OFCOM PAY TV MARKET INVESTIGATION

CONSULTATION

Response to consultation from the FA Premier League

14 March 2008

Submitted by DLA Piper UK LLP

For and on behalf of the FA Premier League

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RESPONSE TO CONSULTATION
DOCUMENT BY THE FA PREMIER LEAGUE

1. INTRODUCTION

1.1 This response to Ofcom's pay TV Market Investigation Consultation (**"the Consultation"**) is submitted for and on behalf of the FA Premier League (**"the PL"**) by DLA Piper UK LLP.

1.2 The PL is a private limited company whose shareholders are its member football clubs which participate in the PL competition each football season (annually a season runs from August to May).

1.3 Where Ofcom's Consultation questions directly relate to the PL or are within the knowledge of the PL we have responded to these and also set out the PL's submissions on Ofcom's initial conclusions.

1.4 Given the wide ranging nature of the Consultation, and the many different sections of the Consultation and its Annexes in which Ofcom has set out its initial conclusions, the PL also reserves its right to provide Ofcom with further submissions in relation to the issues raised in the Consultation.

1.5 Nonetheless, the PL has sought to address all issues raised in the Consultation that may affect its member clubs, the operation of the commitments (**"the Commitments"**) given by the PL to the European Commission (**"the Commission"**) in 2006 and/or the downstream broadcasting markets and the sale and use of PL TV rights.

1.6 To the extent that the PL has not addressed all issues raised in the Consultation or all initial conclusions put forward by Ofcom, the PL is not to be taken as agreeing with or accepting any issues or initial conclusions which it has not directly addressed.

1.7 The PL would be happy to meet with Ofcom to discuss any aspect of this response or any other issues that may affect the PL arising out of the Consultation and/or any future action by Ofcom in relation to the pay TV market investigation.

2. EXECUTIVE SUMMARY

2.1 The Consultation raises a number of potential competition concerns. The primary concern, albeit not directly stated, appears to be that pay TV prices in the UK (and in particular for premium sports and movies) are too high (i.e. above competitive levels) and that this is as a result of a lack of competition in the provision of premium channels at the wholesale and/or retail level.

2.2 We have reviewed the Consultation and identified the key initial conclusions and issues that Ofcom directs towards the PL, as follows:

2.2.1 The aggregation of PL matches, sold collectively by the PL, gives rise to monopoly rents for the PL and is done deliberately to increase the value to the PL as content provider;

2.2.2 The sale of aggregated content by content rights holders (i.e. the PL) can result in market power for the purchasers (i.e. the wholesale channel providers) of the rights;

2.2.3 There are narrow economic markets for

(i) retail sale of premium sports channels; and

(ii) the wholesale of premium sports channels;

2.2.4 There are separate markets for pay TV and free to air TV;

2.2.5 Barriers to entry arise in the market for the wholesale of premium sports channels because, in order to purchase premium sports rights, the wholesale channel provider can only buy these on a staggered and exclusive basis for a fixed fee from the content owners;

2.2.6 Sky has significant market power because there are significant barriers to entry into these markets;

2.3 We do not propose to address all of the issues raised in the Consultation but instead have concentrated on the definition of the relevant market and the arrangements under which the PL sells its television rights.

2.4 Even if there were a distinct pay TV market which is a separate economic market to the free to air TV broadcasters and even if there were any competition concerns in the pay TV market, none of these can be attributed to the PL.

2.5 There is no basis for any further regulatory restrictions on how the PL markets and sells its television rights.

2.6 Furthermore, there is no basis for Ofcom to re-open the competition concerns and issues that have already been addressed by the Commission in its decision to accept commitments from the PL in March 2006[1] (**"the Commitments Decision"**). Details of the issues addressed by the Commission are set out in Annex One.

2.7 The Commitments given to the Commission were accepted by the Commission as being sufficient to meet all the competition concerns of the Commission in relation to the sale of PL rights for the seasons 2007/8 - 2012/13. Acceptance of the Commitments meant that there were no longer grounds for action by the Commission and, therefore, no competition concerns can continue to exist in relation to the sale of the PL rights in either the upstream or the downstream markets.[2]

2.8 Therefore, the Consultation should not now include any review of the sale of PL rights or any theoretical corresponding effects in the downstream broadcast markets.

2.9 Nevertheless, only two years later the Consultation attempts to re-open the same issues as have already been addressed by the Commission in relation to the sale of the PL's rights.

2.10 In view of the above the PL does not accept that Ofcom has any grounds to intervene in any issues relating to the sale of its rights and this includes any intervention in relation to purchase of the PL's rights by wholesalers and/or retailers of pay television services.

2.11 Furthermore, not only has sale of the PL's rights been the subject of a Commission investigation but the Commission has also issued a number of other decisions in recent years approving the collective selling of sports rights and the effect which collective selling has on competition in both the upstream and downstream markets.[3]

2.12 Nevertheless, despite the PL's primary submission that the Consultation should not review the sale of its rights, and/or the effect of the sale of its rights on the

[1] Case COMP/C-2/38. 173 Joint selling of the media rights to the FA Premier League.
[2] See paragraphs 38-45 ibid
[3] Case COMP/37.576 *UEFA Broadcasting Rules* (19 April 2001); Case COMP/C-2/37.214 *Joint selling of the media rights to the German Bundesliga* (19 January 2005).

downstream broadcast markets, it has (where appropriate and directly relevant to the PL) addressed the consultation questions and Ofcom's initial conclusions in relation to market definition and the arrangements under which the PL sells its TV rights.

2.13 The remainder of this submission follows the headings in the Consultation document.

3. OFCOM CONSULTATION SECTION ONE - SUMMARY

3.1 We have considered the statements made by Ofcom in the summary section of its Consultation document and have addressed the issues that impact on the PL below. However, because Ofcom develops its summary section in more detail in the rest of the Consultation document and annexes we have limited our response at this stage. Further and more detailed responses will be provided in the appropriate sections below.

Content Aggregation

3.2 Ofcom notes that the mechanism for content aggregation at the upstream level of content owners is by collective selling, that content is sold on a staggered basis and for a fixed duration; and that content aggregation is likely to be necessary in order to assemble a credible pay TV proposition.[4]

3.3 Ofcom goes on to form the initial conclusion that from a competition perspective content aggregation is important because it allows a means for other firms active lower down in the supply chain (who have access to the aggregated content) to establish a degree of market power in relation to categories of content.

