

Annex 4b

Sky's comments on Ofcom's proposed conditions

The table below sets out Sky's comments and concerns in relation to Ofcom's proposed conditions.

Annex 4a to this submission contains a suggested mark-up of Ofcom's proposed conditions, which addresses Sky's concerns as well as making other drafting suggestions and corrections.

Provision	Sky comments
<i>Part I: Definitions and interpretation</i>	
"Ancillary Service"	We propose to delete this definition as we are proposing a revised definition of "Application Signing Services" and "Specified Programme Services" in line with our comments at Section 11 of this response.
"Application Signing Services"	<ol style="list-style-type: none">1. We have suggested creating two categories of third party: Third Party Broadcaster and Third Party Retailer. We have proposed an amendment to parts (a) and (b) of the definition of "Application Signing Services" to clarify that these are services to be provided to Third Party Broadcasters (not retailers).2. We propose to delete the words "or listing in an interactive menu". See comment at paragraph 11.16 of this response.3. We suggest moving the reference to "Pay TV Subscriber Services" (amended to "Pay TV Customer Services" – see below) so that it falls within the definition of "Application Signing Services" rather than the definition of "Authentication Services". It is not possible for a third party to provide pay TV customer services (or indeed any service which makes use of a return path) without also taking Application Signing Services from SSSL. Part (c) of the definition clarifies that Pay TV Customer Services are to be provided to Third Party Retailers (not broadcasters). This proposed change is in line with Sky's proposed commitments.
"Authentication Services"	<ol style="list-style-type: none">1. As a consequence of our proposed introduction of a definition of "Third Party Broadcaster" and "Third Party Retailer" (see below) we have added references to these in this definition.2. We have proposed an amendment to this definition to clarify that, in order to receive Authentication Services from Sky, a third party must also take Application Signing Services from Sky.

	3. We have suggested deleting the references at (a) and (b) to Specified Programme Services and Pay TV Subscriber Services, as these are captured within the definition of “Application Signing Services” (as re-drafted by Sky).
“Broadcast Service”	We have proposed this new definition, which covers “Television Broadcast Service” and “Television Licensable Content Service”. This is purely a stylistic change, with the aim of making the conditions easier to read.
“Commercial Watermarking”	We have proposed amendments to this definition so that it more accurately describes the service provided by Sky.
“Pay TV Subscriber Services”	<ol style="list-style-type: none"> 1. We have suggested amending this definition to “Pay TV Customer Services” as the word “subscriber” is inappropriate in the context of pay per view purchases. 2. We have proposed that the references to “Specified Programme Services” be replaced with references to “Broadcast Services” as this term more accurately describes the services purchased by pay TV customers.
“Reference Offer”	As a consequence of our proposed introduction of a definition of “Third Party Broadcaster” and “Third Party Retailer” (see below) we have added references to these in this definition.
“Relevant Device”	We propose to delete the reference to SSSL as “Access Control Services” are already defined by reference to SSSL.
“Specified Programme Services”	We have suggested an amendment to the definition of “Specified Programme Services” in line with our comments at Section 10 of this response.
“SSSL”	We have amended a typographical error – Sky Subscribers Services Limited.
“Subscriber”	We have suggested that the reference to “Specified Programme Service” be replaced with a reference to “Broadcast Service” as this term more accurately describes the services purchased by pay TV customers.
“Television Broadcasting Service”	We have proposed this definition for ease of reference.
“Television Licensable Content Service”	We have proposed this definition for ease of reference. We have not included reference to “electronic programme guides” (as is included in the definition of “Television Licensable Content Service” set out at

