



OFCOM REVIEW OF SKY'S ACCESS CONTROL SERVICES REGULATION SKY RESPONSE

1. Introduction

1.1 This submission sets out Sky's response to Ofcom's consultation entitled '*Review of Sky's Access Control Services Regulation*' dated 25 July 2013 (the "Consultation"). In summary:

- The Consultation fails to give sufficient emphasis to the tests that need to be met in relation to the setting of access-related conditions (Section 2).
- The imposition of any new regulation on Sky in relation to access control services would not meet the relevant statutory tests (Section 3).
- Ofcom's review process for the removal of the Continuation Notice¹ is highly unsatisfactory, inconsistent with Ofcom's policy and too long. Moreover, removal of the Continuation Notice does not preclude Ofcom considering this issue further at a later date (Section 4).

2. Ofcom's relevant powers and duties

2.1 Ofcom's consideration of its relevant powers and duties in relation to this issue is set out in Section 3 of the Consultation.

2.2 Ofcom acknowledges in its Consultation that it has a "*duty to issue a notice discontinuing the Continuation Notice if it decides not to replace the continued provisions with conditions set under the Act or, if it decides to set such conditions, once they come into effect*"². Ofcom further indicates that it intends to remove the Continuation Notice once it has decided whether or not to set replacement conditions.³

Sections 45 and 47 of the Communications Act 2003 are of primary importance in the setting of access-related conditions

2.3 The Consultation focuses on the issue of whether Ofcom should replace the conditions of the Continuation Notice with "access-related conditions" imposed under Part 2 of the

¹ 'Continuation Notice to a Class of Persons defined as the Licensee for the Purpose of Access Control Services under Paragraph 9 of Schedule 18 to the Communications Act 2003'.

² Paragraph 3.8 of the Consultation. We welcome Ofcom's acknowledgment at paragraph 3.7 that it has a duty to do so "*as soon as reasonably practicable*" and note again that Ofcom is in breach of this duty.

³ Paragraphs 2.1, 5.33 and 5.34 of the Consultation.

Communications Act 2003 (“the Act”).

2.4 Ofcom’s powers to set access-related conditions are derived from section 45 of the Act – “*Power of OFCOM to set conditions*”. The relevant test that any access-related conditions set under section 45 must meet is set out in section 47 of the Act. Ofcom’s Consultation fails to give sufficient emphasis to sections 45 and 47 of the Act. It instead focuses on Ofcom’s powers under sections 73 and 74 of the Act, as well as a number of Ofcom’s “general duties”, some of which are not of direct relevance but are nonetheless set out in some detail. By contrast, the crucial section 47 test is summarised by Ofcom in a short paragraph.⁴

2.5 Under section 47, any proposed condition or modification to existing conditions must be:

- (a) **“objectively justifiable** in relation to the networks, services, facilities, apparatus or directories to which it relates [...];
- (b) **not such as to discriminate unduly** against particular persons or against a particular description of persons;
- (c) **proportionate** to what the condition or modification is intended to achieve;
- (d) in relation to what it is intended to achieve, **transparent**.” [Emphasis added.]

Ofcom’s general duties

2.6 Ofcom cites a number of general duties it considers relevant to its Consultation. It fails, however, to refer to a number of important general duties, namely section 3(3) and section 6(1)(b) of the Act, that are plainly of direct relevance to the Consultation. Section 3(3) requires Ofcom, in carrying out its principal duty:

“to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed”.

2.7 Section 6(1)(b) of the Act requires that Ofcom should secure that “*regulation by OFCOM does not involve the maintenance of burdens that have become unnecessary*”.

3. The imposition of any new regulation on Sky in relation to access control services would not meet the relevant statutory tests

3.1 The fundamental question that Ofcom first must address is whether the conditions included in the Access Control Continuation Notice could legitimately be replaced by new access-related conditions. For the reasons set out below, this is not the case.

