

Ofcom consultation: Proposed BSkyB digital terrestrial television services

Sky response

1. Introduction

- 1.1 In April 2007, Sky and NGW applied to Ofcom to vary their respective DPS and multiplex licences to reflect a proposed change in the line up of Sky channels on DTT Multiplex C - from the three free-to-air channels *Sky News*, *Sky Sports News* and *Sky Three* to three pay channels *Sky Sports*, *Sky Movies Screen1* and *Sky One* (incorporating some *Sky News* content), to be retailed under the Picnic brand. In addition, Picnic would retail two pay channels on DTT provided by the third party broadcasters Disney and Discovery. This is referred to in the consultation document, and this submission, as the “**Proposal**”.¹
- 1.2 These applications from Sky and NGW were limited to a request for approval of the necessary changes to their respective DPS and multiplex licences. As Ofcom acknowledges in its consultation document,² the only test against which Ofcom is required to assess the Sky and NGW applications is that set out in Condition 17(2) of NGW’s Multiplex C licence, which requires Ofcom to consider whether the capacity of the services broadcast on the NGW multiplex “*to appeal to a variety of tastes and interests would be unacceptably diminished*” (with Ofcom’s role being limited to refusing permission only where it considers such variety to be “*unacceptably diminished*”).³
- 1.3 Ofcom has, however, indicated that it is consulting on “*the competition implications of the Proposal*”, as it considers that there are “*competition and other regulatory issues raised by the NGW/Sky proposal*”.⁴ Ofcom indicates that:

*“...the Proposal raises significant competition issues relating both to competition on the DTT platform and the development of competition between DTT and other digital television platforms. In light of these issues we are consulting on the Proposals in the context of our duty to promote competition”.*⁵

¹ As announced by Sky in February and July 2007, Sky ultimately proposes to broadcast its channels on DTT using MPEG4 compression technology. Due to the greater compression efficiency offered by MPEG4 technology, Sky would be able to use its allocated DTT capacity to broadcast more than the present 3 channels (subject to any necessary Ofcom approvals). In such circumstances, *Sky News* would be one of the additional channels that Sky broadcasts using this capacity. NGW has submitted an application to Ofcom for use of MPEG4 on its muxes in November 2007.

² See paragraphs 2.09 and 2.10.

³ Ofcom has noted in its consultation document, however, that it is not yet considering this test because “*the third party channels to be retailed by [Picnic] have not yet been finalised*”. (see paragraph 2.11). Arrangements with Disney and Discovery have now been agreed and publicly announced.

⁴ See paragraph 1.9.

⁵ See paragraph 2.13.

- 1.4 Ofcom acknowledges and accepts the positive impact of the nature of the content Sky proposes to (re-)introduce to the DTT platform:

“the entry of Sky is likely to offer benefits to consumers in terms of expanding the choice of pay TV content that will be available to them and ensuring that there is competitive pressure on pricing at the retail and wholesale level”;⁶

and

“the increased choice brings with it the potential for more competition on the DTT platform in terms of quality of service, and technical innovation, as well as ensuring that there is competitive pressure on pricing, all of which is likely to be to the benefit of consumers at least in the short term”.⁷

- 1.5 These improvements to Sky’s channel line-up will improve and strengthen the overall DTT channel line-up, therefore enhancing the attractiveness, range and quality of the types of programming available to DTT viewers. Picnic will also make available new broadband and telephony services to the wider population. The launch of Picnic will therefore be pro-competitive and will further strengthen competition in relation to television, broadband and telephony (as elaborated on in Section 2 of this submission).
- 1.6 These benefits are recognised with a degree of certainty that Ofcom’s competition concerns are not afforded, which relate more to longer term hypotheses, and are only based on assumptions as to possible market outcomes. That is not a sufficient basis on which Ofcom can justify intrusive, *ex ante* regulation.
- 1.7 Ofcom frequently indicates that its *“regulatory principles are to avoid intervening unless it is clearly necessary to do so, and the benefits outweigh the costs”*, and that its *“bias against intervention means that a high standard of proof must be satisfied”*.⁸
- 1.8 This means that Ofcom should advance a sufficiently compelling evidence base in support of intervention, for example to demonstrate that (i) its hypothesised competition concerns are more likely than not to materialise (if the Proposal is approved), and that (ii) *ex post* enforcement in due course would provide an inadequate means of addressing those concerns.
- 1.9 Ofcom has not, however, been able to do so in this case. The requisite standard of proof has not been met; the case for *ex ante* regulation has not been made. As set out in this submission, Ofcom risks placing excess weight on its hypothesised competition concerns which have no certainty of materialising, at the expense of the benefits created by the launch of Picnic’s services, the significance of which has not been properly recognised.
- 1.10 In light of Ofcom’s general duties, including to *“avoid intervening unless it is clearly necessary to do so”*, it would accordingly neither be appropriate nor proportionate for Ofcom to opt for anything other than Option 1. There is insufficient basis or need, at this stage, for Options 2 or 3 to be selected (or for Ofcom to defer its approval of the Proposal);

⁶ See paragraph 3.77.

⁷ See paragraph 1.11.

⁸ See paragraph 1.24.

Ofcom's stated concerns are hypothetical and not supported by evidence justifying either a conditional approval, or a denial of approval of the Proposal.

- 1.11 This submission sets out the basis for Sky's case that Ofcom has not adduced a case sufficient to warrant intrusive *ex ante* regulation. It commences by reappraising Ofcom of the benefits that the launch of Picnic will provide.

2. Benefits of the Proposal

- 2.1 Picnic will be a new business proposition marketing a compelling range of new pay television, broadband and telephony services. Sky is seeking to extend its existing strategy of providing attractive, competitive, flexible television, broadband and telephony products, to be made available to the wider UK population. These services will each be available on a standalone basis but can also be purchased as part of a bundle of services. The launch of Picnic will be pro-competitive and will further strengthen competition in relation to television, broadband and telephony.

New pay television services

- 2.2 Sky wishes to cease broadcasting channels on DTT on a free-to-air basis, and wishes to provide a more attractive, wider range of content on a pay basis in order to provide a more compelling TV offering to consumers, whilst making a better return on use of its DTT capacity. This proposed change in Sky's DTT television strategy is also designed to respond to existing consumer demand for a wider range of pay TV services via DTT, which is recognised by market research conducted on behalf of Picnic.⁹
- 2.3 The changes to Sky's channel line-up (to include *Sky Sports*, *Sky Movies Screen1*, *Sky One*, *Sky News*, *Disney* and *Discovery* content) will introduce to DTT viewers a broader, more comprehensive range of programming, covering an expanded number of programming genres, with more live and "first-run" programming, than is available through the offering of (pay and Freeview) services currently available on DTT.
- 2.4 Ofcom recognises the positive impact of the nature of the content Sky proposes to (re-) introduce to the DTT platform:

"the proposal would have an immediate, positive effect on choice and availability of retail pay TV services on the DTT platform";¹⁰ and

"it would bring new pay TV content to DTT and provide consumers with a choice of general entertainment, sports, movies, children's and factual content" which "would meet any current unmet demand" for such content.¹¹

- 2.5 These improvements to Sky's channel line-up will therefore enhance the attractiveness, range and quality of the types of programming available to DTT viewers. It will enhance the overall DTT channel line-up, representing a further strengthening of the platform's offering, which has grown from around 20 FTA channels in 2002 to, presently, over 40 FTA channels (including a number of FTA "sister" channels of the main UK PSB analogue terrestrial broadcasters) and some pay services since the launch of Freeview in 2002.
- 2.6 The launch of Picnic will therefore increase competition in relation to the provision of television services not only via DTT, but also more broadly across all platforms, expanding

⁹ This research indicates that there is considerable interest in the new Picnic proposition (with an interest in Picnic indicated by around 60% of those surveyed, and around 40% of existing Freeview viewers surveyed valuing the addition of pay content to DTT), and that it can act as a strong driver for consumers to obtain DTT reception equipment.

¹⁰ See paragraph 1.11.

¹¹ See paragraph 3.54.

