreover, if there are developments providing evidence that commercial supply under the commitments is insufficient, and/or dispute resolution is ineffective, we will be in a position to act swiftly should further action be necessary to impose regulatory conditions.
- 1.20 Sky's commitments do not cover access to the services necessary to provide the on-demand services that are already being provided today by the PSBs. These services are now well established, but we would be concerned if they were no longer available in the future. In relation to these existing on-demand services, the Act confers broad powers allowing us to consider a wide range of issues related to network access and interoperability of services under sections 73 and 74 and the wider significant market power (SMP) framework. As content providers increasingly take advantage of new ways to deliver content, with richer interactivity, this is an area of growing strategic importance. We are now commencing work to gather evidence in relation to access to on-demand services on TV platforms. Our assessment will draw on consumer research, as well as information from platform operators and content providers, to consider whether competition issues exist or are likely to arise in this area. It will also have regard to ongoing commercial developments. That work will enable us to consider whether it would be appropriate and proportionate to exercise our powers to impose conditions to regulate access to these services. Further details on this new work can be found in the Terms of Reference, which we are publishing alongside this document.
- 1.21 In addition, Sky's commitments do not cover access to other forms of interactive services that may be dependent on functionality on any new Sky STB. There is uncertainty as to how interactive online services will develop given these services are still emerging, as well as if and how these services may be dependent on functionality provided in future generations of Sky STBs. New functionality presents opportunities for innovation and investment. For example, there may be the ability to enhance linear TV channels with VOD content or the emergence of user interfaces with improved navigation and search capability, integrating both linear broadcast and internet delivered content. This may engage important questions regarding sustainable competition. For example, while the younger demographic is more comfortable with accessing VOD and online services across multiple devices, there is the potential for the majority of viewing to remain concentrated on the main TV in the household, both for linear and VOD. In this case there is the potential for traditional broadcast platforms to maintain an important role as a 'gateway' to viewers. Our Terms of Reference also cover further work in relation to these services.

Section 2

Introduction and Background

- 2.1 Sky is subject to a number of regulatory obligations that require it, as a satellite platform operator, to give third parties access to certain software services in its set-top boxes (STBs) to enable the provision of interactive services.⁵ As we discuss below in paragraphs 2.10 to 2.21, these software services include Access Control (AC) services.
- 2.2 Following a request from Sky to remove these regulatory obligations, we published a consultation in July 2013 (the "July 2013 Consultation") to gain views on the importance of access to Sky's AC services. Having considered responses and proposed commitments from Sky, we issued a further consultation in July 2014 (the "July 2014 Consultation") seeking views on how access to Sky's AC services should be secured.
- 2.3 This statement sets out our decision in relation to access to Sky's AC services for existing interactive services, traditionally delivered by satellite. In addition to these services, Sky also offers video on-demand (VOD) services on some of its existing STBs (i.e. Sky+HD STBs) which provide access to catch-up services offered by broadcasters, for example, the Public Service Broadcasters (PSBs) and Sky's own content. Both these types of services are evolving and access to provide new types of services on Sky's platform and other linear TV platforms may be an important factor in how competition develops. We therefore also discuss our approach to on-demand as well as future services.
- 2.4 This section sets out contextual information relevant to our review and explains the AC services that are currently subject to regulation on Sky's platform. It also sets out the relevant regulatory framework.

Context

- 2.5 Consumers now have access to a greater range of communications and media services than ever before. Convergence has enabled consumers to access content in different ways; what was previously available on a television, in a cinema, or in a newspaper can now be accessed on devices such as smartphones, tablets and smart TVs. Equally, traditional broadcast TV continues to have enduring popularity, with UK consumers watching on average around three and a half hours per day.⁶
- 2.6 The pay TV sector has delivered substantial benefits to consumers since its emergence in the early 1990s. In early 2014, 60% of households were paying for access to a pay TV service.⁷ Pay TV services typically offer a range of content

⁵ See the description of "interactive services" at paragraph 2.14 and Section 3 below. We use the term "interactive services" to refer to interactive TV services throughout this document.

⁶ On average, viewers watched 3 hours 52 minutes of television per day in 2013. This is comprised of live TV viewing of just under 3 hours per day plus recorded TV viewing of 40 minutes. On-demand, catch-up, streamed and downloaded viewing comprises 19 minutes. Ofcom, *Communications Market Report 2014 (CMR 2014)*, pages 145 to 149 and 179, Figure 2.20 and paragraph 2.3.1, http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr14/2014_UK_CMR.pdf.

⁷ Ofcom's Tech Tracker research, Wave 1 2014, page 464, <http://stakeholders.ofcom.org.uk/binaries/research/statistics/2014apr/2014w1.pdf>.

beyond that available on free-to-view (FTV) platforms, and include the option of purchasing premium sports and movies channels as well as a wide range of other popular and niche channels. Increasingly, on-demand and catch-up services, often delivered over-the-top (OTT) using the internet, are also available across the various pay TV platforms as well as via other devices.

- 2.7 Sky is currently the largest pay TV platform provider with around 10m subscribers.⁸ In comparison, Virgin Media has approximately 3.7m⁹, BT has nearly 1.1m¹⁰ and TalkTalk has 1.3m¹¹ subscribers. The majority (around two-thirds) of pay TV consumers therefore subscribe to Sky's services.
- 2.8 Given the number of subscribers on Sky's satellite platform, access to the platform is not only important for pay TV channels, but for all channel broadcasters. In particular, the availability of a wide range of high quality TV services, including PSB channels, is important so that consumers are able to access the content they value on the TV platforms they choose.
- 2.9 The importance of the supply of TV and related services has resulted in scrutiny from both domestic and European competition authorities over the last 20 years, with competition and regulatory investigations into the operation of competition at different levels in the industry supply chain. Sky's position as a vertically integrated provider (i.e. platform operator, wholesale channel provider and retail pay TV service provider) has been a particular focus in a number of these investigations.
- 2.10 Broadcasters and interactive service providers who wish to make their content available on Sky's platform require some or all of the following technical platform services (TPS):
- **Conditional Access (CA) services** enable broadcasters to restrict access to their content so that it reaches only authorised subscribers (and not non-subscribers), e.g. encryption technologies;
 - **Electronic Programme Guide (EPG) listing** provides the allocation of a slot on the EPG and the provision of a technical interface to enable the broadcaster to deliver schedule information; and
 - **Access Control services** are software and security services which enable the provision of interactive television services via Sky's STB, such as 'red button' services.
- 2.11 Sky's platform is subject to certain pieces of regulation that require it to provide third parties with access to its STBs in order to make their content available on its platform (i.e. provide their channels to customers directly without having to be a part of Sky's retail package).

⁸ British Sky Broadcasting Group plc, *Unaudited results for the three months ended 30 September 2014*, page 2, indicate 10.7 million subscribers, including Republic of Ireland and NOW TV subscribers, <https://corporate.sky.com/documents/investors/results/2015/q1-press-release.pdf>.

⁹ Virgin Media – *Virgin Media Reports Selected 2014 Results*, published 13 February 2015, <http://www.libertyglobal.com/pdf/press-release/Virgin-Media-Q4-2014-Investor-Release-FINAL.pdf>.

¹⁰ BT Group plc, *Key Performance Indicators Q3 2014/15*, page 5, 30 January 2015, <http://www.btplc.com/Sharesandperformance/Quarterlyresults/PDFdownloads/q315-KPIs.pdf>.

¹¹ TalkTalk Group plc, *Q3 FY15 trading update*, published 3 February 2015, page 2, <http://www.talktalkgroup.com/~media/Files/T/TalkTalk-Group/pdfs/reports/2015/q3-update.pdf>.

- 2.12 Sky's request relates to the regulation of its AC services only. This statement does not address EPG or CA services and we assume the EPG and CA regime remain unchanged.

Access Control Services

- 2.13 Sky's AC services consist of a suite of software and security services which are available on the Sky satellite platform that enable third parties to access application programme interfaces (APIs) in Sky's STB. APIs are the software libraries resident on the STB that allow an interactive application to access the STB functionality. These AC services and APIs are required by third parties in order for them to provide interactive services to or for the benefit of viewers using Sky's STBs.
- 2.14 The interactive services in question cover a range of TV content and associated services, which entail viewer interaction. This includes, for example, red button services, which can provide access to different videostreams; and services such as betting, voting and shopping which require the subscriber to submit information via the return path facility in the STB¹² to the interactive services provider. They also include certain services which are not interactive but are associated with TV content, such as on-screen watermarking.¹³ Sky currently provides two types of AC services: application signing services and authentication services.

Application Signing Services

- 2.15 Application signing services (ASS) provide broadcasters and interactive service providers with the technical means to ensure that their applications are permitted access to, and are appropriately recognised by, Sky's STBs. These include signing tools, keys and certificates.
- 2.16 ASS typically enable the selection of different video feeds, such as different camera angles in a sporting event, the provision of programme information and on-screen watermarking.
- 2.17 We understand that as of March 2015, there are currently seven third parties¹⁴ taking ASS from Sky (compared to nine at the time of the July 2013 Consultation and eight in July 2014).¹⁵ Nickelodeon and Turner no longer take these services and ceased providing them in January 2015. However we understand that since our July 2014 Consultation, Racing UK Limited now takes ASS from Sky.¹⁶

Authentication Services

- 2.18 Authentication services provide the means by which broadcasters and providers of interactive services are able to utilise the return path facility historically provided via a narrowband dial-up modem in the STB, to access an interactive service provider's online service and enable two-way interactions. Authentication services are used to

¹² The return path enables information to be submitted by the subscriber to the interactive services provider, historically via the narrowband dial-up modem in the STB.

¹³ For example, the pint glass symbol used in commercial premises to indicate they are authorised to show particular pay TV channels.

¹⁴ These parties are Attheraces, BBC, BT, Community Channel, Racing UK Limited, S4C and Setanta Sports Hibernia.

¹⁵ This is down from 30 in 2008, see July 2013 Consultation, paragraph 2.27 and paragraph 4 of Sky's request for removal of the AC Continuation Notice, available at Annex 6 of the July 2014 Consultation.

¹⁶ Sky emails of 27 February and 10 March 2015.

provide services which involve the viewer sending information back to the service provider (entered via the remote control handset) e.g. voting services, competition entries and transactional services.

- 2.19 Currently on the Sky platform, any third party wishing to use the return path must have access to an authentication server. This server guarantees that only Sky STBs are able to connect to the online platform and also ensures that STBs do not connect to unapproved online platforms. Third parties can either procure a dedicated authentication service from Sky or negotiate access to an existing server.
- 2.20 In order to provide two-way TV interactivity, such that the viewer does not need to leave the TV viewing environment, certain interactive services need both ASS and authentication services. For instance, an interactive TV betting service structured around a live sports programme would need both types of AC services.
- 2.21 While Sky itself makes use of these services, and there has been third party interest in using them, there are currently no third parties taking authentication services.

The Access Control Continuation Notice

History of AC Regulation

- 2.22 Regulation was originally imposed on Sky in 2000 in a licence granted under the Telecommunications Act 1984, following a finding that Sky was in a dominant position in the supply of AC services for digital interactive TV services. The licence governed the way Sky made its AC services accessible to third parties, in order to promote sustainable competition and to ensure the interoperability of third party services for the overall benefit of consumers.
- 2.23 The Telecommunications Act 1984 was repealed in 2003 when the Communications Act came into force. In order to ensure that there was no regulatory gap, Oftel exercised its power to give continued legal effect to the relevant conditions of Sky's licence by giving the AC Continuation Notice¹⁷ to Sky in 2003.

Requirements of the Access Control Continuation Notice

- 2.24 The AC Continuation Notice imposed by Oftel requires Sky to:
- supply AC services on fair and reasonable terms;
 - maintain accounting records dealing separately with its AC services business;
 - not unduly discriminate or show undue preference in relation to the provision of AC services; and
 - publish charges and terms and conditions in an agreed manner.

¹⁷ The AC Continuation Notice was included in Annex 5 of the July 2013 Consultation <http://stakeholders.ofcom.org.uk/binaries/consultations/review-access-control/summary/review-sky-access-control.pdf>.

The regulatory framework

2.25 In our July 2013 Consultation, we set out in detail the underlying legal framework in which regulation of Sky's AC services currently operates and explained the requirements for removing the AC Continuation Notice, as well as our relevant powers for imposing replacement conditions if appropriate.¹⁸ Ofcom has been under a duty since the AC Continuation Notice was made in 2003 to consider, as soon as reasonably practicable, whether or not replacement conditions set under the Act are necessary.¹⁹ Ofcom must make this assessment before it can remove the AC Continuation Notice.

Access-related conditions

2.26 We explained that the types of conditions permitted under Chapter 1 Part 2 of the Act are set out at section 45 of the Act. Of relevance to this statement is the power to set access-related conditions authorised by section 73 of the Act. As set out in section 73(2), these include: "conditions relating to the provision of such network access and service interoperability as appears to OFCOM appropriate for the purpose of securing—

"...

(a) efficiency;

(b) sustainable competition;

(ba) efficient investment and innovation; and

(c) the greatest possible benefit for the end-users of public electronic communications services."²⁰

2.27 Specific provisions which fall within the scope of section 73(2) are set out in section 74(2) and include: "conditions imposing obligations on a person providing facilities for the use of application programme interfaces ...as OFCOM consider to be necessary for securing—

(a) that persons are able to have access to such programme services provided in digital form as OFCOM may determine; and

(b) that the facility for using those interfaces ...is provided on terms which—

(i) are fair and reasonable; and

(ii) do not involve, or tend to give rise to, any undue discrimination against any person or description of persons."

¹⁸ See Section 3 of the July 2013 Consultation.

¹⁹ Under Schedule 19, paragraph 9(11) of the Act.

²⁰ As we noted that in the July 2013 Consultation, the recitals to the Access Directive from which sections 73 and 74 derive (Directive 2002/19/EC as amended by Directive 2009/140/EC) suggest that media plurality and cultural diversity objectives may also be relevant.

- 2.28 Thus for the purpose of setting an access-related condition under this provision, Ofcom must not only be satisfied that the condition is appropriate for securing the four objectives listed in section 73(2) (see paragraph 2.26) but also that it is necessary to secure access to a set of “programme services” as Ofcom may determine. Programme services are defined in section 405 of the Act and include television broadcasting services, such as those provided by the BBC and the licensed PSBs, and television licensable content services (for example, television channels provided by other broadcasters or which are distributed via an electronic communications network).
- 2.29 An “application programme interface”, referred to in section 74(2) is defined in section 74(3) as “a facility for allowing software to make use, in connection with any of the matters mentioned in subsection (4), of facilities contained in other software”. The matters referred to are:
- “(a) allowing a person to have access to programme services;
- (b) allowing a person, other than a communications provider or a person who makes associated facilities available, to make use of an electronic communications network by means of which a programme service is broadcast or otherwise transmitted;
- (c) allowing a person to become the end-user of a description of public electronic communications service.”
- 2.30 There is no requirement to establish dominance or significant market power before access-related conditions can be imposed under these provisions of the Act, which is in contrast to the legislative regime which preceded the Act and under which the existing regulation was originally imposed on Sky by Oftel.
- 2.31 We also noted that the procedures for setting a condition under section 45 of the Act are set out in sections 48 – 48C of the Act. Further, pursuant to section 47(2), Ofcom may only set a condition under section 45 where it is satisfied that it meets the tests contained in section 47(2) of the Act in that it is objectively justifiable, non-discriminatory, proportionate and transparent.

Ofcom’s general duties

- 2.32 We also explained that in exercising its functions Ofcom must act in a manner which is consistent with its general duties under section 3 of the Act and the Community requirements under section 4. Our general duties include Ofcom’s principal duty under section 3(1) of the Act to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. For the purposes of this review, we also consider the following to be of particular (but not exclusive) relevance:
- the duty under section 3(2) to secure, in carrying out our functions, the availability throughout the UK of a wide range of television services and the maintenance of a sufficient plurality of providers;
 - the duty under section 3(3) to have regard to our regulatory principles of transparency, accountability, proportionality, consistency and to target intervention only where action is needed;

- our duty under section 3(4) to have regard to relevant objectives such as promoting the fulfilment of the purposes of public service television broadcasting, promoting competition and encouraging investment and innovation in relevant markets, and to the different interests of persons in different parts of the UK; and
- the Community requirements under section 4 to promote competition and to encourage service interoperability for the purposes specified in section 4(8) (which match those in section 73(2) (as set out in paragraph 2.25.1).