3.2 The Continuation Notice regulates the provision of access control services by Sky alone. The fact that the Continuation Notice applies only to Sky is, in essence, a historical issue. Ofcom imposed regulation on Sky in 2000 for reasons that are of little relevance today. In

⁴ Paragraph 3.13 of the Consultation.

particular, the regulation was imposed on the basis of a finding of dominance in a market for “digital interactive television services”. In defining this market, Oftel relied on the findings of the European Commission in the ‘BiB case’⁵ as follows:

*“In defining the relevant market for Access Control Services, Oftel has also made use of the market definition used by the European Commission in its ‘BiB decision’ ie the Decision of 15 September 1999 relating to a proceeding under Article 81 of the EC Treaty [Case IV/36.539, British Interactive Broadcasting/Open] (1999/781/EC). The BiB decision stated that there is a separate economic market for digital interactive TV services in the UK.”*⁶

- 3.3 A key element of the European Commission’s market definition analysis in the BiB case was the potential substitutability of interactive services delivered via the internet. In rejecting the potential for such substitutability, the European Commission stated:

*“Both the demand-substitutability test and differences in the characteristics of interactive services available via television sets and via personal computers lead to the conclusion that they are separate product markets. A small permanent increase in the price of such services available via televisions is unlikely to be constrained by the existence of services available on personal computers. While television sets are ubiquitous, in the United Kingdom only some 25% of households have a personal computer and fewer than half of these are equipped with a modem. Moreover, the relatively high cost of personal computers means that the switching cost for end-users would be high.”*⁷

- 3.4 It is plain that such analysis relates to a bygone era.
- 3.5 Section 47(2)(b) of the Act requires that Ofcom must be satisfied that any access-related conditions do not “discriminate unduly against particular persons”. Sky’s access control services are technical services that enable broadcasters and interactive service providers to provide interactive services to consumers. Today, there is a large range of providers of such technical services, operating a wide range of platforms, including some of the largest firms in the world, such as Apple, Google and Microsoft - as well as a host of other UK-based players including Virgin Media, BT, Freeview, YouView, Freesat etc. In these circumstances, it is impossible to see how the application of access-related conditions in relation to access control services provided by Sky alone might reasonably be considered to meet this test.
- 3.6 Even if this test was met, it is also plain that, in today’s market environment, it could not reasonably be considered to be proportionate to impose access-related conditions on the

⁵ 1999/781/EC: Commission Decision of 15 September 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/36.539 - British Interactive Broadcasting/Open) (notified under document number C(1999/2935)).

⁶ Paragraph 1.10, ‘Decision as to the status of Sky Subscribers Services Limited as a Regulated Supplier in the market for access control services for digital interactive TV services’, Oftel, June 2000.

⁷ Paragraph 21 of the BiB case.

provision of access control services on Sky's DTH satellite platform. Nor could it reasonably be said that the imposition of access-related conditions would be "*targeted only at cases in which action is needed*".

- 3.7 As set out in Sky's January submission, the simple reason for lack of necessity for imposing access-related conditions on Sky's provision of access control services is that there is a substantial and increasing diversity of ways for firms to provide interactive services to consumers, among which Sky's set top boxes are of minor importance.
- 3.8 As stated by Sky in its January submission and as acknowledged by Ofcom at paragraphs 5.5 to 5.7 of the Consultation, the number of third parties taking access control services from Sky, and the range of interactive activities carried out by Sky's customers of Sky's access control services, have declined sharply over the past four years. Such decline is largely as a result of the development of the internet, which is a significantly more cost-effective and sophisticated means by which service providers can provide interactive services to consumers. These changes have rendered the types of interactive services that are able to be delivered via Sky's set top boxes virtually obsolete and of minimal importance to competition among service providers.
- 3.9 It is wholly evident that there is sufficient compelling information readily available to Ofcom that access-related conditions relating to Sky's provision of access control services could not lawfully be imposed, having regard to the relevant tests and duties imposed on Ofcom under the Act.

Ofcom's analysis in Section 5 of the Consultation

- 3.10 In Section 5 of the Consultation, Ofcom considers whether it is necessary for Ofcom to set any access-related conditions replacing those set out in the Continuation Notice. This section covers a number of issues, one of which is stated as being "*understanding the demand for access to Sky's APIs from current and prospective users*"⁸.
- 3.11 As set out above, Sky considers that the issue of necessity of imposing access-related conditions on Sky is a second-order question – the fundamental question being whether such conditions could legitimately be imposed on Sky.
- 3.12 Moreover, Sky considers that the focus of the analysis set out in Section 5 of the Consultation is too narrow, and is apt to generate erroneous conclusions. For example, even if this analysis identified a number of interactive services which would not be provided on Sky's satellite platform absent supply of access control services, this would not mean that it is necessary (or appropriate) for Ofcom to impose access-related conditions on Sky in relation to those services. Nevertheless, for completeness we have addressed Ofcom's analysis of current and potential future uses of Sky's access control services at **Annex 1**.

