

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: **Pay TV Second Consultation “Access to premium content”**

To (Ofcom contact): **William Hayter**

Name of respondent: **Stephen Dean**

Representing (self or organisation/s): **BT**

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Confidential information has been redacted

If you want part of your response, your name or your organisation to be confidential, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)? **No**

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom’s website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments. Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name **Stephen Dean** Signed (if hard copy)



BT's response to Ofcom Consultation on Pay TV Second Consultation "Access to Premium Content"

16 December 2008

BT welcomes any comments on its position as laid out in this document, which will be available electronically at <http://www.btplc.com/responses>.

Comments should be addressed to Stephen Dean, BT, Newcastle Telephone Exchange, Carliol Square, Newcastle upon Tyne, NE1 1BB.or by email to stephen.h.dean@bt.com

Introduction

BT is one of four parties¹ who have together submitted a Joint Response to Ofcom's second consultation on Pay TV. This Joint Response is a comprehensive document which BT fully supports. However it would be unusual for a combined response from four different companies to reflect accurately all the various priorities and concerns of each company.

Consequently BT has prepared this document, which contains our additional views on a few key topics of particular interest to BT. [Redacted]

BT Vision's future investment

BT believes that its BT Vision product offers the opportunity to deliver real innovation, significant improvements in consumer welfare and genuine competition in the pay TV market, once the issue of Sky's dominance is fully addressed.

BT Vision has already delivered significant improvements in consumer choice in the pay TV market. It provides the opportunity for subscribers to pay only for the content that they want to watch and allows subscribers to access this content at a time of their choosing. In particular, there are no obligatory monthly subscription requirements, which means that consumers are not forced into buy-through arrangements or purchasing bundled content that they do not demand. BT Vision's flexibility in pricing and packages differs significantly from the historic model of pay TV services with its focus on the delivery of linear basic and premium channels using a buy through, monthly subscription model.

BT Vision's delivery of Video on Demand (VoD) programmes via IP, and the pricing strategy of pay per view with no fixed contract, provides a genuinely new alternative to consumers.

BT Vision also offers customers the opportunity for on-demand programming and Setanta Sports 1 as a standalone channel. However, these are entirely optional. The coupling of optional subscriptions with VOD services is an important underpinning of the commercial model for BT Vision. Subscription services help to drive the acquisition of customers to the BT Vision platform and help to defray the fixed costs of the platform and the content.

However, this strategy is hampered by limited availability of key content and lack of access to Sky's premium sports and movies channels in particular. [Redacted]

[Redacted] BT has invested significantly in its technology to deliver an innovative proposition. It has invested in its content in order to provide greater consumer choice. It has developed and widened its VoD offering including recent deals with Fox Films and ITV, and has negotiated the rights for key content wherever possible. [Redacted]. These investments, alongside access to Sky's premium content channels, are the basis for BT to [Redacted] This the long term solution to the market power Sky holds in the pay TV market today, not an artificial base of pay TV resellers, but a base of competitors with scale customer bases that can compete with Sky for content in an unregulated world in future. Therefore, BT views the wholesale-must offer remedy

¹ The four parties are BT, Setanta, Top up TV and Virgin.

currently proposed by Ofcom as the first step in the investment ladder that will allow BT to be able to compete effectively with Sky at the retail level, [Redacted].

BT Vision as a business invests [Redacted] in innovation, which it anticipates will grow and evolve over time, given a level competitive playing field. Wholesale access to Sky's premium sports and movies channels is an essential part of this and will allow BT Vision to innovate further, and provide real competition in this market.

The Wholesale Must Offer Remedy

As set out in the Joint Response, BT supports a wholesale must offer obligation in relation to Sky's premium sports and movie channels. Evidence submitted by all parties to date regarding the experience of "negotiating" access and pricing to these channels with Sky demonstrates that any solution involving negotiation is not practicable. BT believes that this would simply lead to delay and inevitable disputes to Ofcom, ultimately requiring Ofcom to set the price in any case. As such, BT believes that an essential element of making a wholesale must offer obligation work in practice will be for Ofcom to specify the actual wholesale prices for Sky's premium channels.

BT supports Ofcom's suggestion of a "retail-minus" approach, with a cost-based analysis as a cross check.. However, correctly determining the "minus" will be essential if it is to meet Ofcom's objective of encouraging competition to develop in a manner that best serves consumers, in particular in terms of promoting entry.

The Joint Response sets out the key components of the minus, which summarise those costs that would be incurred by rival pay TV retailers when offering Sky's premium channels in competition with Sky's retail services. BT agrees that in order for effective competition to develop the minus must be calculated using the rival pay TV retailers' costs, as reasonably efficient competitors, and not Sky's as the incumbent. The optimum theoretical approach to determining the retail minus rule would be to determine a separate value for the minus, and thus a separate wholesale price, for each rival pay TV platform (DTT, cable and DSL), each reflecting their individual costs of provision of the competing service. However, BT recognises that this may be an overly complex solution that could create a significant administrative burden for Ofcom, and so Ofcom may be more likely to choose the more pragmatic route of determining a single wholesale price for all rival pay TV platforms.