2.33 In relation to the duty under section 3(3) referred to above, our general regulatory principles²¹ 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.

Impact Assessment (IA) and Equality Impact Assessment (EIA)

2.34 Impact assessments provide a valuable way of assessing different options for regulation. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that generally Ofcom has to carry out impact assessments where its proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of its policy decisions. For further information about Ofcom's approach to impact assessments, see our guidelines.²² We set out our impact assessment in our two consultation documents. In this document we take into account relevant responses and set out our conclusions.

2.35 We are also required to assess the impact of our functions, policies, projects and practices on particular groups such as those identified by age, race, religion, disability, maternity, gender and sexual orientation. Equality Impact Assessments (EIA) also assist us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers. We have undertaken an EIA, the detail of which is set out in Annex 1.

Our review process

2.36 Our review of regulation of AC services on Sky's platform has included the following key stages:

²¹ <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>.

²² Ofcom, *Better Policy Making – Ofcom's approach to Impact Assessment*, Ofcom, 21 July 2005 http://stakeholders.ofcom.org.uk/binaries/consultations/better-policy-making/Better_Policy_Making.pdf

- **Sky's request to remove the AC Continuation Notice (January 2013).** In its submission, Sky stated that there was no significant demand for interactive services, the costs of the existing regulation were material and burdensome and that it inhibited its innovation and development of new platform functionality. Sky also offered a commitment to provide access to AC services until 2016.
- **Ofcom's first consultation (July 2013).** Our consultation sought stakeholders' views on current and likely future demand for Sky's AC services, alternative means of providing interactive services and the ability to secure access to these services absent regulation. We explained that absent evidence of demand for AC services, we were minded to remove the AC Continuation Notice without further action. Respondents indicated that interactive services (e.g. accessed via the red button) continued to be popular and important, and third parties wished to continue providing such services beyond 2016. As such, they would have demand for AC services.
- **Sky's revised commitments (February 2014).** Following the publication of responses to our first consultation, Sky submitted to us revised commitments, developing its proposal and setting out in some detail how it would provide AC services to third parties in the absence of regulation.
- **Ofcom's second consultation (July 2014).** Our consultation set out the evidence we had received from stakeholders and presented two options when removing the AC Continuation Notice: either to impose replacement access-related conditions²³ or to not impose replacement conditions, in light of Sky's proposed commitments.

2.37 The July 2014 Consultation covered the following areas.

- **Demand for AC services and alternatives available.** We noted that there is demand for AC services in order for third parties to provide content linked to the main channel content, particularly for enhanced TV services. We said access to Sky's APIs allowed navigation via the red button to content such as alternative videostreams which we considered to be an important service, valued by users, and for which there were unlikely to be sufficiently good alternatives.
- **Commercial provision.** We observed that some stakeholders expressed the view that the regulation had provided certainty and had enabled access to Sky's APIs to be secured and access was less certain absent regulation. Sky stated that it had strong commercial incentives to make its platform more attractive and provide access to third parties.
- **Sky's proposed commitments.** We summarised the proposed commitments put forward by Sky which set out how Sky would provide AC services to third parties in the absence of regulation.
- **Analytical framework.** We set out the four objectives (efficiency, sustainable competition, efficient investment and innovation, and the greatest possible benefit for end-users of these services) that formed that basis of our framework for assessment. We noted the objectives had both a competition dimension and a public policy dimension in relation to cultural diversity and media plurality. We recognised the potential for tension between these objectives and the need to

²³ The July 2014 Consultation included a set of draft conditions.

strike an appropriate balance, for example between sustainable competition and incentives to invest and innovate.

- **Assessing the case for regulation.** Taking into account the available information and evidence, we assessed the case for two options following removal of the AC Continuation Notice: (i) not imposing replacement access-related conditions in light of Sky's proposed commitments and (ii) the imposition of replacement access-related conditions under sections 45, 73 and 74 of the Act, setting out proposed draft conditions.

2.38 In September 2014, as part of its consultation response, Sky submitted further revisions to its proposed commitments.

Section 3

The Importance of Access to Sky's Platform

Introduction

- 3.1 In this section we discuss the importance of access to Sky's platform in providing the following services:
- i) Existing interactive services – interactive services that have traditionally been delivered via satellite to the Sky STB;²⁴
 - ii) Existing VOD services – video on-demand services that are provided on some of Sky's existing STBs (i.e. Sky+HD STBs) and provide access to catch-up services offered by broadcasters; and
 - iii) Future services – services that rely on functionality not available on the current generation of Sky STBs (but may already be available on other platforms).
- 3.2 We conclude that, for existing interactive services that enhance linear TV services, access to Sky's STB is important on both public policy and competition grounds. Therefore, we consider in Section 4 whether new regulatory conditions are required to ensure this access continues to be available.
- 3.3 We explain that access for existing VOD services is increasingly important as consumers move towards viewing on-demand services. Public policy concerns may arise if the PSBs are unable to access platforms in order to provide content to a wide audience, in keeping with their public service objectives, and competition concerns could also arise if access to certain content (from PSBs or other providers) was restricted. We also recognise that content services are continuing to evolve beyond the current services supported on Sky's STB. In order to understand the requirements for access for existing VOD services and for future services we will commence a new piece of work. We have published the Terms of Reference for this work alongside this statement.

Context

- 3.4 Traditional linear broadcast TV accounts for the majority of consumers' viewing.²⁵ To watch linear TV, consumers choose a pay TV or FTV TV service. That TV service consists of a selection of content (TV channels) as well as a user interface to navigate that content, typically an EPG, and potentially other services such as personal video recording functionality. In order to provide this, access to a delivery platform is required; for example, Freeview using Digital Terrestrial TV, Sky's satellite platform, or Virgin Media's cable platform.

²⁴ As discussed in paragraph 3.6 below, these services may also use the narrowband or broadband connection to provide a return path for some services.

²⁵ See paragraph 2.5.

- 3.5 As explained in Section 2, Sky is the largest provider of pay TV services, so that the majority (around two-thirds) of pay TV consumers use Sky's STB to access linear TV services.
- 3.6 In addition to linear TV services, the Sky STB also provides, or may in future provide, access to other services:
- i) **Existing interactive services** – interactive services that are traditionally delivered via satellite to the Sky STB, though they may also, in some instances, make use of the return path provided by a narrowband or broadband connection to make use of authentication services.²⁶ These services provide access to additional information and audio/videostreams that complement the broadcast linear TV programme; offer alternative ways to discover and navigate to TV content; can provide commercial services linked to the linear TV content (for example, a shopping channel) or are services not integrated with linear TV content but that are accessed on the TV. They are often accessed via the red button.
 - ii) **Existing VOD services** – video on-demand services that are provided on some of Sky's existing STBs (i.e. Sky+HD STBs) and provide access to catch-up services offered by broadcasters, for example, the PSBs and Sky's own content. Content is hosted on, and delivered from, Sky's servers. The content is delivered to the STB via the broadband connection. Access to this content may be provided using existing interactive services capability. For example, access to the BBC's iPlayer content can be accessed via the red button.
 - iii) **Future services** – services that rely on functionality not available on the current generation of Sky STBs. These services could be evolutions of existing interactive and/or VOD services, or could integrate the two. Some of these services are already available on platforms other than Sky's. For example, the BBC's Connected Red Button (CRB) service brings together linear TV, online content and the BBC iPlayer and is available on a range of platforms, including Virgin's TiVo and YouView STBs and some smart TVs.²⁷
- 3.7 To date, our review has focused primarily on the first of these categories and as such, responses to our July 2014 Consultation were also focused on securing access for existing interactive services, though respondents also commented on future services that may develop on future generations of Sky's STB.
- 3.8 In the rest of this section we first explain our framework and then discuss these three types of services in turn.

Framework for considering access

- 3.9 Our analytical framework derives from our general duties as discussed in Section 2. In considering the question of access, we recognise the importance of both the operation of competition and the speed and nature of technological developments. We discussed these in Sections 6 and 7 of the July 2014 Consultation, noting that it

²⁶ Authentication services are described in Section 2. For example, betting services use the return path to authenticate the user and provide transaction details.

²⁷ *Inside the BBC: BBC Connected Red Button FAQs*, BBC, <http://www.bbc.co.uk/corporate2/insidethebbc/whatwedo/redbuttonfaq/>.

may be necessary to strike an appropriate balance between different considerations.²⁸ In particular:

- **Sustainable competition.** Access to established platform infrastructure is necessary to allow competitors to provide their services to consumers where this infrastructure cannot be easily replicated (or alternative infrastructure does not provide a realistic alternative). A firm with a strong market position based on its platform may be able to foreclose competitors from a market by refusing access. As a result of refusing access to competitors, the firm would not face the same incentives to reduce costs, develop new services, etc. Access is therefore a key component to securing competition in a market, and regulation plays an important role where access is not provided on a commercially negotiated basis. In relation to interactive services on the Sky platform, access to provide interactive services which enhance the TV propositions could be important to broadcasters to allow them to compete with Sky's own content services.
- **Innovation and investment.** There is the need to also consider the incentives to innovate and invest over time in a market. The needs of the operator of established platform infrastructure to continue to invest to maintain its network and to invest in the development of new technologies should be taken into account, as should the incentives for competitors to develop and invest in their own facilities. Where there is considerable uncertainty about the impact or indeed the success of technological developments, the possibility of access regulation could have an adverse effect on incentives to innovate and invest in those new technologies. If this were to happen, then it would in turn result in the loss of benefits to the end-users that would otherwise arise from the development of new services and products and new approaches.^{29, 30} In the context of interactive services, incentives to innovate and invest are particularly relevant, given the speed with which services and platforms are evolving. Consideration of the need for access to Sky's platform needs to take account of developments of Sky's platform and STB, and any access regulation should not unduly impede Sky's incentive to innovate and invest in new services and functionality.

3.10 It is thus a question of weighing up these different considerations. In markets where there is the potential for significant technological developments (and thus the incentives for investment and innovation in new technology are likely to be particularly important), it will be necessary to seek an appropriate balance between intervention to secure and maintain competition in existing services in the short-run and maintaining incentives for efficient innovation and investment in new services over the longer-run.

²⁸ The Access Directive recognises the potential trade-off between competition and incentives to invest and innovate. Recital 19 of the Access Directive.

²⁹ At the same time, there is the need to be mindful about maintaining continuity of existing services which third parties make use of but which the platform provider may be considering withdrawing from providing. In such a situation there could be a case for ensuring the continued provision of certain services even if the platform operator was no longer using those services itself in downstream markets.

³⁰ In addition, where there is uncertainty about how regulation would be applied (e.g. whether access provisions did or did not apply to new services; the terms on which access might need to be provided; whether the risk attached to particular investments would be properly reflected in the price the firm was allowed to charge under regulation etc.) that could also negatively impact on a firm's propensity to invest in the first place.

- 3.11 In addition to these economic considerations, our assessment also has a public policy dimension. The Access Directive recognises that competition rules alone may not be sufficient to ensure cultural diversity and media plurality and that access obligations may be appropriate to secure accessibility for end-users to specified digital broadcasting services.³¹ In the context of our assessment, these factors are most clearly pertinent (albeit not exclusively so) in relation to the ability of PSBs to fulfil their public service purposes and responsibilities.
- 3.12 These different considerations have informed our assessment of the extent to which regulation is required of Sky's AC services in relation to existing services, and our consideration of services provided in future.

Existing interactive services

- 3.13 In the July 2014 Consultation we said that there are four main types of interactive services that can currently be provided on Sky's platform:
- i) Enhanced TV – services that provide access to additional information and/or videostreams that complement the broadcast linear TV programme;
 - ii) Navigation and Discovery – services that provide alternative ways to discover and navigate to TV content;
 - iii) Contextual Commercial services – services developed to exploit the TV channel or programme. These services may overlap some aspects of enhanced TV services; and
 - iv) Standalone services – services not integrated with the TV channel or programme but that are accessed on the TV.
- 3.14 Broadcasters have provided interactive services, particularly enhanced TV services, which have been of benefit to consumers of their linear TV services. These include, in particular:
- i) Alternative audio and videostreams – alternative streams are broadcast via satellite to the STB and are accessed via an interactive application, generally the red button. The BBC has provided red button access to alternative videostreams for a range of programming, including the 2012 Olympics (allowing it to cover all events in real time); Wimbledon, where it showed multiple matches; and Glastonbury, where it showed coverage of different stages. Channel 4 also provided red button access to alternative videostreams during its coverage of the 2012 Paralympics. Sky provides red button access to alternative videostreams, particularly on its sports channels (for example to provide alternative camera angles, on its Formula 1 coverage). BT has recently launched a red button service, 'BT Sport Extra', to allow it to manage sports rights clashes.³² S4C provides red button access to alternative audiostreams, for example, alternative language commentary.

³¹ Recital 10 to the Access Directive (Directive 2002/19/EC as amended by Directive 2009/140/EC).

³² BT has purchased a range of sports rights. Where these events take place at the same time, it may not be able to show them all on its three channels. The red button allows some of these rights to be shown as alternative videostreams.

- ii) Information services – the red button can also be used to provide access to information, such as general news and weather or information supporting the main channel content. Again, the information is broadcast to the STB via satellite in order to provide these services. The BBC uses interactive services to provide text and information services, while Sky provides information such as lap times to enhance its Formula 1 coverage.
 - iii) Navigation to alternative language subtitles and soundtracks – S4C uses interactive services to provide easy navigation to alternative language subtitles and soundtracks. The alternative soundtracks and subtitles are broadcast to the STB and can be accessed via the menu system, but using the red button provides a simpler navigation to these services.
 - iv) Commercial watermarking allows broadcasters to include a symbol to identify where a commercial subscription is being viewed. This allows identification of whether commercial premises (such as pubs and clubs) have the appropriate subscription to pay TV services. Sky and BT use commercial watermarking on their sports broadcasts.
- 3.15 To provide these services on Sky's platform, these content providers need access to APIs on Sky's STBs. Access to these APIs is provided by Access Control services³³, and has been regulated by the Access Control Continuation Notice, which has been the focus of this process.

July 2014 Consultation

- 3.16 In the July 2014 Consultation, we said that access to Sky's APIs via AC services was important to allow the PSBs and pay TV providers to provide enhanced TV services, which were valued by users. Our view was that there were unlikely to be sufficiently good alternatives if access to Sky's APIs was not available.
- 3.17 In relation to other interactive services that could be provided via access to AC services, we said that demand for commercial contextual services and other navigation and discovery services appeared to be low.³⁴
- 3.18 We said that standalone services had traditionally included services such as online banking and that there was no demand for such services on Sky's STB. However, standalone services now included a wider range of services such as Facebook, Netflix and Amazon Prime Instant Video.³⁵ In relation to these standalone services we drew a distinction relating to the capability of STBs:
- Internet Protocol (IP) enabled STBs: these included any STB that included the capability to access content via an IP connection. We said that Sky had STBs that were IP enabled.³⁶ Sky's STBs access content provided from Sky's own content servers (e.g. PSB catch-up services) but do not provide access to services on the public internet. We therefore said that access to standalone

³³ Access Control services include Application Signing Services and Authentication Services as described in Section 2.

³⁴ See July 2014 Consultation, paragraphs 3.80 to 3.81.

³⁵ See July 2014 Consultation, paragraph 3.83.

³⁶ We said that we understood that Sky+ STBs were IP enabled. See July 2014 Consultation, paragraph 3.83.

services that required access to the public internet was not currently within the technical capabilities of Sky's platform.

- Internet-enabled devices: these are a subset of IP-enabled devices, which are able to access content on the public internet. Sky's current STBs do not have this capability.