⁸ Paragraph 5.3 of the Consultation.

4. Ofcom's process is highly unsatisfactory and inconsistent with its policy on the discontinuation of continuation notices

The current approach is inconsistent with Ofcom's policy on removal of continuation notices

- 4.1 The process being followed by Ofcom does not conform with Ofcom's legal obligation to regulate in a consistent manner.
- 4.2 In conformity with its duty to review Continuation Notices as soon as reasonably practicable, Ofcom undertook a programme of reviewing such notices after the Act came into force, during 2003 and 2004. At first, continuation notices were reviewed one-by-one. In that process conditions were removed either (i) on completion of a market review, or (ii) where Ofcom determined that the conditions related to market that *"it should not review with a view to imposing ex ante regulation"*⁹.
- 4.3 At the end of 2004, however, Ofcom adopted a new policy approach, set out in its statement entitled *"Discontinuation of conditions and directions continued in July 2003 from licences made under the Telecommunications Act 1984, except for certain specific provisions"* (the "2004 Statement"). The position set out in the 2004 Statement was as follows:

*"While it is appropriate to keep [continuation] notices in place pending completion of planned market reviews, Ofcom does not believe it is appropriate to maintain Continuation Notices for services in a market where there are no plans to review that market under the Communications Act 2003... Given the progress of Ofcom's programme of market reviews, Ofcom believes it is now appropriate that, instead of specifying the exceptional markets in which continued provisions should be deemed no longer to apply, **it should now discontinue all Continuation Notices in their entirety except for specific provisions which should remain in force pending review of those specific markets.**"*¹⁰ [Emphasis added.]

- 4.4 Ofcom described the intention of this approach as follows:

*"To a large extent the exercise is precautionary and **it is intended to ensure that no continued provisions and directions are left in place inadvertently.**"*¹¹ [Emphasis added.]

- 4.5 Accordingly, Ofcom's clear policy was to remove all continuation notices **unless** there were concrete plans to review the *"specific markets"* to which they related. The statement gave effect to this policy, and resulted in the issuing of eight discontinuation notices, covering a wide range of matters. For example, in relation to BT, all but four conditions in continuation notices were discontinued.¹² As far as Sky is aware, Ofcom has not subsequently adopted a different policy.

⁹ Paragraph 2.7 of the 2004 Statement.

¹⁰ Paragraphs 2.6 - 2.7 of the 2004 Statement.

¹¹ Paragraph 2.1, *Ibid.*

¹² See paragraph 2.19, *Ibid.*

4.6 The Access Control Continuation Notice did not benefit from this approach because Ofcom was already engaged in a review of the market to which this notice related.¹³ In explaining why the Access Control Continuation Notice was not, at that time, being discontinued, Ofcom stated:

“Ofcom is reviewing the relevant services and expects to discontinue these continued provisions in their entirety when the review has been concluded.”¹⁴

4.7 Yet, as set out in the Consultation, some nine years later Ofcom has neither completed a market review, nor removed the Continuation Notice.

4.8 There is no indication that Ofcom intends to carry out a market review in the foreseeable future in relation to access control services. This asymmetric treatment of the Access Control Continuation Notice is plainly inconsistent. If Ofcom does not plan to review the market relating to access control services, it should withdraw the Continuation Notice in accordance with its policy set out in the 2004 Statement.

Failure to refer to Sky’s proposed commitments

4.9 A review of decisions by Ofcom to discontinue continuation notices in the past also indicates that in a number of cases where the regulation was of relatively minor significance, Ofcom was prepared to discontinue it on receipt of non-legally binding undertakings from those to whom it applied. For example, such undertakings were provided:

- in May 2004 by BT in relation to charges for number portability standard services;
- in May 2004 by BT in relation to non-conveyance elements of a public emergency call service;
- in November 2004 by BT and Kingston in relation to rental prices for hardwired phones; and
- in February 2005 by BT and Kingston in relation to payphone access charges.

4.10 The third of these examples is particularly apposite. By 2004 BT and Kingston had a small number of customers – around 140,000 – who continued to use “hardwired” rather than plug and socket telephones. Charges for such phones were regulated by a price control – one of the most intrusive forms of regulation – in order to protect the small number of remaining users of that type of phone. Ofcom’s consultation in relation to this issue considered three options: (i) doing nothing – simply leaving the continuation notice in place, (ii) conducting a market review, with a view to replacing the conditions in the continuation notice with SMP conditions, or (iii) accepting informal undertakings from BT and Kingston in relation to supply of hardwired phones and removing the continuation notice.

