



SKY'S RESPONSE TO OFCOM'S CONSULTATION - 'HELPING CONSUMERS TO ENGAGE IN COMMUNICATIONS MARKETS - CONSULTATION ON END-OF-CONTRACT AND OUT-OF-CONTRACT NOTIFICATIONS'

EXECUTIVE SUMMARY

1. Sky sees some merit in Ofcom's proposals and we're keen to work with Ofcom to ensure the final requirements meet the sensible objective of ensuring that notifications are simple for consumers to understand and practical for providers to implement. We also welcome the fact that Ofcom has separately decided to focus its attention on the issue of combined mobile airtime and handset payments. This issue is a far more significant source of consumer harm (with overpayments estimated by Ofcom at £330m a year) than any supposed lack of knowledge about contractual status.
2. It is crucial that the final requirements for the notifications are not overly prescriptive. Providers should have flexibility to communicate in a way that their customers recognise and are familiar with. We are pleased to see that Ofcom's proposals generally adopt this approach.
3. Sky has considerable experience developing customer communications and therefore is well placed to offer guidance that will help Ofcom ensure that customers are not confused or misled by the notifications they receive. In responding to the Consultation we have taken the opportunity to offer a number of practical suggestions that will improve Ofcom's proposals in this regard.
4. Whilst Sky is broadly supportive of Ofcom's proposals, the Consultation contains a number of flaws and the evidence presented is not always robust. For example, we consider that Ofcom has not sufficiently recognised the high levels of customer service innovation and general customer satisfaction across the mobile, landline, broadband and pay TV sectors. It is also disappointing that Ofcom pays such scant regard to the flexibility and other benefits that consumers enjoy by choosing to remain out of contract. We therefore encourage Ofcom to amend its proposals in two areas.
5. First, Ofcom should consider the extensive information that providers already make available to consumers to help them understand their needs and shop around. We encourage Ofcom to build on this when finalising the notification requirements. For example, Ofcom should give providers the option to refer customers to their online account for details of other services provided, with the information about those services required in the notification itself limited to a link to where this information can be found and details of how to access it.
6. Second, Ofcom's assessment of the knowledge and attitude of out of contract customers lacks substance. It is also unclear what specific harm this aspect of the proposals is designed to address. In particular, the evidence presented does not fairly compare customers in different tenure groups, such as those who have been out of contract for only a few months and those who have been out of contract for much longer. Sky urges Ofcom to reconsider the scope of this aspect, specifically by removing the requirement to notify customers who have chosen to remain out of contract for a lengthy period (e.g., 12 months or more).

7. It appears, somewhat surprisingly, that Ofcom intends to apply its new general condition to providers of pay TV services. To support the inclusion of pay TV Ofcom provides a single paragraph analysis of the definition of an “electronic communications service” (ECS) within the underlying legal framework. As we have indicated previously, Ofcom’s analysis of pay TV as an ECS is legally incorrect and inconsistent with its practice to date. Put simply, Ofcom does not have the legal authority to apply the proposed condition to pay TV provided as a standalone service and to do so would be contrary to Ofcom’s long established practice.

8. Ofcom says it wants people to be able to take advantage of the wide choice of communications services available and to be able to shop around with confidence. Sky agrees with this sentiment and we look forward to further helping Ofcom put in place appropriate and proportionate measures to improve consumer understanding in this regard.

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INTRODUCTION

1. This submission provides Sky's response to Ofcom's Consultation entitled 'Helping consumers to engage in communications markets – Consultation on end-of-contract and out-of-contract notifications' published on 31 July 2018 ("Consultation")¹.
2. This response comprises four sections:
 - Section 1: Ofcom has not shown a clear case for intervention;
 - Section 2: The scope of Ofcom's proposals;
 - Section 3: The content and form of end of contract notifications ("ECNs") and out of contract notifications ("OCNs"); and
 - Section 4: Ofcom's draft General Condition.
3. Sky's responses to the questions posed in the Consultation are set out in Annex 1. The following annexes are also included:
 - Annex 2: Sky Sports end of contract notification;
 - Annex 3: Ofcom's assertion that pay TV is an "electronic communications service";
 - Annex 4: Service information in Sky customers' online accounts.

¹ All references to paragraphs, figures, annexes and footnotes are to those in the Consultation unless stated otherwise.

SECTION 1: OFCOM HAS NOT SHOWN A CLEAR CASE FOR INTERVENTION

- 1.1 As we have indicated in previous consultation responses, we consider that it is important to consider issues such as those discussed in the Consultation in context. The Consultation, however, contains very little contextual information or analysis. It is focused entirely on (i) consideration of perceived deficiencies in the information providers give to their customers, and (ii) potential solutions to those deficiencies.
- 1.2 In this case, we consider that the following contextual factors are important, and that Ofcom has not had sufficient regard to them:
- Ofcom’s proposals relate to highly competitive sectors that consistently deliver innovation and positive outcomes for consumers, with high levels of consumer satisfaction²;
 - providers already make significant amounts of information available to consumers to help them understand their needs and shop around; and
 - consumers know they can shop around for a deal but many choose not to because they prefer the flexibility and other benefits of staying out of contract.
- 1.3 Ofcom’s own consumer research on engagement illustrates the extent to which satisfaction and/or the terms of supply lead them to stay with their current provider. As the table below shows, the four biggest reasons (and seven of the top ten reasons) why out-of-contract customers do not look for a new deal relate to satisfaction with their current services, their positive opinion of their current provider and the deal they are on³.

	Mobile+*	Standalone Pay TV	Dual Play	Triple Play	Bundle Total
Happy with the service I receive from my current provider	60%	56%	59%	57%	58%
I don't want to change provider	47%	36%	36%	45%	40%
I trust that my provider makes sure I am on their best deal	29%	16%	27%	17%	23%
Looking for a better deal isn't a priority	17%	15%	20%	22%	21%
It's too time consuming to compare deals	17%	16%	16%	20%	18%
I wouldn't save enough by finding a new deal with my current or another provider	5%	9%	17%	18%	17%
Other providers don't offer the service/s I need	5%	10%	9%	20%	14%
It's difficult to compare deals	14%	13%	12%	6%	10%
I value/ like being out of contract	3%	9%	9%	6%	8%
It's difficult to work out what I need from a deal	3%	10%	6%	4%	5%
No other providers are available in my area	-	11%	4%	3%	3%
Not confident/ don't understand enough to look into other deals	3%	2%	7%	5%	6%
Waiting for new equipment or technology to become available (e.g. a new handset or better broadband speed)	2%	2%	1%	5%	3%

² Ofcom data show satisfaction in these sectors is high – 91% for mobile, 87% for pay TV, 84% for bundles and 80% for broadband. Ofcom, ‘Comparing service quality 2017’, May 2018: https://www.ofcom.org.uk/_data/assets/pdf_file/0023/113639/full-report.pdf.

³ Slide 28, ‘Critical Research, Consumer Engagement 2018, January – April 2018’: https://www.ofcom.org.uk/_data/assets/pdf_file/0022/117076/Consumer-engagement-quantitative-research-2018-slide-pack.pdf (‘Quantitative Research’).

