



Review of Sky's Access Control Services Regulation

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Consultation

Publication date: 23rd July 2014

Closing Date for Responses: 17th September 2014

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About this document

This document is about regulation of access to interactive services on Sky's satellite platform. 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. This enables third parties to provide interactive services to end-users, such as 'red button' services including alternative videostreams, voting and gaming.

Ofcom is required to consider whether or not to replace the Access Control Continuation Notice with new regulatory conditions. Following our first consultation last year, we are now consulting, in the light of responses, on the approach we should take when removing the Continuation Notice.

Section 1

Executive Summary

Background

- 1.1 Traditional broadcast TV continues to have enduring appeal, and the popularity of pay TV in the UK has continued to grow, with take-up now at 60% of TV households. Sky is the largest provider of pay TV services in the UK with 10.6m subscribers and aspects of its satellite platform are regulated¹ to ensure other broadcasters can retail their pay TV channels directly to consumers on Sky's platform, without being part of Sky's own retail packages.
- 1.2 One component of the regulated platform access regime concerns Access Control ("AC") services; specific software services linked to Sky's set-top box ("STB"). Access to these AC services has enabled the provision of interactive TV services. These interactive services have developed over time, to include features such as 'red button' access and on-screen watermarking², and two-way interactive services such as voting, gaming and betting.
- 1.3 There have been significant market developments over recent years since this regulation was put in place, with an increasing number of internet-connected devices in use, including smartphones and tablets. Many interactive services such as information services, social interaction, commerce and betting can be made available through devices which do not rely on interaction with a STB. Conversely, other interactive services, including some presented on the main TV screen, can only be provided by third parties if they have a direct relationship with the STB provider.
- 1.4 The existing regulation on Sky comprises conditions in relation to AC services which are given legal effect by the AC Continuation Notice under transitional provisions of the Communications Act 2003 ("the Act"). Sky has submitted that the regulation of its AC services is no longer relevant given market developments and that it presents an unnecessary financial and administrative burden which hinders its investment and innovation. It therefore considers regulation should be removed. However, to provide comfort to its existing customers in the absence of regulation, Sky has proposed a set of voluntary commitments under which it would continue to provide AC services.
- 1.5 We are required to take all steps necessary to consider whether to set replacement conditions prior to removing the Continuation Notice. We consider that sections 73 and 74 of the Act, which enable us 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 this assessment. 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 Regulated access to Sky's platform, known as the Technical Platform Services ("TPS") regime, covers Conditional Access ("CA") (encryption) and Electronic Programme guide ("EPG") services in addition to Access Control ("AC") services.

² For example, the pint glass symbol used in commercial premises to indicate permission to show specific TV channels.

Framework

- 1.6 These objectives have formed the basis of the analytical framework we have used for our assessment. Where there are competing considerations in meeting these objectives we have sought to strike an appropriate balance, noting in particular:
- Sustainable competition. Sky's vertical integration and market position, particularly in pay TV, present a risk that competing broadcasters are hindered from providing interactive services which enhance their TV proposition, potentially placing them at a competitive disadvantage to Sky.
 - Innovation and investment. Regulation should not unduly impede incentives to innovate and invest in new services and functionality; this is particularly relevant as Sky considers future platform and STB development. There are also implications for the providers of interactive services, whether on Sky's platform or using alternative means of provision.
- 1.7 Our objective to deliver the greatest possible benefit to end-users also encompasses public policy considerations, in particular access to public service broadcasting.
- 1.8 We consulted last year to gain a better understanding of the use of AC services, both now and in the next two to three years. Responses to our first consultation highlighted continuing demand for AC services from third parties given the importance of enhanced TV services; interactive services which enhance linear TV (including alternative videostreams, access to subtitling, digital text, commercial watermarking). Some respondents also indicated an interest in using new internet-enabled functionality that Sky may develop in future generation STBs, such as to support standalone 'over the top' services for delivery of video on demand (VOD) content.

Our proposals for interactive services

- 1.9 The responses to our first consultation illustrated the distinction between the interactive services used by broadcasters (and valued by consumers) to enhance TV services, and other sorts of services, including new forms of interactive services relating to VOD content which would depend on Sky's deployment of new functionality. We deal initially with whether to impose conditions for interactive services in relation to enhanced linear TV.
- 1.10 We have considered the question with reference to the framework described above. Opportunities for innovation are likely to be more limited in the context of existing interactive services (in comparison to new forms of interactive services), but competition concerns are still relevant. Interactive services for enhanced TV are valued by consumers and we consider there should be continued access for third parties in a way that secures benefits to end-users. We have considered two options: imposing conditions or, alternatively, not imposing conditions, in light of Sky's commitments. Sky's vertical integration and market position have caused a number of stakeholders to question whether third party access will be maintained in the absence of regulation. Access-related conditions would address these concerns and we set out the replacement conditions we propose, which would support the ongoing provision of interactive services for enhanced TV.
- 1.11 The key elements of the proposed access-related conditions are:

- **Access** – a requirement to provide AC services to third parties, as reasonably requested, in order to support enhanced TV (interactive services which are provided in relation to a linear TV channel and are directly related to its content).
- **Fair and reasonable terms** – a requirement to provide AC services on terms and conditions which are fair and reasonable, and not unduly discriminatory, similar to the requirements under the current regulation.
- **Transparency** – a requirement to publish a reference offer including standard terms and conditions, and the provision for Ofcom to request accounting information relevant to these services.

1.12 In response to the concerns raised about Sky's intentions to continue to provide third party access in the absence of regulation, Sky has proposed commitments, revised most recently in February 2014. In the commitments Sky undertakes to continue to provide access for existing interactive services, on current generation STBs and also future generation STBs.

1.13 The key elements of Sky's proposed commitments are:

- **Duration** – unlimited duration, effective from the date of the AC Continuation Notice's removal until Ofcom notifies Sky that they are no longer required.
- **Monitoring** – provision to Ofcom on written request of all information that it would require in order to monitor adherence to the commitments.
- **Services** – provision of AC services (or equivalent on future generation STBs) to provide access to: alternative videostreams broadcast via digital satellite; alternative audio soundtracks; digital text services; subtitling; voting, gaming and betting services; commercial watermarking; and pay TV customer services.
- **Pricing** – prices for services to enable the above listed interactive TV services (with the exception of voting, gaming and betting services where additional charges apply) to be capped at the existing charge of £100,000p.a.
- **Terms and conditions** – a right of renewal incorporated into existing customers' contracts on Sky's standard terms at the time of renewal and at charges no higher than current levels; Sky's Standard Terms and commitments published on its corporate website.

1.14 Sky's commitments would appear to address many of the concerns that have been raised with us. However, their effectiveness in ensuring appropriate access for third parties may turn on specific details. We anticipate respondents will have views on the details of the commitments and their wording. We also recognise that the commitments are not legally binding, raising questions over whether these arrangements would provide appropriate recourse if agreement is not forthcoming; for example whether existing contractual provisions are sufficient.

1.15 The draft access-related conditions are formulated differently to the commitments. In particular, they are formulated by reference to the principle of securing the availability of interactive services which enhance linear TV rather than by reference to a specific set of interactive services as currently provided. They may provide greater confidence to some stakeholders and would ensure the availability of a regulatory mechanism to resolve any disputes. However, in other respects formal conditions may be less attractive to third parties than Sky's proposed commitments. For

example, for enhanced TV services on a future generation STB, third parties may incur higher costs where incremental development is required, whereas Sky has committed to no additional charges under its commitments.

- 1.16 In summary, given we are required to remove the Continuation Notice, we are consulting on whether to:
- remove the Continuation Notice without imposing replacement access-related conditions, in light of Sky's proposed commitments; or
 - remove the Continuation Notice and impose replacement access-related conditions.
- 1.17 We are seeking views and evidence from interested parties on these options and the issues set out in this consultation document.

Future developments in interactive services

- 1.18 Looking forward, consumers have benefited significantly from the increase in internet-connected devices, and associated applications and services, which have provided the opportunity for a much richer interactive experience, both as an alternative and complement to traditional broadcast services. These market developments have important implications for competition. Broadly, we would expect them to bring positive benefits, for example in terms of consumer choice and innovation. However, it is still early days as new IP-delivered content platforms continue to launch, and consumer behaviour evolves to take advantage of the change in the way content is delivered. Platforms have the potential to act as gateways and the control of such gateways may continue to be an area of concern which could frustrate effective competition and impede consumers realising the benefits of greater choice and competition.
- 1.19 Given Sky's vertical integration and market position, Sky may be well placed to maintain a strong position in the provision of interactive TV services, recognising the significant benefits of being able to reach 10.6m pay TV subscribers. Interactive TV services will continue to develop over time, and new forms of interactive services are likely to become available on Sky's platform as Sky deploys new functionality. We want to ensure that consumers continue to benefit from developments and competition in the provision of these services, as they have done in the past. When considering functionality yet to be deployed, these issues need to be considered carefully. In line with the framework set out above, we note that regulation may risk adverse effects on incentives to innovate and invest in new technologies, both for Sky in terms of platform development and for interactive TV service providers in terms of alternative approaches to provision. Following this consultation, should we decide to impose access-related conditions, the draft conditions we have set out would continue to ensure availability for third party broadcasters to the extent that new functionality deployed supports interactive services which enhance linear TV channels. Looking forward we expect to apply the same framework to benefit consumers in relation to other types of content services, in particular VOD services.
- 1.20 Given the potential for future concerns to develop in this area, we will be following developments closely and will consider what further work we should do following our decision in relation to removal of the Continuation Notice.

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 ("STB") to enable the provision of interactive services.³ 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'). We asked stakeholders for their views on the extent to which third parties were likely to require access to Sky's AC services in the next two to three years and whether such access could be secured in the absence of regulation. We received ten responses to the consultation expressing a variety of views (see Sections 3, 4 and 7).
- 2.3 This further consultation seeks stakeholders' views on our assessment of demand for AC services, potential concerns that could arise in the absence of regulation and the approach we should take in relation to AC services in the next two to three years.
- 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 As we outlined in our July 2013 consultation, 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 just under four hours per day.⁴
- 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.⁵ Pay TV services typically offer a range of content beyond that available on free-to-air ("FTA") 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 are also available across the various pay TV platforms as well as via other means of delivery.

³ 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.

⁴ BARB figures. Number of hours per day among all individuals aged 4+ in 2013.

⁵ Ofcom's Tech Tracker research, Wave 1 2014

<http://stakeholders.ofcom.org.uk/binaries/research/statistics/2014apr/2014w1.pdf>

- 2.7 Sky is currently the largest pay TV provider with 10.6m subscribers.⁶ In comparison, Virgin Media has 3.3m⁷, BT has 1m⁸ and TalkTalk has over 1m⁹ subscribers. The majority of pay TV consumers therefore subscribe to Sky's services.
- 2.8 The supply of pay TV and related services in the UK is an area which has been subject to scrutiny from both domestic and European competition authorities over the last 20 years, which has resulted in competition and regulatory investigations¹⁰ into the operation of competition at different levels in the industry supply chain.
- 2.9 A particular focus in a number of these investigations has been the position of Sky as a vertically integrated provider i.e. platform operator, wholesale channel provider and retail pay TV service provider. In August 2012, the Competition Commission report on Movies on pay TV concluded that competition in the retail pay TV market was not effective and Sky had market power in the pay TV retail market.¹¹
- 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"):

⁶ BSkyB's unaudited results for the nine month period ending 31st March 2014 (Sky subscriber figures include Republic of Ireland and NOW TV) total for "Paid for subscription products"

https://corporate.sky.com/documents/pdf/latest_results/q3_1314_press_release.pdf

⁷ Virgin Media – Third Quarter 2013 results, quarter ended 30th September, 2013, (3.3 million or 88% of all 3.8 million TV customers <http://investors.virginmedia.com/phoenix.zhtml?c=135485&p=irol-newsarticle&ID=1899958>).

⁸ BT Group plc, Results for the three months and year ending 31st March 2014.

<http://www.btplc.com/News/ResultsPDF/q414-release.pdf>

⁹ TalkTalk Group plc, Preliminary Results for the 12 months ending 31st March 2014.

<http://www.talktalkgroup.com/~media/Files/T/TalkTalk-Group/pdfs/reports/2014/preliminary-results-fy14.pdf>

¹⁰ Although there have been a number of competition/regulatory reviews, not all of them have resulted in intervention. These include:

- 1999: The European Commission cleared the British Interactive Broadcasting ("BiB") joint venture subject to certain conditions.
- 2000-02: OFT investigation into margin squeeze by Sky in relation to the wholesale supply of channels to cable companies. The OFT found that Sky was not in breach of competition law.
- 2006: The European Commission accepted commitments from the Premier League about the way in which Premier League rights would be sold through to June 2013. (*Competition: Commission makes commitments from FA Premier League legally binding*. IP/06/356).
- 2007-10: Ofcom's Pay TV review. Ofcom imposed a wholesale must-offer obligation on Sky in respect of its Sky Sports 1 and Sky Sports 2 channels. Ofcom's decision was appealed by BSkyB and subsequently overturned by the Competition Appeals Tribunal ("CAT"). The CAT's decision has in turn been appealed and the Court of Appeal has now found that the CAT failed properly to consider Ofcom's findings that there was ineffective competition in the pay TV market. The Court of Appeal has now asked the CAT to reconsider the case.
- 2012: The Competition Commission's (CC) review of Movies on pay TV. The CC decided there was no adverse effect on competition specifically with respect to movies.

¹¹ *Movies on pay TV market investigation: A report on the supply and acquisition of subscription pay - TV movie rights and services*. Competition Commission (August 2012).

Para 20: "Overall, we found that there was some competition in the pay -TV retail market but the very high and stable level of concentration, the low level of switching between suppliers, the difficulty of large-scale entry/expansion as a traditional pay -TV retailer and the absence of countervailing buyer power in pay-TV indicated that, at the time of our report, competition was not effective".

Para 55: "While we continued to take the view that Sky had market power in the pay -TV retail market..."

- **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;
 - **EPG listing** provides the allocation of a slot on the Electronic Programme Guide and the provision of a technical interface to enable the broadcaster to deliver schedule information; and
 - **Access Control (AC) 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).
- 2.12 Sky's request relates to the regulation of its AC services only. This consultation 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.

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 e.g. the pint glass symbol used in commercial premises to indicate they are authorised to show particular pay TV channels.

- 2.17 We understand that as of June 2014, there are currently eight third parties¹⁴ taking application signing services from Sky (compared to nine at the time of the July 2013 consultation).¹⁵ ESPN no longer takes these services since its acquisition by BT (which takes these services) and QVC ceased taking these services in August 2013. However we understand that since our July 2013 consultation, Setanta Sports Hibernia 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 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 is third party interest in using them,¹⁷ 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

¹⁴ These parties are Attheraces, BBC, BT, Community Channel, Nickelodeon, S4C, Setanta Sports Hibernia and Turner.

¹⁵ This is down from 30 in 2008, see July 2013 Consultation, paragraph 2.27.

¹⁶ Sky emails of 7th and 10th March 2014.

¹⁷ [X]

exercised its power to give continued legal effect to the relevant conditions of Sky's licence by giving the AC Continuation Notice¹⁸ to Sky in 2003.

Requirements of the Access Control Continuation Notice

2.24 The Continuation Notice imposed by Ofcom 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.

Summary of Sky's request

2.25 As discussed in our July 2013 consultation, we received a submission from Sky asking us to remove the Continuation Notice and setting out the underlying reasons for its request.

2.26 Sky said in its submission that there was no significant demand for interactive services, the costs of the existing regulation was material and burdensome and that it inhibited its innovation and development of new platform functionality. It said that the regulation resulted in material detriment to consumers.

2.27 It also said that it would be prepared to offer commitments¹⁹ to existing AC customers and that they would be able to continue providing their existing services until 2016, and would offer to include relevant provisions in their contracts.²⁰

The regulatory framework

2.28 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 Continuation Notice, as well as our relevant powers for imposing replacement conditions if appropriate.²¹ Ofcom has been under a duty since the Continuation Notice was made in 2003 to consider, as soon as reasonably practicable, whether or not replacement conditions set under the Act are necessary.²² Ofcom must make this assessment before it can remove the Continuation Notice.

Access-related conditions

¹⁸ 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>

¹⁹ In addition, Sky noted that Ofcom previously removed Continuation Notices from BT and Kingston, on receipt of non-legally binding undertakings from the relevant parties.

²⁰ Sky 2013 submission, Part 5, paragraph 43.

²¹ See section 3 of the July 2013 consultation.

²² Under Schedule 19, paragraph 9(11) of the Act.

2.29 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 consultation 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.”²³

2.30 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.”

2.31 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 2.29) 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 Public Service Broadcasters (PSBs), and television licensable content services (for example, television channels provided by other broadcasters or which are distributed via an ECN).

2.32 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:

²³ 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.

“(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.”

2.33 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.

2.34 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

2.35 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;
- 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).

- 2.36 In relation to the duty under section 3(3) referred to above, our general regulatory principles²⁴ 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)

- 2.37 The analysis presented in this document represents an impact assessment, as defined in section 7 of the Act.
- 2.38 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.²⁵
- 2.39 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 5.

The structure of this document

- 2.40 This consultation document is structured as follows:
- In Section 3, we discuss the demand for AC services as outlined in the responses to our July 2013 consultation and consider potential alternatives to these services.
 - In Section 4, we set out the July 2013 consultation respondents' views on obtaining access to Sky's STB on commercial terms.
 - In Section 5, we set out Sky's proposed commitments.
 - In Section 6, we set out the analytical framework.

²⁴ <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

²⁵ 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

- In Section 7, we assess, in accordance with our analytical framework, whether there is a need for intervention.
- In Section 8, we set out our conclusions.

Section 3

Demand for Access Control services and Potential Alternatives

Introduction

- 3.1 A key objective of our July 2013 consultation was to get a better understanding of the types of interactive services that third parties want to provide in the next two to three years and whether they could be provided in alternative ways. We therefore set out a number of questions in relation to plans for interactive services. This section summarises the responses to this aspect of the July 2013 consultation. In general, responses were much more extensive on enhanced TV services than the other categories.²⁶
- 3.2 This section also sets out our view on demand for AC services from Sky and potential alternatives. In order to inform our analysis, in addition to responses to the July 2013 Consultation, we requested information from Sky on the usage of interactive services. Sky provided data in response.²⁷ The information provided by Sky broadly supported the arguments it made in its response to the July 2013 Consultation, although Sky highlighted some limitations in the availability of the data we requested.²⁸

Interactive services

- 3.3 In the July 2013 consultation we identified four broad categories of interactive services provided using Sky's Access Control ("AC") Services:²⁹
- **Enhanced TV** - services that provide access to additional information and/or videostreams that complement the broadcast linear TV programme;
 - **Navigation and Discovery** – services that provide alternative ways to discover and navigate to TV content;
 - **Contextual Commercial services** - services developed to exploit the TV channel or programme. These services may incorporate some aspects of enhanced TV services; and
 - **Standalone services** – services not integrated with the TV channel or programme but that are accessed on the TV, such as Netflix and Amazon Prime Instant Video (previously LoveFilm).

²⁶ The other categories were Navigation and Discovery, Contextual Commercial services and Standalone services.

²⁷ Sky letter to Ofcom, 5 December 2013. Sky also provided us with further industry information on interactive services in July 2013, as referred to in Sky's response, paragraph 6.1.

²⁸ Sky indicated that gathering such data was complex and not part of its normal reporting and so it "can only attest to it being materially accurate on a 'best endeavours' basis.", Sky letter to Ofcom, 5th December 2013.

²⁹ July 2013 consultation, paragraph 4.3.

- 3.4 We discuss each of these in turn below, setting out a brief overview of the category of service, the responses we received to the July 2013 Consultation, and our views on the current and potential demand for these services, along with the viability of alternatives to provide these services.
- 3.5 We note that there may be overlap between these categories of services. For example, betting services could be considered as incorporating the characteristics of both contextual commercial services and enhanced TV services. Where an overlap exists, for the purposes of our analysis, we consider the service as an enhanced TV service.

