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# Investigation into Sky's compliance with the obligation to provide end-of-contract notifications

Confirmation Decision under section 96C of the Communications Act 2003 and accompanying explanatory statement

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Non-confidential version – redactions are indicated with [X]

**Issue date:** 19 August 2022

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## 1. Overview

- 1.1 Customers should get a fair deal for their communications services. They should be able to take advantage of the wide choice of services available and shop around with confidence, so that they can get the best deals for their needs. To be able to do this, customers need, amongst other things, to understand the terms of their existing agreements with service providers, and to understand the implications of any changes to those terms. To help achieve this, Ofcom introduced new regulatory obligations with effect from 15 February 2020, requiring providers to send 'end-of-contract' notifications to their customers in certain circumstances.
- 1.2 Under those rules, broadband, mobile, home phone and pay TV companies must notify their residential and business customers when their minimum contract period is coming to an end. The minimum contract period in these types of service agreements is typically for 12, 18 or 24 months, and during the specified period customers are usually prevented from cancelling their services or switching to a different provider without paying a cancellation charge. As a result of the regulatory obligations introduced by Ofcom, residential customers should receive a standalone notification between 10 and 40 days before the end of that period. The notification should include the date the minimum contract period ends, the services currently provided and the price paid, any changes to the service and price paid at the end of this period, information about the notice period required to terminate the contract; and information about the best tariffs currently offered by the provider for those services.
- 1.3 The purpose of the new regulatory requirements was to provide customers with information enabling them to take advantage of the wide choice of communication services available, i.e. the benefits of competition. Many customers are unaware of their contract status and/or the end date of their minimum contract period, and many do not realise that after the end of the minimum contract period (often referred to as being 'out of' or at the 'end of' their contract) they can switch provider or deal without paying a penalty. As a result, many customers may end up paying more than they need to. That risk is heightened by the fact that many customers are on contracts which provide for automatic price increases or permit price increases at the end of the minimum contract term. The end-of-contract notifications at issue in this decision are designed to help customers shop around and switch, or to make an informed decision to stay on their existing deal.
- 1.4 On 11 September 2019, Sky informed Ofcom that it did not consider its pay TV services to be covered by the new obligations and that it did not intend to implement the requirements in respect of its pay TV customers. On 2 December 2020, Ofcom opened an investigation into whether, by failing to send end-of-contract notifications to those pay TV customers, Sky was in contravention of the obligations.

- 1.5 On 14 May 2021, Ofcom issued a notification<sup>1</sup> to Sky under section 96A of the Communications Act 2003 ('the Act'), which set out that Ofcom had reasonable grounds for believing that Sky was contravening the obligations and invited Sky to make representations on our provisional view. Sky submitted its written representations on 9 July 2021 and an oral hearing took place on 26 October 2021. We have considered Sky's written and oral representations in preparing this document.
- 1.6 This is our final decision in relation to our investigation into Sky's compliance with the obligation to provide end-of-contract notifications. For the reasons set out in this decision, we have concluded that Sky has been and is contravening its obligations to send end-of-contract notifications.

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<sup>1</sup> Ofcom's section 96A Notification [SK24].

### What we have decided – in brief

The regulatory obligation to send end-of-contract notifications applies in relation to customers of public electronic communications services, as defined in the relevant legal framework. Such services include services provided for remuneration which consist wholly or mainly in the conveyance of signals on electronic communications networks, including transmission services used for broadcasting.

We have decided that:

- Sky's pay TV services that rely on satellite transmission fall within the definition of public electronic communications services.
- Consequently, by failing to send end-of-contract notifications to customers of those pay TV services, Sky has contravened, and continues to contravene, the applicable regulatory obligations.
- Sky must therefore take all steps necessary to comply with its regulatory obligation to send end-of contract notifications to customers of those pay TV services, starting no later than nine months from the date of this decision.

Annex A1 to this explanatory statement contains the Confirmation Decision given to Sky under section 96C of the Act ('the Confirmation Decision'). Paragraphs A1.18 and A1.19 of that Annex contain specific directions to the above effect.

In addition, Sky must provide Ofcom with a progress report no later than four months from the date of the Confirmation Decision (A1.20). The progress report must outline what steps Sky has taken to implement the remedy and how it will ensure the remedy is fully implemented nine months from the date of the Confirmation Decision.

Paragraph A1.21 of the Confirmation Decision also provides that if Sky brings an appeal against our decision, the direction will be suspended for the following periods:

- The obligation for Sky to provide a progress report will be suspended until four months following the date of a first instance decision of the Competition Appeal Tribunal in Ofcom's favour.
- The obligation for Sky to send end-of-contract notifications will be suspended until nine months following the date of a first instance decision of the Competition Appeal Tribunal in Ofcom's favour.

## 2. Factual and policy background

2.1 This section explains the factual and policy background to our decision.

### Sky's pay TV services

2.2 Sky provides various services to retail consumers, including pay TV, broadband, and fixed and mobile telephony services.

2.3 Sky provides a range of pay TV services, including some which rely on a digital satellite transmission service and a set top box to transmit and receive content. Others, such as Sky Glass, NOW and Sky Go, are delivered using an internet connection and are known as 'over-the-top' ('OTT') services. Some, such as Sky+ and Sky Q, rely on a combination of digital satellite transmission and a broadband connection to deliver content to end-users. Our decision concerns Sky's pay TV services which rely in whole or in part on a digital satellite transmission service (and not Sky's OTT services).

2.4 Services that rely at least in part on satellite transmission remain the largest part of Sky's pay TV business. As an indication of the relative proportions, Ampere Analysis recently estimated in evidence submitted to a parliamentary committee<sup>2</sup> that Sky had over 9 million satellite subscribers, as compared to over 1.5 million NOW subscribers. Sky is also by far the largest operator in the 'traditional' pay TV market (compared to Virgin Media, BT and TalkTalk: see paragraph 6.61 below), although it faces increasing competition in the video-on-demand market from providers of OTT services such as Netflix.

2.5 Sky describes its subscription pay TV services as consisting of the following elements:<sup>3</sup>

- a) linear and on-demand television channels, including channels and content owned by Sky and licensed from third parties;
- b) hardware, such as set top boxes, which are either loaned to the customer (for Sky Q customers), or become the property of the customer upon installation (with the exception of the software in the set top box, for Sky+ and Sky+HD boxes)<sup>4</sup> and satellite dishes, which become the property of the customer upon installation (for all customers);<sup>5</sup>
- c) software, such as the user interface and electronic programme guide;
- d) conditional access, including the provision to subscribers of viewing cards;

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<sup>2</sup> [Supplementary written evidence](#) submitted to the House of Lords Communications and Digital Committee inquiry into BBC future funding by Ampere Analysis's research director, March 2022, page 3 [SK31]. Information provided by Sky to Ofcom as part of this investigation indicated that Sky had 8.2 million subscribers in Q1 2021, see Sky's representations on 96A Notification [SK25a], page 13.

<sup>3</sup> Sky March 2020 Submission [SK12a]. See paragraphs 52 and 68.

<sup>4</sup> See pages 9 to 11 of the Sky Q Terms from January 2021 [SK14a] and clause 3.1 of the Sky+HD Terms from February 2018 [SK15a].

<sup>5</sup> See clause 3.3 of the Sky Q Terms (Jan 2021) [SK14a] and page 15 of the Sky TV Terms from January 2021 [SK13a].

- e) customer service, such as the operation of call centres and online facilities for customers to manage their subscription;
  - f) installation and repair services;
  - g) transmission of content, using satellite and broadband transmission, for both Sky-owned channels and content, and for fewer than half of the third-party channels and content available on Sky TV.<sup>6</sup>
- 2.6 Subscribers to Sky's pay TV services enter into a contract<sup>7</sup> with Sky for a particular package of television channels and on-demand television services, consisting of the Sky Entertainment 'basic' package, with the choice of adding additional packs to their subscription (such as Sky Sports, Sky Cinema or Kids).<sup>8</sup> The contracts<sup>9</sup> include the following terms:
- a) an obligation for the customer to pay the relevant subscription price for the relevant pay TV service selected by the customer;<sup>10</sup>
  - b) a minimum term, defined as a period of 12 or 18 months, starting from the first date on which the customer can receive the relevant pay TV services;<sup>11</sup> and
  - c) automatic continuation of the contract after the expiry of the minimum term.<sup>12</sup>
- 2.7 Those contracts place certain restrictions on Sky's ability to increase prices during the commitment period of the minimum term. However, as noted in the "*Important Terms of Your Subscription Contracts*" section of the booklet containing Sky's terms and conditions:
- "The limits on price increases do not apply after the Minimum Term of the relevant contract."*<sup>13</sup>
- 2.8 Further extracts from Sky's pay TV contracts are provided at Annex A2.

## The obligation to provide end-of-contract notifications

- 2.9 Our decision concerns Sky's contravention of regulatory obligations to provide end-of-contract notifications. These obligations were introduced by Ofcom with effect from 15 February 2020 and later amended with effect from 17 December 2021.

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<sup>6</sup> Sky March 2020 Submission [SK12a], paragraphs 81, 82 and 84.

<sup>7</sup> Consisting either of the 'Sky Digital Subscription Contract' (within the Sky TV Terms) or the 'contract for UK residential TV services' (within the Sky Q Terms). See Annex A2 for further details of these contracts.

<sup>8</sup> Sky March 2020 Submission [SK12a] paragraphs 53 to 57.

<sup>9</sup> Sky Digital Subscription Contract (within the Sky TV Terms (Jan 2021) [SK13a]) or the 'contract for UK residential TV services' (within the Sky Q Terms) [SK14a].

<sup>10</sup> See paragraphs A2.4 (Sky's Digital Subscription Contract) and A2.13 (Sky Q).

<sup>11</sup> See paragraphs A2.11 (Sky's Digital Subscription Contract) and A2.19 (Sky Q).

<sup>12</sup> See paragraphs A2.5 (Sky's Digital Subscription Contract) and A2.17 (Sky Q).

<sup>13</sup> Page 2 of the 'Important terms of your Subscription Contracts' accompanying the Digital Subscription Contract, contained within the Sky TV Terms (Jan 2021) [SK13a].

- 2.10 The obligations are contained in Condition C1 (contract requirements) of Ofcom's General Conditions.<sup>14</sup> As explained at paragraph 3.24 below, the relevant obligations were initially set out at paragraphs C1.10 to C1.15, and are now to be found at paragraphs C1.21 to C1.29 of the General Conditions. These obligations require providers of public electronic communications services (see paragraph 3.35 below) to notify their customers when their minimum contract period (now referred to in the General Conditions and hereafter in this explanatory statement as a 'Commitment Period')<sup>15</sup> is coming to an end.<sup>16</sup>
- 2.11 The rationale for the introduction of these requirements was set out in Ofcom's 15 May 2019 statement on end-of-contract notifications and annual best tariff information (the '2019 Statement').<sup>17</sup>
- 2.12 The 2019 Statement explained that customers of broadband, mobile, pay TV and home phone services often sign up to contracts containing a Commitment Period, which commit them to paying for that service for a minimum length of time, typically 12, 18 or 24 months. This means customers are usually prevented from cancelling their services or switching to a different provider before the end of this minimum period unless they pay a cancellation charge. Once the Commitment Period ends, customers are free to switch to a better deal with their existing provider, or to change providers without paying any cancellation charges. However, many customers are unaware of their contract status and/or the end date of their Commitment Period and, accordingly, do not take advantage of the options available to them at this point. As a result, they may end up paying more than they need to as they miss out on potentially better deals available.<sup>18</sup>
- 2.13 In addition, many customers are on contracts which provide for an automatic price increase or change in services at the end of their Commitment Period, which they might avoid by shopping around instead of allowing their existing contract to roll over. The 2019 Statement found that industry practices of charging customers significantly different prices when they are inside their Commitment Period and when they are outside that period (often referred to informally as being 'out of contract') meant too many customers were not on a good deal.<sup>19</sup> For instance, Ofcom's December 2018 Consultation on the implementation of end-of-contract notifications noted that the average spend by standalone pay TV customers who were 'out of contract' was substantially higher (24% or

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<sup>14</sup> For the General Conditions, see Ofcom's [website](#). This page includes a link to an archive of unofficial consolidated versions of the General Conditions in force at previous points in time.

<sup>15</sup> In the General Conditions, 'Commitment Period' means "a period beginning on the date that contract terms agreed by a Communications Provider and a Subscriber take effect and ending on a date specified in that contract, and during which the Subscriber is required to pay for services, facilities and/or Terminal Equipment provided under the contract and the Communications Provider is bound to provide them". Before 17 December 2021, the term used was 'Fixed Commitment Period' and this had a slightly different definition which did not include the reference to "terminal equipment" and also included that the period was one "in respect of which the Subscriber may be required to pay a charge to terminate the contract".

<sup>16</sup> The obligations do not apply to providers of public electronic communications services when they provide Machine-to-Machine Transmission Services.

<sup>17</sup> Ofcom, 15 May 2019, [Helping consumers get better deals: Statement on end-of-contract notifications and annual best tariff information](#) (May 2019 Statement) [SK05].

<sup>18</sup> Ofcom, 31 July 2018, [Helping consumers to engage in communications markets: Consultation on end-of-contract and out-of-contract notifications](#) (the July 2018 Consultation) [SK01]: see Figure 6.

<sup>19</sup> July 2018 Consultation [SK01], paragraph 3.36.



an average of £9) than the spend of corresponding customers who were 'in-contract'. This finding also applied to customers buying 'triple-play' bundles of pay TV, broadband and a landline, with average out-of contract prices being 26%, or £13, higher.<sup>20</sup> By way of specific examples, Sky TV was being advertised in August 2022 for £27 per month with a new 18 month minimum term, whereas the standard 'out of contract' price of £32 per month applied once customers are outside of the minimum term. Further, Sky's "Ultimate TV" package (which includes access to Netflix content) was advertised in August 2022 for £26 per month with a new 18 month minimum term on "Sky Signature", whereas the 'out of contract' price which applied outside of the minimum term was £38 per month.<sup>21</sup>

- 2.14 Ofcom wants customers to be able to take advantage of the potential benefits of switching provider or re-contracting with their current provider, so that they can get the best deal to meet their needs. Customers who shop around also increase the competitive pressure on providers, which can lead to more investment in new products and better value offers, as providers seek to attract and retain customers.
- 2.15 To this end, Ofcom considers it important to prompt customers to engage with the market and provide them with the information they need to take advantage of the wide choice of communications services available. The purpose of the obligations to provide end-of-contract notifications is to enable this by:
- a) making customers aware that their Commitment Period is about to expire, and providing them with information about any changes to the price and/or services provided once they are 'out-of-contract'; and
  - b) providing them with information to support them to engage with the market, including information about the best tariffs available if they wish to 're-contract' with their current provider. Information about the best tariffs can be used to compare other tariffs offered by their current provider or by other providers.
- 2.16 Ofcom considers that (other than in the case of Sky<sup>22</sup>) there has generally been good levels of compliance with the obligations to send end-of-contract notifications.
- 2.17 Ofcom also considers that there is evidence from the context of other services that the introduction of end-of-contract notifications has been effective in achieving our objectives. In November 2021, we published an initial review of the impact which found that the proportion of broadband customers who were 'out of contract' had fallen from 40% in 2019 to 35% in 2020, and that the proportion of broadband customers who switched or re-contracted within three months prior to or three months after their minimum contract period ended increased from 47% in July 2019 to 62% in September 2020.<sup>23</sup> However,

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<sup>20</sup> December 2018 Consultation [SK03], paragraph 2.10 and figure 1.

<sup>21</sup> Sky website (accessed 2 August 2022) [SK30], under headings "Sky TV" and "£26 Sky Ultimate TV". Set-up charges apply in addition to the monthly cost.

<sup>22</sup> For completeness, we note that on 29 April 2022, Ofcom opened an [investigation](#) into Shell Energy Retail Limited's compliance with end-of-contract notification and annual best tariff notification requirements.

<sup>23</sup> Ofcom, 30 November 2021, '[Helping customers get better deals: A review of the impact of end-of-contract notifications and pricing commitments by broadband and mobile providers](#)' (Helping Customers get better deals) [SK32], paragraphs 1.6 and 1.7.

although we observed this positive trend in customer engagement, we could not categorically say that it was due to the introduction of end-of-contract notifications.

- 2.18 In May 2022, we published a further study on the impact of the introduction of end-of-contract notifications on re-contracting and pricing for broadband services. This used econometric techniques to assess the direct effects on customer re-contracting while controlling for other factors, and also considered the impact on the prices re-contracting customers paid for their broadband services.<sup>24</sup>
- 2.19 This analysis confirmed that end-of-contract notifications increased the rate of re-contracting among broadband customers after their introduction in February 2020 and found that this was a strong indicator that the policy was working in the way Ofcom intended. The study found mixed evidence on prices, with some customers paying more and others paying less than before end-of-contract notifications were introduced. This is likely to reflect different actions customers take when re-contracting in response to a notification (for instance, some customers may choose to upgrade their service to one with a higher price).

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<sup>24</sup> Ofcom, 6 May 2022, '[End-of-Contract Notifications: An ex-post evaluation of the impact of the introduction of end-of-contract notifications on re-contracting and pricing for broadband services](#)' (An ex-post evaluation of end-of-contract notifications) [SK33].

## 3. Legal framework

- 3.1 Under the regulatory regime set out in the Act, providers of electronic communications networks ('ECN') and electronic communications services ('ECS') must comply with any applicable general conditions ('General Conditions') set by Ofcom under section 45 of the Act. A General Condition may apply to every provider of an ECN or an ECS, or to every provider of a particular description.<sup>25</sup>

### Definitions of ECN and ECS

#### The Act

- 3.2 The term ECN is defined in section 32(1) of the Act:

*"In this Act "electronic communications network" means—*

*(a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and*

*(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals—*

*(i) apparatus comprised in the system;*

*(ii) apparatus used for the switching or routing of the signals;*

*(iii) software and stored data; and*

*(iv) (except for the purposes of sections 125 to 127) other resources, including network elements which are not active."*

- 3.3 The term ECS is defined in section 32(2) and (2A) of the Act, as amended:

*"(2) In this Act "electronic communications service" means a service of any of the types specified in subsection (2A) provided by means of an electronic communications network, except so far as it is a content service.*

*(2A) Those types of service are—*

*(a) an internet access service[26]*

*(b) a number-based interpersonal communications service;[27] and*

*(c) any other service consisting in, or having as its principal feature, the conveyance of signals, such as a transmission service used for machine-to-machine services or for broadcasting."*

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<sup>25</sup> See section 46(2) of the Act.