- 1.4 Sky is sceptical of a view that non-engagement by consumers in the UK communications and pay TV sectors is a significant problem which leads to negative outcomes and justifies intervention. We do not consider that the Consultation presents good evidence that customers are materially disadvantaged when they reach the end of their contract or choose to remain out of contract for an extended period. The rest of the comments in this response are without prejudice to this key point.

Providers already make significant amounts of information available to consumers to help them understand their needs and shop around

- 1.5 A particularly disappointing aspect of Ofcom's Consultation is the repeated characterisation of consumers as *"unable to avoid"* changes or finding themselves in situations where they *"cannot make informed decisions"*⁴. The impression given is one of markets where providers habitually obscure important information from customers who are then faced with *"unexpected and unwelcome"*⁵ changes to their package at the end of their contract.
- 1.6 The reality is very different. Sky, for example, makes significant amounts of information available to its customers to enable them to understand their needs and to shop around – including current and future billing information, usage information and intuitive digital tools for managing their package. This gives consumers the tools and information they need to make informed choices at the right time.
- 1.7 The information Sky gives its customers mirrors closely the types of information that Ofcom has previously said is important for consumers to enable them to engage effectively and to choose the right deal for their needs.⁶ Other suppliers do likewise for their customers. The fact that suppliers give customers a raft of information to help them understand their needs and usage should come as no surprise: when it comes to contract end-date information, Ofcom's own evidence shows that almost all consumers who wanted to know their contract end-date were able to find it easily⁷.
- 1.8 Furthermore, in the Consultation Ofcom rejects the status quo option because it says it hasn't seen evidence that *"providers will improve the information they provide to their customers in the absence of regulatory change"*⁸. Sky is unclear to what extent Ofcom has looked for such evidence, but takes this opportunity to outline briefly three instances of recent customer service innovation that show that improvements take place without regulatory intervention or oversight.

⁴ See, for example, paragraphs 3.3, 3.27 and 5.12.


⁵ This particular choice of words is used repeatedly in the Consultation. See, for example, paragraphs 1.4, 1.10, 2.13, 3.86, 4.4, 4.81 and 5.10.

⁶ Paragraphs 3.15 and 3.20, 'Call for Inputs: Helping consumers to engage in communications markets', 14 July 2017: https://www.ofcom.org.uk/data/assets/pdf_file/0014/104441/call-inputs-consumer-engagement-communications.pdf ("Call for Inputs").

⁷ Slide 19, Quantitative Research.

⁸ Paragraph 3.73.

Sky Sports/Cinema ECNs: In 2017 Sky introduced tiered pricing that included an in-contract discount on its Sky Sports and Sky Cinema packages for the first time. The first customers to take advantage of this new pricing structure are now approaching the end of their contract, and Sky has started contacting these customers with an end of contract notification reminding them of the price change and including details of how to re-contract to remain on the lower pricing. An example of such a notification is attached at Annex 2.

'My Sky' app: Sky's 'My Sky' app was launched in February 2017 . As well as providing extensive account information relating to usage and spend, it is the gateway through which Sky customers can enrol in Sky's loyalty programme "Sky VIP" and redeem tenure-linked benefits.

Sky Mobile 'Mix' and 'Roll': When Sky Mobile launched in 2016 it introduced two innovative features, 'Mix' and 'Roll', to give customers complete flexibility over their mobile data tariff. 'Roll' lets customers save unused data (in a 'Sky Piggybank') for use in future months and 'Mix' lets customers change their data plan at any time. Customers logging into their Sky Mobile account on sky.com or in the 'My Sky' app are shown real-time information about how much data they have used that month and have saved in their Sky Piggybank, and are prompted to "Mix my plan". This information is a clear nudge to consumers to consider their needs, with many choosing to downgrade to a cheaper data plan and redeem their saved data to cover any shortfall in the months that follow.

- 1.9 Providers like Sky make significant efforts to give their customers up-to-date and timely information about their products and services. Whilst it is of course true that customers ultimately need to assess this information themselves and exercise their own judgement when considering their needs and shopping around, to imply that providers are in some sense a barrier to consumers doing so is a distorted representation.

Customers know they can shop around for a deal but many choose not to because they prefer the flexibility and other benefits of staying out of contract

- 1.10 A striking aspect of the Consultation is the implicit assumption that being in contract is good for consumers, and being out of contract is bad for them. Early in the Consultation Ofcom expresses "concern" that "too many" customers are "allowing their existing contracts to roll-over onto 'out-of-contract terms'"⁹. From this starting point, Ofcom pinpoints a lack of information as the reason for a significant number of consumers remaining out of contract "for longer than they otherwise would"¹⁰. Ofcom concludes that enhanced information is needed to ensure consumers know when to shop around.
- 1.11 This reasoning ignores two fundamental features of the UK communications and pay TV sectors and leads Ofcom to a conclusion on consumer harm that is not supported by the evidence. These features are:
- (a) consumers are already well aware that they can negotiate a better deal with their existing provider; and
 - (b) many consumers prefer the flexibility of remaining out of contract to agreeing a new contract commitment in exchange for a discount.

⁹ Paragraph 2.6.

¹⁰ Paragraph 3.3.

- 1.12 In relation to the first of these features, Ofcom’s consumer research asks a number of questions about consumer attitudes towards looking for a better deal, such as (i) whether and how often consumers look for a new deal, (ii) the reasons for not looking for a new deal, and (iii) the time taken doing research etc.¹¹ However, this research fails to ask the most important question: are consumers in fact aware that they have the option to negotiate a better deal with their existing provider? If Ofcom is considering intervention to enable consumers to “take advantage of competition in communications markets”¹², it must have a clear understanding of the extent to which consumers are already aware of their options in this regard.
- 1.13 Sky’s own consumer research on customer awareness shows that this knowledge is widespread. In response to the question “Do you think that you could get a better deal [i.e., paying a lower cost or getting a better package than you already pay or than is being advertised] from your current pay TV or broadband provider if you asked for one (e.g. by calling and threatening to cancel, asking outright etc.)?”, more than half of Sky customers answered yes, whilst only a quarter answered no¹³. Clearly then there is already broad understanding amongst consumers that they have scope to negotiate with their provider and secure for themselves a discount that can be worth more than the introductory offers they may have seen advertised.
- 1.14 Turning to the second feature, many customers who remain out of contract are simply making a conscious choice to maintain flexibility to trade up and down (or leave) at a time that is convenient to them and/or do not want to spend time shopping around or thinking about changing – for example, many consumers actively opt out of receiving marketing communications from their suppliers precisely because they do not want to be troubled by it.
- 1.15 In the case of pay TV customers, for example, some content (such as sports content) is seasonal in nature which means that, for customers who value that content, the flexibility to trade up and down may be particularly important. The fact that different consumers pay different prices and make different choices on the trade-off between price and flexibility points to a market that provides customers with a broad range of choice and is working well.
- 1.16 Moreover, by simply highlighting the difference between the average monthly spend by in-contract and out-of-contract groups¹⁴, Ofcom provides no insight into the reasons why consumers choose to remain with their providers, despite it being potentially advantageous from a price perspective for them to switch or renegotiate.¹⁵ This is not direct evidence of consumer detriment. It may equally reflect conscious choices being made by millions of consumers about a contractual status that delivers benefits that they value.
- 1.17 There are other tangible benefits that can be realised by loyal customers which are not available to those customers who switch providers to take up introductory offers. For example, last year Sky launched a loyalty scheme which is the UK’s first tenure-based

¹¹ Slides 26-38, Quantitative Research.