- the ways in which consumers can access a range of content. Its launch will, as Ofcom acknowledges, increase the competitive pressure on other pay services (including Sky's pay services on DSat), and so the competitive benefits will not be confined to the DTT platform.¹²
- 2.7 Research undertaken on behalf of Picnic has indicated that the removal of any or all of the three Sky FTA channels from DTT will not significantly impact Freeview viewers' satisfaction with their overall channel line up, or confidence in their television service (with around two-thirds of respondents indicating that these changes to Sky's channel line-up would not adversely impact their satisfaction with Freeview).
- 2.8 Ofcom also recognises the contribution Sky (through Picnic) can make to innovation on the DTT platform.¹³ Not only will Picnic introduce new pay TV services to DTT viewers, but it will also provide new, competitive broadband and telephony services.
- 2.9 Picnic is putting in place arrangements for the supply of reception equipment that will essentially replicate the "horizontal market" already in place for DTT Freeview set top boxes. Picnic is keen to encourage manufacturers to be innovative in the development of reception equipment, but also to provide a base level of functionality to address different consumer interests. Picnic therefore welcomes manufacturers seeking to develop a variety of reception equipment containing a range of functionality, for example set top boxes which (i) contain an integrated PVR (which could be *Freeview Playback* compatible), and/or (ii) are capable of receiving VOD services (streamed via a broadband connection), in addition to being capable of receiving digital terrestrial broadcast services.¹⁴
- 2.10 Further, Picnic will be happy for manufacturers to include functionality in reception equipment which will enable customers to access further pay TV services, in addition to those provided by Picnic, encrypted with different Conditional Access (CA) technologies.¹⁵ For example, manufacturers will be free to manufacture Picnic compatible set top boxes that contain a common interface (including the ability to connect to a separate conditional access module), or a second CA technology in addition to the NDS CA system selected by Picnic.¹⁶
- 2.11 As a minimum specification, all Picnic compatible set top boxes will have the capability of receiving both MPEG2 and MPEG4-based signals, to allow Picnic (and other DTT broadcasters) to migrate to the MPEG4 compression format at the appropriate juncture. All Picnic set top boxes will therefore have compatibility with all Freeview channels and services (including applications broadcast using MHEG5 v1.06).¹⁷ Picnic is also asking manufacturers actively to support the requirements of the "*Digital Tick*" and to work to an industry best practice standard on all accessibility issues, such as ensuring the availability

¹² See paragraph 3.77.

¹³ See paragraph 3.57.

¹⁴ This would be subject to technical feasibility.

¹⁵ Ofcom should note the plans set out in Section 9 of this submission concerning the access that third party broadcasters would be able to obtain to Picnic set top boxes.

¹⁶ Consumers will also not be required to take out a Picnic subscription as a condition of acquiring a Picnic set top box, which could be acquired solely for the purposes of watching other services, notably Freeview services. Nor does Picnic currently propose to subsidise set top boxes.

¹⁷ Picnic has actively engaged with the DTG and is requesting that manufacturers use the DTG D-Book as the "base line" specification for its reception equipment, to ensure that set top boxes comply with industry-accepted standards.

of audio description services (as well as subtitling services) through such reception equipment (unlike many current DTT set top boxes).

- 2.12 Picnic also envisages addressing viewing of its television service, as well as other FTA DTT services, via PCs. This has involved discussions (which are ongoing) with OEMs in relation to the incorporation of both a DTT tuner and necessary copy protection and conditional access software into PCs (as appropriate), as well as with relevant operating system and software providers.

Broadband and telephony services

- 2.13 Picnic is not just about a new, compelling pay TV proposition; Picnic will also offer broadband and telephony services, available both on a standalone basis and as part of a bundle of services. These services will make use of Sky's Easynet fibre network and will be available to around 70% of UK homes, taking advantage of the considerable investment Sky has already made in local loop unbundling.
- 2.14 Picnic's broadband and telephony services will be based on the model already deployed by Sky in relation to its Sky Broadband and Sky Talk services. Picnic broadband will provide customers with download speeds of up to 16 Mb/s; Picnic telephony will provide customers with a range of competitive call packages. Given the lack of tie-ins between the different Picnic products, all DTT viewers will therefore have access to a new range of attractive and competitive broadband and telephony services, whether or not they subscribe to a Picnic pay TV package.
- 2.15 As Ofcom notes in its draft Annual Plan 2008/9, it is seeking to engender competitive markets which "*display greater levels of innovation, more choice to consumers, higher quality services and lower prices*".¹⁸ These are the attributes which Picnic is seeking to deliver across all of its services, in order best to serve the consumer interest.
- 2.16 Whilst Picnic will launch offering a combination of pay TV, broadband and telephony services, this response will focus on the television aspect of the Proposal, given the scope of the Application and the fact that Ofcom's concerns set out in the consultation document specifically relate to television.

¹⁸ See paragraph 4.28 of the draft Annual Plan 2008/9.

3. Ofcom's legal duties

- 3.1 Ofcom makes a number of references to its general duties in the consultation document. In particular, Ofcom supports the need for the present consultation on the basis that the Proposal "*raises significant competition issues*" and that it is, in particular, under a "*duty to promote competition*"¹⁹ (a reference to its duty "*to further the interests of consumers in relevant markets, where appropriate by promoting competition*").
- 3.2 Ofcom also makes some references to its duty "*to secure the efficient use of spectrum*"; and its requirement to have regard to: "*the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the UK*", "*the desirability of promoting competition in relevant markets*", "*the different needs and interests of all users, both current and potential, of the spectrum used for DTT capacity*" and "*the opinions of consumers and members of the public*".²⁰
- 3.3 Ofcom acknowledges the need to take into account all its duties and to achieve a "balance" between its duties. Nonetheless, it appears that Ofcom has largely confined consideration to its duty of "*the promotion of competition*" (and, to an extent, "*the different needs and interests of people using the spectrum*"), given that it refers to (consideration of) other duties only in the context of "*having a bearing on the competition assessment*".²¹
- 3.4 Such an approach risks Ofcom's consultation being deficient: selective or imprecise references to particular duties in order to support a consultation limited to competition issues (including a proposal to intervene in the Proposal on an *ex ante* basis on competition grounds) would clearly be inappropriate. A balanced and thorough consideration of the Proposal requires a balanced and thorough assessment of all of Ofcom's relevant duties.
- 3.5 Ofcom will be aware of section 3(7) of the Act which requires that, "*where it appears to Ofcom that any of their general duties conflict with each other in a particular case, they must secure that the conflict is resolved in the manner they think best in the circumstances*". Absent such an assessment, there is a risk that inappropriate conclusions to this consultation could be reached, which would conflict with, rather than flow from, Ofcom's general duties.
- 3.6 Sky has the following specific comments on those of Ofcom's general duties that appear relevant to the present consultation.

Section 3(1)(b)

- 3.7 Ofcom makes frequent reference to its "*duty to promote competition*".²² However, as Ofcom itself recognises in paragraph 1.2 (though not consistently elsewhere in the consultation document), its principal duty is not simply the promotion of competition, but "*to further the interests of consumers in relevant markets, where appropriate by promoting competition*". Thus, Ofcom is principally required to consider whether a particular issue is in the

¹⁹ See paragraph 2.13

²⁰ See paragraph 2.12.

²¹ See paragraph 2.14

²² For example, see paragraphs 2.13, 2.14 and 4.1.

interests of consumers; the promotion of competition is not an end in itself, and nor is it a mechanism for seeking through regulation to bring about alternative market outcomes, but a (possible) means by which the interests of consumers can be best served (which is reflected by the fact that section 3(1)(b) states that this is “*where appropriate*”, and it is positioned as a “*desirable*” under section 3(4)(b)).