<sup>26</sup> The term 'internet access service' is defined in section 32(2B) of the Act.

<sup>27</sup> The term 'number-based interpersonal service' is defined in section 32A of the Act.

3.4 This definition of ECS took effect on 21 December 2020. Before that, the definition of ECS in section 32(2) of the Act was:

*“In this Act “electronic communications service” means a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, **except in so far as it is a content service.**” (Emphasis added.)*

3.5 As underscored above, the definition of ECS within the Act draws a specific distinction between content services and ECS. A content service is defined in section 32(7):

*“In subsection (2) “a content service” means so much of any service as consists in one or both of the following—*

*(a) the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network;*

*(b) the exercise of editorial control over the contents of signals conveyed by means of a such a network.”*

3.6 A further relevant term is a public electronic communications service ('PECS'), which is a subset of electronic communications service and is defined in section 151(1):

*“public electronic communications service” means any electronic communications service that is provided so as to be available for use by members of the public;”*

## The Framework Directive

3.7 The definitions of ECN and ECS contained in the Act as made in 2003 were derived from, and are broadly similar to, the definitions set out in Article 2 of the 2002 Framework Directive,<sup>28</sup> which the Act implemented:

*“(a) ‘electronic communications network’ means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;*

*[...]*

*(c) ‘electronic communications service’ means a service normally provided for remuneration which consists wholly or mainly in the conveyance of*

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<sup>28</sup> [Directive 2002/21/EC](#) of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ L 108, 24.4.2002, p.33) ('Framework Directive').

*signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;”*

3.8 The Framework Directive was part of the new, harmonised European regulatory regime for electronic communications networks and services introduced in 2002 ('the 2002 regulatory framework'). That regulatory regime reflected convergence between the telecommunications, media and information technology sectors. Prior to the introduction of this regulatory framework, the focus of the regime had been on regulating telephony or telecommunications services. However, the recitals to the Framework Directive and the four 'Specific Directives'<sup>29</sup> which accompanied it outlined the reasons why the terminology used in these Directives changed, such that the legislation now applied to all 'electronic communications' networks and services rather than to just 'telecommunications' networks and services. As in the Act, a distinction is drawn between ECS and content services. The Directives outlined where, in the light of this change, the dividing line now fell between ECS and content services. On the one hand there are ECS, which are services, normally provided for remuneration, which consist wholly or mainly in the conveyance of signals on electronic communications networks. On the other hand, there are services providing, or exercising editorial control over, content transmitted using electronic communications networks and services. The latter do not constitute ECS, and are therefore not covered by the Framework Directive.

3.9 Recital (5) of the Framework Directive explained:

*“The convergence of the telecommunications, media and information technology sectors means **all** transmission networks and services should be covered by a single regulatory framework. That regulatory framework consists of this Directive and four specific Directives [...].*

***It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore***

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<sup>29</sup> [Directive 2002/19/EC](#) of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (OJ L 108, 24.4.2002, p.7) ('Access Directive'), [Directive 2002/20/EC](#) of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (OJ L 108, 24.4.2002, p.21) ('Authorisation Directive'), [Directive 2002/22/EC](#) of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (OJ L 108, 24.4.2002, p.51) ('Universal Service Directive') and [Directive 2002/58/EC](#) of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ L 201, 31.7.2002, p.37) ('Directive on privacy and electronic communications').

*without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. The content of television programmes is covered by Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. **The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection.***” (Emphasis added.)

- 3.10 For completeness, the recitals to Commission Directive 2002/77/EC on competition in the markets for electronic communications networks and services<sup>30</sup> also addressed this point:

*“(6) In the light of the developments which have marked the liberalisation process and the gradual opening of the telecommunications markets in Europe since 1990, certain definitions used in Directive 90/388/EEC and its amending acts should be adjusted in order to reflect the latest technological developments in the telecommunications field, or replaced in order to take account of the convergence phenomenon which has shaped the information technology, media and telecommunications industries over recent years. The wording of certain provisions should, where possible, be clarified in order to facilitate their application, taking into account, where appropriate, the relevant Directives adopted under Article 95 of the Treaty, and the experience acquired through the implementation of Directive 90/388/EEC as amended.*

*(7) This Directive makes reference to "electronic communications services" and "electronic communications networks" rather than the previously used terms "telecommunications services" and "telecommunications networks". These new definitions are indispensable in order to take account of the convergence phenomenon by **bringing together under one single definition all electronic communications services and/or networks which are concerned with the conveyance of signals** by wire, radio, optical or other electromagnetic means (i.e. fixed, wireless, **cable television, satellite networks**). **Thus, the transmission and broadcasting of radio and television programmes should be recognised as an electronic communication service and networks used for such transmission and broadcasting should likewise be recognised as electronic communications networks.** Furthermore, it should be made clear that the new definition of electronic communications networks also covers fibre networks which*

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<sup>30</sup> [Directive 2002/77/EC](#) of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ L 249, 17.9.2002, p.21) ('Competition Directive').

*enable third parties, using their own switching or routing equipment, to convey signals.” (Emphasis added.)*

## The EECC Directive

3.11 In December 2018, the European Electronic Communications Code ('EECC') Directive<sup>31</sup> entered into force. It updated, consolidated and replaced four of the Directives that made up the 2002 regulatory framework, with effect from 21 December 2020.<sup>32</sup> The aims of the EECC Directive included ensuring a high level of protection for consumers, including the availability of transparent, up-to-date and comparable information on offers and services, which are a key element for consumers in competitive markets where several providers offer services.

3.12 Article 2 of the EECC Directive contains revised definitions of ECN and ECS:

*“(1) ‘electronic communications network’ means transmission systems, whether or not based on a permanent infrastructure or centralised administration capacity, and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including internet) and mobile networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;*

*[...]*

*(4) ‘electronic communications service’ means a service normally provided for remuneration via electronic communications networks, which encompasses, with the exception of services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, the following types of services:*

*(a) ‘internet access service’ as defined in point (2) of the second paragraph of Article 2 of Regulation (EU) 2015/2120;*

*(b) interpersonal communications service; and*

*(c) services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting;”*

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<sup>31</sup> [Directive 2018/1972/EU](#) of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p36) (the 'EECC Directive').

<sup>32</sup> The EECC Directive replaced the Framework Directive, Authorisation Directive, Access Directive and the Universal Service Directive. The Directive on privacy and electronic communications was subject to a separate review procedure.

- 3.13 The changes to the definition of ECS were reflected, with effect from 21 December 2020, in the revised definition of ECS at section 32(2) of the Act. However, the parts of the definition relevant to this decision are effectively unchanged. The definition of ECN in the Act was not changed.
- 3.14 For the purposes of the proper interpretation of these terms, the EU instruments and case law (referred to below) remain relevant as provided in sections 1B, 2, and 6-7 of the European Union (Withdrawal) Act 2018, as amended.

## Parallel regulation of ECS and content services

- 3.15 The EECC Directive makes clear that a business may offer both an ECS and a content service and that both types of service may be subject to different sets of obligations, i.e. they may be governed by different regulatory regimes in parallel. Recital (11) of the EECC Directive states:

*“(11) The same undertaking, for example, a cable operator, can offer both an electronic communications service, such as the conveyance of television signals, and services not covered under this Directive, such as the commercialisation of an offer of sound or television broadcasting content services, and **therefore additional obligations can be imposed on such an undertaking in relation to its activity as a content provider or distributor, in accordance with provisions other than those of this Directive, without prejudice to the conditions laid in an annex to this Directive.**” (Emphasis added.)*

- 3.16 Recital (20) of the Authorisation Directive<sup>33</sup> (which the EECC Directive repealed and replaced) contained equivalent language. Thus, if a business provides both a content service and an ECS, it may be subject to regulation in respect of both types of services. The decision by a business to, for example, also provide a content service does not obviate the need to comply with, *inter alia*, the consumer protection provisions in place in respect of ECS.

## The rights of end-users

### End-User rights in the EECC Directive

- 3.17 As the EECC Directive's recitals emphasised, to take full advantage of the competitive environment, consumers should be able to make informed choices and to change providers when it is in their best interest to do so. The possibility of switching between providers is key for effective competition, and the availability of transparent, accurate and

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<sup>33</sup> [Directive 2002/20/EC](#) of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (OJ L 108, 24.4.2002, p.21) (the Authorisation Directive).



timely information on switching should increase end-user confidence in switching and make them more willing to engage actively in the competitive process.<sup>34</sup>

- 3.18 In light of these aims, Title III of Part III of the EECC Directive<sup>35</sup> specified a range of rights for end-users, building on those formerly contained in the Universal Service Directive,<sup>36</sup> which were subject to full harmonisation and remain relevant to the proper interpretation of domestic law, insofar as it operated to implement the rights specified in the Directive.
- 3.19 Under Article 105(3) of the EECC Directive, these included a requirement to inform end-users, before the end of a fixed duration contract, of the following:
- a) that their contractual commitment is coming to an end;
  - b) the means by which they can terminate the contract; and
  - c) best tariff advice relating to their services.<sup>37</sup>
- 3.20 Article 107 of the EECC Directive extended certain end-user rights, including the contractual and best tariff requirements of Art 105(3), to all elements of a 'bundle' (as defined specifically in that Directive)<sup>38</sup> of services where that bundle included an internet access service or a publicly available number-based interpersonal communications service.<sup>39</sup> Article 107 addressed a concern that where services are sold as part of a bundle, and different elements of the bundle (including terminal equipment) are subject to different rules on contract duration, termination and switching, customers are effectively hampered in their rights to switch provider for the entire bundle or parts of it.
- 3.21 As had been the case with end-user rights established under the Universal Service Directive, the new and additional end-user rights in the EECC Directive were implemented in the UK by way of General Conditions set by Ofcom.

## Setting General Conditions

- 3.22 Section 45 of the Act provides that Ofcom may set General Conditions which contain provisions authorised or required by one or more of sections 51, 52, 57, 58 or 64.

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<sup>34</sup> [EECC Directive](#), Recitals 3, 257, 265, 273 and 277.

<sup>35</sup> Articles 98 to 116, [EECC Directive](#).

<sup>36</sup> [Directive 2002/22/EC](#) of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (OJ L 108, 24.4.2002, p.51) (the Universal Service Directive)).

<sup>37</sup> Article 105(3) [EECC Directive](#) also includes a requirement to provide best tariff information to end-users at least annually.

<sup>38</sup> Note that where the term 'bundle' is used in the EECC Directive it has a specific meaning, as set out in Article 107(1). The pre-existing case-law discusses 'bundles' of services, but such references are not to be equated with the term used in the EECC Directive.

<sup>39</sup> The term 'number-based interpersonal communications service' is defined at Article 2(7) of the EECC Directive as "*an interpersonal communications service which connects with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which enables communication with a number or numbers in national or international numbering plans*".

3.23 Under section 51(1)(a), Ofcom may set General Conditions making such provision as it considers appropriate for the purpose of protecting the interests of end-users of PECS.<sup>40</sup> Section 51(2) sets out a non-exhaustive list of specific types of General Conditions that it may set in pursuance of this purpose. Section 51(2)(d) provides that Ofcom can, by way of a General Condition, “*require the provision, free of charge, of specified information, or information of a specified kind, to end-users*”.

### End of minimum term/fixed duration contract notification requirements

3.24 The new General Conditions requiring communications providers to send end-of-contract notifications were first made on 15 May 2019 and entered into force on 15 February 2020.<sup>41</sup> They were subsequently amended on 17 December 2020, with those amendments coming into force on 17 December 2021.<sup>42</sup> When initially made in May 2019, the relevant requirements were set out at paragraphs C1.10 to C1.15 of the General Conditions. Following their amendment and the re-numbering of the General Conditions that took effect on 17 December 2021, they are now set out at paragraphs C1.21 to C1.29 of the General Conditions.

### The General Conditions on End-of-Contract Notifications, as they applied from 15 February 2020 to 16 December 2021

3.25 General Condition C1.10 (as it applied from 15 February 2020 to 16 December 2021<sup>43</sup>) set out that Regulated Providers<sup>44</sup> must send an End-of-Contract Notification<sup>45</sup> to a Subscriber,<sup>46</sup> in the manner and form specified by Conditions C1.11 to C1.14, if each of the following requirements was met:

- a) the Subscriber has a contract with the Regulated Provider for Public Electronic Communications Services,<sup>47</sup> other than machine-to-machine transmission services;
- b) the contract has a Fixed Commitment Period;<sup>48</sup> and

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<sup>40</sup> The term “public electronic communications service” is defined in section 151(1) of the Act as meaning “*any electronic communications service that is provided so as to be available for use by members of the public*”. See paragraph 3.6 above.

<sup>41</sup> [May 2019 Statement](#) [SK05], see Annex A1.

<sup>42</sup> Ofcom, 17 December 2020, [Implementing the new European Electronic Communications Code: Changes to the General Conditions, Metering and Billing Direction and the National Telephone Numbering Plan](#) (Implementing the new European Electronic Communications Code Statement) [SK34].

<sup>43</sup> See Annex 1 to the [May 2019 Statement](#) [SK05] for the Notification setting these General Conditions.

<sup>44</sup> For the purposes of General Conditions C1.10 to C1.15 for the period from 15 February 2020 to 17 December 2021, Regulated Provider meant all providers of Public Electronic Communications Services.

<sup>45</sup> End-of-contract Notification was defined as a communication sent by a Regulated Provider to their Subscriber that comprises the information described in General Condition C1.11 (if the Subscriber is a Consumer) or General Condition C1.12 (if the Subscriber is not a Consumer).

<sup>46</sup> Subscriber means any End-User who is party to a contract with a provider of Public Electronic Communications Services for the supply of such services.

<sup>47</sup> See paragraph 3.6 above.

<sup>48</sup> Fixed Commitment Period was defined as a period beginning on the date that contract terms agreed by a Communications Provider and a Subscriber take effect and ending on a date specified in that contract, and during which the Subscriber is required to pay for services and facilities provided under the contract and the Communications Provider is bound to provide them and in respect of which the Subscriber may be required to pay a charge to terminate the contract. See footnote 50 below for the revised definition of “Commitment Period” that took effect from 17 December 2021.

- c) the terms of the contract provide (or governing law provides) for the contract to be automatically prolonged after the expiry of the Fixed Commitment Period.
- 3.26 The scope of those obligations was set out at paragraph C1.1 of the General Conditions, which provided that Conditions C1.10 to C1.14 applied to all providers of Public Electronic Communications Services, and each person to whom a provision applies was a 'Regulated Provider' for the purposes of that provision.
- 3.27 Paragraphs C1.11 and C1.12 set out the information that had to be included in an End-of-Contract Notification, including:
- a) the date on which the Fixed Commitment Period for that contract ended;
  - b) details of the services provided under the contract and the price paid for those services;
  - c) details of any changes to the service and price paid at the end of that period;
  - d) information about the notice period required to terminate the contract and how the subscriber may terminate the contract; and
  - e) information about the best tariffs offered by the provider for those services.
- 3.28 Paragraphs C1.13 and C1.14 of the General Condition set out that Regulated Providers must send an End-of-Contract Notification in a timely manner, before the end of the Subscriber's Fixed Commitment Period, and on a Durable Medium.

### **The General Conditions on End-of-Contract Notifications, as they applied from 17 December 2021 onwards**

- 3.29 The General Conditions were substantively amended on 17 December 2020 to implement the end-user rights provisions of the EECC Directive.<sup>49</sup> Those amendments came into effect one year later on 17 December 2021, and included changes to the wording of the requirements on End-of-Contract Notifications, changes to some of the defined terms used in those paragraphs and a wholesale re-numbering of the General Conditions.
- 3.30 Following these changes, the requirements on End-of-Contract Notifications were set out in paragraphs C1.21 to C1.29 of the General Conditions. As amended and re-numbered, paragraph C1.21 of the General Conditions provided that Regulated Providers must comply with Conditions C1.22 and C1.23, if each of the following requirements are met:
- a) the Relevant Customer has a contract with the Regulated Provider for a Relevant Communications Service;
  - b) the contract has a Commitment Period<sup>50</sup>; and

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<sup>49</sup> Ofcom, 17 December 2020, [Implementing the new European Electronic Communications Code: Changes to the General Conditions, Metering and Billing Direction and the National Telephone Numbering Plan](#) (Implementing the new European Electronic Communications Code Statement) [SK34]. See Annex 1 for the Notification amending the General Conditions.

<sup>50</sup> Commitment Period means "a period beginning on the date that contract terms agreed by a Communications Provider and a Subscriber take effect and ending on a date specified in that contract, and during which the Subscriber is required to

- c) the terms of the contract provide (or governing law provides) for the contract to be automatically prolonged after the expiry of the Commitment Period.
- 3.31 The scope of the amended provisions is set out at paragraphs C1.1 and 1.2 of the General Conditions. Paragraph C1.1(d) provides that the obligations apply to “*providers of Public Electronic Communications Services, when they provide these services to Subscribers, except when they provide Machine-to-Machine Transmission Services*”; and paragraph C1.2 provides that references to a “*Regulated Provider*”, “*a Relevant Communications Service*” or a “*Relevant Customer*” in the obligations are references to providers, services and subscribers<sup>51</sup> (as the case may be) in respect of which a provision applies in accordance with General Condition C1.1.
- 3.32 Paragraph C1.23 of the General Conditions provides that where Condition C1.21 applies, Regulated Providers must send an End-of-Contract Notification to the Relevant Customer in the manner and form specified by Conditions C1.24 to C1.28.
- 3.33 Paragraphs C1.24 to C1.26 of the General Conditions set out the information that must be included in an End-of-Contract Notification in similar terms to those set out at paragraph 3.27 above, but with some changes to the terminology used and additional requirements relating to bundles and small business customers.
- 3.34 The obligations for Regulated Providers to send an End-of-Contract Notification to their Relevant Customers on a Durable Medium before the end of their Commitment Period are now to be found at paragraphs C1.27 and C1.28 of the General Conditions.