	section 232 of the Act) as it is our understanding that Ofcom does not intend to capture interactive services which entail "Navigation and Discovery" (see further our comments at Section 10 of this response).
"Third Party"	As stated above, we have suggested creating two categories of third party: Third Party Broadcaster and Third Party Retailer. This is in order to help clarify to which types of customers Sky will be providing specific Access Control Services.
New Part 1 section 3	The proposed wording in this section is in line with existing wording included within the current EPG conditions, CA conditions and current Access Control Continuation Notice.
Part II: The Conditions	
Condition 1 – Requirement to provide Access Control Services on reasonable request	
Condition 1.1 and new 1.2	We have suggested an amendment to Condition 1.1 and the inclusion of a new Condition 1.2, in order to reflect the fact that Sky will be supplying to Third Party Retailers only those Access Control Services which support Pay TV Customer Services. Access Control Services which support other types of service will only be provided to Third Party Broadcasters. This approach is line with Sky's proposed commitments.
New Condition 1.3 (formerly 1.2)	We have proposed an amendment to this Condition to reflect the possibility that Sky may not be in a position to directly provide associated facilities to third parties. It may be the case that Sky would need to procure that a third party provides such associated facilities.
Condition 1.4	<p>We have proposed that this Condition be deleted as it is unclear in what circumstances Ofcom may make a direction under Condition 1 and what the permitted scope of such a direction would be. This creates regulatory uncertainty for Sky. This Condition is also unnecessary in light of Ofcom's ability to intervene pursuant to Section 94 of the Act in the event that Ofcom considers that there are reasonable grounds for believing that SSSL is contravening the conditions.</p> <p>Condition 1.4 is also inconsistent with Ofcom's statement at paragraph 7.85 of its consultation that the conditions "<i>do not seek to place a burden on Sky that is greater than that imposed by the obligations under the Continuation Notice</i>". The Continuation Notice does not contain an equivalent right for Ofcom to issue a direction.</p>

Condition 2 – Requirement to provide Access Control Services on fair and reasonable terms	
Condition 2.1	<p>We propose to delete the requirement for Sky to provide Access Control Services to third parties “on such terms, conditions and charges as OFCOM may from time to time direct”. We consider this requirement to be an unreasonable interference with SSSL’s ability to set its own prices, terms and conditions and is also at odds with Ofcom’s statement at paragraph 7.98, footnote 230 that “<i>The Continuation Notice has required Sky to provide services on FRND terms and conditions. It did not explicitly set charges. As discussed above, our objective is to ensure services provided under the Continuation Notice continue to be supplied. As such, and given that we have not had concerns in relation to charges whilst the Continuation Notice has been in place, we do not consider more intrusive control of charges, such as via charge controls, are appropriate.</i>”</p> <p>This Condition is also unnecessary in light of Ofcom’s ability to intervene pursuant to Section 94 of the Act in the event that Ofcom considers that there are reasonable grounds for believing that SSSL is contravening the conditions i.e. that SSSL’s prices, terms and conditions are not FRND.</p> <p>Condition 1.4 is inconsistent with the current EPG Conditions and CA Conditions applicable to Sky, and is also inconsistent with Ofcom’s statement at paragraph 7.85 of its consultation that the conditions “do not seek to place a burden on Sky that is greater than that imposed by the obligations under the Continuation Notice”. The EPG Conditions, CA Conditions and Access Control Continuation Notice do not contain an equivalent right for Ofcom to dictate Sky’s prices, terms or conditions.</p>
Condition 2.2	<p>Ofcom states at paragraph 7.99 of the consultation document that condition 2.2 “<i>carries over the non-discrimination obligation in the same form as currently applies in the Continuation Notice</i>”, however it does not. For example, Ofcom’s drafting refers to “competitive disadvantage” rather than “significant competitive disadvantage” and does not relate the competitive disadvantage to the provision of access control services or to competitors of Sky. We have therefore suggested amending this Condition in line with the equivalent provisions under the EPG Conditions, the CA Conditions and the Access Control Continuation Notice.</p>
Condition 2.3	<p>We have proposed that this Condition be deleted. See comment above in relation to Condition 1.4.</p>
Condition 3 – Publication of charges, terms and conditions	
Condition 3.2	<p>We have suggested removing the requirement for Sky to include within its Reference Offer “terms of payment and billing procedures” and “details of maintenance and quality standards” as these matters would be incorporated into Sky’s standard terms and conditions, which Sky would be required to publish under (d) (new (c)).</p>

Condition 3.3.	We have suggested deleting this Condition as we consider its contents to already be covered by (i) the requirement not to unduly discriminate, as set out in Condition 2 and (ii) the requirement to update and publish the Reference Offer if Sky makes any changes to the Access Control Services, as set out in Condition 3.4 (formerly 3.5).
New Condition 3.3 (formerly 3.4)	We consider two months to be a reasonable period for Sky to publish its reference offer. We do not consider any interested third parties would be prejudiced by this extended period, as such third parties already hold an agreement for the provision of Access Control Services by Sky.
New Condition 3.4 (formerly 3.5)	We consider the drafting of this Condition to be unclear. We have proposed some amendments which we believe capture Ofcom's intent more clearly.
Conditions 3.10 and 3.11	We have proposed that these Conditions be deleted. See comments in relation to Condition 1.4.