4.11 Notably, Ofcom ruled out the first option on the basis that it:

¹³ ‘The future regulation of access control services, A consultation issued by the Director General of Telecommunications’, 14 November 2003. The Consultation fails to refer to this review.

¹⁴ Paragraph 2.15 of the 2004 Statement.

“is not permissible under the Act...It is therefore not possible for Ofcom to leave the continued provisions in place indefinitely.... This is not a viable option and is included here purely for completeness.”¹⁵

4.12 In relation to the second option, a key drawback that was identified was:

“In order to set SMP apparatus conditions under section 93 of the Act, Ofcom would first need to conduct a market review. This would be a resource-intensive exercise and might be considered disproportionately burdensome, bearing in mind the small proportion of BT’s and Kingston’s customer base affected and the possibility of alternative measures.”¹⁶

4.13 The “possibility of alternative measures” referred to was the proposal to seek voluntary undertakings.

4.14 Ofcom’s statement concluded:

“[Ofcom] remains of the view that the Continued Hardwired Price Controls should be discontinued upon receipt of satisfactory undertakings from BT and Kingston ... Should BT and Kingston renege on the undertakings, which Ofcom does not anticipate will happen, Ofcom could decide to conduct a formal market review and, if appropriate, impose SMP apparatus conditions ... Having carefully considered the responses to the June consultation, Ofcom is now discontinuing the Continued Hardwired Price Controls.”¹⁷

4.15 In Sky’s view, this was a pragmatic and proportionate approach to this issue.

4.16 In its January submission, Sky set out an offer to commit to continue to provide those access control services currently used by broadcasters via Sky’s current generations of set top boxes until the end of 2016, via the inclusion of relevant provisions in their contracts. This was clearly an important proposal, which should ease considerably any concerns held by the small number of existing users of Sky’s access control services about the potential withdrawal of the Continuation Notice. Ofcom’s consultation, however, made no mention of this proposal, and Ofcom refused a subsequent request by Sky to bring this to consultees’ attention.¹⁸

4.17 Again, Ofcom’s approach plainly is inconsistent with its approach to removal of continuation notices in the past.

¹⁵ Paragraphs 30-32, ‘Proposal that BT’s and Kingston’s price controls in respect of rental of hardwired telephone apparatus should be removed and replaced by written undertakings’, 10 June 2004.

¹⁶ Paragraph 39. *Ibid.*

¹⁷ Paragraphs 21-26. ‘Removing the price controls on BT’s and Kingston’s hardwired telephone rental prices in exchange for written undertakings’, 25 November 2004.

¹⁸ When Sky queried this omission, Ofcom responded that it is included in Sky’s submission annexed to the Consultation, and Sky was entitled to draw consultees’ attention to it. These are plainly poor reasons for Ofcom itself failing to draw consultees’ attention to this proposed commitment.

The proposed duration of Ofcom's review is too long

- 4.18 As Ofcom acknowledges, the Act placed (and continues to place) upon Ofcom a duty to review and remove the Continuation Notice "*as soon as reasonably practicable*", yet it has failed to do so for over ten years.
- 4.19 The case for removal of the regulation set out in the Continuation Notice is clear-cut. In these circumstances, and also bearing in mind Ofcom's duties under section 3(1) and section 6 of the Act, Sky would have anticipated that Ofcom should have been prepared to undertake a short analysis and consultation with the aim of withdrawing the Continuation Notice. Such a process was followed in relation to other continuation notices where the case for withdrawing them was relatively clear.¹⁹
- 4.20 Instead, Ofcom's process is intended to be a drawn out one, lasting over a year. Ofcom has already taken six months from the receipt of Sky's January submission to issue a consultation document on this issue. Yet the Consultation simply asks consultees for their views. This stands in stark contrast with almost all Ofcom consultations, in which Ofcom's own views, and potential ways forward, are normally set out with considerable firmness. The Consultation is in fact nothing more than an information-gathering exercise, which Ofcom could have undertaken without delay in early 2013.
- 4.21 It is therefore of considerable concern that Ofcom envisages a significant further period of review following the consultation period. Paragraph A1.11 of the Consultation states that "[f]ollowing the end of the consultation period, Ofcom intends to publish a further consultation or a statement, depending on responses, **early next year**" (emphasis added), potentially covering a broad range of considerations.²⁰ This again conflicts with Ofcom's duty under the Act to withdraw the Notice as soon as reasonably practicable. There is no plausible reason for such an extended timetable, and Ofcom should instead aim to publish a statement in relation to the matters required under Schedule 18 of the Act by the end of 2013 at the latest.