- 3.8 To the extent that it is appropriate for Ofcom to consider possible competition issues raised by the Proposal, it is not axiomatic that its general duties support an approach whereby such issues are “elevated” above others. This is particularly apposite in the present case, given that Sky’s and NGW’s Applications require Ofcom only to undertake a narrow assessment of the Proposal under Condition 17(2) of NGW’s Multiplex C licence.
- 3.9 In addition, this general duty indicates that Ofcom should make any such assessment of consumer interests in the context of “*relevant markets*”, something that Ofcom has elected not to define in this consultation document. Whilst Ofcom has identified a number of possible “candidate” markets, it has “*not gone as far as formally defining relevant economic product markets at this stage*” and has indicated that “*it may ... not be necessary to reach final conclusions on market definition*”.²³
- 3.10 By not determining the appropriate “*framework for the analysis of competition issues*” with any precision,²⁴ Ofcom risks reaching inappropriate or unsupported conclusions which neither accurately serve its general duties, nor properly reflect the actual conditions of competition or consumer interests.²⁵

Section 3(2)(a)

- 3.11 Ofcom appears to make reference to its duty to secure “*the optimal use for wireless telegraphy of the electro-magnetic spectrum*”, where it refers to “*the duty to secure efficient use of spectrum*”.²⁶ However, the consultation document does not elaborate on the steps Ofcom has taken to consider this duty. In particular, no indication is given of the counterfactual against which the principle of “*optimal use*” should be assessed – notably whether use of limited DTT capacity is better served through the availability of a wide range of attractive pay content which is currently not available to DTT viewers, or by Sky’s current offering of three free-to-air channels (whose viewing share is dwarfed by that of other, free-to-air channels also available via DTT, notably the PSB and sister channels).²⁷

Section 3(2)(c)

- 3.12 Other than a brief reference in Annex 6 to the consultation document, Ofcom makes no reference to its duty to secure “*the availability throughout the United Kingdom of a wide*

²³ See paragraph 3.34.

²⁴ See paragraph 3.34.

²⁵ It is noted in paragraph 3.37 of the consultation document that a market definition exercise is being undertaken as part of the pay TV market investigation. Nonetheless, this is a separate investigation; it is not appropriate for Ofcom simply to rely on market definitions reached in other (historic) cases, which considered very different issues (such as mergers) as in section 3 of the consultation document. Such definitions could only be pertinent where the prevailing conditions of competition remain constant, and accompanied by some form of explanation as to their continued relevance, both of which are lacking in the present case.

²⁶ See paragraph 2.14.

²⁷ See paragraphs 3.56 and 4.3 – Sky’s channels’ current viewing share on DTT is less than 2% compared to a 90% level for those of the PSBs.

range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests”.

- 3.13 Ofcom does, however, recognise that, as a result of the Proposal, “consumers would be presented with an increase in choice of sports, movies, factual, children’s and general entertainment programming [on the DTT platform]”²⁸ and that it will lead to a wide range of benefits including meeting “any currently unmet demand” for particular types of television content, representing a new opportunity for certain categories of viewers who otherwise have no access to this type of content.²⁹
- 3.14 These issues should be given appropriate weight by Ofcom in consideration of its general duties.

Section 3(2)(d)

- 3.15 Ofcom is also under a duty to secure “the maintenance of a sufficient plurality of providers of different television and radio services”. There appear to be a number of factors relevant to this duty, in conjunction with Ofcom’s duty under section 3(2)(a) of the Act. For example, the Proposal will result in the introduction of new television services to the DTT platform, provided (in part) by broadcasters whose services are not currently available to DTT viewers.
- 3.16 In addition, as acknowledged by Ofcom, the majority of viewing in DTT homes is presently taken up by the PSB (and sister) channels, with viewing of non-PSB channels in DTT homes being very small in comparison. Ofcom recognises the greater potential demand for the Picnic line-up of pay channels in comparison to the current Sky FTA line-up (based on comparative viewing data for these channels on DSat).³⁰ Such factors are relevant to a consideration of this general duty.

Section 3(3)

- 3.17 Ofcom makes no reference in the consultation document to the principles specified in section 3(3) of the Act. Given that this section sets out core regulatory principles to which Ofcom must have regard in performing its principal duty, and which Ofcom itself frequently espouses, it is imperative that Ofcom gives due consideration to the requirements of sections 3(3)(a) and (b).
- 3.18 Section 3(3) requires that all of Ofcom’s regulatory activities must be “transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed”. In addition, Ofcom is required “to have regard to” other principles which represent “best regulatory practice”. A number of these principles are particularly relevant to this consultation.

Proportionate

- 3.19 As Ofcom will be aware, its regulatory activities should be “proportionate”. Only limited references are made in the consultation document to this principle – for example, the

²⁸ See paragraph 1.11.

²⁹ See paragraphs 3.54 and 3.55.

³⁰ See paragraph 3.56.

word itself is only used once, in paragraph 3.74, where Ofcom contemplates the imposition of *ex ante* regulation and acknowledges that any rules so imposed on Sky “*should be a proportionate response to the issue that has been identified*”.

- 3.20 Ofcom’s duty of proportionality is not, however, limited to the impact of different conditions to be applied (i.e. once a decision to regulate on an *ex ante* basis has been taken). This principle could equally militate against the imposition of any *ex ante* remedy: *ex ante* regulation (or even *ex post* enforcement) as a whole may not be a proportionate act for Ofcom.
- 3.21 Ofcom is consulting on a wide range of possible conditions including, under Option 2, an option to limit Sky’s ability to retail channels directly (which would be a highly intrusive measure, given that the fundamental basis of the Proposal is for Picnic to be a pay TV retailer on DTT) or, alternatively, on the basis of not consenting to the Proposal (Option 3).
- 3.22 The potential significant impact that certain of the conditions raised under Option 2, or Option 3, would have on the Proposal, underline the fundamental importance of the concept of proportionality to Ofcom’s assessment of the issues raised, and the use of legal powers available to it.
- 3.23 The concept of proportionality is one which relates not only to the benefits and detriments of the issue at stake but also to the likelihood of any such benefits or detriments occurring. For example, Ofcom recognises that the Proposal will create benefits, which should be given due recognition. No tangible negative effects are however identified (for example, in relation to consumers or manufacturers): Ofcom’s concerns about detriments are of a longer term and largely hypothetical nature.
- 3.24 To the extent that a hypothetical “issue” were to materialise in practice, it would be capable of remedy, if necessary, on an *ex post* basis. Ofcom appears, prematurely, to have dismissed this possibility on the grounds of “*difficulty*”.³¹ However, it would not be proportionate to impose *ex ante* regulation on the basis that there is a possibility that a hypothetical issue might materialise in the long term.
- 3.25 Nor does the consultation document consider in any detail the issue of materiality, notably in relation to the posited detrimental foreclosure effects that Ofcom considers may flow from the Proposal. This will also have a bearing on the proportionality of Ofcom’s treatment of the Proposal.

Consistent

- 3.26 Ofcom is also required to act in a consistent manner. The depth of scrutiny that it is subjecting the Proposal to at this stage, however, raises questions of consistency, when the approval process for Picnic is assessed in light of (i) Ofcom’s **Statement on Pay TV on DTT** (April 2006) and (ii) the lack of *ex ante* regulatory approval required for the launch of the other pay TV operators whose services are already available to, or are to become available to, DTT viewers.

³¹ See paragraph 3.68.

- 3.27 Ofcom argues that the April 2006 Statement “*could not and did not address the competition issues raised by any specific proposals from any organisation*”³² and has elsewhere indicated (for example, in press statements in June 2007) that the Statement was “*generic and general*” and so could not be considered to provide guidance on which Sky should rely.
- 3.28 It has also indicated that consultation (specifically) on, and approval of, the Proposal is necessary on the basis that it “*would have an impact on competition for pay TV services on the DTT platform and possibly across other digital platforms. Given the critical stage of development of pay TV on DTT, the competition issues need to be considered with great care*”.³³
- 3.29 It is not clear why any guidance that Ofcom indicates to be of a “*general*” nature is incapable of applying to a proposal of the nature contemplated by that guidance – e.g. the Proposal. The conclusions in the April 2006 Statement (notably the acceptance that the “FTA Requirement” could be removed specifically from the multiplex on which Sky’s services are carried) were reached following an assessment of the same general duties as those cited by Ofcom in the present consultation document.³⁴ These duties are of universal and absolute application, and are not susceptible to consideration in isolation, or variation in relation to any particular proposal. Indeed, the conclusions set out in the April 2006 Statement were reached following specific consideration by Ofcom of “*Sky’s position in the supply of pay TV services on the digital satellite platform*”.³⁵
- 3.30 A similar approach (notably involving public consultation about the need for formal *ex ante* approval) has not been required in relation to the launch of, or changes to, other pay TV services provided on DTT.
- 3.31 For example, in addition to potential competition issues, Ofcom raises a number of issues in Section 4 of the present consultation document including (i) the implications for FTA television and “perceptions” of Freeview, and (ii) concerns regarding reception equipment. A similar consideration of these issues (at least) would presumably also be relevant to, for example, the launch of Setanta, Top Up TV and BT Vision’s pay TV services, given that these services all involve either or both of (i) the use of DTT capacity for pay TV services which was previously used by FTA services and/or (ii) a requirement for the purchase by the viewer of “bespoke” reception equipment in order to access such services.³⁶ Likewise, the Kangaroo proposal announced in November 2007 by the BBC, ITV and Channel 4 could also raise similar issues and require a similar assessment by Ofcom.
- 3.32 Ofcom also refers to “*the critical stage of development of pay TV on DTT*” as justification for consideration of the potential competition issues raised by the Proposal. The only tangible explanation given for the meaning of this statement is that “*the imminent DSO process represents a critical window of opportunity for the development of the DTT platform*”.³⁷ However, Ofcom itself dismisses such “criticality”: “*we do not consider the Proposal would*

³² See paragraph 3.11.

