



SKY'S RESPONSE TO OFCOM'S SUPPLEMENTARY CONSULTATION IN ITS REVIEW OF THE PAY TV WHOLESALE MUST OFFER OBLIGATION

EXECUTIVE SUMMARY

1. Ofcom's Supplementary Consultation addresses the issue of whether Sky's insistence on reciprocal wholesale supply of 'key content' may be regarded as a practice that is prejudicial to fair and effective competition. For the reasons set out in this response, that is not the case.
2. The Supplementary Consultation identifies only one case in which it is claimed that Sky's insistence on reciprocal wholesale supply (which has never extended beyond Premier League content) may have had an impact on competition, namely Sky's commercial negotiations with BT with regard to the wholesale supply of Sky Sports for BT's YouView platform.
3. Sky's insistence on reciprocal wholesale supply of Premier League content in its negotiations with BT is the subject of an ongoing Competition Act investigation by Ofcom – a fact barely acknowledged in the Supplementary Consultation. If Ofcom is now considering the use, instead, of section 316 to address the same matters, it should make that clear. A decision to do so would need to be supported by a cogent explanation for Ofcom's change of position; Sky considers that it would be difficult for Ofcom to justify a decision that it is more appropriate now to proceed under section 316.
4. A decision to intervene under section 316 on the grounds of Sky's position on reciprocal wholesale supply would also need to satisfy all other conditions for the legitimate exercise of those powers. The Supplementary Consultation falls well short of meeting those conditions.
5. Contrary to BT's allegation, Sky's demand for reciprocal supply of BT's Premier League content in those discussions was not **[CONFIDENTIAL]**. Sky demonstrates in this response that BT's position during negotiations was inconsistent with this position, that it was reasonable for Sky to see scope for a reciprocal supply agreement and that it is not credible that BT **[CONFIDENTIAL]**.
6. For the reasons set out in this response, it is clear that Sky's insistence on reciprocal wholesale supply of Premier League content would not prejudice fair and effective competition at any level of the pay TV sector. There are two possible outcomes of an unfettered commercial negotiation between Sky and BT: (i) no wholesale supply to BT of Sky Sports 1 and 2, and (ii) a reciprocal wholesale supply agreement. Real-world evidence demonstrates that, under either of these possible outcomes, BT would remain an effective competitor at all levels of the sector. Merely denying BT the ability to differentiate its pay TV retail offering against Sky's in a particular way (by retailing all live Premier League content while Sky cannot) does not in and of itself prejudice fair and effective competition. It is not open to Ofcom to identify a problem purely on the basis that it considers that BT would enjoy a competitive advantage if Sky was not able to insist on reciprocal wholesale supply of Premier League content.

7. There is no evidence that Sky's insistence on reciprocal wholesale supply has been an issue other than between Sky and BT. Beyond the specific case of BT, the generalised concerns expressed in the Supplementary Consultation relate only to hypothetical scenarios involving unspecified pay TV operators who may wish to acquire Premier League rights but would not willing wholesalers to Sky. There is no basis to predict with the required degree of confidence that such a scenario is likely to arise; it certainly is not possible to determine that the outcome would be prejudicial to fair and effective competition.
8. In the circumstances, the appropriate course is for Ofcom to close this aspect of its review. Sky's view remains that Ofcom should remove the WMO obligation and should do so swiftly. While Ofcom's review is ongoing, Sky continues to be prejudiced as a result of the unnecessary and highly intrusive regulation to which it is subject.

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1. Introduction and context for Ofcom's latest consultation

- 1.1 Ofcom's consultation dated 27 July 2015 (the "Supplementary Consultation") invites submissions on the specific issue of whether an insistence by Sky on reciprocal supply of channels containing 'key content' is a practice which is prejudicial to fair and effective competition.
- 1.2 The issues raised in the Supplementary Consultation cannot be viewed in isolation from those raised by Ofcom's first consultation in its review of the pay TV wholesale must-offer obligation (the "First Consultation"). The submissions set out in Sky's response to the First Consultation are equally pertinent to the subject matter of the Supplementary Consultation.¹ In particular, the following points are highly relevant to the Supplementary Consultation.
- 1.3 First, Sky is a willing supplier of its 'key sports channels' and, as a result, those channels are available to UK consumers in a multitude of ways, including via satellite, cable, IPTV platforms, a range of 'over the top' IP-based services, 3G and 4G mobile networks, and via a range of firms in addition to Sky.
- 1.4 Second, the UK audiovisual sector is highly competitive, and delivers excellent outcomes for consumers in terms of choice, quality of service and price. The sector is also subject to rapid and profound ongoing change, and significant exposure to competitive forces and technological trends that emanate from both inside and outside the UK. Having proper regard to this context, the proposition that it is necessary for Ofcom to impose *ex ante* regulation to govern commercial relations among operators in the UK pay TV sector is untenable (and even more so when the Supplementary Consultation concerns a single negotiation between two operators).
- 1.5 Third, BT is a large, highly profitable company – with an annual turnover of £18 billion, and profits of over £3 billion and growing. It has recently proposed spending £12.5 billion to acquire EE, the UK's largest mobile telephony operator with 27 million customers. BT does not need regulatory assistance from Ofcom.
- 1.6 Finally, any conclusion that it is appropriate to impose regulation on Sky under section 316 of the Communications Act must be supported by evidence and analysis capable of withstanding profound and rigorous scrutiny which sets out (on the balance of probabilities) a basis for regulation. In its response to the First Consultation, Sky explained in detail why the evidence referred to in that consultation did not meet this standard. It is plain that the Supplementary Consultation – which, as discussed further below, comprises little more than a request for consultees' views on a number of competing arguments – also does not meet that standard.

2. Legal context

- 2.1 Before deciding whether it is appropriate to introduce or maintain *ex ante* regulation under section 316, Ofcom must ensure that all of the conditions for the legitimate exercise of its power under section 316 have been met. These are: (i) Ofcom must assess whether or not it would be more appropriate for Ofcom to use its Competition Act 1998 ("CA98") powers; (ii) Ofcom must satisfy a number of requirements before proceeding under section 316; and (iii) Ofcom must also comply with its general statutory duties.

¹ Sky's response to the First Consultation dated 27 February 2015.

Ofcom must have due regard to section 317

- 2.2 Ofcom cannot exercise its sectoral enforcement powers under the Communications Act 2003 (“CA03”) for a competition purpose if it considers that a more appropriate way of proceeding in relation to some or all of the matters in question would be under the CA98.² Furthermore, where Ofcom has proceeded under its CA98 powers in relation to a matter, it cannot exercise its sectoral powers in relation to that matter.³
- 2.3 The Supplementary Consultation identifies only one case in which it is considered that Sky’s insistence on reciprocal wholesale supply may have had a prejudicial impact on competition, namely Sky’s commercial negotiations with BT with regard to the wholesale supply of Sky Sports for BT’s YouView platform following the 2012 Premier League auction (the “BT Reciprocal Wholesale Supply Discussions”). This has been the subject of an ongoing investigation by Ofcom under its CA98 powers since 2013.^{4,5}
- 2.4 By deciding to open an investigation under the CA98 into BT’s complaint regarding Sky’s conduct in the BT Reciprocal Wholesale Supply Discussions, Ofcom had clearly taken the decision, at that time, that it was appropriate for it to consider the matters in question under the CA98.
- 2.5 However, in the Supplementary Consultation, Ofcom proceeds to seek stakeholder views on whether the matters arising from the BT Reciprocal Wholesale Supply Discussions require regulatory intervention using Ofcom’s section 316 powers. Ofcom has not explained how the open CA98 investigation in relation to the BT Reciprocal Wholesale Supply Discussions fits in with this Supplementary Consultation. Indeed the existence of the CA98 case is barely acknowledged.⁶ Whereas the First Consultation contained a reference to Ofcom’s duty to consider whether it was appropriate to proceed under the CA98,⁷ the Supplementary Consultation is entirely silent on this obligation.
- 2.6 If, as appears to be the case, Ofcom is now considering the use of section 316 instead of the CA98, it must satisfy its legal obligations under section 317(2) to consider, before exercising its Broadcasting Act powers for a competition purpose, whether it is more appropriate to proceed under the CA98. If Ofcom’s intention is in fact to use this consultation to assess whether it should use section 316 instead of the CA98, Ofcom should make this clear, to allow consultees to comment on the matter. Should Ofcom decide that, despite the existence of an open CA98 investigation into the BT Reciprocal Wholesale Supply Discussions, it is now more appropriate to proceed under section 316, it is incumbent on Ofcom to (i) provide a cogent explanation for its change of position which

² Section 317(2) CA03 requires that “Before exercising any of their Broadcasting Act powers for a competition purpose, OFCOM must consider whether a more appropriate way of proceeding in relation to some or all of the matters in question would be under the Competition Act 1998” [emphasis added].