Removal of the Continuation Notice does not preclude Ofcom considering this issue further at a later date

- 4.22 The key task currently facing Ofcom is to determine whether or not to impose replacement access-related conditions on Sky in relation to its provision of access control services. If such conditions cannot be lawfully imposed (as they cannot, as explained above) Ofcom must give notice to Sky that the Continuation Notice no longer has effect.
- 4.23 The disapplication of the Continuation Notice cannot and would not preclude Ofcom from considering further – in whatever timescale it considered appropriate – the more general issue of whether regulation of access control services (across all providers, including Sky) is necessary and appropriate. Given the highly competitive nature of this activity, however, it

¹⁹ See email from Matthew Marsh to Yih-Cheung Teh dated 15 April 2013, which provides examples of where Ofcom carried out short consultations prior to withdrawing other continuation notices.

²⁰ For example, Ofcom refers at paragraph 5.37 of the Consultation to issues of media plurality and cultural diversity.

is difficult to conceive that such a review could be an administrative priority for Ofcom.

5. Specific comments

5.1 Sky has a number of specific comments on issues raised in the Consultation.

5.2 First, Ofcom states at paragraph 5.20: *“Sky is a vertically integrated firm providing interactive services for end-users via its platform; in principle this could influence its willingness to negotiate access with potential competitors in the absence of regulation”*²¹. The *“in principle”* caveat in this statement is critical. It is a commonplace that vertical integration is normally benign, and only in certain circumstances does it give rise to potential distortions of competition, such as that referred to in paragraph 5.20.

5.3 In particular, intense competition at the downstream (retail) level among services provided using different technologies render concerns about potential competitive effects of vertical integration nugatory. That is plainly the case here. As set out in Sky’s January submission Sky has strong incentives to maximise the attractiveness of its platform to end-users. If third party interactive services (such as the BBC’s red-button Wimbledon service) are likely to be of value to consumers, Sky has strong commercial incentives to facilitate their access to its satellite platform. These incentives are a reflection of strong downstream inter-platform competition.

5.4 Second, Ofcom states that it has *“not received any formal disputes regarding Sky’s regulatory obligations with respect to AC services”*²². The reference to *“formal disputes”* in this statement is misconceived; there is no such thing as an ‘informal dispute’ in relation to Sky’s regulatory obligations. The relevant fact is that no regulator – either Ofcom or Oftel before it – has been called upon to resolve a dispute between Sky and a customer of its access control services, since those services were first provided over 13 years ago.

5.5 Finally, Ofcom states:

*“In the last couple of years Sky has sought to enter into a revised standard agreement with users of ASS but this has not been achieved for the majority of users, resulting in temporarily extending the existing agreements on current terms instead. Consequently, it would appear that the contractual terms have typically remained unchanged for a period of time. Previously extensions have often been provided for a period of six months at a time, but more recently it appears that extensions have been agreed on a month by month basis.”*²³

5.6 These statements appear to be based on a misunderstanding of facts of this situation. When a broadcaster’s Application Signing Agreement (“ASA”) reaches the end of its standard two year term, it is Sky’s usual policy to extend the agreement on a monthly basis until a renewal ASA is signed. However, for a limited period in the run-up to finalising its updated standard ASA in 2012, Sky extended broadcasters’ existing ASAs for 6 month

²¹ Paragraph 5.20 of the Consultation.

²² Paragraph 5.17 of the Consultation.

²³ Paragraph 5.18 of the Consultation.

periods, rather than entering into the outdated version of the standard ASA for a further two year term. Sky finalised its new standard ASA in late October 2012 and sent this to broadcasters for review, at which point it reverted to the usual one month extension period as standard.