Enhanced TV services

- 3.6 Enhanced TV services provide access to additional information and/or videostreams that complement the broadcast linear TV programme. The main types of enhanced TV service recently or currently in use on the Sky STB are as follows:
- 3.6.1 **Alternative videostreams:** Alternative videostreams cover a wide range of additional content. They are used particularly in relation to sports broadcasts to show alternative matches or alternative camera angles but may also be used to enhance other programmes, such as behind-the-scenes videostreams for talent shows. They are generally accessed via the red button. As an example, Sky's red button service for Sky F1 (its Formula 1 channel) allows viewers to access additional camera angles and follow particular drivers alongside supplementary information and statistics about the qualifying or race event.
- 3.6.2 **Information services:** Information services may provide additional information related to a programme (for example, statistics for a sports event such as Sky's F1 coverage mentioned above) or other information such as news or weather content, akin to that previously provided by teletext services.
- 3.6.3 **Betting and gaming services:** Betting and interactive games linked to the content on the main channel may enhance the content by allowing viewers to interact with the content to play along or to place bets on various outcomes based on the content on the main channel.
- 3.6.4 **Subtitling and audio description services:** Subtitling services are the on-screen reporting of speech and sound effects that may not be audible to people with hearing impairments and are synchronised as closely as possible with the TV content. They may also be available in alternative languages. Audio description services provide commentary woven with the soundtrack for blind or visually impaired viewers.³⁰ Subtitling services do not necessarily require access to Sky's APIs as they are also accessible via the services menu on the Sky platform. However, access to the APIs within Sky's STB enables providers of these services to allow viewers to access subtitles more easily via the red button.
- 3.6.5 **Watermarking:** Watermarking entails a symbol (typically a pint glass representation), which is used to help broadcasters ensure that commercial

³⁰ http://stakeholders.ofcom.org.uk/broadcasting/guidance/other-guidance/tv_access_serv/guidelines/

premises, such as pubs and clubs, have the correct subscription to show pay TV channels.

- 3.7 With the exception of watermarking, the above services are typically accessible to viewers via the 'red button' on the TV screen.

Alternative videostreams

Responses

- 3.8 The BBC explained that alternative videostream functionality was most frequently used during major events, such as the Olympics, when it was likely there would be event clashes. Outside of those events, it told us that alternative videostreams were typically used for content that added value to the linear programming such as play-along features, quiz games and behind the scenes footage.³¹
- 3.9 The BBC also said that, since 2009, it has been developing improved red button service delivery based on IP connectivity allowing, amongst other things, access to iPlayer services on Freeview HD³², Freesat HD and Virgin Media's TiVo platforms. Whilst iPlayer access is available via Sky+HD devices, the BBC said this was not accessible via the red button, leading to "...a sub-optimal experience for audiences."³³ [X³⁴]
- 3.10 Whilst the BBC said that a potential solution is offered by IP-connected second screens³⁵, it explained that this required all viewers to own such a device. It noted the importance of enhanced content being close (i.e. accessible via one click of the red button from the main screen) to the linear broadcast on the main screen to provide seamlessness and continuity of user experience.³⁶ It also argued that this second screen solution would lead to fragmentation of the user experience as the "...simple, synchronised and unified 'call-to-action' from the linear broadcast stream" would be lost.³⁷
- 3.11 The BBC did not consider additional EPG listings to be a practical alternative. It highlighted that it would be difficult to secure prominent EPG slots and that it had experienced difficulties in securing EPG slots for additional HD channels during 2013.³⁸
- 3.12 Channel 4 told us that while it was not a regular user of Sky's AC Services, it did use them during the 2012 Paralympic Games because they offered easy access for viewers to alternative videostreams. It noted that viewers found the alternative videostreams 'extremely beneficial'.³⁹ In relation to alternatives, it said that in many cases alternatives did exist but, for some situations, access via the main screen was

³¹ BBC consultation response, paragraph 8 - 9.

³² High Definition (HD).

³³ BBC consultation response paragraph 10.

³⁴ Figure 1, BBC consultation response.

³⁵ Second screens are screens/devices other than the main TV on which content can be viewed at the same time as viewing the main screen, for example computers, tablets and smartphones.

³⁶ BBC consultation response, paragraph 38.

³⁷ BBC consultation response, paragraph 35.

³⁸ BBC consultation response, paragraph 41.

³⁹ Channel 4 consultation response, page 1.

most appropriate, meaning access to the Sky STB would be required for these services.⁴⁰

- 3.13 BT explained that as a sports broadcaster it frequently experienced fixture clashes where the number of matches exceeded the number of channels it had and it was unable to broadcast all of the sports rights it holds.⁴¹ To address this issue, BT told us it would like to use red button functionality,⁴² similar to that used by Sky for its sports channels, to allow viewers easy access to additional videostreams.⁴³ [X⁴⁴] BT also said it wanted to be able to match Sky's interactive services and believed that, in the longer term, offering different camera angles, commentary and greater social media integration would be likely to be required in order to meet consumers' expectations.⁴⁵
- 3.14 BT argued that relying on a second screen application to broadcast multiple sports events, when such live events happen simultaneously, would not be feasible. It said that [X] of its user base had used its online application to view major live sports events. BT argued that second screen applications were better suited to providing additional content, not the primary videostream. BT also argued that limited broadcast delivery, augmented by delivery via the internet to a second screen application for a significant number of rights, would place BT at a disadvantage in bidding for rights offered by major rights holders.^{46 47}
- 3.15 BT also argued that EPG listing was not a viable alternative. It raised similar points to the BBC regarding the prominence of listing. It also flagged that it would have additional costs compared to a red button service. These would arise from having to develop, brand, market and promote additional channels and from having to purchase additional rights to provide sufficient content for these new channels to be viable. BT noted that if alternate EPG listings was the optimum approach, it would expect that Sky would have used this approach itself.⁴⁸
- 3.16 Sky argued that second screens provide a viable alternative to alternative videostreams via the red button. Sky noted that a viewer could connect the second screen device to a main TV (via Bluetooth, wifi or cable) if they preferred watching a TV screen rather than the second screen device.⁴⁹
- 3.17 Contrary to the BBC and BT, Sky also suggested that an alternative was for a broadcaster to purchase additional EPG listings on which to show additional videostreams. It said that this provided the benefit that it could be recorded. Sky

⁴⁰ Channel 4 consultation response, answer to question 3.

⁴¹ BT consultation response, paragraphs 20 - 21.

⁴² BT consultation response, paragraph 48.

⁴³ BT consultation response, paragraph 27.

⁴⁴ BT consultation response, paragraph 27.

⁴⁵ BT consultation response, paragraph 50.

⁴⁶ BT consultation response, paragraph 30 – 31.

⁴⁷ Since BT responded to the July 2013 Consultation it has gained the exclusive live broadcasting rights for the UEFA Champions League for three seasons from 2015/16.

<http://www.btplc.com/News/Articles/ShowArticle.cfm?ArticleID=15D869F4-C14E-44A2-956E-A2C18B1751A9>

⁴⁸ BT consultation response, paragraphs 32 – 42.

⁴⁹ Sky consultation response, Annex 1, paragraph A2, page 11.

pointed to the success of the BBC's additional EPG listed channels during the 2012 Olympics.⁵⁰

Our view

- 3.18 Based on responses to the July 2013 Consultation, our view is that there is demand for access to the APIs in Sky's STB to provide alternative videostreams (accessed via the red button). Demand is primarily for major events – particularly sports events – but also arises for other types of programming. To the extent that other broadcasters obtain rights to these events, they are likely to have similar demand for alternative videostreams (for example, Channel 4 during the Paralympics). BT said it also intends to use these services in the near future.
- 3.19 Alternative videostreams are provided via the red button on the Sky STB. This means the broadcaster must have access to Sky's APIs. We do not consider that access via the red button on Sky's STB would be possible without such access. Therefore in considering whether any alternatives exist, we have considered options that do not rely on access to the Sky APIs to providing alternative videostreams.
- 3.20 As set out in paragraphs 3.10-3.17, respondents to the July 2013 consultation discussed second screen applications and additional EPG listing. We have also briefly considered whether smart TVs may also provide an alternative.
- 3.21 We do not consider that second screen applications provide a viable alternative to access to Sky's APIs for the following reasons:
- 3.21.1 **Take-up of second screen devices:** second screen viewing cannot yet be considered a viable alternative given its relatively low take-up by the population as a whole, though this is increasing.⁵¹ In 2014, tablet ownership is at 44%⁵² and according to our Communications Market Report 2013, just over half of tablet users identify watching some form of TV content as one of their regular activities.⁵³ Smartphone take-up is higher but smartphone users are less likely to watch TV-type content on their smartphones than tablet users are on their tablets.⁵⁴
- 3.21.2 **User experience:** the experience is likely to be different to that provided via the red button. Switching to viewing the second screen would lead to discontinuity in viewing as the alternative videostream is selected, which would clearly impact on the viewer experience. This would be particularly striking for using services such as additional/alternate camera angles on sporting events. This could act to dis-incentivise consumers from using these services, although there may be cases where viewers choose to use a second screen, so they can watch both the main channel content on the main screen and additional content on the second screen. Depending on the content of the alternative videostream, the size of the second screen (i.e. a smartphone or tablet) may also be an issue. For example, viewers may prefer watching sports events such as football matches on a larger screen.

⁵⁰ Sky consultation response, Annex 1, paragraph A2, page 11.

⁵¹ Ofcom, *Communications Market Report*, 1 August 2013, Section 1.5.

⁵² Ofcom's Tech Tracker research, Wave 1 2014

<http://stakeholders.ofcom.org.uk/binaries/research/statistics/2014apr/2014w1.pdf>

⁵³ Ofcom, *Communications Market Report*, 1 August 2013, Section 1.5.2.

⁵⁴ Ofcom, *Communications Market Report*, 1 August 2013, page 57.

- 3.21.3 **Technical restrictions:** Sky suggested that the second screen could be linked to the main screen. This could be achieved via a wireless connection but this would place additional requirements on both the internet-enabled device and the TV (for example, use of the relevant protocols). In addition, this would require the user to have sufficient technical knowledge to correctly configure both devices. Connection via a cable (such as High-Definition Multimedia Input (HDMI)) is also technically possible but this would require the internet-enabled device to be located sufficiently close to the main TV screen. In addition, switching between the content provided via the STB and the content provided via the second screen device would be disruptive to the viewing experience.
- 3.22 We consider that additional EPG listings are unlikely to provide a viable alternative because:
- 3.22.1 Navigating between channels (particularly where these are not in consecutive slots on the EPG) would be disruptive to the viewing experience and would mean alternative videostreams would be used less frequently. This might particularly be the case for services such as alternate camera angles on a sports broadcast.⁵⁵ The red button effectively provides the navigation and discovery functionality to alternative videostreams which would be lost if this content was provided via additional EPG listings instead.
- 3.22.2 Obtaining additional EPG listings would require the broadcaster to provide another channel (or multiple additional channels). Whilst it may be practical to obtain sufficient content to provide a channel in the short term for major events such as Wimbledon or the Olympics, this may prove more problematic where a solution is needed over a longer term – for example where rights may be bought for a number of seasons (for example, UEFA Champions League rights). BT noted that it would incur additional costs to develop, brand and market the channel and to purchase sufficient content to make the channel viable. We also note that the launch queue on the Sky platform for new Standard Definition (SD) channels is closed (though channels can be added through the secondary trading of SD EPG slots) due to limitations in EPG listing capacity in some older Sky STBs.
- 3.23 We have also considered whether alternative videostreams could be provided using APIs on smart TV platforms. However, we do not consider this to be a viable alternative at the present time for the following reasons:
- 3.23.1 **Availability and use of smart TV functionality:** take-up of smart TVs is not universal (for example our research shows that as of Q1 2014, only 12% of TVs are smart TVs⁵⁶, though the Communications Market Report 2013 states that take-up is increasing with just under 30% of TV sales being smart TVs.⁵⁷ Take-up of smart TVs is slightly higher by viewers with pay TV subscriptions).⁵⁸ In addition to the smart TV, the viewer would need

⁵⁵ Alternative camera angles may be a service which the viewer accesses from time to time during the broadcast, whereas alternative matches (i.e. to avoid fixture clashes) are more likely to be accessed only once when the viewer chooses the match they would prefer to watch.

⁵⁶ Ofcom's Tech Tracker research, Wave 1 2014, Table 115

<http://stakeholders.ofcom.org.uk/binaries/research/statistics/2014apr/2014w1.pdf>

⁵⁷ Ofcom, *Communications Market Report*, 1 August 2013, Page 131.

⁵⁸ Ofcom, *Communications Market Report*, 1 August 2013, Page 131.

broadband of sufficient speed to provide access to alternative videostreams. Whilst average broadband speeds are increasing, some users will not have fast enough broadband to support delivery of videostreams.⁵⁹

3.23.2 **Interface from main TV channel:** users that subscribe to Sky will view main channels via the Sky STB. Watching alternative videostreams provided via smart TV functionality would require the user to control multiple devices (i.e. both the Sky STB and the TV), whereas alternative videostreams provided via the red button can be used easily via controlling just one device.

3.24 Therefore, we do not consider that second screens, additional EPG listing or smart TVs are likely to provide suitable alternatives to access to the Sky APIs for alternate videostreams.

3.25 In relation to the BBC's comment (see paragraph 3.9) that iPlayer was not available via the red button, we note that the capability to access BBC catch-up content via the red button on Sky+HD STBs has recently been made available.⁶⁰ It is our view that where catch-up content is already available via the STB, red button access to this content appears to be a valuable navigation tool for viewers and there is likely to be demand for the service (that is, in this case, we consider the navigation via the red button to be the relevant AC service rather than the provision of content itself, which we discuss under standalone services).

Information services

Responses

3.26 We received limited responses in relation to information services. The BBC noted that it provides digital text services, including news and other services (for example, providing text as a supplement to subtitles, which viewers with a hearing impairment can read in their own time).⁶¹

Our view

3.27 As for alternative videostreams, in order to provide information services via the red button on the Sky platform, the broadcaster would need to have access to Sky's APIs. We have therefore considered alternatives that would not require access to the APIs and so would not be supported via red button access.

3.28 The red button continues to be one of many options used to supply information services. Depending on the specific content, alternatives include: linear TV (i.e. news broadcasts), newspapers, radio, the internet (either via a computer or a mobile device/tablet) and magazines.

3.29 Where the information sought by viewers is not linked to the specific content being viewed, viable alternative sources of replacement services may be available, subject to the availability of suitable devices and broadband of sufficient speed.

⁵⁹ Ofcom broadband speed research, November 2013, <http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/broadband-speeds/broadband-speeds-nov2013/>

⁶⁰ http://recombu.com/digital/news/bbc-updates-iplayer-on-sky_M13179.html

⁶¹ BBC consultation response, Figure 1 and paragraph 11.

- 3.30 Where the information is specifically linked to the content of the programme (such as information on lap times provided to supplement motor racing broadcasts), this may be available to viewers via a second screen device. It would, generally speaking, not need the second screen data to be closely synchronised with the main screen and it is likely that accessing such content on a second screen would not be as disruptive as for alternative videostreams. However, as for alternative videostreams (as discussed above), the 'call to action' for the viewer would not be integrated with the main screen.
- 3.31 As such, whilst some alternatives may exist, there may be barriers to providing some types of information services if access to Sky's APIs was not available.

Betting and gaming services on Sky's platform

Responses

- 3.32 The BBC highlighted that it provides interactive applications such as games for children's programmes and play-along features for quiz shows.⁶²
- 3.33 Sky commented on betting services. It told us that only it and Attheraces Ltd provide interactive betting services on Sky's platform but consumer usage of this service is low.⁶³ [§⁶⁴] It argued that online services provide a viable alternative.
- 3.34 BT highlighted that improved betting services could be provided if access was available to the Ethernet port in Sky's STB.⁶⁵ We discuss access to the Ethernet port in the section on future demand from paragraph 3.68 onwards.

Our view

- 3.35 In our July 2013 consultation we considered betting services under the heading of contextual commercial services. As noted in paragraph 3.5, we think this is an example of a service where there could be an overlap between enhanced TV and contextual commercial services. We discuss betting here on the basis that it is offered as an enhancement to the linear programme.
- 3.36 Use of interactive TV as a means of remote gambling is low.⁶⁶ However, this may be because alternatives exist. For example, whilst Sky noted that use of SkyBet via the red button is low, SkyBet's revenues have been increasing overall.⁶⁷ Advertisements promote betting apps for mobile devices before and during sporting events and there has been a significant increase in sports betting advertising in recent years.⁶⁸ These advertisements include latest odds depending on progress of the event. Therefore, we consider that second screen apps may be able to gain sufficient visibility and sufficient synchronisation to the event in the main channel screen to provide a viable alternative to access via the red button.

⁶² BBC consultation response, Figure 1.

⁶³ Sky consultation response, Annex 1, page 12, paragraph A2.

⁶⁴ Sky consultation response, Annex 1, page 12, paragraph A2.

⁶⁵ BT consultation response, paragraph 59.

⁶⁶ July 2013 consultation, paragraph 4.23.

⁶⁷ Sky, 2014 First Half Results, 30 January 2014.

http://corporate.sky.com/documents/pdf/latest_results/q2_1314_presentation.pdf, slide 42.

⁶⁸ For example, an increase of 270% in 2012 compared to 2011 to 91,000. Ofcom research, slide 159 http://stakeholders.ofcom.org.uk/binaries/research/tv-research/Trends_in_Ad_Activity_Gambling.pdf

- 3.37 In relation to gaming (for example, play-along games associated with programmes on the main screen), alternatives have been used (for example, play along with Channel 4's Million Pound Drop on a second screen). However, there would be obvious advantages to red button access, particularly in terms of the 'call to action' to take part in the game. In addition, in some cases, such as play-along games on children's channels, the use of a second screen device may be less appropriate.
- 3.38 Therefore, whilst it is not clear that access to Sky's APIs is necessarily essential to providing these services, such access may be materially advantageous.

Sub-titling and audio description services

Responses

- 3.39 S4C told us that it used the red button service on Sky's STB to deliver Welsh and English language subtitles and to provide viewers with a choice of soundtrack between English and Welsh language commentaries for some sports matches and other events.⁶⁹ It noted that in 2012, around 80% of its programmes offered subtitles in English, showing that the current use of the service is extensive. Whilst these services could be accessed via the services menu, S4C argued that this is more complex than using the red button and means that viewers need to navigate away from the channel, which is likely to act as a disincentive.⁷⁰
- 3.40 S4C suggested that delivery of alternative soundtracks via broadband to PCs, laptops or tablets could be an alternative approach but that these would be limited by broadband speeds and the requirement for the end user to install new software (which may be required to, for example, synchronise an internet feed with the main channel).⁷¹
- 3.41 The BBC told us that the red button allows them to provide other services: "[t]ext-based news and other services provide a useful supplement to subtitles, providing text which those with hearing impairment can read in their own time outside of real time programming windows."⁷² It also provides alternative audio soundtracks via the red button.⁷³ [X⁷⁴]

Our view

- 3.42 The provision of subtitling and audio description services are important services for a significant number of viewers with visual and/or hearing impairments and access to these services is subject to regulatory requirements. Additionally, as highlighted by S4C, in certain circumstances alternate language subtitles and alternative audiostreams may also be necessary to allow the population as a whole to access services (i.e. non-Welsh speakers accessing S4C programmes). These services can therefore help promote cultural diversity.
- 3.43 S4C currently achieves this using red button functionality. If this was unavailable, these subtitles could still be activated by the end user, but this could be more complex and disruptive to the viewing experience and may require navigation away

⁶⁹ S4C consultation response page 2.

⁷⁰ S4C consultation response, page 1 – 2.

⁷¹ S4C consultation response page 3, response to question 3.

⁷² BBC consultation response, paragraph 11.

⁷³ BBC consultation response, Figure 1.

⁷⁴ BBC consultation response, paragraph 11.

from the channel being viewed. Therefore, whilst alternatives do exist to provide these subtitles, we consider that these may be inferior to an approach that makes use of red button functionality.

- 3.44 In relation to alternative language commentary tracks, it is not clear that a viable alternative currently exists. As highlighted by S4C, these could be provided via an alternate feed via the Internet. However, Ofcom's latest Infrastructure Report suggests that there may currently be a material number of viewers in Wales without access to a sufficiently fast broadband connection (though this number may decline in the next few years).⁷⁵ ⁷⁶ However, in addition to broadband speed, consumers would also need the necessary technical skills to be comfortable in configuring devices in this way.
- 3.45 Therefore, we do not consider that the alternative ways to provide alternate language subtitles or soundtracks would be likely to provide a sufficiently good substitute for consumers, compared to the level of user experience that access via the red button on Sky's STB currently provides.

Watermarking

Responses

- 3.46 BT told us that it currently uses Sky's APIs to provide a commercial watermark on its sports channels. BT explained that the commercial watermark was a key part of its enforcement of commercial subscription agreements and acted as a deterrent to potential fraudulent use.⁷⁷ [X⁷⁸] As of May 2014, BT had 19,000 commercial subscribers.⁷⁹
- 3.47 BT identified that the alternative, where access to Sky's APIs is not available, is to dual-illuminate channels⁸⁰ (whereby the channel authorised for viewing in commercial premises is shown on a separate channel and watermarking features can be included within the broadcast signal). BT argued that this was expensive as additional channel slots would need to be purchased. In addition, BT argued that whilst Sky Sports, as an established brand, may be able to increase advertising revenue through a dual-illumination strategy⁸¹, it was unlikely that BT Sport, as a new entrant, would be in a similar position and so would not be able to maximise advertising revenue from its sales in commercial premises even if it was dual-

⁷⁵ As of June 2013, 12% of premises in Wales received a broadband speed of less than 2Mb/s. 48% of premises in Wales have access to Next Generation Access ("NGA") networks which would offer increased broadband but this deployment is currently focused on urban and sub-urban areas. Ofcom, *Infrastructure Report 2013*, 24 October 2013, http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/broadband-speeds/infrastructure-report-2013/?utm_source=updates&utm_medium=email&utm_campaign=infrastructure-2013. Figures 8, 9 and 10.