³³ See paragraph 1.7.

³⁴ These are referred to in paragraphs 2.7 and 2.8 of the April 2006 Statement.

³⁵ See paragraph 2.3 of the April 2006 Statement.

³⁶ As Ofcom will be aware, the pay TV services already provided via DTT by Top Up TV, Setanta or BT Vision are not all available on all DTT boxes; nor are all DTT boxes capable of receiving pay TV services from each of the these providers.

³⁷ See paragraph 5.15.

be likely materially to affect take up of digital television as DSO approaches,³⁸ again raising questions of consistency.

Targeted only at cases in which action is needed

- 3.33 Ofcom frequently espouses the principle that it will intervene only where justified, and then by choosing the least intrusive means of achieving this objective – i.e. reflecting its duty to target its regulatory activities only at cases where action is needed (and to act in a proportionate manner). For example, this approach is expressly referred to in Ofcom’s consultation document “*The Future of Digital Terrestrial Television – enabling new services for viewers*” (November 2007) in which Ofcom states “*Ofcom’s regulatory principles are to avoid intervening unless it is clearly necessary to do so, and the benefits outweigh the costs*”.³⁹
- 3.34 In its document “*Better Policy Making – Ofcom’s approach to Impact Assessments*” (February 2005), Ofcom explains how this principle should be pursued:

*“It should be borne in mind, however, that Ofcom’s bias against intervention means that **a high standard of proof must be satisfied**. In other words, there must be a clear case for regulation, and the prospective benefits [of regulation] must exceed the costs. If a case for regulation can be made, we will choose the least intrusive means of achieving our objective.”⁴⁰ (emphasis added)*

- 3.35 As elaborated on in section 4 of this submission below, the basis for the imposition of any regulatory burden must be clearly identified with a sufficient degree of certainty (“*a clear case for regulation*”) and to the requisite standard of proof (“*a high standard of proof*”), otherwise intervention would not be warranted. This will necessarily involve consideration of the need for intervention at this stage, rather than reliance on subsequent *ex post* enforcement (if appropriate). Sky does not consider that Ofcom has, however, discharged its obligations for the imposition of *ex ante* regulation, such that Option 1 is the (only) appropriate option. To the extent that Ofcom’s hypothetical concerns were to materialise in practice (i.e. with sufficient likelihood or materiality), they would appear to be capable of remedy on an *ex post* basis.

Best regulatory practice

- 3.36 One key aspect of best regulatory practice is for Ofcom to undertake a full impact assessment in relation to “*important proposals*”. Ofcom notes that impact assessments should be proportionate to the likely impact of the proposals: “*this means that the more substantial and wide-ranging the impact on stakeholders, the more comprehensive the impact assessment should be*”.⁴¹
- 3.37 Whilst Ofcom has consulted on the basis of a number of possible options, none of which are (stated as being) recommended, this approach does not, in particular, involve a clear assessment of the different costs and benefits of each proposed option. The fact that, under both Options 2 and 3, Picnic could be prevented from becoming a retailer of pay TV services on DTT (one of its intended main activities), such that DTT viewers would be

³⁸ See paragraph 4.14.

³⁹ See paragraph 1.24 of that consultation document.

⁴⁰ Ofcom document “*Better Policy Making*”, paragraph 5.16.

⁴¹ Ofcom document “*Better Policy Making*”, paragraph 5.1.

denied the ability to gain access to a wider range of content of different genres, underlines the importance that the role of a proper impact assessment should play in Ofcom's assessment of the Proposal.

- 3.38 Sky notes that Ofcom's own guidance indicates that "*it is important that an Impact Assessment should be clearly identified*".⁴² In this regard, Sky considers that the absence of a clearly set out impact assessment indicates that one has not been properly undertaken by Ofcom as part of the present consultation exercise.⁴³

Section 3(4)(a)

- 3.39 Ofcom makes reference to its duty "*to have regard to ... the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom*".⁴⁴ It is not clear, however, how this duty is relevant to Ofcom's consideration of the Proposal, which does not concern or affect the availability of public service television broadcasting (not least on the grounds that all Picnic set top boxes will be Freeview compatible).

Section 3(4)(b)

- 3.40 Ofcom is subject a duty "*to have regard to... 'the desirability of promoting competition in relevant markets'*". As noted above,⁴⁵ Ofcom's frequent references to this duty, along with its principal duty in section 3(1)(b), as one of "*the duty to promote competition*", raises concerns that they are (both) being misinterpreted.
- 3.41 To the extent that it is appropriate for Ofcom to take competition issues into account, pursuant to section 3(4)(b), this duty should be given appropriate consideration and prominence and not simply become a mechanism for seeking, through regulation, to bring about alternative market outcomes.
- 3.42 Ofcom acknowledges the competitive benefits that the Proposal will bring:

"the entry of Sky is likely to offer benefits to consumers in terms of expanding the choice of pay TV content that will be available to them and ensuring that there is competitive pressure on pricing at the retail and wholesale level";⁴⁶ and

"the increased choice brings with it the potential for more competition on the DTT platform in terms of quality of service, and technical innovation, as well as ensuring that there is competitive pressure on pricing, all of which is likely to be to the benefit of consumers at least in the short term".⁴⁷

- 3.43 The concerns about competition expressed by Ofcom relate more to longer term foreclosure hypotheses, which Ofcom also characterises (in the absence from the consultation document of any proper consideration of materiality) as influencing "*the*

⁴² Ofcom document "*Better Policy Making*", paragraph 6.1.

⁴³ The present consultation can be distinguished from Ofcom's current "*Future of DTT*" consultation, in which the impact assessment is set out clearly in a separate annex, with each option given specific consideration.

⁴⁴ See, for example, paragraph 2.12.

⁴⁵ See paragraphs 3.7 - 3.10 of this submission.

⁴⁶ See paragraph 3.77.

⁴⁷ See paragraph 1.11.

future evolution of the pay TV sector as a whole".⁴⁸ These hypotheses are, however, alluded to without any great degree of certainty, even though they are presented as representing (potential) "*eventual market outcomes*".

- 3.44 The fact that this duty is (only) expressed in the Act as a "*desirable*", combined with the lack of certainty (or materiality) about the likely occurrence of competition concerns (and taking into account the acknowledged likelihood of benefits delivered by the Proposal), falls short of providing Ofcom with a sufficient basis for justification of *ex ante* intervention. Further, the desirability of the promotion of competition (in the interests of consumers) must be considered in conjunction with Ofcom's other relevant general duties, and in light of the evidence base that Ofcom is able to produce in support.

Section 3(4)(d)

- 3.45 Ofcom must also have regard to the desirability of encouraging investment and innovation in relevant markets. Any proposal by a regulator to intervene in a market can have the opposite effect and chill further investment, particularly where any such proposal is not supported by a compelling, cogent base of evidence. Further, any proposal to intervene other than by the least intrusive means, for example by the dismissal of the use of *ex post* enforcement powers in favour of *ex ante* regulation without adequate justification, can equally have such a deterrent effect.
- 3.46 Ofcom indicates that "*our objective is to create an environment in which effective competition can thrive*".⁴⁹ However, in the absence of a compelling evidence base or a sufficiently reasoned explanation of the inadequacies of *ex post* enforcement, a decision to prevent, or significantly circumscribe, the launch of a new service which Ofcom itself acknowledges will provide competitive pressure, would be likely to be in conflict with this duty to encourage investment and innovation. Yet Ofcom has made no reference to this duty, or how it considers it has been met, in the consultation document.