¹² As stated in the section in the Consultation headed ‘Our policy objectives’.

¹³ YouGov Omnibus survey, carried out 6-7 September 2018. Sky base: 546 of whom 51% answered ‘Yes, I do’ and 25% answered ‘No, I don’t’.

¹⁴ Figure 6.

¹⁵ Paragraphs 3.34-3.41.

rewards programme (i.e., the longer you stay with Sky, the greater the rewards) and one that customers qualify for irrespective of product holding or spend. Rewards that customers receive through this scheme, such as discounted movies and services, represent clear benefits, which are not taken into account in any of the data presented in the Consultation.

- 1.18 In summary, Sky considers that the Consultation mischaracterises out-of-contract status as indicative of a lack of engagement by consumers and incorrectly assumes that customers who remain out of contract are disadvantaged compared to in-contract customers. This presents a biased and one-dimensional view of both consumer behaviour and provider pricing.

Ofcom has not properly assessed if and to what extent consumers suffer a financial penalty by staying out of contract

- 1.19 Ofcom takes the view that the evidence it has collected from providers indicates that out-of-contract customers spend more on dual-play, triple-play and standalone pay TV packages than customers who are in-contract.¹⁶ The differential is calculated from the data given to Ofcom by providers who were asked to produce data on the average spend by different customer groups determined only by contract status. What this data does not show, however, is the extent to which differences in spending are due to differences in the ‘average’ packages chosen by customers in the respective groups.

- 1.20 Put simply, Ofcom has concluded prematurely that out-of-contract customers pay more than in-contract customers for the same package. Before reaching this conclusion, Ofcom should have examined the extent to which the difference is in fact down to variations in the packages chosen by each group.¹⁷

- 1.21 Two examples from Sky’s own data illustrate that many Sky’s longer tenure customers spend more with Sky because they take either more products or better products.

1.22 ✂

1.23 ✂.

- 1.24 A further problem with Ofcom’s analysis is that it fails to take into account upfront fees. Consumers switching provider or moving to a newer product (for example, one that comes with the latest TV set top box or broadband router) are likely to incur upfront costs, whether for the equipment itself, or related installation or activation services. This of course is in addition to the inconvenience of needing to be at home for engineer visits (if required) and changing equipment.

- 1.25 The average monthly spend information collected by Ofcom from providers does not include such one-off costs and therefore is likely to present a distorted picture of the overall spend by customers in different tenure groups¹⁸. Introductory discounts on

¹⁶ Paragraph 3.34.

¹⁷ Whilst Ofcom acknowledges the possible effect of package variations (paragraph 3.37), it has not considered this further and assumes package equivalence in both its provisional conclusions (paragraph 5.32) and benchmark cost benefit analysis (paragraph A6.75, annex 6).

¹⁸ The average spend figures used by Ofcom in the Consultation are taken from Ofcom’s analysis of provider data (see figures 6 and 7). The information request sent to Sky (and we assume other providers as well) specifically stated that “*spend data should exclude one-time fees such as hardware, installation and activation fees*” (Ofcom s135 notice to Sky, dated 15 May 2018).

monthly subscription prices can be used by providers to help smooth the impact of other charges that customers need to pay on top. Yet this feature is not considered in Ofcom's analysis.

- 1.26 In summary, a central pillar of Ofcom's case for intervention - that there is a financial penalty associated with staying out of contract - is flawed in two key respects: first, it does not compare customers in different tenure groups, and, second, it does not take into account a category of separate costs more likely to be incurred by the in-contract group.

Ofcom's cost benefit analysis

- 1.27 We have not undertaken a detailed review of Ofcom's cost benefit analysis of the proposals set out in the Consultation. At this point, we note the following:
- (a) no specific benefits case has been provided to support sending an ECN to customers who are not subject to a price or service change at the end of their contract;
 - (b) as explained above, Ofcom's benchmark cost benefit model wrongly assumes that consumers who change their behaviour as a result of receiving an ECN or OCN will realise the full difference between the average spend of in-contract and out-of-contract customers; and
 - (c) implementation costs are likely to be higher than Ofcom assumes. Some costs, such as call centre costs, have been deliberately (and erroneously) omitted¹⁹. Others have been wrongly assumed to be *de minimis*, for example the incremental OCN set-up costs (over and above ECN set-up costs)²⁰. Other costs appear to have been inadvertently missed from Ofcom's analysis including (i) the incremental costs for separate systems development required to support sending ECNs to small business customers in addition to residential customers, (ii) the cost of putting in new processes to establish whether small business customers have ten individuals or fewer, and (iii) the costs of having to send heavily personalised notifications in accessible formats such as braille or audio CD.

We welcome the fact that Ofcom is separately focussing on bundled mobile handset payments

- 1.28 Ofcom has recently estimated that 1.5 million mobile customers may be overpaying by around £330 million a year by not making a choice to upgrade or change to a SIM-only deal, either with a new minimum term or on a rolling basis, when their handset has been paid off²¹. This latest estimate of overpayment is a significant uplift from the £130 million estimated in Ofcom's Call for Inputs on Consumer Engagement published in July 2017²². Furthermore, according to Ofcom's own consumer research, around one third of mobile customers in the last three months of their contract are unaware that at the end of their contract they can move to a SIM-only deal if they keep their current handset²³.

¹⁹ Paragraph A6.11, annex 6.

²⁰ Paragraph A6.83, annex 6. ✂

²¹ Page 22, Ofcom, 'Pricing trends for communications services in the UK', 17 May 2018: https://www.ofcom.org.uk/data/assets/pdf_file/0030/113898/pricing-report-2018.pdf

²² Paragraph 3.9, Call for Inputs.

²³ Slide 29, Quantitative Research.

- 1.29 This is a specific and significant overpayment issue caused by the current practices of some of the largest mobile providers who choose to charge a combined price for the airtime and handset. It means, in effect, that some consumers continue to be charged for a handset they have already paid for in full.
- 1.30 As explained in our response to Ofcom’s Call for Inputs, Sky’s view is that regulatory intervention is more likely to be warranted when the contract end-date is a critical trigger for consumer engagement and it is obviously in the consumer’s interests to engage at that point²⁴. Combined airtime and handset payments are an example that clearly falls within this category. Sky therefore welcomes the fact that Ofcom has recently decided to focus its attention on this issue²⁵.