3.4 As recognised by Ofcom, this is dependent on its analysis of market definition and market power being correct. It's initial conclusion on market definition being that "*distinct narrow economic markets exist for pay TV subscription channels containing premium sports… at both the wholesale and retail level of the value chain, and that Sky have market power in these markets*"[5]

3.5 At the outset the PL submits that Ofcom's analysis of the appropriate market definition is flawed in several respects. It fails to take account of the constraint on pay TV by free to air TV. The PL agrees with the Competition Commission's (**"The**

[4] Paragraph 1.23 and Figure 2
[5] Paragraph 1.25 Consultation Document

CC") analysis of the relevant product markets in its merger inquiry into the acquisition of a shareholding in ITV by BSkyB (**"ITV/Sky"**).[6]

3.6 In its report to the Secretary of State for Business Enterprise and Regulatory Reform the CC found that there was one relevant product market for *"all TV"* on the basis that free to air services were a constraint on Sky's pricing. As set out by the CC in the summary section of its report it concluded that *"the appropriate framework for analysing any loss of competition from the acquisition was a UK market for all-TV which included both pay tv and free to air services".*

3.7 Whilst the PL acknowledges that this market was assessed under the merger control provisions of the Enterprise Act 2002 this does not mean that the CC's market definition can be disregarded in this Consultation. It provides the most up-to-date analysis of the relevant market in which the PL's UK licensees operate, contains a finding (with which the PL agrees) that free to air services do constrain Sky's pricing and must, therefore, be an appropriate market definition for Ofcom's purposes.

3.8 The CC, as part of the merger inquiry, had to assess the ability of the merged entity to affect competition in any relevant market. Part of this assessment depends upon an analysis of the competitive conditions in the status quo ante (i.e. prior to the acquisition) and, as the CC sets out upon an analysis of *"the underlying factors affecting existing and future levels of competition in the market, including…the level of competition in the market absent the acquisition"*.[7]

3.9 We deal with the CC's findings in relation to the relevant product market in more detail below in Section 7.

3.10 Furthermore, the PL refers Ofcom to the Commitments Decision in which the Commission did not distinguish between pay TV and free to air TV platforms and instead described the downstream markets simply as *"TV markets".*[8]

3.11 Finally, in relation to market definition a proper application of the standard principles for defining a relevant market indicates that the relevant market at wholesale and retail level is much wider than just premium sports. Ofcom's own survey evidence is

[6] Report by Competition Commission to Secretary of State (BERR) dated 14 December 2007 "Acquisition by British Sky Broadcasting Group Plc of 17.9 per cent of the shares in ITV Plc"
[7] Pargraph 4.2 ibid
[8] Paragraph 22 Commitments Decision

consistent with this conclusion i.e. that the relevant economic markets at the wholesale and/or retail level are wider than for premium sports alone.

3.12 The PL does not agree with Ofcom's initial conclusion that content aggregation is relevant in concluding that there are narrow content markets for premium sports channels in a pay TV only market.

3.13 The PL matches are attractive but by no means unique content. Collective selling of the rights does not have any relevance to Ofcom's initial conclusion that there is a narrow market for premium sports channels.

3.14 The PL also notes Ofcom's initial conclusion that there is a strong incentive for firms to aggregate premium content *"as far up the value chain as is practical, in order to capture the associated benefits of aggregation"*. The PL agrees that there are clear benefits of content aggregation for both broadcasters and its member clubs/football as a whole.

3.15 For broadcasters there are scheduling and quality efficiencies that arise out of collective selling. These are dealt with in more detail below.

3.16 For the PL clubs there are clear economic benefits that arise out of the collective selling of the TV rights. The revenue earned is used by clubs, inter alia, in order to improve the quality of their players which in turn improves the quality of the league and benefits all football fans, including spectators at the grounds and viewers of television broadcasts.

3.17 Collective selling also enables the PL clubs to redistribute the revenue among all 20 clubs to a degree that would not be possible if individual selling were the norm. This has been accepted by the Commission in its White Paper on Sport[9] where it recognised that *"collective selling can be important for the redistribution of income and can thus be a tool for achieving greater solidarity within sports"*.[10]

3.18 The benefits of collective selling are considered in Section 7 below in more detail.

3.19 Individual selling of the rights to an individual club's matches would also not allow broadcasters to showcase the competition as a whole or tell the story of the season,

[9] White Paper on Sport COM(2007) 391 final 11 July 2007
[10] Ibid page 17

and would not give effect to the context of PL matches (i.e. that they are part of a league competition and that each team's performance is relative to the performances of all other teams in the PL).

3.20 Ofcom also goes on to state that *"to the extent that there are any monopoly rents associated with the aggregation of premium content, these will float upstream… any intervention to address concerns associated with any monopoly rents would also have to take place upstream, for example by preventing aggregation of content rights"*.

3.21 The PL does not accept that it achieves any monopoly rents in the sale of its rights. Its rights are attractive but are by no means so unique that broadcasters must have access to them in order to compete effectively in the broadcasting markets for pay TV and free to air television services.

3.22 Furthermore, the regulatory constraints placed on the sale of the PL's rights by the Commitments ensures that the PL does not control the bidding process or impose high prices on purchasers. On the contrary, the prices paid by successful bidders for PL rights are the product of the operation of the market in a regulated and monitored bidding process. This issue is dealt with in further detail in Section 7 below.

Long-run operation of the market - access to premium content

3.23 The PL does not agree that there is limited access to *"premium content"* and nor does it agree that its sale of exclusive rights gives rise to significant barriers to entry into the upstream market for the purchase of wholesale channels.[11]

3.24 The operation of the Commitments is designed to ensure that there is effective competition for the purchase of PL's rights at the downstream level. The rights are auctioned under the mechanism set out in the Commitments which was designed to meet the preliminary competition concerns raised by the Commission. The number of packages, and content within the packages, are carefully balanced to meet the requirements of the widest range of broadcasters and therefore to ensure that competition between broadcasters is increased.

[11] Paragraphs 1.55 - 1.57 Consultation Document

3.25 Each interested party is invited to submit a separate standalone bid for each package that it wishes to bid for and no single buyer can buy all six live packages. This ensures effective competition for the PL's rights and, as recognised by the Commission, acquiring even one of the live packages will be sufficient to enable a broadcaster to showcase the Premier League competition.

3.26 As set out above, participation in the auctions for the purchase of PL's TV rights is open to anyone. There were two winning bidders for the live rights for the 2007/8 to 2010/11 seasons, namely Sky and Setanta. As Ofcom is aware, Setanta won two of the six available PL live packages.

3.27 This clearly demonstrates that there are no insurmountable first mover advantages in the market for premium wholesale channel provision as Sky was outbid for two live packages by Setanta, a new entrant in the bidding for PL rights.

3.28 Whilst the PL's rights do only become contestable on a staggered basis every 3 years, this has been accepted by the Commission as the necessary minimum to allow licensees (including new entrants such as Setanta) to earn a return on their investment, thus accruing efficiency benefits, while not being so long as to foreclose the market for PL rights to unsuccessful bidders.

3.29 Furthermore, Setanta's acquisition of a large number of sports rights, other than PL rights, does not suggest that there are only a limited set of sports content rights available. For example, Setanta currently broadcasts, or will from the start of the next football season broadcast, the following sports content live:

(a) PL matches

(b) Scottish PL matches;

(c) FA Cup matches and England home Internationals;

(d) Blue Square Premium football;

(e) US PGA golf;

(f) French, Dutch and Portuguese football leagues;

(g) Indian premier league cricket;

(h) Australia rugby league;

(i) Magners league rugby; and

(j) boxing.

3.30 Setanta has clearly not been dependent on the PL rights in order to develop its wholesale sports channel offering and, as noted on its website, it now offers more sports channels than any other UK broadcaster.[12] This offering, which has been positioned in the basic channel packages of Virgin Media's retail offering, is based in large part on its rights to a wide range of other sports events, including the US PGA Tour golf, and, from next season, FA Cup and England international football matches.

