

Proposed BSkyB digital terrestrial television services

Response to OFCOM consultation document

1. To what extent do you consider that DTT, DSat, cable and IPTV are in competition with one another for subscribers of pay TV services – either at present or in the future?

DSat and cable are clearly in direct competition with one another for subscribers of pay TV services, on the grounds that they are able to supply a significant number (120+) of subscription TV channels, on-demand and pay-per-view (PPV) content directly to the consumer. IPTV has theoretically unlimited “bandwidth”, if one thinks in terms of traditional broadcast systems: as long as the bandwidth available to the consumer is sufficient to receive IPTV at all, the content available to the consumer is limited only by the ability of the IPTV service provider to acquire the broadcast rights to it. While availability of IPTV services is limited at present, future infrastructure upgrades are expected to improve this situation. It is quite possible, therefore, that in the future IPTV services will provide a significant degree of competition.

DTT does not have this luxury, because the bandwidth is simply not available: under the current DVB-T standards in operation in the UK, the three commercial DTT multiplexes *in total* can only provide, at a reasonable rate of compression, eighteen video streams. This could increase to twenty-four if the two commercial multiplexes operated by NGW switch to 64QAM. Also, capacity may be further increased if existing broadcast spectrum, due to be released post-switchover, were allocated for commercial or pay TV content on DTT. However, even then it is hard to see how sufficient bandwidth could be made available for a pay TV service on DTT to come even close to the content available on the other platforms.

In conclusion, at present pay TV on DTT is at best destined to be the “poor cousin” of such services available on DSat, cable and IPTV, likely to appeal to a relatively narrow group of consumers who wish to receive pay TV services but are unable to subscribe to one of the alternative platforms.

2. To what extent do you consider the Proposal is likely to deliver benefits to the consumer?

It has not been established that there is an appetite for pay TV among those viewers who have not already subscribed to existing pay TV services. It is one thing to look at the BARB figures and conclude that people would prefer to watch, say, Sky One than Sky Three. It is quite another to conclude that people would actually be willing to pay for it, if they have not opted to do so already.

Existing pay TV services on DSat, cable and IPTV are available to the overwhelming majority of the population, so there is no new content on offer that is not already available to the vast majority of consumers by one means or another; and even this small subset of potential pay TV subscribers will become smaller as alternative services such as IPTV become more widely available.

For the majority of people who receive television broadcasts via DTT, therefore, this Proposal will result in an overall *reduction* of service. In particular, free-to-air consumers would lose the only non-BBC rolling news service currently available on DTT.

As such, I consider that the Proposal does not deliver any significant new benefits to the consumer, and that these are outweighed by the costs.

3. To what extent do you consider that there is scope for sustainable competition in pay TV on the DTT platform and, more broadly, across all TV platforms.

The UK is in a privileged position when it comes to the accessibility of pay TV. We have fully-featured pay TV services on no fewer than three platforms – DSat, cable and IPTV – and a more limited pay TV offering available on DTT.

As far as sustainable competition is concerned, the evidence of the history of pay TV services suggests that there is little scope for competition on the same platform; since the merger of British Satellite Broadcasting (BSB) with Sky in 1990, no competitor has emerged to challenge BSkyB's dominance of pay TV services delivered via satellite.

The situation is not too dissimilar in the cable industry: where before we had a host of cable TV providers in the 1980s, though they were not in direct competition with one another (being limited by the geographical constraints of their licences), the provision of cable TV services has been delivered by an ever-decreasing number of providers, and today it is overwhelmingly dominated by Virgin Media.

As such, the historical evidence suggests that the intra-platform competition for pay TV services is confusing for the customer, risks leaving consumers with obsolete equipment, and is inherently unstable. Competition *between* platforms, however, appears to be relatively healthy.

Regarding pay TV on DTT, we already have one pay TV provider – Top Up TV – and as stated, the capacity available to it on DTT is such that its offering is relatively limited, in comparison to other platforms. This was true even of ITV Digital, which was able to broadcast pay TV at 64QAM on three multiplexes: while the service was convenient for those who could receive a good quality signal and could not receive digital cable or satellite services, in general, those who were interested in pay TV and could receive such services on cable or satellite opted to do so.