³ Under Section 317(3) CA03, “[i]f Ofcom decide that a more appropriate way of proceeding in relation to a matter would be under the Competition Act 1998, they are not, to the extent of that decision, to exercise their Broadcasting Act powers in relation to that matter”.

⁴ Complaint from British Telecommunications plc against British Sky Broadcasting Group plc alleging abuse of a dominant position regarding the wholesale supply of Sky Sports 1 and 2, case CW/01106/05/13. See http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01106/. The investigation relates to matters raised by BT in its complaint to Ofcom dated 24 May 2013, which alleges that the terms on which Sky offered wholesale supply of Sky Sports 1 and 2 to BT’s YouView platform amount to abuse of a dominant position (“BT’s CA98 Complaint”).

⁵ Sky does not consider that BT’s CA98 Complaint has merit. Sky notes that Ofcom refused BT’s application for interim measures in the case and, despite detailed investigation, has been silent on the case for several months and has not progressed to issuing a Statement of Objections.

⁶ The sole mention of the case is a passing reference to Ofcom’s interim measures decision in the case, in footnote 10 of the Supplementary Consultation.

⁷ Paragraph 8.19 of the First Consultation.

respects Ofcom's duties of transparency and consistency⁸ and (ii) close the parallel CA98 case. In addition, the CMA's guidelines on concurrency require parties to be informed where Ofcom decides that it is more appropriate to proceed under sector-specific regulation, rather than under the CA98.⁹

- 2.7 In fact, Sky considers that it would be difficult for Ofcom to justify why it would be more appropriate to proceed under section 316, rather than the CA98. In 2010, when explaining its decision to use its section 316 powers rather than proceed under CA98, Ofcom stated that using section 316 enabled it to implement a "*comprehensive solution to a general problem affecting the relevant markets*".^{10,11} As noted in Sky's response to the First Consultation, this objective is not relevant in 2015 to the subject-matter of the First Consultation.¹² It is even less relevant to the extremely narrow subject-matter of the Supplementary Consultation, which, in essence, relates solely to a single set of bilateral negotiations between Sky and one particular counterparty, BT.

Ofcom would need to satisfy a number of requirements before using its section 316 powers

- 2.8 Even setting aside the requirement for Ofcom to be transparent about its decision-making as to why its CA98 powers are not more appropriate to deal with the BT Reciprocal Wholesale Supply Discussions as described above, there are a number of pre-conditions that Ofcom would need to satisfy before it could legitimately decide to regulate Sky using its section 316 powers. These were set out in Sky's response to the First Consultation.¹³ They are summarised below.
- 2.9 First, section 316 can only be used by Ofcom to protect competition by preventing a provider of licensed services from "*engaging in any practice, which Ofcom consider, or would consider, to be prejudicial to fair and effective competition*".¹⁴ In the context of the Supplementary Consultation and the specific case of the BT Reciprocal Wholesale Supply Discussions, Ofcom would need properly to demonstrate that the inclusion by Sky of reciprocal wholesale supply terms, which make the wholesale supply of Sky's Premier League content to BT conditional on BT wholesaling its Premier League content to Sky, is a practice prejudicial to fair and effective competition. It would not be enough for Ofcom simply to show that BT would be either more profitable or a more effective competitor without such terms, even if it were possible to do so.
- 2.10 Second, the standard of proof for exercising Ofcom's powers under section 316 is the civil standard of the balance of probabilities. This means that Ofcom must, as a minimum, reach a view on the evidence that the practice in question and the consequential harm to the competitive process is more likely than not to occur. A merely theoretical or abstract risk of a future practice prejudicial to competition cannot justify proceeding to regulate Sky under section 316.
- 2.11 As outlined in Sky's response to the First Consultation, Ofcom must not set the bar too low for establishing a concern that provides a legitimate basis for its continued regulation of

⁸ See section 3(3)(3)(a) CA03.

⁹ See paragraph 4.6 of CMA 10 Regulated Industries: Guidance on concurrent application of competition law to regulated industries.

¹⁰ Paragraph 1.39 of Ofcom's Pay TV Statement of 31 March 2010.

¹¹ Sky does not accept that section 316 can be used simply to improve the functioning of markets in the absence of a practice which is (or is likely to be) prejudicial to fair and effective competition.

¹² See paragraph 6.10 of Sky's response to the First Consultation.

¹³ See paragraphs 3.3 to 3.19 of Sky's response to the First Consultation.

¹⁴ Section 316(2) CA03.

Sky.¹⁵ It must be based on defined conduct and harm to competition, which is likely to occur, not conjecture. Aside from the specific circumstances of the discussions with BT (which, for reasons given below, do not amount to such a concern), the Supplementary Consultation is based entirely on hypothetical situations, relating to hypothetical pay TV retailers (“*emerging rivals*”¹⁶) who may wish to acquire Premier League rights and would not be willing wholesalers of those rights to Sky. As explained below,¹⁷ there is no basis to predict with the required degree of confidence that such a scenario is likely to arise, and it certainly is not possible to determine that, if one did arise, the outcome would be prejudicial to competition.

- 2.12 Third, when determining whether regulation is required to prevent a practice prejudicial to fair and effective competition, the burden of proof rests with Ofcom. Ofcom must establish the case for regulation on the basis of cogent analysis and evidence capable of withstanding rigorous scrutiny which support Ofcom’s view that a defined practice would be prejudicial to fair and effective competition.¹⁸
- 2.13 The Supplementary Consultation comprises little more than a call for inputs, in which Ofcom is “*inviting comment and evidence from stakeholders*”¹⁹. It does not set out any evidence or detailed analysis by Ofcom on which the consultation is based and does not set out any provisional conclusions. In particular, there is no evidence that the outcome of Sky’s negotiations with BT (had it not been altered by the CAT’s intervention to deliver unilateral wholesale supply to BT) would have been detrimental to fair and effective competition. Indeed, as set out below, the available evidence supports the contrary proposition: BT is an effective competitor and would be so even if reciprocal wholesale supply were to be agreed or if BT did not have wholesale access to Sky Sports 1 and 2.²⁰
- 2.14 Sky does not anticipate that any evidence or analysis is available that would support to the requisite legal standard the need for intervention on the grounds of Sky’s approach to reciprocal wholesale supply. In the circumstances, the appropriate course is for Ofcom to close this aspect of the WMO Review and move swiftly to the next stage, to avoid further prejudice to Sky by prolonging the Review.
- 2.15 In the unlikely event that Ofcom concludes that the inclusion by Sky of reciprocal wholesale supply terms for Premier League content is problematic, Sky must be provided with the evidence relied upon by Ofcom and its analysis and be given the opportunity to comment on the case being made against it. It would not be appropriate for Ofcom’s next stage in this review to draw final conclusions and, potentially, consult on remedies, as Ofcom proposes to do in the Supplementary Consultation,²¹ without giving Sky the opportunity to properly address any case against it.
- 2.16 Finally, it is important for Ofcom to acknowledge that section 316 is to be used to protect competition from prejudicial conduct, not to promote competitors or to manage markets.²² Section 316 cannot be read as giving Ofcom a power to promote the interests of one individual firm within a sector. There is only one alleged manifestation of the potential concern – the BT Reciprocal Wholesale Supply Discussions. Just as in the First

¹⁵ See paragraphs 3.30 to 3.40 of Sky’s response to the First Consultation.

¹⁶ Paragraph 2.16 of the Supplementary Consultation.

¹⁷ See Section 6 below.

¹⁸ See paragraphs 3.41 to 3.44 of Sky’s response to the First Consultation.

¹⁹ See paragraph 2.21 of the Supplementary Consultation.

²⁰ See Section 5 below.

²¹ See paragraphs 1.11 and 1.12 of the Supplementary Consultation.

²² See paragraphs 3.3 to 3.6 of Sky’s response to the First Consultation.

Consultation, therefore, in the Supplementary Consultation Ofcom appears to be contemplating the use of its section 316 powers specifically to bolster BT's market position, which is impermissible irrespective of Ofcom's views of the consequences for competition and consumers.