Pricing Structure

3.31 Ofcom concludes that the pricing structure of the market is significant because, at the content owner level, production costs are high but do not scale with the number of viewers. It also notes that content rights are typically sold for a fixed fee and on an exclusive cross platform basis.

3.32 As set out above, the PL's rights are required to be sold, under the terms of the Commitments, to the highest compliant standalone bidder. It would simply not be possible for the PL to comply with the Commitments if it were to accept variable bids made on a per viewer basis since it would be impossible for the PL to quantify such bids or to compare such bids with fixed fee bids. Furthermore, selling content rights on a per viewer basis would be likely to foreclose the bidding process to new entrants who were seeking to establish a new channel offering and who had relatively few viewers. This is addressed further in paragraph 7.76 below.

3.33 Broadcasters require exclusivity in order to differentiate their product. If the PL did not sell its rights on an exclusive basis, the PL would be unable to meet the requirements of broadcasters and, as a result, the value of its rights would be significantly reduced. This in turn would remove many of the benefits of collective selling and would damage the league.

[12] See Setanta's website www.setanta.com/en/uk/About-US

3.34 Exclusivity is a well recognised practice in the broadcasting of sporting events and as noted by the then Deputy Director General of DG Comp Mr Jean-Francois Pons *"The granting of broadcasting rights for sporting events on an exclusive basis is an established and accepted commercial practice. It guarantees the value of a programme, particularly as interest in, and therefore the value of, sporting events is ephemeral"*.[13]

3.35 Ofcom also appears to believe that an increase in the value of PL rights affects the pricing of premium pay TV sports channels by broadcasters. This is incorrect; the pricing of premium pay TV sports channels is affected by the marginal cost of the PL rights. The PL sells its TV rights on the basis of a fixed sum bid for each package. Where the successful bidder uses PL rights on a premium sports channel, the costs associated with acquiring TV rights to the PL are, therefore, invariant both as to the number of subscribers which that premium sports channel may have and as to the number of downstream retailers of that premium sports channel. In other words, the marginal cost to wholesalers of premium sports channels that use PL rights is zero. This is true regardless of the total value of the rights. This has important implications as, in all industries, wholesale pricing decisions are determined by marginal cost. Since the marginal cost of the PL rights does not vary with the overall valuation of those rights, the amount paid for PL rights does not affect the optimal wholesale price of premium sports channels. Put simply, a decrease in the price paid to secure PL rights will not feed through to a decrease in the wholesale or retail price of premium sports channels that show PL matches.

Switching Barriers

3.36 Ofcom's initial conclusions in relation to switching mainly relate to switching between platforms and/or retailers, and sale of the PL's content rights does not directly impact upon this.

Market Structure

3.37 The PL is not in a position to comment on whether vertically integrated firms such as Sky and Virgin Media have incentives to favour their own business over other operators at the wholesale and retail level or have market power.

[13] Speech by Mr Pons at the Fordham Corporate Law Institute XXVI Annual Conference on International Anti-Trust Law

Summary of Possible Concerns

3.38 We note Ofcom's summary (paragraph 1.61 to 1.65) and for the reasons set out above (and expanded on below) the PL does not agree with the following initial conclusions put forward by Ofcom:

3.38.1 competition concerns arise where aggregation of content by a particular provider (i.e. the content rights holder) leads to the creation of market power;

3.38.2 market power, which results from content aggregation could be leveraged into other markets;

3.38.3 there may be significant barriers to entry into the market for premium wholesale channels primarily due to the way in which content rights become contestable only on a staggered basis.

4. OFCOM CONSULTATION SECTION TWO - CONTEXT

4.1 Ofcom addresses one consultation question under Section Two "Context" which is as follows:

4.1.1 Do you agree with the criteria against which we propose to assess the functioning of the pay TV Sector?

4.2 The criteria set out by Ofcom are, it states, intended to assist it in assessing the extent of any consumer detriment associated with competition concerns.

4.3 As set out above the PL does not accept that there can be any competition concerns arising out of the sale of its rights; either in the upstream market for the sale of content or in the downstream broadcast markets. The Commitments were specifically designed to meet any competition concerns there may have been.

4.4 Furthermore, the PL submits that there is one relevant market for all forms of television (both pay and free to air).

4.5 Therefore, the criteria for assessing whether the market is functioning effectively should include (i) reference to the Commitments, and (ii) a primary consideration of the choice of content for consumers across all television services and not just within

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and Policy - Sport and European Competition Policy, October 1999 the different pay TV services. This would properly reflect the Section 3(5) requirement to *"have regard to the particular interests of those consumers in respect of **choice**, price, quality of service and value for money"* (emphasis added).

5. OFCOM CONSULTATION SECTION THREE - OVERVIEW OF THE UK PAY TV MARKET

5.1 Ofcom addresses three consultation questions in Section 3 as follows:

5.1.1 Does our overview of the pay TV market value reflect the key developments within this market?

5.1.2 Do you agree with our analytic framework for the pay TV value chain? If not, why not?

5.1.3 Are there any additional comments or evidence which you wish to provide?

5.2 The figures shown in Figure 16 on page 40 of Ofcom's Consultation Document show that there are at least eight different sports which are deemed "must-have" by a percentage of a specific category of viewers. Football is one of these sports but "football" encompasses a wide variety of rights and competitions (not just PL rights), and yet Ofcom's research does not differentiate between these different football competitions with the result that Figure 16 shows only that football is a popular sport. Moreover, Ofcom's data at Figure 18 in relation to "spontaneous channel mentions among those who say content is 'must-have'" does not indicate in any way that viewers consider Sky Sports content to be more "must-have" than the content of other channels. In fact, among free to air customers the proportion who considered Sky Sports content to be "must-have" is a mere 1% compared with 25% who considered BBC1 content "must-have". Even more significantly, only 9% of those pay TV customers surveyed considered Sky Sports content to be "must-have" which is exactly the same percentage as those who considered Discovery's channels to be "must have".

5.3 Therefore, whilst the PL agrees that television rights to football matches represent attractive content, Ofcom's own data confirms that it is by no means the only attractive content, and completely fails to support the argument that PL rights are a key driver for subscriptions. Furthermore, Ofcom's conclusion that the increased value of PL rights demonstrates that it is a key driver for subscriptions fails to take account of the fact that the PL rights have increased in value as a result of increased competition between both pay TV and free to air broadcasters. It is not simply the case that the greater the number of its subscribers or the amount of its subscription revenues, the more a pay TV operator will pay for PL rights. This over simplifies the competitive nature of the auction for the PL rights and the impact of free to air broadcasters on the value of the rights. For example, in the last PL auctions, Setanta outbid Sky for two of the six live packages even though Setanta had at that time a small fraction of the number of subscribers which Sky had and free-to-air broadcasters such as the BBC and Channel 4 made very competitive (but ultimately unsuccessful) bids for various of the live packages even though they have no subscribers or subscription revenue. Therefore, a bidder's level of subscriptions has very limited relevance to the value of PL rights.