⁷⁶ The Broadband UK (BDUK) scheme aims to support rollout of NGA into rural areas, and the target is to cover 95% of the UK population.

⁷⁷ BT response, paragraphs 9 – 10.

⁷⁸ BT consultation response, paragraph 12.

⁷⁹ BT press release, May 15, 2014.

<http://www.btplc.com/news/articles/showarticle.cfm?articleid=%7Bc3dc931e-0505-4d55-b1a5-c35f2afae706%7D>

⁸⁰ BT consultation response, paragraph 14.

⁸¹ Dual illumination would enable different adverts to be inserted on the residential and commercial videostreams. This may be of value for targeted advertising, allowing increased advertising revenue to be generated.

illuminating channels. As such, it said that dual-illumination would be “extremely inefficient” and would “saddle a new entrant with significant and unnecessary costs”.⁸²

3.48 In its response, Sky noted that only it and BT currently used watermarking services.⁸³ Sky queried whether watermarking was essential for making pay TV channels available in commercial premises. It argued that some broadcasters of channels intended for reception in commercial premises do not use watermarking, and that watermarking is only one method to identify whether a commercial premise has purchased the appropriate package.⁸⁴

3.49 [X⁸⁵]

Our view

3.50 Watermarking is generally used by sports broadcasters and there is currently no use of the service beyond the sports genre. Not all sports broadcasters that offer packages to commercial premises use watermarking. We accept that some propositions may not see value in watermarking (for example where different prices are not charged for residential and commercial premises). However Sky does use watermarking for its own sports channels and BT and ESPN sports channels⁸⁶ currently use Sky's AC services to provide their own watermarking services, so there is current demand to provide watermarking services on Sky's STB.⁸⁷

3.51 In response to BT's points regarding dual-illumination, we note that BT Sport has only relatively recently launched, and so its commercial position is still evolving. We think that BT's argument that dual-illuminating would not be a cost effective solution is a relevant consideration when compared to the watermarking solution using access to Sky's AC services.

3.52 [X⁸⁸]

3.53 Whilst noting the potential alternatives to watermarking, we consider that it is currently too early to conclude that they represent effective substitutes to the APIs in Sky's STB to provide watermarking.

Navigation and Discovery

3.54 Navigation and discovery services provide alternative ways to discover and navigate to TV content, other than navigation via the standard EPG or links accessible via the red button (such as those described above as enhanced TV services). Examples include advanced search of programme metadata⁸⁹ and recommendations from social networks.

⁸² BT consultation response, paragraphs 16 – 19.

⁸³ Sky consultation response, Annex 1, page 11, paragraph A2.

⁸⁴ Sky consultation response, Annex 1, page 11, paragraph A2.

⁸⁵ Sky consultation response, Annex 1, page 11-12, paragraph A2.

⁸⁶ Owned by BT.

⁸⁷ In addition, we understand that Setanta Sports Hibernia has recently begun to use Sky's AC services to provide watermarking services, Sky emails of 7th and 10th March 2014.

⁸⁸ Sky consultation response, Annex 1, page 11-12, paragraph A2.

⁸⁹ Programme information such as the synopsis, cast, genre of programme etc.

Responses

- 3.55 Sky said that all viewers with a Sky+ STB and a Sky+ entitlement can remotely record programmes from any channel into their planner via the Sky website, a smartphone or tablet device. The Sky+ app allows users to perform the same functionality as a Sky remote, e.g. changing channels, from their smartphone or tablet.⁹⁰

Our view

- 3.56 The demand for access to Sky's APIs to provide navigation and discovery services appears to be low and there is no indication that there is likely to be significant demand for these services on Sky's STB in the next two to three years. We do however note that Zeebox⁹¹ is a second screen application that, using Sky's APIs, can be used as a remote control on Sky+ HD STBs. It also allows users to share information about what they are watching, use social media and access additional information about programming.
- 3.57 There is currently a lack of demand for access to AC services to provide navigation and discovery services (other than those accessible via the red button). However, we recognise that development of navigation and discovery apps appears to still be in its infancy and the importance of these services may develop in the future, at which time we may need to revisit our thinking.

Contextual Commercial Services

- 3.58 Contextual commercial services are services which have been developed to commercially exploit TV channels and programmes, for example, interactive adverts or purchasing functionality on home shopping channels.

Responses

- 3.59 Sky noted that neither it nor any third party currently makes use of interactive advertisements, or interactive shopping functionality via the Sky STB.⁹² QVC, which has previously used Sky's AC services to provide contextual commercial services, told us that it stopped providing these services in August 2013, primarily due to the availability of alternatives, though it noted future developments of the Sky platform may mean it reviews its position.⁹³ We discuss future demand from paragraph 3.68 onwards.

Our view

- 3.60 Whilst there has been a decline in the use of commercial services through the Sky STB, there has been a rise in the purchasing of goods and services through the internet. For example, the Ofcom Communications Market Report 2013 indicated that more than a fifth of mobile internet users have purchased goods or services through

⁹⁰ Sky consultation response, Annex 1, page 13, paragraph A5.

⁹¹ Partly owned by Sky.

⁹² Sky consultation response, Annex 1, page 12, paragraph A2.

⁹³ QVC response.

their phone.⁹⁴ Furthermore, tablet owners are significantly more likely than average to multi-task (including online shopping) while watching TV.⁹⁵

- 3.61 The increase in use of second screen devices/internet shopping appears consistent with the reduced demand for commercial contextual services and indicates that viable alternatives may exist for these services.
- 3.62 New services may develop in the near future. For example, Sky has recently launched AdSmart⁹⁶ which provides targeting advertising. Similar services may also be of interest to third party broadcasters. If and when new services develop, access to Sky's APIs may gain in importance. Therefore, whilst we do not see significant demand for commercial contextual services at present, access to the existing functionality could be beneficial should new demand develop. As any new demand and/or functionality develops we may need to consider our views further if competition concerns arise.

Standalone Services

- 3.63 Standalone services are those which are not integrated with the TV channels and programmes, but are accessed on the TV. Historically, standalone services could have included services such as e-mail and banking services, but standalone services now also include services like Facebook, Netflix and Amazon Prime Instant Video (previously LoveFilm).

Responses

- 3.64 Sky noted that neither it nor any third party provides standalone services on Sky's STB.⁹⁷

Our view

- 3.65 We note that standalone services such as e-mail and banking are not provided via Sky's STB.
- 3.66 In terms of other standalone services, we draw a distinction between Internet Protocol (IP) enabled devices and internet-enabled devices. By the term IP-enabled devices, we mean those that allow access to specific content via an IP connection, though not necessarily via the internet. By the term Internet-enabled devices (which are a subset of IP-enabled devices) we mean those that provide access to content via an IP connection including access to services on the public internet. It is our understanding that Sky+ STBs have the characteristics of IP-enabled devices but are not internet-enabled. Content delivered via the IP connection to Sky+ STBs is provided from Sky's own servers (which provide access to content from services such as the BBC's iPlayer, 4oD, as well as Sky's own Video On Demand ("VOD") and catch-up services) rather than OTT services delivered over the Internet.
- 3.67 In relation to providing access to VOD services, whilst access via the STB appears to be valued by viewers⁹⁸, third party provision of these services are not currently

⁹⁴ Ofcom Communications Market Report 2013, page 4.

⁹⁵ Ofcom Communications Market Report 2013, page 4.

⁹⁶ <http://www.skymedia.co.uk/sky-adsmart/>.

⁹⁷ Sky consultation response, Annex 1, page 12, paragraph A2.

supported on the Sky+ box via access to Sky's APIs. Access would rely on future technical developments, which we discuss further below.

Future Demand

Responses

- 3.68 A number of respondents made comments on the potential future demand for existing AC services and potential new services, notably in relation to enhanced TV services.
- 3.69 Both the BBC⁹⁹ and Channel 4¹⁰⁰ indicated that if Sky adopted a more open platform (for example, one that allowed developers to use HTML5), this could lead to more applications being made available on the platform. However, the BBC said that it believed that if Sky adopted an open-standard HTML browser, it would still need access to Sky's APIs to deliver services (such as a connected red button service).¹⁰¹
- 3.70 [X]¹⁰²
- 3.71 [X]¹⁰³ BT noted that if it had access to the broadband return path, there would be an incentive to develop new services such as betting, social media integration, and voting mechanisms. Moreover, BT would also be interested, in the medium to long term, in being able to offer similar functionality to that of Sky's Anytime+ service as it has acquired relevant VOD content to provide that type of service.¹⁰⁴
- 3.72 S4C said that it had received requests from programme producers to develop authentication services that would require the use of the return path on Sky's platform and anticipated receiving similar requests for that functionality in the future.¹⁰⁵
- 3.73 QVC noted that while it is not currently planning any new interactive services it is aware that Sky currently delivers a number of on-demand and 'push' services using the broadband connection on its platform. If Sky were to offer access to the Sky platform via a broadband connection in the same way that it offers other AC services, QVC said a regulatory assessment may be necessary.¹⁰⁶

Our view

- 3.74 We note that a number of respondents said that interest and demand for interactive services on Sky's STB could increase in the coming years if third parties had access to the Ethernet connection. We take this to refer to access that allows internet access (i.e. that the STB is an internet-enabled device as described above in paragraph 3.66).

⁹⁸ 73% of people with internet-enabled or IP-enabled STBs claim to prefer watching TV VOD services via their STB rather than on other connected devices given the ease of access via the STB. Ofcom Communications Market Report 2013, page 140.

⁹⁹ BBC consultation response, paragraph 61-62.

¹⁰⁰ Channel 4 consultation response, page 1.

¹⁰¹ BBC consultation response, paragraph 63.

¹⁰² [X].

¹⁰³ BT consultation response, paragraph 58.

¹⁰⁴ BT consultation response, paragraph 59-61.

¹⁰⁵ S4C consultation response, response to question 6.

¹⁰⁶ QVC consultation response.

- 3.75 [3<].
- 3.76 Interactive services provided via the Ethernet port, or via other technology changes on Sky's platform (such as a new STB) could either be services that seek to provide the same user experience as available via existing services or could be entirely new types of services. Where a service seeks to essentially replicate an existing service (e.g. red button functionality) but does via a different technical means (e.g. the Ethernet port) access using the new technology could be required to allow the service to be provided. For the viewer, the end result may be the same. In these cases it may be important that suitable access to the new technology is available to provide these services in the most effective and beneficial way for viewers.
- 3.77 Access to the Ethernet port would allow further enhancement of the services discussed above. For example, additional alternative videostreams accessed via the red button could be made available (such as from VOD libraries). It is not obvious that there would be alternative mechanisms to provide these services. Where alternative videostreams support or enhance the programme being viewed, similar concerns to those discussed above (in paragraphs 3.18 to 3.24) would still be relevant.
- 3.78 Access to the Ethernet port could also allow new services to be provided. These services are still developing (including services provided by Sky itself) and currently make up a small proportion of overall viewing.¹⁰⁷ We therefore think it is too early to have a clear view on what these future services may be, the level of demand for them, or the alternative ways of providing such services (other than via the STB). As consumers increasingly look to consume the same content over different devices (e.g. tablets and smartphones, in addition to the main TV screen), we recognise that we may need to consider the development of content platforms more broadly, including those offered by global companies seeking to extend their reach and integrate TV platform offerings with other devices, such as Google, Apple and Samsung in the case of tablets and smartphones. In considering our approach to future demand we also need to consider the balance between investment and innovation against our other objectives, which we discuss in Section 6.
- 3.79 Nonetheless, we understand this is an important area that is likely to develop in the next few years. Developments will provide evidence of the types of services that could be provided and the potential alternative ways to deploy them. We plan to monitor these developments and, to the extent material demand arises, we may need to review again whether viable alternative delivery methods are available.

Conclusion on demand and alternatives for AC services on Sky's platform

- 3.80 Our view is that there is demand for AC services to provide content linked to the main channel content, particularly for the services we have categorised as enhanced TV. Access to Sky's APIs allows navigation via the red button to content such as alternative videostreams (including for example, access to the BBC's catch-up content) to be provided and we consider this is an important service, valued by users. There are unlikely to be sufficiently good alternatives to allow broadcasters to provide these services if access to Sky's APIs is not available. This may also be the case for commercial contextual services (which may, in some cases, be very similar to

¹⁰⁷ For example, VOD viewing was estimated at 2.5% of total viewing. Ofcom Communications Market Report 2013, page 152.

enhanced TV services), though currently demand is low and there may be sufficient alternatives available.

- 3.81 Demand for other navigation and discovery services that require access to Sky's APIs appears low at this stage. However, we recognise that development of these services may still be in its infancy and the importance of these services may develop in future, at which time we may need to revisit our thinking. Standalone services are not currently provided on the Sky STBs though there may be potential demand. This is particularly relevant to future STBs where internet connectivity may be supported. However, it is premature to consider whether any such demand could be met via alternatives.
- 3.82 As STBs and the services deployed on them develop in future, it is important to ensure that enhanced TV services can continue to be provided. As new services develop, we will follow developments closely to consider what further work may be required.

Consultation Question 1: *Do stakeholders agree with our assessment of demand for and potential alternatives to Sky's AC services?*

Section 4

Commercial provision of Access Control services

Introduction

4.1 In this section we summarise stakeholders' views on what their ability would be to secure access to Sky's AC services on a commercial basis, in the absence of regulation. We take account of these views in our assessment of whether replacement access-related conditions might be appropriate in Section 7.

The July 2013 consultation

4.2 As set out in Section 2, under the Continuation Notice Sky has a regulatory obligation to supply AC services to third parties on fair and reasonable terms and must not unduly discriminate in the provision of these services.

4.3 At the time of our July 2013 consultation, Sky had contracts with nine third parties for Sky's AC services, all of whom took ASS (as discussed in Section 2). However, we understand that there are now eight third parties taking these services. One of the purposes of the July 2013 consultation was to find out from stakeholders whether they considered they would be able to negotiate access to Sky's AC services in the absence of regulation, and we therefore asked stakeholders two questions:

- To what extent has the existence of current regulation been relevant to negotiations? Please explain your reasoning and provide any evidence you might have to support your position.¹⁰⁸
- What are your views on your ability to secure access to Sky's access control services in the absence of regulation and your reasons for that view?¹⁰⁹

Stakeholder views

Overarching themes

4.4 In relation to the two consultation questions above, respondents suggested that the Continuation Notice had enabled access to Sky's APIs to be secured and that it had also provided certainty. It was claimed that negotiating access without regulation could have been more difficult, or would not have been granted at all, absent regulation.

4.5 On the other hand, it was also argued by Sky that it had strong commercial incentives to make its platform attractive and provide access to third parties.

4.6 Below we discuss the points raised by stakeholders in more detail.

¹⁰⁸ July 2013 consultation, question 4.

¹⁰⁹ July 2013 consultation, question 5.

Concerns about access

- 4.7 Some stakeholders felt that absent regulation, Sky would not supply AC services to third parties. BT stated in its response that “[t]here is no reason to believe that Sky would willingly supply Access Control services to BT that it was not obliged to supply.”¹¹⁰
- 4.8 BT believed that Sky exerted “gateway control” in relation to enhanced TV and interactive services.¹¹¹ BT set out that whilst Sky said in its submission that third party interactive TV services enhanced its platform, if this were true, Sky would not have offered to provide these services only to 2016¹¹² with a limitation of provision only over its existing STBs. BT considered that it was clear from Sky’s statements that Sky intended to cease provision of AC services to third parties by 2016 at the latest.
- 4.9 BT stated that Sky’s principal justification for putting forward its request for the regulation to be removed related to cost and therefore this “clearly confirms Sky’s intention to withdraw AC services from third parties if AC regulation is removed.”¹¹³ BT said it would be impossible for Sky to continue to provide these services without incurring these costs and therefore it must follow that Sky would not provide these services if regulation was removed.¹¹⁴
- 4.10 It was further argued by BT that if Ofcom were to withdraw the AC Continuation Notice (without replacement conditions being put in place), it would put BT at a material disadvantage in being able to bid for sports rights and have an adverse effect on competition, given the red button was required to manage match clashes.¹¹⁵ BT said that Sky’s claim of not wanting to deter third party investment in interactive TV services was hollow; it stated that Sky admitted that it had itself forborne from investing in certain interactive services, in order to prevent third parties from being able to offer corresponding services over Sky’s platform, despite Sky stating that these services would enhance its platform.¹¹⁶
- 4.11 The BBC also expressed concern that the offer of commitments to 2016 signalled that Sky had an intention to withdraw these services or change the terms under which they were provided after this date.¹¹⁷ It considered that this supported its view that absent regulation, the BBC could not ensure equitable or indeed any access to Sky’s platform for the provision of interactive services.¹¹⁸
- 4.12 The BBC said it was concerned that an unregulated market could increase costs for interactive services, [X]. It said continued regulation of Sky’s AC services was a “vital first step in ensuring continued PSB access on reasonable terms.”¹¹⁹ S4C was also concerned that absent regulation, costs of access to the Sky platform could increase.¹²⁰ It additionally said there could be a resurgence of demand and interest in

¹¹⁰ BT consultation response, paragraph 63.

¹¹¹ BT consultation response, paragraph 69.

¹¹² BT consultation response, paragraph 72.

¹¹³ BT consultation response, paragraph 78.

¹¹⁴ BT consultation response, paragraph 80.

¹¹⁵ BT consultation response, paragraph 75.

¹¹⁶ BT consultation response, paragraph 77.

¹¹⁷ BBC consultation response, paragraph 49.

¹¹⁸ BBC consultation response, paragraph 49.

¹¹⁹ BBC consultation response, paragraph 44.

¹²⁰ S4C consultation response, page 3.

second generation interactive services once the transition from a dial-up modem to broadband connection was complete, which could further increase access costs above the current standard flat fee.¹²¹

- 4.13 Channel 4 noted that despite the requirement for Sky to provide access on fair, reasonable and non-discriminatory (FRND) terms, Sky nonetheless introduced other costs that affected the ability of parties to offer services, such as the requirement for indemnity insurance when entering into the Application Signing Agreement (the "ASA"). Channel 4 felt that it would be sensible to ensure that "regulations which are introduced by Sky do not create significantly high burdens for their third party providers to meet (as against, for instance, Sky's own channels to meet)".¹²²
- 4.14 In its response, Channel 4 also noted that while access to Sky's platform may be possible absent regulation, it was concerned that the removal of the requirement to provide access on FRND terms could "lead to access to the services becoming either cost prohibitive or being offered on a discriminatory basis, such as only to services which agree to be part of a pay TV service."¹²³ In particular, Channel 4 noted that if Sky were to introduce a HTML5 app and offer access to external services via the broadband connection, (which would be attractive to content providers) absent regulation, they may be offered on a discriminatory basis.
- 4.15 ITV told us it was not a current user of Sky's AC services but nonetheless considered that the removal of the requirement for Sky to provide AC services on a FRND basis could allow Sky to discriminate against competing providers, particularly if demand for emerging services was significant.¹²⁴
- 4.16 ITV considered that given the inherent uncertainty relating to demand for Access Control services and given that the current regulation was unlikely to impose significant burdens on Sky at present, that the potential downside risks of removing the AC conditions would outweigh the potential benefits. ITV considered that it would be prudent to retain regulation to ensure that Sky did not engage in discriminatory behaviour in future and for Ofcom to monitor how the market for the relevant services evolves over the next two to three years. ITV considered that there may be a stronger case for removal of the conditions if no issues emerged over that period.¹²⁵

Protracted negotiations

- 4.17 BT considered that Ofcom had shown an "unduly optimistic view" in its July 2013 consultation in relation to third parties being "...able to reach a satisfactory resolution via the negotiation process."¹²⁶ It said that Sky's submission to Ofcom "...unequivocally confirms that Sky would not have an incentive to supply AC services to third party broadcasters if the current regulatory obligation to do so were removed."¹²⁷

¹²¹ S4C consultation response, page 3.

¹²² Channel 4 consultation response, response to question 4.

¹²³ Channel 4 consultation response, response to question 5.

¹²⁴ ITV consultation response.

¹²⁵ ITV consultation response.

¹²⁶ July 2013 consultation, paragraph 5.19.

¹²⁷ BT consultation response, paragraph 68.