Responses to the July 2014 Consultation

- 3.19 We received six responses to the consultation from the BBC, BT, Channel 4, ITV, S4C and Sky.
- 3.20 Stakeholders reported there is still demand for access to Sky's APIs to provide third party enhanced TV services and the BBC, BT, Channel 4 and S4C agreed with Ofcom's assessment of demand.³⁷ Channel 4 said that "*while it is clear that the number of broadcasters who use these services has reduced, it is less clear that their popularity with users has*".³⁸
- 3.21 The BBC said it expected "*continued strong audience demand for interactive TV services for the foreseeable future*"³⁹ and said it delivered nearly all types of 'enhanced TV services' identified by Ofcom. It stated that its BBC Red Button service, delivered by digital satellite, offered alternative video streams linked to linear services, with navigation to other BBC on-demand services such as the BBC iPlayer; information services; subtitles, audio description and text-based news; and games.⁴⁰ It said its innovation and ongoing investment in its existing services demonstrated its expectation that there would be continued strong demand for the foreseeable future.⁴¹
- 3.22 BT said its current demand was for a specific set of enhanced TV services including alternative videostreams for clash management, commercial watermarking and [X]. It reiterated the importance of being able to provide enhanced TV services and said there was a significant risk that BT would be placed at "*a (further) material competitive disadvantage compared to Sky*" if it was unable to deliver an equivalent enhanced TV service on its BT Sports channels to Sky's Sports channels.⁴²
- 3.23 BT said there were no viable alternatives to access to Sky's AC services for clash management.⁴³ It argued that, in order to manage clashes between sports rights, it needed to use the red button; providing more channels would be costly, obtaining new EPG slots would be problematic, and even if it could, these would not be next to its current channels on the EPG, making navigation more difficult.⁴⁴ [X].⁴⁵
- 3.24 BT said that viable or effective alternatives did not exist for enhanced TV and commercial watermarking services.⁴⁶ It said that second screens could not be

³⁷ BBC response, page 4, paragraphs 3 to 6; BT response, Annex 1; Channel 4 response, page 1 and S4C response, page 1.

³⁸ Channel 4 response, page 1.

³⁹ BBC response, page 2.

⁴⁰ BBC response, page 4, paragraph 3.

⁴¹ BBC response, page 4, paragraph 6.

⁴² BT response, Annex 1.

⁴³ BT response, paragraph 2.11 to 2.27.

⁴⁴ BT response, paragraph 2.22.

⁴⁵ BT response, paragraph 2.14.

⁴⁶ BT response, paragraphs 2.19 and 2.28.

considered as a viable alternative for providing enhanced TV services. In particular, it said ownership did not necessarily equate to usage, so that the number of tablets could not necessarily be taken as evidence of alternatives being available.⁴⁷ It also said that consumers could be put off using a second screen application as this may seem un-necessarily complex, as compared to using interactive services linked to the main channel.⁴⁸

3.25 BT argued that effective alternatives did not exist for commercial watermarking.⁴⁹ [redacted].⁵⁰

3.26 Sky argued that Ofcom had over-stated the importance of interactive services to PSBs.⁵¹ It said we had mis-interpreted Recital 10 of the Access Directive by stating that “*regulatory intervention to secure an environment in which [cultural diversity and media plurality] can flourish may be appropriate*”.⁵² Sky also said we placed too much importance on this objective.⁵³ It noted that the BBC was the only major broadcaster of FTV television channels that used Sky's AC services and argued that even the BBC had significantly scaled back its offering on Sky's platform less than two years ago, on the basis that the costs were not justified.⁵⁴ Sky went on to say that there was “*virtually no prospect of any new significant FTV users of Sky's AC services emerging in the future*.”⁵⁵ It said this was because interactive services on Sky's satellite platform are expensive to develop and operate, and the cost cannot be justified by commercially funded broadcasters.⁵⁶ Sky further suggested that the fact that only the BBC and S4C had agreements to provide interactive services on its platform indicated the “*limited role*” these services play in the delivery of PSB objectives.⁵⁷

3.27 Sky also argued that a lack of access to AC services would not impact the process for bidding for sports rights⁵⁸ and that the value of showing rights behind the red button was low.⁵⁹ It argued that clash management was not an issue for rights such as the Premier League [redacted].⁶⁰ It also said alternatives, such as day-part channels, existed.⁶¹

Conclusion

3.28 Our view is that demand exists to continue to provide existing interactive services, particularly to provide access to content that enhances linear TV. While we acknowledge that the number of providers using these services has reduced, we consider that there remains important demand from content providers to provide these interactive services. For example, in its response to our July 2013

⁴⁷ BT response, paragraph 2.19.

⁴⁸ BT response, paragraph 2.20.

⁴⁹ BT response, paragraph 2.28.

⁵⁰ BT response, paragraphs 2.37 to 2.38.

⁵¹ Sky response, paragraph 6.3.

⁵² Sky response, paragraph 6.4.

⁵³ Sky response, paragraph 6.5.

⁵⁴ Sky response, paragraph 6.19.

⁵⁵ Sky response, paragraph 6.19.

⁵⁶ Sky response, paragraph 6.19.

⁵⁷ Sky response, paragraph 6.5.

⁵⁸ Sky response, paragraphs 7.7 to 7.12.

⁵⁹ Sky response, paragraphs 7.21 to 7.22.

⁶⁰ Sky response, paragraph 7.72.

⁶¹ Sky response, paragraphs 7.45 to 7.82.

Consultation, the BBC noted that the weekly reach of the red button was substantial, and audience appreciation is high.⁶² In addition, popularity increases when used to enhance coverage of large events.

- 3.29 The BBC said that during the Olympics, where it offered 24 additional streams in SD and HD via the red button, each stream attracted in excess of 100,000 viewers and cumulative reach of all the streams was 32 million via cable and satellite. It also noted that more users of the red button service (both in total and as a proportion of the user base) were on the Sky platform compared to other platforms.⁶³ The BBC said similar trends are also evident for major annual events, such as Wimbledon and Glastonbury.⁶⁴ Finally, the BBC said that usage of the red button was increasing.⁶⁵ S4C also emphasised the importance of its red button access to alternative language subtitles and audiostreams.⁶⁶
- 3.30 Therefore, we consider that those broadcasters currently providing interactive services to enhance linear TV view them as important services, and that consumers derive significant value from using these interactive services. In relation to the PSBs, we do not consider the fact that not all PSBs provide interactive services demonstrates a limited role these services provide in PSBs' output. While we do recognise that interactive services form a small part of the overall service provided by the PSBs, we note from the responses of the BBC and S4C the important contribution that interactive services play in providing their services.
- 3.31 Sky argued that we had overstated the importance of access to AC services in bidding for sports rights.⁶⁷ Where broadcasters obtain a range of rights (as they would need to do if they seek to provide a comprehensive sports channel), there is the potential for clashes between rights, and interactive services offer a way to broadcast these rights. Alternatives may exist but we do not consider that the existence of alternatives means that access to AC services can be assumed to be unimportant. Rather, it is a question of the extent to which alternatives are sufficiently effective. While alternatives such as using day-part channels were appropriate in the case of Sky Sports 3 and 4, this will not necessarily be the case for other broadcasters. Different business models of other providers (such as BT Sport) and/or consumer expectations mean that interactive services could provide the best approach for broadcasting these rights and that alternative approaches used by Sky are less suitable. In order that broadcasters can innovate in terms of the services they provide, and how they provide them, it is important they can test different approaches where a range of reasonable alternatives exist, without being constrained to follow the approaches taken by Sky itself. Therefore, the simple existence of potential alternatives does not mean that access to AC services is not required.
- 3.32 We conclude that demand exists to provide interactive services that enhance linear TV services, and that it is not clear that alternatives are sufficient. Access to Sky's APIs is therefore important to provide interactive services. Without access, the fulfilment of PSB objectives may be impacted, and there may be concerns that other

⁶² BBC response to the July 2013 Consultation, paragraph 24 and paragraph 26.

⁶³ BBC response to the July 2013 Consultation, paragraphs 27 to 28.

⁶⁴ BBC response to the July 2013 Consultation, paragraph 29.

⁶⁵ BBC response to the July 2013 Consultation, paragraph 30.

⁶⁶ S4C response, page 2.

⁶⁷ See paragraph 3.27 of this statement.

TV providers may be placed at a competitive disadvantage if they are not able to provide similar services to those provided by Sky.

3.33 In relation to other types of interactive services that may currently be provided:

- we consider demand for commercial contextual services and navigation and discovery services is low;
- we also consider there is no demand for standalone services such as banking; and
- for other standalone services:
 - we discuss on-demand services where content is delivered from Sky's servers under the heading of existing VOD services below (see paragraph 3.35); and
 - we discuss services that would require new functionality such as the ability to deliver content from the internet under the heading of future services (see paragraph 3.47).

3.34 Given the importance of access to Sky's APIs to continue to provide existing interactive services that enhance linear TV, we assess whether or not new regulatory conditions are required following the removal of the AC Continuation Notice in Section 4.

Existing VOD services

3.35 As discussed above, linear TV, and interactive services that enhance it, remain important to consumers. In addition, content is now being viewed in other ways with VOD services increasing in popularity. Ofcom research indicates that while live TV continues to be the predominant way in which consumers access content, use of VOD services is growing.⁶⁸ In this process to date, we have not explicitly sought views from stakeholders regarding VOD services. However, given the growth of VOD services, these are increasingly becoming an important part of the set of services valued by consumers.

3.36 We discussed in the PSB Review that if the PSBs are able to maintain their share of viewing through on-demand viewing, a faster shift to these new services could help the PSBs to better meet audience needs through better targeting, personalisation, greater convenience and deeper engagement. However, a faster shift away from live/linear television viewing to on-demand viewing could lessen the reach and impact of the PSBs, if they lose share of overall viewing as a result.⁶⁹

3.37 The PSBs have extended their services by offering on-demand services: the BBC via the BBC iPlayer; ITV via ITV Player; Channel 4 via 4oD and Channel 5 via Demand 5. The BBC Trust is also considering a proposal to make BBC Three an online only offer.⁷⁰ In addition to the PSBs, traditional pay TV providers now also offer on-

⁶⁸ CMR 2014, pages 146 to 147, Figure 2.20 and Figure 2.21.

⁶⁹ See paragraph 1.36, Ofcom, *Public Service Content in a Connected Society*, 15 December 2014. <http://stakeholders.ofcom.org.uk/consultations/psb-review-3/>.

⁷⁰ *Trust begins public consultation on BBC Three proposals*, BBC Trust, 20 January 2015, http://www.bbc.co.uk/bbctrust/news/press_releases/2015/bbc_three_proposals.

demand services (for example, Sky offers catch-up content on its STB). Other broadcasters (for example, UKTV) also offer on-demand services.

- 3.38 Currently, on-demand content including catch-up services from each of the PSBs⁷¹ and some other broadcasters is available on a range of platforms, including Sky. Access to this content on the Sky+HD STB is provided by commercial agreements between Sky and each of the broadcasters.
- 3.39 This on-demand content can also be accessed online using a range of devices, such as laptops and tablets, smart TVs and games consoles. Viewing of on-demand content on laptops/PCs, smartphones and tablets accounts for just over half of long-form 'pull' viewing.⁷² However, the proportion watched on TV sets is increasing, taking into account viewing delivered not only via STBs, but also using games consoles, smart TV applications, etc. Viewing of on-demand content may also vary by demographics, with 16 to 24 year olds more likely to view on-demand content than some older age groups,⁷³ while some consumers may be deterred from accessing on-demand content if it is not delivered on the platform they use for their main TV viewing.
- 3.40 Therefore, VOD services are now well established with consumers. VOD content, and the possibility to deliver it via a range of platforms, provides the opportunity for greater choice for consumers, with a wider range of content made available across a range of traditional and new platforms, allowing content to be provided in a more personalised and relevant way.
- 3.41 However, there is the potential for concerns to arise. Concerns could arise if access to VOD services was restricted on the platform used to view linear TV services, where these platforms are also the preferred choice for consumers to access VOD services. As viewing shifts away from linear services towards on-demand, access to the PSBs' on-demand content will be increasingly important to the delivery of public policy objectives. Platforms may be incentivised to provide access to the PSBs given that this content is likely to be attractive to a range of consumers. But public policy concerns may arise in the future if the PSBs are unable to access platforms to meet their public service objectives. Competition concerns could also arise if access to certain content (from PSBs or other providers) was restricted.
- 3.42 It is therefore important for us to understand, more generally, how VOD services are provided and how consumers want to access these services in order to fully assess how competition might develop in the market and what incentives to invest and innovate exist.
- 3.43 In order to understand whether concerns may exist, it is important that we more fully understand consumer behaviour and offerings from providers across the market for VOD services. As set out in our framework, we also need to recognise the need not to unduly impede or inhibit innovation by platform providers, content providers or broadcasters in delivering services.

⁷¹ On-demand from each of the PSBs is available on all main TV platforms.

⁷² Long-form 'pull' viewing refers to watching programmes on-demand rather than short clips. CMR 2014, page 147, Figure 2.21.

⁷³ CMR 2014, page 64, Figure 1.45.

Conclusion

- 3.44 We consider that access to on-demand services is an important strategic issue in the evolution of TV services. We see an immediate need to understand the role linear TV platforms will play in delivering on-demand content and to understand whether, given the importance of linear TV to consumers at present, linear TV platform providers might be in a position to restrict access to other content, for example, in order to benefit its own content.
- 3.45 We want to understand the extent to which linear TV services are likely to remain important to consumers, the key characteristics on which consumers choose linear TV platforms, and how consumers are likely to access on-demand services via linear TV platforms and other platforms. While we have focused on Sky's platform so far (given it is the only platform subject to the AC Continuation Notice), we need to consider the question of access to on-demand services on linear TV platforms more broadly.
- 3.46 In order to carry out this analysis, we will now commence work to gather evidence in relation to access to on-demand services on TV platforms. We have published the Terms of Reference for this piece of work in parallel with this statement, setting out the scope and key questions which we plan to consider.

Future services

- 3.47 There is the opportunity for developments in content and in platforms to lead to greater choice for consumers, with a wider range of content made available across a range of traditional and new platforms, with this content provided in a more personalised and relevant way.
- 3.48 Content providers are continuing to evolve their services. The BBC has developed its Connected Red Button (CRB) service, which brings together linear TV, online content and the BBC iPlayer. The CRB is available on a range of platforms, including Virgin Media's TiVo and YouView STBs and some smart TVs,⁷⁴ though other platforms, such as Sky's do not currently support the technical capability needed to provide the CRB. Channel 4 has also recently announced plans to evolve its 4oD service to All 4, which will bring together linear TV, on-demand and online content through a common interface.⁷⁵ Newer providers, such as Netflix and Amazon Prime Instant Video, using internet delivery continue to develop their offerings as their services grow in popularity. Other new services such as Vodafone's or EE's new TV service may also become popular.
- 3.49 As discussed in the July 2014 Consultation, these services rely on capabilities not supported on Sky's current generation of STBs. In particular, these services may require the ability for content to be delivered directly from the internet (as opposed to from Sky's servers as is the case for the current generation of Sky STBs). However, any new STB developed by Sky may allow for a greater range of services to be supported. We recognised that development of new services as new capabilities evolved was an important area that we would continue to monitor, but said that we considered that it was too early to have a clear view on future services.

⁷⁴ *Inside the BBC: BBC Connected Red Button FAQs*, BBC,

<http://www.bbc.co.uk/corporate2/insidethebbc/whatwedo/redbuttonfaq/>.

⁷⁵ *Channel 4 to launch new digital service All 4*, Channel 4, 11 September 2014,

<http://www.channel4.com/info/press/news/channel-4-to-launch-new-digital-service-all-4>.