5.4 Ofcom's statements at paragraph 3.68 are also irrelevant to the key issues in the Consultation (i.e. whether any competition concerns exist in the pay TV market). The proportion of Sky's operational costs that are accounted for by PL rights and the revenue received by PL clubs does not demonstrate that the PL rights are a key driver in pay TV subscriptions.

5.5 Pay TV customers are concerned with having access to a wide range of premium and basic channel offerings which offer a wide range of choice of attractive programming (not just sport), and the possibility for obtaining complementary telephony and/or broadband services. This is clearly demonstrated by Ofcom's own research which appears at Figure 18 of the Consultation.

5.6 The PL has no comment in relation to Question 2 and Question 3 of the three consultation questions Ofcom cites under this section.

5.7 However, in relation to Question 4 the PL repeats its submissions set out above that pay TV is constrained by free to air TV and Ofcom should review more carefully its analysis of the content preferences of consumers across both free and pay television services in order to assess the function of the pay TV market.

5.8 Ofcom's own research supports the PL's submission that there is a single market for both free and pay TV services. 26% of pay TV consumers regard access to a <u>range</u> of channels as an important element of their current service. Customers are clearly not driven by access to one type of channel only.[14]

5.9 Furthermore, Ofcom's research also demonstrates that 87% of consumers cite "content", with no differentiation between types of content, as key; and that there are very few specific items of content which are valued by large groups of consumer.

6. OFCOM CONSULTATION SECTION FOUR - THE CONSUMER EXPERIENCE OF PAY TV

6.1 The PL does not have any specific comments in relation to Ofcom's initial conclusions in this section or the consultation questions numbered 5 to 10.

7. OFCOM CONSULTATION SECTION FIVE - CHARACTERISTICS OF PAY TV MARKET

7.1 Ofcom addresses six consultation questions in Section 5 as follows:

7.1.1 "What is your view on our approach to defining markets?"

7.1.2 "Do you agree with our definitions of premium content markets?"

7.1.3 "Do you agree with our preliminary conclusions on both / free to air markets?"

7.1.4 "Do you agree with our assessment of market power?"

7.1.5 "Have we identified the correct set of intrinsic market characteristics? Are there any that you allowed?"

7.1.6 "Have we correctly captured the role of vertical integration?"

7.2 Ofcom sets out its initial analysis of market definition and market power in Section 5 and this is expanded on in Annex 13.

7.3 The PL notes the following initial conclusions of Ofcom, in this section, as being relevant to its position and addresses these below:

[14] Paragraph 5.49 Consultation Document

7.3.1 There are separate retail and wholesale markets for the supply of premium sport….channels. The market for premium sports channels is likely to include both Sky Sports and Setanta although Ofcom cannot rule out a narrower market for Sky Sports alone as a premium sports channel.[15]

7.3.2 PL matches are played throughout the year and, therefore, they are capable of forming the basis of a premium sports channel.[16]

7.3.3 Wholesale channel providers (such as Sky and Setanta) do not regard any other sports rights packages as a close substitute for the PL's rights.[17]

7.3.4 Access to content in premium sports is a significant barrier to entry and means that there are limited constraints on Sky, giving Sky significant market power.[18]

7.3.5 Collective selling of sports rights has the potential to raise competition concerns in relation to the way which rights are sold and the potential creation of downstream market power.[19]

7.4 The PL submits that Ofcom's initial conclusions are ill founded, based on flawed methodology and assessments, and incorrectly ignore both the Commitments Decision and the CC's recent findings in the ITV/Sky merger inquiry.

Consultation Question 11 *"What is your view on our approach to defining markets"*

7.5 Ofcom's approach to the definition of markets is fundamentally lacking in any analysis of the first main question of market definition it identifies at paragraph 5.3. In that paragraph the first bullet point refers to Sky's submission that *"pay TV providers participate in a broader market within which they face significant competition from free to air television"*. The PL agrees that this is a key factor in proper market definition and yet it is not addressed by Ofcom, either properly or at all.

[15] Paragraph 5.23 Consultation Document
[16] Paragraph 5.28 Consultation Document
[17] Paragraph 5.29 Consultation Document
[18] Paragraph 5.56 Consultation Document
[19] Paragraph 5.66 Consultation Document

7.6 This question was, however, considered very recently, and in detail, by the CC in the ITV/Sky merger inquiry. Ofcom should not simply ignore the analysis and conclusions reached by the CC in the Consultation.

7.7 As set out by the CC in its Report to the Secretary of State (dated 14 December 2007) there is a UK market for all TV which includes both pay TV and free to air services.[20] It further found that free to air services pose a constraint on Sky's pricing and that the BBC and ITV were key to the strength of the free to air offering. Clearly this is due to the content offered on these channels because the more attractive the content available on FTA channels, the lower the willingness of consumers to pay for pay TV channels.

7.8 The position taken by the CC is supported by ITV's submission to the CC in ITV/Sky where it stated that "competition between the parties occurred first and foremost for viewers".[21]

7.9 Ofcom goes on to set out the analytical framework it has used for defining the relevant markets in paragraphs 5.9 to 5.22.

7.10 In particular, Ofcom refers to factors that it considers make the definition of broadcasting markets challenging, including;-

7.10.1 how to account for the possibility that current prices may be above competitive levels - the cellophane fallacy;

7.10.2 how to address the risk of stated preference by survey;

7.10.3 how to take account of the two sided nature of the market;

7.10.4 how to gauge the substitutability of products which can only be consumed as part of a wider bundle; and

7.10.5 how to define markets for products which were highly differentiated.

7.11 Ofcom acknowledges that the standard approach for assessing the definition of the relevant market is the hypothetical monopolist test (**"HMT"**).

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[20] Paragraph 14 and 16 Report by Competition Commission to Secretary of State (BERR) dated 14 December 2007 "Acquisition by British Sky Broadcasting Group Plc of 17.9 per cent of the shares in ITV Plc"
[21] Paragraph 4.13 ITV/Sky CC Report

7.12 The application of the HMT begins by considering the products or services of the type supplied by the firm under investigation, and asking whether a hypothetical monopolist with control over all of these products would be able profitably to raise the price of those products permanently by 5-10%, assuming that the price of all other goods or services remained constant. If the answer to that question is yes, then this set of products defines a relevant market and competition between suppliers of those products provides the main sources of competitive constraint. If the answer is no, then this implies that suppliers of other products also provide important competitive constraints.

7.13 A market is defined as the smallest set of products that meets the HMT test. In other words the HMT test defines a market as the smallest set of products worth monopolising.

7.14 The correct analytical framework of the HMT makes it clear that the relevant consideration is the extent to which consumers of premium sports channels would respond to a relative price increase. We can consider such a relative price change in two ways.

7.15 First, how would consumers respond if the price of premium sports channels were to increase relative to other channels? Second, how would consumers respond to (more) sports content available on free to air broadcasters?