For this reason, among others (which I shall raise in my answers to later questions), I do not consider the introduction of a second pay TV service on DTT would result in sustainable competition for pay TV services on DTT. It appears more likely, based on past events, that in the longer term Top Up TV and Picnic would merge, most likely with BSkyB retaining a strong interest in the merged company.

4. What are likely to be the key aspects of competition between providers of retail pay TV services on the DTT platform? E.g. what is the role of premium sports and movies content?

Premium content providers can have a significant impact on competition between pay TV providers; for instance, if a premium service were broadcast using a compression or encryption method that made it incompatible with receivers owned by Top Up TV subscribers, but compatible with receivers owned by Picnic subscribers, this may oblige some consumers to purchase new equipment and subscribe to Picnic, even if their subscription service of preference is Top Up TV.

5. Do you consider that if Sky were to become the only provider of pay TV on the DTT platform it would be likely to have a significant detrimental effect on competition on the long term? How might this affect the development of other platforms for the delivery of pay TV services?

If Sky were to become the only provider of pay TV on DTT, there would clearly be less competition for pay TV services than there is currently – even if the level of competition offered by pay TV services on DTT at present is fairly minimal. It would remove one player (Top Up TV) from the field of competition altogether, and give one player (Sky) control over pay TV services on two platforms with an overwhelming combined reach – far higher than that available to IPTV or cable providers. It is not clear how this would significantly affect the delivery of pay TV services

on IPTV or cable, though there are some scenarios under which this could occur: for instance, if BSkyB were to offer its channels and packages at preferential rates to Sky Digital and Picnic subscribers while charging higher rates to cable and IPTV providers, or to offer some content exclusively to Sky Digital and Picnic subscribers, this would distort competition in the market still further in favour of pay TV services on DTT and DSat. Indeed, there are already some indications that this is already a potential problem in light of the difficulties between BSkyB and Virgin Media. As such, I do not consider it to be in the interests of the public for any pay TV provider to attain such a dominant position in respect of the provision of pay TV services.

6. To what extent, if at all, do you consider that the Proposal would be likely to lead to any of the public policy concerns outlined at Section 4?

As things currently stand, take-up of DTT in the UK is encouraging. However, this trend could easily be harmed if free-to-air channels were removed from DTT, to be replaced by pay TV content: not so much because of the appeal of the channels that currently exist, but because it is likely to be seen as part of an overall trend towards replacing free-to-air TV with pay TV on DTT. For a long time there was a strong association of “digital TV” with “pay TV” amongst consumers, and to an extent there still is; though the launch of the Freeview brand has done a great deal to address this perception, the reduction of the variety of free-to-air channels on DTT may fuel the perception that the ultimate purpose of digital switchover is to oblige consumers to subscribe to a pay TV service.

As such, I consider it to be a significant cause for concern that DTT viewers, many of whom have no interest in subscribing to a pay TV service, will suffer a reduction in the choice and variety of services in the years approaching digital switchover. The removal of Sky News, in particular, would leave free-to-air consumers with BBC News 24 as their sole choice of rolling news service on DTT unless it were replaced with another free-to-air rolling news service. As such, this too does not serve the interests of the public.

While I appreciate Sky's concerns about content security, the preference for NDS CA technology is another cause for concern. To date, NDS has not released a CA module that could be used in third-party DSat receivers or integrated digital satellite televisions (IDSTVs), and it does not look like it has any plans to introduce one in the future. The result is that, in order to subscribe to Sky Digital's pay TV services on DSat, one is obliged to purchase a Sky Digital STB. (IDSTVs are almost nonexistent in the UK, as they are incompatible with Sky Digital's proprietary encryption system and EPG.) This means that the consumer, manufacturer and broadcaster alike are tied to Sky's EPG, Sky's compression system, Sky's proprietary encryption system and Sky's subscription service. While it is to be accepted that this has some benefits in terms of a uniformity of user experience, it does so at a considerable cost to consumer choice.