Stakeholder responses to the July 2014 Consultation

- 3.50 As well as regarding access for existing services to be important, stakeholders also argued that access to Sky's next generation of STB to provide new services was important and should be made available to third parties.
- 3.51 Respondents suggested that if access to any new generation of Sky STB were made available to third parties to provide enhanced interactive services that made use of additional capability, (such as the ability to deliver services via the internet), they would be interested in providing these services.
- 3.52 The BBC emphasised its development of the CRB, (although this is not currently available on Sky's platform), and said that regulation should cover access for both its existing services and future services including CRB and navigation to the BBC iPlayer via the red button.⁷⁶
- 3.53 BT discussed access to the Ethernet port in Sky's STBs, and potential new functionality available in any new STB. It said that access to the Ethernet port (particularly two-way access) would allow the provision of a range of services such as real time betting and play functionality, social media integration, and the ability to deliver video and audio content related to the underlying channel content.^{77,78} It considered other services may also develop if such access was available,⁷⁹ though noted that the specific services that may develop is unclear.⁸⁰ It argued that there should be a clear process for third parties to obtain access for new services, while new enhanced TV services would be covered by the ongoing AC regime.⁸¹
- 3.54 Sky made a number of points regarding new services and any new STB it launches. In relation to the services that could be supported and the need for access, it argued that regulatory best practice would be to forbear from regulation⁸² [3<].⁸³

Conclusion

- 3.55 A number of respondents to the July 2014 Consultation suggested that access to any new Sky STB would be important to allow them to develop services and that regulation should be imposed to allow this access.
- 3.56 We recognise that interactive and on-demand services will continue to develop, as will the platforms used to deliver this content, and we need to continue to monitor developments across the market to ensure consumers continue to benefit from new services.

⁷⁶ BBC response, paragraph 21.

⁷⁷ BT response, paragraph 2.49.

⁷⁸ Sky indicated that the key consideration is not access to the Ethernet port, but rather, relevant functions on the Sky STB to allow content to be streamed over-the-top (including, where applicable, access to the Internet). As such, BT's comments are related to functionality that does not exist on its current STBs, even though some of these STBs have Ethernet ports. See Sky's comments on responses to Ofcom's second consultation on regulation of Sky's provision of access control services, paragraphs 1.23 to 1.26.

⁷⁹ BT response, paragraphs 2.51 to 2.56.

⁸⁰ BT response, paragraph 2.57.

⁸¹ BT response, paragraph 2.60.

⁸² Sky's comments on responses to Ofcom's second consultation on regulation of Sky's provision of access control services, paragraphs 1.6 to 1.8.

⁸³ Sky response, paragraphs 9.1 to 9.4.

- 3.57 There is uncertainty as to how these services will develop. For example, new services that enhance linear TV channels with VOD content may emerge, or user interfaces with improved navigation and search capability may develop to allow the integration of linear broadcast and internet delivered content. These developments may also raise important questions regarding sustainable competition. For example, while the younger demographics may be more comfortable with accessing services across multiple devices, there is the potential for the majority of viewing to remain concentrated on the main TV in the household, both for linear and VOD. In this case there is the potential for traditional broadcast platforms to maintain an important role as a 'gateway' to viewers.
- 3.58 In addition, in relation to stakeholder responses, the extent to which these services may be dependent on functionality provided in future generations of Sky STBs is also uncertain. New functionality presents opportunities for innovation and investment. We need to recognise the need not to unduly impede or inhibit innovation by Sky and others in developing capabilities that allow services to develop.
- 3.59 Before considering whether any regulation is appropriate on any platform (or platforms), we need to understand how services may develop, and the access required to linear TV platforms to allow these services to be provided. Therefore, in addition to considering the question of existing VOD services further, as discussed in paragraph 3.46 above, we will also consider future services in the work we are commencing. Again, we consider it is appropriate to think about TV platforms in general, rather than focusing specifically on Sky, as well as taking into account the range of alternative ways that new content and services may be delivered. The Terms of Reference published alongside this statement cover this further work in relation to future services.

Summary of conclusions

- 3.60 Beyond linear TV, we have discussed three groups of services:
- i) Existing interactive services – interactive services that have traditionally been delivered via satellite to the Sky STB;
 - ii) Existing Video On Demand (VOD) services – services that are provided on some of Sky's existing STBs (i.e. Sky+HD STBs) and provide access to catch-up services offered by broadcasters; and
 - iii) Future services – new services that might rely on functionality not available on the current generation of Sky STBs (but may already be available on other platforms).
- 3.61 In relation to the first of these categories, we have concluded that, given that demand exists to provide existing interactive services that enhance linear TV, and that it is not clear that alternatives are sufficient, access to Sky's APIs is needed to provide interactive services. In Section 4 we discuss how to secure this access.
- 3.62 In relation to the other two categories above, we are publishing Terms of Reference setting out further work we intend to undertake to understand these services more, the access needed to provide these services, the incentives on platform operators to provide access for these services, and whether concerns that this access will not be forthcoming may arise.

Section 4

Securing Access to AC Services

Introduction

- 4.1 In Section 3 we explained why we consider that access for third parties to provide existing services through the APIs on Sky STBs remains important. We set out that in addition to Sky's linear TV services, it also provides interactive services (some of which have been traditionally delivered via broadcast satellite), and on-demand services such as the BBC iPlayer service.
- 4.2 We explained that in this section we would consider the first of these services (interactive services some of which have traditionally been delivered via satellite) and that we are commencing work in relation to the two other types of services: VOD services on TV platforms and future services.
- 4.3 In this section we set out our assessment of whether or not we should set new regulatory conditions, following the removal of the AC Continuation Notice, in order to ensure the continued provision of AC services provided by Sky to third parties. In presenting our assessment leading to our decision not to impose new conditions, we set out:
- 4.3.1 the analysis and proposals contained in our July 2014 Consultation;
 - 4.3.2 a discussion on stakeholder responses to those proposals;
 - 4.3.3 Sky's revised commitments; and
 - 4.3.4 an assessment of whether new regulatory conditions are required.
- 4.4 Stakeholders provided detailed submissions on all aspects of our consultation proposals. While we have had regard to the totality of the consultation responses, in reaching the decision set out in this statement we have not found it necessary to reach definitive conclusions on all aspects of our July 2014 Consultation and the responses to it. We therefore focus the discussion below on the matters that have been central to our decision not to impose replacement conditions.

The July 2014 Consultation

- 4.5 In Section 7 of the July 2014 Consultation we set out our assessment of the case for imposing new regulation on Sky having regard to: (i) the legal and economic framework set out in Section 6 of the consultation; (ii) the evidence received from stakeholders regarding demand, substitutability and third party concerns regarding access to Sky's AC services in the absence of regulation; and (iii) the evidence of Sky's intentions in relation to AC services following the removal of the AC Continuation Notice, as set out in its proposed commitments.
- 4.6 Following that assessment, we reached the view that there continued to be demand for access to Sky's AC services on both existing STBs and on any future STBs as well.
- 4.7 Having regard to our statutory duties and the relevant legal and economic framework, we explained our view that continued access to Sky's AC services is consistent with

the objectives set out in section 73 of the Act, and that the imposition of new regulatory conditions to replace the AC Continuation Notice *may* be an objectively justified and proportionate use of this power.

- 4.8 We considered that Sky was in a unique position as it has control of a significant platform as well as being active in content and channel provision; Sky's market position therefore, together with its vertical integration, could mean that it had mixed incentives in relation to the continued provision of AC services to third parties in the absence of regulation. We identified a concern that absent regulation Sky could deny access or offer it on less favourable terms. Consequently we considered whether there was value in ensuring access to Sky's APIs had a regulatory underpinning. In this regard we proposed draft regulatory conditions under section 73 and 74(2) of the Act, including a requirement to provide AC services to third parties on request; a requirement to provide those services on fair and reasonable terms (including charges); and transparency obligations, including the publication of a reference offer containing standard terms and conditions and the provision for Ofcom to request information relevant to these services.⁸⁴
- 4.9 We also considered the concerns that we had identified (and for which we had proposed setting replacement conditions) by reference to the voluntary commitments that Sky had proposed in the course of our review.⁸⁵ In that regard, our assessment indicated that the commitments appeared to satisfy the majority of concerns raised by stakeholders, including FTV and pay TV channel operators. Notably access would be retained for existing third party customers; pricing would be maintained; a reference offer would be published for potential new customers; and the commitments would be of unlimited duration providing investment certainty for broadcasters using AC services.⁸⁶
- 4.10 We discussed the case for conditions in light of Sky's proposed commitments.⁸⁷ We said there might be advantages associated with commitments such as greater certainty regarding pricing and the ability to develop new services delivered via satellite without having to negotiate commercially with Sky (except in relation to new services on any new generation of Sky STB). We considered that under conditions, charges would be set on FRND⁸⁸ terms, and this would allow Sky to recover development costs for new services, which could mean charges were higher than under commitments. Further, we noted that the draft conditions were limited to services for which we had identified demand and so may be narrower than the proposed commitments.
- 4.11 Conversely, we noted the commitments would not be enforceable by Ofcom in the same way as regulatory conditions and, while existing third party customers would have recourse under private law for breach of contract, this would not be the case for any new customers (those without a contract). We noted the views of certain stakeholders indicating that recourse to a regulatory process could be an important factor in some cases and we explained that imposing conditions would provide a greater degree of certainty in the event of future problems arising. We also noted that

⁸⁴ The draft conditions were set out in paragraphs 7.84 to 7.102 of the July 2014 Consultation.

⁸⁵ The differences between these commitments and the current commitments are discussed further in paragraph 4.74.

⁸⁶ July 2014 Consultation, paragraphs 7.121 to 7.130.

⁸⁷ July 2014 Consultation, paragraphs 7.131 to 7.145.

⁸⁸ Fair, reasonable and non-discriminatory.

in the commitments there was no explicit undertaking in relation to discrimination between internal supply by Sky and supply to external third parties.

- 4.12 In the light of our assessment, given the presence of Sky's commitments, our view was that the case for imposing new regulatory conditions on the removal of the AC Continuation Notice was finely balanced, as was the question of the best means of giving effect to our duties in sections 3 and 4 of the Act. We therefore consulted on two options following removal of the AC Continuation Notice, as follows:
- (i) not imposing replacement access-related conditions; and
 - (ii) the imposition of replacement access-related conditions under sections 45, 73 and 74 of the Act.

Stakeholder views on our July 2014 proposals

- 4.13 In this section we set out a summary of responses to the July 2014 Consultation and outline stakeholder views expressed on:
- 4.13.1 Ofcom's proposals;
 - 4.13.2 Sky's incentives;
 - 4.13.3 the imposition of conditions; and
 - 4.13.4 the adequacy of Sky's proposed commitments

General views on Ofcom's proposals

- 4.14 Stakeholders had divergent views on the assessment presented in the July 2014 Consultation and on whether or not we should impose replacement conditions on Sky following the removal of the AC Continuation Notice.
- 4.15 The BBC argued that it was "*necessary and appropriate to impose access-related conditions, notwithstanding Sky's proposed voluntary commitments*".⁸⁹ The BBC said that Sky's commitments were not an adequate tool to ensure access on FRND terms, citing concerns about certainty, transparency, the ability to independently assess terms and resolve disputes, and the lack of enforcement.⁹⁰
- 4.16 According to BT, Ofcom overstated the benefits of the commitments while ignoring certain benefits of the draft conditions and understated the risks associated with the commitments. Once these issues were addressed, BT considered that there was an overwhelming case for imposing new access-related conditions.⁹¹ BT argued that it was clear that "*the commitments would not prevent Sky from obtaining an unfair competitive advantage*" and it felt new access-related conditions were "*not only necessary to prevent such an adverse effect on competition and consumers, they [were] also manifestly proportionate*."⁹² It went on to say that as Sky had the incentive and ability to weaken any competitive constraint BT might present, it was

⁸⁹ BBC response, page 8, paragraph 24.

⁹⁰ BBC response, page 2.

⁹¹ BT response, paragraph 1.16.

⁹² BT response, paragraph 1.18.

essential Ofcom implemented an appropriate regime providing BT with certainty to underpin its ongoing investment in sports rights.⁹³

- 4.17 Channel 4 stated that Sky's proposed commitments were not sufficient to provide reassurance to broadcasters that there would continue to be guaranteed access to services which enhance the enjoyment of linear channels. It argued the commitments were narrow in scope, were not FRND and were non-binding.⁹⁴ Channel 4 said that it did not believe Sky's commitments provided the same level of surety as Ofcom's draft conditions.⁹⁵
- 4.18 ITV said Ofcom should impose replacement access-related conditions to require Sky to provide FRND access to new and existing customers who wanted access to Sky's APIs. ITV said if no regulation was in place, it would enable Sky to engage in discriminatory behaviour in future, in a way that would be detrimental to consumers.⁹⁶
- 4.19 S4C reported that "*the wording of Sky's proposed commitments [were] generally acceptable*" but it had concerns about enforceability, changes to terms and conditions and while it welcomed the financial certainty of a cap under commitments, it was unclear whether it would be on FRND terms.⁹⁷ S4C said that unless solutions to the concerns it had raised were found, it agreed with Ofcom's case for replacement conditions. It said a guarantee of continued availability of AC services on FRND terms was of key importance to S4C.⁹⁸
- 4.20 Sky's view was that the commitments were a pragmatic and proportionate means of addressing an issue that in practice did not raise significant consumer, competition or public interest issues. It said Ofcom could have no reasonable basis for believing that Sky would not abide by the commitments, whether in spirit or in reality. It pointed out that the commitments did not preclude Ofcom from deciding in the future that regulation was required, if the commitments regime was found not to be working as desired.⁹⁹
- 4.21 Moreover, Sky disputed our assessment of its incentives to supply AC services in future. Sky said that it "*operates in a world of strong and growing platform competition*" and that "*[i]n 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*".¹⁰⁰ Sky said that there is "*no sound basis*" for the view that it has, or may have, an incentive to withhold access to AC services from third parties and that, therefore, it should be compelled by regulation to provide them.¹⁰¹ Rather, Sky said, Ofcom should accept the commitments that Sky had proposed. Sky provided a further amended set of commitments with its consultation response, which were designed to "*meet the residual concerns expressed by Ofcom in the [July 2014] consultation*".¹⁰² We discuss Sky's commitments in more detail in paragraphs 4.69 to 4.74.4 below.

⁹³ BT response, paragraph 3.14.

⁹⁴ Channel 4 response, page 2.

⁹⁵ Channel 4 response, page 4.

⁹⁶ ITV response.

⁹⁷ S4C response, pages 1 to 2.

⁹⁸ S4C response, pages 2 to 3.

⁹⁹ Sky response, paragraph 3.

¹⁰⁰ Sky response, paragraphs 8 to 10.

¹⁰¹ Sky response, paragraph 16.

¹⁰² Sky response, paragraphs 18 to 19. Sky's commitments can be found at Annex 2 to this statement.

Views on Sky's incentives

- 4.22 The BBC stated that it agreed that “*Sky’s market position, with sole control of a vertically integrated platform and 10.6m subscribers mean[t] access to Sky’s STB was a critical route to market for interactive TV services.*”¹⁰³ It explained its view that, depending on the type of interactive service and its overall strategy, Sky was likely to face mixed incentives.¹⁰⁴ The BBC considered that Sky may not have the necessary commercial incentives to make all of the BBC’s interactive TV services available on FRND terms. The BBC noted Sky’s views that it makes content available, such as Wimbledon streams, because it is valued by customers. However, taking the BBC’s interactive TV services as a whole, the BBC considered that “*views on what is ‘valuable’ and how ‘value’ should be measured is likely to differ between a PSB and Sky as a commercial platform provider and channel provider.*”¹⁰⁵
- 4.23 BT also agreed that Sky’s vertical integration and market position in pay TV created a concern about access to AC services.¹⁰⁶ BT argued that it was not just Sky’s vertical integration and platform control, but rather Sky’s absolute and relative scale combined with its vertical integration. BT argued that other platforms are in a fundamentally different bargaining position to Sky vis-a-vis channel access, which meant they have fundamentally different incentives to Sky.¹⁰⁷
- 4.24 BT went on to say that Sky’s control of a scale bottleneck meant it had the ability to limit competition from third parties by affecting the quality and look and feel of TV services provided over its platform.¹⁰⁸ Further BT argued that while Sky might wish to provide the most attractive pay TV offering from third parties, in practice, its incentives as a channel provider to limit potential competition would outweigh this desire.¹⁰⁹
- 4.25 According to BT, because of Sky’s “*significant market power, incumbency advantages and persistent super-normal profits across its pay TV business, BT does not underestimate the difficulties of building a sustainable sports channel.*”¹¹⁰
- 4.26 BT said Sky intended to act on its incentives to limit competition if regulation was removed; it said that if Sky had said the current regulation had a chilling effect on its willingness to innovate and invest, and that it incurred material costs to test third party applications, it followed that Sky would not provide any third party access once the regulation was removed and existing contracts ended.¹¹¹ BT also referred to Sky’s submissions and suggested Sky itself had said it had not provided certain services to prevent third parties from being able to offer corresponding services.¹¹²
- 4.27 Sky considered that Ofcom failed to give appropriate weight to the significance of platform competition and Sky’s strategy.¹¹³ Sky stated that there was strong and increasing competition among an ever-increasing range of platforms and services

¹⁰³ BBC response, page 2.