7.16 The Consultation directly addresses the first of these approaches (see Annex 13 paragraphs 4.20 et seq.) and Ofcom's own survey evidence finds the following consumer responses to a relative 10 per cent increase of Sky's various sports packages.[22]

7.16.1 9% of consumers would switch to Setanta;

7.16.2 7% would drop sports;

7.16.3 5% would drop movies but keep sports;

7.16.4 4% would drop sports and movies but keep basic; and

[22] As Ofcom notes, this price increase actually translates into a 2 to 6 per cent increase in the overall cost of Sky channels. These results are therefore likely to understate the degree of substitutability.

7.16.5 4% would drop pay TV altogether.

7.17 In short, a significant proportion (nearly one-third) of current subscribers of Sky Sports would seek substitutes in response to a 10% increase in the price of the sports channels. As Ofcom accepts, such levels of switching would make such price increases unprofitable.

7.18 However, Ofcom seeks to ignore such evidence with reference to the cellophane fallacy to suggest that market power is already being exercised and that, therefore, there may be evidence that prices are already set at above competitive levels by the wholesale and retail providers.[23]

7.19 As Ofcom notes, problems in properly interpreting empirical evidence in non-merger inquiries arise from the inherent difficulties in identifying the appropriate benchmark against which to apply the hypothetical price increase that is central to the HMT.

7.20 The problem arises because profit-maximising firms will always set their prices at a level at which a further price increase would be unprofitable. The degree of substitution observed between two products will therefore depend in large part upon the current relative prices of the products concerned. Consequently, the mere fact that *at current prices* two products appear to be effective substitutes does not necessarily rule out the possibility that the firm producing one of the products possesses significant market power.

7.21 The critical issue is, therefore, how to discriminate between *effective* competition and *apparent* competition. In this particular case, the issue to be determined is whether the acknowledged sensitivity of consumers to increases in the relative price of premium sports reflects the fact that other content provides an effective competitive constraint (and therefore premium pay TV sports channels and other content form part of the same relevant market) or whether other content is considered by consumers to be an “inferior” product that only becomes attractive in terms of achieving consumers’ viewing desires because the price of premium pay TV sports channels has been increased significantly above competitive levels.

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23 Ofcom refers to precedents to supports its reference to the cellophane fallacy. These apparent precedents are set out in paragraph 5.5 of the Consultation. However, paragraph 5.5 refers to the decisions cited as evidence in support of the conclusion that there are narrow retail and wholesale markets for sale of premium sports.

7.22 However, there is a real danger of the analysis becoming circular. As noted in the introduction, Ofcom's main competition concern appears to be that Sky is able to charge prices for its premium sports channels above competitive levels. But this is the issue that Ofcom is supposed to be analyzing, not assuming. In other words, it cannot be assumed that prevailing prices do not reflect competitive prices and, in consequence, that premium sports channels do not form part of a wider relevant market.

Consultation Question 12 and 14 "Do you agree with our definitions of premium content markets" and "Do you agree with our assessment of market power?"

7.23 Given the problems raised by the cellophane fallacy, as set out above, it is important to consider the other evidence put forward by Ofcom in relation to the definition of the relevant market.

7.24 The Consultation refers to consumer survey evidence that addresses the attractiveness of content that is available on premium sports pay TV channels. However, the professed attractiveness of sports content cannot directly address the key question in defining the relevant market (i.e. how would consumers respond if relative prices were to change).

7.25 It is not sufficient for Ofcom to simply assert that *"access to content, choice and range of sports are the most important characteristics in driving demand for premium sports pay TV channels"* and the fact that *"premium sports pay TV channels offer a substantially greater amount of programming"* proves that consumers would not switch in response to a relative price increase above competitive levels.

7.26 In short, the PL submits, for the reasons set out above and below, that the Consultation does not provide any credible evidence to support Ofcom's preliminary conclusions on content/channel market definitions and that premium sports pay TV channels delineate a separate relevant market.

7.27 Ofcom should have followed the market definition found by the CC in the recent ITV/Sky inquiry. The CC concentrated on the competition between pay TV and free to air operators for viewers and the constraint that free to air services place on pay TV services. The CC's market definition is further supported by Ofcom's own survey data referred to at paragraph 5.2 above.

Premium Sports Channels

7.28 Ofcom attempts to demonstrate that it has evidence to support its initial conclusion that there is likely to be a narrow retail market for premium sports channels, which includes Sky Sports, and may also include Setanta Sports.

7.29 However, the rationale for this, as set out in paragraphs 5.25 to 5.33, does not appear to provide any substantive evidence for this conclusion.

7.30 Firstly, Ofcom states that *"A premium sports pay TV service is usually defined as one that provides live access, often on an exclusive basis, to a specific set of highly valued sports events."* However, it gives no explanation of where this "usual" definition comes from or what evidence it has to support it.

7.31 It goes on to note that the characteristics of premium sports channels are quite distinct from those of free to air or basic pay TV services. These major characteristics are that premium sports pay TV services provide live access, often on an exclusive basis, to a specific set of highly valued key sports events. However, this completely ignores the fact that a major characteristic of free to air television services and of certain pay television services available as part of basic channel packages (including Setanta Sports) is that they also provide live exclusive access to highly valued sports events.

7.32 For example, over the weekend of 8/9 March 2008 the BBC provided its viewers with live and exclusive access to three Rugby Union Six Nations matches and three FA cup matches.

7.33 Whilst Ofcom acknowledges (in paragraph 5.28) that high quality sports content is provided on free to air channels; and that five of the six most important sports events deemed by customers to be *"must have"* are available either in whole or in part on free to air TV, it tries to discount this crucial fact by commenting that these are "relatively short one-off events" and that the PL is "the only one of these capable of forming the basis of a premium sports channel". It also fails to give proper weight to the fact that there is other high quality live and exclusive sports content available on free to air TV, such as rugby union, golf, tennis and Formula 1 motor racing.

7.34 For example, the BBC's free to air channels show live exclusive coverage of the Rugby Six Nations tournament; and ITV shows live exclusive coverage of the UEFA

Champions League and Formula 1 season. A full list of the key sports content available on free to air channels is set out in Annex Two.

7.35 Furthermore, the Formula 1, FA Cup, the Rugby Six Nations tournament and the UEFA Champions League are clearly not "short one-off" events. They are all key sporting events which are regularly scheduled over a period of months. On this basis *"premium sports"* are clearly available on free to air TV and there are no exclusive characteristics of the pay TV content provision that serve to make it a separate market.

7.36 The commercial valuations attributed to PL matches by wholesale channel providers are also irrelevant to Ofcom's assessment of whether the PL rights form the basis of a narrow retail market for premium sports channels.

7.37 The PL disputes Ofcom's conclusion that the valuations for PL matches, relative to the valuations of other sports rights, suggest that wholesale channel providers such as Sky and Setanta do not regard any other sports rights packages as being a close substitute for PL matches. Indeed, it is unclear how that is relevant to defining relevant markets even if it were true. As noted above, the relevant question is how consumers would respond to a relative increase in the price of premium channels. As noted above, consumers would likely substitute away from premium sports in the event of a price increase.

7.38 As shown in paragraph 3.35 above, Ofcom is incorrect in its assertion that an increase in the value of PL rights affects the pricing of premium pay TV sports channels by broadcasters.

