

BSkyB DTT Proposal

Tiscali UK response to Ofcom consultation

Sky proposes to remove the three free-to-air (FTA) channels it currently provides on DTT and replace them with five pay TV channels. These would include premium sports and movies content. Sky proposes to use technical standards that will require new set-top boxes that may not be compatible with other services on DTT.

The key points that Tiscali would like to make in relation to this consultation are set out below. Brief responses to the questions posed within the document follow at the end of this submission.

- Pay TV already exists on DTT. The Sky proposal would provide more premium content and hence more choice to consumers.
- Customers wishing to take these pay services from Sky would need to purchase the appropriate equipment. In the case of those with existing DTT services, this would require replacement equipment and the existing equipment would become redundant.
- Technical standards for set-top boxes are already changing (to enable HD broadcast, for example), so any proposal to improve them would be consistent with this reality.
- Consumers would not be compelled to change set-top boxes, other than to be able to take the Sky service, and may have to change to receive HD services in future anyway.
- Sky would be able to leverage power and control over premium content and its pricing into pay DTT (as is done in other parts of the pay TV market), while the situation for sport would be lessened only slightly due to the existence of Setanta Sports' pay service on DTT.
- Sky is able to maintain dominance in the control of premium content (sports and movie rights) and its pricing because of its power in the retail market (satellite pay TV) in a form of 'virtuous circle' but only sells (under regulatory obligation) on a wholesale basis to Virgin Media. Sales of premium sports and movies to other providers such as Tiscali are on a retail basis only.
- Any remedies to address such dominance should be in place regardless of plans now or in the future for pay TV over DTT by Sky or others.
- **An extended remedy of obliging Sky to sell premium content on a wholesale basis to all market players (satellite, DTT, IPTV and cable) is a potential outcome of the ongoing pay TV market investigation and, if applicable, should therefore apply in the conclusion of this consultation.**
- **Cross-industry cooperation on the development of technical standards for set-top boxes should be instigated, to ensure that a consistent approach is taken as services change and consumer harm and confusion does not result where it can be avoided.**
- Dominance in the control of rights over and the consumer pricing of premium content is bought rather than owned and initial control always lies with the content owners; it is appropriate for regulators to review existing remedies and perhaps investigate ways to attach wholesaling obligations to content deals to address dominance issues affecting the industry at their root.

Answers to questions posed by Ofcom in the consultation document are given below.

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?

The platforms are in competition for pay TV subscribers and that competition will grow, but the market is dominated by satellite and cable and will remain so for some time to come. Sky is the most powerful competitor in the market, benefiting from effective technology, complete geographical coverage and control of significant content rights. Virgin Media is competitive in the 50% of the UK it can reach on the cable network. DTT is a very effective platform in the c.70% of the UK it reaches, but the competitiveness of pay TV over DTT depends on content availability and the propensity of consumers to pay for content at all on a platform they regard as 'free'. Pay TV services provided over IPTV (BT Vision and Tiscali TV, for example) are in competition with the other platforms but likely to be hindered by lack of access to content at competitive rates (premium sports and movies etc) and lack of ability to reach the whole of the UK (Tiscali in particular cannot reach half the UK because supply over BT Wholesale products is unviable). Competition between the platforms in pay TV should increase in the near term, but only if regulatory issues currently facing Ofcom are effectively dealt with. It is also worth noting that IPTV providers offer DTT functionality in their set-top boxes (for reasons of bandwidth utilisation and linear channel availability) and any changes in the technological set up of DTT have a consequential effect on IPTV providers' equipment choices and development cycles.

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

Consumers could benefit from the provision of pay content on DTT that includes some premium viewing as it could provide more choice of viewing. However, one has to consider that the availability of new channels may be at the expense of existing channels that some viewers regularly watch. In addition, viewers of current channels that do not wish to purchase those that replace them would feel disadvantaged, especially when they have bought into the concept (sold by the founders including the BBC) that the Freeview service that they purchased the equipment to receive (set top box and possibly an aerial upgrade) is free.

Freeview viewers would be able to access a type of content previously unavailable, as well as more of something already there (Premier League football). More competition on DTT should encourage technical development and competitive constraints on pricing, although the former may create some confusing proliferation of set-top boxes.

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 pay TV platforms?

Without action to address dominance issues in the control of pay TV content, mainly concerning Sky, it is likely that Sky will eventually dominate pay TV on DTT in the same way that it dominates pay TV in the UK market as a whole. Regulatory actions necessary should arise from this consultation and the ongoing pay TV market investigation and the wholesale remedies that may be required to address problems

identified. Dominance in pay TV is derived from content rights and retail market power that affects the ability of other players to compete. These different types of dominance enable and reinforce each other and a review of internal trading between divisions and transparency will be required to allow a judgement on whether some form of functional separation will be necessary to promote a competitive environment.

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?

Competition for pay TV services on DTT could be expected to focus on premium sports and movies content. An increase in pay content available on DTT reduces the difference between traditionally 'heavy' pay TV services (Sky and Virgin) and DTT, which was developed as a FTA proposition that enabled customers to access digital channels without having to pay for extra content and make decisions on combinations of channel deals. Consumer choice could be increased and one would expect pay TV on DTT to maintain a level of popularity, but most consumers will continue to regard DTT as something they don't have to pay for on a monthly basis. Those that do pay subscriptions are likely to do so to access premium content that they could otherwise obtain from Sky or Virgin, having made the decision to remain a DTT customer. IPTV services that make premium content available on a comparable basis will aim to take a share of this business, but will be disadvantaged by the lack of (regulated) wholesale premium content deals with Sky that Virgin Media enjoys.