#### Defined terms used in the General Conditions

- 3.35 The terms ECN, ECS and PECS are defined<sup>52</sup> in the General Conditions as follows:

- a) An ECN<sup>53</sup> is:

*“(a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and*

*(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals:*

*(i) Apparatus comprised in the system;*

*(ii) Apparatus used for the switching or routing of the signals; and*

*(iii) software and stored data.”*

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pay for services, facilities and/or Terminal Equipment provided under the contract and the Communications Provider is bound to provide them”.

<sup>51</sup> Since 17 December 2021, the term “Subscriber” has been defined as “any End-user who is party to a contract with a provider of Public Electronic Communications Services or Bundles for the supply of such services or such a Bundle”.

<sup>52</sup> Terms which are capitalised in these definitions are themselves defined terms in the General Conditions.

<sup>53</sup> The definition of ECN in the General Conditions has remained the same throughout the period covered by this investigation.

- b) ECS was defined, for the period until 17 December 2021, as a service consisting in, or having as its principal feature, the conveyance by means of an ECN of signals, except in so far as it is a content service;
- c) Since 17 December 2021, ECS has been defined as any of the following types of service provided by means of an ECN, except so far as it is a Content Service<sup>54</sup>:

*“(a) an Internet Access Service;*

*(b) a Number-based Interpersonal Communications Service; and*

*(c) any other service consisting in, or having as its principal feature, the conveyance of Signals such as a Machine-to-Machine Transmission Service, or a transmission service used for broadcasting.”*

- d) A PECS is defined as any ECS that is provided so as to be available for use by members of the public.<sup>55</sup>

3.36 The defined terms above used in the General Conditions are effectively the same as those used in the Act and are ultimately derived from the EU regulatory framework (that is, the Framework Directive and its successor, the EECC Directive, as explained above).

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<sup>54</sup> A content service is defined in the General Conditions as so much of any service as consists in one or both of (a) the provision of material with a view to its being comprised in Signals conveyed by means of an ECN; (b) the exercise of editorial control over the content of Signals conveyed by means of such a network.

<sup>55</sup> The definition of PECS in the General Conditions has remained the same throughout the period covered by this investigation.

## 4. Ofcom's consultation and decision-making on end-of-contract notifications

### Consultation processes in 2018

- 4.1 Ofcom's first consultation on the proposed introduction of new General Conditions which would require providers to send end-of-contract notifications to their residential and small business customers was published in July 2018 (the 'July 2018 Consultation').<sup>56</sup> We set out detailed proposals in relation to the scope, content and structure of these notifications, as well as the method and timing of delivery. The proposals were intended to ensure consumers were informed, at an appropriate time, that their Commitment Period would be coming to an end, and of any changes to price or services that would occur as a result.<sup>57</sup>
- 4.2 We proposed to implement these requirements by modifying the General Conditions and setting new conditions using our powers under sections 45 and 51 of the Act.
- 4.3 The EEC Directive entered into force on 20 December 2018, including the requirements of Article 105(3).<sup>58</sup> As noted above, the aims of the EEC Directive included ensuring a high level of protection for consumers, including the availability of transparent, up-to-date and comparable information on offers and services, which are a key element for consumers in competitive markets where several providers offer services.
- 4.4 Our July 2018 Consultation predated the EEC Directive. In December 2018, we issued a further consultation as we recognised that the purpose, intended scope and objectives of the Directive tied in with those we set out in our July 2018 Consultation and confirmed the case for intervention (the 'December 2018 Consultation').<sup>59</sup>
- 4.5 Although the EEC Directive provided that it should be applied from 21 December 2020 (allowing for a two year transposition period), given our earlier work, we saw no reason to deprive UK consumers of the benefits and protections of end-of-contract notifications until the end of 2020. We therefore consulted on amended proposals that would effectively implement the relevant parts of Article 105(3) earlier.
- 4.6 Specifically, we proposed to require providers to send their residential and business customers an end-of-contract notification before the end of their Commitment Period, including information about their current contract and their provider's best tariffs. We made further detailed proposals about the content, form and timing of both types of

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<sup>56</sup> Ofcom, 31 July 2018, [Helping consumers to engage in communications markets: Consultation on end-of-contract and out-of-contract notifications](#) [SK01].

<sup>57</sup> We also proposed new General Conditions requiring providers to send one-off out-of-contract notifications, which were intended to inform consumers that their Fixed Commitment Period had already ended if they were not previously informed of this.

<sup>58</sup> See paragraph 3.19 above.

<sup>59</sup> Ofcom, 14 December 2018, [Helping consumers get better deals - Consultation on end-of-contract and annual best tariff notifications, and proposed scope for a review of pricing practices in fixed broadband](#). (December 2018 Consultation) [SK03].

notifications (which differed in some respects from the proposals in the July 2018 Consultation).<sup>60</sup> We again proposed to implement these proposals by setting General Conditions under sections 45 and 51(2)(d) of the Act.

## The 2019 Statement

- 4.7 On 15 May 2019, Ofcom published a statement on end-of-contract notifications.<sup>61</sup>
- 4.8 The 2019 Statement imposed new rules requiring providers to notify their residential and business subscribers before their Commitment Period comes to an end. Since those rules came into effect, end-of-contract notifications must contain key information to enable subscribers to make informed choices about their services. This information includes, but is not limited to, the price that the subscriber is currently paying, the price that they will pay after the end of their Commitment Period, the options available to the subscriber (e.g. remain on the same contract, switch to a new contract with the same provider, or switch to a different provider) and the best tariffs that are available from their current provider.
- 4.9 A key objective of the best tariff requirements is to prompt customer engagement with the market. While a customer may sign up to one of their existing provider's tariffs as set out in the notification, they may also use the tariff information (and information on the options available) to seek out different tariffs both with their existing provider and across the market more generally.
- 4.10 The new rules were imposed by way of modifications to General Condition C1, which entered into force on 15 February 2020, following a nine month implementation period.<sup>62</sup> They are summarised at paragraphs 3.25 to 3.28 above.
- 4.11 Ofcom also published additional guidance under General Condition C1, addressing the new conditions (the 'Guidance').<sup>63</sup> The Guidance set out, *inter alia*, that in complying with the requirement in relation to Subscribers who are consumers, we expected providers to send notifications between 10 and 40 days before the end of a consumer's Fixed Commitment Period.<sup>64</sup>

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<sup>60</sup> We also proposed to require providers to send their residential and business customers an annual best tariff notification if the customer is outside of a Fixed Commitment Period.

<sup>61</sup> [May 2019 Statement](#) [SK05].

<sup>62</sup> General Condition C1 was also modified to require Regulated Providers to send an annual notification to subscribers when they are beyond an initial Fixed Commitment Period, which sets out information about their current contract, their options and their provider's best tariffs. This also formed part of the Statement but is not relevant for the purposes of this decision.

<sup>63</sup> [Ofcom's Guidance under General Condition C1 – contract requirements](#) [SK23a].

<sup>64</sup> [Ofcom's Guidance under General Condition C1 – contract requirements](#) [SK23a], paragraph 1.75.

## Further consultations and statements on implementing the EECC Directive

- 4.12 On 17 December 2019, Ofcom published a consultation on proposals to implement certain of the other rights for end-users required under the EECC Directive.<sup>65</sup> The consultation included proposals to amend the scope of the obligations to send end-of-contract notifications and best tariff advice, in order to implement the requirements of Article 107 of the EECC Directive.<sup>66</sup> The consultation also proposed amendments to the guidance on end-of-contract (and annual best tariff) notifications.
- 4.13 Annex 12 to the consultation set out a table showing Ofcom's proposed changes to General Condition C1 to give effect to our proposals. These included renumbering the relevant provisions and making minor drafting amendments to reflect new defined terms, as part of wider changes Ofcom was proposing to implement the requirements of the EECC Directive.
- 4.14 On 27 October 2020, Ofcom published a statement and consultation ('the October 2020 Statement and Consultation') which confirmed our decision to introduce our proposed changes to extend end-of-contract notification rules as set out in the consultation, and to make the associated changes to our guidance under General Condition C1.<sup>67</sup> The October 2020 Statement and Consultation also set out that these changes would apply to any notifications sent on or after the implementation date in December 2021. In addition, the October 2020 Statement and Consultation included a further consultation on, *inter alia*, certain proposed consequential changes to the General Conditions, including proposed changes to some of the defined terms used in the General Conditions. For this reason, the October 2020 Statement and Consultation did not include a legal notification setting the new conditions.
- 4.15 On 17 December 2020, Ofcom published a further statement ('the December 2020 Statement') in connection with the implementation of the EECC Directive, which concluded the consultation in the October 2020 Statement and Consultation.<sup>68</sup> The December 2020 Statement included (as Annex 1) a notification of new general conditions and modifications to the General Conditions (including General Condition C1 and definitions relevant to that condition) that Ofcom had decided to make, in accordance with section 48(1) of the Act.
- 4.16 The notification provided for the changes to General Condition C1 in relation to end-of-contract notifications to take effect on 17 December 2021. The obligations to provide end-

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<sup>65</sup> Ofcom, 17 December 2019, [Fair Treatment and easier switching for broadband and mobile customers: proposals to implement the new European Electronic Communications Code](#) (Fair treatment and easier switching consultation) [SK35].

<sup>66</sup> See paragraph 3.20 above.

<sup>67</sup> Ofcom, 27 October 2020, [Fair treatment and easier switching for broadband and mobile customers: Implementation of the new European Electronic Communications Code](#) (Fair treatment and easier switching statement) [SK36].

<sup>68</sup> Ofcom, 17 December 2020, [Implementing the new European Electronic Communications Code: Changes to the General Conditions, Metering and Billing Direction and the National Telephone Numbering Plan](#). (Implementing the new European Electronic Communications Code statement) [SK34].



of-contract notifications are therefore now to be found at General Condition C1.21 to C1.29 (summarised above at paragraphs 3.29 to 3.34).<sup>69</sup>

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<sup>69</sup> The notification of 17 December 2020 set out the modifications coming into effect on 17 December 2021 at Schedule 2, and showed the changes from the text of the existing General Conditions. Ofcom also published an unofficial consolidated version of the General Conditions as applicable from 17 December 2021.

## 5. Engagement with Sky

### Sky's comments on scope during the 2018 consultation phase

- 5.1 In the July 2018 Consultation and the December 2018 Consultation, Ofcom explained its view that a pay TV service provided to an end-user falls within the definition of ECS, insofar as it includes the conveyance of signals on an ECN. We based our view on the definition of ECS in the Act and the Framework Directive, and on the case law of the Court of Justice of the European Union ('CJEU').<sup>70</sup>
- 5.2 In its responses to the July 2018 and December 2018 Consultations, Sky submitted that its pay TV services are not ECS and therefore fall outside Ofcom's legal remit, and that the ECS definition and the CJEU case law should be interpreted differently.<sup>71</sup>
- 5.3 Having carefully considered Sky's submissions, in the 2019 Statement Ofcom confirmed its view (as expressed in the December 2018 Consultation) that it had the power to regulate a pay TV service provided to an end-user as an ECS insofar as it includes the conveyance of signals on an ECN. We further stated that whether a particular pay TV service falls within that scope of an ECS will depend on the specific nature of the service in question, and the specific circumstances under which it is provided, which should be assessed on a case-by-case basis.<sup>72</sup>

### Exchange of correspondence following publication of the 2019 Statement

- 5.4 Following publication of the 2019 Statement on 15 May 2019, Sky wrote to Ofcom on 11 September 2019 stating that it did not intend to implement Ofcom's May 2019 decision (and the new General Conditions it imposed) in respect of its pay TV services, on the grounds it considered its pay TV services are not ECS and, accordingly, were not within the scope of Ofcom's decision (or, therefore, the new General Conditions C1.10 to C1.15).<sup>73</sup> Sky further stated that it considered Ofcom was obliged to carry out an appropriately detailed assessment of the specific nature of Sky's pay TV services before it could assess whether it has the power to regulate these services as an ECS.<sup>74</sup>
- 5.5 As noted above, the new General Conditions did not come into force until 15 February 2020, following a nine month implementation period. On 11 February 2020, Ofcom wrote

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<sup>70</sup> July 2018 Consultation [SK01] paragraph 4.4; December 2018 Consultation, paragraph 2.38.

<sup>71</sup> Paragraphs 2.1-2.3 of *Sky's response to Ofcom's Consultation – 'Helping consumers to engage in communications markets – consultation on end-of-contract and out-of-contract notifications* (October 2018) [SK02] and paragraph 3.1 of *Sky's response to Ofcom's 'Consultation on end-of-contract and annual best tariff notifications, and proposed scope for a review of pricing practices in fixed broadband'* (February 2019) [SK04].

<sup>72</sup> May 2019 Statement [SK05] paragraphs 3.4 and 3.7.

<sup>73</sup> Letter dated 11 September 2019 from Matthew Braovac (Director of Legal – Consumer, Corporate and Competition, Sky) to Lindsey Fussell (Consumer Group Director, Ofcom) [SK06]

<sup>74</sup> Letter dated 11 September 2019 from Matthew Braovac (Director of Legal – Consumer, Corporate and Competition, Sky) to Lindsey Fussell (Consumer Group Director, Ofcom), page 2 [SK06].

to Sky<sup>75</sup> confirming the position set out in the 2019 Statement: that it considered the decisions in the 2019 Statement (and the corresponding General Conditions) applied to all public electronic communications services other than machine-to-machine services, and pay TV services provided to end-users are susceptible to regulation as ECS insofar as they include the conveyance of signals on an electronic communications network. In that letter, Ofcom confirmed:

*“we consider the new conditions apply in relation to those subscribers who contract with Sky for a conveyance service as well as a content service. We believe this approach to be consistent with the relevant European case law and we do not consider it necessary to carry out a further detailed assessment as suggested in your letter”.*<sup>76</sup>

- 5.6 Ofcom made clear that if Sky did not implement the decision in respect of its pay TV services, Ofcom would proceed to take enforcement action, to ensure that consumers of Sky's pay TV services benefited from the protections which the new conditions were intended to provide.
- 5.7 This led to further correspondence,<sup>77</sup> and a meeting between Ofcom and Sky on 28 February 2020. At that meeting, Sky explained why it considered its pay TV services not to be ECS and Ofcom explained why it took the opposite view.<sup>78</sup>
- 5.8 Following the meeting, on 6 March 2020, Sky sent Ofcom a detailed submission (the 'Sky March 2020 Submission')<sup>79</sup> setting out in more detail its view that its pay TV services were not ECS. The Sky March 2020 Submission expanded upon the points Sky had made in response to the July 2018 and December 2018 Consultations which underpinned the 2019 Statement. We have summarised the contents of the Sky March 2020 Submission below.

## The Sky March 2020 Submission

- 5.9 The Sky March 2020 Submission explained that Sky's pay TV services in the UK comprise (a) its Sky branded service (Sky TV) and (b) NOW TV, an OTT content service. The Sky March 2020 Submission focuses on Sky TV, as Ofcom accepts that genuine, standalone OTT content services are unlikely to constitute ECS.<sup>80</sup>
- 5.10 Sky argued that on a proper application of the relevant legislation and case law, Sky TV is not an ECS because either:

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<sup>75</sup> Letter dated 11 February 2020 from Lindsey Fussell (Consumer Group Director, Ofcom) to Matthew Braovac (Director of Legal – Consumer, Corporate and Competition, Sky) [SK07].

<sup>76</sup> Letter dated 11 February 2020 from Lindsey Fussell (Consumer Group Director, Ofcom) to Matthew Braovac (Director of Legal – Consumer, Corporate and Competition, Sky) [SK07].

<sup>77</sup> Letter dated 14 February 2020 from Claire Canning (General Counsel, Sky) to Lindsey Fussell (Consumer Group Director, Ofcom) [SK08] and Letter dated 21 February 2020 from Lindsey Fussell (Consumer and External Relations Group Director, Ofcom) to Claire Canning (General Counsel, Sky) [SK09].

<sup>78</sup> *Note of a meeting between Sky and Ofcom*, 28 February 2020 [SK10].

<sup>79</sup> Sky March 2020 Submission [SK12a].

<sup>80</sup> See paragraph 3.8 of the May 2019 Statement [SK05].

- a) it is a content service, and/or
- b) it does not consist wholly or mainly in the conveyance of signals.

Sky therefore suggested that it is outside the scope of application of the new General Conditions imposed by Ofcom.

- 5.11 Sky argued that Sky TV is properly categorised as a content service, and is therefore excluded from the definition of an ECS.<sup>81</sup> In particular:
- a) Sky emphasised that its pay TV service includes its own content, over which it exercises editorial control. It says that such content, provided over certain channels such as Sky One, is central to its pay TV service.<sup>82</sup> It considers that this makes Sky TV a 'content service' under the definition of ECS in the Framework Directive and in the Act, both of which exclude content services.
  - b) Sky argued that its pay TV service cannot therefore properly be described as consisting "wholly or mainly" in the conveyance of signals.<sup>83</sup> Sky argued that its pay TV service is instead a 'unified service' comprising several elements<sup>84</sup> and that the transmission is only a relatively minor element of the service. It noted that it spends much less on transmission than on content,<sup>85</sup> and argued that [redacted] of Sky TV's pay TV channels are not transmitted by Sky.<sup>86</sup> It further noted that the majority of on-demand content is transmitted via the open internet, with only 'push-VOD' content transmitted via satellite.<sup>87</sup>
- 5.12 Sky acknowledged that it transmits its own television channels (over 30 channels) by satellite<sup>88</sup> and also provides transmission for [redacted] of the third-party channels that comprise Sky TV.<sup>89</sup> However, it maintained that a service which it considers qualifies as a content service cannot also constitute an ECS.
- 5.13 Sky relied on the judgments of the CJEU in cases *UPC v Hilversum*<sup>90</sup> and *UPC DTH*<sup>91</sup> to argue that (i) a service must consist wholly or mainly in the conveyance of signals to comprise an ECS; and (ii) content services are not ECS. The services in those cases involved the transmission of third party content and were found to be ECS. However, Sky maintains that Sky TV is different because the operators in *UPC v Hilversum* and *UPC DTH* did not produce content or TV channels of their own.

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<sup>81</sup> Sky March 2020 Submission [SK12a] paragraphs 92-94.

<sup>82</sup> Sky March 2020 Submission [SK12a] paragraph 92.

<sup>83</sup> Sky March 2020 Submission [SK12a] paragraph 96.

<sup>84</sup> Sky March 2020 Submission [SK12a] paragraph 97.