6. Further relevant documents and resources

- 6.1 In July this year Sky sent Ofcom a range of recently published articles and other documents which represent just a small sample of the huge news-flow related to developments in connection with interactive services. These articles and documents illustrate (i) the diversity of ways in which interactive services are now provided to consumers and (ii) the rapid ongoing changes that are occurring in relation to such services. The articles and documents also show that broadcasters are providing interactive services via a wide range of internet enabled devices (such as Smart TVs, PCs, laptops, iPads/tablets, smartphones and games consoles) (“internet-enabled devices”) which are easily used while consumers are watching television. As stated in Sky’s email to Ofcom of 17 July 2013²⁴, the direction of travel is clear: there are many ways in which broadcasters can provide and consumers can access interactive services delivered other than via a Sky set top box. Ofcom confirmed in an email to Sky dated 18 July 2013 that it would reflect on the articles and documents provided by Sky at the same time that it considers any responses to its Consultation.
- 6.2 We have provided at **Annex 2** summaries or links to four additional resources that provide relevant background to Ofcom’s Consultation, two of which are documents recently published by Ofcom.

Sky

19 September 2013

²⁴ See email from Matthew Marsh to Caroline Chandan-Roels dated 17 July 2013.

Annex 1

A1. Section 5 of the Consultation includes an assessment of demand for Sky's access control services, based on an analysis of the provision of existing and prospective interactive services via Sky's set top boxes. That analysis includes an assessment of alternative ways in which such services might be provided. This Annex sets out Sky's comments on Ofcom's assessment.

Existing Interactive Services

A2. For each category of interactive service identified in the Consultation which currently makes use of access control services, there are viable alternatives for delivery to consumers, as further detailed below:

- "Enhanced TV" services: Ofcom describes these as services which provide "access to additional information and/or video feeds that complement the broadcast TV programme"²⁵. The main example cited by Ofcom is the traditional red button service²⁶, which currently only Sky and the BBC make use of on the Sky platform. Viable alternatives include:
 - Making additional video feeds available on a second screen via internet enabled devices. If a consumer wanted to view the content on the TV screen rather than on a second screen, this could be achieved by "air playing" the content from the second screen to the main TV screen via bluetooth/wifi/cable.
 - Making the additional video feeds available on separate channels. This has the added advantage of making it possible for consumers to record the content and view the EPG schedules for the additional feeds. For example, during the Olympics the BBC made alternative video feeds available both via the red button and also on 24 separate EPG-listed channels. [3<]
- "Commercial Watermarking": Commercial watermarking (e.g. the pint glass symbol) is not essential for making pay-TV channels available in commercial premises – indeed a number of broadcasters of channels intended for reception in commercial premises do not use commercial watermarking. It is, rather, one means by which distributors of pay-TV content can verify whether a commercial premises has purchased the appropriate commercial pay TV subscription from the distributor – by checking whether the pint glass is present in the corner of the screen of a television being used in a commercial premises. Only Sky and British Telecommunications PLC currently make use of commercial watermarking. [3<]
- "Contextual commercial services": Ofcom describes these as "services which have been developed to commercially exploit the TV channels and programmes"²⁷. Examples include interactive advertisements, purchasing functionality on home shopping channels and interactive betting services:

²⁵ Paragraph 4.3.1 of the Consultation.

²⁶ 'Traditional red button services' are those which provide access to additional information and/or video feeds that complement the broadcast TV programmes.

²⁷ Paragraph 4.3.3 of the Consultation.

- Neither Sky nor any third party is currently making interactive advertisements available via the Sky satellite platform. Viable alternatives include making interactive advertisements available via Smart TVs and second screens on internet enabled devices, plus a plethora of other means available for advertising and promoting products and services, including during a channel's normal ad breaks and promotional airtime.
 - Neither Sky nor any third party is providing interactive shopping functionality via the Sky satellite platform. QVC ceased providing this service on 12 August 2013. Viable alternatives, as identified by Ofcom at paragraph 5.13 of the Consultation, include *"calling a phone number displayed on the TV broadcast, or by using a smartphone/tablet app which accesses information over the internet from the broadcaster's server"*. In addition to the alternatives mentioned by Ofcom, consumers could make purchases over the internet using any other internet enabled devices.
 - Only Sky and Attheraces Ltd (via Skybet) provide interactive betting services and, as noted by Ofcom, use of such services by consumers on the main screen is low.²⁸ [3<] Viable alternatives include interactive betting via internet enabled devices.
 - **"Standalone services"**: Ofcom describes these as *"[s]ervices which are not directly associated with the TV channels and programmes, but are accessed on the TV. For example, e-mail and banking services"*²⁹. Neither Sky nor any third party is currently providing these services via Sky set top boxes. Sky notes that the provision of such services via internet enabled devices is more cost-effective, provides a richer viewer experience, and enables the app provider to deliver the interactive service to the consumer irrespective of the television platform the consumer is using. As noted by Ofcom, *"there has been somewhat of a renaissance of such services on smart TVs"*³⁰, which provides further evidence that access to Sky's set top boxes is not essential for standalone interactive services to reach consumers.
- A3. Notwithstanding the existence of (i) viable alternatives for third parties to make their interactive services available to consumers and (ii) Sky's commercial incentives to continue to facilitate access to other broadcasters' valuable interactive content on a commercial basis, in its January submission Sky has offered to undertake to continue to provide access control services currently used by broadcasters via Sky's current generations of set top boxes until the end of 2016.