²⁴ Paragraph 2.9, Sky’s response to the Call for Inputs, September 2017: https://www.ofcom.org.uk/data/assets/pdf_file/0023/108437/Sky.pdf (“Sky CFI response”).

²⁵ Ofcom press release, ‘Clear and fair handset charges for mobile users’, 26 September 2018: <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2018/clear-fair-mobile-handset-charges>

SECTION 2: THE SCOPE OF OFCOM'S PROPOSALS

- 2.1 In this section we comment on the scope of Ofcom's proposals. The section comprises two sub-sections:
- (a) the proposed new General Condition cannot be applied to standalone pay TV services; and
 - (b) providers should not be required to send an OCN to customers who have been out of contract for a lengthy period (e.g., 12 months or more).

The proposed new General Condition cannot be applied to standalone pay TV services

- 2.2 Ofcom states that *"the proposed new general condition that we propose will apply to providers of landline, broadband, mobile and pay TV services"*²⁶. To support the inclusion of pay TV Ofcom provides a single paragraph analysis of the definition of an *"electronic communications service"* ("ECS") in the relevant EU directive and the subsequent interpretation of that definition in two cases before the Court of Justice of the European Union²⁷.
- 2.3 As we have indicated previously, Ofcom's analysis of pay TV as an ECS is legally incorrect and inconsistent with its practice to date. Ofcom does not have the legal authority to apply the proposed condition to pay TV provided as a standalone service.
- 2.4 A fuller analysis of the correct legal interpretation of the definition of ECS is provided in Annex 3.

Providers should not be required to send an OCN to customers who have been out of contract for a lengthy period (e.g., 12 months or more)

- 2.5 Ofcom's proposals include a requirement to send a one-off OCN to all customers who are out of contract and who have not previously been given the information to be included in the ECN. Ofcom says that this is because *"it is equally important that our proposals address the harm we have identified in relation to these customers"*²⁸.
- 2.6 Ofcom offers no justification why it considers that it is *"equally important"* that provider's send an OCN to customers who have already been out of contract for a significant period (e.g., 12 months or more). There are compelling arguments why OCNs are not necessary in that case.
- 2.7 First, there is no principled justification for requiring this. Nothing is changing about the products and services the customer receives or the price they pay for them, and it is unlikely that the customer is unsure about the ongoing price because they will have received a bill each month detailing this. It is highly significant, yet ignored by Ofcom, that most of the information tagged as essential by participants in Ofcom's consumer research (e.g., contract end date, monthly price changes²⁹) is irrelevant in the context of OCNs.

²⁶ Paragraph 5.60.

²⁷ Paragraph 5.59.

²⁸ Paragraph 4.93.

²⁹ Slide 16, 'End-of-contract notifications - Attitudes to and understanding of alternative content options', Jigsaw, July 2018: https://www.ofcom.org.uk/_data/assets/pdf_file/0020/117074/Qualitative-end-of-contract-notification-research-July-2018.pdf ("Qualitative Research").

- 2.8 As well as serving no useful purpose, OCNs risk confusing some long-term out-of-contract customers into thinking that something is changing with their service when that is not the case.
- 2.9 Second, there are significant gaps in Ofcom’s analysis of consumer understanding and harm that it uses to justify its proposal to send an OCN to all out-of-contract customers.
- 2.10 Ofcom’s qualitative research on OCNs lacks substance, comprising two brief and inconclusive pages in a 68 page research document³⁰.
- 2.11 There are also significant flaws in Ofcom’s quantitative research. For example, the research groups all out-of-contract customers together and fails to explore whether there are differences in attitude among consumers who have been out of contract for a short period and those who have been out of contract for a long period. This is surprising given it is reasonable to expect differences in attitudes between customers who have been out of contract for, say, a month or two and those who have been out of contract for several years or more.
- 2.12 Equally problematic is the fact that, whilst the consumer research questionnaire clearly and unambiguously asked consumers whether they would find an ECN useful³¹, the equivalent question asked to out-of-contract customers is very unclear. Question 10b asks: *“How useful would you find it to be contacted by your provider and told (if/that) you are out of contract for your (Service)”*. It seems highly likely that many out-of-contract customers will have answered this question by thinking about how useful they would find an ECN at the end of a new contract they enter in the future, not by thinking about whether they would find it useful to be reminded now (via an OCN) of something they already know. The result is a highly questionable piece of research into consumer attitudes towards OCNs that Ofcom should not rely on³².
- 2.13 Ofcom’s assessment of the necessity of sending an OCN to all out-of-contract customers is ill-considered and not supported by evidence of consumer harm. This calls into question the necessity of sending OCNs at all, and particularly to those customers who have chosen to remain out of contract for a lengthy period (e.g., 12 months or more). Sky urges Ofcom to revisit this aspect of its proposals and, as a minimum, reduce its scope to only include those customers who have recently moved out of contract.

³⁰ Slides 38-39, Qualitative Research (this section of the research ends with the inconclusive statement “A communication to this group could include...”)

³¹ Slides 23, Quantitative Research (Question 10a: *“How useful would you find it to be contacted by your provider and told your contract for (SERVICE) is coming to an end, for example about 1-2 months before this happens?”*).

³² As Ofcom has done in paragraph 3.80 (*“Stated interest in such notifications was strong among those who said they were out of contract”*).

SECTION 3: THE CONTENT AND FORM OF ECNS AND OCNS

- 3.1 In this section we comment on Ofcom's proposals for the content, structure, form, timing and frequency of the notifications. We are mindful of Ofcom's objectives to ensure that notifications are simple for consumers and practical to implement.³³ Sky has considerable experience developing customer communications across multiple products and customer scenarios and is well placed to offer practical guidance that will assist Ofcom to meet these objectives.
- 3.2 This section comprises three sub-sections:
- (a) elements of Ofcom's approach to notification design that Sky supports;
 - (b) clarifications to make sure consumers who receive an ECN or OCN are not confused or misled by it; and
 - (c) avoiding unnecessary personalisation that increases costs for providers and negatively impacts the customer experience.
- 3.3 The comments in this section are without prejudice to our views set out in sections 1 and 2 above. In particular, Ofcom should not infer from any Sky TV or OCN examples given below that Sky accepts that (i) Sky TV is covered by Ofcom's proposals, or (ii) OCNs are warranted if the customer has been out of contract for 12 months or longer. Any such examples are included for illustrative purposes only.

Elements of Ofcom's approach to notification design that Sky supports

- 3.4 There are several elements of Ofcom's approach to notification design that Sky supports:
- (a) Giving providers flexibility to communicate with customers in their own way using their own style and tone of voice. Providers communicate regularly with their customers, who are accustomed to a particular style. Any requirement to depart from that is unnecessary and risks consumers querying the veracity and sender of the notification. It is important both that Ofcom does not prescribe the specific language used in notifications and that it limits any requirements relating to the structure and ordering of the notification to the absolute minimum. By and large, Ofcom's current proposals accord with this approach.³⁴
 - (b) Requiring only a single notification. Multiple notifications are unnecessary, will contribute to 'information overload' for consumers and will increase costs for providers.
 - (c) Not requiring providers to include the following information:
 - the total price paid over the contract period. This would confuse customers by presenting information in a way that is not generally used in the mobile, landline, broadband and pay TV sectors.
 - detailed information about other contracts taken from the same provider. This would result in complex and lengthy notifications that would be more costly to build and carry an increased risk of customers being sent incorrect or out-of-date information.