7.39 The quantity of programming available is also irrelevant to the assessment of the appropriate relevant product market.

Ofcom preliminary conclusions on content channel market

7.40 PL has considered Ofcom's preliminary conclusions and its underlying analysis at Annex 13 of the Consultation .

7.41 PL disagrees with Ofcom's conclusion that there is a narrow economic market (at both the wholesale and retail level) for premium sports channels. Therefore, Sky's revenue market shares in a "premium sports retail market" are irrelevant; any conclusion of market power by Sky should be against the market definition of an all TV market.

7.42 Furthermore, at the wholesale level the PL does not agree that there is a premium sports content market and nor does it agree that access to PL content is difficult and capable of being a significant barrier to entry. Sports content covers a wide range of sporting events and is not just limited to PL matches. Therefore, pay-TV operators are not dependent on Sky for content as there is sufficient high quality sports content on free to air channels and on other pay TV channels (most notably, but not only, on Setanta's channels). This poses a direct constraint on Sky's retail pricing and means that PL content does not give rise to substantial market power to Sky in the relevant market (i.e. the all TV market).

Consultation question 15 - "Have we identified the correct set of intrinsic market characteristics?"

7.43 As set out above Ofcom should not be using its Consultation to review issues such as content aggregation or collective selling. If there are competition concerns in the UK television market, then these are not attributable to the way in which the PL sells its rights.

7.44 As Ofcom recognises, content aggregation and collective selling of PL rights has been considered by the Commission and accepted. Therefore, Ofcom's comment in paragraph 5.66 that collective selling "*has the potential to raise competition concerns based in relation to the way in which these are sold … and the potential creation of downstream market power*" cannot be correct.

7.45 As the Commission noted in the Commitment's decision its objective was to "*ensure that the arrangements do not restrict output or result in competitors being foreclosed from the relevant market, to the detriment of consumers*".

7.46 Therefore, the PL's sale of its rights in compliance with the Commitments will not foreclose any broadcast markets and, therefore, cannot create a barrier to entry for a wholesale channel provider.

7.47 The PL repeats the example of Setanta's entry into the market which illustrates this point perfectly.

7.48 The Consultation appears to suggest that the source of competition concerns it claims to have identified in the UK television market stems from content aggregation at the upstream (rights owner) level and that the PL earns monopoly rents.

7.49 However, these arguments are not properly articulated in the Consultation, and Ofcom fails to recognise that collective selling of TV rights to football competitions gives rise to inherent efficiencies that benefit broadcasters, consumers (including football fans who actually attend matches) and football.

7.50 As set out above, these inherent efficiencies have been acknowledged by the Commission in various decisions regarding the collective selling of live TV rights to various football competitions (including in the UEFA Champions League and Bundesliga cases).

7.51 Collective selling delivers two types of inherent efficiencies to broadcasters. These are:

7.51.1 Scheduling efficiency - i.e. a broadcaster can plan its programming schedule so as to provide access to live games throughout the season which showcase the PL competition as a whole and tell the story of the season.

7.51.2 Quality efficiency - i.e. it is easier for a broadcaster to choose an attractive game in any given week, enhancing the attractiveness of their programming schedules.

7.52 Collective selling also delivers benefits to the PL, football as a whole and end consumers. These are:

7.52.1 the revenue allows clubs to invest in talent;

7.52.2 the revenue is redistributed between stronger and weaker clubs in the PL competition;

7.52.3 the revenue allows the promotion of the PL and English football generally;

7.52.4 the revenue received by clubs allow the investment in safe stadia and high quality facilities; and

7.52.5 part of the revenue is invested by the PL in good causes at home and abroad, such as grass roots football, club youth development systems, club community investment, the Football Foundation, and through PL clubs own investment in training academies (refer paragraphs 7.67-7.71 below).

Scheduling efficiencies

7.53 Collective selling delivers efficiency benefits to broadcasters since it provides them with access to a ready stream of attractive matches to broadcast. Broadcasters who buy rights to matches played as part of a league competition are interested in providing regularly scheduled attractive matches to their viewers which showcase the competition rather than live broadcasts of the matches of an individual club. In order to offer a programming schedule that tells the story of the season and showcases the competition, broadcasters would need to have access to rights to show matches in the majority of the 38 fixture rounds, and to choose from matches featuring all or a significant number of clubs. If we assume under individual selling that each club holds the rights to individual home matches, and the away team is also willing to allow a sale by the home team, then broadcasters would need to purchase the rights of several clubs if they were to be in a position to tell the story of the season. It is therefore clear that it would be insufficient for a broadcaster to secure the rights of only one club; this would only provide the broadcasters with rights to the available home matches of a single club.

7.54 Collective selling removes this scheduling inefficiency by effectively giving broadcasters the right to select a given number of matches which are played on certain days (i.e. the number of live games contained in the package acquired). For example, if a broadcaster obtains a package of television rights under collective selling that allows it to show 20 games, then the broadcaster can select the matches in advance in such a way as to showcase the competition as a whole and can plan in advance the scheduling of those 20 games in its programming schedule. Moreover, it knows that if it obtains another package of 20 games, then it has the right to select an additional 20 games around which it can plan its programming schedule and which it can use to tell the story of the season.

7.55 This efficiency benefit is explicitly acknowledged by the Commission in its decisions on the collective selling of football television rights. For example, in *UEFA Champions League*, the Commission states: [24]

"It is conceivable that media operators could put such a package [of rights] together even without joint selling. However, this would require the acquisition of significantly more rights than is currently the case. For a media operator to create the same end product in the context of individual sale of all media rights would risk being significantly less efficient, involving more acquisition and transaction costs. ***The only guarantee of an equally interesting selection of matches would be if one media operator were to buy all of the rights available individually either before the start of the football season or consecutively as the football season develops depending on the performance of the football clubs."*** (emphasis added)

"[J]oint selling therefore reduces the transaction complexity and costs for broadcasters. Broadcasters can establish predictable commercial, technical and programming plans for a whole football season, which enhances the selling of advertising slots and subscriptions."

7.56 The EC Commission notes further that: [25]

"[A] individual club could not enter into a commercial agreement, which would give a broadcaster any guarantee of being able to plan its programme schedule for the whole [duration of the competition]. The joint selling of the TV rights solves this problem, as the broadcaster does not buy the rights of particular football clubs, but the right to broadcast the matches which are played on certain days".

7.57 It should be noted that the transaction cost efficiencies, which the Commission correctly acknowledges, go beyond the savings arising from a reduction in the number of negotiations necessary to secure the required rights (i.e. the efficiency benefits go beyond a mere reduction in the time and money spent in securing rights). Rather, the efficiency benefits arise directly from the fact that broadcasters are better able to secure sufficient television rights for their programming requirements; they

[24] Case COMP/37.576 *UEFA Broadcasting Rules* (19 April 2001).
[25] Case COMP/37.576 *UEFA Broadcasting Rules* (19 April 2001) paragraph 145.

can do so with more certainty and, more importantly, most likely at a lower aggregate cost.