4.18 It took less than three months¹²⁸ for BT to conclude terms with Sky for the provision of AC Services. However, BT has argued that this was because "...the terms of Sky's standard form were largely non-negotiable and had effectively been imposed by Sky on the industry for a period of more than thirteen years..." BT also reported that it was in the process of launching BT Sport channels and it was unable to divert resources to a "protracted negotiation" with Sky over the terms which would have had little or no prospect of success.¹²⁹ It said that Sky rejected BT's attempts to modify a number of the more material provisions.¹³⁰

4.19 [X¹³¹ 132 133]

4.20 [X¹³⁴]

4.21 [X¹³⁵]

Additional constraints felt by PSBs given public policy requirements

4.22 The BBC argued that [X¹³⁶] It considered that removal of the AC regulation would significantly alter its negotiating position and would make it harder for it to deliver value for money for licence fee payers.¹³⁷

4.23 S4C said that it aims to secure universal access as a public service broadcaster and that Ofcom should continue to ensure access for PSBs through setting new access-related conditions.¹³⁸

Benefits of greater certainty provided by regulation

4.24 In its response, the BBC said the AC regulation ensures a more reasonable and balanced negotiation, as well as a framework from which to determine the cost base relative to other platforms.¹³⁹ It considered that the regulation ensures that the BBC is able to access important APIs on FRND terms ensuring that it can deliver interactive content to all Sky users in an easily accessible manner from the BBC's portfolio of channels.¹⁴⁰

4.25 S4C stated in its response that the existing regulation provided certainty and a flat fee tariff.¹⁴¹

4.26 Channel 4 said that the current requirement for Sky to offer access to its services on a FRND basis had enabled third parties to obtain access to the Sky STB without requiring commercial negotiation and therefore with an ability to manage the cost

¹²⁸ Negotiations took place between 25 January 2013 and 10 April 2013, BT consultation response, paragraph 63.

¹²⁹ BT consultation response, paragraph 64.

¹³⁰ BT consultation response, paragraph 64.

¹³¹ BBC consultation response, paragraph 48.

¹³² [X].

¹³³ BBC consultation response, paragraph 47.

¹³⁴ BBC consultation response, paragraph 46.

¹³⁵ Sky meeting with Ofcom 14 October 2013.

¹³⁶ BBC consultation response, paragraph 45.

¹³⁷ BBC consultation response, paragraph 45.

¹³⁸ S4C consultation response, page 2.

¹³⁹ BBC consultation response, paragraph 42.

¹⁴⁰ BBC consultation response, paragraph 43.

¹⁴¹ S4C consultation response, page 3, response to question 4.

profile of this activity. It said these requirements were particularly important to public service broadcasters.¹⁴²

Counter incentives to provide access in the case of attractive interactive services

- 4.27 In our July 2013 consultation we noted that Sky is a vertically integrated firm providing services on its platform which could, in principle, influence its willingness to negotiate with competitors absent AC regulation.¹⁴³ Sky noted that vertical integration was normally “benign”¹⁴⁴ and would only result in distorted negotiations in certain circumstances which were not relevant for the provision of AC services, because of the intense competition at the retail level. It stated that “Sky has strong incentives to maximise the attractiveness of its platform to end-users. If third party interactive services (such as the BBC’s red-button Wimbledon service) are likely to be of value to consumers, Sky has strong commercial incentives to facilitate their access to its satellite platform. These incentives are a reflection of strong downstream inter-platform competition”.¹⁴⁵
- 4.28 Sky has also told us¹⁴⁶ that it still wants to provide access so that existing third party interactive services can continue to be provided to end-users and that “viewers value the BBC red button service and Sky wants the BBC to continue to make it available on its platform.”¹⁴⁷ It also said it is “very keen that Champions League matches, for which BT has exclusive broadcasting rights from the 2015/16 season, are made available to households on Sky’s platform.”¹⁴⁸
- 4.29 Sky also highlighted in its consultation response that neither Ofcom nor Oftel had ever been called upon to resolve a dispute between Sky and a third party relating to AC services in the 13 years it has been providing these services.¹⁴⁹

¹⁴² Channel 4 consultation response, response to question 4.

¹⁴³ Ofcom consultation July 2013, paragraph 5.20.

¹⁴⁴ Sky consultation response, page 9, paragraph 5.2.

¹⁴⁵ Sky consultation response, page 9, paragraph 5.3.

¹⁴⁶ Meeting with Sky 3rd December 2013.

¹⁴⁷ Sky email 7th March 2014.

¹⁴⁸ Sky email 7th March 2014.

¹⁴⁹ Sky consultation response, page 9, paragraph 5.4.

Section 5

Sky's proposed commitments

- 5.1 As we discussed in Section 2, Sky requested in its submission that we remove the Continuation Notice because it considered that the regulation was no longer required. Its arguments included the view that there was no significant demand for AC services, the regulation was burdensome and that it inhibited innovation.
- 5.2 In this submission Sky stated that it “would be willing to undertake to continue to provide those access control services currently used by broadcasters via Sky’s current generations of STBs to broadcasters until the end of 2016, via the inclusion of relevant provisions in their contracts.”¹⁵⁰
- 5.3 After the July 2013 consultation had closed, Sky developed this proposal and set out in some detail how it would provide AC services to third parties in the absence of regulation. The proposed commitments are set out at Annex 7.
- 5.4 Sky’s proposed commitments are voluntary and are not legally binding. This means that Ofcom would not be able to take enforcement action against Sky if it did not act in accordance with its proposed commitments. Third parties that had existing contracts with Sky would potentially have a remedy in private law for breach of contract if issues were to arise. However we note that this option would be different from third parties having a regulatory recourse and also would not be available to new third party customers without an existing contract with Sky.
- 5.5 However, Sky has told us that any commitments would be signed by its CEO¹⁵¹ and would be published on Sky’s corporate website.¹⁵² It argued that it would suffer reputational damage if it were to renege on such commitments.¹⁵³
- 5.6 We consider the proposed commitments provide evidence relevant to our assessment of what is likely to happen if regulation is removed. Accordingly, we consider them as part of the evidence base before us.
- 5.7 We have summarised Sky’s proposed commitments below.

Summary of Sky’s proposed commitments

- 5.8 **Duration** - The proposed commitments are of unlimited duration in that they would be effective from when the AC Continuation Notice was removed until Ofcom notified Sky that they were no longer required. Sky also commits to not depart from the commitments unless Ofcom has given Sky its prior written consent to do so.
- 5.9 **Monitoring** – Sky has offered to provide to Ofcom on written request all information that it would require in order to monitor adherence to the commitments. The scope of this commitment is wide and does not limit Ofcom to requesting specific types of

¹⁵⁰ Sky submission, January 2013, Part F, paragraph 43.

¹⁵¹ Conference call with Sky on 9th January 2014.

¹⁵² As set out in Sky’s proposed commitments – see Annex 7 of this document, paragraph 7.

¹⁵³ Conference call with Sky on 9th January 2014.

data.¹⁵⁴ For example, we consider that the types of information which could assist us monitor the extent to which third parties secure access in accordance with the commitments include: amendments Sky might make to its standard terms; a list of the parties with current AC related contracts and the services provided; and details of any parties who approach Sky but where no contract is signed.

5.10 **Current generations of Sky STBs** - Sky commits to providing ASS and authentication services on the current generation of STBs in order for third parties to provide interactive services, which would include, but would not be limited to the following services:

- 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.

5.10.1 We understand from Sky that this list has been provided for clarity to assure third parties that these services could continue to be provided by means of Sky's AC services under the proposed commitments. It is not meant to be exhaustive, but seeks to capture, at a minimum, the interactive services which are or could be provided by third parties using Sky's APIs at the moment. We understand that as a result, under the proposed commitments, third parties would be able to develop new services to be made available by means of Sky's existing AC services on the current generations of STB.

5.10.2 However, we note the express exclusion for the provision of video services via means other than digital satellite at paragraph 5.12 below. We understand that the ability to provide new interactive services by means of Sky's AC services does not extend to IP-based VOD services.

5.10.3 **Pricing** – Sky commits to capping ASS charges at a maximum of £100,000 p.a. In respect of charges for authentication services, Sky has committed to a maximum charge which reflects a share of (1) the hardware, software and

¹⁵⁴ We note that our statutory power to require the provision of information under section 135 of the Act may also be available, should we consider such information necessary for the purpose of carrying out our statutory functions.

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. Sky has also set out the maximum level of any additional charges,¹⁵⁵ where applicable, for ASS Services (which is £100,000 p.a. as outlined above) and authentication services.

- 5.10.4 Whilst Sky has committed to a maximum charge reflecting shared costs for authentication services, how this share is calculated would be at Sky's discretion to determine (particularly without a reference to charges being FRND in the proposed commitments). Further, not all aspects of these charges can be determined without further knowledge of the specific service in question and therefore there is some scope for uncertainty.
- 5.10.5 **Terms and conditions** – For existing customers, Sky offers to incorporate into their contracts, on request, a right of renewal on Sky's standard terms at the time of renewal and at charges no higher than current levels. Sky says it would provide its standard terms to third parties on request and would publish its commitments and standard terms on its corporate website (with the exception of certain technical documents which would be provided after third parties have entered into a non-disclosure agreement with Sky).
- 5.10.6 Sky commits not to alter its standard terms without "good reason", namely changes required to ensure that the terms properly reflect the technologies and processes used by Sky to enable third parties to deliver interactive services via Sky STBs. It gave examples in its commitments of where it may need to amend its standard terms such as to reflect a change in the underlying technology, the introduction of new functionality, or any operational changes (such as in relation to testing) in connection with the provision of ASS and/or authentication services.
- 5.10.7 We note that the fact that Sky's standard terms and conditions would only be determined on the date any proposed commitments came into effect could give rise to uncertainty for third parties seeking to enter into new or renewed contracts with Sky. Concerns could arise in relation to Sky's ability to change its standard terms if it has "good reason"; whilst it specifically refers to changing terms to properly reflect the technologies and processes used by Sky to enable delivery of third party services, there is flexibility in how "good reason" could be interpreted.
- 5.11 **Future generations of Sky STBs** – Sky's proposed commitment to provide "Technical Services"¹⁵⁶ on future generations of STBs to any broadcaster to enable the provision of the same list of services as set out above.¹⁵⁷

¹⁵⁵ For example, email and SMS service charges of 4p per authentication.

¹⁵⁶ Our understanding is that "Technical Services" are those services which would in effect replace the functionality of ASS and authentication services to enable the provision of interactive services specified in the proposed commitments. The definition of Technical Services is also included in the proposed commitments at Annex 6.

¹⁵⁷ We understand Pay TV Customer Services to appear as a separate point in the case of Technical Services to reflect that provision is to be made to 'any pay TV distributor', as opposed to 'any broadcaster' in the case of the other services listed.

- 5.11.1 We understand from our discussions with Sky¹⁵⁸ that third parties could provide their existing services to all Sky customers, even when a new generation of STB was rolled out.
- 5.11.2 However, if a third party broadcaster wished to develop an entirely new interactive service (i.e. this service was not included in the list of services in Sky's proposed commitments) on a new generation of STB, it would not be covered by the proposed commitments. Sky has indicated that it would be prepared to negotiate third party access for new services on commercial terms.
- 5.11.3 We note that services provided through any new generation of STB would only be covered by the commitments if that third party was a broadcaster, (except in the case of pay TV customer services) whereas for existing generations of STB, the commitments would be for any third party. In practice, however, this is unlikely to have a material effect given that it is only broadcasters that currently provide interactive services on Sky's platform.
- 5.11.4 **Pricing**– Sky commits to a maximum charge of £100,000 p.a. for services which enable interactive applications to be authored and made available on future generations of STBs (and this charge would cover existing *and* new generations of STB so the maximum total charge would be £100,000 p.a.) and that there would be no additional charges for services specified in annex 2 of its commitments.¹⁵⁹ For any services not listed (including gaming, betting and voting), it would agree charges with the broadcaster. Sky would offer these services on standard terms which it stated would be “reasonable”.
- 5.11.5 **Terms and conditions** - Sky offers to provide standard terms which would be “reasonable” for the provision of Technical Services to a broadcaster or third party pay TV distributor on request and would publish its standard terms on its corporate website. The commitment to provide access on “reasonable” terms would give Sky some flexibility to interpret what it considered was “reasonable” particularly in the absence of any published guidance. This flexibility could also give rise to uncertainty for stakeholders, particularly given that these terms have not yet been determined.
- 5.11.6 It would only provide certain technical documents after these third parties had entered into a non-disclosure agreement with Sky. It would also incorporate into Sky's standard terms for Technical Services an obligation on Sky to offer to enter into a renewal agreement.¹⁶⁰
- 5.12 **Exclusions** - Sky has said its commitments would exclude the provision of video services via means other than digital satellite and the making available of an EPG or similar navigation mechanisms on existing and future generations of Sky STBs.

Consultation Question 2: What are stakeholders' views of Sky's proposed commitments?

¹⁵⁸ Meeting with Sky on 14th November 2013.

¹⁵⁹ For example, services that enable viewers to access and select alternative linear video feeds broadcast via digital satellite or commercial watermarking.

¹⁶⁰ On Sky's standard terms at that time.

Section 6

Analytical framework

- 6.1 In this section we set out the analytical framework under which we have considered whether replacement conditions may be appropriate.
- 6.2 As set out in Section 3, the responses to the July 2013 consultation revealed that there is on-going demand for existing AC services from third parties for the provision of enhanced TV services¹⁶¹ via Sky's current STB. In addition, a number of respondents also said that Sky should be required to provide access to any new internet-enabled functionality¹⁶² that it might develop to enable the provision of interactive services not currently accessible from Sky's STBs. In Section 4 we discussed the potential issues that may arise for parties seeking access to Sky's AC services in the absence of regulation and we set out Sky's proposed commitments in Section 5.
- 6.3 Given the evidence from consultation responses indicating the continued demand for Sky's existing AC services and the issues raised by stakeholders about gaining access to Sky's platform, we consider that it is appropriate to consider further the question of imposing replacement regulation. We have considered two alternative options, namely:
- Option 1: removal of the Continuation Notice without imposing replacement access-related conditions; or
 - Option 2: removal of the Continuation Notice and imposing replacement access-related conditions.
- 6.4 This section sets out the analytical framework we have used to assess these options in this consultation and which we propose to use in order to reach a decision. We first identify the statutory objectives that form the basis of our analysis. We then discuss the economic and policy considerations that in principle could influence the achievement of these objectives in the context of this review, including the circumstances in which it may be necessary to strike a balance between them. In Section 7, we then go on to apply the analytical framework to the evidence before us in order to make our assessment.

Objectives

- 6.5 In this review we are considering the question of whether or not to impose conditions under Chapter I of the Act to replace the obligations to which Sky is currently subject under the Continuation Notice. As set out in Section 2, the conditions which we consider to be the most relevant in this context are access-related conditions set under the powers in sections 73 and 74 of the Act. Ofcom has the power, under section 73(2) to impose such conditions relating to network access and service interoperability as Ofcom considers appropriate for the purpose of securing:

¹⁶¹ As noted in paragraph 3.6, by the term enhanced TV services, we mean those services that provide access to additional information and/or videostreams that complement the broadcast TV programme.

¹⁶² See the distinction drawn between "internet-enabled devices" and "IP-enabled devices" at paragraph 3.66 above.

- efficiency;
- sustainable competition;
- efficient investment and innovation; and,
- the greatest possible benefit for end-users of these services.

6.6 These objectives form the basis of our analytical framework. The objectives have both an economic dimension (efficiency, competition and incentives to invest are specific economic concepts) and a public policy dimension. This latter aspect derives from the recitals to the Access Directive, which recognise 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.¹⁶³

6.7 In the following sub-section, we discuss the economic considerations that we have identified as being capable of influencing the achievement of these statutory objectives, notably sustainable competition and efficient innovation and investment were identified by respondents to the July 2013 consultation and by Sky as being of key concern. We also consider how the policy considerations of cultural diversity and media plurality might be engaged in this review. Finally, we recognise that there are situations where these objectives examined in isolation may be in tension with each other and a balance based on an exercise of regulatory judgement may need to be sought in determining how best to meet the objectives overall.

Relevant economic considerations

6.8 Decisions about the regulatory framework have the potential to influence both the operation of competition and the speed and nature of technological developments. In certain circumstances these factors can pull in opposite directions.

6.9 In general terms, a key rationale for mandating access to established platform infrastructure is to increase the level of competition. This is motivated by the expectation that there will be benefits from increased competition e.g. greater efficiency (in terms of lower prices to consumers as well as lower production costs), higher quality, greater product innovation etc. If a firm with a strong market position is able simply to foreclose competitors from a market by refusing access, then it would not face the same incentives to reduce costs or develop new services. Mandated access can therefore be a means to secure competition and greater efficiency in a market.

6.10 However, when thinking about sustainable competition and the efficient level of innovation and investment, there is the need to take into account the impact on the incentives to innovate and invest over time in a market. That is, to consider the longer term implications. When considering imposing access conditions on a network, there will be the need to take account of the impact on the established network operator to continue to invest to maintain its network and to invest in the development of new technologies as well as the incentives for competitors to develop and invest in their own facilities.

¹⁶³ Recital 10 to the Access Directive (Directive 2002/19/EC as amended by Directive 2009/140/EC).

- 6.11 The Access Directive itself sets out this potential trade-off between competition and incentives to invest and innovate in the following terms:

“Mandating access to network infrastructure can be justified as a means of increasing competition but national regulatory authorities need to balance the rights of an infrastructure owner to exploit its own infrastructure for its own benefits and the rights of other service providers to access facilities that are essential for the provision of competing services. ...The imposition by national regulatory authorities of mandated access that increases competition in the short-term should not reduce incentives for competitors to invest in alternative facilities that will secure more competition in the long-term”.¹⁶⁴

- 6.12 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.
- 6.13 For instance, in a situation where there is a single network which has high fixed costs and low marginal costs, an emphasis on (static) efficiency considerations might point towards mandating access to that network. There would be the expectation that making access to a network available as widely as possible - and pricing access at or close to marginal cost (the allocatively efficient level) - would in turn stimulate service-based competition from firms being able to offer their own services over the established network infrastructure.
- 6.14 However, emphasising short-term competition considerations (and mandating access at marginal cost) could have a negative impact on future investment incentives. Taking the example described in the previous paragraph, the regulated firm would now have no incentive to make further investments in its network because being forced to price at marginal cost would prevent it from recovering the fixed costs it had invested in the network. While it would be possible to argue that a decision to impose access conditions might have little impact on the provision of existing services (because the costs of establishing the network have already been incurred), it could still have an adverse impact when it came to the network owner making decisions about investing in renewing the underlying assets or more particularly investing in the next generation of services. Indeed if the network owner anticipated that regulation would require access to new functionality to be priced at marginal cost it would not invest in that functionality in the first place.
- 6.15 As set out above, considerations of competition and incentives to innovate and invest are interlinked. Innovation in processes and/or services is important in that it is a way that a firm can build or maintain a competitive advantage over its rivals. If imposing access conditions meant that a firm was not able to profit from any competitive advantage it might otherwise gain from innovation, then the incentive to experiment and innovate will be reduced. Seeking to establish a competitive advantage over rivals is part of the competitive process: it is what then forces competitors to respond

¹⁶⁴ Recital 19 of the Access Directive.

in terms of improving and investing in their own service, reducing their costs and seeking to maintain the attractiveness of their product to customers.

- 6.16 It also needs to be taken into account that innovation and investment typically takes place against a background of uncertainty, e.g. whether innovation will ultimately lead to the firm bringing new products to market, whether there will be demand for the new products etc. 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, new ways of doing things, etc.^{165 166}
- 6.17 These different economic considerations will inform our assessment of the extent to which on-going regulation of Sky's AC services is required to secure: (i) sustainable competition (looked at on both a short- and long-run basis); and, (ii) incentives to invest and innovate because of the benefits that will be delivered to end-users in the longer-run.
- 6.18 We note that in considering whether there is the need for regulation at a time of technological change and uncertainty, one option that is available to a regulator is to forbear from intervening to require third party access to new technologies or services and/or to regulate the price for those technologies or services. Instead the regulator could choose to monitor how the new technology develops and how competition actually plays out, in relation to the development of new services, and thus mitigate the risk of regulatory failure in relation to the development of those new services.¹⁶⁷ Adopting such an approach would not prevent the regulator from using its formal powers to intervene if a competition concern did then emerge at a later date.¹⁶⁸

Relevant public policy considerations

- 6.19 As discussed in the previous sub-section, both competition and efficient investment and innovation bring benefits to end-users. However, there can be other matters, which serve the public good (and hence for the purposes of the statutory objectives are to be treated as conferring benefits on end-users) but which may not be delivered by competition and technological advances alone. As noted in paragraph 6.6, cultural

¹⁶⁵ 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.

¹⁶⁶ 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.

¹⁶⁷ For instance, in our review of pay TV in 2010 we decided that the wholesale must-offer ("WMO") remedy should apply to both SD and HD versions of the Sky Sports 1 and 2 channels. We also considered whether to set wholesale prices for the HD versions of the channels as we did for the SD versions. We concluded that we would not set prices, accepting the argument that HD services were a relatively recent innovation, and that pricing flexibility would help promote future innovation.

¹⁶⁸ Any future consideration of whether and/or at what price regulated access should be made available would need to take appropriate account of the investments and risks that the firm had incurred in developing those services.

diversity and media plurality fall into this category and regulatory intervention to secure an environment in which these can flourish may be appropriate.