³³ Section 4 of the Consultation is headed 'Making end-of-contract and out-of-contract notifications simple for consumers and practical to implement'.

³⁴ Paragraphs 4.3 and 4.49

- historical pricing information. This information would be out-of-date and meaningless and therefore potentially confusing for consumers.
- (d) The option to send customers an SMS with a link to more detailed information in an online account. Sky welcomes the fact that Ofcom acknowledges the strong preference among some consumers for SMS communications³⁵.

Clarifications to make sure consumers who receive an ECN or OCN are not confused or misled by it

3.5 Ofcom should be mindful of any aspects of its proposals that risk causing customer confusion when finalising the form and content of the notifications. Providers such as Sky interact with millions of customers every week and we are well placed to offer insight into what causes customer confusion, prompts queries and generates complaints. In this subsection we outline three areas where we think such outcomes are likely unless the notification requirements are changed.

ECNs need to be carefully timed if early termination charges would be payable on linked products that automatically terminate

3.6 An ECN should not be required for a product (Product A) if the customer has another product (Product B) that remains in-contract and customer must keep Product A to be able to use Product B. In this scenario the customer would be required to pay an early termination charge (“ETC”) on Product B if they chose to end their subscription for Product A upon receipt of the ECN.

3.7 It is best to illustrate this with an example. A Sky TV subscription has a minimum contract term (typically 18 months) and if a customer chooses to take Sky Multiscreen that is a separate subscription with its own separate minimum term³⁶. A customer needs to maintain a Sky TV subscription in order to use their Sky Multiscreen subscription. This means that if a customer takes Sky TV on an 18 month contract and at month nine adds Sky Multiscreen on an 18 month contract then, if the customer ends their Sky TV subscription at the end of Sky TV contract the Sky Multiscreen subscription would automatically terminate at the same time and the customer would need to pay an ETC for the remaining nine months of the Sky Multiscreen subscription.

3.8 Accordingly, an ECN for the Sky TV subscription that included a statement that ETCs no longer apply³⁷, whilst correct for the core product, could be wrong in respect of any linked products. Although the customer would be told at the point of cancellation about any ETCs payable, this sort of scenario clearly has scope to cause unnecessary confusion and significant wasted time for consumers.

3.9 This point should be clarified by Ofcom in its final statement and in the wording of the new General Condition. Sky suggests that in scenarios such as this, the end of the contract for last linked product should be the relevant trigger for the ECN (i.e., an ECN sent 40-70 days before that date).

³⁵ Paragraph 4.51.

³⁶ Sky Multiscreen may also require separate equipment and installation services which are often subsidised in exchange for a minimum term commitment.

³⁷ Per the requirements summarised in paragraph 4.121.

Providers should have the option to include multiple products in the same notification

- 3.10 Providers should have the option to send combined OCNs or ECNs if multiple products are either already out of contract or will move out of contract on dates that are close to each other.
- 3.11 There is nothing in the Consultation to suggest that Ofcom has considered combined notifications, and given that different products may each have their own 'Fixed Commitment Period', the wording of the proposed General Condition seems to envisage a separate notification per contract product³⁸.
- 3.12 Receiving separate but similar notifications very close together is likely to be a source of confusion and annoyance for customers. Sky suggests that where multiple products are already out of contract (when sending the OCN), or where multiple products will reach the end of their contract within 90 days of each other, providers should have the option to send a single combined notification. In the case of ECNs for multiple products, the earliest contract end date should be the relevant trigger for the ECN (i.e., a combined ECN sent 40-70 days before that date).

Where separate charges apply for the SIM and handset there is no need for SIM-only information in the notification

- 3.13 For both ECNs and OCNs Ofcom states that, in respect of the options available to the customer after the contract has ended, the "notification to customers of mobile services must include SIM-only as one of the options"³⁹. This is not necessary for notifications sent by providers who charge separately for mobile SIMs and mobile handsets.
- 3.14 In those cases, when the handset has been paid off, no further payments for the handset are taken. Or, put another way, the relevant contract for an "electronic communication service" is already a SIM-only contract.
- 3.15 Ofcom should therefore clarify that there is no need to include SIM-only information in ECNs or OCNs sent to customers with mobile contracts that do not include handset payments.

If the customer has made a recent change to their package the information in the notification may be out of date

- 3.16 Price information included in the notification may be out of date if the customer makes a package change in the period between the notification being generated by the provider and it being received and read by the customer.
- 3.17 Ofcom should therefore clarify that providers may include a statement in the notification explaining that the information provided may no longer be correct if the customer has made a recent change.

Avoiding unnecessary personalisation that increases costs for providers and negatively impacts the customer experience

³⁸ Condition C1.14, Annex 9: Schedule 1.

³⁹ Paragraph 4.121.

- 3.18 Ofcom states that “more complex [ECNs and OCNs] (for example, with more personalised information) would tend to need more systems development, and so would generate higher implementation costs for providers”⁴⁰. This is correct. However, Ofcom’s proposals include two requirements that are examples of unnecessary personalisation.

It is unnecessary to include the contract end date in OCNs

- 3.19 The first example is the requirement to include the date the customer’s contract ended in the OCN⁴¹. The relevant information for out-of-contract customers is simply the fact that they are out of contract. The date this happened, which could be one month ago or could be ten or twenty years ago, is entirely irrelevant because it has no bearing on the customer’s options or the timing of any action they may choose to take in response to receiving the notification.
- 3.20 Furthermore, it is likely that some historic contract end-date data will either be missing from providers’ systems or will be inaccurate as it is held on legacy systems. This is more likely to be the case for customers who have chosen to remain out of contract for a lengthy period⁴².
- 3.21 As explained above, Ofcom’s consumer research on OCNs lacks substance. Yet it is important to recognise that the single example given in that research of how an OCN could look does not include the contract end date⁴³.
- 3.22 For these reasons Ofcom should remove the requirement to include the contract end date in the OCN.

Providers should be able to direct customers online for the list of other services taken pursuant to other contracts

- 3.23 The second example of unnecessary personalisation is the requirement to include a list of other services taken with the same provider pursuant to other contracts⁴⁴.
- 3.24 In addition to adding significantly to the implementation cost and complexity by requiring a large number of extra data fields (as Ofcom acknowledges⁴⁵), the information is unnecessary because it is already made available to consumers in their online account and listed on monthly bills. Annex 4 shows examples of how this information is provided to Sky customers in their online account area on sky.com. The same information is also available in the ‘My Sky’ app.
- 3.25 Ofcom’s assessment of this requirement highlights participants in its consumer research who felt that inclusion of this information “would act as a reminder of the services they currently take and would allow them to review what they are paying for and consider whether they still require those services”⁴⁶. However, it is equally important to recognise that an

⁴⁰ Paragraph A6.8, annex 6.