If this proposal were to go ahead, this could allow Sky to dictate to STB manufacturers what features are permitted in order for their STBs to be approved by Sky. This could potentially result in the same scenario being repeated on DTT.

This scenario may also encourage some manufacturers and retailers, for the sake of simplicity and streamlining production, to discontinue the production and distribution of free-to-air or Top Up TV models – particularly if there were incentives offered by Sky to manufacturers or retailers that made it beneficial for them to do so. This would give Sky an undue influence not only over the development of other pay TV services on DTT, but also potentially over the development of DTT as a whole – for instance, by attempting to pre-empt standards agreed between OFCOM and stakeholders for the transmission of standard- and high-definition services post-switchover by imposing “standards” of its own that were subsequently built into any new DTT receiving hardware without such agreement. Though the Proposal as outlined does not include the use of MPEG-4, the

suggestion is that manufacturers producing STBs for Sky's pay TV services would be asked if not required to implement it, and this would increase the pressure on OFCOM to permit its use, and on other stakeholders to make use of it.

In short, a scenario whereby a content provider is in a position to determine the specification of receivers, even if it does not produce them itself, represents a slippery slope towards vertical integration in all but name.

As such, to allow Sky to mandate its own set of specifications for receivers of its pay TV services that are not in line with existing DVB-T standards would not be in the interests of the public.

Furthermore, the implementation of such an encryption method *without* supplying a means for integrated digital TV users to receive encrypted broadcasts would appear to be in contention with §11.(6) of Part Two of the Multiplex C licence (attachment to variation 5, dated 19 February 2007), which requires National Grid Wireless to

“give all reasonable technical support for the purpose of the development and/or production of an implementation of the conditional access system used by the Licensee in a form appropriate for connection to an open-standard digital television set”

It is clearly not possible for National Grid Wireless to meet this obligation under the terms of the Proposal as outlined, unless the means of producing such a conditional access system were to be made available by NDS.

7. Specifically, to what extent do you consider that the Proposal would be likely to lead to consumer confusion?

I consider that there is a great deal of potential for consumer confusion. Having two mutually incompatible pay TV services on DTT would most likely result in additional expense to the consumer, who may need to purchase two separate STBs in order to receive all pay TV services, and confusion about which services were available on which platform. In particular, if either Sky's or Top Up TV's pay TV service on DTT were to fail, or if one service were to be taken over by the other, consumers would be left with STBs that would no longer be fit for the purpose for which they were purchased.

8. To what extent do you consider that it is beneficial for consumers to be able to obtain Sky and existing DTT pay TV content without having to purchase separate STBs?

This option is clearly beneficial to the consumer, as it would not require the consumer to purchase additional hardware in order to receive additional pay TV content. It would be even more beneficial if Sky were to offer its content to Top Up TV, for the latter to offer to its customers through its own subscription service, as this could allow consumers to receive the additional content without requiring the use of two viewing cards.

9. Do you consider that the Proposal might lead to any additional public policy concerns?

I consider that any TV provider, whether free-to-air or pay, on DTT must adhere to the existing broadcasting standards as agreed between OFCOM and stakeholders, and may only adopt new standards as and when approved by a similar consultation process. Introducing proprietary encryption algorithms and compression methods without general consent is to be avoided at all costs. DTT is a public resource, and as such, it is not the place of any commercial organization to attempt to impose its own *de facto* standard on the public, on OFCOM, or on any other stakeholder.

As such, I consider that Sky should be obliged to use the existing DVB-T and MPEG-2 standards required of every other content provider, and *if* it is allowed to broadcast encrypted content, it should use the same Mediaguard encryption as is currently used by Top Up TV, unless Sky can provide sound reasons why this would be detrimental to their interests. Ideally, it should make use of Top Up TV's own subscription service, as this would allow existing Top Up TV customers to benefit from the proposed new content without the need to purchase additional hardware or additional viewing cards.

This is particularly crucial, in my view, in the years running up to digital switchover: if the platform were perceived as complicated, confusing or unstable, this would undermine public confidence in DTT as a whole.