<sup>85</sup> Sky March 2020 Submission [SK12a] paragraph 65: Sky notes that it spent [redacted] on content provided via Sky TV in 2019, and [redacted] on other elements of the service, including equipment, software, conditional access, customer service and installation and repair (paragraph 69). Of this, it states its costs of providing transmission (in relation to its own and third party channels) were [redacted] (paragraph 86).

<sup>86</sup> Sky March 2020 Submission [SK12a] paragraph 84 and Annex 12 of Sky March 2020 Submission [SK12b]

<sup>87</sup> Sky March 2020 Submission [SK12a] paragraph 80.

<sup>88</sup> Sky March 2020 Submission [SK12a] paragraph 81.

<sup>89</sup> Sky March 2020 Submission [SK12a] paragraph 84.

<sup>90</sup> Case C-518/11 *UPC Nederland BV v Gemeente Hilversum* (EU:C:2013:709) ('*UPC v Hilversum*').

<sup>91</sup> Case C-475/12 *UPC DTH Sàrl v Nemzeti Média- és Hírközlési Hatóság Elnöksége* (EU:C:2014:285) ('*UPC DTH*').

- 5.14 Sky also relied on the CJEU's judgments in the *Skype*<sup>92</sup> and *Gmail*<sup>93</sup> cases. In Sky's view, these support its argument that a 'unified' service should be considered as a whole. On that basis, Sky submitted that, if the overall service does not consist wholly or mainly in the conveyance of signals, it should not be deconstructed into its constituent elements and thus cannot be treated as an ECS, even if the service entails the conveyance of signals on an ECN.
- 5.15 Sky further claimed that Ofcom treating Sky TV as an ECS is likely to lead to a significant distortion of competition between (regulated) 'traditional' pay TV services and (unregulated) OTT pay TV services.<sup>94</sup> It considered that TV subscribers, like subscribers to other pay TV services, are fully protected by the provisions of UK consumer law.

## Ofcom's decision to investigate

- 5.16 Following further engagement, in which Sky maintained its position, Ofcom decided to open an investigation to examine whether Sky was failing to comply with the obligation to provide end-of-contract notifications.
- 5.17 On 19 February 2021, Ofcom sent an information request<sup>95</sup> under section 135 of the Act to Sky, to which Sky responded on 5 March<sup>96</sup> and 22 March 2021.<sup>97</sup>
- 5.18 On 14 May 2021, Ofcom gave Sky a notification under section 96A of the Act, setting out Ofcom's determination that there were reasonable grounds to believe that Sky was failing to comply with the obligation.<sup>98</sup>
- 5.19 Sky provided its written representations in response to that notification on 9 July 2021<sup>99</sup> and made oral representations at a hearing held on 26 October 2021.<sup>100</sup> Sky's representations, can be summarised as follows:
- 5.20 Sky's core arguments in its written and oral representations identify six alleged errors on Ofcom's part:
- a) Ofcom applied the wrong legal test. Ofcom does not find that Sky TV consists 'wholly or mainly' in the conveyance of signals on an electronic communications network which is the test Ofcom is required to apply;<sup>101</sup>

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<sup>92</sup> Case C-142/18 [Skype Communications Sàrl v Institut belge des services postaux et des télécommunications](#) (EU:C:2019:460) ('Skype').

<sup>93</sup> Case C-193/18 [Google LLC v Bundesrepublik Deutschland](#) (EU:C:2019:498) ('Gmail').

<sup>94</sup> Letter dated 6 March 2020 from Claire Canning (General Counsel, Sky) to Lindsey Fussell (Consumer Group Director, Ofcom) [SK11] pages 3-4.

<sup>95</sup> Information Request from Ofcom to Sky dated 19 February 2021 [SK19].

<sup>96</sup> Sky's response to questions 1 to 4 of Ofcom's Information Request, 5 March 2021 [SK20].

<sup>97</sup> Sky's response to questions 5 and 6 of Ofcom's Information Request, 22 March 2021 [SK21] and data attached to Sky's response to questions 5 and 6 of Ofcom's Information Request, 22 March 2021 [SK22].

<sup>98</sup> Ofcom's Section 96A Notification [SK24].

<sup>99</sup> Sky's representations on 96A Notification [SK25a-SK25g] and Sky's points of clarification [SK27].

<sup>100</sup> Oral hearing transcript [SK26].

<sup>101</sup> Sky's representations on 96A Notification [SK25a], paragraphs 3(a) and 4-10 and Oral hearing transcript [SK26] page 5.

- b) Ofcom was wrong to disaggregate Sky's content and transmission services, and should instead look at its pay TV services as a "unified service";<sup>102</sup>
- c) Ofcom failed to give proper effect to the fact that Sky's pay TV services are (primarily) a content service;<sup>103</sup>
- d) It would be unfair and would breach the principle of equal treatment to regulate Sky's pay TV services while not regulating its 'OTT' competitors;<sup>104</sup>
- e) Ofcom's proposed remedy does not align with the identified breach of the General Conditions;<sup>105</sup>
- f) The implementation period of two months proposed by Ofcom in the section 96A notification was inadequate, unfair and discriminatory,<sup>106</sup> and the long-stop, one-year, date for implementation, if Sky appealed, was not justified.<sup>107</sup>

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<sup>102</sup> Sky's representations on 96A Notification [SK25a], paragraphs 3(b) and 11-22 and Oral hearing transcript [SK26], pages 12-13.

<sup>103</sup> Sky's representations on 96A Notification [SK25a], paragraphs 3(c) and 23-24.

<sup>104</sup> Sky's representations on 96A Notification [SK25a], paragraphs 3(d) and 25-34.

<sup>105</sup> Sky's representations on 96A Notification [SK25a], paragraphs 3(e) and 35-39.

<sup>106</sup> Sky's representations on 96A Notification [SK25a], paragraphs 3(f) and 40-49(a) and Oral hearing transcript [SK26], pages 13-15.

<sup>107</sup> Sky's representations on 96A Notification [SK25a], paragraph 49(b).

## 6. The application of the General Conditions to Sky's pay TV services

- 6.1 This section sets out the services provided by Sky to which the obligation to provide end-of-contract notifications in General Conditions C1.21 to C1.29 apply, i.e. to which the General Conditions in force since 17 December 2021 apply.
- 6.2 The provisions containing the obligation to provide end-of-contract notifications which applied to those services in the period from 15 February 2020 to 16 December 2021 (under paragraphs C1.10 to C1.15 of the General Conditions in force at the relevant time) are set out in footnotes.
- 6.3 In this section we set out the basis for Ofcom's conclusion that the end-of-contract notification obligations apply to Sky's pay TV services, and explain why we have rejected Sky's submissions in this regard. In particular:
- a) We start by explaining, by reference to the relevant legislation and caselaw, that pay TV services fall within the definition of ECS insofar as they include a transmission element which meets the definition set out in the Act and the General Conditions;
  - b) We then go on to explain that a pay TV service may include both content and transmission services. The relevant legislation carves out content services as an exception from the types of services which may fall within the definition of an ECS. Where a package of services includes both elements of content and transmission, the correct approach is to apply content regulation to the content part and transmission regulation to the transmission part;
  - c) Next we set out Ofcom's position on the application of the General Conditions to the pay TV services provided by Sky; and
  - d) Lastly in this section, we respond to the arguments made by Sky in its written<sup>108</sup> and oral<sup>109</sup> representations to Ofcom in response to the notification given to Sky under section 96A of the Act.

### Pay TV services are ECS insofar as they include a transmission element

- 6.4 Ofcom's position is that pay TV services fall within the definition of ECS insofar as they include a transmission element which meets the definition set out in the Act and the General Conditions.
- 6.5 The terms PECS and ECS, as defined in the Act and General Conditions, reflect the terms used in the Framework Directive and the EEC Directive. The definition of ECS in the

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<sup>108</sup> Sky's representations on 96A Notification [SK25a – SK25g] and Sky's points of clarification, 16 November 2021 [SK27].

<sup>109</sup> Oral hearing transcript [SK26].

Framework Directive and the EECC Directive, and the recitals to the Directives set out in section 2 above, show that “*transmission services in networks used for broadcasting*”<sup>110</sup> or, in the EECC Directive, “*transmission services used ... for broadcasting*”<sup>111</sup> (‘broadcasting transmission services’) and, in particular, “*the transmission and broadcasting of radio and television programmes*”<sup>112</sup> in cable television and satellite networks are properly to be considered ECS. This reflects the convergence between the telecommunications, media and information technology sectors and is thus in keeping with the objectives of the regulatory framework, as set out above.

- 6.6 The 2002 regulatory framework introduced new terminology to reflect convergence between the telecommunications and media sectors. The intention was to separate regulation of transmission from regulation of content and create a single regime which applied to all transmission services, including telecommunications and broadcast transmission services. We address the parallel regulation of content in the next section, at paragraphs 6.10 to 6.19 below.
- 6.7 Insofar as a pay TV service includes a means of transmitting the content to the end-user over an ECN, that transmission service is susceptible to regulation as an ECS.
- 6.8 The issue of whether pay TV services constituted ECS as defined in Framework Directive was considered in two CJEU cases: *UPC v Hilversum* and *UPC DTH*. The CJEU was clear that a pay TV service should be classified as an ECS in so far as it involves the conveyance of signals over an ECN, where the provider is responsible vis-à-vis end-users for transmission of the signal, ensuring that they are supplied with the service to which they have subscribed. As explained below, the fact that the transmission element of the service is classified as an ECS, however, does not exempt the transmitted content from regulation. Both frameworks apply in parallel, with ECS and content governed by the respective rules, thus according with the objective set out in the Framework Directive to separate the regulation of transmission from the regulation of content.<sup>113</sup>
- 6.9 The definition of ECS was further considered in the *Skype* and *Gmail* cases. Neither of these cases suggest that certain packages of services should be considered ‘unified’ services, in respect of which ECS and other elements of the service cannot be regulated separately, with the relevant frameworks applying to the respective elements in parallel. See further paragraphs 6.44 to 6.56 below in which we address the arguments advanced by Sky.

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<sup>110</sup> [Framework Directive](#), Article 2, Definitions, subparagraph (c).

<sup>111</sup> EECC Directive, Article 2(4)(c).

<sup>112</sup> [Competition Directive](#), recital (7).

<sup>113</sup> [Framework Directive](#), recital (5).



## The services provided by a pay TV provider may include both an ECS and a content service, and each service may be subject to relevant regulation

- 6.10 Where a package of services includes both elements of content and transmission, Ofcom considers that the correct approach is to apply content regulation to the content part and transmission regulation to the transmission part. Ofcom does not consider it correct to apply an either/or approach, which proceeds on the assumption that if the service is a content service it cannot be an ECS, and if it is an ECS it cannot be a content service.
- 6.11 As outlined at paragraphs 3.3 to 3.5 above, 'Content services' are excluded from the definition of ECS: "... *"electronic communications service" means a service of any of the types specified in subsection (2A) provided by means of an electronic communications network, **except so far as it is a content service***"<sup>114</sup> (emphasis added). A content service, as defined in the Act,<sup>115</sup> is "so much of any service" as consists in either "the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network" and/or "the exercise of editorial control over the contents of signals conveyed by means of a such a network". Content services were not defined in the Framework Directive or the EEC Directive, but the definitions of ECS incorporated an exclusion in relation to content services along similar lines.
- 6.12 As both the Authorisation Directive and the EEC Directive make clear, the same service provider can provide both transmission services and content services simultaneously, alongside one another. Where that is the case, as the recitals to the Framework Directive make clear, "it is necessary to separate the regulation of transmission from the regulation of content".<sup>116</sup> Content regulation applies to the production of content, and transmission regulation applies to its transmission. This applies even where the transmission service and content service(s) are provided to the end-user together as part of a package or bundle of services.
- 6.13 That position was confirmed by the CJEU in *UPC v Hilversum*, which concerned a service consisting of the supply of a basic package of radio and television programmes via cable. The charge customers had to pay included transmission costs as well as payments to broadcasters and royalties paid to copyright collecting societies in connection with the transmission of programme content. One of the questions before the court was whether this service was an ECS and was therefore subject to the regulatory regime for electronic communications. The court decided that it was. It held that the service provided was an ECS "in so far as that service entails primarily the transmission of television content on the cable distribution network to the receiving terminal of the final consumer" (emphasis added).<sup>117</sup> Thus, insofar as the particular overall service provided by the relevant company

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<sup>114</sup> Section 32(2) and (2A) of the Act (see also paragraph 3.5 above).

<sup>115</sup> Section 32(7) of the Act (see also paragraph 3.5 above).

<sup>116</sup> [Framework Directive](#), recital (5).

<sup>117</sup> *UPC v Hilversum*, Operative §1.

met the test that the service consists wholly or mainly in the conveyance of signals on electronic communications networks, it qualified as an ECS. The fact that additional services were provided and charges made for those services did not dis-apply the application of the Framework Directive to the services that did fall within the definition of an ECS.

- 6.14 Moreover, the conclusion that the transmission service was an ECS did not result in the content carried by that service becoming exempt from content regulation rules. Rather, the content element of the service continued to be regulated as content, whereas the transmission element, i.e. the service by which that content was provided to end-users, was regulated as an ECS. The Court found that the relevant EU Directives “*make a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility. Content and transmission are covered by different measures which pursue their own specific objectives...*”.<sup>118</sup> This is underscored by Recital (11) of the EEC Directive, which states, *inter alia*, that “*the same undertaking, for example, a cable operator, can offer both an electronic communications service, such as the conveyance of television signals, and services not covered under this Directive, such as the commercialisation of an offer of sound or television broadcasting content services*”, and **additional obligations** could be applied to its activity as a content provider in accordance with a further regulatory regime (see paragraph 3.15 above).
- 6.15 In *UPC DTH*, the CJEU confirmed its decision in *UPC v Hilversum* and emphasised that “*the fact that the transmission of signals is by means of an infrastructure that does not belong to UPC is of no relevance to the classification of the nature of the service. All that matters in that regard is that UPC is responsible vis-à-vis end-users for transmission of the signal which ensures that they are supplied with the service to which they have subscribed*” (emphasis added).<sup>119</sup> The Court also made clear that “*the fact that that service includes a conditional access system ... is irrelevant*”.<sup>120</sup>
- 6.16 As addressed in more detail in paragraph 6.53 below in response to Sky's submissions, in our view, the *Skype* and *Gmail* cases do not introduce a different approach for ‘unified’ services:
- a) In *Skype*, the CJEU reiterated that to constitute an ECS, the service must include the conveyance of a signal and that “*all that matters in that regard is that that provider is responsible vis-à-vis the end-users for transmission of the signal which ensures that they are supplied with the service to which they have subscribed.*”<sup>121</sup> The Court went on to hold that, while *Skype* “*provides a bundle of services*”, some of which could not be classed as ECS, the ECS elements of that bundle of services were “*clearly distinct in their purpose and remain entirely autonomous in their operation.*”<sup>122</sup> Contrary to what

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<sup>118</sup> *UPC v Hilversum*, §41.

<sup>119</sup> *UPC DTH*, §43.

<sup>120</sup> *UPC DTH*, Operative §1.

<sup>121</sup> *Skype*, §29.

<sup>122</sup> *Skype*, §§42-43.

Sky suggests, however, it does not follow that a bundle of services can **only** entail both ECS and content services where these are entirely distinct and autonomous and that a bundled service such as Sky TV cannot be considered by reference to its constituent parts. There was simply no issue regarding the degree of 'unification' of the services in *Skype* – indeed, the term 'unified' does not even feature in the judgment. All *Skype* shows is that (i) a single operator can provide a range of services and (ii) if one of its services or one element of its overall service consists of wholly or mainly conveying signals, it will qualify as an ECS even if other of its services or elements of its overall service are not ECS. See further paragraph 6.53 below.

- b) In *Gmail*, the CJEU found that Gmail, a web-based (or OTT) email service which does not itself provide internet access, does not consist wholly or mainly in the conveyance of signals on electronic communications networks and therefore does not constitute an ECS. In essence, the Court found that as it is internet service providers ('ISPs') that provide connectivity for OTT email services, it was the ISPs that are providing ECS, rather than Gmail. In that case, however, Google conveyed the service over the internet on the basis of the 'best effort' principle. It did not exercise actual or legal control over the signal conveyance process or have responsibility for it.<sup>123</sup> Unlike Sky, Google thus was not responsible vis-à-vis end-users for transmission of the signal – that was the role of the end-users' respective ISPs. Contrary to what is suggested in the Sky March 2020 Submission, the CJEU's decision in *Gmail* did not turn on it being a 'unified' service. The Court did not make any finding that an operator's service must be treated in a unified manner. On the contrary, the CJEU focused on the Gmail service, despite noting that Google provides a range of other services, many of which qualify as ECS.<sup>124</sup> It was willing to consider different elements of Google's overall 'service' independently, to assess whether they qualified as ECS. See further paragraph 6.53 below.

- 6.17 For completeness, we note that the CJEU further considered this issue in *TV Play Baltic*<sup>125</sup> The Court's decision in that case was consistent with its previous rulings as to the separation between content regulation and the regulation of ECS.<sup>126</sup>
- 6.18 As such, Ofcom considers that there is no requirement to classify a pay TV provider's services as either an ECS or a content service in its entirety. Both may be elements of a

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<sup>123</sup> *Gmail*, §§21 & 33-37.

<sup>124</sup> *Gmail*, §§33 & 40.

<sup>125</sup> Case C-87/19 *TV Play Baltic AS v Lietuvos redijo televizijos komisija* (EU:C:2019:1063).

<sup>126</sup> *TV Play Baltic broadcast "packages of pay television channels in Lithuania by means of a satellite network owned by a third party for which it pays remuneration"* [§7]. The CJEU found that "activities of television rebroadcasting over satellite networks owned by third parties are not covered by the concept of 'provision' of an electronic communications network" [§24]. However, it held that TV Play Baltic could nonetheless be made subject to additional regulatory requirements (in that case, a "must carry" obligation) [§27] because "the directives which form part of the common regulatory framework ... are without prejudice to measures taken ... to pursue general interest objectives, in particular relating to content regulation and audiovisual policy, since that common framework does not apply to the content of services delivered over electronic communications networks" [§26; citing Case C-298/17 *France Télévisions* (EU:C:2018:1017), §17]. The CJEU emphasised that "it is not apparent from any evidence in the case file before the Court that it is necessary to assess activities of broadcasting television content, in the light of Article 31(1) of the Universal Service Directive, differently depending on whether they are provided via satellite or online" [§29].

bundle or package of services and, insofar as they are ECS, they may be governed by the relevant legal and regulatory framework, including the General Conditions set by Ofcom.