⁴¹ Paragraph 4.121.

⁴² In this regard, the risk will be somewhat lower if the requirement to send OCNs is narrowed to exclude customers who have been out of contract for a lengthy period (e.g., 12 months or more).

⁴³ Slide 39, Qualitative Research.

⁴⁴ Paragraph 4.121.

⁴⁵ Paragraph A6.8, annex 6.

⁴⁶ Paragraph 4.24.

equivalent number of participants in that research did not want this information included⁴⁷.

- 3.26 A reminder of what services are taken and a chance to review what is being paid for could equally be facilitated by the inclusion of a link to the customer's online account, together with a prompt to go there to review their existing package. If Ofcom wants to increase customer engagement, a highly effective way of doing so is encouraging customers to use the wealth of personalised information available in their online account on an ongoing and updated basis⁴⁸.
- 3.27 Ofcom should also recognise that for customers who have recently changed their package there may be a discrepancy between the information online (which is likely to be updated in near real-time) and the information in the notification itself (which may have been extracted from systems days or weeks before the notification is actually received and read by the customer). Therefore from a customer experience perspective, it is preferable to direct customers to a single source for this information, i.e., the online information providers already make available.
- 3.28 For these reasons Ofcom should give providers the option to refer customers to their online account for details of other services, with the information in the notification itself limited to a link to where this information can be found and details of how to access it.
- 3.29 It is important to point out that Ofcom is satisfied that this alternative approach meets its objectives in the case of ECNs and OCNs sent by SMS⁴⁹. There can be no logical reason why the same approach cannot be adopted for notifications sent by other means, and indeed, as explained above, there are compelling reasons why the alternative approach is preferable.

⁴⁷ Slide 41, Qualitative Research.

⁴⁸ See further paragraphs 1.22-1.26, Sky CFI response.

⁴⁹ Paragraphs 4.61 and 4.104.

SECTION 4: OFCOM'S DRAFT GENERAL CONDITION

- 4.1 This final section provides Sky's comments on the drafting of the proposed General Condition set out in Annex 9 of the Consultation.

The drafting of the new General Condition

- 4.2 The comments below are limited to drafting points only. The changes to Ofcom's proposals suggested by Sky in sections 1-3 above would mean further changes to the drafting of the proposed General Condition. In this section, however, we have not repeated the comments made in those sections or drafted the necessary changes.

General Condition C1.12

(e) whether any discounts have been applied at any point during the Fixed Commitment Period;

- 4.3 GC C1.12 (e) should be amended to clarify what the words "*any discounts*" relate to. We assume Ofcom intends this to mean any discounts applied to the core subscription price, and not discounts in respect of ancillary charges such as call rates or pay-per-view content. The drafting should clarify this. The inclusion of unrelated discounts would increase the complexity and cost of providing the information.

(h) details of the options available to the Subscriber at the end of the Fixed Commitment Period. This should include a message that the Subscriber may be able to make savings by exploring the available options. An End of Contract Notification to a Subscriber of a Mobile Communications Service shall include reference to SIM Only Contract as an available option.

- 4.4 The words "*options available*" in GC C1.12 (h) are unclear and imprecise. More precise drafting is needed in relation to the minimum information about available options that must be included, e.g., a statement that the customer can choose to remain on their current deal, that they may be able to get a new deal by contacting their provider, or that they can shop around⁵⁰. We also suggest including an express reference to any information being provided to customers being subject to data protection and privacy laws.

(i) the services provided by the Regulated Provider to the Subscriber pursuant to any other contract.

- 4.5 The words "*services*" and "*any other contract*" in GC C1.12 (i) are too broad and could be interpreted to include any type of service, including those that are not related to the provision of mobile, landline, broadband and pay TV services⁵¹. The drafting should be amended to refer to "*electronic communications services*" provided under another contract.

⁵⁰ Sky notes that this example is consistent with the illustrative example of an ECN shown in paragraph 4.50 of the Consultation.

⁵¹ For example, on the basis of the draft wording it would appear that Tesco could be required to include details of its banking services in a notification about Tesco Mobile, and SSE could be required to include details of its energy services in a notification about its broadband and phone packages.

(f) details of any changes to the services referred to in (c) that will come into effect once the **Fixed Commitment Period** ends;

- 4.6 GC C1.12 (f) should be amended to refer to service changes that will come into effect "*because the Fixed Commitment Period has ended*". Other service changes that are happening but which are unrelated to the change in the customer's contractual status should not need to be explained in the ECN⁵².

(b) that the **Subscriber** may terminate the contract without paying an **Early Termination Charge** once the **Fixed Commitment Period** ends, subject to any applicable notice periods, detailing what those notice periods are;

- 4.7 It is unclear why "*notice periods*" is plural in GC C1.12 (b).
- 4.8 The comments above apply equally to the relevant parts of GC C1.21 (where applicable) in respect of OCNs.

General Condition C1.15

C1.15 An End of Contract Notification must be sent via a Durable Medium using the customer's preferred method of contact, if known, otherwise via the same method by which the Subscriber is provided with billing information.

- 4.9 In some cases, providers may not have specifically asked customers their preferred contact method but will nevertheless have an established method of communication based on the contact details provided by the customer. For example, service communications may generally be sent by email when the customer has provided a valid email address.
- 4.10 On a strict reading of GC C1.15, if the provider has not specifically asked the customer for their preferred method of contact, the provider must default to using the same method by which billing information is provided. In many cases this would be via an online account only. It would be preferable to give providers the option to instead default to the method of communication the provider normally uses to send the customer other service-related communications.
- 4.11 The comment above applies equally to GC C1.23 in respect of OCNs.

General Condition C1.19

(c) the **Subscriber** remains a customer of the **Regulated Provider** in respect of the service in question but has not entered into a new contract or agreed to a further **Fixed Commitment Period**.

- 4.12 GC C1.19 (c) should be amended so that the words "*new contract or agreed to a further Fixed Commitment Period*" relate specifically to a new contract etc for the service in question.

⁵²

Of course providers may be required to send the customer a separate contract change notification explaining such service changes, for example under GC C1.6 and/or pursuant to the customer's terms and conditions.

General Condition C1.20

C1.20 The requirement to send an **Out of Contract Notification** pursuant to **Condition C1.19** only applies with respect to **Subscribers** who have not received an **End of Contract Notification**, pursuant to **Condition C1.11**.

- 4.13 We assume that Ofcom intends the notification alternatives (an ECN under GC C1.11 or an OCN under GC C1.19), to apply for each separate service. As drafted GC C1.20 could be read as removing the requirement to send any OCNs if the customer has received an ECN for any service.