- 2.17 For the reasons set out in the remainder of Sky's response, there is no evidence that the BT Reciprocal Wholesale Supply Discussions were prejudicial to fair and effective competition. Nor does the Supplementary Consultation provide any evidence or analysis to support a conclusion that Sky's position on reciprocal wholesale supply is likely to harm fair and effective competition in the future (whether in relation to BT or any other party).

Ofcom must also meet its other duties

- 2.18 In addition to the specific requirements under section 316 above, and again as noted in Sky's response to the First Consultation,²³ Ofcom must also comply with its wider statutory duties.²⁴ These include Ofcom's duty to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed and its duty to take account of all relevant facts and evidence when assessing the need for regulation.

- 2.19 In Sky's response to the First Consultation, Sky set out why Ofcom was failing to meet its relevant duties.²⁵ If Ofcom lowered the threshold for intervention in order to use the narrow and fact-specific circumstances of the BT Reciprocal Wholesale Supply Discussions as a reason to continue to impose wholesale regulation on Sky, whilst not imposing the same cross wholesale supply obligations on BT, Ofcom would again be neglecting its statutory duty to act proportionately and consistently.

- 2.20 Similarly, Ofcom would be failing in its duty to take account of all relevant facts and evidence if it decided to draw final conclusions on the existence of grounds for regulatory intervention and move directly onto a remedies stage, before allowing Sky the opportunity to respond to any cogent evidence provided by other parties in response to the Supplementary Consultation and taking such Sky submissions into account.

3. There is no practice prejudicial to fair and effective competition

- 3.1 As already noted above, the only concrete example pointed to in the Supplementary Consultation of a possible prejudicial practice is that of the BT Reciprocal Wholesale Supply Discussions. The following sections therefore focus on the BT Reciprocal Wholesale Supply Discussions:

- we first show that, contrary to BT's arguments, Sky's position on reciprocal wholesale supply does not amount to non-supply of Sky's 'key content'; and
- we then show that whatever the outcome of BT Reciprocal Wholesale Supply Discussions would have been and whatever the outcome of future commercial negotiations between BT and Sky in respect of reciprocal wholesale supply of Premier League content (*i.e.* whether the parties do or do not enter into a reciprocal supply arrangement), there is no basis on which to conclude that there would be prejudice to fair and effective competition.

²³ Paragraphs 3.14 to 3.19 of Sky's response to the First Consultation.

²⁴ The duties referred to above and in Sky's response to the First Consultation derive from section 3(3)(a) and section 6(1) CA03.

²⁵ Paragraphs 3.45 to 3.51 of Sky's response to the First Consultation.

- 3.2 We do not consider in detail the concerns that Sky's position on reciprocal wholesale supply will have a negative impact on 'emerging rivals' as such concerns are not sufficiently particularised in the Supplementary Consultation to allow for a meaningful response. As set out later in this response, there is nothing in the Supplementary Consultation to elevate these concerns above the merely hypothetical.
- 3.3 Before addressing the question of the implications for competition of Sky's insistence on reciprocal wholesale supply terms during the BT Reciprocal Wholesale Supply Discussions, it is appropriate to note that Sky's position amounted to a legitimate protection of its commercial interests.²⁶ Sky's concern was that if BT received wholesale supply of Sky Sports 1 and 2 for YouView, while Sky did not have wholesale supply of BT Sport for retail on its DTH platform, BT would enjoy **[CONFIDENTIAL]** marketing advantages over Sky.²⁷ Such a situation has the potential to **[CONFIDENTIAL]**. Furthermore, Sky would have no comfort that its DTH customers would have access to BT's 'key content' by alternative means or on reasonable terms,²⁸ since BT has discretion over the decision to retail its channels on the open DTH platform and the retail terms set.

4. **There is no practice of non-supply of Sky's 'key content'**

- 4.1 BT has argued that **[CONFIDENTIAL]**. BT has also alleged that Sky's request for reciprocal supply of BT's channels with Premier League content was **[CONFIDENTIAL]**²⁹.
- 4.2 Ofcom characterises this as an argument by BT that Sky's requirement for reciprocal supply from BT amounts to "a practice of non-supply of Sky's key content"³⁰ and goes on to note its position in the First Consultation that non-supply of Sky's 'key content' would be a practice that was likely to prejudice fair and effective competition. For the reasons set out in this section, Sky's position on reciprocal wholesale supply does not amount to a practice of non-supply of Sky's 'key content'.
- 4.3 For completeness, Sky reiterates that, as noted in Sky's response to the First Consultation, Ofcom has not advanced any concrete or evidenced analysis of the harm to competition that it asserts would result from non-supply of Sky's channels.³¹ Ofcom's consideration of the impacts on competition amounts to no more than unsubstantiated theorising. Ofcom's assessment in the First Consultation certainly does not provide a proper basis for Ofcom to conclude that lack of access for BT's customers to Sky Sports 1 and 2 on YouView would prevent BT from being an effective pay TV retailer.

Sky's demand for reciprocal supply of BT's Premier League content was not [CONFIDENTIAL]

- 4.4 The implication of BT's argument is that Sky has deliberately adopted a position which it knows eliminates the possibility that BT will have wholesale supply of Sky Sports 1 and 2. It is not true, however, that, at the time of the BT Reciprocal Wholesale Supply Discussions, Sky knew that BT **[CONFIDENTIAL]**. (As discussed below, the indications were to the contrary.) Nor, as discussed further below, is it possible for either Sky or Ofcom to know

²⁶ For further details of Sky's rationale for insisting upon reciprocal supply Ofcom is referred to paragraph 71ff of Mai Fyfield's first witness statement in response to BT's application dated 11 April 2014 to amend the WMO Interim Relief Order ("Mai Fyfield's First Witness Statement") and Sky's submissions in response to BT's CA98 Complaint, for example paragraph 9ff of Sky's submission of 7 June 2013 to Ofcom.

²⁷ See, in particular, paragraphs 71-74 of Mai Fyfield's First Witness Statement.

²⁸ For example, whether BT Sport would be priced at an excessively high level. See paragraph 7.2 below.

²⁹ Paragraph 2.9 of the Supplementary Consultation.

³⁰ Paragraph 2.11 of the Supplementary Consultation.

³¹ Paragraph 3.29(ii) of Sky's response to the First Consultation.

now whether BT would enter into such a reciprocal wholesale supply arrangement in the future.

4.5 When it participated in the BT Reciprocal Wholesale Supply Discussions following the 2012 Premier League auction, Sky believed that there was a genuine prospect that a reciprocal wholesale supply deal could be agreed. Sky's behaviour was consistent with this and with its position as a willing supplier to BT's YouView customers. As set out in Sky's response to the First Consultation,³² Sky made strenuous efforts to reach agreement with BT on acceptable terms of supply. **[CONFIDENTIAL]**³³

4.6 The record shows that not only has BT **[CONFIDENTIAL]**.

4.7 The documentation of the BT Reciprocal Wholesale Supply Discussions, already in Ofcom's possession,³⁴ demonstrates that it was reasonable for Sky to take the view that there was a genuine prospect of a reciprocal wholesale supply agreement with BT – **[CONFIDENTIAL]**. Key points from those negotiations are as follow:

- Quite inconsistently with the contentions it has advanced to Ofcom, BT itself proposed an arrangement that would have provided wholesale supply of BT Sport to Sky: **[CONFIDENTIAL]**³⁵.
- **[CONFIDENTIAL]** This was also Ofcom's understanding, having considered all the evidence, as Ofcom made clear in its decision of July 2013, rejecting BT's request for interim measures:

[CONFIDENTIAL]³⁶.

[CONFIDENTIAL]³⁷.

BT did not suggest that it required long-term retail differentiation for its pay TV service using Premier League content.

- **[CONFIDENTIAL]**³⁸ **[CONFIDENTIAL]**
- **[CONFIDENTIAL]**

4.8 At the point in mid-2013 when the BT Reciprocal Wholesale Supply Discussions reached an end (or, from Sky's perspective, were suspended), therefore, Sky's expectation was that **[CONFIDENTIAL]** there was a good chance of the parties reaching an agreement for reciprocal wholesale supply, which could have encompassed both parties' sports channels, in advance of the 2014 Premier League season. **[CONFIDENTIAL]**

³² See paragraph 4.28ff of Sky's response to the First Consultation.

³³ For further discussion of the negotiations between Sky and BT, **[CONFIDENTIAL]**. Ofcom is referred to paragraphs 46 to 50 of Mai Fyfield's First Witness Statement and paragraphs 14 to 19 of Ms Fyfield's second witness statement in the same proceedings.