6.19 Thus, in summary, Ofcom's position is, in principle, that:

- a) A broadcasting transmission service is the means by which content is delivered to the consumer. The overall service or package of services provided to the consumer may include both a content service and a transmission service. These are not mutually exclusive categories – in that, the overall service or package of services need not be classified as either one or the other, but can encompass both elements. The relevant elements are susceptible to content regulation insofar as they comprise a content service, and to regulation as an ECS insofar as they are a transmission service, with both regulatory frameworks applying in parallel where appropriate.
- b) Ofcom therefore has the power to regulate a pay TV service provided to an end-user as an ECS insofar as there is a service, or an element of a bundled service, which consists wholly or mainly or primarily in the conveyance of signals on an ECN. As noted in the 2019 Statement (and above, at paragraph 5.3), whether a particular pay TV service falls within that scope will depend on the specific nature of the service in question, and the specific circumstances under which it is provided, which should be assessed on a case-by-case basis.<sup>127</sup>

## Ofcom's position on the application of the General Conditions to Sky's services

### Pay TV services provided by Sky

6.20 Sky has described Sky TV as a 'unified' service consisting of the provision of TV content to consumers on a subscription basis, including Sky's own content, linear TV channels licensed from third parties, and content provided on-demand. The service also encompasses a range of other elements, including hardware, software, conditional access, customer service, installation and repair services and transmission of content.<sup>128</sup>

6.21 The channels and content available via Sky TV are provided to its customers by a variety of different means. It can be delivered by satellite, broadband and mobile networks. Sky stated that it *"does not transmit, nor is it responsible for the transmission of, all the content delivered to Sky TV subscribers."*<sup>129</sup> Sky told us it transmits [redacted] the third party channels available on Sky TV,<sup>130</sup> with the broadcasters of [redacted] channels making their own arrangements for transmission. Where content is not delivered by satellite, for example

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<sup>127</sup> May 2019 Statement [SK05] paragraphs 3.4 and 3.7.

<sup>128</sup> Sky March 2020 Submission [SK12a] paragraph 52.

<sup>129</sup> Sky March 2020 Submission [SK12a] paragraph 79.

<sup>130</sup> Sky March 2020 Submission [SK12a] page 1 and see Annex 2.1 of Sky representations on 96A Notification [SK25d] for a list of third party channels as at 18 June 2021. In Annex 2.0 of Sky representations on 96A Notification [SK25c], Sky provided updated UK-only data which shows that in the UK [redacted] of third party channels that are retailed by Sky have their own transmission arrangements.

on-demand content downloaded to the set top box over the open internet, the content is transmitted by the customer's internet access service provider.

- 6.22 Nevertheless, for Sky's wholly-owned channels (which Sky itself describes as being "*at the heart of Sky TV*"),<sup>131</sup> transmission of the content shown on those channels is provided by [X] and transmitted over [X]. Sky is responsible for ensuring that transmission of these channels to the end-users subscribed to them is effective. Specifically, the content is transmitted via a satellite uplink and downlink to the satellite dish at the subscriber's premises, and from there via wiring to the Sky set-top box. In addition, Sky also provides transmission for [X] third-party channels that are carried on Sky TV, [X].<sup>132</sup>
- 6.23 For the reasons explained below, in Ofcom's view, the transmission services which deliver Sky's pay TV services (whether via Sky's own infrastructure or a third party's) constitute an ECS to which the obligation to provide end-of-contract notifications applies.

### OTT services

- 6.24 As acknowledged in the 2019 Statement, genuine OTT services (including Sky's NOW TV service), which rely on the open internet for conveyance, do not fall within the scope of ECS as defined in the Act. As such, they are not subject to the obligation to provide end-of-contract notifications (but information about such services which form part of a bundle with a service to which the obligation applies may need to be included within an end-of-contract notification for that service).

### Sky provides, *inter alia*, ECS and content services

- 6.25 For the reasons explained at paragraphs 6.10 to 6.18 above, Ofcom is not required to classify Sky's pay TV services as either an ECS or a content service in its entirety. Both are elements of its bundle of services and, insofar as they are ECS, they are governed by the relevant legal and regulatory framework, including the General Conditions set by Ofcom. As noted at paragraph 6.19 above, insofar as a pay TV service includes a means of transmitting the content to the end-user over an ECN, that transmission service is susceptible to regulation as an ECS.
- 6.26 Ofcom considers that Sky's satellite transmission network constitutes a transmission system for the conveyance of signals by the use of electrical, magnetic or electro-magnetic energy.<sup>133</sup> As such, Sky's satellite transmission network constitutes an ECN as defined in the General Conditions and underlying legal framework.
- 6.27 In order to access Sky's pay TV services, end-users enter into Sky's Digital Subscription Contract or the Sky Q Contract, which govern the contractual terms for the supply of such

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<sup>131</sup> Sky March 2020 Submission [SK12a] paragraph 70.

<sup>132</sup> Sky March 2020 Submission [SK12a] paragraph 84.

<sup>133</sup> See the definitions of ECN in Article 2a of the [Framework Directive](#) and Article 2(1) of the [EECC Directive](#), which explicitly reference satellite networks.

services.<sup>134</sup> Ofcom considers that such end-users constitute Subscribers as defined in the General Conditions.

- 6.28 Sky is therefore responsible vis-à-vis its subscribers for transmission of the signal which ensures that they are supplied with the Sky pay TV services to which they have subscribed. Even if the transmission of these signals is by means of an infrastructure that does not belong to Sky, *UPC DTH* makes clear that this is of no relevance.<sup>135</sup>
- 6.29 The transmission service provided by Sky to its subscribers constitutes an ECS: it is a service which has as its principal feature, or it consists wholly or mainly of, the conveyance of signals by means of an ECN. It therefore falls within the definitions applied under the Act, the Framework and EECC Directives and the General Conditions.
- 6.30 Further, Sky's pay TV services include the transmission of content to end-users over an ECN, namely Sky's wholly owned channels and certain third party channels carried on Sky TV. This element of Sky's pay TV service may be subject to appropriate content regulation. But the fact that Sky is also a provider of content does not preclude its ECS from being subject to appropriate regulation, including obligations imposed on ECS providers to protect the interests of consumers.
- 6.31 For these reasons, we consider that Sky's pay TV services are an ECS. Those services are provided to members of the public and, as such, constitute a PECS as defined in the Act and General Conditions.<sup>136</sup>

### **Sky's contracts contain a Commitment Period and automatically continue after the expiration of that period:**

- 6.32 Both Sky's Digital Subscription Contract and the Sky Q contract contain a minimum term of 12 to 18 months,<sup>137</sup> beginning on the date that the end-user can receive the pay TV service and ending either 12 or 18 months later. During this period (i) Sky is obliged to provide the services<sup>138</sup> and (ii) the end-user:
- a) is required to pay a monthly subscription fee for the pay TV services;<sup>139</sup> and
  - b) may not terminate the contract (unless Sky break any of the conditions contained in the contract) without incurring an early termination charge.<sup>140</sup>

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<sup>134</sup> See paragraph 2.6 above and Annex A2 below.

<sup>135</sup> See 6.15 above.

<sup>136</sup> General Condition 1.21 applies in respect of all subscriber contracts for PECS except for machine-to-machine transmission services. Sky's pay TV services are provided to members of the public; they are not machine-to-machine transmission services.

<sup>137</sup> See paragraph 2.6 above, A2.11 (Sky's Digital Subscription Contracts) and A2.19 (Sky Q).

<sup>138</sup> See paragraph 2.5 above.

<sup>139</sup> See paragraph 2.6, A2.4 (Sky's Digital Subscription Contract) and A2.13 (Sky Q).

<sup>140</sup> See paragraphs A2.7 and A2.8 (Sky's Digital Subscription Contract) and A2.18 for (Sky Q).

Ofcom considers that this constitutes a Commitment Period as defined in the General Conditions.<sup>141</sup>

- 6.33 The terms of Sky's Digital Subscription Contract and the Sky Q Contract each provide for the contracts to be automatically prolonged after the expiry of the minimum term contained in the contract.<sup>142</sup>

## Sky must comply with the end-of-contract obligations

- 6.34 In light of the reasoning and findings set out above in this section, we have concluded that Sky's pay TV services which rely in whole or in part on a digital satellite transmission service are ECS and that Sky must therefore comply with General Conditions C1.21 to C1.29 in respect of those services. For the same reasons, we have also concluded that Sky was required to comply with the obligations that were in force between 15 February 2020 and 16 December 2021, then found at General Conditions C1.10 to C1.15.

## Sky's submissions in response to the section 96A notification

- 6.35 In the rest of this section, we set out the arguments made by Sky in its written<sup>143</sup> and oral<sup>144</sup> representations to Ofcom in response to the notification given under section 96A of the Act in relation to Ofcom's proposed decision that Sky provides an ECS, to which the end-of-contract notification obligation should apply to.<sup>145</sup> We organize Sky's submissions by reference to the list of errors it said Ofcom had committed in its representations on the section 96A notification (the 'Sky s.96A Submissions').<sup>146</sup> We also set out Ofcom's response to these representations, with reference to our conclusions in this Confirmation Decision and explanatory statement.

## Sky considers that Ofcom has applied the wrong legal test – Alleged Error 1

- 6.36 Sky claims that Ofcom failed to identify and apply the correct legal test in the section 96A Notification.<sup>147</sup> Sky argues that the core test which must be satisfied for a service to be an ECS is that it 'consists wholly or mainly in the conveyance of signals', or it must consist of or have it as its "principal feature"— as per Article 2(4)(c) of the EECC Directive, Article 2(c) of the Framework Directive, and section 32 of the Act.<sup>148</sup> Sky also refers to the language used by the CJEU in *UPC v Hilversum*, where the Court found that a cable package was an ECS

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<sup>141</sup> See the definitions of "Commitment Period" (in the General Conditions applicable from 17 December 2021) and "Fixed Commitment Period" (in the General Conditions applicable from 15 February 2020 to 16 December 2021) set out at footnote 15 above.

<sup>142</sup> See paragraph 2.6, A2.5 (Sky's Digital Subscription Contract) and A2.17 (Sky Q).

<sup>143</sup> Sky's representations on 96A Notification [SK25a–SK25g] and Sky's points of clarification, 16 November 2021 [SK27].

<sup>144</sup> Oral hearing transcript [SK26].

<sup>145</sup> Ofcom's Section 96A Notification [SK24].

<sup>146</sup> Sky's representations on 96A Notification [SK25a] paragraph 3(a).

<sup>147</sup> Sky's representations on 96A Notification [SK25a] paragraphs 4–10 and Oral hearing transcript [SK26], page 12.

<sup>148</sup> Sky's representations on 96A Notification [SK25a] paragraph 4 and Oral hearing transcript [SK26], pages 4-5.

*"insofar as that service entails primarily"* the transmission of television content via an ECN to the final consumer.<sup>149</sup>

- 6.37 Sky alleges that Ofcom *"consistently and erroneously identifies the legal test for whether a service is an ECS as whether it 'includes' or 'involves' the conveyance of signals"*.<sup>150</sup> Sky acknowledges that the inclusion of an element of transmission is necessary for a service to be an ECS, but it says that it is not sufficient in of itself; and that Ofcom applied the wrong test.<sup>151</sup> However, it says that Ofcom *"nowhere asks whether Sky TV 'consists wholly or mainly' in the transmission of signals, nor whether the service 'consists in or has as its principal feature' the conveyance of signals, nor whether Sky TV 'entails primarily' the transmission of television content."*<sup>152</sup> Sky then submits that Sky TV does not wholly or mainly consist in the conveyance of signals for the reasons given in the Sky March 2020 Submission (see paragraph 5.10 above).<sup>153</sup> Those arguments rest on the submission that Sky TV is primarily a content service (see paragraph 5.11 above and paragraphs 6.57 to 6.58 below).<sup>154</sup>

## Ofcom's response

- 6.38 We do not accept that Ofcom has identified or applied the wrong legal test for whether a service constitutes an ECS.
- 6.39 Sky takes issue with Ofcom's use of language in the section 96A Notification as it states the service constitutes an ECS because it 'includes' or 'involves' the conveyance of signals on an ECN;<sup>155</sup> and says that Ofcom should have applied the 'wholly or mainly' test.<sup>156</sup>
- 6.40 The terminology used in the section 96A Notification reflects the language used in the European case law which has applied and interpreted the ECS definition. In particular, at paragraph 44 of the *UPC v Hilversum* case, the Court found that the service at issue in that case *"falls within the definition of electronic communications service and, therefore, the substantive scope of the NRF, in so far as that service includes the conveyance of signals on the cable network."*
- 6.41 This passage from *UPC v Hilversum* was relied upon in the section 96A notification to make the point that the services provided by a company like Sky do not need to exclusively involve the conveyance of signals, such as a transmission service, within the meaning of Article 2(c) of the Directive, or section 32 of the Act. That is why Ofcom referred to Sky's services including or involving transmission services, as it is recognised that Sky provides *other* services alongside those services. As outlined at paragraph 6.16 above, the core point made by the case-law is that the substantive obligations which apply to the provision

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<sup>149</sup> Sky's representations on 96A Notification [SK25a], paragraph 5 and Oral hearing transcript [SK26], pages 7-8.

<sup>150</sup> Sky's representations on 96A Notification [SK25a], paragraph 6.

<sup>151</sup> Sky's representations on 96A Notification [SK25a], paragraph 9 and Oral hearing transcript [SK26], page 10.

<sup>152</sup> Sky's representations on 96A Notification [SK25a], paragraph 7.

<sup>153</sup> Sky's representations on 96A Notification [SK25a], paragraph 10 and Oral hearing transcript [SK26], page 12.

<sup>154</sup> Sky's representations on 96A Notification [SK25a], paragraphs 3(c) and 23–24 and Annex 2.0 of Sky's representations on 96A notification [SK25c], page 2.

<sup>155</sup> Sky's representations on 96A Notification [SK25a], paragraph 6.

<sup>156</sup> Sky's representations on 96A Notification [SK25a], paragraphs 4-5.



of an ECS apply to a service provider *insofar* as their service includes the conveyance of signals. The fact that a company like Sky provides *additional* or *other* services does not remove their obligations as an ECS provider, see further paragraph 6.55 below.

- 6.42 For the avoidance of any doubt, Ofcom has made clear at paragraph 6.19 above that it is satisfied that Sky pay TV provides a service which consists wholly or mainly, or has as its principal feature or is primarily a service involving the conveyance of signals, which is in this case a transmission service. That test has been applied insofar as Sky's pay TV services include a service consisting of the conveyance of signals, recognising that Sky provides other services.
- 6.43 In practice, Sky's Alleged Error 1<sup>157</sup> raises the same core point made in the Sky March 2020 Submission, and which is addressed in more detail below. Sky's core point is that its pay TV services are primarily 'content' rather than 'transmission' services with the effect that the obligations which attach to an ECS do not apply to it.<sup>158</sup> That point is wrong for the reasons given at paragraphs 6.10 to 6.19 above, and developed at paragraphs 6.57 to 6.58 below.

## **Sky believes that Ofcom is wrong to disaggregate its services into separate services, including transmission and content services – Alleged Error 2**

- 6.44 Sky believes that Ofcom was wrong to disaggregate the content and transmission elements of its service;<sup>159</sup> that its service should be considered as a 'unified' service<sup>160</sup> and the 'wholly or mainly' (or 'principal feature') test should be applied to that unified service as a whole.<sup>161</sup> In the Sky s.96A Submissions, Sky argues that the legislative application of a 'wholly or mainly' test implicitly assumes that there can be multiple features of the service, some of which do, and some of which do not, constitute transmission. Where that is the case, an evaluation must take place to determine whether transmission is the whole or main element.<sup>162</sup> By contrast, Sky submits that Ofcom's approach seeks to deconstruct a single service into multiple elements, and then to disregard all those elements other than transmission. Were this approach correct, however, there would never be any cause to identify what is the whole or main element of a service. Sky therefore submits that Ofcom's approach is inconsistent with, and indeed nullifies, the "wholly or mainly" test.<sup>163</sup> Applying the test that way, Sky says, it is clear that their pay TV service is primarily about the content, not transmission.<sup>164</sup> Sky relies on its own interpretation of the key case-law,<sup>165</sup> in this regard, referred to where relevant below.

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<sup>157</sup> Sky's representations on 96A Notification [SK25a], paragraphs 4–10 and Oral hearing transcript [SK26], pages 5–7 and 12.

<sup>158</sup> Sky March 2020 submission [SK12a], pages 1–2.

<sup>159</sup> Sky's representations on 96A Notification [SK25a], paragraph 11–12 and Oral hearing transcript [SK26], page 12.

<sup>160</sup> Sky's representations on 96A Notification [SK25a], paragraph 19(b) and Oral hearing transcript [SK26], pages 12-13.

<sup>161</sup> Sky's representations on 96A Notification [SK25a], paragraphs 13–15 and Oral hearing transcript [SK26], pages 5 and 11-12.

<sup>162</sup> Oral hearing transcript [SK26], page 5.

<sup>163</sup> Sky's representations on 96A Notification [SK25a], paragraph 12 and Oral hearing transcript [SK26], page 9.

<sup>164</sup> Annex 1 of Sky's representations on 96A Notification [SK25b], pages 1–2 and Oral hearing transcript [SK26], pages 12-13.

<sup>165</sup> Oral hearing transcript [SK26], pages 7–11.