Prospective Interactive Services

- A4. In relation to prospective interactive services on the Sky satellite platform, Ofcom states that:

²⁸ Paragraph 4.23 of the Consultation.

²⁹ Paragraph 4.3.4 of the Consultation.

³⁰ Paragraph 4.26 of the Consultation.

“there are a number of developments which highlight the potential for new interactive services to provide benefits to consumers through a richer enhanced TV experience, improved navigation and discovery of content, and greater integration with second screens and other devices. Some providers of these interactive services may be interested in accessing Sky’s APIs in order to bring these services and benefits to end-users on Sky’s platform.”³¹

A5. If asked, it is likely that providers of certain interactive services may indicate an *interest* in bringing their services to end-users on Sky’s satellite platform. However, the interest a speculative third party may or may not have in accessing Sky’s Application Programme Interfaces (“APIs”) is of little relevance in the absence of any *need* for Ofcom to regulate such access. As stated above in relation to existing interactive services, if the new service is likely to enhance the Sky satellite platform, Sky would be strongly incentivised to provide access on a commercial basis. Further, there are viable alternatives to accessing consumers, including Sky viewers, as detailed below:

- “Navigation and Discovery”: Ofcom describes these as *“services which facilitate navigating or discovering content, such as content recommendations. Examples include Zeebox’s iPad app”³²*. Ofcom further states that *“[t]he latest innovation in the sector is to provide EPG-like functionality on second screens. These second screen applications can operate independently of the TV platform, but provide greater benefits to viewers when integrated – allowing the second screen to access data from the STB and also control it, such as changing the TV channel or setting up a recording on the PVR. As described above, the integration of first and second screens typically requires access to APIs on the STB”³³*. However, access to Sky set top box APIs are not required to provide these services:
 - Second screens do not need to access data from the Sky set top box as this can be acquired from alternative sources. For example, EPG scheduling data for most channels can be acquired from alternative sources such as the Press Association.
 - As identified by Ofcom at paragraph 5.28 of the Consultation, second screen applications which rely on knowing what channel/programme a viewer is watching can work this out by various alternative means, including through audio content recognition technology, or through over the top access to the broadcaster’s servers. In addition, the consumer could simply input information into or select this information from within the relevant app.
 - Sky already provides a service by which all viewers with a Sky+ set top box and a Sky+ entitlement³⁴ can remotely record programmes from any channel (whether broadcast by Sky or a third party broadcaster) into their Planner either via the website sky.com or via Sky’s Sky+ app on smartphone/tablet devices. The Sky+ app, which is available free of charge, also enables viewers to use their smartphone

³¹ Paragraph 5.21 of the Consultation.

³² Paragraph 5.22 of the Consultation.

³³ Paragraph 4.20 of the Consultation.

³⁴ A Sky+ entitlement is available on a stand-alone basis i.e. an additional subscription to a Sky pay-TV package is not required.

or tablet to perform a number of functions normally performed by the Sky remote control, for example changing television channels.³⁵ As viewers do not need to subscribe to any of Sky's pay-TV services in order to make use of this remote record and remote control functionality, and such functionality is available in respect of all channels broadcast via the Sky platform, it is not necessary for this functionality to be made available to third parties on a regulated basis.

- "Contextual commercial services": Ofcom describes these as *"services which provide additional revenue streams, potentially integrated with the linear TV broadcast. Examples include targeted advertising and shopping services, such as Marks & Spencer's app on Samsung's smart TVs"*³⁶. Viable alternatives include: (i) providing the interactive shopping service via internet enabled devices and (ii) launching a shopping channel in Sky's EPG, and directing the consumer to make purchases either over the phone or via a website or app.
- "Stand alone services": Ofcom describes these as *"[c]ontent services which are an independent standalone service on the main TV screen"*³⁷. Examples provided by Ofcom include the BBC iPlayer app, Netflix, LoveFilm and Blinkbox. Sky notes that these services are all accessible via PCs, smartphones, Smart TVs, tablets and some via games consoles. It is clear that access to Sky's APIs is therefore not necessary to launch or provide such stand-alone services to consumers. As noted by Ofcom, *"OTT movie service providers have typically focussed on making their services available on smart TVs and games consoles as well as the internet"*³⁸.