6.20 In the context of this review, 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. The purposes of public service broadcasting are set out in section 264(6) of the Act and include:

- the dissemination of information and the provision of education and entertainment;
- reflecting, supporting and stimulating cultural activity in the UK and its diversity by the representation of drama, comedy, music and other visual and performing arts; and
- comprehensive and authoritative coverage of news and current affairs to facilitate civic understanding and fair and well-informed debate.

6.21 In conjunction with these public purposes, PSBs also have obligations to make their services generally available to their intended audiences. Thus, the licensed PSBs (Channel 3, Channel 4 and Channel 5) each have obligations under their licences to procure the terrestrial broadcast of their service so as to be available for reception by members of the public within the relevant licence area and to offer their services for broadcast via satellite so as to be available to members of the public in the UK.¹⁶⁹ There are similar statutory obligations in relation to S4C to ensure the broadcast of the service to members of the public in Wales,¹⁷⁰ while the BBC is required under the terms of its framework agreement with the Secretary of State to “do all that is reasonably practicable to ensure that viewers, listeners and other users (as the case may be) are able to access the UK Public Services that are intended for them, or elements of their content, in a range of convenient and cost effective ways which are available or might become available in the future.”

6.22 It is clear from the purposes of public service broadcasting set out above that the PSBs contribute to cultural diversity and media plurality and that they have responsibilities to ensure the distribution of their services for the benefit of viewers across the UK. Accordingly, in carrying out our assessment, we have been mindful of the extent to which access to Sky's AC services enables the PSBs to deliver their services in accordance with their responsibilities and whether regulation is required to enable them to continue to do so for the benefit of end-users.

Balancing considerations

6.23 Viewed in isolation, each of the particular considerations relevant to securing each objective in section 73 may suggest different outcomes in terms of the potential impact of regulation. Where this is the case, Ofcom will use its regulatory judgement as to how to strike the appropriate balance between the objectives. This is discussed in more detail in our assessment in Section 7.

¹⁶⁹ Sections 272 and 273 of the Act.

¹⁷⁰ Paragraph 5, Part 2, Schedule 12 of the Act.

Section 7

Assessing the case for regulation

Introduction

- 7.1 In this section we consider the case for imposing new access-related conditions following the removal of the Continuation Notice to secure the provision of interactive services for third parties on Sky's satellite platform. We have carried out an assessment taking account of:
- (a) our analytical framework set out in Section 6;
 - (b) the evidence discussed in Sections 3 and 4 of demand, substitutability and third party concerns about their ability to access Sky's AC services in the absence of regulation; and
 - (c) the evidence of how Sky intends to deal with third party access if the Continuation Notice were to be removed, as set out in its proposed commitments discussed in Section 5 and attached as Annex 7.
- 7.2 We consider two options for proceeding following the removal of the Continuation Notice: (i) not imposing replacement access-related conditions in the light of Sky's proposed commitments; or (ii) the imposition of replacement access-related conditions under sections 45, 73 and 74 of the Act. We explain our view that there is a case for imposing conditions in the form proposed but that the assessment is finely balanced. We are therefore consulting on the two options to gather stakeholders' views on our analysis before making a decision.
- 7.3 We consider whether replacement access-related conditions are necessary to secure the continued supply of enhanced TV services; interactive services which enhance linear TV (including alternative videostreams, access to subtitling, digital text and commercial watermarking). For the purposes of our assessment we have focussed on the availability of such services over the next two to three years.
- 7.4 Given the potential for new services and new functionality to develop in the future (noting that responses to the July 2013 consultation raised concerns in relation to access to platforms to supply new services in the longer term), we would be concerned if access to other types of AC services that deliver benefits to consumers was not forthcoming. We discuss this further in paragraphs 7.72 to 7.78.
- 7.5 This section is structured as follows:
- (a) We first discuss Sky's position as a platform provider and broadcaster.
 - (b) We then discuss enhanced TV services that use AC services provided by Sky. We first consider if there is a case for ensuring access to Sky's AC services. We then go on to consider whether, in practice, Sky will continue to provide access to AC services.
 - (c) Next we discuss how the concerns we have identified might be addressed by the imposition of new access-related conditions. We propose a draft set of access conditions that would address these concerns at Annex 6. We describe what the draft conditions would cover and how we envisage they

would work in practice, should they be enacted. We also explain how we consider these conditions meet the relevant legal tests of section 47 of the Act.

- (d) We then consider Sky's proposed commitments. These are an important aspect of our evidential assessment given that they represent a public statement of how Sky intends to deal with third party access absent regulation, and provide for services and capabilities to be maintained on terms and conditions set out in, or equivalent to, its current agreements. We set out our views on the proposed commitments and whether, in light of these, there remains a case for imposing access-related conditions.

- 7.6 We have taken this approach in order to clearly present the alternatives of imposing replacement access-related conditions or, conversely, relying on Sky's proposed commitments. In this consultation we are seeking the views of stakeholders on each of these alternatives to inform our final decision.

The scope of our analysis

- 7.7 As referred to in paragraph 2.12, this review relates to AC services only and we have assumed that the CA and EPG regime remain unchanged. As discussed, the Continuation Notice places access conditions on the provision of services on the Sky platform. In removing the Continuation Notice we are first required to consider whether replacement access-related conditions should be imposed on Sky.
- 7.8 As set out in Section 2, Sky is currently the largest retail pay TV platform by a considerable margin with over 10.6m subscribers. The next largest pay TV retailer is Virgin Media, with approximately 3.3m pay TV subscribers. Sky has remained the largest pay TV platform since the original regulation was imposed.
- 7.9 At the present time, Sky is the only broadcaster with sole control of a vertically integrated platform. Other TV delivery platforms (e.g. Virgin Media, YouView and Freeview) are either not vertically integrated or are structured in such a way that they do not appear to face incentives that could lead to restricted access as can arise in the case of a single, vertically integrated company such as Sky.
- 7.10 Virgin Media has in the past also been involved in the wholesale provision of TV channels, but it is no longer vertically integrated with content provision.¹⁷¹ Without its own content and channel business, it should not have a commercial incentive to restrict the ability of third parties to provide interactive services. We note in this regard that Virgin Media has already been engaging in developing its interactive services capability with channel providers. For instance, it has been working with the BBC on connected red button services that will make use of the functionality on its TiVo STB to integrate linear and IP streaming.
- 7.11 The YouView platform seeks to integrate linear and IP streaming services. YouView is a joint venture between the BBC, ITV, Channel 4, Channel 5, BT, TalkTalk and

¹⁷¹ In June 2010 Virgin Media sold VMtv to Sky and in 2011 it sold its 50% stake in UKTV to the US-broadcaster Scripps Network. We note that Liberty Global, the owner of Virgin Media, has recently acquired a 50% share in All3Media (a content creator with a number of production company subsidiaries). <http://www.theguardian.com/media/2014/may/08/all3media-sold-discovery-liberty-global-deal> and has also acquired a 6.4% share in ITV <http://www.libertyglobal.com/pdf/press-release/07-17-Liberty-Global-ITV-FINAL.pdf>.

Arqiva. Its constitution requires that it provides access to its platform on fair, reasonable and non-discriminatory terms.¹⁷²

- 7.12 Consequently, Sky is currently in a unique position, in that it has control of a significant platform as well as being active in content and channel provision. We do not consider that it is necessary at this time to broaden the current exercise to consider other platforms. However, this does not preclude us carrying out a wider review of platforms, which could also include other non-broadcasting platforms, at some point in the future.

Interactive services which make use of Sky's existing AC services

- 7.13 As explained in Section 3, Sky is currently required by the Continuation Notice to provide access to allow the provision of a range of interactive services, which we have grouped under the broad headings of: enhanced TV services; navigation and discovery services; contextual commercial services; and standalone services. We have identified particular demand for enhanced TV services from responses to our July 2013 consultation.
- 7.14 Enhanced TV services are ancillary to linear broadcast services and supplement and augment them. For example, we consider that the ability to offer red button interactive services as an adjunct to linear broadcast services could influence viewers' perceptions of the quality of a channel. As a result, although enhanced TV services are ancillary to linear TV services, we regard them as forming an integral part of the viewer experience and we consider that they could have a bearing on how competition might operate in relation to television services in general. For example, if one sports channel is able to offer different camera angles, match statistics and the ability to bet on match outcomes as a result of access to red button services, while a rival channel is not able to offer the same functionality and richness of consumer experience, then (all other things being equal) our expectation is that the first channel would tend to be perceived as being a higher quality service by viewers.
- 7.15 Interactive services other than enhanced TV services are not so closely tied to specific linear TV services but can still be associated with linear broadcast services. Control over a platform which provides retail TV services puts the platform operator in a position to affect the "look and feel"¹⁷³ of TV and TV-related services provided over that platform. It therefore enables the platform operator to influence the way in which competing channels/services delivered over that platform are perceived by viewers/subscribers. While not necessarily an issue in isolation, when combined with vertical integration this could have an impact on the incentives of the platform operator, in respect of providing enhanced interactive services to firms that compete (or that might compete) with its downstream operations.
- 7.16 Our analysis indicates that there is in particular a demand for enhanced TV services from viewers on the Sky satellite platform and that access to functionality on Sky's platform is required to provide these services. Moreover, as set out in paragraph

¹⁷² For instance, the BBC Trust approved BBC participation in the YouView project subject to certain conditions relating to access to third parties. One of these conditions is that the core technical specifications will be made available to third parties on a fair, reasonable and non-discriminatory basis; source: paragraph 1.26 of the BBC Trust document, *Canvas Proposals: Final Conclusion*. June 2010.

¹⁷³ By "look and feel" we mean a range of features that are relevant to the viewer experience such as the user interface, the colour of the EPG, the layout and design of the menu system that the viewer uses to select their programming, the layout of the remote control etc.

7.12, we consider that Sky is in a different position to other platform operators in that it is active in the provision of TV channels. Our focus here therefore, is to assess whether Sky's commercial incentives would be likely to lead to the continued provision of access required by third parties to provide enhanced TV services, where we have found that there are no good substitutes to Sky's existing AC services. These enhanced TV services include alternative audio and video streams; information services; betting and gaming services; subtitling and audio description services; and commercial watermarking.

- 7.17 We start by considering the case for securing third party access to Sky's AC services to enable the provision of FTA enhanced TV services before considering the case for pay TV services. We have considered FTA and pay TV separately as Sky may have differing incentives to provide access to different broadcasters and because there may be different objectives to consider (for example, PSBs may be in a different position to pay TV operators).

Access to Sky's AC services for enhanced TV services

Free-to-air channels

- 7.18 Currently, the BBC and S4C are the FTA broadcasters making use of Sky's AC services to provide enhanced TV services within the scope of this assessment (in addition to Sky's use on its FTA channels, for example, Sky News).¹⁷⁴ These third party broadcasters are using the services to enhance the provision of public service broadcasting. The BBC uses the functionality to provide access to BBC Red Button, an interactive service which, in the BBC's view, "facilitates deeper engagement by audiences with public service material".¹⁷⁵ As set out in Section 3, the content made available to end-users via the BBC Red Button includes additional videostreams to cover major sporting and cultural events, such as the Olympics, Commonwealth Games and Glastonbury, and text-based news to supplement subtitles for those with hearing impairment. BBC data reveals that the reach of BBC Red Button has almost doubled since 2004, with monthly users rising from 10.3m in 2004 to 20.4m in 2011.¹⁷⁶
- 7.19 S4C also uses the functionality to provide services, namely Welsh and English subtitles and different language commentaries, which are accessible via the red button. In 2012 around 80% of S4C's programmes were subtitled in English.¹⁷⁷
- 7.20 Both the BBC and S4C have commented on the extent to which red button services are accessed by their audiences via the Sky platform. Based on BBC data, the reach of BBC Red Button in the first half of 2013 was on average 16.6m adults per week, of which [X] were on Sky's platform.¹⁷⁸ S4C has observed that satellite television is a particularly important delivery platform in Wales: 48% of consumers in Wales use a satellite service for their main television (compared to the UK national average of

¹⁷⁴ The Community Channel is also currently using the functionality, in partnership with Looking Local, to provide access via the red button to online public sector services (for example information about universal credit). The Community Channel did not respond to the July 2013 Consultation but our understanding of the services which viewers are able to access via the red button on the Sky platform is that they are not directly linked to the broadcast content of the channel and may be accessed by other means (including mobiles, Facebook and gaming devices).

¹⁷⁵ BBC consultation response, paragraph 12.

¹⁷⁶ BBC consultation response, paragraph 30.

¹⁷⁷ S4C consultation response, page 1.

¹⁷⁸ BBC consultation response, paragraph 24 and paragraph 25.

40%), while 60% of consumers living in rural areas of Wales do so.¹⁷⁹ S4C commented: "As a minority language channel, this facility is very important for S4C, in order to be able to serve as wide an audience as possible."¹⁸⁰

- 7.21 The BBC said it expects to support the BBC Red Button for at least another five years and that this will require continued access to Sky's existing AC services.¹⁸¹ Likewise, S4C has said that it intends to continue making use of AC services on Sky's platform for the provision of its red button services.
- 7.22 In relation to other PSBs responding to our consultation, only Channel 4 provided information about its previous and anticipated use of Sky's AC services.¹⁸² It described its use of Sky's AC services to offer additional videostreams during the 2012 Paralympics as "an extremely beneficial enhancement to our successful Paralympic coverage" and indicated that it may make use of the services again in the future.
- 7.23 Only two non-PSB free to air broadcasters responded to our consultation – QVC and one other respondent – and only one of these referred to its use of Sky's AC services. QVC said that it stopped providing interactive services by means of Sky's AC services in August 2013 due to their declining popularity and said it had no plans to launch any new services via this functionality.¹⁸³

Our assessment in relation to FTA channels

- 7.24 Both the BBC and S4C are making use of Sky's AC services to provide broadcast services with a public interest purpose. In the case of the BBC Red Button, the data (see paragraph 7.20) shows that the service is widely used by audiences, while S4C's red button subtitling service is provided for the significant majority of its programming. Further, the data cited above reveals that the availability of these services via the Sky platform makes a material contribution to the accessibility of the respective red button services of the BBC and S4C to end-users. Both the BBC and S4C expect to continue providing red button services for a reasonably foreseeable period. For these reasons, we consider that continued access to Sky's AC services for the provision of such services will provide material benefits for end-users.
- 7.25 We are also required under section 73, to consider whether access-related conditions would secure benefits in terms of efficiency, sustainable competition, and efficient investment and innovation. In Section 3 we note that, in the absence of access to Sky's AC services, there are unlikely to be sufficiently good alternatives to provide enhanced TV services. This could mean enhanced TV services would not be provided without access to Sky's AC services, which would impact on the viewer experience and the competitive benefits arising from the provision of enhanced TV services. We also note the BBC's concern about the impact on innovation in relation to its red button services, should access to Sky's AC services be put at risk.¹⁸⁴ Further, as noted in Section 6, mandated access to secure the availability of a wider set of services for end-users has the potential to increase competition, resulting in greater efficiency and innovation.

¹⁷⁹ S4C consultation response, page 1.

¹⁸⁰ S4C consultation response, page 2.

¹⁸¹ BBC consultation response, paragraph 16.

¹⁸² Channel 4 consultation response, page 1.

¹⁸³ QVC consultation response.

¹⁸⁴ BBC consultation response, paragraph 16.

- 7.26 We consider there is limited evidence before us that providing access to AC services for PSBs could adversely impact Sky, whether financially or technologically. In its initial submission, Sky said the requirement to give third parties access to its STB functionality imposes a material cost burden and inhibits innovation on its platform.¹⁸⁵ Sky explained that this was because third party applications have the potential to compromise the stability of Sky's STB software, thereby causing the STBs to malfunction, preventing end-users from accessing their television services. Based on these representations, therefore, continued access to Sky's AC services to enable the provision of enhanced TV services might appear to have the potential to adversely affect Sky's incentives to invest and innovate, and reduce the benefits accruing to end-users.
- 7.27 We consider, however, that this is unlikely in relation to access to the AC services currently provided by Sky (whether on the current generation of Sky's STB or new functionality fulfilling a similar purpose on any new generation of STB that Sky may develop). As discussed at paragraph 7.73 below, Sky continues to be concerned about the impact on its incentives to innovate and invest if it were to be required to give access to new internet-enabled functionality to enable the provision of services not currently accessible from its STB. However, in its response to our consultation and in subsequent meetings and correspondence with us, Sky has not reiterated that concern in relation to access to its existing AC services or the potential for such access to give rise to a material cost burden.
- 7.28 In addition, we note that a testing regime is already in place for Sky's existing AC services and Sky is able to recover, under the terms of its contracts, its reasonable testing costs directly from third parties. As a result, we do not consider that Sky is exposed to any significant upfront costs that are caused solely by the need to provide access to third party applications.

Pay TV channels

- 7.29 Of the eight third parties currently making use of Sky's AC services, five (BT, Nickelodeon, attheraces, Setanta and Turner) do so in conjunction with pay TV services. We focus on the services that BT is either currently providing, or plans to provide shortly, since these appear to have the greatest potential to influence competition with Sky's own pay TV services.¹⁸⁶
- 7.30 BT's use of Sky's AC services is related to its premium sports pay TV channels and we understand that at the present time is confined to watermarking for the supply of these channels to commercial subscribers. BT has said that the sale of commercial subscriptions is an important activity for a premium pay TV sports channel and that the use of watermarks underpins the commercial revenues that BT generates from these subscriptions. This is because watermarking facilitates the detection of fraud by those receiving the channel for commercial purposes without the appropriate authorisation.¹⁸⁷ As of May 2014, BT had 19,000 commercial subscribers.¹⁸⁸

¹⁸⁵ Sky submission of January 2013, paragraphs 31 – 41.

¹⁸⁶ The betting or games services which are available from Nickelodeon, attheraces and Turner are all provided by Sky entities (see paragraph 2.27 of the July 2013 consultation). As set out at paragraph 3.35 – 3.36, we consider that there may be potential substitutes to Sky's AC services for the provision of these services, particularly betting services.

¹⁸⁷ BT consultation response, paragraphs 10 - 11.

- 7.31 BT has said it is planning to make use of Sky's AC services to provide enhanced TV services via the red button, such as additional videostreams, additional camera angles and subscription upgrades.¹⁸⁹
- 7.32 Although BT is not currently making use of red button functionality, it explained in its response that [X¹⁹⁰] BT's need to provide more videostreams by means of the red button [X¹⁹¹]. As a result of fixture clashes, BT will need to make use of Sky's AC services in order to broadcast some matches via red button functionality [X¹⁹²]
- 7.33 BT has said that access to red button functionality for the provision of additional videostreams contributes to its competitiveness in two ways. First, if it is unable to exploit all the rights it holds, it is at a cost disadvantage in terms of bidding for rights relative to another broadcaster, such as Sky, which does have the ability to broadcast rights in full.¹⁹³ Second, red button services are a factor in the competitiveness of bids for sports rights, since rights holders will assess bids not just on the value of the bid but also on a range of qualitative criteria including the level of exposure that potential licensees would be able offer in relation to their content.¹⁹⁴ As a result, BT said in its response that in order to launch successful bids for sports rights, it needs to have certainty that it will be able to secure access to Sky's AC services [X].^{195,196}
- 7.34 [X¹⁹⁷]

Our assessment in relation to pay TV channels

- 7.35 There are particular features of the pay TV sector which are relevant to how competition in pay TV works and our assessment in this case. We have noted that Sky operates the largest pay TV platform in the UK and is the only such platform that is vertically integrated (without the safeguards present in Freeview¹⁹⁸ and YouView). As discussed in more detail below, this raises the potential for it to have competing incentives in relation to giving third parties access to its platform. In terms of retail competition in pay TV services, there have been a number of recent developments, including BT's entry into the sector, as a well-resourced retailer of premium pay TV sports channels with a demonstrable ability to acquire new rights in order to expand its retail offering.¹⁹⁹

¹⁸⁸ BT press release, May 15, 2014.

<http://www.btplc.com/news/articles/showarticle.cfm?articleid=%7Bc3dc931e-0505-4d55-b1a5-c35f2afae706%7D>

¹⁸⁹ BT consultation response, paragraph 50 & email from BT to Ofcom, 5 March 2014[X].

¹⁹⁰ BT consultation response, paragraph 27.

¹⁹¹ Email from BT to Ofcom, 5 March 2014.

¹⁹² BT consultation response, paragraphs 26–28; Email from BT to Ofcom, 15 November 2013.

¹⁹³ BT consultation response, paragraph 23.

¹⁹⁴ BT consultation response, paragraphs 24 – 25.

¹⁹⁵ BT consultation response, paragraphs 44 and 47.

¹⁹⁶ [X].

¹⁹⁷ BT consultation response, paragraphs 52 – 57.