³⁴ The documentation of the BT Reciprocal Wholesale Supply negotiations was provided to Ofcom in the context of its investigation of BT's CA98 Complaint – see Annex 3 of BT's CA98 Complaint and Annex 17 of Sky's initial comments on the application for interim measures in BT's CA98 Complaint, dated 24 June 2013.

³⁵ See tab 19 of Annex 3 to BT's CA98 Complaint.

³⁶ Paragraph 4.6.1 of Ofcom's final decision dated 31 July 2013 refusing BT's request for interim measures in BT's CA98 Complaint.

³⁷ Paragraph 2.40(e) of BT's CA98 Complaint.

³⁸ See tab 30 of Annex 3, *ibid*.

- 4.9 In the circumstances, there was no reason for Sky to conclude that BT was implacably opposed to a reciprocal wholesale supply arrangement, the posture it now seems to be adopting. It is also clearly incorrect to characterise Sky's approach to the negotiations as amounting to deliberate non-supply at the wholesale level, given that it was reasonable in the circumstances for Sky to see scope for an agreement to be reached within a reasonable timeframe.
- 4.10 After acquiring UEFA rights in November 2013, **[CONFIDENTIAL]**.
- 4.11 Sky also notes that BT's evidence to the CAT in BT's application for extension of the WMO Interim Relief Order to its YouView platform in May 2014 was that it was open to agreeing terms for wholesale supply of its channels to Sky.³⁹ Again, this is completely at odds with the current argument as to BT's position.
- 4.12 In November 2014 the CAT ruling on BT's application to extend the WMO Interim Relief Order delivered BT asymmetric wholesale supply of Sky Sports 1 and 2 for YouView. Since then, the question of whether a reciprocal wholesale supply agreement would be reached has become moot. **[CONFIDENTIAL]**⁴⁰ **[CONFIDENTIAL]**
- 4.13 The only support now offered by BT for the proposition **[CONFIDENTIAL]** is the highly theoretical Compass Lexecon model, commissioned by BT after negotiations with Sky ended. Ofcom has previously established that in July 2013, at the time of Ofcom's decision on BT's application for interim measures, BT had not yet modelled the impact of accepting reciprocal wholesale supply.⁴¹ BT also apparently made submissions to Ofcom in the context of the CA98 case as to the difficulty of quantifying the impact and capturing such a scenario in its financial modelling.⁴² The Compass Lexecon reports therefore are purely *ex post* rationalisation and not the reflection of BT's 'state of mind' at the time of the negotiations. Nor has BT produced contemporaneous internal documents to support its position.
- 4.14 Putting aside whether it is correct that a reciprocal supply arrangement **[CONFIDENTIAL]** as:
- (i) BT did not express this view to Sky: if this was a genuine concern one it would be expected that BT would have raised it in negotiations; in fact, BT's position suggested the opposite;
 - (ii) BT has produced no contemporaneous documents which support this view. Even if BT thought that modelling the impact of accepting reciprocal supply was difficult, it would be expected that BT would possess documents expressing this view;
 - (iii) it is surprising that BT did not model the impact of reciprocal supply: it is hard to see that it would be difficult for BT to do or to procure, and surprising that that it did not do so at the time if this was a genuine concern; and
 - (iv) the highly theoretical and stylised Compass Lexecon model, constructed *ex post*, takes the matter no further.
- 4.15 There is no indication in the Supplementary Consultation that Ofcom accepts the assertions in the Compass Lexecon reports or that it intends to place any weight on them.

³⁹ John Petter's second witness statement, paragraph 50.

⁴⁰ **[CONFIDENTIAL]**.

⁴¹ Paragraph 4.11 of Ofcom's final decision dated 31 July 2013 refusing BT's request for interim measures in the BT CA98 Complaint.

⁴² *Ibid.*

In these circumstances, and given the resources that would be involved in responding to them, Sky does not propose to respond to those reports.⁴³ We note, however, that if Ofcom were to change this position and to seek to rely on Compass Lexecon's reports in support of its conclusions, Sky must be given an adequate opportunity to address them.

- 4.16 Ofcom will also appreciate that the context for the BT Reciprocal Wholesale Supply Discussions was one in which BT was alive to the possibility that regulatory intervention would deliver BT unilateral wholesale supply of Sky Sports 1 and 2.⁴⁴ For BT, entering into a reciprocal wholesale supply arrangement would have involved giving up on a chance of being gifted (through regulation) a significant advantage not obtainable through normal commercial negotiations and competition on the merits *i.e.*, guaranteed asymmetric wholesale supply of Sky's 'key sports channels'. It is not possible to know how BT would have approached the commercial negotiations with Sky in an environment undistorted by this specific regulatory backdrop. Ofcom therefore cannot conclude, on the basis of the facts before it, that, absent the possibility of regulatory intervention, **[CONFIDENTIAL]**. And such an understanding can certainly not be attributed to Sky at the time of the BT Reciprocal Wholesale Supply Discussions.

It is incorrect to characterise the alternative to reciprocity as "non-supply"

- 4.17 In paragraph 2.1 of the Supplementary Consultation, Ofcom describes the practice of non-supply which it identified as potentially prejudicial to fair and effective competition as "failure to supply key sports channel(s)... *on either a wholesale or self-retail basis*" (emphasis added); in other words, the 'non-supply' envisaged results in 'key sports channels' not being available to a rival pay TV retailer's customers at all. Ofcom thus recognises that self-retailing is a form of distribution to a rival retailer's customers which is not inconsistent with fair and effective competition.⁴⁵ However, having set out this position at the start, the Supplementary Consultation thereafter fails to have any regard at all to self-retail of 'key sports channels' as an alternative to wholesale supply.
- 4.18 The failure of BT and Sky to reach an agreement which provided BT with wholesale supply of Sky Sports 1 and 2 in relation to its YouView platform cannot be equated with non-

⁴³ It is Sky's view that the analysis and conclusions of the reports are wholly unreliable. In principle, Sky could commission consultants to undertake a comprehensive critique of the Compass Lexecon reports but at this stage it is simply not necessary. **[CONFIDENTIAL]**. Second, in the CAT proceedings the Tribunal concluded that given Ofcom's position that its conclusions were founded on analysis of Sky's actual behaviour (rather than economic theory) "there is no need for the Tribunal to resolve the issues debated before us at some length as to the plausibility or otherwise as a matter of economic theory of the alleged strategic incentives on which Sky was said by Ofcom to be acting in its conduct of the various negotiations." (paragraph 829 of the Judgment). The sole purpose of the Compass Lexecon reports seems to be to provide an *ex post* justification for BT not entering into a wholesale deal **[CONFIDENTIAL]**. This is better answered, as in the CAT proceedings, by an analysis of actual behaviour – see paragraphs 4.7 to 4.12 above. Significantly, as noted above, BT advances no contemporaneous evidence that it considered at the time that a wholesale deal would in any circumstances reduce its profitability (and yet it would be surprising if such a large and well-resourced company had not performed a thorough evaluation of possible scenarios); this is not the position it took in negotiations with Sky, as explained above, and there is no evidence that Sky thought that this was the case. It was BT and not Sky that approached the negotiations tactically with an eye to regulatory intervention.

⁴⁴ BT made several attempts, via different regulatory avenues, to compel Sky to supply its sports channels to BT for its YouView platform rather than engage constructively in meaningful commercial negotiations (BT's application of 21 March 2013 to the Court of Appeal in the context of the Pay TV appeal for an amendment to the CAT's order giving effect to its judgment of 8 August 2012, BT's CA98 Complaint and accompanying request for interim measures, and BT's application dated 11 April 2014 to amend the WMO Interim Relief Order) – the last one successful.

⁴⁵ This is consistent with Ofcom's position articulated in paragraph 8.13 of the First Consultation: "In respect of the practice of limited distribution, this could be addressed through an obligation to offer key content to rivals. That might be a requirement to offer on a wholesale basis or, where technically possible, a self-retail basis. Alternatively, it could be a combination where it is up to the provider of key content how it does it (wholesale or self-retail) where more than one means of distribution is possible. This should ensure the availability of that key content on a competing platform...".

supply – *i.e.*, no availability of Sky Sports 1 and 2 to customers on BT YouView whether on a wholesale or self-retail basis.