¹⁰⁴ BBC response, page 2.

¹⁰⁵ BBC response, page 7, paragraph 20.

¹⁰⁶ BT response, paragraph 3.4.

¹⁰⁷ BT response, paragraph 3.5.

¹⁰⁸ BT response, paragraph 3.7.

¹⁰⁹ BT response, paragraph 3.8.

¹¹⁰ BT response, paragraph 3.14.

¹¹¹ BT response, paragraphs 3.15 to 3.18.

¹¹² BT response, paragraph 3.20.

¹¹³ Sky response, paragraphs 6.13 to 6.17.

and noted that Ofcom itself had recently recognised the level of platform proliferation.¹¹⁴ It argued that Ofcom had given “*only cursory consideration to the impact of such competition on Sky’s incentives, and [was] somewhat dismissive of its impact.*”¹¹⁵ It said the attractiveness of its platform was not only determined by the services Sky itself provided, but also by the third party services it offered.¹¹⁶ It added that Ofcom had not carried out a full market analysis in order to evaluate whether Sky’s incentive to withhold AC services dominated its incentive to supply those services.¹¹⁷

- 4.28 Sky said its dominant incentive was to make its platform as attractive as possible. Enhanced services provided on its satellite platform by third parties were predominantly used by Sky subscribers. Sky gave examples of where it has included third party services on its own non-regulated services such as its catch-up service, NOW TV and Sky+ app.¹¹⁸ It said if PSB services were not included in new services or functionality developed by Sky, they would be seen by Sky customers as being incomplete, and not particularly attractive.¹¹⁹

Views on the imposition of conditions

- 4.29 The BBC said it could not see a way to overcome the concerns associated with the voluntary commitments; it said the issues could only be overcome by the alternative approach of new Ofcom regulation.¹²⁰ The BBC also commented that although the draft conditions did not include a cap for pricing unlike the commitments, it would not expect charges to materially increase and thought they could potentially fall upon the application of FRND principles.¹²¹
- 4.30 Channel 4 believed the case for replacement access-related conditions was strong. It said the core FRND principles of the existing regulation were important and should remain. It argued that absent regulation, Sky would seek to ensure differentiation between its own and third-party services.¹²² Channel 4 suggested that Ofcom consider ensuring that AC charges are on a cost-recovery basis only.¹²³
- 4.31 S4C said conditions were required to guarantee access on FRND terms. It said that the wording of the draft conditions, underpinned by Ofcom’s enforcement powers, would secure this access.¹²⁴
- 4.32 BT said that the proposed new access-related conditions, with some amendments, would secure effective access to Sky’s AC services to allow the provision of enhanced TV services.¹²⁵ It said the conditions would have to be FRND and reflect

¹¹⁴ Sky response, paragraph 6.14.

¹¹⁵ Sky response, paragraph 6.15.

¹¹⁶ Sky response, paragraph 6.16.

¹¹⁷ Sky response, paragraph 4.3.

¹¹⁸ Sky response, paragraph 10.

¹¹⁹ Sky response, paragraph 6.21.

¹²⁰ BBC response, page 6, paragraph 15.

¹²¹ BBC response, page 8, paragraph 23.

¹²² Channel 4 response, page 3.

¹²³ Channel 4 response, page 4.

¹²⁴ S4C response, page 2.

¹²⁵ BT response, Annex 1.

- the cost of providing the services.¹²⁶ BT argued that the conditions would “*not deter Sky from investing and innovating and would not produce adverse effects for Sky*”.¹²⁷
- 4.33 BT stated that under Condition 2, Sky would be required to offer AC services on FRND terms and conditions (including charges) as is currently the case under the AC Continuation Notice.¹²⁸ It said this would mean that all AC customers would have certainty that the prices they were charged were cost oriented.¹²⁹ BT also noted that Condition 2 would not impact the existing TPS regime, since it replicated what was already in place and should be fully compatible.¹³⁰
- 4.34 Under conditions, BT said that there would not be a risk of Sky seeking to interpret the concept of ‘reasonable’ terms in a way that was adverse to fair and effective competition, as the interpretation of the new access conditions would ultimately be a matter for Ofcom,¹³¹ whereas the interpretation of the commitments would be subject to Sky’s discretion.¹³² BT was concerned about Condition 1.3¹³³ and the reference to “*as soon as reasonably practicable*” as it felt there was scope for interpretation as to what was “*reasonably practicable*” and Sky could delay the process. BT said Ofcom should adopt a clear framework with specified timetables as to how Sky should address AC requests. Further Sky should also publish this framework.¹³⁴
- 4.35 Sky considered “*the case put forward by Ofcom in support of imposing new access remedies on Sky is without merit.*”¹³⁵ It said an argument for regulation could not be based on the “*mere fact that a firm has such mixed incentives, nor on the mere possibility that the incentive to withhold outweigh[ed] the incentive to supply.*”¹³⁶ Further, Sky submitted that the absence of an inter-platform competition assessment by Ofcom meant there was no basis on which to make an assessment of the extent to which this affected Sky’s incentives. It said evidence demonstrated that inter-platform competition was a key driver of many elements of Sky’s strategy and behaviour.¹³⁷
- 4.36 Sky said the type of regulation proposed by Ofcom was “*highly intrusive*” and regulation should only be adopted when the case for it was clear and compelling. Sky also said imposing intrusive regulation [X] went against Ofcom’s regulatory principle to “*operate with a bias against regulation*”.¹³⁸

¹²⁶ BT response, paragraph 1.13.

¹²⁷ BT response, paragraph 1.15.

¹²⁸ BT response, paragraph 5.10.

¹²⁹ BT response, paragraph 5.11.

¹³⁰ BT response, paragraph 5.12.

¹³¹ BT noted this would be in accordance with published guidelines.

¹³² BT response, paragraph 5.15.

¹³³ Condition 1.3. states “The provision of Access Control Services under this condition must take place as soon as reasonably practicable after receiving the request from a Third Party”. See Annex 6 of the July 2014 Consultation, page 85.

¹³⁴ BT response, Annex 2.

¹³⁵ Sky response, paragraph 5.

¹³⁶ Sky response, paragraphs 4.2.

¹³⁷ Sky response, paragraph 4.9.

¹³⁸ Sky response, paragraph 17.

- 4.37 Sky also questioned whether Ofcom had the necessary legal powers under sections 73 and 74 of the Act to impose the ex-ante access-related conditions in this context.¹³⁹
- 4.38 Sky argued that definitions of AC services under the draft conditions were “*overly broad*” and would cover services Ofcom had stated it did not see a need for regulation to cover. It said there would be an ongoing lack of clarity as to whether a particular service was covered by the regulation and the conditions also required Sky to provide access to an interactive menu where no such obligation exists today. Sky said that some of the obligations in the draft conditions were more onerous than those imposed under the AC Continuation Notice.¹⁴⁰

Views on Sky's proposed commitments

- 4.39 Stakeholders raised a number of concerns about the commitments that had been offered by Sky at the time of the July 2014 Consultation by reference to the concerns they had about access to Sky's AC services in the absence of regulation. The main points raised centred on the following broad themes:
- 4.39.1 Concerns about the **scope** of the proposed commitments in relation to **AC services** provided by third parties on **current and future generations** of STB;
 - 4.39.2 Relating to the above, BT raised specific arguments about its **ability to bid for sports rights** in the absence of regulatory conditions;
 - 4.39.3 Concerns about **pricing** and other aspects of the **terms and conditions**; and
 - 4.39.4 Ofcom's ability to **enforce** under commitments compared to conditions.

Scope of and access to AC services under the commitments

- 4.40 BT considered the scope of Sky's proposed commitments was limited. It said Sky's offer in the commitments to allow third parties to access the functionality of any new STBs did not extend to the development of any new enhanced or interactive TV services.¹⁴¹ BT thought it important that Ofcom did not consider access in a static way limited to the current range of enhanced TV services (i.e. just red button and commercial watermarking), and that it should consider the importance of future enhanced TV services.¹⁴²
- 4.41 BT said that third parties would only be entitled to develop new enhanced TV services which rely on Sky's AC services “*on the current generations of STBs*”.¹⁴³ It noted however that “*in practice the development of new enhanced TV services using Sky's current boxes seem[ed] rather unlikely*”.¹⁴⁴

¹³⁹ Sky response, paragraph 21.

¹⁴⁰ Sky response, paragraph 21.

¹⁴¹ BT response, paragraph 4.3.

¹⁴² BT response, paragraph 4.7.

¹⁴³ BT response, paragraph 4.10.

¹⁴⁴ BT response, paragraph 4.8.

- 4.42 The BBC said that regulated access control must include the navigation link from the enhanced TV service to other complementary services accessible via the Sky STB, including the BBC iPlayer.¹⁴⁵
- 4.43 Channel 4 said the commitments were limited to the specific services offered today, thereby ruling out access to improved services which may have a greater appeal to broadcasters, such as the ability to use the Ethernet port to provide IP delivered services and using open standards such as HTML5 to develop these services.¹⁴⁶

BT's arguments on its ability to bid for sports rights

- 4.44 As discussed in paragraph 3.23, BT considers red button services to be important to manage clashes between fixtures on its sports channels. In this regard BT stated that delivering additional alternative videostreams through the Sky red button was critical for it to be able to fully realise its investment in its sports rights.¹⁴⁷ This is because the red button functionality enables BT to broadcast all available live matches (which are played simultaneously). BT told us that access to alternative videostreams on the Sky platform was [redacted].¹⁴⁸
- 4.45 BT went on to say that [redacted].¹⁴⁹ In BT's view, Sky could limit the competition it faced from BT when bidding for sports rights by creating significant bidding uncertainty for BT as to its ability to exploit rights fully, or achieve enhanced revenue streams, via the red button. It argued that this "*would help preserve [Sky's] structural bidding advantages and thereby protect Sky's dominance at the wholesale and retail levels*".¹⁵⁰
- 4.46 In response, Sky stated that BT's assertions were without merit and that "*it would be irrational to believe that an ability to deliver enhanced TV services on Sky's DTH¹⁵¹ 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.*"¹⁵² Sky argued that BT had been able to build a subscriber base to its premium sports channels of around five million subscribers (including an estimated over one million paying subscribers on Sky's satellite platform) in less than a year, without providing any interactive enhancements to those channels on Sky's platform.¹⁵³
- 4.47 Sky said it had an incentive to enable third party premium sports channels to enhance their channels on Sky's platform.¹⁵⁴ Sky estimated that around [redacted] of subscribers to BT Sport on Sky's platform were also Sky subscribers. As such, Sky said it had a good incentive to allow BT to be able to deliver its services.¹⁵⁵ Sky said that a combination of the commitments it was offering and the inclusion of a

¹⁴⁵ BBC response, page 3.

¹⁴⁶ Channel 4 response, pages 2 to 3.

¹⁴⁷ BT response, paragraph 2.13.

¹⁴⁸ BT told us that, [redacted] and that its means of doing so on Sky's platform was via the red button, BT response, paragraph 2.13 to 2.16.

¹⁴⁹ BT response, paragraph 2.14.

¹⁵⁰ BT response, paragraph 3.9.

¹⁵¹ Direct-to-home.

¹⁵² Sky response, paragraph 7.2.

¹⁵³ Sky response, paragraph 7.19.

¹⁵⁴ Sky response, paragraph 7.4.

¹⁵⁵ Sky response, paragraph 7.5.

perpetual right of renewal in BT's existing agreement with Sky should eliminate any concerns.¹⁵⁶

Pricing and terms & conditions

- 4.48 The BBC raised a number of concerns about the terms of access to Sky's AC services in the absence of regulatory conditions. The BBC said that voluntary commitments exposed third parties to the risk of not having access on FRND terms and that there was a risk of protracted negotiations around 'non-negotiable' terms.¹⁵⁷ The BBC noted that there would be no obligation for Sky's standard terms to be FRND under the proposed commitments. Further, Sky alone would be able to determine whether standard terms were amended for 'good reason'.¹⁵⁸ Concern was also raised in relation to the technical requirements not being published and having to comment on the principle of standard terms without having sight of them in the consultation.¹⁵⁹
- 4.49 Similarly Channel 4 was concerned that the proposed commitments were not FRND.¹⁶⁰ It said these terms were "*basic and enduring principles which should be maintained*" especially because, as it said Ofcom noted, there was little evidence to show that they resulted in a significant financial burden on Sky.¹⁶¹
- 4.50 S4C welcomed the financial certainty of a cap on prices of £100,000p.a. but said there was no clarity on how the fees were calculated or whether they would be on FRND terms.¹⁶² It was concerned about the possibility of Sky changing its standard terms and conditions in the future, in the absence of the ability to refer disputes to Ofcom.¹⁶³
- 4.51 BT did not believe that Sky's proposals to fix some of its AC charges were beneficial for third parties.¹⁶⁴ It noted that voting, betting and gaming services were excluded but said growth in demand may be expected in the future and yet Sky had not set out any framework for how prices would be determined.¹⁶⁵ It noted that for authentication services, the calculation would (as it is today) be calculated on share of costs, but that under commitments, third parties would not have the protection of FRND terms.¹⁶⁶ BT said most importantly the commitments would mean AC services were outside the existing TPS framework and pricing guidelines. It said Ofcom had not addressed what impact this would have on the recovery of common costs across the TPS regime and the potential for pricing distortions.¹⁶⁷ BT was also concerned that it was not clear whether the maximum price cap put forward by Sky represented a good deal for customers.¹⁶⁸

¹⁵⁶ Sky response, paragraph 7.11.

¹⁵⁷ BBC response, page 6, paragraph 13.

¹⁵⁸ BBC response, page 5, paragraph 12.

¹⁵⁹ BBC response, page 5, paragraph 12.

¹⁶⁰ Channel 4 response, page 2.

¹⁶¹ Channel 4 response, page 1.

¹⁶² S4C response, page 1.

¹⁶³ S4C response, page 1 to 2.

¹⁶⁴ BT response, paragraph 4.32.

¹⁶⁵ BT response, paragraph 4.33.

¹⁶⁶ BT response, paragraph 4.34.

¹⁶⁷ BT response, paragraph 4.36.

¹⁶⁸ BT response, paragraph 4.38.