Section 3(5)

- 3.47 Ofcom is required to have regard to the interests of consumers "*in respect of choice, price, quality of service and value for money*". Ofcom appears to accept that the Proposal will secure benefits in this regard:

"the entry of Sky is likely to offer benefits to consumers in terms of expanding the choice of pay TV content that will be available to them and ensuring that there is competitive pressure on pricing at the retail and wholesale level".⁵⁰

- 3.48 Ofcom does not make reference to this duty in its consultation document, or has apparently considered how its requirement to have regard to these factors will influence its assessment of the Proposal.

⁴⁸ See paragraph 3.63.

⁴⁹ See paragraph 3.53.

⁵⁰ See paragraph 3.77.

Section 6

- 3.49 Ofcom is also under a duty to ensure that regulation does not involve the imposition of burdens which are unnecessary or the maintenance of burdens that have become unnecessary. Despite the fundamental importance of this duty to Ofcom's stated approach to regulation (notably having a "*bias against intervention*"), the absence of any reference to it in the consultation document is surprising.

Summary of legal duties issues

- 3.50 Ofcom indicates that it considers that:

"...the Proposal raises significant competition issues relating both to competition on the DTT platform and the development of competition between DTT and other digital television platforms. In light of these issues we are consulting on the Proposals in the context of our duty to promote competition".⁵¹

- 3.51 As indicated above, this is not the only general duty (and in fact is not how Ofcom's actual consumer interest-related duty is formulated) to which Ofcom must have regard in the pursuit of its regulatory activities. The risk of misapplication of Ofcom's general duties, for example through the "elevation" of a "*duty to promote competition*" above all else (including the interests of consumers), appears to be summed up by the following statement in the consultation document:

"There may be a prospect of the emergence of a pay TV provider on DTT to compete with providers of pay TV services on other delivery platforms such as DSat and cable. ... It may be a less desirable outcome should the Proposal lead to Sky emerging as the sole provider of pay TV services on DTT in the longer term and hence controlling a second major pay TV platform than an outcome where there is a different provider of pay TV services on DTT."⁵²

- 3.52 Ofcom's duties, taking into account all duties which are relevant, including (and notably) those set out in sections 3(3) and 6 of the Act, do not extend to Ofcom seeking to use the current review process proactively to ensure or promote additional market entry, via a route of *ex ante* regulation. Ofcom's proper role, in accordance with its general duties, is to apply its legal powers to address clearly identified concerns. To the extent that there is a lack of certainty to indicate the materialisation of such concerns, Ofcom would not have the requisite basis for intervention. To act otherwise, particularly on an *ex ante* basis, risks inconsistency with Ofcom's duties.
- 3.53 Ofcom's bias against intervention means that, unless there is a "*clear case for regulation*", it should allow markets, and therefore competition, to develop without interference, in full knowledge that its *ex post* enforcement powers remain at its disposal.⁵³

⁵¹ See paragraph 2.13.

⁵² See paragraph 5.15.

⁵³ Which, as Ofcom itself acknowledges, will act as a deterrent, for example, to anti-competitive behaviour.

4. Legal powers and standard of proof

4.1 Ofcom has not clarified which legal powers it would apply, were it to determine that some form of regulatory intervention is required (under Options 2 or 3). Instead, it has referred to a number of legal powers at its disposal that could be used including, notably, its competition law powers (both sectoral and general) and its powers under the “fair and effective competition” licence conditions.

4.2 In terms of which powers Ofcom would use (if necessary), it has indicated that:⁵⁴

*“The extent to which we would be able to rely on ex post enforcement (under either our CA98 or sectoral powers) to remedy any competition issues is a key consideration. An issue identified in the concerns set out above is the possibility that Sky’s actions in relation to the retail market could have a material impact on the longer term development of competition at all levels and **that it would be difficult to address that after the event. If Sky’s entry leads quickly to the exclusion of other retailers it is unlikely that ex post measures would be effective in unwinding that position.***

*If there is the potential for certain types of behaviour to have a material impact on competition, **it may be relevant to adopt a precautionary principle and put in place ex ante rules to prevent such a potential from being exploited.** However, any such rules should be a proportionate response to the issue that has been identified”* (emphasis added).

4.3 These paragraphs indicate that, were Ofcom to determine that the Proposal “*could have a material impact on the longer term development of competition*”, its (“precautionary”) inclination will be to impose *ex ante* measures, and thus select either Option 2 or 3. By implication, Ofcom is dismissing the appropriateness of reliance on its *ex post* powers (notably under the Competition Act), on the basis that “*it would be difficult to address that after the event*”.

4.4 This approach raises a number of concerns:

- has Ofcom met the standard of proof required to impose any regulatory obligation (either on an *ex ante* or *ex post* basis), such that it has made the case for either Option 2 or 3, rather than Option 1?
- has Ofcom prematurely dismissed the sufficiency or effectiveness of *ex post* enforcement, either through use of the Competition Act or through other, existing reviews?

Standard and burden of proof

4.5 Ofcom’s assessment of issues raised, the likelihood of adverse consequences and the imposition of regulatory remedies to address such consequences must all meet the requisite standard of proof. Given that Ofcom’s role is to assess the need for regulatory intervention, the burden of proof rests with Ofcom. As noted in paragraph 3.34 above,

⁵⁴ See paragraphs 3.73 and 3.74.

Ofcom itself recognises this, indicating that its “*bias against intervention means that a high standard of proof must be satisfied*”.

- 4.6 The requisite standard that must be met is the civil standard of “balance of probabilities”, i.e. the adverse consequence is, on the evidence, “**more likely than not**” to occur. Ofcom is contemplating using a range of legal powers, under any of the Communications Act, Competition Act or Broadcasting Acts. Whichever of these legal powers it proposes to use, the legal standard to be met is the same.
- 4.7 For example, if Ofcom were to act under the Communications Act (notably under s.316 or s.317), it would need to demonstrate that it is more likely than not that the Proposal is prejudicial to fair and effective competition, for example through the foreclosure of competition. If Ofcom were to act under the Competition Act, it would need to demonstrate that it is more likely than not that the Proposal had resulted in an infringement of the Chapter I or II prohibitions (i.e. on an *ex post* basis).⁵⁵
- 4.8 The CAT has confirmed the “*balance of probabilities*” standard in relation to the Competition Act in a series of cases including *NAPP* and *Genzyme*. The CAT has also confirmed this standard of proof in relation to Ofcom’s powers under the Communications Act (in relation to Part 2 of the Act) in the *Hutchison 3G (UK) Limited v. Ofcom* case, in which the CAT held that an exercise of determining SMP (i.e. dominance) has “*serious consequences*” and that an assessment of:

*“future events, if part of a chain of events said to give rise to future dominance, **have to be proved to be likely on a balance of probability**”*⁵⁶ (emphasis added).

The CAT added:

*“The case demonstrates (if it needs to be demonstrated) that theory and surmise is not enough. One must look to see how things operate in practice, and prove whatever has to be proved to an appropriate level of proof. It points out the need to be particularly careful in relation to that when one is considering future conduct.”*⁵⁷

- 4.9 In order to meet this standard of proof, Ofcom must therefore provide sufficiently strong evidential support for its concerns, which should not be “*theory*” or “*surmise*”.
- 4.10 Given Ofcom’s stated “*bias against intervention*”, and its requirement to act proportionately and only in cases where action is needed, where Ofcom is contemplating acting on an *ex ante* basis, it is particularly important that this standard is met, since it also has *ex post* enforcement powers at its disposal.⁵⁸
- 4.11 Correspondingly, the standard must also be met by any decision to dismiss the appropriateness of use of *ex post* enforcement powers in favour of a need for *ex ante*

⁵⁵ Any ability to seek interim measures would require Ofcom to demonstrate a reasonable suspicion that there would be “*serious and irreparable harm*” caused in the absence of such measures (i.e. that an infringement was enduring, not hypothesised).

⁵⁶ See paragraph 31 of the judgment, dated 29 November 2005.

⁵⁷ See paragraph 32 of the judgment.

⁵⁸ It is noteworthy, in this regard, that the standard Ofcom appears to be imposing on itself in the “Future of DTT” consultation proposals, in relation to intervention through regulation, is one of “*market failure*”.

intervention, given that in effect amounts to a decision not to allow the market to develop on its own, and that intervention is instead necessary.