7.58 In short, collective selling solves scheduling inefficiencies that are associated with individual selling.[26] Such efficiency benefits of collective selling are inherent; they are necessarily passed onto broadcasters and ultimately benefit not only the broadcasters but their respective viewers and advertising customers.

Quality efficiencies

7.59 In addition to the above scheduling efficiency, collective selling provides broadcasters access to the most attractive games at any given time (subject to any restrictions on the number of times a given club should be broadcast live and to the packages acquired by other broadcasters); i.e. collective selling also gives rise to a *quality efficiency*. Under individual selling, broadcasters would only be able to choose from among the games of those clubs for which they have acquired the live rights.

7.60 While some clubs will always be attractive to viewers and hence broadcasters and their advertisers from season to season, the attractiveness of other clubs will vary from season to season depending on their performance. For example, certain clubs may perform better than expected and therefore fixtures involving this club (both home and away) will assume greater importance than they might have done otherwise. Similarly, certain matches can be critical in determining the outcome of the league championship, which teams qualify for Europe, and which teams are relegated or promoted. It is therefore difficult to forecast in advance which matches will be most attractive to viewers. Under individual selling, broadcasters are constrained to show, on average, less attractive matches than under collective selling where broadcasters have a choice across all available matches (subject to any broadcasting restrictions and to the rights acquired by other broadcasters).

7.61 Collective selling better enables broadcasters to offer attractive programming since broadcasters are interested in reaching a wide audience (i.e. football fans interested in the PL as a whole) and not just those viewers interested in one or two particular clubs.

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26 It is possible that the scheduling inefficiency under individual selling could be "solved" by a wholesaler of rights purchasing the rights of all the individual clubs and then on-selling those rights in a "collective" package. However, this would simply result in collective selling at another level of the market. See Section 3.4.

Again this inherent efficiency benefit of collective selling is acknowledged by the Commission:[27]

"[Collective selling] provides media operators and consumers with an overview of the whole [football competition], benefiting, for example, those viewers who have a general interest."

7.62 In short, collective selling results in a more attractive outcome for both broadcasters and viewers.

Investment in talent and promoting the quality of the PL

7.63 The revenue received by clubs from the sale of TV rights is one of the two main sources of revenue. The other being the club's fan base, and the sales of tickets and merchandise etc.

7.64 Collective selling of PL TV rights is one of the principal drivers behind the investment in talent in the PL and the consequent promotion of quality, as the majority of a club's revenue is spent buying and developing talent.

7.65 Talent is expensive and maximising the quality of talent is dependent on the ability of clubs to maximise the revenues available from the sale of TV rights. The revenue obtained from gate receipts, merchandising, etc is not sufficient in itself to maintain the level of investment in player talent.

Investment in English football and facilities

7.66 Deloittes forecasts that in the season 2007/8 the value of the goods and services contributed in support of community activities undertaken by the PL and its 20 member clubs will equate to an estimated value of £122million; more than any other sporting organisation in the world.

7.67 During 2007/8, the PL will reinvest £62m into the grassroots of the game and direct solidarity payments (in support of the Commission's objective in its White Paper on Sport) to other football leagues. Of this figure, £30m will be ring fenced for use specifically in clubs' youth development systems and £4.2m for club community

[27] Case COMP/37.576 *UEFA Broadcasting Rules* (19 April 2001).

investment. Furthermore, £34m will be channelled into good causes work at home and abroad, which includes £15m worth of core funding for the Football Foundation, the UK's largest sports charity.

7.68 The PL pays these sums out before the revenues are distributed between the clubs.

7.69 Furthermore, the PL estimates that the PL clubs use funds of approximately £48m per annum to invest in their own training academies to assist in the search for and development of local talent.

7.70 The PL clubs also use broadcasting revenue to invest in facilities and stadia for fans in order to ensure that they are providing the safest and most up-to-date facilities.

Collective selling is inevitable

7.71 As the EC Commission noted in its *UEFA Champions League* decision, the inherent efficiencies associated with the collective selling of television rights to football competitions implies that collective selling will take place at some level:[28]

> *"Even in respect of competitions where the media rights are sold by individual clubs, the rights are generally aggregated and packaged in later levels of the transaction chain by intermediaries such as sports agents or by the broadcasters creating clearing houses or joint exploitation bodies.* ***A certain level of packaging or aggregation of the individual rights therefore seems optimal or even necessary for an efficient exploitation of the media rights of a football tournament"*** (emphasis added).

7.72 In other words, the question is not whether the aggregation of television rights will arise but who would undertake the required degree of such aggregation? Will it take place at the level of the league or further down the supply chain? In its assessment in determining that collective selling represents an indispensable restriction, the Commission notes the following:[29]

[28] Case COMP/37.576 *UEFA Broadcasting Rules* (19 April 2001) paragraph 151.

[29] Case COMP/37.576 *UEFA Broadcasting Rules* (19 April 2001) paragraph 174.

"The Commission notes that media rights of sports competitions most often are aggregated in some form at some level of the exploitation chain before they are offered to the viewer. The Commission is neutral as to who undertakes this task".

7.73 In view of the inherent efficiencies associated with the collective selling of football television rights, the Commission acknowledges that collective selling is indispensable to provide the efficiencies and improvements leading to consumer benefits. Given the inherent demand of broadcasters for collective rights, collective selling enhances, rather than restricts, competition, delivers considerable efficiency benefits, improves the competitive balance of sports leagues and contributes to wider social policy objectives arising from the redistribution of revenues to clubs and organisations outside the PL.

Certain key rights are frequently sold for a fixed fee, on an exclusive, and often cross technology, basis

7.74 Ofcom notes that content providers typically sell their content for a fixed fee (i.e. a fee that is independent of the number of viewers) and on an exclusive basis covering multiple technologies. In the case of the Premier League, the PL sells its rights on a fixed fee and exclusive basis in order to optimise the benefits obtained from collective selling of its rights. These benefits have been recognised and accepted by the Commission in its Commitments decision.

7.75 Furthermore:

7.75.1 The reason why the PL (like many other content owners) sells its rights on a fixed fee basis is that the PL needs certainty as to the level of revenue which it will earn from the sale of its rights. Without that certainty, the benefits of the collective selling of the PL's rights would be undermined and undoubtedly lost.

7.75.2 Moreover, the sale of rights for a fee dependent upon a variable such as the number of the licensee's viewers would simply not be practicable. For example, clubs would not be able to negotiate deals with players' agents under which the player's salary varied according to the number of viewers of Setanta's live broadcasts, or with construction companies for the carrying out of improvements to stadia where the amount payable to the construction company varied according to the number of Sky's viewers. Similarly, a solidarity payment to the Football League which was dependent upon the number of Setanta's viewers would be of very limited use to the Football League.

7.75.3 We have already explained why content owners sell rights on an exclusive basis. The main reason is in order to meet the requirements of broadcasters who require exclusivity in order to differentiate their products and services from those of their competitors. Without that exclusivity, broadcasters will be reluctant to invest in the purchase of rights. It is however important to bear in mind that, in the case of the PL, the level of exclusivity granted to each licensee is heavily diluted by the centrally-sold rights packages awarded by the PL and also by the individual club rights granted by the PL to each individual club. For example, in the last auction round, the PL awarded a total of eleven centrally-sold packages to a total of five different licensees.