- 4.52 BT thought the commitments would lead to “*profound uncertainty*”¹⁶⁹ and said Sky’s standard terms would not be known up until the day the AC Continuation Notice was removed.¹⁷⁰ It said Sky could interpret what “reasonable” meant in relation to setting or changing terms.¹⁷¹
- 4.53 Sky considered that the BBC, as the main user of AC services, had sufficient bargaining power to secure provision of AC services.¹⁷² It considered BT was a large organisation with a high turnover that was fully capable of negotiating from a position of strength. It said it had a strong market position in the telecoms sector which it was bolstering with a pay TV offering.¹⁷³
- 4.54 Sky set out a number of points in its response relating to concerns raised in the July 2014 Consultation regarding terms and conditions. These included concerns relating to the expiry of existing agreements, the potential for Sky to favour itself unduly, changes to terms and conditions and when these came into effect, uncertainty for new entrants, confidentiality of technical requirements, interpretation of reasonable terms, and sharing of costs for authentication services.¹⁷⁴ Sky responded to these points by providing updated commitments to address these concerns (discussed below in paragraphs 4.69 to 4.74.4).
- 4.55 Sky said that BT’s concerns with the impact on other TPS charges were incorrect and that it was not right to consider that charges for AC services provided by Sky could have any significant effect on charges for other TPS services provided by Sky. It said the costs and revenues associated with AC services were small, and there was no sound reason to believe that this would change significantly in the future. Further, it said that TPS charges comprised a de minimis part of the costs of delivering services via Sky’s satellite platform; and also that TPS charges for CA services and EPG listings were required to be not unduly discriminatory.¹⁷⁵

Enforcement

- 4.56 A number of respondents raised concerns about Ofcom’s ability to hold Sky to its commitments in the absence of regulatory conditions. These stakeholders argued that Ofcom’s inability to undertake such enforcement action was a reason why Ofcom should impose regulatory conditions.
- 4.57 The BBC stated that under commitments, there would be no route for enforcement action where there was a problem gaining access or with terms for access. In particular, there would be no independent route to require changes to Sky’s terms or to resolve a dispute; it would be up to Sky to be the sole judge of whether standard terms were amended for ‘good reason’.¹⁷⁶ It continued stating that while Ofcom had said it would subsequently propose new regulations if the commitments did not have the necessary effect, this would not be speedy and responsive. The BBC felt that issues would be raised at the end of a series of problems rather than in response to a

¹⁶⁹ BT response, paragraphs 4.40 to 4.62.

¹⁷⁰ BT response, paragraph 4.43.

¹⁷¹ BT response, paragraph 4.54.

¹⁷² Sky response, paragraph 6.19.

¹⁷³ Sky response, paragraphs 7.24 to 7.25.

¹⁷⁴ Sky response, Section 10.

¹⁷⁵ Sky submission on responses to Ofcom’s second consultation, paragraph 1.45.

¹⁷⁶ BBC response, page 5, paragraph 12a.

particular problem and that depending on the timing, new regulation could require a new market analysis which would take time to complete.¹⁷⁷

- 4.58 The BBC noted that Sky had said that neither Ofcom nor Ofel had been called on to resolve a dispute in relation to AC services; this was according to the BBC, likely to be the result of the presence of regulation having a moderating effect. However it went on to argue that even under the existing regime it had had *“a number of problems in securing access to the Sky platform, even with the benefit of the current Continuation Notice providing a regulatory back-stop.”*¹⁷⁸ It concluded stating that *“the approach of voluntary commitments therefore exposed third parties to the risk of no access on FRND terms, protracted negotiations around ‘non-negotiable’ terms, and/or no independent dispute resolution or enforcement route.”*¹⁷⁹ The BBC said it could not see a way to overcome *“the major structural limitations of voluntary commitments, particularly regarding independent assessment of terms, dispute resolution and enforcement. These can only be overcome by the alternative approach of new Ofcom regulation.”*¹⁸⁰
- 4.59 S4C stated that it had a fundamental concern regarding the lack of enforceability of the commitments. It said in the future, there might be a time when *“the reputational damage to Sky from breaching its voluntary commitments might be outweighed by other commercial or policy considerations”*.¹⁸¹ S4C questioned whether it would be possible for a broadcaster to enter into a long-term contract with Sky containing the proposed commitments, prior to the AC Continuation Notice being removed. It also considered whether a contractual dispute resolution clause could be incorporated, giving Ofcom the right to make a determination should parties fail to agree on revised terms.¹⁸²
- 4.60 Likewise BT said the fundamental shortcoming with the commitments was that they were not enforceable.¹⁸³ It argued that Sky would suffer no reputational damage as a result of departing from its commitments.¹⁸⁴ It also said there were many *“grey areas”* where the interpretation of the commitments would be down to Sky and therefore Sky would not have to renege on its commitments to impede fair and effective competition.¹⁸⁵ BT also considered that even if Ofcom monitored compliance with the commitments, it would have no remedy available to deal with any non-compliance.¹⁸⁶
- 4.61 The BBC stated that the possibility of a private court action only applied to a broadcaster with a contract that it might argue Sky had breached, whereas this option would not be available for a new broadcaster seeking access.¹⁸⁷
- 4.62 [X]¹⁸⁸

¹⁷⁷ BBC response, page 6, paragraph 12b.

¹⁷⁸ BBC response, page 5 to 6, paragraphs 12 to 13.

¹⁷⁹ BBC response, page 6, paragraph 13.

¹⁸⁰ BBC response, page 6, paragraph 15.

¹⁸¹ S4C response, page 1.

¹⁸² S4C response, page 3.

¹⁸³ BT response, paragraph 1.10.

¹⁸⁴ BT response, paragraph 4.65.

¹⁸⁵ BT response, paragraphs 1.10 and 1.11, and BT's "Commentary on Sky's response to Ofcom's Review of Sky's Access Control Regulation", paragraph 4.5.

¹⁸⁶ BT response, paragraph 4.77.

¹⁸⁷ BBC response, page 6, paragraph 12.

¹⁸⁸ BT response, paragraph 4.22.

- 4.63 Sky said there was “*no question of Sky departing*” from the commitments and it would suffer reputational damage if it did not adhere to them. It considered there would be “*little practical impact*” on existing or prospective AC customers as Ofcom would always be able to consider imposing conditions in the event that Sky was not complying with the commitments. Sky said it had an unblemished record in the provision of AC services and noted there were several previous instances of Ofcom accepting informal commitments.¹⁸⁹
- 4.64 As discussed in paragraph 4.71.1 below, to address enforcement concerns relating to existing third party customers, Sky said it had updated its commitments 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.¹⁹⁰
- 4.65 Sky stated it had also updated its commitments to include a requirement on it to provide AC services to new entrants as soon “*as reasonably practicable*” after receiving a request and to include an obligation on Sky to inform Ofcom on receipt of any request for AC services from a potential new customer. Sky said 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.¹⁹¹
- 4.66 Sky said interactive services were expensive to develop and operate and could not often be justified by broadcasters and that therefore it was unlikely that a new third party provider would request access to provide enhanced TV broadcast services (on Sky’s current generation of STBs).¹⁹²
- 4.67 In relation to new entrants of broadcasting sports channels, Sky said it would abide by its commitments and it strongly objected to the idea that it would breach the commitments. It said Ofcom had no justifiable reason to believe that Sky would behave in this way.¹⁹³
- 4.68 Sky said any new entrants (in relation to premium sports channels) would be well-resourced businesses¹⁹⁴ and would be well-used to dealing with uncertainty, and adjusting their plans as circumstances change.¹⁹⁵ Further Sky considered that they would be likely to have a strong online presence and may view red button services as an unattractive way of delivering content to consumers.¹⁹⁶ It continued arguing that the idea that new entrants could decide not to bid substantial amounts for sports rights because of concerns about adherence to Sky’s commitments was not credible.¹⁹⁷ It said in the unlikely event that Sky did not abide by its commitments, the new entrant would have plenty of time for Ofcom to intervene to address the situation.¹⁹⁸

¹⁸⁹ Sky response, paragraph 10.4.

¹⁹⁰ Sky response, paragraph 10.5.2.

¹⁹¹ Sky response, paragraph 10.5.10.

¹⁹² Sky response, paragraph 6.19.

¹⁹³ Sky response, paragraph 7.77.

¹⁹⁴ Sky response, paragraph 7.79.

¹⁹⁵ Sky response, paragraph 7.81.

¹⁹⁶ Sky response, paragraph 7.80.

¹⁹⁷ Sky response, paragraph 7.81.

¹⁹⁸ Sky response, paragraph 7.82.i.

Sky's September 2014 commitments

- 4.69 As part of its request to remove the AC Continuation Notice in January 2013, Sky offered to commit to providing access to AC services until 2016. Sky has modified its commitments on several occasions since then in order to respond to concerns raised by Ofcom and stakeholders.¹⁹⁹
- 4.70 As part of its response to the July 2014 Consultation, Sky provided a further set of revised commitments on 17 September 2014. In providing these commitments Sky stated that it was doing so “*to meet the residual concerns expressed by Ofcom*”.²⁰⁰
- 4.71 These commitments are set out in full at Annex 2 and are summarised below:
- 4.71.1 the commitments will be of **unlimited duration** and will remain in place until Ofcom notifies Sky that they are no longer required and third parties will have the **right to renew existing contracts** on their **current terms**, effectively **protecting current supply indefinitely**;
 - 4.71.2 the commitments include a list of named interactive **services** (covering all services currently or recently used by third parties) that **will continue to be provided on existing and new generations of STB** (without excluding that other services may also be provided on request) and there is scope for new enhanced TV services that use the same functionality as existing services on current STBs, but on any future generations of STBs new services may be provided through commercial negotiation;
 - 4.71.3 Sky will commit to provide services on **fair, reasonable and non-discriminatory terms** and commits to only changing these terms and conditions where there is reasonable justification;
 - 4.71.4 Sky will set a **price cap at £100k per annum** for access to the current services on the current and any future STB, though there will be additional charges for some services;
 - 4.71.5 Sky will **publish a set of standard terms and conditions** for all customers and prospective customers to see and the commitments will be publically available and will be signed by Sky's CEO;
 - 4.71.6 Sky will **notify Ofcom** each time a **new customer requests access** to provide the named services and will commit to **providing access** to those customers on the standard terms and conditions **as soon as reasonably practicable**; and
 - 4.71.7 Sky will provide to Ofcom on written request all information it requires to **monitor adherence to the commitments**.
- 4.72 These commitments will be incorporated into current and new contracts through Sky's standard terms.

¹⁹⁹ The revisions over the past two years have focussed on a number of points: contract end dates and the right of renewal; provision of existing services over current and new STBs; charges for services; terms and conditions; and the incorporation of provision for new, prospective customers.

²⁰⁰ Sky response, paragraph 18.

- 4.73 The provision of video services via means other than digital satellite and the making available of an EPG or similar navigation service on both existing and future STBs is excluded from the commitments.
- 4.74 As discussed in paragraph 4.69, to produce this latest version of the commitments, Sky has made a number of key amendments compared to the version published in the July 2014 Consultation. The main changes are outlined below:
- 4.74.1 Sky has committed to offer its customers the **option to renew their contracts on their existing contractual terms** or to renew the contracts on Sky's proposed Standard Terms.²⁰¹
- 4.74.2 **Sky will notify Ofcom** within 30 days of receiving a request for access to provide the named services from **a new and/or prospective customer** and will commit to providing **access for new customers** to provide those services on its Standard Terms at the standard charges **as soon as reasonably practicable**.
- 4.74.3 Sky will **notify Ofcom** in advance of any **changes being made to the Standard Terms** or its terms for the provision of Technical Services²⁰² and will **not alter these terms without reasonable justification**.
- 4.74.4 Sky has committed to offer access to provide its named services on **fair, reasonable and non-discriminatory terms** (and the non-discrimination clause includes a direct reference to Sky's own use of services).

Our assessment of the need for replacement conditions

- 4.75 As set out in Section 2, the statutory framework requires us to determine whether or not to set replacement conditions before we remove the AC Continuation Notice. It also sets out the matters that must be considered in order to set such conditions.
- 4.76 Section 47 of the Act sets out the general test that we are required to apply when setting any regulatory conditions. In order to impose a regulatory condition, we are required to be satisfied that the condition is objectively justifiable, proportionate, non-discriminatory, and transparent. While each of these criteria is of equal importance when satisfying the section 47 tests, the question of the proportionality of imposing new conditions is particularly important given the existence of: (i) the contracts in place between Sky and third parties with existing access to AC services, and (ii) Sky's proposed commitments.
- 4.77 The Competition Appeal Tribunal has explained that the principle of proportionality consists of the following elements. These are that the measure: *"(1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued."*²⁰³ This is also consistent with our general regulatory principles, which include: operating with a bias against intervention, but with a willingness to intervene promptly and effectively where required, and always seeking the least intrusive regulatory mechanisms to

²⁰¹ "Standard Terms" is a term defined by Sky in its commitments. See Annex 2 of this document.

²⁰² "Technical Services" is a term defined by Sky in its commitments. See Annex 2 of this document.

²⁰³ *Tesco. Barclays Bank Plc v Competition Commission* [2009] CAT 27.

achieve our policy objectives. Our objective in this context, as set out in Section 3, is to ensure the continued availability of access to AC services for third parties on Sky's platform.

4.78 In our assessment below, we consider:

- 4.78.1 the counterfactual, including the contractual position for Sky's existing customers for AC services and Sky's commitments;
- 4.78.2 whether new regulation is required to address the potential concerns we identified in our July 2014 Consultation and those identified by stakeholders, regarding access to AC services in the absence of regulation, or whether the existing contractual position supported by Sky's commitments would be sufficient (by reference to each of the issues highlighted above).

The counterfactual

- 4.79 In our July 2014 Consultation, our assessment at the end of Section 7 focused on whether regulation was required given Sky's commitments and we reported that, in our view, the case was finely balanced. Sky argued in its response to the July 2014 Consultation that any assessment of the need for regulation should occur against a counterfactual of what would happen, or was likely to happen, absent that regulation.²⁰⁴ It said this meant that absent formal regulation, Sky would be operating under the commitments it had offered to Ofcom.²⁰⁵ BT agreed that the correct counterfactual for considering the need for Ofcom's draft conditions is Sky's proposed commitments and that it had adopted this approach in its response to Ofcom's recent consultation.²⁰⁶
- 4.80 We agree that the appropriate basis for our assessment needs to take place having regard to the commitments proposed by Sky. While certain stakeholders have questioned whether Sky would have the incentive to abide by the commitments once the AC Continuation Notice has been removed and whether the reputational effects of it not doing so would be sufficiently strong, in our view, in the absence of any evidence to indicate to the contrary, it is appropriate to proceed on the basis that Sky will respect the commitments entered into.
- 4.81 In addition to the commitments, the existing contracts for AC services form part of the counterfactual. We understand BT and the BBC have AC contractual supply to [X].²⁰⁷ Sky has indicated through its commitments that it will offer a contract extension to the other AC customers which would give all existing customers the certainty of contractual supply without any regulatory intervention.
- 4.82 As discussed in paragraph 4.70, since the July 2014 Consultation, Sky has offered revised commitments including the offer to give third parties the right to renew their contracts on an indefinite basis. This means that the contracts will remain in place for as long as they are required by the relevant broadcaster.

²⁰⁴ Sky response, paragraph 5.1.

²⁰⁵ Sky response, paragraph 5.2.1.

²⁰⁶ BT Commentary on Sky's Response to Ofcom's Review of Sky's Access Control Regulation, paragraph 6.2.

²⁰⁷ Email from Sky to Ofcom dated 1 October 2014 and note of meeting between Ofcom and Sky held on 28 March 2014.

Assessment of whether regulation is required to secure access for existing third party services

- 4.83 In this section we set out our views on the issues raised by stakeholders in their consultation responses and then discuss the implications for existing third party AC customers and services.

Sky's incentives to provide access to its APIs

- 4.84 We raised the question in our July 2014 Consultation of the potential for Sky to have mixed incentives given its role as a platform operator and a provider of content and said we were concerned these incentives could affect the ability of third parties to gain access to Sky's APIs. We note the views of Sky's customers for AC services, who considered that such mixed incentives did exist given Sky's market position. However we also note Sky's view that it is facing increasing platform competition from the proliferation of new services and platforms coming to market and needs to make its platform as attractive as possible to subscribers. Moreover, Sky presented evidence of actions in terms of reaching agreements with broadcasters to carry their content on its platforms in other contexts. In our view the evidence on Sky's incentives in relation to AC services is inconclusive.
- 4.85 In any event, notwithstanding such potential incentives, we note that Sky has offered contract extensions to certain of its customers for AC services, that these offers have been taken up and that Sky has offered commitments to provide access to its APIs. This evidence would point towards third parties being able to continue gaining access on an ongoing basis, despite any mixed incentives on the part of Sky.