Arrangements between content owners and the distributing operators will also be important to the future of pay TV on DTT. The current split in rights over Premier League football in the UK between Setanta and Sky will be effective in enabling some sort of competition for DTT pay services (but only if a choice is made between 'packages' of football matches). No comparable situation exists for key rights over movies content, however, and the dominant position in controlling premium content enjoyed by Sky would transfer to DTT.

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 in the long term? How might this affect the development of other platforms for the delivery of pay TV services?

It would be detrimental to competition in pay TV in general if Sky were to become the dominant or only provider of pay TV on DTT. The result would be a lessening of the potential for alternative pay TV providers, whether they deploy over DTT (Setanta and Top-Up TV today) or IPTV (Tiscali TV and BT Vision today), to gain traction in the pay TV market since Sky would have restricted target markets for such services: those potential Freeview upgraders who are price sensitive and are not willing to pay the relatively high subscription fees for Sky's service over satellite; those who would like to downgrade from high cost subscription services like Sky and cable to lower price alternatives but not Freeview; those new to digital TV that want a low cost pay TV option that gives them a channel choice and service functionality above that of Freeview.

Platforms such as IPTV would continue to experience difficulty in competing against Sky if this situation were to transpire. If Sky gains control over pay TV and premium services on DTT, the incentives to limit others' access to content and the ability to do so will increase. The likely outcome would be to guarantee the niche characteristic of such services and entrench Sky control of the wider pay TV market.

The current existence of Top Up TV and Setanta on DTT should be encouraging in this regard, as the aim should be to ensure that services with valuable content remain on the platform and give good balance and breadth to choice available to consumers. It will obviously be important to ensure that technical aspects of proposed developments do not end this existence for the wrong reasons.

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?

Tiscali does not believe that the Proposal would have any significant detrimental effects on the availability of FTA channels on DTT or that it would lead to major changes in terms of charges for previously free channels or the take-up of DTT.

Tiscali does believe that there are issues to address in respect of future incompatibility between set-top boxes, whether they are caused by Sky proposals or other developments like HD service provision or offerings from other providers.

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

It is very difficult to predict levels of confusion that may arise in the minds of UK consumers, but easy to imagine some confusion arising. It is probably unlikely that issues with boxes will significantly affect the take up of digital television in the medium term. However, the market may present consumers with a set of choices that are sub-optimal and some form of intervention may need to be considered to remove the worst of these problems. As Sky is not likely to be solely responsible for any profusion of set-top box technologies, it may be difficult to enforce a solution on Sky alone. However, it will be necessary for Ofcom and the industry as a whole to consider these issues and try to produce sensible plans to deal with them for the good of the UK consumer.

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?

It would be beneficial for consumers to need only one set-top box to access pay TV content on DTT, but that aim may be unrealistic and impossible for Ofcom or anyone else to guarantee. See answers above for further relevant comment.

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

No.

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 these conditions/directions take?

Taking account of what has been said above, Tiscali does believe that competition issues can be addressed by setting conditions that affect Sky and the other providers in the market.

Firstly, Sky should be required to wholesale content to other providers on a pricing basis that enables competition and does not unfairly impact Sky. This is likely to have to focus on premium sports and movies content and may raise issues about the control of similar content by other parties and the consistency (or otherwise) of approaches taken to the sale of rights over such content in the market. The wholesale obligations to be placed on Sky should benefit all pay TV platforms, so there is consistency in opportunity between cable, DTT and IPTV. These obligations should be imposed along with commitments from Sky to trade internally on a transparent and equivalent basis, so that no unfair advantages may be gained by downstream parts of the Sky organisation and margin squeezing would be exposed and discouraged. In addition to the remedies described, a review of contractual conditions and rights deals that allow a dominant player such as Sky to influence trading between other parties and limit competition and the development of services should take place, probably as a part of the ongoing pay TV market investigation.

Secondly, a cross-industry collaborative approach should be taken to the development of technologies affecting compatibility of set-top boxes and the services that will be made available to consumers. This should aim to maximise the opportunity to adopt standards and cross-compatibility for the good of consumers and industry. If Ofcom finds that any provider is promoting the use of hardware or software that locks the consumer into buying a box for every service, then stronger action should be taken.

As mentioned briefly in paragraphs above, it may be appropriate for Ofcom to consider issues of control over content beyond the familiar boundaries of Sky versus the rest of the industry. This is likely anyway, as a coherent review and analysis of markets and existing remedies should be central to Ofcom's ongoing investigation of the pay TV market. Sky has been able to achieve a dominant position in the acquisition of premium content rights because of success in platform markets and the two elements of success support each other in a virtuous circle. If rights were sold with an obligation to wholesale to other market participants many issues may be solved, although it would be argued that the value of those rights would drastically reduce. Such ideas may be difficult to apply to movies content, where many studios and producers are supplying and issues centre on the ability of a dominant aggregator to control rights windows. They may be more appropriate to sports, where measures are already taken to ensure supply to more than one downstream customer (eg Sky and Setanta for Premier League football) but the market is still locked up by the lack of wholesale availability to all market participants.

Content wholesaling obligations may be central to remedies that Ofcom might apply to the UK pay TV market, which is currently under investigation. For this reason, it is crucial that appropriate and consistent solutions result from this consultation and the outcomes are best for the UK at the end of both processes.