¹⁹⁸ The DTT platform (marketed as Freeview) is built on open standards and a horizontal market for equipment which facilitates a broad range of consumer electronics manufacturers supplying compliant receivers. As noted in paragraph 7.11, YouView's constitution requires that it provides access to its platform on fair, reasonable and non-discriminatory terms.

¹⁹⁹ Other developments include the launch and/or expansion of retail services from NOW TV (Sky), Netflix and Amazon Prime Instant Video (previously LoveFilm).

- 7.36 As noted at paragraph 7.14, enhanced TV services supplement and augment linear broadcast services and have the potential to influence competition. We consider that this is the case in relation to the enhanced TV services that BT is currently providing by means of Sky's AC services (commercial watermarking) and those that it is planning to provide.
- 7.37 In relation to commercial watermarking, BT already has 19,000 commercial subscribers. BT states that this figure is similar to those sold by its main competitor Sky.²⁰⁰ We recognise the importance to BT's business and its competitiveness of being able to protect and develop the revenues it generates from commercial subscriptions.
- 7.38 We also accept BT's submissions that the provision of red button services will have important implications for its competitiveness, as set out in paragraphs 7.33 and 7.34 above. Accordingly, we consider that continued access to Sky's AC services for the provision of red button services and commercial watermarking will contribute to securing sustainable competition in the supply of retail pay TV services. In turn, we would expect this to lead to benefits in terms of efficiency, innovation and investment and bring benefits for end-users.
- 7.39 As with access for FTA channels, discussed above, there is limited evidence before us that providing access to its existing AC services to pay TV channels could adversely impact Sky financially or technologically.

Sky's incentives to provide access on fair and reasonable terms, absent regulation

Free-to-air channels

- 7.40 Sky may face mixed incentives in relation to providing access to AC services for FTA channels. On the one hand, as a platform operator, it is likely to want to make its platform as attractive as possible and so will provide services that viewers find attractive. On the other hand, as a channel provider, it may seek to reduce the attractiveness of other channels in favour of its own.
- 7.41 In Section 4 above, we discuss Sky's argument that it has an incentive as a platform operator to provide access for interactive services that viewers are likely to value. Data provided by the BBC demonstrates that its interactive services are valued by Sky's customers. As noted, in the first half of 2013, the average weekly reach of BBC's Red Button on Sky's platform was [~~X~~²⁰¹] This increased to about 60% of Sky's subscribers over the 2012 Olympic period,²⁰² showing the potential for demand to increase further during high-profile broadcast events of this nature.
- 7.42 Sky has acknowledged the popularity of these services with its customers and has explained that it wants the BBC to continue to make them available on its platform.²⁰³
- 7.43 We have no equivalent data on the reach of S4C's red button services on Sky's platform but we would expect it to be materially lower than the BBC's, given that

²⁰⁰ BT press release, May 15, 2014.

<http://www.btplc.com/news/articles/showarticle.cfm?articleid=%7Bc3dc931e-0505-4d55-b1a5-c35f2afae706%7D>

²⁰¹ BBC consultation response, paragraph 25.

²⁰² BBC consultation response, paragraph 28.

²⁰³ Meeting with Sky 3rd December 2013 and Sky email of 7th March 2014.

S4C's service is a minority language channel. However, as noted in paragraph 7.19 above, there is wide-spread use of red button services across S4C's schedule, with around 80% of programming having English subtitles accessible via the red button.²⁰⁴ Further, within Wales, S4C's primary target audience, almost 50% of viewers receive a satellite television service. In principle, therefore, S4C's red button services provided by means of Sky's AC services appear to represent a valuable facility, widely accessible by viewers on the Sky platform.²⁰⁵

- 7.44 Sky may have countervailing incentives as a provider of content. In relation to sports broadcasts, as a provider of premium sports channels, Sky may seek to restrict access to its AC services for BBC Red Button, notably in relation to interactive services which enhance the BBC's coverage of sporting events. [X²⁰⁶] This may also be the case for other content - we note that [X²⁰⁷].
- 7.45 As set out in Section 4, stakeholders have expressed concerns in relation to gaining access to Sky's AC services in the absence of regulation. Respondents said that absent regulation, they were concerned about gaining access to the services at all, about increased costs and about services being offered on a discriminatory basis. Concerns about protracted negotiations and the greater certainty associated with regulation were raised as reasons to impose new access-related conditions.
- 7.46 Both S4C and the BBC expressed concerns about the terms on which access might be granted in the absence of regulation. As discussed in paragraph 4.25, S4C has said that the current regulation provides it with certainty in relation to access and a clear tariff.²⁰⁸ The BBC said, [X] and that the removal of regulation would make it more difficult to deliver value for money for licence fee payers in its negotiations with Sky.²⁰⁹ It observed that even with the benefit of regulation, [X²¹⁰] In its response to our consultation, Channel 4 highlighted that Sky's current terms, such as the requirement to provide indemnity insurance, can affect the ability of broadcasters to provide services via Sky's AC services and contended that steps should be taken to prevent Sky imposing "significantly high burdens".²¹¹
- 7.47 As referred to above in paragraph 7.26, Sky's initial submission argued that the requirement to give third parties access imposed a material cost burden and specifically mentioned factors such as the need to test new applications to ensure that they did not compromise the stability of the Sky platform. This might suggest that Sky would have an incentive to increase prices above current levels to recover such costs. However, for the reasons set out in paragraph 7.28 above, we do not consider that Sky is exposed to significant upfront costs as regards third party access to Sky's existing AC services.

²⁰⁴ S4C consultation response, page 1.

²⁰⁵ We note from S4C's Annual Report 2012, that large numbers of viewers were unaware of the availability of English subtitles via the red button but that efforts to raise awareness were being monitored.

²⁰⁶ BBC consultation response, paragraph 47.

²⁰⁷ BBC consultation response, paragraph 47.

²⁰⁸ S4C consultation response, page 3, response to question 4.

²⁰⁹ BBC consultation response, paragraph 45.

²¹⁰ BBC consultation response, paragraphs 46-48.

²¹¹ Channel 4 consultation response, response to question 4.

Our assessment of Sky's incentives in relation to free-to-air channels

- 7.48 Our assessment of whether Sky would, absent regulation, give access to AC services on fair and reasonable terms derives from consideration of Sky's incentives as a platform operator and provider of channels. We focus our assessment on PSB channels, given the evidence on use of AC services by these channels. We then also consider the case for non-PSB FTA channels.
- 7.49 As set out in the preceding paragraphs, there is evidence that indicates that Sky may have mixed incentives in relation to providing access to third parties. Sky recognises the popularity of BBC Red Button with consumers and the BBC's data indicate that the BBC's red button services in relation to sporting events may in some circumstances act as a complement to Sky's premium sports services. For example, the BBC's analysis of its expanded red button services for the 2012 Olympics showed that Sky delivered most viewers, both in absolute terms (17.4m viewers in total) and as a proportion of its customer base (around 60% of Sky subscribers).²¹²
- 7.50 Whilst the BBC red button services might have widespread appeal to Sky subscribers, without regulated access Sky may have the incentive not to provide access to its AC services for red button services (for example, related to certain content such as sports broadcasts) or to provide access on terms that are not fair and reasonable within the meaning of existing regulation. This could manifest itself in terms of protracted negotiations (resulting in the potential for delay in the provision of services benefitting citizens and consumers) or onerous terms (e.g. charges or indemnities).
- 7.51 Audience figures for S4C suggest that its red button services are likely to be used significantly less frequently by Sky's customers than the BBC's red button services (although there are likely to be strong cultural benefits for those viewers relying on these services) and they do not appear to represent a material competitive threat to Sky's broadcast channels. As a result it is not apparent what advantage Sky might gain from restricting access in the future. Since S4C's red button services are provided as an enhancement to a minority language channel, we consider any action by Sky to remove or restrict access would carry a risk of reputational damage. However, Sky could still seek to impose onerous terms for providing such access.
- 7.52 In relation to the terms on which Sky will give access for these services in the future, we note that both the BBC and S4C already have contracts in place. [X] However, in the absence of regulation, Sky may look to vary the terms of contracts to reflect its own commercial incentives.
- 7.53 Turning to non-PSB FTA channels, with the exception of The Community Channel, we are not currently aware of any demand for access to Sky's AC services from other FTA broadcasters for the provision of enhanced TV services. As noted, The Community Channel makes use of other means of delivering its information services currently available via the red button on Sky's platform. However, despite these other means, we understand that the services provided by The Community Channel on Sky's platform are particularly directed at vulnerable consumers without internet access at home.
- 7.54 There could be demand for access in the future. If access to AC services is not mandated for FTA channels, providing red button services may be more problematic.

²¹² BBC consultation response, paragraph 28.

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

- 7.55 Sky's incentives to provide access (or otherwise) would depend on the benefit it sees from providing such access. There are a number of cases where Sky's incentives may lead to access not being available (or only available on disadvantageous terms), for example:
- i) As Sky's own channels compete with FTA channels for viewers and advertising, there may be some incentive to seek to reduce the quality of service of other channels to distort competition. For example, Sky News has a red button (and is FTA). Sky may see some advantage in not providing similar services to other, similar, FTA channels.
 - ii) Pay TV broadcasters may also want to offer FTA promotional²¹³ channels (for example to offer free access for a weekend / day / match) with a red button service in order to entice viewers to upgrade to pay services.
 - iii) If new third party FTA channels approached Sky to provide interactive TV services and Sky felt the proposed services were either of little value to its subscribers or conversely could draw viewers away from its own channels, it may not have the incentive to provide access to its AC services.
- 7.56 On the other hand, similar to PSBs, Sky may want to support such services to provide the best experience for its retail customer base on its platform, and these benefits to Sky may outweigh the incentives not to provide access set out above.
- 7.57 Our assessment is finely balanced, but we are of the view that, absent regulation, Sky may have mixed commercial incentives. This leads to concerns that access to AC services may not be provided to some or all access seekers on fair and reasonable terms and that there is a case for imposing new access-related conditions on Sky in order to secure third party access to Sky's AC services for PSBs and other FTA channels.

Pay TV channels

- 7.58 We have explained why, as a vertically integrated platform and pay TV channel provider, Sky has mixed incentives in relation to allowing access to its AC services for the provision of enhanced TV services by third party pay TV channels.
- 7.59 Where another pay TV provider holds rights to specific events, Sky may have an incentive as a platform operator to provide AC services in order to provide the most attractive offer to its retail subscribers. However, where rights are being offered, it may be in Sky's interests not to offer access, or a guarantee of access, such that other bidders are uncertain as to whether they will be able to provide a full service if they obtain rights. This may influence the approach these other providers adopt when bidding for rights.
- 7.60 Sky has explained that it wishes to retain the existing set of enhanced TV services available on its platform.²¹⁴ It has said that it is "very keen" that Champions League

²¹³ Sometimes referred to as 'barker' channels.

matches, for which BT has exclusive broadcasting rights from the 2015/16 season, are made available to households on the Sky platform.²¹⁵ Further, it has offered BT an extension to its existing contract for the supply of AC services [X²¹⁶].

7.61 BT has contended, however, that in the absence of regulation Sky would not give third parties access to its AC services. In its response to the July 2013 consultation, it put forward a number of reasons for this view, namely:

- 7.61.1 BT's inability to secure wholesale access to Sky's broadcast channels which have never been the subject of "regulatory obligations to supply",^{217 218}
- 7.61.2 the limited extent to which BT was able to negotiate revisions to Sky's contract for the supply of AC services;²¹⁹
- 7.61.3 Sky's initial offer to continue providing broadcasters with access to its existing AC services only until 2016; and²²⁰
- 7.61.4 Sky's submission that it incurs material costs as a result of being required to give third parties access to its services, because of the need to test the security of third party applications.²²¹

Our assessment in relation to pay TV channels

7.62 As we have explained in paragraph 7.35, there are particular features of the pay TV sector which are relevant to the operation of competition in this context and, as noted in Section 2, there have been a number of previous competition investigations relating to pay TV services.²²² Within this environment, we consider that BT's entry to this sector has the potential to be pro-competitive, bringing benefits for consumers in terms of choice and innovation. We have therefore considered carefully whether there is evidence to support the imposition of replacement access-related conditions to maintain the regulatory environment whereby competition in the provision of pay TV services is able to develop.

7.63 In relation to access to Sky's AC services for the provision of enhanced TV services BT has contractual security until [X] and has now had an offer from Sky to extend that until [X]. Accordingly, in relation to BT's competitive position, the evidence before us could suggest that in the absence of regulation, BT would be able to secure continued access on current terms to Sky's existing AC services at least until [X].

²¹⁴ "These type of services are well established and enhance Sky's platform. Sky would not wish to take actions which deter these broadcasters from continuing to offer such services via its DTH satellite platform." Sky submission January 2013, paragraph 29.

²¹⁵ Meeting between Sky and Ofcom on 3 December 2013 and email from Sky on 7th March 2014.

²¹⁶ Email from Sky to Ofcom dated 4 February 2014.

²¹⁷ BT consultation response, paragraph 63.

²¹⁸ Although we note that BT has since agreed terms with Sky for the provision of Sky movies on BT TV, <http://www.btplc.com/news/articles/showarticle.cfm?articleid=%7B2bbe25e5-5129-420f-916c-93add21f5354%7D>

²¹⁹ BT consultation response, paragraph 64.

²²⁰ BT consultation response, paragraphs 70 – 72.

²²¹ BT consultation response, paragraph 78 – 80.

²²² See paragraphs 2.8 - 2.9.

- 7.64 Sky's incentives to offer access to a competing premium sports provider may depend on the value of the content available via that provider, and the extent to which Sky provides competing content and/or may seek to purchase rights to the content in question. These considerations may influence whether Sky refuses access or, alternatively, provides access on unattractive terms (from a commercial or technical perspective). Alternatively, Sky may seek to prolong negotiations.²²³ This may allow Sky to obtain an advantage by blocking access to its platform or by increasing risks for other premium sports providers about the ability to provide services via Sky (for example when bidding for new rights).
- 7.65 In the absence of regulation, new entrants may not be able to secure contractual terms and would not have certainty about their ability to secure access prior to discussion with Sky. Where they are bidding for rights that also hold an interest for Sky, this could, in turn, dis-incentivise new entrants from bidding, if they consider they would only be able to offer a less feature-rich service than Sky itself provides. Imposing new access-related conditions would ensure that new third party entrants were able to secure access to Sky's AC services to provide enhanced TV services. Similarly, providers with existing contracts may face similar issues where the length of that contract does not extend to cover the period of new rights being awarded. Taken together, these issues could reduce the extent of competition in the provision of premium sports services. Given the important role that sports content plays in driving the take-up of pay TV, this could lead to a reduction in choice for consumers.
- 7.66 We anticipate that providers that seek to bid for sports rights will be particularly concerned with gaining speedy resolution of issues relating to gaining access to Sky's platform. In the absence of the certainty provided by regulatory conditions, it may be more difficult to achieve such resolution. Where the issue relates to an existing contract, resolution will be based on the terms included within the contract itself. Where a new access seeker is involved and/or where new forms or access are required, it is not obvious that there would be any mechanism for resolution of access issues, as no contract and no regulation would be in place.
- 7.67 The balance of Sky's incentives may favour it offering access to any party seeking it on commercial terms, and in a timely fashion. However, the balance of these incentives are likely to be difficult to accurately assess and may be different on a case-by-case basis. Where Sky does not have the incentive to provide access, delaying or refusing commercial agreement or setting unattractive commercial terms could act to dis-incentivise new entrants for rights, or dis-incentivise current rights holders bidding for new rights. As rights are offered periodically (typically on a three year cycle for the Premier League and UEFA Champions League), Sky's actions could impact competitors for significant periods of time. Therefore, the risk to competition of Sky acting on commercial incentives not to offer access to certain access seekers could have a significant impact on competition.
- 7.68 Given the arguments set out above in paragraphs 7.64 to 7.67, we consider there is a case for imposing new access-related conditions on Sky in order to secure third party access to Sky's AC services for pay TV providers. We discuss the proposed conditions further below.

²²³ We note that some stakeholders have indicated cases where negotiations between the two parties have been protracted under the current Continuation Notice.

Access to AC services other than enhanced TV services

- 7.69 For other AC services discussed in Section 3 – navigation and discovery services, contextual commercial services and standalone services – we have not identified current demand, or where we have identified potential demand we have also either found potential substitute services or technical limitations in providing these services on Sky's current platform.
- 7.70 Because of this, it is not clear that it is necessary to impose replacement access-related conditions in respect of these services. However, in Section 3 we also note that these services may develop and become increasingly important in the future. We discuss our view on future developments below.
- 7.71 [X]. Our view is that, as for enhanced TV services discussed above, there may be a case for imposing replacement access-related conditions to secure third party access for pay TV subscriber services.
- 7.72 Advances in technology and new generations of STBs may also lead to the development by Sky of other types of functionality. In the future, we would expect Sky to introduce new generations of STBs as technology develops, allowing it to provide new services and/or functionality. [X].
- 7.73 Sky has explained its view that the current access obligation under the Continuation Notice has a chilling effect on its willingness to innovate and invest. It has said that there are two aspects to this. First, Sky considers the scope of the current obligation to be unclear and that this inhibits innovation, since Sky is concerned not to inadvertently extend its access obligation to any new functionality that it may develop in the future. Second, Sky says if it were required to give third party access to any such new functionality, it would incur material costs because of the need to test the security of third party applications to avoid those applications causing its STBs to malfunction to the detriment of end-users.²²⁴
- 7.74 A number of respondents to the July 2013 consultation, including the BBC, BT, Channel 4 and one other respondent, have said that they wish to secure access to new internet-enabled functionality, should that become available on Sky's STBs, in order to provide IP-based services not currently accessible on Sky's platform. [X]²²⁵ but will require access to any new functionality that Sky develops in order to do so. BT has said that there are a number of enhancements and interactive services it would wish to provide if it were to have access to enable it to utilise the Ethernet ports on Sky's STBs and the broadband return path.²²⁶
- 7.75 Whilst we recognise this demand for access to new functionality, services which could be provided over the Ethernet port in Sky STBs are still developing and, in our view, it is too early to reach a clear view on the nature of demand for such services or on the alternatives that may exist.
- 7.76 Further, as we have set out in Section 6, the recitals to the Access Directive, from which section 74 of the Act derives, state explicitly "The imposition... of mandated access that increases competition in the short-term should not reduce incentives for competitors to invest in alternative facilities that will secure more competition in the

²²⁴ Sky submission of January 2013, paragraphs 31–41.

²²⁵ BBC consultation response, paragraph 23.

²²⁶ BT consultation response, paragraphs 58 – 62.

long-term.”²²⁷ If Sky was developing new functionality which was capable of supporting the types of services suggested by respondents, we would be mindful of the potential effects of distorting or reducing its incentives to invest and innovate in this way. In advance of the distribution of services which may become available via any technological developments of this nature, we are not in a good position to assess the benefits that may result from mandated access. Therefore we consider that it would not be an appropriate exercise of our section 73 power to impose access-related conditions at this stage on functionality to support such services which may be developed in the future. To do so would, in our view, carry the risk of undermining Sky's incentives to invest and innovate, to the detriment of viewers on the platform.

7.77 Accordingly, at this stage, we do not propose to set access-related conditions under section 74 that would require Sky to give access to third parties to new functionality that it may develop in the future in relation to services other than enhanced TV services. Further, we do not consider this process to be appropriate to address longer term future concerns, given it is limited to considering replacement access-related conditions at this point in time and is focused on the availability of services over the next two to three years.

7.78 Nonetheless, we recognise, in line with submissions made by respondents to our consultation, that technological developments that Sky may introduce in any new generation of STB have the potential to impact competition, particularly in the longer term. We are also concerned that these developments could impact how AC services are provided. We therefore plan to monitor the development of TV platforms closely, including Sky's platform in particular, for example in how Sky exploits future technological developments that it may make. In considering developments, we would expect to apply the same framework as used above in relation to other types of future content services e.g. standalone services. This will enable us to determine what further work we should do following our decision in relation to removal of the Continuation Notice.

Summary in relation to access to Sky's AC services

7.79 For the reasons set out in paragraphs 7.18 to 7.39, we consider that there is demand for access to Sky's AC services to enable the provision of enhanced TV services by FTA (particularly PSB) and pay TV channels. These services, which are described more fully in Section 3, include alternative audio and video streams²²⁸, information services, betting and gaming services, subtitling and audio description services and commercial watermarking. We consider that it is important that access to these enhanced TV services should be provided not just on existing STBs but also on any future STBs. This may mean existing services are replicated on future STBs, or that Sky provides access to allow enhanced TV services to be developed which take account of the new technology and functionality.

7.80 In the case of both FTA and pay TV channels, our assessment indicates that continued access to these services is consistent with our section 73 objectives and that the imposition of replacement access-related conditions may be an objectively justified and proportionate use of this power. Specifically, we consider that the

²²⁷ Recital 19 of the Access Directive.