Sky

October 2018

SKY'S RESPONSE TO OFCOM'S CONSULTATION - 'HELPING CONSUMERS TO ENGAGE IN COMMUNICATIONS MARKETS - CONSULTATION ON END-OF-CONTRACT AND OUT-OF-CONTRACT NOTIFICATIONS'

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ANNEX 1: SKY'S RESPONSE TO THE CONSULTATION QUESTIONS

Question 1: Do you agree with our assessment of harm relating to residential consumers and Small Businesses?

There are significant flaws and gaps in Ofcom's assessment of harm. Please refer to paragraphs 1.1 to 1.26 of this submission.

Question 2: Do you agree that providers should send both end-of-contract and out-of-contract notifications?

For the reasons explained in paragraphs 2.5 to 2.13 above, Sky does not agree that providers should be required to send an OCN to customers who have been out of contract for a lengthy period (e.g., 12 months or more).

Question 3: Do you agree with our proposal that notifications should be sent to all residential and Small Business customers who take Public Electronic Communications Services?

No. Please refer to section 2 of this submission.

Question 4: Do you agree with our proposals on the content of the end-of-contract notification?

Sky agrees with some aspects of Ofcom's proposals but disagrees with other aspects and has further suggestions on how to improve ECNs. Please refer to section 3 of this submission.

Question 5: Do you agree with our proposals on the structure, method, timing and frequency of the end-of-contract notification?

By and large Sky agrees with these aspects of Ofcom's proposals, but suggests some clarifications to help ensure that consumers who receive an ECN are not confused or misled by it. Please refer to section 3 of this submission.

Question 6: Do you agree with our proposals on the content of the out-of-contract notification?

Sky agrees with some aspects of Ofcom's proposals but disagrees with other aspects and has further suggestions on how to improve OCNs. Please refer to section 3 of this submission.

Question 7: Do you agree with our proposals on the structure, method and frequency of the out-of-contract notification?

By and large Sky agrees with these aspects of Ofcom's proposals, but suggests some clarifications to help ensure that consumers who receive an OCN are not confused or misled by it. Please refer to section 3 of this submission.

Question 8: Do you agree that our proposals are both effective and the minimum necessary to achieve our policy objectives?

Sky agrees with some aspects of Ofcom's proposals but disagrees with other aspects. The remainder of Sky's submission explains why.

Question 9: Do you agree with the impacts we identify, and the approach we take to quantify these impacts, in our assessment in Annex 6?

Ofcom's cost benefit analysis in Annex 6 is incomplete and flawed. The reasons for this are outlined in paragraph 1.27 of this submission.

Question 10: Do you agree with our provisional assessment that the potential costs for providers are not disproportionate in order to achieve our policy objectives?

Ofcom's assessment of costs is incomplete. The reasons for this are outlined in paragraph 1.27 of this submission.


Question 11: Do you agree with our proposed implementation timescale for end-of-contract notifications and for the one-off notification to customers who are already outside of their minimum contract period?

If Ofcom's proposals are amended in line with Sky's comments in the remainder of this submission, then the proposed implementation timescales are reasonable.

Question 12: Do you have any comments on the draft condition set out in Annex 9 to this document?

Yes. Please refer to section 4 of this submission.

ANNEX 2: SKY SPORTS END OF CONTRACT NOTIFICATION

 [View email in browser](#) | [Log in to My Sky](#)


Important information about your Sky Sports subscription

Dear Lee,

Your Sky Sports contract is coming to an end soon.



Sky Sports in HD is currently £34 a month outside of a contract. However, you can **pay £22 a month** when you sign up for a new 18-month contract for your Sky TV and Sky Sports.

[Renew now](#)



[Renew now](#)

Or, call 0333 759 4679 to renew

My Sky ID: 123456789 | [My Account](#) | [Terms and Conditions](#)  

This email was sent to Lee.Banks@sky.uk
Please add sky@email.contact.sky to your address book or safe sender list.

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Offer expiration date 30 September. Sky Sports in HD £22 per month (pm) extra. Current standard in-contract price. New 18-month minimum terms for Sky Sports and Sky TV required. Sky Sports HD is currently £34 pm extra. Current standard price when outside of minimum term. Prices may go up during your contract. Calls to Sky contact centres are free for Sky Talk customers. If you're not with Sky Talk, calls to 03 numbers cost the same as calls to 01 or 02 numbers and are included in your calls package. If you don't have a calls package, charges may apply, check your provider's tariff guide. Other offers on your Sky TV package are unaffected and will continue for the period previously agreed. Further terms apply. Correct at 25 August 2018.

ANNEX 3: OFCOM'S ASSERTION THAT PAY TV IS AN "ELECTRONIC COMMUNICATIONS SERVICE"

A3.1 Ofcom states that the proposed new general condition "will apply to providers of... pay TV services"⁵³. However Ofcom does not have the legal power to do so. Ofcom's assertion that it has the power to do so is: (i) inconsistent with the Common Regulatory Framework ("CRF"); (ii) a mischaracterisation of domestic legislation; (iii) a misinterpretation of the *Hilversum* judgment; and (iv) inconsistent with Ofcom's actual practice to date.

Ofcom's position is not compatible with the Common Regulatory Framework or implementing domestic legislation

A3.2 Ofcom's fundamental assertion is that it has the legal power to regulate the provision of information to customers of pay TV services because it considers that those services fall within the definition of an electronic communications service ("ECS")⁵⁴. This assertion is not compatible with either the Common Regulatory Framework ("CRF") or the implementing domestic legislation.

A3.3 Ofcom's powers to regulate the provision of information to customers of telecommunications services are derived from the CRF. The purpose and scope of the CRF is clearly set out in the Framework Directive, which differentiates between the regulation of transmission and the regulation of content⁵⁵. To stress this distinction, the CRF identifies services falling outside the scope of the CRF, which include broadcasting content and web-based content.⁵⁶

⁵³ Paragraph 5.60.

⁵⁴ Paragraph 5.59.

⁵⁵ Recital 5, 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 (the "Framework Directive"). See also recital 2, 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 (the "Access Directive") and recital 20, 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 (the "Authorisation Directive"). *"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 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). (Recital 5, Framework Directive).

⁵⁶ *"The definition of 'information society service' in Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules of information society services spans a wide range of economic activities which take place on-line. Most of these activities are not covered by the scope of this Directive because they do not consist wholly or mainly in the conveyance of signals on electronic communications networks. Voice telephony and electronic mail conveyance services are covered by this Directive. The same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content"* (emphasis added). (Recital 10, Framework Directive).

- A3.4 The exclusion of content services from the scope of the CRF is most clearly set out in the Access Directive:
“services providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the common regulatory framework for electronic communications networks and services.”⁵⁷
- A3.5 The Act, which transposes the CRF, echoes this distinction between transmission and content, defining an ECS as:
“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.”⁵⁸ (Emphasis added.)
- A3.6 Ofcom asserts that a service will be an ECS if it includes the conveyance of signals on an electronic communications network⁵⁹. This is manifestly incorrect and a misapplication of the law.
- A3.7 In order for a service to be deemed an ECS, and therefore within Ofcom’s power to regulate, Ofcom must be able to answer one of two questions affirmatively:
- (a) Does the service consist entirely in the conveyance of signals by means of an electronic communications network? or
 - (b) Does the service have as its principal feature the conveyance of signals by means of an electronic communications network?
- A3.8 Ofcom must also be able to answer one further question in the negative:
- (a) Is the service in question a content service?