4.19 It is important to recognise that, even if there was no wholesale supply of Sky's sports channels to BT, BT's YouView customers would still be able to subscribe to Sky's sports channels via NOW TV on an OTT basis. In common with anyone in the UK with an internet connection, they are already able to subscribe to Sky Sports via NOW TV,⁴⁶ and to watch Sky Sports channels on their main TV set via a range of devices, including games consoles,⁴⁷ smart TVs and the NOW TV set top box.⁴⁸ When unicast delivery of linear channels is enabled on the YouView platform, they will also be able to subscribe to the channels via NOW TV on YouView.

4.20 **[CONFIDENTIAL]** Ofcom will also be aware of this from the documentation of the negotiations provided to it in the context of its CA98 investigation. Sky has always been committed to making its channels available to all customers on the YouView platform⁴⁹ (including BT's customers), **[CONFIDENTIAL]**. **[CONFIDENTIAL]**⁵⁰ **[CONFIDENTIAL]**.⁵¹ **[CONFIDENTIAL]**.

5. Neither possible outcome of Sky's position on reciprocal wholesale supply renders BT an ineffective competitor

5.1 Sky has set out above why it would be incorrect for Ofcom to conclude that Sky's insistence on reciprocal wholesale supply of Premier League content from BT amounts to a practice of non-supply of Sky's Premier League content (or channels that carry that programming).

5.2 Without prejudice to this point, for the reasons set out below an insistence by Sky on reciprocal wholesale supply of Premier League content would not prejudice fair and effective competition. Neither of the two possible outcomes of an unfettered negotiation between Sky and BT, *i.e.*:

- (i) no wholesale supply to BT of Sky's Premier League content (which implies correspondingly no wholesale supply of BT's Premier League content to Sky); or
- (ii) a reciprocal wholesale supply agreement⁵²

would prevent BT from competing effectively at any level of the sector.

We discuss BT's competitive position in each of these possible outcomes in the sections below, noting that the test for the exercise of section 316 is prejudice to fair and effective competition, rather than prejudice to the effectiveness of an individual competitor.⁵³

⁴⁶ As Ofcom is aware, NOW TV now enables consumers to subscribe to Sky Sports on a monthly basis.

⁴⁷ Over 10 million games consoles that provide access to NOW TV have been sold in the UK (source: GfK).

⁴⁸ Switching to watch content delivered via NOW TV on a television set via another device is a straightforward matter of switching television input, in the same way that consumers must do to watch a DVD or play a game on a games console connected to their television set.

⁴⁹ Sky already wholesales its sports channels to TalkTalk for retail to its YouView customers.

⁵⁰ See paragraph 4.30 of Sky's response to the First Consultation.

⁵¹ See paragraphs 4.29 to 4.32 of Sky's response to the First Consultation. **[CONFIDENTIAL]**.

⁵² For the reasons set out above (see paragraph 4.16), Sky considers it entirely possible that without the prospect of regulatory intervention affecting the BT Reciprocal Wholesale Supply Discussions, those discussions would have resulted in a reciprocal wholesale supply agreement.

- 5.3 At the outset, however, Sky notes the following critical point: it would be illegitimate for BT (or Ofcom) to claim that prejudice to fair and effective competition has been demonstrated simply because BT would be either (i) better off, or (ii) a more effective competitor if Sky acceded to asymmetric supply of Premier League content.
- 5.4 The key issue raised in the consultation is whether there is a *problem* (arising from a *practice*) that merits regulatory intervention (via section 316). As set out above, the principal market outcomes that would arise absent regulatory intervention in relation to negotiations between Sky and BT on Premier League content are (a) reciprocal wholesale supply, or (b) no reciprocal wholesale supply of live Premier League content. The proper task facing Ofcom is to assess whether competition in relevant markets (including BT's role in such competition) under the two possible outcomes of commercial negotiations would be fair and effective.
- 5.5 The question of whether BT would be a more effective competitor if it were able to pursue a strategy of differentiating its services via (a) receiving wholesale supply of Sky's Premier League content, while (b) withholding wholesale supply of its own Premier League content from Sky (and potentially other pay TV retailers), is not the relevant question for identifying whether there is a problem that merits regulatory intervention.
- 5.6 The crux of the objections to Sky's insistence on reciprocal wholesale supply appears to be that it excludes an outcome which allows BT to pursue the specific retail differentiation strategy described in the previous paragraph. For this to be an appropriate basis for Ofcom to intervene under section 316, it would need to be the case that BT is unable to compete effectively unless it can pursue this strategy and that, as a result, fair and effective competition overall is prejudiced.
- 5.7 It is plain, however, that in order to compete effectively BT does not need to be able to differentiate its retail offering against Sky's by being put in a position where it is able to retail all live Premier League matches, whereas Sky cannot. There are many other ways that BT can – and does – differentiate its retail offering against Sky's other than through being able to retail more live Premier League matches, in order to compete effectively.⁵⁴ To give just a few examples:
- other content: Sky has only ever sought the wholesale supply of BT's Premier League content in return for its own Premier League content, leaving it open for BT to use other content as the source of differentiation:
 - sports content: BT is currently heavily marketing its exclusive coverage of Champions League matches.⁵⁵ It is also investing heavily in other sports content, such as top-flight cricket, recently securing a five-year deal to broadcast Australian home cricket internationals, including the 2017-18 Ashes series. As noted by Cricket Australia at the time of announcement, BT:

⁵³ Without prejudice to this point, in this response Sky often comments on BT's ability to compete effectively. It follows that where BT's ability to compete effectively is not prejudiced by Sky's position on reciprocal wholesale supply in negotiations with BT, those circumstances cannot be prejudicial to fair and effective competition in general.

⁵⁴ See Annex 2 to this response for examples of BT's marketing activity seeking to differentiate its offerings on the basis of its Champions League content, its Ultra HD technology, its other sports content, the new AMC channel and its differential pricing for BT broadband customers and non-BT broadband customers.

⁵⁵ See Annex 2.

“...are uniquely placed to become one of the UK’s largest sports channels and we think cricket can provide the content and opportunities to help them do just that”⁵⁶;

and

- non-sports content: BT has recently acquired the exclusive right to distribute the AMC channel in the UK, including exclusive drama series from the US AMC Networks and movies.⁵⁷ BT could also acquire and commission content to create its own non-sports channels;
- its advantages in the supply of other services which can be packaged with TV, such as broadband and telephony. This is particularly relevant as BT has the incumbency position in broadband and telephony, and also makes its BT TV service available only to BT broadband subscribers;
- hardware: Sky notes, for example, that EE has recently successfully entered the pay TV retail sector, differentiating itself primarily through its innovative set top box.⁵⁸ Virgin Media also seeks to differentiate itself (among other ways) through its TiVo box, including a direct comparison with Sky’s set top box on its website,⁵⁹
- technical features: for example, BT Sport Ultra HD was the UK’s first 4K TV channel – BT is currently heavily advertising its 4K service as delivering “up to 4X the detail of Sky HD”⁶⁰,
- off-platform services such as BT TV Everywhere, BT’s off-platform service, which allows customers to stream TV channels to multiple devices, such as smart phones and tablets. It also includes a “digital locker”, which allows customers to view movies which they have purchased via their BT TV set-top box on up to four devices;⁶¹ and
- retail pricing: BT can choose to compete aggressively on retail price, and has the financial strength to enable it to do so.

Possible outcome (i) above: an absence of wholesale supply of Sky’s Premier League content would not prevent BT from competing effectively

5.8 Sky explains below why, if the outcome of unfettered negotiations between BT and Sky is that BT does not receive wholesale supply of Sky Sports 1 and 2 (*i.e.*, Sky’s channels that carry live Premier League football), this would not prevent BT from competing effectively at any level of the sector.⁶² As discussed in Section 3 above, in considering this issue, it is

⁵⁶ BT press release of 24 August 2015: <http://sport.bt.com/more-sport-hub/more-sport/bt-sport-to-show-2017-18-ashes-series-S11363999728418>.

⁵⁷ BT press release of 5 August 2015: <http://tv.bt.com/tv/tv-from-bt/amc-to-launch-for-the-first-time-in-the-uk-exclusively-on-bt-11363986780728>. See also ‘BT steps up sport and drama as it tussles with Sky for customers’ (The Guardian, 6 September 2015): <http://www.theguardian.com/media/2015/sep/06/bt-sky-sporting-rights-drama-premier-league>. See also Annex 2 to this response.

⁵⁸ See EE’s website: <https://broadband.ee.co.uk/ee-tv-features>.

⁵⁹ See Virgin Media’s website: <http://store.virginmedia.com/discover/tv/tivo/explore/tivo-box.html>.