- 4.12 In the present case, this means that Ofcom should be able to demonstrate that, notwithstanding the inherent “*degree of uncertainty as to the impact of the Proposal on competition and consumers*”⁵⁹ that a prospective analysis assessment brings, there is nonetheless a sufficiently compelling evidence base in support of intervention. This would amount to being able to demonstrate that (i) competition (foreclosure) concerns are more likely than not to materialise if the Proposal is approved, and (ii) *ex post* enforcement in due course is more likely than not to prove to be an inadequate means of addressing those concerns.⁶⁰
- 4.13 If Ofcom is unable to meet this standard of proof, which Sky considers is the case, compliance with its general duties would require it to approve the Proposal unconditionally:
- 4.13.1 The evidence base in support of Options 2 or 3 amounts to assertion (or “*surmise*”): Ofcom has not demonstrated with sufficient certainty that the “*significant competition issues*” it contemplates happening, or the assumed certain outcomes, are anything other than hypotheses.
- 4.13.2 The dismissal of the potential for *ex post* enforcement is unreasoned. Ofcom notes that “*it is possible that the nature of those concerns is such that it may be difficult to address them adequately on an ex post basis*”.⁶¹ An unsupported assertion of “*difficulty*” is, however, insufficient to meet the legal standard of proof.
- 4.14 This means that the only appropriate option available for Ofcom is, in fact, Option 1, given that it has not adequately demonstrated the case for either Options 2 or 3.

⁵⁹ See paragraph 3.79.

⁶⁰ In many respects, the prospective analysis being undertaken by Ofcom is akin to a merger review, which is also forward-looking, thus emphasising the need for a cogent, reliable evidence base. However, in contrast to merger cases, a regulatory case such as the present one does not result in “structural” changes to the market, such that a preference for *ex ante* control is appropriate.

⁶¹ See paragraph 3.80.

5. Ofcom's competition assessment

- 5.1 Ofcom has indicated that it has “*longer term concerns*” about “*the way in which Sky's entry might influence the future evolution of the pay TV sector as a whole*”.⁶² These concerns relate to a possible:

“transition from a situation where there is a single “platform” for the provision of pay TV services on DTT with several retailers ...”,

to a situation where:

*“a single provider of pay TV services emerges on DTT or at the very least there is a significant degree of concentration”.*⁶³

- 5.2 Ofcom argues that “*if there is just one provider of pay TV services on DTT, then there is a greater risk that competition issues will arise*”.⁶⁴ In support of these concerns, Ofcom indicates that “*potential*” reasons are:⁶⁵
- There is “*a tendency within the UK for one main retailer of pay TV services to emerge on any given platform*”;
 - The same “*tendency*” has emerged in other countries (with no explanation of their relevance); and
 - There is a lack of “*counter-examples*” to this tendency (with BT Vision and Setanta being described (only) as still being “*case studies*”).
- 5.3 Ofcom indicates that the “*likelihood*” of one main retailer emerging on DTT “*may be greater on a platform with significant capacity constraints*” (emphasis added), and that these capacity constraints “*significantly [restrict] the likelihood of new entry by other competing retail content providers*”.⁶⁶
- 5.4 Ofcom reinforces these concerns by reference to the change that Picnic's launch would (in Ofcom's view) ultimately bring to Sky's incentives to compete, which it considers would raise issues of foreclosure in relation to competing pay TV retailers (on DTT). In particular, Ofcom considers that:

*“Sky might have not only the incentive to exclude new entrants but that going forward it would be better placed to implement such a strategy across multiple platforms and at multiple levels in the value chain”;*⁶⁷

*“where a wholesale channel provider is vertically integrated with a retailer the incentive to offer content to rivals may be weakened by the impact on its own downstream retail business”;*⁶⁸

⁶² See paragraph 3.63.

⁶³ See paragraph 3.63.

⁶⁴ See paragraph 3.66.

⁶⁵ See paragraph 3.45.

⁶⁶ See paragraph 3.47.

⁶⁷ See paragraph 3.67.

*“these incentives are likely to be strengthened by dominance at the wholesale content provision level;”*⁶⁹

*“the above discussion is intended to highlight the potential economic incentives on Sky in the DTT market [sic] in the absence of regulation”.*⁷⁰

5.5 Nonetheless, Ofcom recognises that *“there is some uncertainty in how competition will evolve in the longer term;”*⁷¹ and that: *“there are a number of different scenarios which could play out in terms of the way in which competition on DTT evolves”.*⁷²

5.6 These different scenarios cover:

- (i) multiple retailers using a single CA system,
- (ii) multiple retailers using competing CA systems, or
- (iii) a single retailer using a single CA system.

5.7 Ofcom acknowledges that its concerns will, however, depend on the relevant market definition adopted:

5.7.1 following a narrow market definition, Ofcom’s concerns appear to relate to a *“likelihood ... that one competitor will, in due course, become the de facto monopoly provider of pay TV services on the DTT platform”*,⁷³ thereby providing it with *“the scope for abusive behaviour”*;

5.7.2 whereas in a wider market, it is the *“expectation that inter-platform competition would be weaker”*, given that Sky would *“be in control of two of the major pay TV platforms in the UK”*.

5.8 The concerns raised by Ofcom amount to speculation. Ofcom has hypothesised about possible outcomes in a way that does not meet the required standard of proof identified in section 4 above: Ofcom does not demonstrate that any of these outcomes, such as the emergence of a *“monopoly provider of pay TV services on the DTT platform”*, are *“more likely than not”* to occur. Equally, Ofcom has not explained why any other outcome, for example one in which the benefits created by the Proposal (and recognised by Ofcom) still arise but without identifiable competition concerns being raised, are more unlikely to occur. Thus, the case has not been made that, as a result of the launch of Picnic, there is a *“greater risk that competition issues will arise”*.

5.9 As Ofcom has not reached any firm view on appropriate relevant market definition, having limited its assessment at this stage to reference to various possible *“candidate markets”* at the wholesale and retail level, it has also not established the appropriate frame of reference in which potential competition concerns should be assessed.

⁶⁸ See paragraph 3.70.

⁶⁹ See paragraph 3.71.

⁷⁰ See paragraph 3.72.

⁷¹ See paragraph 3.41.

⁷² See paragraph 3.42.

⁷³ See paragraph 3.49.

- 5.10 Ofcom has also not fully articulated which aspects of the Proposal underpin its concerns, whether this is primarily Picnic being the retailer of Sky's content on the DTT platform, or Picnic deploying its own population of set top boxes (containing their own, proprietary conditional access technology), or a combination such that Picnic becomes a vertically integrated DTT platform operator and retailer. The absence of such analysis impacts the assessment of the extent of any possible foreclosure concerns.
- 5.11 Further, Ofcom has made various assumptions about Sky's likely incentives, following the launch of Picnic, which amount to assertion not supported by evidence.
- 5.12 Moreover, given that concerns of foreclosure and possible "*abusive behaviour*" appear to underpin Ofcom's analysis, were such concerns to manifest and be demonstrated to the requisite standard of proof (i.e. they are "*more likely than not*" to happen), they would appear capable of being addressed by Ofcom's *ex post* enforcement powers, given that the Competition Act is designed to address exactly these types of concern. Ofcom, however, appears to dismiss this possibility, even though it has failed to articulate sufficiently why this is the case.

6. Critique of Ofcom's competition assessment

- 6.1 Ofcom's concerns appear to relate to potential foreclosure issues, combined with what are, in Ofcom's view, Sky's (unique) incentives and ability to exclude new entrants. For such concerns to meet the requisite standard of proof for Ofcom to be able to intervene, notably through the use of *ex ante* regulatory powers, a proper assessment of these issues in an appropriate frame of reference is required. In the absence of adequately substantiated concerns based on an appropriate approach to relevant market definition, Ofcom's general duties oblige it to avoid intervention and not impose any (unnecessary) regulatory burdens.