## Ofcom's response

- 6.45 We consider that Sky's position on this point ignores the wording of the recitals to the various Directives, and the wording of the key definitions of ECS in the Act, Directives and General Conditions.
- 6.46 As outlined above, the Recitals to the Framework Directive and Competition Directive make clear that the new single regulatory framework was intended to cover all transmission networks and services.<sup>166</sup> This was due to the convergence of telecommunications, media and information technology sectors. To that end, the new definitions of ECN and ECS brought together under "**one single definition all electronic communications services and/or networks which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means (i.e. fixed, wireless, cable television, satellite networks). Thus, the transmission and broadcasting of radio and television programmes should be recognised as an electronic communication service...**"<sup>167</sup> (emphasis added).
- 6.47 The introduction of this single regulatory framework for transmission networks and services did not, however, ignore the fact that a cable operator may offer other services. See paragraphs 3.15 to 3.16 above. Indeed, the Directives recognised in terms that:
- "The same undertaking, for example a cable operator, can offer both an electronic communications service, such as the conveyance of television signals, and services not covered under this Directive, such as the commercialisation of an offer of sound or television broadcasting content services, and therefore additional obligations can be imposed on this undertaking in relation to its activity as a content provider or distributor".*<sup>168</sup> (Emphasis added.)
- 6.48 Reflecting this, the distinction between services that qualify as ECS and content services is plain from the wording of the definitions of ECS under the Directives, the Act and therefore the General Conditions. For example, and ease of reference, the current version of section 32(2) of the Act provides that: "**electronic communications service**" means a service of any **of the types specified in subsection (2A) provided by means of an electronic communications network, except so far as it is a content service**" (emphasis added). Section 32(2A) provides:
- (2A) Those types of service are—
- (a) an internet access service<sup>[169]</sup>
- (b) a number-based interpersonal communications service,<sup>170</sup> and

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<sup>166</sup> Framework Directive, recital (5).

<sup>167</sup> Competition Directive, recital (7).

<sup>168</sup> Authorisation Directive, recital (20) and EEC Directive, recital (11).

<sup>169</sup> The term 'internet access service' is defined in section 32(2B) of the Act.

<sup>170</sup> The term 'number-based interpersonal service' is defined in section 32A of the Act.

*(c) any other service consisting in, or having as its principal feature, the conveyance of signals, such as a transmission service used for machine-to-machine services or for broadcasting.”*

- 6.49 As set out at paragraphs 3.3 to 3.5, 3.7 and 3.12 above, the previous definition of ECS in the Act, and the definition used in the Directives, contained essentially the same exclusion of content services from its scope of application. The tests of “consisting of” or “principal feature”, or “wholly or mainly” or “principally”, are used to determine whether a service is of a certain type provided by means of an ECN. An operator may provide multiple services of the type falling within the definition. However that test is not applied, expressly, to a cable operator’s service insofar as it falls within the definition of a content service. This is supported by the repeated references to content services and ECS being subject to different regulatory frameworks (see paragraphs 3.8 to 3.10 above).
- 6.50 None of the relevant provisions of the legislation state that the test applies in the way Sky advocates for, namely that: an assessment must be done of the totality of the cable operator’s service, i.e. including, in particular, its transmission and content services, and a judgment made of what the totality wholly or mainly consists of.<sup>171</sup> Nor does the legislation support the conclusion that once the wholly or mainly test, or the test in its various forms, is applied, only one regulatory framework can apply to govern the operator’s actions vis-à-vis, *inter alia*, its consumers.
- 6.51 In the relevant part of its submissions, Sky does not engage with the wording of the legislation. Instead, it relies on an incorrect interpretation of the case-law to support its position, which is addressed below.
- 6.52 This does not mean, however, that the “wholly or mainly” or “consisting of” or “principal feature” tests have no meaning. As is plain from, for example, the wording of the current version of section 32, these tests are the means by which other types of ECS are identified.
- 6.53 In Ofcom’s view, the case-law supports its interpretation of the regulatory framework, see paragraphs 6.16 to 6.18 above. In addition, we note the following points on the case-law to which Sky refers.
- a) *Gmail*: In paragraphs §§30-31 of *Gmail* the Court referred expressly to the need to “*separate the regulation of transmission from the regulation of content*”, and that the Framework and other Directives, “*make a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility, content and transmission being covered by different measures which pursue their own specific objectives*”, referring to *UPC v Hilversum* and *UPC DTH*. Contrary to Sky’s submission, Ofcom does not misread the Court’s judgment in this case. As outlined at paragraph 6.16 above, this judgment turned on the fact that it was not possible to establish Google’s responsibility vis-à-vis those holding an email account with Gmail for the conveyance of signals necessary for that account’s functioning (§38).

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<sup>171</sup> Sky’s representations on 96A Notification [SK25a], paragraph 12 and Oral hearing transcript [SK26], page 5.

- b) *UPC v Hilversum*: Sky's position that the transmission element of their services should be excluded from regulation as an ECS where it is attached to a larger content service is contrary to the central reasoning of the Court in *UPC v Hilversum* at §§41, and 43-45, where the Court said this interpretation would "*considerably reduce the scope of the NRF, undermine the effectiveness of its provisions and therefore compromise the achievement of the objectives pursued by that framework*" and that "*the exclusion of the activities of an undertaking such as UPC from its scope, on the pretext that it does not restrict itself to conveying signals, would deprive the NRF of all meaning.*"
- c) *UPC DTH*: Ofcom's position is not, contrary to the Sky s.96A Submissions, incompatible with *UPC DTH*.<sup>172</sup> That case concerned the supply of a package of satellite broadcast services where access to the programmes comprising those services were controlled by means of a conditional access system. The referring Court had been operating under the premiss that an ECS and a conditional access system must be mutually exclusive. The CJEU explained in its ruling that this premiss was incorrect, that a conditional access system constitutes a means of accessing the broadcast content, but it was not enough on its own to provide such access; that access would also rely on the transmission of signals over an ECN. In those circumstances, where the same operator is providing both the underlying supply service and the conditional access system, the conditional access system "*may be attached to an [ECS] for the broadcasting of radio or television programmes without that service losing the status of [ECS]*". This simply demonstrates that it does not follow from the existence of an additional service or ancillary element that a service cannot meet the definition of an ECS. This does not provide any support for Sky's contention that where a transmission service is provided alongside a content service, the transmission service should lose its status of ECS.<sup>173</sup> Indeed, the judgment of the Court states the opposite at §36, referring to *UPC v Hilversum*, "*... the Framework Directive makes a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility. The Court stated [in UPC v Hilversum<sup>174</sup>] that content and transmission are covered by different measures which pursue their own specific objectives.*"
- d) *SkypeOut*: Sky contends that this judgment, *SkypeOut*, provides a "*strong indicator*" that where services are not clearly distinct or entirely autonomous, but rather part of a unified service, they should be assessed as such.<sup>175</sup> It provides no such indicator. At §43, the Court did find that the SkypeOut feature of the Skype software was 'clearly distinct' and 'entirely autonomous' in its operation. However, its conclusion on the application of the definition of ECS supports our approach, and not Sky's submissions. The Court went on to find that the SkypeOut feature constituted an ECS because it consisted of the transmission of voice signals over an ECN and Skype must be regarded as assuming

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<sup>172</sup> Sky's representations on 96A Notification [SK25a], paragraph 13.

<sup>173</sup> Annex 1 of Sky's representations on 96A Notification [SK25b], pages 1-3.

<sup>174</sup> The Court refers to this case as "*UPC Nederland*".

<sup>175</sup> Sky's representations on 96A Notification [SK25a], paragraph 16 and Oral hearing transcript [SK26], pages 9-10.

responsibility vis-à-vis its subscribers for the transmission of those signals, within the meaning of the *UPC DTH* judgment. The fact that Skype provided “a bundle of services” did not alter this conclusion. The Court did not address nor find that the definition of an ECS may only be applied to a bundle of services that can be divided into clearly distinct or entirely autonomous services. Moreover, this judgment did not address the correct approach to content services.

6.54 At the oral hearing, Sky maintained that its pay TV services do not comprise two separate services, arguing:

*“Sky doesn’t contract separately with users as if they were two separate services and they’re not separable in any meaningful sense at all. No one wants a DTH transmission service without content; it would be utterly pointless. So there is no sense in which to use the words of the European Court in Skype, transmission is ‘clearly distinct in [its] purpose and ... entirely autonomous in [its] operation’. It isn’t remotely that; it is integrally bound up with the provision of content.”<sup>176</sup>*

6.55 We consider that the fact that Sky has chosen for commercial reasons to combine transmission and content into a single customer package in this way should not prevent its transmission service from being recognised as an ECS, applying the clear carve out for content services provided for expressly in the legislation (see paragraph 3.5 above).

6.56 Lastly, as regards Sky’s ‘unified service’ arguments, Sky also relies on recital (33) of the Digital Content and Digital Services Directive,<sup>177</sup> and paragraph 215 of the EU Commission Guidelines on Vertical Restraints.<sup>178</sup> We do not consider either of these documents to be of relevance to the matters under consideration in this investigation, which concern the correct interpretation of the relevant provisions of the Act.

### **Sky believes Ofcom failed to appreciate that Sky TV is a content service – Alleged Error 3**

6.57 Sky asserts Ofcom has failed to appreciate that Sky TV is a content service.<sup>179</sup> Sky explains that its service includes TV channels and on-demand content over which it exercises editorial control.<sup>180</sup> This, Sky says, is to be contrasted with the services considered in the *UPC v Hilversum* and *UPC DTH* cases, where UPC did not produce or exercise editorial control over any of the content that it transmitted as part of its services. As a content service, Sky says Sky TV is excluded from the definition of an ECS.<sup>181</sup>

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<sup>176</sup> Oral hearing transcript [SK26], page 12.

<sup>177</sup> Sky’s representations on 96A Notification [SK25a], paragraph 22(b).

<sup>178</sup> Sky’s representations on 96A Notification [SK25a], paragraph 22(c).

<sup>179</sup> Sky’s representations on 96A Notification [SK25a], paragraph 3(c).

<sup>180</sup> Sky’s representations on 96A Notification [SK25a], paragraph 23.

<sup>181</sup> Sky’s representations on 96A Notification [SK25a], paragraph 24.

## Ofcom's response

6.58 We have addressed this point in detail at paragraphs 6.10 to 6.19 above. The fact that Sky provides a content service, by exercising editorial control over some of the content it transmits, does not mean that its transmission service cannot fall within the definition of an ECS. Indeed, Sky fails to explain how such an approach would be consistent with the express wording of the legislative framework, and its object and purpose. In particular, there is no reason why the regime would wish to provide pay TV subscribers with end of contract notifications to enable switching where the cable operator does not produce its own channels, but would not wish to do so when an operator like Sky does also exercise editorial control over some or all its channels. It would be wrong in principle if, by combining two types of services, the provider of such services would be able to escape regulatory requirements applying in respect of either constituent element.

## Sky's argument that Ofcom's interpretation of the legal framework breaches the principle of equal treatment by creating competitive distortions – Alleged Error 4

- 6.59 In essence, Sky's argument on this point is that it is not fair that Sky's pay TV services are subject to regulation as an ECS when the online content services provided by companies such as Netflix, Amazon Prime and Disney+, are not.<sup>182</sup> Sky says that [S<].<sup>183</sup> Sky also says that Ofcom has erred in this regard by failing to properly apply the "wholly or mainly" test.<sup>184</sup>
- 6.60 For the reasons explained at paragraphs 6.38 to 6.43 above, Ofcom has not failed to apply the correct test. The terms of the legislation make clear its scope and the types of services covered by it: traditional pay TV services which include the conveyance of signals on an ECN are in scope, whereas OTT services, which do not include any conveyance of signals, are out of scope. These services are not treated as functionally equivalent for the purposes of the regulatory framework. Sky is subject to regulation as a provider of ECS because it is responsible for the conveyance of signals over an ECN to its subscribers. Netflix, Amazon Prime and Disney+ are all 'OTT' content services, where the end-users' ISPs are responsible for the transmission of signals over the internet, not Netflix, Amazon or Disney.
- 6.61 By focusing on OTT content providers, Sky ignores the fact that other providers of traditional pay TV services over an ECN, such as Virgin Media, BT and TalkTalk are subject to the regulatory obligation to send ECNs to their customers. If they were subject to the obligation and Sky were not, this would create a competitive distortion between Sky and its traditional pay TV competitors. It is notable in this regard that, relying on Sky's own data, Sky has by far the largest number of subscribers of providers of traditional pay TV services.

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<sup>182</sup> Sky's representations on 96A Notification [SK25a], paragraphs 25-34 and Sky's points of clarification [SK27].

<sup>183</sup> Sky's representations on 96A Notification [SK25a], paragraph 33.

<sup>184</sup> Sky's representations on 96A Notification [SK25a], paragraph 26.

**Table 1: Number of subscribers to traditional pay TV service providers**

<b>Traditional pay TV service providers</b>	<b>Number of subscribers (Q1 2021) (millions)</b>
<b>Sky</b>	8.2
<b>Virgin Media</b>	3.4
<b>BT</b>	1.6
<b>TalkTalk</b>	1.0

*Source: Sky representations on 96A Notification of 9 July 2021 [SK25a], page 13.*

## **Conclusion**

6.62 Nothing in Sky's written or oral representations affects our conclusions that Sky's pay TV services constitute an ECS and therefore can be made subject to Ofcom's General Conditions. Sky is responsible for the end-to-end transmission of the signal carrying its pay TV content to its subscribers over an ECN. As such, it is an ECS and within scope of the legislative framework.

## 7. Sky's failure to comply with the obligation to provide end-of-contract notifications

- 7.1 For the reasons set out in section 6 above, Ofcom has concluded that Sky is required to comply with General Condition C1.21 to C1.29 in respect of its pay TV services. Ofcom has also concluded that Sky was required to comply with the obligations that were in force between 15 February 2020 and 17 December 2021, then found at General Condition C1.10 to C1.15.
- 7.2 Given that the relevant requirements in General Condition C1 came into force on 15 February 2020, and our Guidance<sup>185</sup> set out that we expect notifications to be sent between 10 and 40 days before the end of the subscriber's contract, Ofcom considers that Sky should have been sending end-of-contract notifications to subscribers whose contracts expired on or since 26 March 2020 (i.e. 40 days after 15 February 2020).
- 7.3 As set out in this section, Ofcom is satisfied that Sky has contravened, and continues to contravene, its obligations to provide end-of-contract notifications under General Condition C1 in respect of its pay TV customers, with adverse impacts for those customers.

### Sky has not sent end-of-contract notifications to its relevant pay TV customers

- 7.4 On 11 September 2019, Sky informed Ofcom that it did not intend to implement Ofcom's May 2019 decision, and the new obligations in the General Conditions it imposed, in respect of its pay TV services, on the grounds that it did not consider Sky TV fell within the definition of an ECS.<sup>186</sup>
- 7.5 In subsequent correspondence, the meeting held between Ofcom and Sky on 28 February 2020, the Sky March 2020 Submission, and its written and oral representations in response to the section 96A notification, Sky maintained its position that its pay TV services did not fall within the definition of an ECS and, as such, were not covered by the obligations under General Condition C1.10.<sup>187</sup>
- 7.6 In the information request dated 19 February 2021, Ofcom asked Sky to confirm the position with respect to end-of-contract notifications sent to customers who obtain both pay TV services and broadband/landline services from Sky. In its response of 5 March 2021,

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<sup>185</sup> [Ofcom's Guidance under General Condition C1 – contract requirements](#) [SK23a].

<sup>186</sup> Letter dated 11 September 2019 from Matthew Braovac (Director of Legal – Consumer, Corporate and Competition, Sky) to Lindsey Fussell (Consumer Group Director, Ofcom) [SK06].

<sup>187</sup> Letter dated 11 February 2020 from Lindsey Fussell (Consumer Group Director, Ofcom) to Matthew Braovac (Director of Legal – Consumer, Corporate and Competition, Sky) [SK07]. February 2020 meeting [SK10]. Letter dated 6 March 2020 from Claire Canning (General Counsel, Sky) to Lindsey Fussell (Consumer Group Director, Ofcom) [SK11]. Sky March 2020 Submission [SK12a], Sky's representations on 96A notification [SK25a] and Oral hearing transcript [SK26].



Sky confirmed that end-of-contract notifications sent to such customers would relate to their broadband/landline services only.<sup>188</sup>

- 7.7 Ofcom therefore understands that Sky has not sent end-of-contract notifications to its customers in respect of its pay TV services. This is supported by a number of complaints received by Ofcom's Customer Contact Team from customers of Sky's pay TV services since the requirements came into effect on 15 February 2020, each of which state that Sky failed to notify them that their Sky TV contracts were due to expire.<sup>189</sup>
- 7.8 As such, Ofcom is satisfied that Sky has failed and continues to fail to comply with its obligations to provide end-of-contract notifications under General Condition C1 in respect of its customers of pay TV services.

## The impact of the failure to send end-of-contract notifications

- 7.9 In failing to send end-of-contract notifications, Sky has failed to provide to affected customers information that would (i) enable them to make more informed decisions about their pay TV services, and/or (ii) prompt them to do so.
- 7.10 In response to our information request, Sky told us that as of 31 December 2020 there were [X] Sky customers whose Commitment Period for pay TV services had expired on or after February 2020.<sup>190</sup> It also said that, in 2021, the Commitment Period for pay TV services was due to expire for approximately an additional [X] Sky customers.<sup>191</sup> As of the date of this decision in 2022, there will have been [X] whose Commitment Period will have expired during the period between January 2022 and that date.
- 7.11 Ofcom considers that the availability of transparent, up-to-date and comparable information on offers and services is important for consumers in competitive markets where several providers offer services.<sup>192</sup> In order to take full advantage of the competitive environment, consumers should be enabled to make informed choices and change providers when it is in their best interest to do so.<sup>193</sup>
- 7.12 It follows that Sky's failure to comply with its obligations to provide end-of-contract notifications under General Condition C1 in respect of customers of its pay TV services has had, and is likely to continue to have, an adverse impact on many of its customers. It limits the availability of transparent, accurate and timely information on switching, thereby inhibiting end-user confidence in switching and/or making them less willing and able to

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<sup>188</sup> Sky's response to question 4 in document *Sky's response to questions 1 to 4 of Ofcom's Information Request dated 5 March 2021* [SK20].

<sup>189</sup> Note of disclosable complaints made to Ofcom's Consumer Contact Team regarding Sky TV end-of-contract or out-of-contract notifications from February 2020 to 30 April 2021 [SK18].

<sup>190</sup> Sky's response of 22 March 2021 to questions 5 and 6 of Ofcom's Information request dated 19 February 2021 [SK22].

<sup>191</sup> Sky's response of 22 March 2021 to questions 5 and 6 of Ofcom's Information request dated 19 February 2021 [SK22].

<sup>192</sup> See also the [EECC Directive](#), recital 265.