I think that, in the longer term, it may well be beneficial for the development of DTT as a whole that the platform moves towards the use of MPEG-4, DVB-T2, MHP or whatever other new standards may be considered. However, any new standards for DTT ought to be discussed, planned and implemented in a considered fashion, with appropriate consultation between all parties, with a respect for the timescales required to transition to any new standard, including the time required for manufacturers to provide new hardware and for old hardware to cycle out of use; they should *not* be pre-empted or presented as a kind of *fait accompli* by any particular provider.

10. If Sky becoming the only provider of pay TV services on the DTT platform were likely to have a significant detrimental effect on competition, do you consider that it is possible to address this through a set of additional conditions and/or directions? If so, what form should those conditions/directions take?

I consider that allowing Sky to run a separate subscription service on DTT would have a marked negative impact on competition for pay TV services as a whole in the long term, and therefore I consider it not to be in the interests of the public to allow Sky to offer its channels directly to the public on DTT. Rather, it would be preferable for Sky to offer its channels to the public through the existing pay TV provider, Top Up TV.

While I can understand Sky's concerns about content security, I do not consider it desirable for Sky to introduce a proprietary encryption system, or non-standard compression system, in advance of an agreement between OFCOM and stakeholders to adopt wholesale a new set of standards for DTT, and these to be introduced in a measured and controlled manner, with full consideration of the impact on owners of current receiving equipment, even if such standards as proposed by Sky may be beneficial in the long term. As such, I consider that Sky should be required to adhere to the existing DTT standards (DVB-T, MPEG-2, MHEG-5) until such time as new standards (such as DVB-T2, MPEG-4, or MHP) are agreed upon for the DTT platform as a whole, and that it should not be permitted to mandate specifications to manufacturers are incompatible with existing standards or have a high risk of incompatibility with future standards.

I recognise that OFCOM has concerns about effectively mandating an encryption standard, and wishes to remain "technology neutral"; however I am also sure that OFCOM recognises that allowing a pay TV provider to implement an encryption standard that is incompatible with any existing hardware is clearly not in the interests of the consumer. In the longer term, I consider that it may be appropriate and beneficial for OFCOM to mandate an encryption standard for DTT to ensure compatibility between pay TV services on the platform. This would need to be done with a regard for all parties concerned about the security of their content, but also with regard for compatibility with existing receivers. The Videoguard encryption system offered by NDS meets the first, but – significantly – fails the second criterion.

Requiring NDS to supply a compatible conditional access module for use in existing STBs and IDTVs as a condition of acceptance of this Proposal may address this issue to some extent, but there are other concerns that may have a direct impact on competition for pay TV services on DTT. News Corporation is a major shareholder in NDS and holds a significant minority stake in BSkyB. Any proposal that risks placing an obligation on pay TV providers to adopt Videoguard clearly places News Corporation in an enviable position when it comes to licensing the use of its encryption service, risks favouring Sky over other content providers, and it may be that further measures are required to ensure that licences are awarded on a fair and equitable basis.

I also consider that in order for there to be fair and effective competition in the pay TV market as a whole, other pay TV service providers, not only on DTT but on other platforms, are able to obtain Sky's content on a fair and equitable basis. As such, it may well be desirable to require Sky to provide some or all of its content on a wholesale basis, subject to regulations in terms of pricing. In light of the recent difficulties with Virgin Media, this option has the potential to improve competition for pay TV services not only on DTT, but also on IPTV and cable.

However, I do not think this will help competition for pay TV services on DTT if Sky is permitted to retail its content directly to the customer. Even if Sky were obliged to offer Sky One or Sky Sports to Top Up TV, the bandwidth is not available to Top Up TV to carry it, unless Sky were prepared to simulcrypt its content – which would not address Sky's concerns about content security, as simulcrypt is only as secure as its weakest encryption method.

In conclusion, I recognize that this combination of conditions and/or directions would represent a complex burden of regulation, and is unlikely to be acceptable to Sky. As a result I favour Option 3 as the option that would be most beneficial for the DTT consumer and competition between pay TV services as a whole in the run-up to digital switchover.