Tendency for one main retailer

- 6.2 Ofcom's concerns stem from its view that there is a "tendency" for one main retailer of pay TV services to emerge on each digital television platform. This tendency amounts to assertion which has not been adequately substantiated so as to meet the requisite standard of proof: the examples provided fall short of sufficient and appropriate corroboration.⁷⁴ For example:
- 6.2.1 Ofcom appears not to have taken into account the fact that, in the UK, cable operates as a "closed" platform, thereby preventing there being more than one retailer on cable. It is noted that, in this regard, the BT Vision and Top Up TV DTT platforms also continue to remain "closed", in the sense that neither is currently subject to a regulated access regime.⁷⁵
- 6.2.2 Ofcom also appears not to have considered the role played by the regulated access regime that applies to the DSat platform in the UK, where broadcasters/retailers can obtain EPG and CA services on regulated fair, reasonable and non-discriminatory terms; this route of regulated access has been taken up by many broadcasters, including Setanta.
- 6.2.3 No explanation is given as to why the DTT platform in the UK can be expected to follow a similar trend. Ofcom simply notes that it is, in comparison to the other established digital television platforms in the UK, significantly capacity constrained, such that its concerns may be more acute.⁷⁶ To the extent that this is a valid theory (which Sky disputes), Freeview could already be considered to fulfil such a "main retailer" role, given its prominence on DTT.
- 6.2.4 However, DTT in the UK is marked by the development of different, and hybrid, models of content distribution. In comparison to cable and DSat, DTT is not a "uniform" single platform with a single operator. It already comprises (at least) two pay platforms, operated separately by Top Up TV and BT Vision (across which Freeview services are commonly available), which employ different approaches to content delivery. Key differences include the following:

⁷⁴ See paragraph 3.45.

⁷⁵ Though Ofcom, of course, consulted in February 2007 on the application of such a regulated access regime to Top Up TV. This consultation exercise remains to be finalised.

⁷⁶ See paragraphs 7.14-7.16 on inter-platform competition below, which negates such capacity constraint concerns.

- The services available through Top Up TV's PVR set top boxes are a combination of pay and FTA linear broadcast content and pay content "pushed" overnight to the PVR hard drive;
 - BT Vision set top boxes also receive a combination of pay and FTA linear broadcast content, and also have access to a library of content available on a video on demand basis via the set top box's broadband connection;
 - BT Vision's VOD services are not available on Top Up TV's set top boxes, nor are Top Up TV's push services available on BT Vision's set top boxes;
 - This diversity in hardware can be expected to continue, notably following the recent announcement by the BBC, ITV and Channel 4 about the proposed new "Kangaroo" archive VOD service; it is understood that these broadcasters intend that this service will be available via DTT set top boxes (with the "Kangaroo" software downloaded to such set top boxes and the VOD content then accessed via a broadband connection to such set top boxes).
- 6.2.5 Further, access to each population of set top boxes is controlled separately (through different, and not wholly compatible, implementations of the Nagra CA technology, access to neither of which is currently regulated by Ofcom).⁷⁷
- 6.2.6 The diversity of delivery mechanisms (i.e. including linear broadcast, "push" broadcast or VOD) provides different content providers with a choice as to how best retail their content. This choice impacts the significance or relevance of there being more than one CA provider on DTT. Further, this choice, and the lack of a single CA provider, does not appear to have hindered platform entry to date – for example, Setanta makes its channel available to subscribers using the CA services provided by Top Up TV and BT Vision.
- 6.2.7 Further, there is no explanation of why DTT capacity constraints will "*significantly*" restrict new entry, nor the importance of such new entry. In fact, DTT in recent years can be characterised as exactly the opposite: there being a track record of new entry of which Picnic can be considered the latest example.⁷⁸
- 6.2.8 Given this diversity in content delivery mechanisms already employed on the DTT platform, it is not therefore appropriate for Ofcom simply to assume that its development will take place on the same basis as cable and DSat.
- 6.2.9 Further, the references to examples from other countries are not supported by any explanation as to their relevance (for example, in relation to the conditions of competition and regulatory environments that exist in those countries). There are

⁷⁷ The fact that Setanta provides its pay TV service over both the Top Up TV and BT Vision platforms encrypted with one CA technology (albeit different implementations) does not mean that they form a single platform.

⁷⁸ In Section 7 of this submission, Sky explains why an appropriate retail market definition encompasses both FTA and pay services, provided across all platforms. On this basis, the fact that existing DTT retailers already compete with retailers and FTA services on other platforms challenges the significance of Sky's entry as a pay TV retailer onto DTT.

other examples, such as in France and Italy, where more than one retailer exists on platforms.⁷⁹

Barriers to entry

- 6.3 Ofcom argues that its “*tendency*” concerns could also manifest as a result of an ability for Sky to raise entry barriers, to make it “*more difficult for other suppliers of retail pay TV channels and platform services to enter the market*”.⁸⁰ The analysis of such concerns, however, is limited and inconclusive such that it again does not provide a basis for *ex ante* regulation.
- 6.4 This shortcoming is compounded by the lack of clarity on relevant market definition: to adequately assess the nature and substance of any hypothesised barriers to entry, an appropriate frame of reference should be set, with an analysis undertaken against an appropriate counterfactual.

Scale of opportunity

- 6.5 It is also not clear the extent to which Ofcom’s concerns relate to Picnic’s ownership of a population of set top boxes or of the retail relationship with customers (or both). Ofcom has not articulated why it considers the emergence of a single or main retailer on a particular platform is necessarily something that should be prevented (and how such prevention would be consistent with Ofcom’s duties). Ofcom notes that the emergence of a single or main retailer on a particular platform is an “*outcome [that] could arise purely through competition on the merits*”.⁸¹
- 6.6 Given that scale is relevant to the extent of any foreclosure concerns, it would also appear appropriate for Ofcom to take into account the likely size of the Picnic DTT platform (in terms of estimated subscriber and set top box numbers), in comparison (at least) to the size of existing DTT platforms and retailers.
- 6.7 For example, Top Up TV “inherited” a population of over 1.2 million set top boxes from the former ITV Digital platform⁸² (many of which would have subsequently been rendered obsolete when it moved to a “push” broadcast model). Sky understands that it has recently commenced subsidising the retail price of its PVRs, in order to achieve greater penetration of compatible set top boxes, and is currently estimated to have attracted a subscriber base of around 200,000 homes.
- 6.8 BT Vision, in common with Top Up TV (and Setanta) enjoys the benefits of access to significant funding resources. BT Vision has commenced offering its set top box for free to its new and existing customers that sign up to BT Total Broadband. It is expected to have attracted around 100,000 subscribers by the end of 2007, and has publicly stated that, in the medium term (to around 2011) it is seeking to gain around 2-3 million subscribers.⁸³

⁷⁹ For example, Canal+ retailing a bouquet of channels over cable and DTT, in addition to satellite.

⁸⁰ See paragraph 3.67.

⁸¹ See paragraph 3.67.

⁸² ITV Digital had around 1.2 million subscribers at the time of its collapse in 2002; the total base of ITV Digital set top boxes at that time can therefore be expected to be higher.

⁸³ See press release: <http://www.btplc.com/News/Articles/Showarticle.cfm?ArticleID=aefe3bbc-65cd-4bf0-9e63-7d6bb6aee1c6>

- 6.9 Upon launch, Picnic will start from a base of zero subscribers/set top boxes, which it will have to grow in the face of significant competition both from existing DTT operators and from other digital television platforms. Ofcom is aware of Picnic's (confidential) subscriber projections, which amount to around [REDACTED – CONFIDENTIAL] TV subscribers 3 years after launch (i.e. potentially at a similar time as BT's target of 2-3 million subscribers is reached).⁸⁴
- 6.10 Ofcom acknowledges that the opportunity for pay TV on DTT is likely to be small in the short term, and that its "*starting presumption is that pay TV subscribers will form only a small proportion of DTT households in the short term*".⁸⁵ This starting presumption, combined with the diversified nature of the DTT platform, and the existence of well funded existing retailers on DTT, all undermine the likelihood that Ofcom will need to use its *ex post* powers, let alone that Ofcom could justify *ex ante* regulation.