²²⁸ The red button can also be used to provide a navigation link to catch-up on-demand content, as the BBC now provides on Sky+HD STBs, and we can see the attraction and the benefit of this type of service.

enhanced TV services currently provided by FTA and pay TV providers promote sustainable competition and secure important benefits for end-users. We do not consider that securing access to these services would materially impact Sky's incentives to invest or innovate. We also consider that securing access supports PSBs in the provision of services which help to promote cultural diversity and media plurality.

- 7.81 We therefore consider that this access should continue. Through responses to our July 2013 consultation, we have identified a concern that in the absence of regulation, Sky could deny access or offer it only on less favourable terms, given its mixed incentives as a platform operator and retailer of pay TV channels. Respondents to our consultation that take AC services from Sky have expressed their concerns as to their ability to negotiate with Sky absent replacement conditions. As such, we have considered whether there may be value in ensuring that the provision of AC services has a regulatory underpinning to safeguard these important benefits.
- 7.82 For services other than enhanced TV, as discussed above, which may require access to functionality not currently provided by Sky but which could be developed in future, we currently consider that it is not necessary to propose regulatory access-related conditions. We will, however, closely monitor developments and will consider what further work we should do following our decision in relation to removal of the Continuation Notice.
- 7.83 We therefore propose replacement AC conditions as discussed below. In this regard at Annex 6 we have published a notification under section 48A of the Act containing a set of draft conditions. We discuss these draft conditions below.

Draft Conditions

- 7.84 The concerns we have identified are that Sky may not supply access, or may offer access to AC services for enhanced TV services on terms that are not fair and reasonable and/or on terms that are discriminatory.
- 7.85 We have identified the following as conditions that may be appropriate to achieve the continued provision of enhanced TV services. Our view is that these obligations are targeted only at those areas we have identified above and they do not seek to place a burden on Sky that is greater than that imposed by the obligations under the Continuation Notice.
- 7.86 The conditions we propose are:
- 7.86.1 A requirement to provide AC services to third parties on request;
 - 7.86.2 A requirement to provide those services on fair and reasonable terms (including charges); and
 - 7.86.3 Transparency obligations, including the publication of a reference offer containing standard terms and conditions and the provision for Ofcom to request accounting information relevant to these services.
- 7.87 We discuss these in turn below.

Draft condition 1: Requirement to provide AC services to third parties on request

- 7.88 As explained above, in the absence of regulatory remedies Sky may have an incentive to refuse to provide access to third parties, and this could restrict competition in the provision of services to consumers. A condition requiring Sky to provide access would help to enable other providers to compete with Sky by allowing them the access they need, but which they cannot replicate through other means.
- 7.89 However, it is not appropriate to require Sky to provide any and all types of access requested by third parties. A requirement to provide any type of access could result in Sky being required to develop multiple products at potentially high costs with very limited customer demand. Draft condition 1 therefore only requires Sky to meet those requests that are reasonable.
- 7.90 In terms of the substantive scope of the services covered by this obligation, draft condition 1 covers the enhanced TV services discussed in Section 3. This includes access to Application Signing Services and authentication services (or equivalent functionality on any new STB) requested for the purpose of or in connection with enabling viewers to access "Specified Programme Services" on Sky STBs and, in the case of authentication services, "Pay TV Subscriber Services".
- 7.91 The draft condition does not distinguish between FTA, (including PSB) or Pay TV channels. Whilst we may have greater concerns related to PSBs and pay TV providers than for other FTA channels, we consider that the same approach should be taken in relation to FTA channels. If only PSBs and Pay TV were covered by conditions, it could distort competition, as highlighted in paragraph 7.55. The incremental effect of including FTA channels would be small if conditions were also in place for pay TV and PSBs and we consider that it would place additional burden on parties (including Sky) if Sky were required to treat FTA channels differently in relation to interactive services. Our provisional view is that if we were to impose access-related conditions on Sky for PSB and pay TV services, it would be appropriate to extend this to FTA services.
- 7.92 Specified Programme Services includes television broadcasting services, television licensable content services and certain ancillary services. By the combination of those services, the draft condition is therefore intended to cover the enhanced TV services discussed above. It would therefore include links to red button interactive services such as those offered by the BBC and commercial watermarking used by BT. It also covers access to services requiring the return path function within the Sky STB. The draft condition also includes associated facilities that are reasonably necessary for the provision of the main services, which we consider to cover factors like access to testing platforms and resources, technical specifications, etc.
- 7.93 The draft condition is neutral as to the form of STB via which these services were provided/deployed. This would require Sky to provide access to the enhanced TV services within the scope of the conditions on any new generation of STB, even where those services are provided using different technology and/or functionality (e.g. an Ethernet connection rather than a narrowband return path).
- 7.94 The draft condition includes access to authentication services (and the equivalent on any new STB that might be developed). This would allow services that require the

return path to be used, such as pay TV subscriber services. [X²²⁹]. We recognise the potential competitive distortion if competing retailers are unable to offer services already offered by Sky.

- 7.95 We have not identified current demand for commercial contextual services or navigation and discovery services. Respondents indicated some demand for standalone services but it is our view that the current Sky platform is not capable of supporting such services. Further in line with our policy objectives of wanting to ensure sustainable competition in the long term through ensuring Sky has sufficient incentives to innovate and invest, we do not consider it appropriate to impose access-related conditions which might negatively impact any innovation or investment. Therefore, commercial contextual services, navigation and discovery services and standalone services (e.g. Amazon Prime Instant Video or Netflix) are not within the scope of the draft condition.
- 7.96 We have identified a potential concern related to the timeliness of negotiations. Draft condition 1 therefore includes a requirement for Sky to provide access as soon as reasonably practicable.

Draft condition 2: Requirement for fair and reasonable terms (including charges)

- 7.97 We have also identified a concern that Sky may have an incentive to offer access on terms that are not fair and reasonable. Such actions would have the potential to distort competition. In particular, Sky could provide access on terms and conditions that discriminate in favour of Sky's own channels. For example, it might decide to charge competing providers more than the amount charged to itself or it might provide the same services but within different delivery timescales, which could have an adverse effect on competition. Draft condition 2 contains an obligation on Sky to provide AC services on fair and reasonable terms and conditions, including charges.
- 7.98 Sky would be required to set fair and reasonable charges.²³⁰ This ensures access seekers are able to obtain the access they need, whilst also allowing Sky the opportunity to recover its efficiently incurred costs. In assessing charges set by Sky, we would consider the merits of the specific case in question, but, in addition, we have reviewed the TPS guidelines published in September 2006²³¹ and it is our view that these, together with current pricing levels (which are required to be consistent with the TPS Guidelines), would continue to provide an appropriate starting point for considering whether charges are fair and reasonable. We would also expect Sky to be able to explain how any changes in pricing, for example, were consistent with the TPS Guidelines.
- 7.99 Draft condition 2 also contains a requirement to provide the AC services on terms that do not involve or tend to give rise to any undue discrimination. In this regard, the draft conditions would deem there to have been undue discrimination if Sky were to favour, to a material extent, an activity carried out by it so as to place one or more

²²⁹ [X].

²³⁰ 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.

²³¹ Ofcom, *Provision of Technical Platform Services*, 21 September 2006.

<http://stakeholders.ofcom.org.uk/consultations/tpsguidelines/statement/>

third parties at a competitive disadvantage. This carries over the non-discrimination obligation in the same form as currently applies in the Continuation Notice. This means that each third party that seeks access to AC services should be provided such access on materially the same basis as Sky provides to itself, for example:

- i) it should have sufficient information provided in terms of development standards, etc.;
- ii) the same process for deploying developments should be in place (for example, processes related to scheduling and carrying out testing); and
- iii) the same timescales for testing and deployment should apply, where applicable.

Draft conditions 3 and 4: Transparency obligations

7.100 In order to ensure Sky is complying with any obligations to provide access on a fair, reasonable and non-discriminatory basis, the draft conditions include several obligations related to ensuring transparency. Without these obligations, not only would it be difficult for third parties to assess whether Sky was meeting its obligations to provide access and to not discriminate unduly, but third parties might not have sufficient information in order to decide whether, or how, to gain access to Sky's APIs in order to provide AC services. This could ultimately undermine the effectiveness of any access remedies.

7.101 Draft condition 3 would require Sky to publish a reference offer on a publicly accessible website. The reference offer would need to include at least a description of the services to be provided; the relevant charges; details of maintenance and quality standards; and the standard terms and conditions. Given that our intention in proposing conditions is in large part to maintain the provision of services which are already being provided, it is our expectation that existing contracts will fall within the scope of what is required - i.e. we would not expect that they would need to be replaced or modified as result of the draft conditions entering into force. The draft condition would require Sky to notify Ofcom of any amendments to the charges, terms and conditions in a Reference Offer by no later than the day on which any amendment takes place (this condition would be without prejudice to any contractually agreed procedure for amendments to the contracts).

7.102 In order to ensure that Sky is complying with any obligations to provide access on fair and reasonable terms and conditions, including charges, and to do so on a non-discriminatory basis, it is necessary that Ofcom has the ability to obtain relevant accounting information. Draft condition 4 contains an obligation on Sky to provide to Ofcom, on request, relevant accounting information. In the event of a complaint or dispute in future, this provision would enable Ofcom to gather data to assess compliance with any conditions imposed on Sky.

Legal Tests

7.103 We have set out above why we are consulting on replacement access-related conditions using our power under section 45 of the Act and why we consider that such conditions may be appropriate for the purpose of securing efficiency; sustainable competition; efficient investment and innovation; and the greatest possible benefits for the end-users of these services, within the meaning of section 73 of the Act. Moreover, we have explained that section 74(2) of the Act expressly provides for the imposition of access conditions imposing obligations on persons (like Sky) providing facilities for the use of APIs.

- 7.104 In addition, section 47 of the Act provides that Ofcom is only to exercise its powers where it is satisfied that the conditions to be imposed are objectively justifiable, non-discriminatory, proportionate and transparent. This legal test is supplemented by the duties to which Ofcom is subject under sections 3 and 4 of the Act (including our principal duty of furthering the interests of consumers and citizens).
- 7.105 In the light of the matters set out above, and having given careful consideration to all of the responses to our July 2013 consultation, we have considered the draft conditions at Annex 6 by reference to the criteria set out in section 47(2) of the Act.
- 7.106 In terms of objective justification, we have explained in this document why we consider that it is important for there to be access for third parties to Sky's AC services to provide enhanced TV services. We consider that such access would promote competition to the benefit of consumers and provide benefits associated with the provision of PSB services. Given Sky's vertical integration and the mixed incentives that it may face in relation to the provision of access control services, we consider that it may be appropriate for there to be some form of obligation on Sky to ensure the continued provision of these services. The draft conditions that we have published would, in our view, address these concerns.
- 7.107 We do not consider that the draft conditions are unduly discriminatory. We are required to consider in this exercise whether to impose replacement access-related conditions on Sky. We have not considered at this stage whether it would be appropriate for conditions to be imposed on any other platform operators. As noted above at paragraphs 7.8 to 7.12, Sky is, in any event, currently in a different position to other platforms. If conditions were imposed, we would monitor whether regulation remained appropriate (and if so the scope of any such regulation) and would keep the position of other platforms under review.²³²
- 7.108 We have also considered whether the imposition of replacement AC conditions in the form proposed would be a proportionate exercise of our regulatory powers. In this regard, the draft conditions on which we are consulting seek to address the specific concerns we have identified in this document. They are targeted at the enhanced TV services provided by Sky (whether to itself or to third parties) and are targeted specifically at the concerns we have identified; namely, the provision of those services on fair and reasonable terms and conditions including charges. In our view, the draft conditions therefore go no further than is necessary to secure the access to these important services.
- 7.109 Moreover, we do not consider that the draft conditions would produce adverse effects for Sky. The conditions would allow for Sky to recover its reasonably incurred costs in providing the necessary access. The scope of the conditions also recognise the need to not dis-incentivise innovation by Sky. The inclusion of access for non-PSB FTA services (in addition to access for PSBs and pay TV services) would not, in our view, impose significant incremental costs on Sky.
- 7.110 Another important aspect of proportionality, where more than one means of addressing concerns is identified, is adoption of the least onerous approach. In this regard the commitments proposed by Sky are particularly relevant to our decision whether to impose replacement access-related conditions. We consider Sky's proposed commitments in paragraphs 7.113 to 7.130 below.

²³² See also paragraphs 3.78 and 7.78.

- 7.111 In terms of transparency, the draft conditions (at Annex 6) included in this document are clearly linked to the regulatory principles we have set out. They are more targeted and make it clear to stakeholders what services would be covered. These draft conditions would therefore provide clarity and certainty for stakeholders given that they explicitly take into account current services in a way that the existing Continuation Notice does not.
- 7.112 Our assessment against the test in section 47 of the Act takes into account our view on Sky's commercial incentives as discussed previously. However, we recognise its proposed commitments may impact this assessment. As set out in Section 5, Sky proposed commitments in which it said it would enable third parties to access its AC services to provide interactive TV services. We discuss the impact of these commitments on our assessment (particularly in relation to the proportionality and objective justification of conditions) below.

Sky's proposed commitments

Overview of the commitments

- 7.113 As set out in Section 5, Sky provided its proposed commitments to Ofcom earlier this year. In these commitments, Sky said it would provide access to its STBs for third parties to provide the following services: alternative videostreams broadcast via digital satellite; alternative audio soundtracks; digital text services; subtitling; voting, gaming and betting services; commercial watermarking; and pay TV customer services on existing generations of STB and on any new generation of STB that Sky might develop in future.
- 7.114 It proposed that charges for these services would be capped at the existing charge of £100,000 p.a. (with the exception of voting, gaming and betting services, where additional charges would apply), with a right of renewal incorporated into existing customers' contracts on Sky's standard terms at the time of renewal and at charges no higher than current levels. It also said it would publish its standard terms and its commitments on its corporate website. The proposed commitments would be effective from the date of the Continuation Notice's removal until Ofcom notified Sky that they were no longer required. Finally, it included provision for Ofcom to request all information that it would require in order to monitor adherence to the commitments.
- 7.115 Sky indicated that the proposed commitments would be signed by its Chief Executive Officer and would be available on its website. It also said that it would suffer reputational damage if it were to renege on such commitments.²³³
- 7.116 Sky's stated intention, as evidenced through its proposed commitments, is to maintain access to its AC services to enable third parties to deliver their interactive services. Sky has developed these commitments significantly since its initial offer (put forward in its original submission), in which it said it would offer third parties access to its platform for interactive services only until 2016. The proposed commitments would give access to its platform on an on-going basis to third parties to provide interactive services. Sky recognises the value these third party services

²³³ Conference call with Sky on 9th January 2014.

bring to its platform and has told us, for example, that Sky viewers value the BBC red button service.²³⁴

7.117 As further evidence, Sky has already offered extensions to AC contracts to some third parties.

7.118 We discuss below what impact the proposed commitments might have on FTA (including PSB and non-PSB providers) and pay TV providers of interactive services on Sky's platform.

Potential impact of the proposed commitments

Free-to-air channels

7.119 As set out in paragraphs 4.7 to 4.16, concerns have been raised in relation to gaining access to Sky's AC services in the absence of regulation. Consultation respondents²³⁵ said in the absence of regulation they were concerned about gaining access at all, about increased costs and services being offered on a discriminatory basis. It was also argued that even under existing FRND terms, other requirements introduced by Sky e.g. indemnity insurance, affected the ability of third parties to offer services. Concerns about protracted negotiations and the greater certainty associated with regulation were all raised as reasons to impose new access-related conditions.

7.120 Sky's own position, as set out in its proposed commitments, would be to give existing FTA customers access to its AC services and to provide certainty as to the terms on which it would give this access. As noted in Section 5, it has said that it would maintain access to AC services for existing customers on their current terms, and give such customers a right of renewal on its standard terms, at charges no more than current levels. [X]. Sky has also offered to give new customers access to its existing AC services at charges which would be no higher than current prices and on terms published on its website.

7.121 The pricing commitment would particularly benefit smaller interactive service providers whose AC services charges may represent a significant proportion of their budgets. It would allow S4C, for example, and other FTA broadcasters, to plan and manage their future budgets more effectively. We note, however, that the fact that Sky's standard terms and conditions would only be determined on the date of the proposed commitments, and that there is scope for change, could give rise to uncertainty for third parties seeking to enter into new or renewed contracts with Sky.

7.122 The proposed commitments also include an undertaking to third parties that they could continue to offer their existing services under the proposed commitments using existing STBs or any new generation of STB that Sky might develop. This would also provide FTA broadcasters with greater certainty.

7.123 Overall, we understand the proposed commitments to indicate that Sky plans to continue to give access on reasonable terms to its existing AC services in order to enable the provision of red button services by the BBC, S4C and other FTA providers

²³⁴ Email from Sky, 7th March 2014.

²³⁵ As set out at paragraphs 4.7-4.16, respondents included the BBC, S4C and Channel 4.

on an on-going basis and this would facilitate their ability to access Sky's AC services.²³⁶

- 7.124 The commitments would appear to satisfy the majority of the concerns raised by stakeholders discussed above in paragraph 7.119. Access would be retained for FTA broadcasters; prices would be maintained;²³⁷ and the fact that the proposed commitments and a reference offer would be published on Sky's website emphasises Sky's commitment to prevent discrimination. These measures, should they come into effect, would help to provide third parties with certainty which would aid investment decisions.

Pay TV channels

- 7.125 A number of concerns were raised in response to our July 2013 consultation and these are set out in paragraphs 4.7 to 4.18. The issues raised were similar to those raised by FTA providers: BT felt that Sky intended to cease providing access after 2016, that this would have an adverse effect on third parties' ability to bid for sports rights which, given the red button is required to manage match clashes, would have a negative impact on competition.
- 7.126 Sky's position, as set out for FTA broadcasters above, is that the commitments would provide pay TV providers with greater certainty both in relation to services but also to pricing and terms and conditions. In addition, we note that Sky has approached BT to offer an extension to its existing contract for the supply of AC services [X²³⁸]. Under the proposed commitments, it would also give BT, on request, a contractual right of renewal thereafter on its standard terms at charges no higher than current prices.²³⁹ They would also enable BT to provide new enhanced TV services on existing generations of STBs and to continue providing these enhanced TV services on any future generations of STBs that Sky might develop.
- 7.127 We have weighed the evidence of Sky's proposed commitments to give access to its existing AC services against the submissions made by BT as to why such access is unlikely to be forthcoming. While noting BT's observations about its difficulty in securing wholesale access to Sky's broadcast channels without regulatory intervention, we consider that it is in a different position as regards access to Sky's existing AC services, given that it has an existing contract with Sky for access for AC services, [X] with an offer, under the proposed commitments, to have a contractual right of renewal.
- 7.128 While Sky will not have a similar contractual obligation to provide access to new entrants, Sky is proposing to make its standard terms for the provision of AC services available on its website for an indefinite period, which would facilitate negotiations for access for new entrants.
- 7.129 The proposed commitments, should they come into effect, appear to address the major concerns raised by BT: access to Sky's platform to provide enhanced TV services would continue at current prices and the unlimited duration of the commitments would provide BT with certainty in relation to bidding for future sports rights.

²³⁶ Although note our observations at paragraph 7.140(ii) below in relation to the technical requirements that third parties must meet in order to secure access.

²³⁷ with the exception of voting, gaming and betting services where additional charges would apply.

²³⁸ Email from Sky to Ofcom dated 4 February 2014.

²³⁹ Email from Sky to Ofcom dated 4 February 2014.

7.130 As discussed in paragraphs 4.7 to 4.9, BT considered, given Sky's initial submission, that Sky did not intend to offer third parties access to its APIs after 2016. However, should they come into effect, the proposed commitments would be in place until such time as Ofcom indicated to Sky that they were no longer required.

The case for conditions in light of Sky's proposed commitments

7.131 As set out in paragraphs 6.9 and 6.10, as well as the specific objectives of section 73, we wish to ensure enhanced TV services provided by third parties have access to Sky's AC services and can continue to be provided for the benefit of end-users, thereby helping ensure sustainable competition in both FTA and pay TV. Secondly we are mindful of wanting to ensure that sustainable competition can flourish in the longer term and this involves ensuring that Sky has a sufficient incentive to invest and innovate to develop new platform services in the future.

7.132 We must also be mindful of our general duties and general regulatory principles, as set out in paragraphs 2.35 to 2.36, for example to operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required, when determining whether replacement access-related conditions are required. Moreover, elements of the legal test in section 47 of the Act, notably objective justification and proportionality, require us to consider whether the proposed commitments would be sufficient, such that replacement regulatory conditions are not necessary.

7.133 We consider that imposing replacement access-related conditions would ensure that enhanced TV services could continue to be provided using Sky's AC services to the benefit of end-users and helping to ensure sustainable competition. Equally, if Sky were to act in accordance with its proposed commitments, third parties would continue to be able to provide such existing services, also providing benefits to end-users and helping to ensure sustainable competition. The case for achieving sustainable competition through imposing or not imposing new conditions is therefore finely balanced.