³⁵ This functionality is available for all viewers, whether or not they have a Sky+ or Sky TV subscription.

³⁶ Paragraph 5.22 of the Consultation.

³⁷ Paragraph 5.22 of the Consultation.

³⁸ Paragraph 5.29 of the Consultation.

Annex 2

- A1. In July this year Sky sent Ofcom a range of recently published articles and other documents which represent just a small sample of the huge news-flow related to developments in connection with interactive services.
- A2. In this annex we provide a description of, or links to, four further resources that provide further evidence in relation to the huge diversity and rapid change in the delivery of interactive TV services to consumers.

Two new Ofcom documents

- A3. Two documents recently published by Ofcom note a number of developments in the UK communications sector which reinforce Sky's argument that providers of interactive services do not need access to the APIs in Sky's set top boxes, due to the wide range of alternative routes to market, in particular via internet enabled devices. First, Ofcom's Communications Market Report 2013³⁹ notes a number of developments, including the following 'key points' which are of particular relevance to Ofcom's Consultation:

- the rapid increase in take up of smartphones and tablet computers;
- the average UK household is most likely to own a laptop, smartphone and games console. Each household in the UK has, on average, three different types of internet enabled device, and 86% have at least one;
- over half of UK adults are regular media multi-taskers i.e. they "stack" (interacting or communicating about the TV they are viewing) or "mesh" (conducting unrelated media tasks) while watching TV weekly or more often; and
- "Bigger screen" activities such as watching TV programmes or films are evolving as tablet oriented.⁴⁰

- A4. Second, an independent report recently published by Ofcom entitled 'Industry Perspectives on the Future of Commercial Communications on TV and TV-like Services'⁴¹ makes the following observations:

"Th[e] explosion in consumer choice is being enabled by four underlying technological shifts. Broadband internet has enabled video to be distributed over the internet, and some estimates suggest that it will shortly account for 90% of internet traffic. Cloud based storage is enabling cheap storage outside the home, making it possible for limitless video to be available on demand at very low cost. Smartphones and tablets are ensuring that consumers can enjoy more processing power in their handheld device than has been available in set top boxes, and enabling consumption in new locations inside and outside

³⁹ Ofcom's Communications Market Report 2013, 1 August 2013.

⁴⁰ See pages 4 to 12 of Ofcom's Communications Market Report 2013.

⁴¹ Report by Jon Gisby, published by Ofcom on 22 August 2013, <http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/future-of-tv-communications/>

the home. And finally the ability to generate, collate and analyse vast quantities of data creates new opportunities for consumers, content and advertisers to connect, and will eventually have a similar impact on the TV industry as it has on music, financial services and retail.

These technologies are creating a new and potentially more important 'digital switchover', away from mass broadcast technologies towards data-driven, personalised and internet based services, enabling UK consumers to access and engage with video content in entirely new ways⁴².

Presentation by Ralph Rivera, Director, Future Media, BBC

- A5. The following link provides a video of a presentation given by the BBC's Director of Future Media, Ralph Rivera, in May 2013: <http://www.bbc.co.uk/blogs/internet/posts/Online-Brefing-Keynote-Ralph-Rivera>. This presentation provides clear evidence of the diverse ecosystem in which interactive services provided via Sky's set top boxes operate, as well as the almost peripheral importance of Sky's set top boxes to the provision of such services today. Rivera's presentation emphasises the importance of the BBC's "four screen strategy" in relation to its services – across mobile phones, computers, tablets and connected televisions.⁴³

Article on Vidora's Apple TV app

- A6. A recent article on the launch of an Apple TV app by Vidora asserts that it "essentially makes the set-top-box obsolete". (See 'Vidora's second screen Apple TV app now helps content producers fatten their wallets', <http://venturebeat.com/2013/09/04/vidora-apple-tv-app-update/>.) Whilst plainly somewhat overstated, the article illustrates clearly how rapidly online services, delivered via a wide variety of devices, are developing.

⁴² See page 10 of the report.

⁴³ See further: 'Future Media; Delivering Quality First', http://downloads.bbc.co.uk/aboutthebbc/reports/pdf/dqf_futuremedia.pdf