⁶⁰ See, for example, <http://www.productsandservices.bt.com/products/ultra-hd/>.

⁶¹ See, for example, <http://www.techradar.com/news/television/bt-launches-tv-everywhere-app-and-buy-to-keep-movies-for-your-devices-1275583>.

⁶² Sky reiterates that, as highlighted in Section 2 above, it is Ofcom that bears the burden of proof to establish that the inclusion of reciprocal wholesale supply terms is a practice that is more likely than not to be prejudicial to fair and effective competition, rather than for Sky to establish that this is not the case.

important to have regard to the fact that each party is able to self-retail their services to the other's customers.

BT TV: BT does not require wholesale supply of Sky Sports 1 and 2 in order to compete effectively as a pay TV retailer

- 5.9 Even if Ofcom adopted an inappropriately narrow focus, restricted to pay TV retailing, the impact on BT's competitiveness as a pay TV retailer of not reaching an agreement for wholesale supply of Sky Sports 1 and 2 would be small (notably as BT TV customers can access Sky Sports via NOW TV on an OTT basis and will be able to do so on BT's YouView once unicast is enabled).
- 5.10 Real-world evidence supports this proposition. There are now over 1 million subscribers to the BT TV service.⁶³ Yet the number of subscribers to Sky's sports channels via BT is small – fewer than **[CONFIDENTIAL]**.
- 5.11 This cannot reasonably be attributed to not having supply of Sky Sports in relation to BT's 'strategic' YouView platform. Since BT gained regulated wholesale supply of Sky Sports 1 and 2 for its YouView platform in December 2014, its sales of Sky Sports have been deeply underwhelming – notwithstanding its insistence at the time of concluding the wholesale supply agreement that it was crucial that BT should be able to start retailing the channels before Christmas 2014. At the end of August 2015, BT had fewer than **[CONFIDENTIAL]** Sky Sports subscribers on its YouView platform.⁶⁴

Triple play: BT does not require wholesale supply of Sky Sports 1 and 2 in order to be an effective competitor in triple play

- 5.12 Any analysis of BT's effectiveness as a competitor must recognise that the fact that triple play is the key focus of competition between traditional pay TV retailers of the type with which Ofcom was concerned in the First Consultation. Sky has already pointed out, in its response to the First Consultation, the perils of viewing competition between pay TV retailers only in relation to pay TV services.⁶⁵
- 5.13 BT's primary commercial strategy in pay TV is to persuade customers to source all triple play elements from BT. As a successful competitor in the TV element of the triple play package and the incumbent operator with network economics in the remaining two elements of the triple play package (broadband and telephony), BT can compete effectively in triple play. By retailing pay TV services on its own platform and Sky's DTH satellite platform, with Sky's sports channels available to its customers from NOW TV (either via Sky's self-retail on the BT YouView platform or OTT via other devices), BT would continue to be an effective competitor in triple play. The inability to retail Sky Sports would have a marginal impact, at most, on BT's competitiveness in triple play.

BT Sport: Wholesale supply of Sky Sports to BT makes no material difference to BT's ability to monetise its sports channels

- 5.14 There is no evidence that a lack of an ability to retail Sky Sports 1 and 2 has in the past inhibited BT's ability to acquire subscribers to the BT Sport channels, or would do so in the

⁶³ Page 40, BT's annual report for the year ending 31 March 2014: http://www.btplc.com/Sharesandperformance/Annualreportandreview/pdf/2014_BT_Annual_Report_smart.pdf

⁶⁴ As noted in Sky's initial comments on BT's application for interim measures in connection with BT's CA98 Complaint, dated 24 June 2013 (at paragraph 49), the launch of Sky Sports channels on BT's Cardinal platform in 2010 had no material impact on the growth of BT's pay TV subscriber numbers. There is no reason to believe that the consequence for BT's YouView subscriber numbers will be any more impressive; the evidence to date certainly does not support such a belief.

⁶⁵ See paragraph 3.29(iii).

future. All available evidence supports the contrary proposition: in just the first nine months following the launch of BT Sport, when BT did not have supply of Sky Sports for its YouView platform, BT built a sizeable base of subscribers to BT Sport, acquiring nearly as many UK subscribers as it had taken Sky over ten years to acquire for its own sports channels⁶⁶ BT now has “around 3 million”⁶⁷ direct subscribers to the BT Sport channels (*i.e.*, excluding the large number of subscribers via Virgin Media).

- 5.15 It is critical to note that a substantial number of subscribers to the BT Sport channels are on Sky’s DTH satellite platform, and BT’s wholesale deal with Virgin Media is a further important source of revenue for the channels. BT’s ability to retail Sky Sports channels on the BT YouView platform plays no role at all in attracting subscribers to its own channels on these platforms.
- 5.16 Sky explained in its response to the First Consultation document that supply of Sky’s ‘key sports channels’ to BT makes no material difference to BT’s threat as a bidder for sports rights.⁶⁸ Given BT’s sports rights acquisitions over time,⁶⁹ it is simply not credible to contend that the absence of Sky’s ‘key sports channels’ from BT’s own retail offering on YouView would negatively affect BT’s incentives to bid for sports rights in a manner which might prejudice fair and effective competition in relation to either the production of premium sports channels, or bidding for sports rights.

Possible outcome (ii) above: a reciprocal wholesale supply agreement for Premier League content would not prevent BT from competing effectively

- 5.17 At paragraphs 2.12 to 2.18 of the Supplementary Consultation, Ofcom goes on to discuss BT’s assertions that agreeing to a reciprocal wholesale supply arrangement would prejudice fair and effective competition.
- 5.18 Sky notes that Ofcom couches two of three limbs of the arguments against reciprocal supply arrangements in general terms,⁷⁰ apparently seeking to establish prejudicial effects which extend beyond the outcome of negotiations between BT and Sky. For example, Ofcom refers generally to “rivals”⁷¹ to Sky, or Sky’s “emerging rivals”⁷². In so far as this refers to BT, Sky sets out immediately below why a reciprocal wholesale supply arrangement in respect of Premier League content between BT and Sky would not prevent BT from competing effectively. Then, Section 6 below explains why hypothetical scenarios in respect of other vertically-integrated operators do not provide any basis for Ofcom to consider imposing broad wholesale obligations on Sky.

⁶⁶ See paragraph 2.7 of Sky’s response to the First Consultation.

⁶⁷ Page 40, BT’s annual report for the year ending 31 March 2014: http://www.btplc.com/Sharesandperformance/Annualreportandreview/pdf/2014_BT_Annual_Report_smart.pdf

⁶⁸ Section 4(B)(i) of Sky’s response to the First Consultation.

⁶⁹ These include the rights to the following competitions (values indicated where publicly available): the UEFA Champions League and Europa League for the 2015/16 to 2017/18 seasons for £897million (the first time the rights have been awarded on an exclusive basis); sets of Premier League rights for the 2013/14 to 2015/16 seasons for £738 million, and 2016/17 to 2018/19 seasons for £960 million; the FA Cup for 2014/15 to 2017/18 seasons; the Aviva Rugby Premiership for 2013/14 to 2020/21 seasons. As noted in paragraph 5.7 above, BT recently entered into a five-year deal giving it the rights to broadcast Australian home cricket internationals, including the 2017-18 Ashes series. Other rights acquired by BT include BDO World Darts Championship, Formula E motorcar championship, Major League Baseball, Moto GP motorcycle racing World Championships and National Basketball Association.

⁷⁰ See paragraph 5.21 below, where we summarise the three limbs of Ofcom’s paragraph 2.17.

⁷¹ Paragraph 2.17 of the Supplementary Consultation.

⁷² Paragraph 2.16 of the Supplementary Consultation.