7.134 We consider that the proposed commitments would enable Sky to invest and innovate. Whilst developing the draft conditions, we have been mindful of Sky's investment and innovation incentives and consider that the draft conditions would also enable Sky to invest and innovate.

7.135 We consider that the proposed commitments, if effective, offer largely the same outcome as the conditions we have proposed in paragraphs 7.84 to 7.102 in securing access to provide those AC services for which we have identified demand (e.g. enhanced TV services). There are, however, some differences, as discussed below.

7.136 There may be some advantages to the proposed commitments compared to conditions, including greater certainty for third parties in relation to pricing. Under the proposed commitments, Sky has undertaken not to charge third parties more than a maximum charge of £100,000 p.a. for ASS and for authentication services charges to be based on a share of costs. By comparison, the conditions we propose require charges to be set on a fair and reasonable basis. This would, in principle, allow Sky greater flexibility in pricing, in that it does not specify an absolute level. The proposed commitments would therefore appear to offer third parties more certainty in relation to pricing which, as we discussed in paragraph 7.121, might be of particular benefit to smaller third parties.

- 7.137 If replacement access-related conditions were imposed, charges associated with any services provided on any new generation of STB would also be set on a fair and reasonable basis, allowing for Sky to recover the costs of development of the STB functionality required to provide AC services. This could lead to higher prices (if the costs justified this). The proposed commitments already include terms related to any new STB development at the current prices.
- 7.138 In addition, as well as covering services for which we have identified concerns (particularly enhanced TV services) and which we have included in the scope of the conditions, the commitments would continue to allow third parties to develop other new interactive TV services. Sky has explicitly set out a list of end-user services which it would support at a minimum on both existing and any future generations of STB. Further, existing authoring tools, in principle, enable any third party to launch a broader set of applications on existing generations of STB. This means that third parties would be permitted to develop some new interactive services without having to negotiate commercially with Sky. On any new generations of STB however, except for the named services, third parties would be required to negotiate with Sky commercially if they wished to launch a new type of interactive service. On the other hand, the draft conditions are limited to those services for which we have identified demand (e.g. enhanced TV services) and so may be narrower than the proposed commitments in this respect, though we note that we have not identified demand for other services that can be supported on the current STB.
- 7.139 Whilst Sky's commitments provide stakeholders with a level of certainty and Sky has indicated it would abide by its proposed commitments, they are not enforceable by Ofcom. Third parties with existing AC contracts with Sky would not have recourse to Ofcom if they encountered problems whilst trying to gain access, although as discussed in paragraph 5.4, these parties would be able to seek resolution under private law if a breach of contract arose. New access seekers would not have recourse to Ofcom under the proposed commitments and they would not have an option under private law for breach of contract. However, the proposed commitments would be signed by Sky's CEO and would be made available on its website. Sky has indicated that we should consider this means that it takes the proposed commitments seriously and is unlikely to breach them.
- 7.140 Nonetheless, concerns expressed by stakeholders indicate that having recourse to a regulatory process to resolve issues may be an important factor in a number of cases, for example:
- i) Under both the commitments and the conditions, Sky would be able to update its standard terms and conditions, impacting the access available to third parties when they renew contracts and to new access seekers. Where regulation is in place, third parties would be able to raise concerns about updated terms and conditions with Ofcom, where the third party considers the changes mean Sky is no longer meeting its obligations. Ofcom's statutory dispute resolution mechanism may then be available, as would the power of direction included in the draft conditions. Under the proposed commitments, Sky could change the terms and conditions with good reason, but under the draft conditions, Sky would only be able to change them if these changes were FRND.
 - ii) Under the proposed commitments, third parties would have to meet Sky's technical requirements in order to secure access on Sky's standard terms. The nature of these technical requirements would not be publicised for reasons of commercial confidentiality. Whilst Sky would be able to take a similar approach under the conditions (as it is likely to be reasonable for Sky to satisfy itself that

third party services are compatible with its platform and for it to protect its own commercial confidentiality), the lack of transparency about the technical standards that must be met gives rise to a degree of uncertainty and does potentially allow scope for Sky to delay or restrict third party access.

- iii) Where new functionality is made available on Sky's platform (for example, via a new STB), it may be possible to provide enhanced TV services in new and better ways. Under both commitments and conditions there may be a difference of opinion on whether these constitute new services (that are excluded from the scope of the commitments and/or conditions). Under the draft conditions, third parties could seek review by Ofcom in the case of disagreement; and
- iv) As set out in Section 5, although we note that Sky has committed to a maximum charge reflecting shared costs for authentication services, how these costs are calculated would be at Sky's discretion to determine.

- 7.141 The lack of enforceability and recourse to Ofcom in the event of future difficulties under the proposed commitments means that imposing replacement access-related conditions would provide a greater degree of certainty, given that if access problems were to arise, third parties would have a route to Ofcom to resolve them.
- 7.142 Further, there is no explicit commitment in relation to discrimination between internal supply by Sky and supply to external third parties within the proposed commitments. The proposed commitments would secure access to the current AC services at current prices and this may provide sufficient safeguard. However, to the extent that Sky could seek to set terms, conditions, charges or technical requirements that unduly favour its own retail operations, the proposed commitments would not provide a safeguard.
- 7.143 We note however, that although the proposed commitments lack enforceability and there may be concerns related to discrimination, a third party could still raise their concerns with Ofcom and we would be able to consider the case for imposing access-related conditions under sections 45 and 73 of the Act based on an updated assessment of the effectiveness of the commitments and examination of existing market conditions. The time it would take to complete the analysis required and to impose conditions under the Act would be somewhat dependent on the issue in question, but there may be cases where it would not take substantially longer than the enforcement process. We are, in any case, free to commence assessment of whether to impose access-related conditions under section 73 or to commence a market review at any time, irrespective of whether a stakeholder raises concerns.
- 7.144 Given the presence of Sky's proposed commitments, our view is that the question of imposing conditions is finely balanced, as is the question of the best means of giving effect to our duties in sections 3 and 4 of the Act. The draft conditions address the concerns that we have identified following the July 2013 consultation and have the benefit of providing a regulatory framework within which complaints and disputes can be addressed. However, given Sky's proposed commitments we consider that the concerns raised might be addressed without the imposition of conditions. Sky's proposed commitments provide an indication of Sky's intended behaviour and, indeed, it has already evidenced this behaviour by offering extensions to existing AC contracts to some third parties.
- 7.145 Based on the discussion above, we welcome views from stakeholders as to whether they consider the imposition of replacement access-related conditions would be objectively justified and proportionate in these circumstances.

Consultation questions

Consultation question 3: *Does the provision of enhanced TV services via Sky's AC services result in benefits for end-users and competition, efficiency, innovation and investment benefits?*

Consultation question 4: *What is your view of the case for replacement access-related conditions?*

Consultation question 5: *Do you consider that the proposed conditions would secure effective access to Sky's AC services to allow the provision of enhanced TV services? Please give your reasons.*

Consultation question 6: *In light of Sky's proposed commitments, do you consider that it is necessary to impose access-related conditions on Sky to secure the continued provision of enhanced TV services? Please give your reasons.*

Section 8

Conclusion

- 8.1 As discussed in paragraph 2.28, before removing the Continuation Notice, we are required to determine whether or not to impose replacement access-related conditions. We explained that we have two options to consider:
- Option 1: to remove the Continuation Notice without imposing replacement access-related conditions in light of Sky's proposed commitments; or
 - Option 2: to impose replacement access-related conditions taking effect on removal of the Continuation Notice.
- 8.2 As regards Option 2, we are consulting on a notification which proposes new access control conditions. A copy of that notification is at Annex 6. Following the analysis in Section 7, we are seeking stakeholders' views on which option it is appropriate to take and on the content of draft replacement access-related conditions.
- 8.3 Once we have concluded the process of this review, we will continue to monitor the extent to which third parties make use of Sky's existing AC services and how Sky exploits any technological developments that it may make to its STB. We will consider what further work we should do following our decision in relation to the removal of the Continuation Notice.

Next steps

- 8.4 This consultation closes on 17th September 2014 and we plan to publish a statement following consideration of consultation responses setting out our decision.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 17th September 2014**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/sky-access-control/>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response cover sheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email Accesscontrol@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response cover sheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Caroline Chandan-Roels
Competition Group
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7783 4109
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Caroline Chandan-Roels on 020 7783 4912.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether

all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement.
- A1.12 Please note that you can register to receive free mail updates alerting you to the publication of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is as easy as possible. For more information, please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or email us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Tel: 020 7981 3601

Email Graham.Howell@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the cover sheet. If you are responding via email, post or fax you can download an electronic copy of this cover sheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing Name/contact details/job title

Whole response Organisation

Part of the response If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 4

Consultation questions

Consultation Question 1: *Do stakeholders agree with our assessment of demand for and potential alternatives to Sky's AC services?*

Consultation Question 2: *What are stakeholders' views of Sky's proposed commitments?*

Consultation question 3: *Does the provision of enhanced TV services via Sky's AC services result in benefits for end-users and competition, efficiency, innovation and investment benefits?*

Consultation question 4: *What is your view of the case for replacement access-related conditions?*

Consultation question 5: *Do you consider that the proposed conditions would secure effective access to Sky's AC services to allow the provision of enhanced TV services? Please give your reasons.*

Consultation question 6: *In light of Sky's proposed commitments, do you consider that it is necessary to impose access-related conditions on Sky to secure the continued provision of enhanced TV services? Please give your reasons.*

Annex 5

Equality Impact Assessment

Introduction

A5.1 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.

A5.2 It is not apparent to us that the outcome of our review 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

A5.3 We have considered whether imposing or not imposing replacement access-related conditions on Sky 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.

A5.4 Currently, Sky's AC services which are the subject of our proposals in this consultation 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 services²⁴⁰, 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;²⁴¹
- S4C also uses Sky's AC services to provide English and Welsh subtitles and Welsh and English language soundtracks via the red button.²⁴² 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;
- 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.²⁴³ We consider that taking account of the content of the

²⁴⁰ BBC Response, paragraph 11.

²⁴¹ See BBC Response, paragraph 37.

²⁴² S4C Response, pages 1 - 2.

²⁴³ <http://lookinglocal.gov.uk/site/news/2010-12-02-cc.html>

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

- A5.5 We consider that if Sky ceased providing AC services to third party broadcasters, there could be an adverse impact on the users of the services referred to above. However, we are consulting on two approaches that relate to 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 proposals. Further, as set out in section 8, we propose to monitor the extent to which third parties make use of Sky's AC services. Should evidence of concerns emerge, this could lead us to reassess our position.
- A5.6 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.
- A5.7 We therefore consider that our proposals would not have an adverse impact on any particular groups of society.

Annex 6

Notification of proposed access-related conditions under section 48A(3) of the Act

Proposal to set access-related conditions in relation to each of the persons specified in the Schedule to this Notification

1. OFCOM proposes to set the access-related conditions set out in the Schedule to this Notification which are to apply to SSSL.
2. OFCOM's reasons for making this proposal, and the effect of the proposed conditions, are set out in the accompanying consultation document.
3. OFCOM considers that the proposals comply with the requirements of sections 45 to 49C and sections 73 to 74 of the Act, insofar as they are applicable.
4. In making these proposals, OFCOM has considered and acted in accordance with their general duties under section 3 of the Act and the six Community requirements set out in section 4 of the Act.
5. Representations may be made to OFCOM about the proposals until **5pm on 17th September 2014**.
6. If implemented, the access-related conditions shall enter into force on a date to be specified in OFCOM's final statement in relation to these proposals.
7. A copy of this Notification is being sent to the Secretary of State in accordance with section 48C(1) of the Act.
8. In this Notification:
 - a. **"the Act"** means the Communications Act 2003;
 - b. **"OFCOM"** means the Office of Communications;
 - c. **"SSSL"** means Sky Subscriber Services Limited (company number 02340150), any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.
9. Words or expressions shall have the meaning assigned to them in this Notification, and otherwise any word or expression shall have the same meaning as it has in the Act.

10. For the purposes of interpreting this Notification: (i) headings and titles shall be disregarded; and (ii) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.

11. The Schedule to this Notification shall form part of this Notification.

A handwritten signature in black ink that reads "Yih-Choung Teh". The signature is written in a cursive style with a large, looped 'T' at the end.

Yih-Choung Teh

Competition Policy Director

23rd July 2014

A person authorised by OFCOM under paragraph 18 of the Schedule to the Office of Communications Act 2002.

SCHEDULE

Access-related conditions

Part 1: Definitions and interpretation

1. In this Schedule:

“**Act**” means the Communications Act 2003;

“**Access Control Services**” means Application Signing Services, Authentication Services or any other service which SSSL may provide for equivalent purposes;

“**Ancillary Service**” means:

- a) a service authorised by section 48(4) of the Broadcasting Act 1990;
- b) a service authorised by section 204(6) or section 204(7) of the Act;
- c) a relevant ancillary service within the meaning of section 232(6) of the Act;
- d) any other service which is ancillary to a programme included within a television broadcasting service and directly related to its contents;

“**Application Signing Services**” means services which:

- a) enable the provision by a Third Party of Specified Programme Services selected by means of an interactive application available via an on-screen symbol or listing in an interactive menu; or
- b) enable the provision by a Third Party of Commercial Watermarking in connection with the provision of Specified Programme Services to a Subscriber;

“**Authentication Services**” means services which enable the operation by a Third Party of a return path for the transmission of communications between that Third Party and end-users in connection with:

- a) the provision of Specified Programme Services to end-users; or
- b) the provision of Pay TV Subscriber Services to end-users;

“**Commercial Watermarking**” means the provision of an on-screen symbol to verify the authorisation of a Subscriber to receive a relevant Specified Programme Service;

“**Pay TV Subscriber Services**” means:

- a) the provision of information in relation to the use of and payment for a subscription for Specified Programme Services;

- b) services which allow an end-user to subscribe for Specified Programme Services;

“Reference Offer” means the terms and conditions (including charges) on which SSSL is willing to enter into an agreement with a Third Party for the provision of Access Control Services;

“Relevant Device” means an end-user terminal system, consisting of a set top box or equivalent device integrated into a TV set, that is capable of decoding digital satellite transmissions and which is capable of providing functionality for SSSL's Access Control Services;

“Specified Programme Services” means any of the following services:

- a) a television broadcasting service broadcast (whether by the person providing the service or by another) from a satellite;
- b) a television licensable content service broadcast (whether by the person providing the service or by another) from a satellite;
- c) an Ancillary Service;

“SSSL” means Sky Subscriber Services Limited (company number 02340150), any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006;

“Subscriber” means an end-user who is party to a contract for the provision of Specified Programme Services; and

“Third Party” means a broadcaster or a retailer of Specified Programme Services.

2. For the purpose of interpreting the conditions set out in Part 2 of this Schedule:

- a) words or expressions shall have the meaning ascribed to them in this Part 1 and otherwise any word or expression shall have the same meaning as it has in the Act;
- b) the Interpretation Act 1978 shall apply as if each of the conditions were an Act of Parliament; and
- c) headings and titles shall be disregarded.

Part 2: The Conditions

Condition 1 – Requirement to provide Access Control Services on reasonable request

- 1.1 SSSL must provide to a Third Party such of the Access Control Services as that Third Party reasonably requests in writing for the purpose of, or in connection with, enabling end-users to have access to Specified Programme Services on Relevant Devices.

- 1.2 The provision of Access Control Services by SSSL in accordance with this condition must also include such associated facilities as may be reasonably necessary for the provision of the Access Control Services.
- 1.3 The provision of the Access Control Services under this condition must take place as soon as reasonably practicable after receiving the request from a Third Party.
- 1.4 SSSL must comply with any direction OFCOM may make from time to time under this condition.

Condition 2 – Requirement to provide Access Control Services on fair and reasonable terms

- 2.1 In fulfilment of its obligations under condition 1, SSSL must provide the Access Control Services to a Third Party on terms and conditions (including charges) which:
 - a) are fair and reasonable;
 - b) do not involve, or tend to give rise to any undue discrimination against any person or description of person; and
 - c) are on such terms, conditions and charges as OFCOM may from time to time direct.
- 2.2 In this condition SSSL may be deemed to have shown undue discrimination if it unfairly favours to a material extent an activity carried on by it so as to place one or more Third Parties at a competitive disadvantage in relation to activities carried on by SSSL.
- 2.3 SSSL must comply with any direction OFCOM may make from time to time under this condition.

Condition 3 – Publication of charges, terms and conditions

- 3.1 Except in so far as OFCOM may otherwise consent in writing, SSSL must publish a Reference Offer in relation to the provision of Access Control Services and act in the manner set out below.
- 3.2 SSSL must ensure that a Reference Offer in relation to the provision of the Access Control Services includes at least the following:
 - a) a description of the Access Control Services to be provided;
 - b) relevant charges, terms of payment and billing procedures;
 - c) details of maintenance and quality standards;
 - d) the standard terms and conditions for the provision of the Access Control Services.
- 3.3 To the extent that SSSL provides to itself Access Control Services in a manner that differs from that detailed in a Reference Offer in relation to the provision of the Access Control Services to any Third Party, SSSL must ensure that it publishes a Reference Offer in relation to the Access Control Services that it provides to itself

- which includes, where relevant, at least those matters detailed in condition 3.2 a)-d).
- 3.4 SSSL must, within one month of the date that this condition enters into force, publish a Reference Offer in relation to the Access Control Services that it is providing as at the date that this condition enters into force.
- 3.5 SSSL must update and publish the Reference Offer in relation to any amendments or in relation to any further Access Control Services provided after the date that this condition enters into force.
- 3.6 Publication referred to above must be effected by SSSL placing a copy of the Reference Offer on any relevant publicly accessible website operated or controlled by SSSL.
- 3.7 SSSL must send to OFCOM written notice of any amendment to the terms of the Reference Offer in relation to the provision of Access Control Services on or before the day on which any such amendment comes into effect.
- 3.8 SSSL must ensure that a notice required by condition 3.7 includes:
- a) a description of the Access Control Services in question;
 - b) a reference to the location in the SSSL's current Reference Offer of the terms and conditions associated with the provision of those Access Control Services;
 - c) the date on which or the period for which any amendments to charges, terms and conditions will take effect; and
 - d) the current and proposed new charges, terms and conditions (as applicable).
- 3.9 SSSL shall provide to OFCOM on request copies of any agreements entered into with Third Parties in relation to the provision of Access Control Services. SSSL shall provide the information requested by OFCOM under this condition 3.9 within 28 days of receiving such a request in writing.
- 3.10 SSSL must make such modifications to the Reference Offer as OFCOM may direct from time to time.
- 3.11 SSSL must comply with any direction OFCOM may make from time to time under this condition.

Condition 4 – Provision of accounting information to OFCOM

- 4.1 SSSL shall provide to OFCOM on request accounting information relating to the provision by SSSL of Access Control Services.
- 4.2 The information that OFCOM may request under condition 4.1 includes, in particular, financial information on the costs (including capital costs), revenues, assets employed in and liabilities attributable to (including attribution methodologies) the provision of Access Control Services to itself and Third Parties.
- 4.3 SSSL shall provide the information requested by OFCOM under condition 4.1 in a form specified within 28 days of receiving such a request in writing.

Annex 7

Sky's Proposed Commitments

Ofcom Review of the Access Control Continuation Notice Sky Draft Commitments: 4 February 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

1. Sky agrees to provide on written request from Ofcom all information required to monitor its adherence to these commitments.

B. Current Generations of Sky set top boxes

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

2. To continue 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.
3. 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.
 4. Upon expiry of Existing Access Control Services Customers' agreements, and 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.
 5. To incorporate the services specified at paragraph 2 of these commitments and the maximum charges specified at Annex 1 of these commitments into Sky's Standard Terms.
 6. To provide Sky's Standard Terms to third parties on request.
 7. To 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).
 8. To incorporate into Sky's Standard Terms (and into Existing Access Control Services Customers' current agreements, if so requested by such customers) an obligation on Sky, upon expiry of such agreement, to offer to enter into a renewal agreement on Sky's then-current Standard Terms.
 9. Not to alter Sky's Standard Terms without good reason. For the avoidance of doubt, the purpose of this commitment is to enable Sky to change the Standard Terms 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 its Standard Terms in the following circumstances:
 - to reflect a change in the underlying technology used to provide the Application Signing Services and/or Authentication Services;
 - 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.

C. Future Generations of Sky set top boxes

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

10. To provide Technical Services to any broadcaster who requests such services which are required to enable that broadcaster to provide the following interactive services:
 - 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.
11. 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.
 12. 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).
 13. 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 reasonable.
 14. To incorporate into Sky's standard terms for the provision of Technical Services an obligation on Sky, upon expiry of such agreement, to offer to enter into a renewal agreement on Sky's then-current standard terms.

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, either via an on-screen trigger (typically depicting a “red button”) or via a specific listing in Sky’s Interactive Main Menu.

“**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.

“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 sub-titles 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 sub-titles 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 as at the date of these commitments]

Annex 4

[To be inserted: Sky's standard terms for the provision of Authentication Services as at the date of these commitments]