<sup>193</sup> [EECC Directive](#), recital 273.

engage actively in the competitive process.<sup>194</sup> This means it is likely that Sky's customers have paid more for their pay TV services than they would have done if they had switched to a more competitive deal offered by Sky or one of its competitors. It is precisely this type of harm to consumers which the end-of-contract notifications were introduced to avoid or reduce.

## Conclusion

- 7.13 For the reasons set out above, we have concluded that Sky has failed to comply with the obligation to provide end-of-contract notifications to customers of its pay TV services. Our Confirmation Decision under section 96C of the Act to that effect is set out at Annex A1 to this explanatory statement.
- 7.14 In reaching this decision (and in considering what steps Sky should now be required to take, as described in section 8 below), we have taken account of our statutory duties under sections 3 and 4 of the Act including, in particular, our principal duty of furthering the interests of citizens in relation to communications matters and the interests of consumers in relevant markets, where appropriate by promoting competition.
- 7.15 As required by section 2B of the Act, we have also had regard to the statement of strategic priorities prepared by the Secretary of State and designated for the purposes of section 2A of the Act, so far as that statement relates to telecommunications.<sup>195</sup> Of particular relevance to our decision are the strategic priorities set out in the statement of addressing the difficulties that consumers experience in navigating the communications market by giving them the right data, information and support to boost their engagement, and of removing barriers that consumers face to switching products and services (see paragraph 46 of the statement).

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<sup>194</sup> On 6 May 2022, Ofcom published '[End-of-Contract Notifications: An ex-post evaluation of the impact of the introduction of end-of-contract notifications on re-contracting and pricing for broadband services](#)' (An ex-post evaluation of end-of-contract notifications) [SK33]. Using econometric techniques, this analysis provided evidence that end-of-contract notifications increased re-contracting among broadband customers after the requirement to send notifications came into effect in February 2022, and that some of this increase in re-contracting in the broadband market could be directly attributed to the policy, rather than external factors. These findings followed Ofcom's research published in November 2021 that found that the number of broadband customers who are 'out of contract' fell from 8.7 million (40%) in 2019 to 7.4 million (35%) in 2020.

<sup>195</sup> [Statement of Strategic Priorities](#), Department for Digital, Culture, Media and Sport, designated on 29 October 2019 [SK38].

## 8. Remedies

8.1 Ofcom's Confirmation Direction directs Sky to take all steps necessary to comply with Condition C1.21 to C1.29 in relation to its pay TV customers. In this section, we outline the remedy that Sky is required to implement, and why we consider it to be appropriate. We also explain why we have not imposed a penalty in relation to the breach outlined in Section 7.

### Remedy

#### Steps that Sky must take to comply with the end-of-contract notification requirements in General Conditions C1.21 – C1.29

- 8.2 Sky must take all necessary steps to comply with the end-of-contract notification requirements in General Conditions C1.21 to C1.29 in relation to its customers of pay TV services, starting no later than nine months from the date of the Confirmation Decision in Annex A1.
- 8.3 Ofcom considers the nine month period granted to Sky to achieve compliance to be appropriate. In particular, we consider that this period gives Sky a reasonable amount of time to implement the end-of-contract notification requirements and is consistent with the period given to communications providers to implement the end-of-contract notification requirements by the 2019 Statement.<sup>196</sup> Our Guidance<sup>197</sup> on General Condition C1 provides that end-of-contract notifications should be sent between 10 and 40 days before the expiry of the subscriber's contract. In accordance with this, we expect Sky to send notifications for contracts that expire on or after nine months plus 40 calendar days after the date of the Confirmation Decision.
- 8.4 In addition, Sky must provide Ofcom with a progress report on the implementation of the remedy no later than four months following the date of the Confirmation Decision. The progress report must set out what Sky has done so far to implement the remedy, and what steps it will take to ensure that it is fully implemented within the nine month period given.
- 8.5 However, recognising that this investigation centred on a point of legal interpretation which may need to be resolved by the courts, if Sky decides to appeal, these requirements will be suspended pending the outcome of the appeal, so that Sky will instead be required to:
- a) provide a progress report to Ofcom about the implementation of the remedy no later than four months following the date of any decision of the Competition Appeal

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<sup>196</sup> Sky's representations in relation to the period to implement the end-of-contract notification requirements, and Ofcom's response to those representations, is set out at 8.16 to 8.21 below.

<sup>197</sup> [Ofcom's Guidance under General Condition C1 – contract requirements \(June 2022\)](#) [SK23b].

Tribunal determining in Ofcom's favour the appeal brought by Sky against the Confirmation Decision; and

- b) send end-of-contract notifications to its in-scope pay TV customers no later than nine months following the date of any decision of the Competition Appeal Tribunal determining in Ofcom's favour the appeal brought by Sky against the Confirmation Decision.<sup>198</sup>

8.6 Due to the ongoing consumer harm arising from Sky's refusal to send end-of contract notifications, Sky must ensure that it implements the remedy in the nine month period given. Ofcom will not grant any further extension or suspension of the implementation period unless Sky is able to demonstrate exceptional circumstances.

## Penalty

8.7 Ofcom's notification given to Sky under section 96A of the Act set out Ofcom's views as to whether it would be appropriate to impose a financial penalty on Sky, taking into account our Penalty Guidelines<sup>199</sup> published under section 392 of the Act. The Penalty Guidelines note<sup>200</sup> that the central objective of penalties is to effectively deter contraventions of regulatory requirements.

8.8 In the particular circumstances of this case, Ofcom has decided that imposing a financial penalty would not act as an effective incentive to compliance on the specific facts of this case. This is because, in particular:

- a) Sky has engaged with Ofcom in an open and transparent manner on the question of whether it is obliged to send end-of-contract notifications. The answer to that question raises a point of legal interpretation that may ultimately need to be resolved by the Courts.
- b) The question of whether Sky's pay TV services should properly be considered ECS has been the subject of long-standing disagreement between Sky and Ofcom, raised in relation to a number of issues, many of which predate the matter of whether Sky should send ECNs. However, this difference of interpretation has not previously manifested itself in a way which has resulted in a need for enforcement action. This disagreement on the legal interpretation has therefore been known about without resolution for a significant period of time. That period has been extended by the Covid pandemic, which delayed Ofcom's process in reaching the Confirmation Decision.
- c) While Ofcom is of the view that it is clear that Sky should be complying with General Conditions C1.21 to C1.29, it has recognised that in these specific and highly unusual circumstances the deterrent effect of any penalty on Sky would be minimal. We are

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<sup>198</sup> In accordance with paragraph 1.148 of [Ofcom's Guidance under General Condition C1 – contract requirements \(June 2022\)](#) [SK23b]. This would mean that we would expect Sky to comply with General Condition C1.10 for contracts that expire nine months plus 40 calendar days after the determination by the Competition Appeal Tribunal.

<sup>199</sup> Ofcom, 14 September 2017, [Penalty Guidelines](#) [SK37].

<sup>200</sup> *Ibid*, paragraph 1.11.

also of the view that the facts of this case do not specifically raise concerns about Sky's future wider compliance which must be addressed via a penalty.

- 8.9 Noting that Ofcom has a high degree of discretion in determining the appropriate level of a penalty, Ofcom's notification to Sky under section 96A therefore set out that Ofcom was not minded to impose a financial penalty on Sky. A confirmation decision given under section 96C may only impose a penalty where a penalty was specified in the notification under section 96A, and so the Confirmation Decision does not impose a financial penalty on Sky.
- 8.10 We will continue to consider whether to impose a penalty in all future cases in light of their specific facts and circumstances.

## Sky's submissions in response to the section 96A notification

- 8.11 Here we address Alleged Errors 5 to 6 identified by Sky in the Sky s.96A Submissions.<sup>201</sup>

### Sky believes that Ofcom's proposed remedy did not align with the identified breach of the General Conditions – Alleged Error 5

- 8.12 Sky contends Ofcom only found part of its pay TV service (the transmission element) to be an electronic communications service.<sup>202</sup> However, Sky notes that Ofcom's proposed remedy applies to its entire pay TV service and pay TV customers, and claims this means the remedy is not aligned to the contravention identified in the section 96A notification.<sup>203</sup> Consequently, Sky states the requirement to send end-of-contract notifications should only apply to the transmission element of Sky's pay TV services as opposed to its entire pay TV offering.<sup>204</sup> Such a direction would be unworkable, as if customers cancel the transmission element of their service, they would lose access to content. In Sky's view, this is an indication that transmission is not a distinct service.<sup>205</sup>

### Ofcom's response

- 8.13 Sky has an obligation to send end-of-contract notifications in respect of the ECS it offers its customers. As outlined above, Ofcom recognises that Sky provides a transmission and content service, but that does not mean that Sky should escape its obligations as a provider of an ECS.
- 8.14 The same approach applies to issues of practicality. The fact that Sky offers pay TV services to its customers as a single contractual package consisting of a number of different services, including pay TV content and an ECS,<sup>206</sup> does not mean it can avoid sending end-of-contract notifications. As there is a single contract for Sky's pay TV services, to which a

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<sup>201</sup> Sky's representations on 96A Notification [SK25a], paragraphs 3(e)-(f) and 35-50.

<sup>202</sup> Sky's representations on 96A Notification [SK25a], paragraph 35.

<sup>203</sup> Sky's representations on 96A Notification [SK25a], paragraphs 36-38.

<sup>204</sup> Sky's representations on 96A Notification [SK25a], paragraph 38.

<sup>205</sup> Sky's representations on 96A Notification [SK25a], paragraph 39.

<sup>206</sup> It may also include other services, for example the supply of equipment to customers and customer billing services.

single fixed-term commitment period applies, then a notification must be sent in respect of that contract in order for Sky to comply with its obligations in respect of the ECS. The fact that in deciding to switch to a different Sky package or a package from its competitors would involve the user terminating both its agreement for transmission and content services does not render the remedy unworkable. Rather, it is a consequence of Sky providing its services under a single contract.

- 8.15 As such, we do not accept that the remedy and breach have been misaligned. The remedy is designed to ensure that Sky meets its obligations under the General Conditions.

### **Sky contended that the implementation period proposed by Ofcom was inadequate, unfair and discriminatory – Alleged Error 6**

- 8.16 In our section 96A notification, we proposed requiring Sky to comply with General Condition C1.10 (as it then was) starting no later than two months following the date of Ofcom's final notification, or delayed for up to a year if Sky appealed. Sky argued that it would be impossible to implement the remedy in the two months following final determination of the case, as proposed by Ofcom. Further, Sky highlighted various points in support of its submission that a two month implementation period was inadequate.<sup>207</sup>

- 8.17 Sky submitted in the Sky s.96A Submissions that a sensible and reasonable window to deliver the notifications would be twelve months, and at an absolute minimum nine months.<sup>208</sup> Sky also estimates that a solution requires [X] working days effort (a time frame of nine to twelve months)<sup>209</sup> and a total spend of [X].<sup>210</sup> [X].<sup>211</sup> Consequently, Sky states a manual solution is not feasible.<sup>212</sup>

- 8.18 In this context, Sky has also objected to the proposed long-stop date included in the direction.<sup>213</sup> Sky states no justification has been given for its presence. In addition, Sky contends there is an unacceptable level of legal uncertainty in the direction as Ofcom has not outlined in what circumstances we will exercise our discretion to extend the long-stop date.<sup>214</sup>

### **Ofcom's response**

- 8.19 We accept there may be some merit to Sky's submission that the two month period proposed in our section 96A notification was too short. However, we do not accept that it should have twelve months in which to comply. Instead, as outlined at paragraph 8.3 above, we have decided that Sky should be subject to a nine month implementation period

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<sup>207</sup> Sky's representations on 96A Notification [SK25a], paragraphs 42–46 and Oral hearing transcript [SK26], pages 13-16.

<sup>208</sup> Oral hearing transcript [SK26], pages 14–16.

<sup>209</sup> Oral hearing transcript [SK26], page 14.

<sup>210</sup> Sky's representations on 96A Notification [SK25a], paragraph 42.

<sup>211</sup> Sky's representations on 96A Notification [SK25a], paragraph 44.

<sup>212</sup> Oral hearing transcript [SK26], pages 20–21.

<sup>213</sup> Oral hearing transcript [SK26], pages 15–16.

<sup>214</sup> Sky's representations on 96A Notification [SK25a], paragraph 49(b).

(from the date of the Confirmation Decision, or if Sky appeals, from the date of the Competition Appeal Tribunal's judgment in Ofcom's favour). This is because:

- a) Due to the extent of ongoing consumer harm that is occurring while this matter is outstanding, we consider it reasonable that Sky should implement a solution as soon as possible. While Sky would prefer twelve months, it has submitted that it would be possible to implement a solution within nine months.
- b) The nine month implementation period granted to Sky from the date of the Confirmation Decision is the same length as that granted to its competitors in May 2019.
- c) Sky has been aware since May 2019 that we considered it had an obligation to send end-of-contract notifications to its pay TV customers (see paragraphs 5.1 to 5.3 above). As such, it could be argued Sky has already received far more than the nine months given to other providers, so has not faced unfair or discriminatory treatment, and that its failure to take significant steps towards implementation has been at its own risk. The granting of the same period to Sky as was granted to other pay TV service providers in 2019 is a fair and consistent approach.

8.20 Following our decision to extend the implementation period for the remedy from two months to nine months, we no longer consider the long-stop to be necessary. As a result, we have removed the proposed long stop date.

8.21 However, due to the ongoing consumer harm arising from Sky's refusal to send end-of-contract notifications to its in-scope pay TV customers (see paragraphs 7.9 to 7.122 above), Ofcom has decided it should have more insight into Sky's proposed implementation of the remedy. As such, Sky must provide a progress report no later than four months into the implementation period about the work it has done so far and what steps it will take to ensure that it meets the nine months' deadline for implementation (see paragraph 8.4 above and paragraph A1.20 of the Confirmation Decision).

# A1. Confirmation Decision given to Sky UK Limited

## Section 96C of the Communications Act 2003

A1.1 Section 96C of the Communications Act 2003 (the “Act”) allows the Office of Communications (“Ofcom”) to give a person a decision (a “Confirmation Decision”) confirming the imposition of requirements on that person where that person has been given a notification under section 96A of the Act, Ofcom has allowed that person an opportunity to make representations about the matters notified, and the period allowed for the making of representations has expired. Ofcom may not give a Confirmation Decision to a person unless, having considered any representations, it is satisfied that the person has, in one or more of the respects notified, been in contravention of a condition or commitment specified in the notification under section 96A.

A1.2 A Confirmation Decision:

- a) must be given to the person without delay;
- b) must include the reasons for the decision;
- c) may require immediate action by the person to comply with requirements of a kind mentioned in section 96A(2)(d) of the Act<sup>215</sup> or may specify a period within which the person must comply with those requirements; and
- d) may require the person to pay:
  - i) the penalty specified in the notification given under section 96A of the Act, or
  - ii) such lesser penalty as Ofcom consider appropriate in light of the person's representations or steps taken by the person to comply with the condition or commitment or to remedy the consequences of the contravention, andmay specify the period within which the penalty is to be paid.

## The General Conditions of Entitlement

A1.3 The General Conditions of Entitlement<sup>216</sup> are the regulatory conditions that communications providers must comply with, as applicable, in providing electronic communications networks and services in the United Kingdom. They are set and, as the case may be, modified from time to time by Ofcom under section 45 of the Act.

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<sup>215</sup> Such requirements include those steps that Ofcom thinks should be taken by the person in order to remedy the consequences of a contravention of a condition.

<sup>216</sup> See '[General Conditions of Entitlement](#)' on Ofcom's website.



- A1.4 For the purposes of this Confirmation Decision, the relevant condition is Condition C1 of the General Conditions of Entitlement, which includes obligations for communications providers to send end-of-contract notifications to their customers.
- A1.5 This Confirmation Decision concerns the period from when those obligations came into force on 15 February 2020 until the date of this Confirmation Decision. In the period from 15 February 2020 and ending on 16 December 2021, the relevant provisions of Condition C1 were paragraphs C1.10 to C1.15. In the period from 17 December 2021, the relevant provision of Condition C1 were and are paragraphs C1.21 to C1.29.
- A1.6 In the period from 15 February 2020 and ending on 16 December 2021, Condition C1.10 required that:
- Regulated Providers must send an End-of-Contract Notification to a Subscriber, in the manner and form specified by Conditions C1.11 to C1.14, if each of the following requirements are met:***
- (a) the **Subscriber** has a contract with the **Regulated Provider** for **Public Electronic Communications Services**, other than machine-to-machine transmission services;*
- (b) the contract has a **Fixed Commitment Period**; and*
- (c) the terms of the contract provide (or governing law provides) for the contract to be automatically prolonged after the expiry of the **Fixed Commitment Period**.*
- A1.7 The following definitions (among others) applied in respect of Condition C1.10:
- a) **Regulated Providers** means all providers of **Public Electronic Communications Services** (see paragraph C1.1(b));
  - b) **End-of-Contract Notification** means a communication sent by a **Regulated Provider** to their **Subscriber** that comprises the information described in Condition C1.11 (if the **Subscriber** is a **Consumer**) or Condition C1.12 (if the **Subscriber** is not a **Consumer**);
  - c) **Subscriber** means any **End-User** who is party to a contract with a provider of **Public Electronic Communications Services** for the supply of such services;
  - d) **Public Electronic Communications Service** means any **Electronic Communications Service** that is provided so as to be available for use by members of the public;
  - e) **Electronic Communications Service** means a service consisting in, or having as its principal feature, the conveyance by means of an **Electronic Communications Network** of signals, except in so far as it is a content service;
  - f) **Fixed Commitment Period** means a period beginning on the date that contract terms agreed by a **Communications Provider** and a **Subscriber** take effect and ending on a date specified in that contract, and during which the **Subscriber** is required to pay for services and facilities provided under the contract and the **Communications Provider** is bound to provide them and in respect of which the **Subscriber** may be required to pay a charge to terminate the contract.