Scope of and access to AC services under the commitments

- 4.86 Under the commitments Sky will continue to provide access to its APIs for a defined list of interactive services. We consider that existing contracts together with the commitments will mean that access continues to be available to all third parties to enable them to provide existing interactive services that have traditionally been delivered via satellite broadcast on Sky's current generations of STB. We do not believe that any of these interactive services have been excluded from the commitments. Some services that are yet to launch are also covered by Sky's commitments; for example, Sky has offered to include a commitment to provide for Pay TV customer services, [§]. There did not appear to be any particular concern on the part of stakeholders about any existing services being excluded from the commitments but concerns were raised in relation to access to new generations of STB for existing services.
- 4.87 Given that Sky is yet to launch any new STB, it follows that there are no associated contracts available yet for third parties to enter into to provide services. As a result, third parties will be reliant on the commitments alone to gain access to Sky's new generation of STB and not on their existing contracts (as is the case for current STBs). However, we expect that Sky's incentives to launch any new STB which provides, at a minimum, the same interactive services as on its existing STBs, mean that these services are likely to be provided on any new STB. [§].²⁰⁸ If and when Sky does launch a new generation of STB into the marketplace, we will be closely monitoring activities to ensure it adheres to its commitments to offer third party access to any new STB.

²⁰⁸ Email and attachments from Sky to Ofcom dated 2 December 2014.

- 4.88 We note both Sky and BT consider it unlikely that any new interactive services will be launched on the current generations of Sky STB. However, should any new third party interactive services be developed using the functionality of Sky's existing STBs, we consider that customers' existing contracts, together with the commitments, are likely to enable such services to be provided on existing STBs (in a way that is currently afforded under their existing contracts).²⁰⁹ We will monitor any developments closely.
- 4.89 We also note Sky's commitments do not cover access to the services necessary to provide the VOD services that are already provided today by the PSBs on the current STB. Further, stakeholder responses also focused on the ability to gain access to provide interactive online or OTT services on new generations of Sky's STB through the commitments. We recognise that the commitments do not cover these services. As discussed in paragraph 3.62, we will be considering access for VOD services currently supported on Sky's STB and for new services requiring functionality not available on the current STB (but potentially available on future generations of Sky STBs and on other platforms) as part of a new piece of work. We do not consider them further here.
- 4.90 We consider below the further concerns raised by stakeholders on the need for new regulation.

BT's arguments on its ability to bid for sports rights

- 4.91 BT made extensive submissions on the impact that an absence of regulation would have on its ability to manage its currently held sports broadcast rights and its ability to bid for new sports rights (particularly the Champions League).²¹⁰ However, BT has a contract with Sky for the services it requires which runs until [redacted].²¹¹ Under the commitments, Sky will provide BT with an option to incorporate into its contract a right of extension on the existing terms or the prevailing standard terms and conditions. We do not therefore consider that bidding for sports rights could be affected by the removal of the AC Continuation Notice in the way set out by BT. We also note that BT was successful in bidding for UEFA Champions League rights (2015-18) [redacted]²¹² and while we were undertaking this review of access to Sky's AC services, [redacted].

Pricing and terms & conditions

- 4.92 We discussed stakeholders' concerns about Sky being able to change its terms and conditions and implications for charging under the commitments in paragraphs 4.48 to 4.55.
- 4.93 Given that the commitments provide for Sky's current AC customers to renew their contracts on existing terms and conditions on an ongoing basis, for existing STBs,²¹³

²⁰⁹ While new interactive services developed using functionality available on current STBs are covered, the commitments do not cover providing these services on future generations of STB. However, for the reasons outlined above in paragraph 4.87, we would expect Sky to provide access for these services where practical.

²¹⁰ BT response, paragraph 2.12.

²¹¹ Email from Sky to Ofcom dated 1 October 2014.

²¹² Email from Sky to Ofcom dated 15 April 2013.

²¹³ Third parties will also have the right to renew contracts signed in relation to new generations of STBs and they will be able to extend their contracts on the terms and conditions they originally agreed to.

we consider the revised commitments will address stakeholder concerns about Sky changing its terms and conditions in a way that could adversely affect third parties. If Sky does change its terms and conditions, third parties will have the opportunity to continue with the existing terms and conditions contained in their contracts or to opt for Sky's then updated terms and conditions.

- 4.94 Sky has offered in its commitments to provide services on FRND terms in response to concerns raised by stakeholders. It has also committed to providing the same services under the same terms and conditions to itself as it will to third parties.
- 4.95 Further it has committed to only changing its terms and conditions in relation to both current and future generations of STB where it has "*reasonable justification*",²¹⁴ for example, to properly reflect the technologies and processes used by Sky to enable broadcasters to deliver interactive services via Sky STBs. Specifically, Sky says changes may be required to reflect changes in the underlying technology, where there is new functionality or as a result of operational changes.²¹⁵ However, we note that these "new" terms and conditions will still be required to be FRND after any changes. In any case, we will be monitoring closely any changes Sky makes to its terms and conditions.
- 4.96 The ability to renew contracts indefinitely on existing terms and conditions should also help address any residual stakeholder concerns relating to protracted contract negotiations.²¹⁶ In relation to charges, Sky has told us that the £100,000 p.a. maximum charge is the level it charges to customers for ASS.²¹⁷ The commitment does not prohibit price reductions and it provides certainty for stakeholders.
- 4.97 Concerns were raised by BT about the recovery of common costs under the TPS regime. As set out in paragraph 4.54, Sky responded to BT's concerns stating that there was no reason for AC costs to change and that they made up a small part of the costs of delivering services on Sky's satellite platform.²¹⁸ We note that Sky is still required to continue to provide CA and EPG services in accordance with the TPS Guidelines and on FRND terms; in addition, we recognise that the removal of the AC Continuation Notice may have implications for the TPS Guidelines which we need to consider further.
- 4.98 Stakeholders said it was important that terms and conditions were transparent. In addition, they sought certainty. Given contracts can be renewed on an ongoing basis (on the same terms and conditions) and that Sky will publish its commitments and standard terms and conditions on its website, we consider stakeholders will be provided with both sufficient transparency and certainty. We also understand that existing customers will already have the ability to gain access to the technical requirements Sky refers to in its commitments.²¹⁹

²¹⁴ See Annex 2, Sky's commitments.

²¹⁵ See Annex 2, Sky's commitments.

²¹⁶ Concerns relating to protracted negotiations with Sky were raised as part of the July 2013 Consultation.

²¹⁷ See the Sky submission for the removal of the AC Continuation Notice received by Ofcom in January 2013, paragraph 6. This submission was published at Annex 6 of the July 2013 Consultation. Sky also confirmed this by email on 27 February 2015.

²¹⁸ Sky submission on responses to Ofcom's second consultation, page 9, paragraph 1.45. We also discussed this further with Sky by email on 27 February 2015.

²¹⁹ Sky response, paragraph 10.5.14.

Enforcement

- 4.99 Stakeholders have identified that a difference between having and not having regulatory conditions in place following the removal of the AC Continuation Notice is the means of enforcement. Should regulatory conditions be imposed, Ofcom would have specific powers under the Act to take enforcement action specifying the actions that Sky would have to take and potentially imposing financial penalties. We cannot use these specific powers to enforce against breaches of the commitments. We do not agree with the BBC, however, that this means that there would be no route for redress in the event that Sky breaches its commitments. Nor do we agree with BT that this represents a fundamental shortcoming with Sky's proposed commitments.
- 4.100 As a first point, a decision now not to impose new regulatory conditions does not preclude Ofcom from reviewing this decision at a later date. Ofcom retains the ability to intervene and impose regulatory conditions in the future should there be evidence that the commitments are not working as they should be. In the course of this review we have already undertaken a substantial amount of analysis that would be needed to impose conditions and, as such, would be in a position to impose new regulation more quickly, relying on any evidence of problems with access to Sky's APIs that have arisen.
- 4.101 Secondly, for the customers of Sky that already have contracts in place for access to AC services, it will be possible for them to take direct private enforcement action under the terms of their contracts. While any new potential customers wishing to access AC services will not have existing contracts on which to base a private law claim, Sky's commitments provide for the publication of a set of standard terms and conditions, which must offer FRND terms. Sky has committed to provide access on those standard terms as soon as reasonably practicable.
- 4.102 Thirdly, Ofcom has powers under the Act to consider and resolve disputes between certain classes of parties relating to the provision of network access.²²⁰ In appropriate circumstances, Ofcom would be able to exercise these powers in the event of disputes between Sky and existing customers or new customers for AC services. Ofcom's powers on resolving disputes include: making a declaration setting out the rights and obligations of the parties in dispute, giving a direction setting the terms and conditions of transactions between the disputing parties, imposing an enforceable obligation on the parties to the dispute to enter into an agreement on terms and conditions fixed by Ofcom.

Implications for Sky's existing customers for AC services

- 4.103 In addition to considering the points above, we have considered whether removing the AC Continuation Notice will have a particular impact on Sky's existing customers for AC services such that new regulation may be required.
- 4.103.1 **The BBC:** We consider the BBC will continue to have access to Sky's APIs to provide its traditional red button services which will help it to fulfil its PSB remit. Services provided using the current generations of STBs will be provided under the BBC's current AC contract, which can be renewed on the current terms and conditions, with the additional assurance of Sky's commitments. In relation to any new STB, under Sky's commitments the BBC will be able to continue providing existing services to consumers. We

²²⁰ Section 185 of the Communications Act 2003.

also expect that any services the BBC has developed over the current generation of STB will also be provided with access by Sky on a new generation of STB and we will be watching closely to ensure this is the case. Sky's commitments do not cover access for VOD services provided on the current STB. However, the BBC has in place an agreement with Sky in relation to the provision of the BBC iPlayer on current STBs which will remain in place. In addition, the commitments do not cover new interactive online or OTT services developed on any new STB (for example, the CRB). We have discussed our approach for VOD services and new services needing new functionality in Section 3, setting out a new piece of work we will undertake.

- 4.103.2 **S4C:** We expect Sky to follow up on its commitment to offer a new contract provision which offers S4C the option of a contract extension on current terms and conditions thereby providing S4C with contractual certainty; this will also assist S4C in fulfilling its PSB objectives. S4C, in its response, commented on the attraction of a price cap and the certainty this would provide and we therefore expect S4C to value this pricing certainty.
- 4.103.3 **BT:** We consider under the terms of BT's AC contract and Sky's commitments, BT will be able to provide alternative videostreams, through the red button, enabling it to manage match clashes on both the existing and new Sky STBs. We consider the contractual security BT has in relation to its service on existing STBs and the existence of the commitments for any new STB will address concerns BT has raised in relation to fulfilling its contractual commitments to UEFA.²²¹ Further we consider BT's ability (or any other new premium sports channels provider's ability) to bid for premium sports rights will not be impacted by the removal of the AC Continuation Notice.
- 4.103.4 **Other AC customers:** We expect that Sky will offer new contract provisions which give third party AC customers the ability to extend their contracts on existing terms and conditions (or those in existence at the time of renewal if these third parties prefer) as set out in Sky's commitments. As above, we consider this will provide greater certainty to these third parties, thereby aiding competition, but also investment decisions.

Implications for potential new third party customers for AC services

- 4.104 We recognise that new third party customers wishing to launch services will not hold a contract with Sky so cannot rely on private contract law in the event of any dispute arising. In this regard, Sky's commitments include a commitment to notify Ofcom each time a new request for access to provide named services is received by Sky together with a commitment to provide AC services to new customers as soon as reasonably practicable. This provides us with the necessary confidence that any new customers for AC services will be able to access Sky's STB for interactive services on FRND terms. Moreover, we will be in a position to monitor new demand for access to provide named services and respond should there be evidence that the process is not working as it should be.

²²¹ BT response, paragraph 2.13.

Decision

- 4.105 Having undertaken a comprehensive review of Sky's provision of AC services, we have decided not to exercise our powers to impose new access-related conditions on the removal of the AC Continuation Notice. While we have concluded that continued access to the APIs in Sky's STB remains important for third party content providers to provide interactive services to viewers, we consider that the contractual agreements currently in place in the market, supported by Sky's commitments, are sufficient to ensure that such services continue to be available to content providers for as long as they are required. Notably, in this regard:
- 4.105.1 the scope of the services covered by the commitments is sufficient to address those existing services for which respondents identified there is demand;
 - 4.105.2 the commitments cover these services on Sky's existing STB and any future generation of STB;
 - 4.105.3 for Sky's existing customers, there is the added protection afforded by existing contracts, which under the commitments will be capable of being extended on their current terms;
 - 4.105.4 for any new customers, we consider that the publication of standard terms and conditions together with a commitment by Sky to enter into agreements on those terms as soon as reasonably practicable, affords sufficient protections in the absence of regulation. Ofcom's ability to monitor such new requests provides additional safeguards; and
 - 4.105.5 in relation to enforcement concerns, existing customers have contractual rights that can be enforced, and Ofcom has a range of other powers that may be exercised in appropriate circumstances.
- 4.106 In light of that assessment, we have reached the view that it would not be a proportionate exercise of our regulatory powers to impose new access-related conditions on Sky in relation to existing interactive services traditionally delivered via satellite. Sky's commitments represent an effective means of securing our policy objectives in a way that is less onerous than imposing new regulation.
- 4.107 We will keep under review both Sky's adherence to its commitments and market and industry developments on an ongoing basis. If the commitments are not working as expected, we will be swift to intervene and consider imposing new access-related conditions if appropriate.
- 4.108 Sky's commitments do not cover access to existing on-demand services (e.g. catch-up services provided by the PSBs) and nor do they cover new interactive online or OTT services delivered via any new generation of Sky STB. As explained in Section 3, we are now undertaking further work which will enable us to determine whether regulation covering these services would be appropriate.
- 4.109 In the following section, we set out how we expect the process of removal of the AC Continuation Notice and implementation of commitments to work.

Section 5

Implementation

- 5.1 We have set out our decision in Section 4 not to impose replacement conditions following the removal of the AC Continuation Notice. In order to give effect to this decision, the Act requires us to provide Sky with a notice that the AC Continuation Notice has ceased to have effect.²²² We are required to give that notice as soon as reasonably practicable following this decision.²²³
- 5.2 Prior to our giving notice to Sky formally removing the AC Continuation Notice there are a number of steps that need to take place, as envisaged by Sky's proposed commitments. They are as follows:
- 5.2.1 Sky's commitments involve standard terms and conditions that will apply in respect of current generations of Sky STBs (for Authentication Services and Application Signing Services). Sky committed to agreeing with Ofcom the date of the applicable version of those standard terms prior to entering into the commitments.²²⁴ These standard terms should incorporate Sky's commitments in relation to renewal and should be published on Sky's corporate website.^{225,226}
- 5.2.2 Publication of the commitments on Sky's corporate website.²²⁷
- 5.3 Further the proposed commitments state that within 21 days of the commitments coming into force Sky will write to each current holder of an Application Signing Services agreement to offer to include a right for that third party to renew the agreement on expiry on the same terms or on Sky's then standard terms.²²⁸
- 5.4 On receiving confirmation from Sky that these matters have been fulfilled (together with copies of associated documentation) and confirmation that it will be writing to third parties as set out above, Ofcom will then be in a position to provide Sky with formal notice that the AC Continuation Notice has ceased to have effect. As well as providing Sky with such notice we will publish a copy on our website at <http://stakeholders.ofcom.org.uk/consultations/sky-access-control/>.

²²² Section 9(9) of Schedule 18 to the Communications Act 2003.

²²³ As above section 9(12).

²²⁴ Paragraph 10.5.7 of Sky's response to the July 2014 Consultation.

²²⁵ Paragraph 10 of Sky's proposed commitments.

²²⁶ Paragraph 1 of Sky's proposed commitments.

²²⁷ Publication will not include technical documentation, which will be provided to third parties who have entered into confidentiality agreements with Sky.

²²⁸ Paragraph 11 of Sky's proposed commitments.

Annex 1

Equality Impact Assessment

Introduction

A1.1 Ofcom is required by statute to assess the potential impact our proposals may have on certain equality groups. We fulfil these obligations by carrying out an Equality Impact Assessment (EIA), which examines the potential impacts our proposed policy is likely to have on people, with respect to certain protected characteristics (e.g. race, age, gender, disability). EIAs also assist us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers regardless of their background or identity.