7.75.4 Ofcom also complains that rights become available on a staggered basis and that this creates barriers to entry. However, this theory runs counter to all of the available evidence. In particular, the launch by Setanta of a series of a new premium sports channels in recent years would appear to contradict Ofcom's theory. The acquisition by Setanta in the last two or three years of a whole series of key sports rights (see paragraphs 3.29-3.30 above) would, on the contrary, seem to support the view that it assists market entry for a wholesale channel provider to be able to assemble rights packages over a period of time so that all of that channel provider's investments in new rights acquisitions do not have to be made at or around the same time.

7.76 Therefore, these considerations are irrelevant to Ofcom's consultation.

8. OFCOM CONSULTATION SECTION SIX - OPERATION OF THE MARKET

Aggregating content increases its value

8.1 As set out above the PL reminds Ofcom that content aggregation (i.e. collective selling) by the PL has been approved by the Commission in its Commitments decision.

8.2 Ofcom's initial conclusion that aggregating content means that a channel provider that already has the rights to a significant range of content can extract more value from the next set of rights to become available does not reflect the actual bidding history in the most recent auction of PL rights in 2006.

8.3 As Ofcom is aware, in that auction a new entrant, Setanta, placed the highest bid for, and won, two of the six available live packages by outbidding Sky.

8.4 Whilst the value of the PL rights has increased over time this is only a reflection of the increase in competition amongst downstream broadcasters (both pay and free to air).

8.5 The PL notes and rejects Ofcom's initial conclusions regarding the aggregation of content and its suggestion that high wholesale prices for premium sports and consequently high retail prices result from alleged monopoly rents earned by the PL.

8.6 As set out above the PL does not achieve monopoly rents and does not enjoy a monopoly position in the supply of attractive content to pay and free to air broadcasters. Nor is there any detrimental effect as a result of its collective selling. Ofcom's suggestion that the PL does achieve monopoly rents is unsupported by any evidence or any identification of the level of rents the PL should earn under competitive conditions.

Long run operation of the market - access to premium content

8.7 The PL notes Ofcom's summary of the parties' submissions in paragraph 6.58 and, in particular, the submission that Sky has a "firm grasp of attractive content that it purchases on an exclusive basis".

8.8 As set out above, the PL rights are attractive but by no means unique content.

8.9 Furthermore, Sky currently has only four of the six available PL live rights packages, and is significantly constrained by Setanta and the sports content available on free to air TV and on other pay TV channels.

8.10 It is not correct that Sky is always in a position to pay more for attractive content and this is clearly demonstrated by the bidding data for the last auction round of PL rights.

8.11 Ofcom notes in paragraph 6.66 that it might be possible to implement barriers to entry through regulatory intervention. The PL has addressed Ofcom's initial conclusions on the existence of barriers to entry on the wholesale channel provision arising out of the sale of its rights and does not agree that there is any necessity for any further regulatory intervention. As acknowledged by Ofcom, the Commitments facilitated Setanta's acquisition of content rights that were previously owned by Sky. Therefore, competition is clearly operating in the downstream broadcast markets. However, Ofcom fails to recognise or analyse how the introduction of Setanta has affected both wholesale and retail pricing. This would provide a natural experiment with which to test Ofcom's assertion that fragmentation of the PL's rights will necessarily result in benefits to consumers.

ANNEX ONE

SUMMARY OF THE COMMITMENTS DECISION

1. As Ofcom is aware the Commission undertook an investigation into the joint selling arrangements by the football clubs in the PL for the sale of the media rights[30] for all PL members.[31]

2. The PL sells the rights on behalf of its member clubs. The rights are sold by way of auction. It has typically always sold packages of rights every three years.

3. In the Commitments Decision the Commission's preliminary assessment of the relevant markets and the competition concerns were as follows:

Relevant Markets[32]

- The joint selling arrangements affected various markets for the acquisition of media rights of premium football matches. Premium football denotes …. matches involving clubs that play in the PL;

- There are several markets for the acquisition of media rights, of which the most commercially significant is the market for the acquisition of live TV rights. Broadcasters acquire rights on this upstream market and use these rights to create football programming which they include in channels made available to consumers (on a <u>free to air</u>, <u>pay</u> or <u>pay per view</u> basis);

- The markets for the acquisition of media rights are closely linked to the downstream markets in which these rights are used, alone or in conjunction with other rights, to provide media services to consumers, and that the restriction in the upstream market is likely to affect downstream markets as well.

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[30] For the purposes of this response reference to PL rights includes all audio-visual media rights exploited by the PL clubs in making content of PL matches available. This includes live rights and near live rights (e.g. delayed transmission and highlights packages).
[31] 20 clubs play 38 matches in 10 rounds during the season. A total of 138 matches are played during one season.
[32] See paragraphs 20-23 of the Commitments Decision.

***Competition Concerns*[33]**

The Commission expressed the following concerns which were addressed by the Commitments:

- The joint sales organisation can, depending on how and to whom the rights are sold, restrict output and create foreclosure problems on downstream markets.

- One example of such a foreclosure problem is in the exclusive sale of large packages … this is likely to create barriers to entry or downstream television markets in the UK leading to foreclosure in these markets.

- Other concerns could arise through the sale of all of the PL live TV rights to a single buyer, given the likelihood that this would lead to foreclosure on the downstream television markets.

- Without the arrangements the rights would have been sold by individual clubs, creating greater scope for ex ante competition on the upstream market for the acquisition of media rights and consequently for competition in the downstream markets.

[33] See paragraphs 24-30 of the Commitments Decision.

ANNEX TWO

FREE TO AIR HOLDERS OF SPORTS RIGHTS

BBC

Football	FA Cup (until August 2008); PL highlights; England football home games (until August 2008); FIFA World Cup; European Championship
Rugby Union	Six Nations rugby
Rugby League	Challenge Cup
Horse racing	Grand National; Epsom Derby; Royal Ascot meetings
Tennis	Wimbledon; Australian Open; French Open; Davis Cup; Queen's Club championship; Eastbourne
Golf	Open; US Masters; MW PGA Championship; HSBC World Match play championship; Scottish Open; Women's British Open; Ryder Cup highlights
Athletics	World championship; European championship; London Marathon and Great North run
Snooker	World championships; British Open; Masters; Grand prix
Skiing	Ski Sunday
Olympics	
Commonwealth Games	

ITV

Football	FA Cup (shared with Setanta from August 2008); England home internationals (shared with Setanta from August 2008); UEFA Champions League; FIFA World Cup; European Championship
Motor sport	Formula 1, World Rally championship, British superbike championship
Rowing	University Boat Race
Rugby Union	World Cup
Cycling	Tour de France

CHANNEL 4

Football	Italian league
Horse racing	All major race meetings, including events at Cheltenham, Newmarket, Newbury, York, Chester and Doncaster, except for those broadcast by BBC (refer above)

Skiing	World cup

CHANNEL 5

Football	UEFA Cup games
Baseball	Major League Baseball
Basketball	National Basketball Association
Hockey	National Hockey League
Cricket	Test and one day match highlights