A1.8 In the period from 17 December 2021, Condition C1.21 and C1.23 require that:

*C1.21 **Regulated Providers** must comply with Conditions C1.22 and C1.23, if each of the following requirements are met:*

*(a) the **Relevant Customer** has a contract with the **Regulated Provider** for a **Relevant Communications Service**;*

*(b) the contract has a **Commitment Period**; and*

*(c) the terms of the contract provide (or governing law provides) for the contract to be automatically prolonged after the expiry of the **Commitment Period**.*

*C1.23 Where Condition C1.21 applies, **Regulated Providers** must send an **End-of-Contract Notification** to the **Relevant Customer** in the manner and form specified by Conditions C1.24 to C1.28.*

A1.9 The following definitions (among others) apply in respect of Conditions C1.21 to C1.23:

a) **Regulated Providers** mean

providers of Public Electronic Communications Services, when they provide these services to Subscribers, except when they provide Machine-to-Machine Transmission Services;

insofar as the Conditions refer expressly to **Bundles**, they apply to providers of **Bundles** to the extent stated in the relevant Condition when they provide **Bundles** to:

i) Consumers; and/or

ii) Microenterprise or Small Enterprise Customers or Not-For-Profit Customers, unless they have expressly agreed otherwise.

b) **Relevant Customer** means each type of **Customer**, **End-User** and/or **Subscriber** in relation to whom a provision applies in accordance with Condition C1.1;

c) **Relevant Communications Service** means each **Public Electronic Communications Service** in relation to which a provision applies in accordance with Condition C1.1;

d) **End-of-Contract Notification** means a communication sent by a **Regulated Provider** to their **Subscriber** that comprises the information described in Condition C1.24 (if the **Subscriber** is a **Consumer**) or Condition C1.25 (if the **Subscriber** is not a **Consumer**);

e) **Subscriber** means any **End-User** who is party to a contract with a provider of **Public Electronic Communications Services** or **Bundles** for the supply of such services or such a **Bundle**;

f) **Public Electronic Communications Service** means any **Electronic Communications Service** that is provided so as to be available for use by members of the public;

- g) **Electronic Communications Service** means any of the following types of service provided by means of an **Electronic Communications Network**, except so far as it is a **Content Service**: (a) an **Internet Access Service**; (b) a **Number-based Interpersonal Communications Service**; and (c) any other service consisting in, or having as its principal feature, the conveyance of **Signals** such as a **Machine-to-Machine Transmission Service** or a transmission service used for broadcasting;
- h) **Commitment Period** means a period beginning on the date that contract terms agreed by a **Communications Provider** and a **Subscriber** take effect and ending on a date specified in that contract, and during which the **Subscriber** is required to pay for services, facilities and/or **Terminal Equipment** provided under the contract and the **Communications Provider** is bound to provide them;
- i) **Bundle** means a contract, or two or more closely related or linked contracts, between the provider of a **Public Electronic Communications Service** and an **End-User**, which:
  - (a) relates, or together relate, to the provision of at least one of the following:
    - (i) an **Internet Access Service**; or
    - (ii) a **Number-based Interpersonal Communications Service**; and
  - (b) also relates, or together also relate, to the provision of at least one of the following:
    - (i) another service falling within paragraph (a)(i) or (ii);
    - (ii) any other **Public Electronic Communications Service**;
    - (iii) an **Information Society Service**;
    - (iv) a **Content Service**; and/or
    - (v) **Terminal Equipment**.

## Enforcement of General Conditions

- A1.10 Sections 96A to 96C of the Act give Ofcom the powers to take action, including the imposition of penalties, against persons who contravene, or have contravened, a condition set under section 45 of the Act.

## Subject of this Confirmation Decision

- A1.11 This Confirmation Decision is addressed to Sky UK Limited ("Sky"), whose registered company number is 02906991. Sky's registered office is Grant Way, Isleworth, Middlesex, TW7 5QD.

## Notification given by Ofcom under section 96A of the Act

- A1.12 On 14 May 2021, Ofcom gave a notification under section 96A of the Act ("the section 96A Notification") to Sky as Ofcom had reasonable grounds for believing Sky had contravened (and continued to contravene) Condition C1.10 by failing to send End-of-Contract

Notifications to Subscribers of its pay TV services whose Fixed Commitment Period ended between 26 March 2020 and the date of the section 96A Notification.

- A1.13 The explanatory statement accompanying the section 96A Notification stated Ofcom was not minded to impose a penalty on Sky in respect of the contravention of Condition C1.10 due to the longstanding disagreement over its status in law. It further specified the steps that Ofcom thought should be taken by Sky in order to comply with Condition C1.10.
- A1.14 The section 96A Notification allowed Sky the opportunity to make representations to Ofcom about the matters set out in the section 96A Notification and the accompanying explanatory statement.

### **Ofcom's consideration of appropriateness to proceed under Competition Act 1998 ("CA98")**

- A1.15 Before giving the section 96A Notification, Ofcom considered whether it would be more appropriate to proceed under the CA98. Ofcom concluded that it would not be more appropriate to proceed under the CA98 as the prohibitions set out there were not engaged.

### **Confirmation Decision given to Sky under section 96C of the Act**

- A1.16 Sky provided its written representations in response to the matters set out in the section 96A Notification on 9 July 2021 and made oral representations at a hearing held on 26 October 2021. Having considered Sky's representations, Ofcom is satisfied that Sky contravened the relevant requirements by failing to send end-of-contract notifications to subscribers to its pay TV services whose commitment period ended between 26 March 2021 and the date of this Confirmation Decision.
- A1.17 Ofcom has therefore decided to give Sky a Confirmation Decision confirming the imposition of the requirements set out below. Ofcom's reasons for the decision are set out in the explanatory statement accompanying this Confirmation Decision. In reaching this decision, we have taken account of our statutory duties under sections 3 and 4 of the Act including, in particular, our principal duty of furthering the interests of citizens in relation to communications matters and the interests of consumers in relevant markets, where appropriate by promoting competition. As required by section 2B of the Act, we have also had regard to the statement of strategic priorities prepared by the Secretary of State and designated for the purposes of section 2A of the Act, so far as that statement relates to telecommunications.<sup>217</sup>

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<sup>217</sup> [Statement of Strategic Priorities](#), Department for Digital, Culture, Media and Sport, designated on 29 October 2019 [SK38].

## Steps to comply with condition

- A1.18 Sky must take all necessary steps to comply with the end-of-contract notification requirements in Conditions C1.21 to C1.29 in relation to subscribers to its relevant pay TV services, starting to send such notifications by no later than nine months from the date of this Confirmation Decision. In accordance with our Guidance<sup>218</sup> on Condition C1, which provides that end-of-contract notifications should be sent between 10 and 40 days before the expiry of the subscriber's contract, we expect notifications to be sent for contracts that expire on or after nine months plus 40 calendar days after the date of this Confirmation Decision.
- A1.19 Sky's relevant pay TV services for these purposes are any of its pay TV services which rely in whole or in part on a digital satellite transmission service.
- A1.20 In addition, Sky must provide Ofcom with a progress report on the implementation of the remedy (i.e. the steps being taken) no later than four months following the date of this Confirmation Decision. The progress report must set out what Sky has done so far to implement the remedy, and what steps it will take to ensure that it is fully implemented within the nine months given.
- A1.21 If, however, Sky appeals against this Confirmation Decision to the Competition Appeal Tribunal ("the Tribunal") under section 192 of the Act, Sky must instead:
- a) provide Ofcom with a progress report on the implementation of the remedy no later than four months following the date of the Tribunal's decision on the appeal; and
  - b) take all necessary steps to comply with the end-of-contract notification requirements in Conditions C1.21 to C1.29 in relation to subscribers to its relevant pay TV services, starting to send such notifications no later than nine months from the date of the Tribunal's decision on the appeal.<sup>219</sup>

## Interpretation

- A1.22 Except insofar as the context otherwise requires, words or expressions used in this Confirmation Decision have the meaning assigned to them in this Confirmation Decision

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<sup>218</sup> [Ofcom's Guidance under General Condition C1 – contract requirements \(June 2022\)](#) [SK23b].

<sup>219</sup> In accordance with paragraph 1.148 of [Ofcom's Guidance under General Condition C1 – contract requirements \(June 2022\)](#) [SK23b]. This would mean that Sky would be obliged to comply with General Conditions C1.21 to C1.29 for contracts that expire nine months plus 40 calendar days after the decision by the Tribunal.

and otherwise any word or expression shall have the same meaning as it has for the purposes of Conditions C1.21 to C1.29 or the Act.

Signed by



Paul Phillips

**Legal Director**

*A person duly authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002*

**19 August 2022**

## A2. Extracts from Sky's pay TV contracts

- A2.1 This Annex sets out extracts of relevant clauses from Sky's pay TV contracts:
- a) Sky's Digital Subscription Contract<sup>220</sup> (for Sky TV, Sky+, Sky+HD and Sky HD customers<sup>221</sup>); and
  - b) Sky Q contract for UK Residential TV Services<sup>222</sup> (for Sky Q customers).
- A2.2 On 19 February 2021, Ofcom sent an information request<sup>223</sup> under section 135 of the Act to Sky, to which Sky responded on 5 March<sup>224</sup> and 22 March 2021.<sup>225</sup> As part of its response, Sky provided Ofcom with the terms applicable to new customers of Sky's pay TV services (including Sky TV, Sky+, Sky+HD, Sky HD and Sky Q) on 1 September 2005, 1 September 2010, 1 September 2015 and from 15 February 2020 to 5 March 2021.<sup>226</sup> We reviewed these contracts and are satisfied that they contain terms which are materially equivalent to those referred to at paragraph 2.6 above and summarised below.
- A2.3 This Annex was initially prepared to accompany the section 96A Notification, which was published in May 2021, and the extracts below are taken from the January 2021 versions of the respective contracts. Between that time and the date of the section 96C Confirmation Decision, the Terms and Conditions on Sky's website<sup>227</sup> have been updated. The 'Sky Digital Subscription Contract' is now to be found at pages 4-10 of the 'Sky TV Terms and Conditions' (from March 2022)<sup>228</sup>, and the Sky Q contract for 'UK Residential TV Services' is contained at pages 11-26 of the 'Sky Q Terms and Conditions' (from March 2022)<sup>229</sup>. The terms of those updated contracts are materially equivalent to those set out below.

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<sup>220</sup> Contained within Sky TV Terms (Jan 2021) [SK13a]. To note, the clauses reproduced from the January 2021 contract, as set out in this Annex 2, are materially equivalent to the clauses contained in the previous version of the Sky Digital Subscription Contract (within the Sky TV Terms (Nov 2020)) [SK13b].

<sup>221</sup> Sky+ and Sky+HD customers must additionally enter into Sky+ Terms (Sep 2010) [SK17a] or Sky+HD Terms (Feb 2018) [SK15a] respectively.

<sup>222</sup> Sky Q Terms (Jan 2021) [SK14a]. To note, the clauses reproduced from the January 2021 contract, as set out in this Annex 2, are materially equivalent to the clauses contained in the previous version of the Sky Q Terms from November 2020 [SK14b].

<sup>223</sup> Information Request from Ofcom to Sky dated 19 February 2021 [SK19].

<sup>224</sup> Sky's response to questions 1 to 4 of Ofcom's Information Request, 5 March 2021 [SK20].

<sup>225</sup> Sky's response to questions 5 and 6 of Ofcom's Information Request, 22 March 2021 [SK21] and data attached to Sky's response to questions 5 and 6 of Ofcom's Information Request, 22 March 2021 [SK22].

<sup>226</sup> In Sky's response to questions 1 to 4 of Ofcom's Information Request dated 5 March 2021 [SK20], Sky explained that it does not require all Customers to be on the same terms and only certain updates to terms are notified to existing Customers. As such, the terms applicable to Customers of Sky's pay TV service at a particular date will therefore differ depending on when each individual became a Customer and the terms they accepted at that stage, as well as any subsequent modifications that were notified to those Customers.

Furthermore, at paragraph 1.1 Sky confirmed that "*the Customer contracts available on Sky.com/shop are, when combined with any Customer-specific information or terms confirmed in writing following an order, the terms currently applicable for new Customers for those products. These were last updated on 17 February 2021.*" We note that at the date of the section 96A Notification, the latest terms available on Sky.com/shop were dated January 2021, and therefore the clauses set out in Annex 2 refer to that document.

<sup>227</sup> <https://www.sky.com/help/articles/sky-terms-and-conditions>.

<sup>228</sup> Sky TV Terms (March 2022) [SK28].

<sup>229</sup> Sky Q Terms (March 2022) [SK29].

## Sky's Digital Subscription Contract

A2.4 Clause 2(a) of Sky's Digital Subscription Contract states:

*"Unless we agree otherwise, you will be charged for the Service from the first date we enable your Box to receive the Service under this Contract. **You must pay us Subscription Payments every month in advance**". (Emphasis added.)*

A2.5 Clause 11 states:

*"Unless Condition 11(a) or (b) apply or you end your Contract and immediately enter a new one, **you must subscribe to the Service for at least the Minimum Term and you cannot cancel your subscription during the Minimum Term**. If you do not subscribe to the Service for at least the Minimum Term you will breach these Conditions. **The Contract will continue after the Minimum Term unless it is ended according to the Conditions below**". (Emphasis added.)*

A2.6 Clause 11(a) further notes:

*"You may end this Contract by giving us 7 days' notice at any time (including during the Minimum Term) if we or SSSL break any of the Conditions. If you want to end the Contract for any other reason **you may do so at the end of or after the Minimum Term, by giving us at least 31 days' notice at any time**". (Emphasis added.)*

A2.7 Clause 11(c) and (d) state:

*(c) Except where Condition 11(b) applies, **we will not end this Contract during the Minimum Term**. We may end this Contract after the Minimum Term by giving you 31 days' notice.*

*(d) We will not refund any Subscription Payments or other payments made under this Contract if we end this Contract because you have broken the Conditions. If during the Minimum Term we end this Contract in accordance with Condition 11(b), **you will have to pay us an early termination charge**". (Emphasis added.)*

A2.8 In addition, in the section entitled "Important Terms of Your Subscription Contracts" within the same document as the Digital Subscription Contract, it states:<sup>230</sup>

*"If we end your Sky digital Subscription Contract or your Sky Multiscreen Subscription(s) Contract (or your Sky Multiscreen Subscription ends automatically) **during the relevant Minimum Term we will charge you an early termination charge**, unless stated otherwise in the relevant contract". (Emphasis added.)*

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<sup>230</sup> Page 1 of the Digital Subscription Contract, contained within the Sky TV Terms (Jan 2021) [SK13a]



A2.9 Clause 2(d) of the Digital Subscription Contract states:

*“During the Minimum Term, unless it is for a reason set out in Conditions 2(e) or 4 (when the following increase limits do not apply), we may increase the price of your Option in accordance with Condition 2(c) only once in any 12 month period and that increase will not be more than:*

*(i) 10%; or*

*(ii) the increase in the UK Retail Price Index over the 12 months before we tell you about that price increase whichever is greater. This price increase will not affect you during the first 60 days of your first Minimum Term.”*

A2.10 In addition, in the section “Important Terms of Your Subscription Contracts”, it states:<sup>231</sup>

***“The limits on price increases do not apply after the Minimum Term of the relevant contract.”*** (Emphasis added.)

A2.11 The “Minimum Term” is defined as:

*“the period agreed between us (usually 12 or 18 months) starting from the first date on which you can receive the Service under this Contract, or any additional period (usually 12 or 18 months) beginning on the date agreed between us.”<sup>232</sup>*

## Sky Q Contract for UK Residential TV Services

A2.12 Clause 11.1 states:

*“You must have paid in full in advance any upfront payment we agree to set you up as a Sky customer including for any standard installation and/or any one-off charges for PVR functionality and additional TV viewing. Any charges for non-standard installation must be paid before the engineer begins installation of your Sky dish.”*

A2.13 Clause 11.2 states:

*“You agree to pay the price we have told you for each TV subscription service you choose to subscribe to from the date your main Sky Q box is enabled for that TV subscription service.”*

A2.14 Clause 11.3 states:

*“You agree to pay the price (if any) notified to you in advance for any TV extra services you choose to use.”*

A2.15 Clause 11.7 further states:

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<sup>231</sup> Page 2 of the ‘Important terms of your Subscription Contracts’ accompanying the Digital Subscription Contract, contained within the Sky TV Terms (Jan 2021) [SK13a]

<sup>232</sup> Clause 1 of the Digital Subscription Contract, contained within the Sky TV Terms (Jan 2021) [SK13a]

*“During the minimum term, unless it is for a reason set out in condition 11.8 below (where the following increase limits do not apply), we may increase the then standard price of each TV subscription service only once in any 12 month period and the increase will not be more than 10% or the increase in the UK Retail Price Index over the 12 months before we tell you about that price increase, whichever is greater. In addition, any price increase for a TV subscription service will be delayed so as not to apply during the first 60 days of your minimum term in which case the 12 month period referred to will start on the date your price would have increased but for the delay. The limits on the timing, frequency and amount of any price increase in this condition are referred to as “price protection”.*

A2.16 Entitled ‘Your minimum term’, Clause 14.1 states:

*“**You must subscribe to your Sky Q subscription package for at least the minimum term** unless you are allowed to end the service earlier under condition 14.4 or you end your contract and enter a new one. If you do not do this you will breach these conditions.” (Emphasis added.)*

A2.17 Clause 14.3 further states:

*“**This contract will continue after your minimum term until your Sky channel subscription is ended in accordance with this condition 14**” (emphasis added.)*

A2.18 Clause 14.16 states:

*“If we end all or part of your Sky Q subscription package under condition 14.7 **during the minimum term or new minimum term you will have to pay us early termination charges for the TV subscription services that end and for any TV subscription services, which automatically end during the minimum term as a result.** The early termination charge shall not be any more than the payments you would have made for the relevant TV subscription services for the remainder of your minimum term (assuming you would have continued to subscribe to the same TV subscription services) less any costs we save, including the cost of no longer providing you with the service and the benefit to us in receiving payment early. You may be able to reduce the amount of these early termination charges by changing your option and/or removing any part of your TV subscription services you pay extra for (where permitted), such as stand-alone premium channels, in accordance with these conditions provided such change takes effect before this contract ends. Unless you tell us otherwise, we may charge your early termination charge directly to any of the credit or debit cards which you have provided us with details of, e.g. when you paid any one-off or upfront charges, and by accepting the terms of this contract, you authorise us to do so. We will give you reasonable notice before making the*

*charge. For more information about these charges go to [sky.com/earlytermination](https://sky.com/earlytermination).” (Emphasis added.)*

A2.19 “Minimum term” is defined as:

*“The period agreed between us (usually 12 or 18 months) starting on the date we enable the Sky Q box(es) to receive your Sky Q subscription package”.<sup>233</sup>*