While BT recognises the need for Ofcom to be pragmatic, Ofcom must also recognise that this simplification could give rise to concerns if there is significant divergence in the platform costs of the various rival pay TV operators. If, in practice, the component costs of the minus vary appreciably across the various rival pay TV platforms then setting a single wholesale price could provide a considerable advantage for those competitors with lower platform costs allowing them to better compete in this market. [Redacted] a single wholesale price may impact Ofcom's aims of encouraging entry and dynamic efficiency in the pay TV market. But, unlike Ofcom, BT has limited visibility of its rival pay TV platforms' cost stacks and is therefore not in a position to determine whether the individual pay TV retailers' platform costs diverge materially. If these costs do vary materially, then BT believes that Ofcom must have due regard to this fact and should consider setting more than one wholesale price to reflect these variations.

[Redacted]

BT cost stack for 2008

[Redacted]

BT cost stack for [Redacted]

[Redacted]

Use of Ofcom's broadcasting sectoral powers

BT supports Ofcom's decision to use its broadcasting sectoral powers under section 316 of the Communications Act ("s.316") to implement a wholesale must offer obligation on Sky in respect of its premium sports and movie channels. Ofcom's reliance on s316 does, however, present a number of issues which Ofcom must fully consider in order to ensure that all impediments preventing effective competition in the pay TV market are fully addressed.

Market definition issue

As set out in the Joint Response, BT believes that Ofcom's market definition as it currently stands in relation to premium sports channels is too narrow, focussing only on FAPL content. In reality the competition issue stems from a lack of substitution for Sky's sports channels, which results from Sky's aggregation of content at the channel level.

This broader market definition and assessment of market power is, BT believes, more consistent with usage of s.316 – which is a licence condition designed to address competition issues arising in relation to a channel/channel provider's behaviour. As the competition issue arises from a lack of substitutes for Sky's sports channels as a result of the aggregation of sports content on those channels, then s.316 is clearly an appropriate instrument for intervention.

Development of on-demand services

BT believes that on-demand services is one area where new products and services can be created that will provide genuine long term competition to Sky's linear premium sports and movies channels. As such, BT believes that any behaviour that Sky undertakes in order to limit or prevent such competing services from emerging must be fully dealt with by Ofcom's pay TV market review. In particular, BT believes that it is essential that issues in relation to Sky's warehousing of SVoD movie rights (buying rights and then not using them) and the contractual hold-backs (negotiating with content owners such that on-demand rights will not be sold to rivals) and other upstream contractual arrangements between Sky and the movie studios designed to limit competition from rival pay TV operators must be addressed.

In relation to the warehousing of SVoD movie rights, BT notes that Ofcom is proposing that Sky could be required to launch a wholesale SVoD service which includes all the relevant premium movies by a specified date, subject to Sky's

ownership of these rights. BT is supportive of this proposal, but wishes to understand better the details of how it would be implemented in practice using s.316². BT believes that an appropriately robust remedy can be implemented using s.316 that will deliver access to SVoD movies warehoused by Sky and supports Ofcom in this approach. This is an appropriate use of Ofcom's broadcasting competition powers to regulate the conduct of a broadcasting licensee for competition purposes. In BT's view, if Sky is unwilling or unable to offer a wholesale service for such rights an obligation on the channel to dispose of any such rights to wholesale customers is a narrower and still appropriate use of section 316. BT believes that access to these SVoD rights is essential to the development of different consumer offerings and without such access innovation will be stifled. As such, if Ofcom does not implement an appropriate remedy using s.316 it must consider other options to ensure access, such as a market reference to the Competition Commission.

As highlighted in the Joint Response, Sky also uses holdbacks and "most favoured nation" clauses (MFNs) to prevent rival pay-TV operators from acquiring other content, including on demand content rights. Using a wide variety of restrictions, Sky impedes the ability of rivals to acquire content, including on-demand content, blocking the emergence of new and innovative competing services. If Ofcom only implements a wholesale must offer remedy in relation to those SVoD rights held by Sky this will not address Sky's ability to restrict competition from rival offerings unless these additional upstream contractual restrictions are addressed. Therefore, it is essential that whatever remedy is ultimately implemented in this market it must also be capable of preventing Sky from entering in to these kinds of upstream contractual arrangements where they have the effect of preventing, restricting or distorting downstream competition.

If Ofcom does not fully address issues with warehousing and upstream contractual terms using s.316 then notwithstanding the proposed introduction of the wholesale must-offer obligation, Ofcom must refer the pay TV market to the Competition Commission under the Enterprise Act in parallel with any ongoing work on the wholesale must offer remedy in order to ensure these wider issues are addressed.

BT believes that Ofcom should use its available powers under the Communications Act to the full limit of their capacity to deal with competition issues in this market. BT considers that a wholesale must offer remedy under s.316 is the right approach for addressing most of the competition issues identified. However, BT believes that it is essential that Ofcom also moves towards making a reference to the Competition Commission in respect of all those features of the market that are impeding fair and effective competition to the extent that such issues cannot be fully addressed using s.316. In particular, BT considers that the network of agreements between multiple parties and between the channel and content markets needs to be referred to the Competition Commission and that the decision to do so should not, and need not, be postponed until after Ofcom has completed the development of any wholesale must offer remedy. A time lag in addressing these issues could be highly prejudicial to the development of competition in the pay TV market.

² In practice there are also a number of practical issues with this proposal in terms of how it would be priced. Presumably, since there is no equivalent Sky retail service, Ofcom would establish a price on a cost-plus basis.

Non confidential version

British Telecommunications

December 2008

Annex A Consultation Questions

[Redacted]