A1.2 It is not apparent to us that our decision is likely to have any particular impact on groups with protected characteristics. Specifically, we do not envisage the impact of any outcome to be to the detriment of any group of society.

Equality impact assessment

A1.3 We have considered whether relying on Sky's commitments would lead to an adverse impact on promoting equality. In particular we have considered whether there would be a different or adverse effect on UK consumers and citizens with respect to certain protected characteristics such as: age, disability, gender reassignment, pregnancy and maternity, race, religion, sex and sexual orientation, and, in Northern Ireland, religious belief and dependents.

A1.4 Currently, Sky's AC services which are the subject of our decision in this statement are used by at least three broadcasters for the provision of services to viewers falling within one or more of the groups set out above:

- the BBC provides enhanced TV services, e.g. text based news services,²²⁹ which can help those with hearing impairments. Further, there is evidence that audiences which only use red button services are skewed to those who are older and towards households with lower incomes, compared to those that make use of online services;²³⁰
- S4C also uses Sky's AC services to provide English and Welsh subtitles and Welsh and English language soundtracks via the red button.²³¹ These provide support for deaf and hard-of-hearing viewers and also enable non-Welsh speaking viewers and Welsh learners to access S4C's programming; and
- the Community Channel provides public sector information services (for example, information about Universal Credit) via the red button on Sky's platform, which are intended specifically for those without internet access in their homes.²³² We consider that taking account of the content of the service provided and the target

²²⁹ BBC Response to July 2013 Consultation, paragraph 11.

²³⁰ BBC Response to July 2013 Consultation, paragraph 37.

²³¹ S4C Response to July 2013 Consultation, pages 1 to 2.

²³² See 'Looking Local launches red button service in partnership with the Community Channel', Looking Local, at <http://lookinglocal.gov.uk/site/news/2010-12-02-cc.html>.

audience, viewers are likely to be vulnerable consumers within older and/or lower income households.

- A1.5 We consider that if Sky ceased providing AC services to third party broadcasters following the removal of the AC Continuation Notice, there could be an adverse impact on the users of the services referred to above. However, we believe that the commitments made by Sky are sufficient to ensure the continued provision of AC services for these enhanced TV services. Accordingly, we do not consider that any of these groups of society would be adversely impacted by our decision. Furthermore, as set out in Section 4, we will monitor the extent to which third parties make use of Sky's AC services under the commitments. Should evidence of concerns emerge, this could lead us to reassess our decision about the appropriateness of the commitments and the need for conditions.
- A1.6 In addition, we did not find any reason to suspect that there would be the potential for negative impacts against any of the other defined equality groups.
- A1.7 We therefore consider that our decision would not have an adverse impact on any particular groups of society.

Annex 2

Sky's Commitments

Ofcom Review of the Access Control Continuation Notice Sky Draft Commitments: 17 September 2014

As part of Ofcom's ongoing consultation process on removing and/or replacing the Access Control Continuation Notice, Sky voluntarily makes the following commitments to Ofcom. These commitments will be effective from the date on which Ofcom discontinues the Access Control Continuation Notice until Ofcom notifies Sky that they are no longer in effect. Sky will not depart from these commitments unless Ofcom has given Sky its prior written consent to do so.

The fact that certain services are identified specifically in these commitments cannot and should not be taken to mean that Sky will not support the provision via its set top boxes of services that are not so identified. The purpose of identifying specific services is to provide platform users with assurance that, at minimum, the identified services will be supported.

A. Monitoring

Sky agrees to:

1. Publish these commitments and Sky's Standard Terms on Sky's corporate website (with the exception of certain technical documents which Sky will provide to third parties once they have entered into a non-disclosure agreement with Sky).
2. Notify Ofcom in writing in advance of making any changes to (i) Sky's Standard Terms for the provision of Application Signing Services or Authentication Services or (ii) Sky's standard terms for the provision of Technical Services.
3. Provide on written request from Ofcom all information required to monitor its adherence to these commitments.
4. Notify Ofcom in writing each time a request is received from (i) a New Customer seeking supply of Application Signing Services or Authentication Services, and (ii) a prospective new customer seeking supply of Technical Services from Sky, within 30 days of having received such a request.

B. Current Generations of Sky set top boxes

In relation to Current Generations of Sky set top boxes Sky agrees:

5. To provide Application Signing Services and Authentication Services to any third party who requests such services, which are required to enable that third party to provide interactive services including, but not limited to:
 - services that enable viewers to access and select alternative linear video feeds broadcast via digital satellite;
 - services that enable viewers to access and select alternative audio soundtracks;

- services that enable viewers to access and select digital text services (such as digital text services providing news, sports news, weather bulletins, travel news and lottery results);
 - services that enable viewers to access and play games;
 - services that enable viewers to access and use betting services;
 - services that enable viewers to select sub-titles in their language of choice;
 - services that enable viewers to vote;
 - Commercial Watermarking; and
 - Pay TV Customer Services.
6. To continue to provide Application Signing Services to Existing Access Control Services Customers pursuant to such customers' current agreements for those services, until expiry or earlier termination of such agreements in accordance with their terms.
 7. To incorporate the services specified at paragraph 5 of these commitments and the maximum charges specified at Annex 1 of these commitments into Sky's Standard Terms.
 8. To provide Sky's Standard Terms to third parties on request.
 9. On request from prospective New Customers, to offer to provide Application Signing Services and/or Authentication Services on Sky's Standard Terms and at charges no greater than those set out in Annex 1 as soon as reasonably practicable.
 10. To incorporate into Sky's Standard Terms a right for counterparties to have an option upon expiry of each Application Signing Services and/or Authentication Services agreement, to extend that agreement for a further period of three years on either (i) the same terms as their existing agreement (subject to the qualifications in paragraph 13) or (ii) Sky's then-current Standard Terms.
 11. Within 21 days of these commitments coming into force, to write to each current holder of an Application Signing Services agreement to offer to include in each such agreement a right for counterparties to have an option upon expiry of their Application Signing Services agreement, to extend that agreement for a further period of three years on either (i) the same terms as their existing agreement (subject to the qualifications in paragraph 13) or (ii) Sky's then-current Standard Terms. In the event that counterparties do not accept that offer within 60 days, such offer will be deemed to have lapsed.
 12. Not to alter Sky's Standard Terms without reasonable justification.
 13. Where a counterparty with a contract for the supply of Application Signing Services or Authentication Services exercises an option to extend that agreement for a further three year period on the same terms as their existing agreement, those terms may be varied by Sky where Sky has reasonable justification for making such variation(s).

14. For the avoidance of doubt, the purpose of the commitments set out at paragraphs 12 and 13 above is to enable Sky to change the terms on which it provides Application Signing Services and Authentication Services in order that they properly reflect the technologies and processes used by Sky to enable third parties to deliver interactive services via Sky set top boxes. By way of example, Sky may need to amend such terms in the following circumstances:
- to reflect the introduction of new functionality which forms part of the Application Signing Services and/or Authentication Services offered by Sky; or
 - to reflect any necessary operational changes to the provision of Application Signing Services and Authentication Services e.g. in relation to testing of interactive applications.
15. To ensure that Sky's Standard Terms, including charges, (i) are fair and reasonable, and (ii) do not discriminate unduly among users of Sky's Application Signing Services or Sky's Authentication Services (including Sky's own use of those services).

C. Future Generations of Sky set top boxes

In relation to Future Generations of Sky set top boxes Sky agrees:

16. To provide Technical Services to any broadcaster who requests such services which are required to enable that broadcaster to provide the following interactive services via an on screen symbol:
- services that enable viewers to access and select alternative linear video feeds broadcast via digital satellite;
 - services that enable viewers to access and select alternative audio soundtracks;
 - services that enable viewers to access and select digital text services (such as digital text services providing news, sports news, weather bulletins, travel news and lottery results);
 - services that enable viewers to access and play games;
 - services that enable viewers to access and use betting services;
 - services that enable viewers to select sub-titles in their language of choice;
 - services that enable viewers to vote; and
 - Commercial Watermarking.
17. To provide Technical Services to any pay TV distributor who requests such services which are required to enable that pay TV distributor to provide Pay TV Customer Services as soon as reasonably practicable.
18. To provide Sky's standard terms for the provision of Technical Services to a broadcaster or pay TV distributor on request, and to publish such standard terms on Sky's corporate website (with the exception of certain technical documents which Sky will provide to broadcasters/pay TV distributors once they have entered into a non-disclosure agreement with Sky).

19. To offer to provide Technical Services to broadcasters and pay TV distributors at charges no greater than those set out in Annex 2 and on Sky's standard terms which will be fair and reasonable, and will not discriminate unduly among users of those services (including Sky's own use of those services).
20. To incorporate into Sky's standard terms for the provision of Technical Services a right for counterparties to have an option upon expiry of each agreement, to extend that agreement for a further period of three years on either (i) the same terms as their existing agreement (subject to the qualifications in paragraph 22) or (ii) Sky's then-current standard terms.
21. Not to alter Sky's standard terms for the provision of Technical Services without reasonable justification.
22. Where a counterparty with a contract for the supply of Technical Services exercises an option to extend that agreement for a further three year period on the same terms as their existing agreement, those terms may be varied by Sky where Sky has reasonable justification for making such variation(s).
23. For the avoidance of doubt, the purpose of the commitments set out at paragraphs 21 and 22 above is to enable Sky to change the terms on which it provides Technical Services in order that they properly to reflect the technologies and processes used by Sky to enable broadcasters to deliver interactive services via Sky set top boxes. By way of example, Sky may require amendments to be made in the following circumstances:
 - to reflect a change in the underlying technology used to provide the Technical Services;
 - to reflect the introduction of new functionality which forms part of the Technical Services; or
 - to reflect any necessary operational changes to the provision of Technical Services e.g., in relation to testing of interactive applications.

D. Exclusions

For the avoidance of doubt, these commitments do not require Sky to permit:

- a) the provision of video services via Sky set top boxes by means other than digital satellite; or
- b) the making available of an electronic programme guide or similar navigation mechanism via Sky set top boxes

in relation to (i) Current Generations of Sky set top boxes and/or (ii) Future Generations of Sky set top boxes.

Definitions for the purpose of these Commitments

“Application Signing Services” means the services provided by Sky in order to enable interactive applications to be validly signed by or on behalf of a broadcaster, by which broadcasters and digital interactive television service (“DITS”) providers are provided with the signing tools, keys and certificates that enable them to sign their own interactive applications in order that those interactive applications are recognised by Current Generations of Sky set top boxes and permitted access to Current Generations of Sky set top boxes. These services provide a means for broadcasters and DITS providers to offer interactive services that run on Current Generations of Sky set top boxes.

“Authentication Services” means the services provided by Sky in order to enable a third party to operate a return path (i.e. which enables ‘two-way’ interactions) in relation to Current Generations of Sky set top boxes, which may then be utilised by interactive applications broadcast by broadcasters and DITS providers who are in receipt of Application Signing Services from Sky. Access to a return path is required when running interactive services which involve the viewer inputting information using their remote control which is then transmitted to service providers – for example, voting services, entries in competitions, charitable donations, and retail transactions.

“Commercial Watermarking” means the display of a visual identifier on the screen (such as, but not limited to a pint glass symbol), which is specifically broadcast to commercial premises, so that the pay TV distributor of that channel can verify whether a commercial premise has purchased the appropriate commercial subscription from that pay TV distributor.

“Current Generations of Sky set top boxes” means Sky set top boxes which Sky confirms are supported for use with the Sky digital satellite platform and which include the ability to execute appropriately signed OpenTV o-code applications.

“Existing Access Control Services Customer” means a party to an agreement for Application Signing Services and/or Authentication Services with Sky on the date that these commitments come into force.

“Future Generations of Sky set top boxes” means future Sky set top boxes which Sky confirms are supported for use with the Sky digital satellite platform and which support the provision of interactive applications utilising an alternative technology to OpenTV v1.2/v1.3.

“New Customer” means a third party that does not hold an agreement for Application Signing Services or Authentication Services with Sky on the date that these commitments come into force.

“Pay TV Customer Services” means services provided by or on behalf of a pay TV distributor that enable viewers to:

- access information about their account with that pay TV distributor, including information about the pay TV products to which they have subscribed or purchased on a pay-per-view basis;
- view the invoices issued to them by that pay TV distributor;
- subscribe/unsubscribe to/from additional pay TV products provided by that pay TV distributor; and
- register as a new customer of that pay TV distributor (in order that they may then subscribe to pay TV products or make impulse pay-per-view purchases from that pay TV distributor).

“Standard Terms” means Sky’s standard terms for the provision of Application Signing Services and Authentication Services as amended from time to time. Sky’s standard terms

for the provision of Application Signing Services as at the date of these commitments are set out in Annex 3. Sky's standard terms for the provision of Authentication Services as at the date of these commitments are set out in Annex 4. The Standard Terms included at Annex 3 and Annex 4 shall be Sky's standard terms prevailing as at *[insert date to be agreed between Sky and Ofcom prior to Sky entering into these Commitments]*.

"Technical Services" means the services provided by Sky which enable interactive applications to be made available on Future Generations of Sky set top boxes, and for such interactive applications to facilitate "two-way" interactions.

Annex 1**Maximum charges in relation to Current Generations of Sky set top boxes**

Service provided by Sky	
Application Signing Services	£100,000 per annum <i>and</i> Additional Charges (where applicable – see table below).
Authentication Services	An amount which reflects a share of (1) the hardware, software and human resource costs in establishing the technology infrastructure utilised for the provision of Authentication Services, and (2) the anticipated operating and on-going development costs associated with the provision of those Authentication Services; <i>and</i> Additional Charges (where applicable – see table below).

Additional Charges

Service provided by third party to end-user	
Services that enable viewers to access and select alternative linear video feeds broadcast via digital satellite	Zero
Services that enable viewers to access and select alternative audio soundtracks	Zero
Services that enable viewers to access and select digital text services	Zero
Services that enable viewers to select subtitles in their language of choice	Zero
Commercial Watermarking	Zero
Pay TV Customer Services	Zero
E-mail Services	4p per authentication
Voting Services	4p per authentication
SMS Services	4p per authentication
Marketing Registrations	10p per set of details collected
Retail Transactions	(i) 4p per authentication; and (ii) 2% of value of goods sold
Chargeable Calls	The greater of 4p per chargeable call or 5% of the call charges
Charitable donations	Zero
Gambling Services	(i) 25% of gross margin; and (ii) 1p per authentication

Travel Transactions	(i) 4p per authentication; and (ii) 1.5% of ex-VAT transaction value
Advertising Responses	(a) 4p per authentication (no customer details passed); or (b) 7p per authentication (consumer details passed to an advertiser or their agent)
Ticket Transactions	4p per authentication
Game Response Call	4p per Game Response Call
Any other service not listed above	To be agreed between the third party and Sky

Annex 2

Maximum charges in relation to Future Generations of Sky set top boxes

Service provided by Sky	
Services which enable interactive applications to be authored and made available on Future Generations of Sky set top boxes	£100,000 per annum <i>and</i> Additional Charges (where applicable – see table below).

Additional Charges

Service provided by broadcaster to end-user	
Services that enable viewers to access and select alternative linear video feeds broadcast via digital satellite	Zero
Services that enable viewers to access and select alternative audio soundtracks	Zero
Services that enable viewers to access and select digital text services	Zero
Services that enable viewers to select subtitles in their language of choice.	Zero
Commercial Watermarking	Zero
Any other service not listed above	To be agreed between the broadcaster and Sky

Service provided by pay TV distributor to end-user	
Pay TV Customer Services	Zero

Where customers procure both Application Signing Services and Technical Services from Sky, the annual fee shall be payable once.

Annex 3

[To be inserted: Sky's standard terms for the provision of Application Signing Services prevailing as at a date to be agreed with Ofcom prior to entering into these Commitments]

Annex 4

[To be inserted: Sky's standard terms for the provision of Authentication Services prevailing as at a date to be agreed with Ofcom prior to entering into these Commitments]