- 5.19 BT's view is that, in circumstances where Sky requires reciprocal wholesale supply of Premier League content as a term of wholesale supply of its own Premier League content, it is better off forgoing wholesale supply of Sky Sports 1 and 2 than entering into a reciprocal wholesale supply arrangement in respect of Premier League content. Even if BT's view is correct, this does not amount to evidence that a reciprocal supply arrangement between BT and Sky would prejudice fair and effective competition. BT would remain an effective competitor, and competition in the sector would remain effective, in a scenario in which BT and Sky wholesaled channels carrying live Premier League football to each other. There is no basis for thinking otherwise.
- 5.20 There is also, in BT's arguments against reciprocal supply arrangements, an implicit claim that requiring BT to suffer reduced profitability in order to obtain wholesale supply of Sky's Premier League content is contrary to fair and effective competition. Simply identifying the potential for a better competitive outcome or greater profitability would not, however, provide the basis to conclude that reciprocal supply prejudices fair and effective competition. A finding of likely prejudice to fair and effective competition would require Ofcom to establish that wholesale supply of BT's Premier League content as a *quid pro quo* for wholesale supply of Sky's Premier League content would render BT an ineffective competitor at one or more levels of the value chain, and that this in turn prejudiced fair and effective competition in a relevant market.
- 5.21 At paragraph 2.17 of the Supplementary Consultation Ofcom sets out a number of potential adverse effects on competition that it is alleged may flow from an insistence by Sky on reciprocal wholesale supply of 'key content', as follows:
- (i) reciprocal wholesale supply could *"reduce the competitive pressure that may have resulted from the rival using bundles of attractive content (in particular bundling their own key content with Sky's key content) as a point of differentiation to attract subscribers"*;
 - (ii) *"as a result of rivals being unable to fully benefit from their competitive differentiator, their incentives to develop new content proposals may be reduced. In particular where a rival pay TV retailer is operating, or intends to operate a sports channel which includes key sports content, its incentives to acquire rights may be affected if it is faced with a choice of either (a) being unable to access Sky's key sports content or (b) being deprived of the full benefit of its investment if it has to give up the key content it acquires to its major rival"*; and
 - (iii) reciprocal wholesale supply *"might influence competition in the sale of sports content to satellite subscribers"* by affecting BT's incentives *"to compete as strongly with Sky for these customers"*.⁷³
- 5.22 At the outset, Sky notes that these propositions are neither well specified nor evidenced in any way. The discussion of them amounts to little more than a brief statement of a number of potential effects. It is manifestly incapable of supporting well founded conclusions on the extent to which a reciprocal wholesale supply agreement between Sky and BT could result in prejudice to fair and effective competition in any relevant market. The following points are made without prejudice to this fundamental point.
- 5.23 The first two theoretical effects are both based on a proposition that BT may be worse off under a reciprocal supply arrangement than a situation in which (a) BT receives supply of Sky's live Premier League content, but (b) withholds its own live Premier League content from Sky.

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All references are from paragraph 2.17 of the Supplementary Consultation.

- 5.24 The proper question for Ofcom is not whether there would be greater competitive pressure on Sky if it was required to provide non-reciprocal wholesale supply of its live Premier League content to BT; the relevant test here is whether there would be prejudice to fair and effective competition in a scenario in which there was reciprocal supply of live Premier League content.
- 5.25 The first two theoretical effects discussed by Ofcom derive from a view that an asymmetric wholesale supply arrangement would enable BT to differentiate its services from Sky's. As in the case of the 'no reciprocal supply' scenario, however, cross-wholesale supply of live Premier League content would not prevent BT from differentiating its retail service from Sky's: there are many ways it is able to do so other than via use of Premier League football, as described in paragraph 5.7 above. In this respect, it is important to bear in mind the unchallenged findings of the CAT in its judgment in the Pay TV appeals in relation to the competitive position of Virgin Media. The CAT found that Virgin Media was an effective competitor to Sky. It stated:

*"the evidence overall demonstrates that VM is rightly regarded by Sky as a serious, well-established rival capable of constraining Sky's actions in the market, and that it does in fact compete effectively with Sky in relation to the supply of packages which include CPSCs"*⁷⁴.

- 5.26 In this regard, it is important to note that, at the time of the CAT's judgment (and subsequently), there was no difference in the range of live Premier League football matches carried by Sky and Virgin Media.⁷⁵ It is also notable that the CAT gave explicit consideration to the role that differentiation – across a range of other attributes – played in competition between Sky and Virgin Media, concluding:

*"Competition between operators with these inherent differences is never going to be symmetrical, and each is obliged to play to its own particular advantages. Effective competition does not require such symmetry."*⁷⁶

- 5.27 Furthermore, in relation to the second of the posited potential effects, there is no basis for the proposition that BT would be likely to be disincentivised from bidding for sports rights by the knowledge that it would be required to wholesale its own sports channels with Premier League content to Sky as a *quid pro quo* of wholesale supply of Sky's 'key sports channels'. Wholesale supply to Sky can be an attractive and effective means of monetising investment in sports content at scale (alongside other means of monetisation such as retailing on its own platform and wholesale supply to other retailers).⁷⁷ The reciprocal supply arrangement proposed to BT by Sky in the BT Reciprocal Wholesale Supply Discussions would also have allowed BT to self-retail its sports channels on the DTH platform alongside Sky.
- 5.28 The third potential effect posited by Ofcom (that a reciprocal supply agreement might diminish BT's incentives to compete with Sky in the sale of sports content to satellite subscribers) founders on the misconception that BT is interested in encouraging subscribers to Sky's sports channels on its DTH satellite platform to switch to BT's sports

⁷⁴ See 'British Sky Broadcasting Limited, Virgin Media, Inc, The Football Association Premier League and British Telecommunications plc v Office of Communications', [2012] CAT 20 (the "Pay TV Judgment"), in particular paragraph 813.

⁷⁵ Sky recognises that this did not come about via cross-wholesaling of live Premier League content. However, it is the outcome – of no difference in the range of live Premier League football carried by Sky and Virgin Media – that is relevant for present purposes.

⁷⁶ Paragraph 810 of the Pay TV Judgment.

⁷⁷ As set out above, in the BT Reciprocal Wholesale Supply Discussions, Sky was willing to offer BT a sizeable minimum revenue guarantee in return for wholesale supply of BT's channels.

channels on the same platform. BT has no such incentive. BT would recognise that there would be an extremely small number of Sky Sports subscribers on DTH satellite who would choose to rely solely on BT's sports channels for their sports consumption on DTH satellite.

- 5.29 Instead, BT's objective is first and foremost to encourage Sky subscribers to switch their telephony and broadband service to BT. This is demonstrated clearly by the large difference in the price BT charges for the BT Sport Pack depending on whether a customer subscribes to BT broadband, and the more limited BT Sport package options available to non-BT broadband customers.⁷⁸
- 5.30 For completeness, Sky responds to BT's assertion (cited at paragraph 2.12 of the Supplementary Consultation) that the CAT has determined that reciprocal supply was an inappropriate condition for Sky to seek to impose. It is not the case that the CAT has reached a view on the overall appropriateness or otherwise of Sky's position in commercial negotiations that reciprocal wholesale supply should be a condition of its wholesale supply of Sky Sports. The CAT's decision related to the very specific and narrow circumstances of BT's application to have the benefit of the interim relief arrangements in respect of the WMO obligations imposed by Ofcom extended to its YouView platform. In that context, the CAT held that BT should not be denied the benefit of the WMO remedy for its YouView platform for the reason that it was not willing to wholesale its Premier League channels to Sky. That is not at all the same as a finding that reciprocal supply would be an inappropriate condition to include in a commercial wholesale supply arrangement.

6. The generalised concerns in respect of hypothetical scenarios involving other 'rivals' do not provide grounds for Ofcom to use section 316

- 6.1 It has been shown above that it would not be appropriate for Ofcom to exercise its section 316 powers in respect of an insistence by Sky on reciprocal wholesale supply of Premier League content as a condition of entering into an agreement with BT for the wholesale supply of Sky Sports 1 and 2. Ofcom would first need to establish that it was not more appropriate to continue to proceed under its CA98 powers. Even if it did so, it has been shown above that there is no prejudice to fair and effective competition, whatever the outcome of an insistence by Sky on reciprocal wholesale supply of Premier League content in negotiations with BT.
- 6.2 As noted above, certain arguments as to the prejudicial effects for competition of reciprocal supply arrangements are expressed in the Supplementary Consultation as generalised concerns about impact on Sky's "emerging rivals"⁷⁹. The Supplementary Consultation does not, however, provide any basis to conclude that Sky's insistence on reciprocal wholesale supply of Premier League content in respect of any other rival pay TV retailer is likely to result in prejudice to fair and effective competition – whether through disincentivisation of entry into sports broadcasting or impact on competition at the retail level.
- 6.3 If the reference to 'emerging rivals' is intended to extend to rivals beyond BT, Ofcom does not identify who these rivals are, why they can be expected to be vertically integrated, or why they would not be willing wholesalers of Premier League content to Sky. There is no evidence that rival retailers have ever been dissuaded from bidding for sports rights by the prospect that they would need to wholesale any Premier League content they might

⁷⁸ The BT Sport Pack is priced at £19.99 per month to non-BT broadband subscribers, compared to £5 per month if DTH satellite customers take BT broadband (http://www.productsandservices.bt.com/products/bt-sport-on-sky-packages?s_intcid=con_sportoverview_to_skyonly). BT Sport Lite is available on DTH satellite only to those customers who take broadband from BT.