Ofcom’s position is not supported by the case law

- A3.9 Ofcom cites case law relating to the definition of an ECS in support of its assertion. However, there is nothing in the applicable case law that changes the legal test. In fact, the case law simply provides further guidance as to how to apply the test.
- A3.10 In the 2013 *Hilversum*⁶⁰ case cited by Ofcom, the question raised was whether Article 2(c) of the Framework Directive must be interpreted as meaning that a service consisting in the supply of free to air (“FTA”) radio and television channels via a basic cable package falls within the definition of an ECS.
- A3.11 In considering the question before it, the Court of Justice of the European Union (“CJEU”) noted the definitions set out in Articles 2(a) and 2(c) of the Framework Directive, the fact that Recital 5 specifies that the regulation of transmission should be separated from the regulation of content, and that the CRF does not cover the content of services delivered over electronic communications networks using an ECS, such as broadcasting content.

⁵⁷ Recital 2, Access Directive.

⁵⁸ Section 32(2) Communications Act 2003. “Content service” is subsequently defined by section 32(7) as “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 such a network”.

⁵⁹ Paragraph 5.59.

⁶⁰ Case C-518/11 *UPC Nederland BV v Gemeente Hilversum*, Judgment of 7 November 2013 (“*Hilversum*”).

- A3.12 The CJEU noted (as highlighted by Ofcom), that a basic cable package would fall within the definition of ECS only in so far as that service includes the conveyance of signals on the cable network⁶¹. However, in its final conclusion, and the operative part of the judgment, the CJEU notes that the service in question would only fall within the scope of an ECS in so far as that service entailed primarily the transmission of television content on a cable distribution network to the receiving terminal of the final consumer⁶². Accordingly, if the primary purpose of the service in question had been anything other than the transmission of television content (i.e. the conveyance of signals), it would not have been an ECS.
- A3.13 *Hilversum* concerned the transmission of FTA television and radio content via a cable network, where UPC did not produce or exercise editorial control over the content in question⁶³. The facts of *Hilversum* are not comparable to pay TV services like Sky's, where Sky both produces and has editorial control over content within its service. Therefore not only has Ofcom incorrectly summarised the *Hilversum* judgment (as shown above) but Ofcom has also erred in its application of that judgment to pay services such as Sky's.

Pay TV content services are not Electronic Communications Services

- A3.14 To regulate the provision of information to customers of pay TV services Ofcom must satisfy itself of the following:
- (a) that the service in question is not a content service. Both the CRF and the Act are clear – where a pay TV service is a content service, it is not an ECS. According to the case law, where a service includes content produced by the service provider and/or content over which the service provider has editorial responsibility that service is a content service, and is therefore excluded from the definition of an ECS⁶⁴;
 - (b) that the service is wholly or mainly an ECS. Where a number of services (some of which are an ECS and some of which are neither an ECS nor a content service) are combined, Ofcom must satisfy itself that the ECS element of the service is the principal feature of that service. If not, the overall service cannot be deemed an ECS.
- A3.15 It is clear, therefore, from the legislation and the case law that the status of each relevant service (as an ECS or otherwise) must be determined on a case by case basis. Ofcom has, however, made no attempt to conduct such an assessment and has failed therefore to show that it has jurisdiction to regulate pay TV services in the way it purports to in the Consultation.
- A3.16 Had Ofcom undertaken such an analysis, it would become readily apparent that content services like Sky's pay TV service do not fall within the scope of the definition of an ECS. Ofcom does not therefore have the power to regulate such services.

Ofcom's decision to apply its proposals to pay TV is inconsistent with its practice to date

- A3.17 As discussed above, Ofcom's assertion that it has the power to regulate the provision of information to customers of pay TV services is based on an (incorrect) interpretation of the judgment in *Hilversum*, which is now nearly five years old. Ofcom provides no

⁶¹ See paragraph 44, *Hilversum*.

⁶² See paragraph 47, *Ibid*.

⁶³ See paragraph 43, *Ibid*.

⁶⁴ See further the Advocate General's opinion at paragraph 35 in Case C-475/12 – *UPC DTH Sarl v Nemzeti Media – es Hirkozlesku Hatosag Elnokhelyettese*.

explanation at all as to why it only now takes the view that *Hilversum* warrants a significant change in its approach to regulation of pay TV services, having not taken such a view previously.

- A3.18 To date, Ofcom's practice has been inconsistent with the view set out in the Consultation. In particular, Ofcom has drafted and enforced the General Conditions, which apply to providers of an ECS, on the basis that they do not apply to pay TV services. The position in the Consultation therefore is inconsistent with Ofcom's approach to the General Conditions and is demonstrative of the lack of consideration Ofcom has given to its position and the consequences of its assertion that all pay TV services that include the conveyance of signals are an ECS.
- A3.19 Given the significance of this change in approach by Ofcom, in line with Ofcom's regulatory principle of transparency, Sky would have expected Ofcom to have set out its position carefully and thoroughly, including addressing any inconsistencies with its approach to the issue to date. Ofcom, however, fails to address the inconsistency of its proposals with its practice to date, or to consider the wider implications of an assertion that it regards pay TV services as an ECS.





ANNEX 4: SERVICE INFORMATION IN SKY CUSTOMERS' ONLINE ACCOUNTS

Welcome Paul
Here is your account summary





TV Broadband & Talk Mobile My Details

Account number: [redacted] Viewing card number: [redacted]

Your Package

 <p>Box Sets Bundle Binge on our Box Sets collection</p>	 <p>Sky Sports More of the sports you love</p>	 <p>Sky Cinema Enjoy new premieres daily and over 1,000 movies on demand</p>	 <p>F1® Every Formula 1® practice and race live</p>
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Your Equipment

 <p>Sky Q 2TB Box Record 6 shows and watch a 7th live</p>	 <p>Sky Q Mini Box Connect up to 4 and watch concurrently on 2</p>	 <p>Sky+HD 2TB Box Record up to 350 hour-long episodes in HD.</p>	 <p>Sky+HD 1TB Box Record up to 240 hour-long episodes in HD</p>
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TV Bill

Next payment is due
26 Sep

[View TV, Broadband & Talk Bill](#)

Welcome Paul

Here is your account summary

TV **Broadband & Talk** Mobile My Details



Account number:



Landline number:

Your Package

Sky Fibre Unlimited

Sky Fibre Unlimited

You have truly unlimited broadband with your package.



Sky Talk International Extra

You have international calls included in your package.



Sky Line Rental

Your package includes line rental, which comes with a number of call features as standard.

Your Equipment



Sky Q Hub

You have our best-ever Sky Hub with our fastest wireless speeds via 5GHz and dual-band wireless technology.

Broadband & Talk Bill

Next payment is due

26 Sep

[View TV, Broadband & Talk Bill](#)