⁷⁹ Paragraph 2.16 of the Supplementary Consultation. This section of the Supplementary Consultation is peppered with references to unspecified rivals, e.g. "where a pay TV retailer is operating, or intends to operate a sports channel which includes key sports content" (paragraph 2.17(ii)).

acquire to Sky in order to obtain wholesale access of Sky Sports 1 and 2. Nor does the Supplementary Consultation provide any analysis to support:

- (i) the proposition that this is likely to occur in the future (still less that this would be prejudicial to fair and effective competition), or
- (ii) the proposition that a reciprocal wholesale supply arrangement with Sky, under which each party supplied the other with Premier League content, could be expected to be prejudicial to fair and effective competition.

These points are expanded upon below.

- 6.4 It cannot be assumed that any other pay TV retailer that might acquire Premier League rights in the future would not be a willing wholesaler to Sky. BT's strategy for distribution of its channels carrying Premier League content certainly does not provide a basis to do so. Rather, BT's strategy reflects the very particular circumstances of, and reasons for, its entry into sports broadcasting: BT's preferred strategy for its sports channels involves withholding wholesale supply from Sky and instead self-retailing them so as to drive sales of its communications services.
- 6.5 It does not follow that a strategy of withholding wholesale supply of Premier League content from Sky would be the preferred strategy of other vertically integrated pay TV retailers, and indeed the real-world evidence suggests the contrary. Wholesale supply is a significant aspect of how pay TV sectors function. It is an important part of how Sky monetises its own sports rights, as it is for other sports broadcasters, such as Eurosport and ESPN in the US (and was for ESPN in the UK before its channels were acquired by BT). For other sports broadcasters, wholesale supply to Sky, the most effective pay TV retailer in the sector, is an effective way to monetise sports rights.
- 6.6 By way of further illustration of the contention that wholesale supply to Sky may be an attractive option for vertically integrated pay TV retailers, **[CONFIDENTIAL]**.
- 6.7 Even if any other vertically integrated holder of Premier League rights wished to pursue a withholding strategy against Sky, there is no reason to assume that it could not do so successfully and still be an effective pay TV retailer without wholesale supply of Sky Sports.
- 6.8 In short, hypothetical scenarios in respect of hypothetical vertically-integrated retailers do not provide any basis for Ofcom to impose broad wholesale obligations on Sky.

7. Ofcom's approach to retail pay TV differentiation using 'key sports content'

- 7.1 There is an implicit assumption in the arguments that Sky's insistence on reciprocal wholesale supply may be prejudicial to fair and effective competition that BT's ability to use 'key sports content' as a competitive differentiator is a positive development.⁸⁰
- 7.2 Ofcom is required, when carrying out its duties, to have regard to the interests of consumers in respect of choice, price, quality of service and value for money. When reaching a view on whether it would be appropriate for Ofcom to regulate to prevent Sky from including reciprocal wholesale supply terms, Sky would expect Ofcom to consider carefully whether it is in consumers' interests to incentivise BT to pursue its withholding strategy and potentially to intensify it. BT withholds supply of BT Sport from TalkTalk's YouView customers.⁸¹ As noted above,⁸² BT already charges a significantly higher price for

⁸⁰ This appears to be implicit in paragraphs 2.17(i) and 2.18 of the Supplementary Consultation, for example.

⁸¹ By definition, TalkTalk YouView customers are not BT YouView customers, nor are they BT broadband customers.

⁸² Paragraph 5.29 above.

the BT Sport Pack to non-BT broadband customers on DTH than to DTH customers who take BT broadband. Furthermore, DTH customers already have a reduced choice of BT Sport packages unless they subscribe to BT broadband; only those DTH customers in the latter category are offered the option to take a smaller (and cheaper) package of BT's sports channels (BT Sport Lite) which does not include BT Sport Europe (with BT's Champions League coverage).⁸³ At its extreme, BT's strategy could involve withholding its sports channels completely from the DTH satellite platform, or making the channels available to non-BT broadband customers only on highly unattractive terms.⁸⁴

- 7.3 Ofcom has not conducted any analysis of the impact on consumers of regulation which incentivises such a differentiation strategy.⁸⁵
- 7.4 A key theme of Ofcom's 2010 Pay TV Statement was that consumers' choice of platform should not be distorted by restricted supply of Core Premium Sports Channels. The benchmarks for judging whether competition in pay TV was delivering positive outcomes for consumers in terms of choice included "*choice for consumers of platform and of content once platform selection is made*"⁸⁶. Ofcom's view was that restricted supply of Core Premium Sports Channels gave rise to consumer harm: Ofcom considered that consumer choice was limited because consumers who had preferences for particular platform features and a demand for the relevant channels were forced to make a trade-off between platform and content. As a result, in Ofcom's view, customers would choose a platform that would not otherwise be their first choice, while others would have their preferred platform but no access to the channels.⁸⁷
- 7.5 If Ofcom were now to adopt the position that retail differentiation through the withholding of 'key content' is desirable, therefore, it would amount to a significant departure from its position in the 2010 Statement. Consistent with Ofcom's duties of consistency and transparency, Sky would expect Ofcom to set out its reasoning for this change in approach.

8. Conclusion and next steps

- 8.1 The Supplementary Consultation provides no evidence or analysis that would be sufficient to justify exercise of Ofcom's regulatory powers under section 316. It provides no basis to conclude that an insistence by Sky on reciprocal wholesale supply of live Premier League content is likely to be prejudicial to fair and effective competition.
- 8.2 There has been only one case where Sky's insistence on reciprocal supply has been at issue, which is the subject of an open investigation under CA98. It is not open to Ofcom now to address that situation using its section 316 powers without explaining why this would be more appropriate than the use of its CA98 powers.
- 8.3 There is no evidence that Sky's insistence on reciprocal wholesale supply has been an issue other than between Sky and BT. It would not be appropriate for Ofcom to impose broad *ex ante* regulation as a response to a situation that has arisen only between Sky and BT. Any

⁸³ The price of the BT Sport Pack increased when BT Sport Europe was added to it. Thus non-BT broadband customers on DTH are effectively required to pay for an additional channel which they may not want.

⁸⁴ Note that the CAT considered it necessary to make its decision extending the benefit of the WMO Interim Relief Order to BT's YouView platform conditional upon BT undertaking to maintain the self-retailing of its BT Sport channels on the DTH platform.

⁸⁵ To date, as pointed out in Sky's response to the First Consultation (paragraphs 5.19 to 5.24) of Sky's response to the First Consultation. Ofcom appears to have underestimated the impact of BT's limited distribution of BT Sport on competition for pay TV subscribers and triple play customers.

⁸⁶ Paragraph 1.15 of Ofcom's Pay TV Statement of 2010.

⁸⁷ See, for example, paragraphs 8.4 and 8.51 to 8.69, *ibid*.

other situation is hypothetical and it is not possible to predict what the outcome or resulting impact would be.

- 8.4 In any event, in relation to section 316 it is clear that Sky's insistence on reciprocal supply of live Premier League content did not and would not prevent BT from being an effective competitor at any level of the sector. Fair and effective competition in the sector has not been prejudiced. Thus intervention under section 316 is not justified.
- 8.5 The Supplementary Consultation comprises little more than a call for inputs. It does not provide Ofcom's assessment of whether an insistence by Sky on reciprocal wholesale supply is a practice prejudicial to fair and effective competition. If, notwithstanding the submissions above, Ofcom were to reach a view that Sky's approach to reciprocal supply provides grounds for intervention under section 316, as a matter of procedural fairness Sky must be afforded the opportunity to review and comment on Ofcom's assessment, including any evidence on which Ofcom relies. Ofcom would need to have due regard to Sky's submissions before reaching a final view. It would not be appropriate for Ofcom to proceed to a final view and remedies without such further stage.
- 8.6 Sky's view remains as set out in its response to the First Consultation: Ofcom should close the review and remove the WMO obligation, and it should move to do so swiftly. While Ofcom's review is ongoing, Sky continues to be subject to unnecessary and highly intrusive regulation which skews normal commercial negotiations and incentives and is prejudiced as a result.

Sky

21 September 2015