Incentives

- 6.11 Ofcom also indicates that (in particular) Sky's incentives for anti-competitive conduct need to be considered. In this regard, Ofcom indicates that:
- "Sky may have an incentive to act in a way that could prevent, restrict or distort competition at the retail level. The principal motivation could be a desire on the part of Sky to avoid a situation in which a rival pay TV retailer was able to establish a position in the retail market which it could use to become a more credible rival in competition for premium content rights, particularly premium sports rights".⁸⁶*
- 6.12 These concerns about Sky's incentives are, however, not substantiated in the consultation document, but are presented on a hypothetical basis. Sky's October 2007 Response to Ofcom on the pay TV market investigation ("**October 2007 Response**") has already specifically covered the types of concerns raised by Ofcom in the present consultation paper – in particular, why concerns about channel wholesaling incentives and "downstream foreclosure" are not substantiated.⁸⁷
- 6.13 Pay TV channel providers have a strong incentive to achieve wide distribution of their channels across multiple platforms. Forgoing revenues from potential subscribers on other platforms (whether served directly by Sky as retailer or via wholesale arrangements with a third party retailer) implies significant costs to Sky which, in practice, provide a strong disincentive on Sky from engaging in downstream foreclosure. This is particularly the case in differentiated sectors such as television, where different retailers may be more efficient in reaching different categories of customer. There are strong incentives on any channel provider, including Sky, having invested in attractive content to make its channels available on all efficient platforms in order to reach as many interested consumers as possible.⁸⁸ Access to different delivery platforms can facilitate such wide distribution of content.

⁸⁴ Contained in Sky's response to Ofcom's request for information submitted on 15 June 2007.

⁸⁵ See paragraph 3.27.

⁸⁶ See paragraph 3.78.

⁸⁷ See in particular section 4 of the CRA paper annexed as Annex 4 to Sky's October 2007 Response.

⁸⁸ See, for example, paragraphs 6 and 50 of the CRA paper at Annex 4 to Sky's October 2007 Response.

- 6.14 It is for these reasons that, in principle, Sky would wish to retail its channels via any compatible and secure DTT platform to which Sky was granted access on FRND terms (see Section 9 below).
- 6.15 The absence of a clear relevant market definition compounds the uncertainty around Ofcom's concerns. As is evident from the discussion in paragraphs 3.49 and 3.50 of the consultation document, where Ofcom indicates that its concerns could relate either to intra-platform or inter-platform competition, the frame of reference (and counterfactual) used will be crucial for an assessment of the possible impact of the Proposal.

7. Appropriate frame of reference

- 7.1 Ofcom has not clearly defined the relevant markets at either a retail or wholesale level. Instead it is considering a number of alternative (“candidate”) definitions which it may or may not adopt (though it already appears to have dismissed two of the candidate retail market definitions, one as being “*likely to be too broad*” and another as “*may well not be a distinct market*”, despite not having carried out “*a detailed market definition exercise at this stage*”).
- 7.2 At the retail level, Ofcom is considering the extent to which different types of television compete, with a view to understanding whether there is an “all TV” market, or a market containing a subset of content, be it pay TV in general, or premium and basic pay TV separately. At the wholesale level, Ofcom merely refers back to the OFT 2002 *BSkyB Chapter II* decision.
- 7.3 Sky’s October 2007 Response articulates the need for Ofcom to take into account the three extremely important elements of the actual context in which pay TV services in the UK are provided: (i) competition between pay TV and free to air television services, (ii) significant and ongoing changes at almost every level of the audiovisual sector in the UK, and (iii) the recent occurrence of major regulatory interventions.
- 7.4 The factors discussed by Sky in its October 2007 Response are of direct relevance to Ofcom’s assessment of the Proposal: the significant constraint that the availability of free to air services plays on providers of pay TV services strongly indicates that Ofcom should be assessing the Proposal in the context of an “all TV” relevant market.

Appropriate relevant market definition

- 7.5 At the **retail** level, there is a relevant market for the supply of audiovisual content to end users. This market includes the supply of individual programmes, films and television channels (whether free to air or pay, whether broadcast in linear format or downloaded/viewed on demand) and the supply of programmes in pre-recorded formats, all of which are substitutable. As outlined in **Annex A** to this submission, Sky considers that it competes with all suppliers of audiovisual programming to end users, including television broadcasters such as the BBC, ITV, Channel 4, Five, retailers of audiovisual programming such as Virgin Media, Top Up TV, BT Vision, Tiscali/HomeChoice and FilmFlex, and retailers and rental providers of pre-recorded audiovisual programming (e.g. DVDs) including Amazon, HMV and Zavvi (formerly Virgin Megastores), Blockbuster, Lovefilm and Tesco. Sky notes that, save for the inclusion by Sky of the provision of audiovisual content to end users on pre-recorded formats, this market definition accords broadly with the “candidate” relevant retail market proposed by Ofcom of “all TV”.
- 7.6 In this regard it would be inappropriate to make any distinction between the different delivery platforms over which such content is provided – given that all such platforms compete with each other for viewers/subscribers.⁸⁹ A consistent theme in previous

⁸⁹ Ofcom acknowledges this (only) in relation to the wholesale level of the market (see paragraph 3.38 of the consultation document), though there is no reason for any distinction to be made at the retail level.

decisions of various competition authorities has been the fact that different platforms compete.⁹⁰

- 7.7 The UK audiovisual industry is highly dynamic, characterised by an intense (and intensifying) “zero sum game” in which an increasing number of providers, across different platforms, compete for the same number of viewers via numerous different means. This competitive dynamic means that the constraints arising from people’s willingness to pay for television services are tightening over time. Pay television retailers (and pay television channel providers) therefore need to respond by offering consumers improved value for money over time. The same is true as competition intensifies for audiences who increasingly choose to watch audiovisual programming over new content delivery media such as the internet and mobile phones.
- 7.8 At the **wholesale** level, there is a relevant market for *at least* the production and supply of television channels – which is further explained in **Annex A**. The demand for such channels is derived from demand downstream – ultimately, from the demands of end users of audiovisual content.
- 7.9 In principle, the wholesale market may actually be defined to be wider than this – for example, including also the supply of individual programmes and films at the wholesale level (which are then distributed to end users – for example via pay per view and on demand services, or via DVD sale and rental).
- 7.10 Sky considers that this relevant market – encompassing the supply of over 500 television channels by a wide range of broadcasters, including large and powerful broadcasters such as the BBC, Channel 4, Five, Disney, Viacom, UKTV and Discovery, as well as growing players backed by private equity such as Setanta, Sparrowhawk and Chartshow (as well as providers of other PPV and on demand services and DVDs) – is diverse and intensely competitive. Furthermore, barriers to entry to, and expansion in, the market are low (as evidenced by the massive and ongoing proliferation of television channels provided in the UK) providing a very important constraint on the position of all players within the market.
- 7.11 Sky has also set out in its October 2007 Response further arguments on the importance of free to air television services; the extent of changes in the sector; the fact that the sector is characterised by effective competition; and the fact that the sector delivers significant benefits (rather than harm) to consumers.⁹¹
- 7.12 It is noted that Ofcom makes reference in this regard to the recent Competition Commission provisional findings in relation to Sky’s acquisition of a stake in ITV plc, in which the Commission also recognised the competitive constraint that free to air services have on pay TV providers, such that it considered there to be “*a UK market for all-TV which included both pay-TV and FTA services*” which is “*highly differentiated and dynamic*”.⁹² The Competition Commission also agreed that “*...BSkyB compete[s] for viewers within a*

⁹⁰ For example, the OFT decision (2006): *ntl/Telewest*; the EC decision (2007): *SFR/Tele 2 France*. (Note, however, the comments made about market definition in footnote 25 above.)

⁹¹ See Part B of Sky’s October 2007 Response to Ofcom.

⁹² See paragraph 14 of the provisional findings. It is noteworthy that the Commission expressed its review as covering “*the strength of existing and future constraints on BSkyB in the market for all-TV*” (emphasis added) (paragraph 15).

differentiated product market”, noting in particular the fact that providers can make services available as part of a bundle with other services (such as telephony or internet access).⁹³

- 7.13 Further, the Competition Commission also considered it relevant to take into account “*the timeliness with which content is provided (linear or on-demand)*”, concluding that:

“if a provider of audiovisual services possesses suitable content and sufficient capacity, it can choose the form of delivery [traditional linear broadcast or VOD] that suits its commercial offer best. Therefore we believe that, for content suitable for VOD, there is sufficient demand- and supply-side substitution between VOD and linear broadcasting that VOD should form part of the same market”.⁹⁴

- 7.14 The Competition Commission explicitly also considered that “*it would be inappropriate to segment the market purely on the grounds that some packages are delivered over different platforms*”. In addition to the BBC, ITV, Channel 4, five and Virgin Media, the Competition Commission specifically refers to Tiscali, BT Vision and Top Up TV in its “*overview of competitors*”.

Assessment of Proposal based on appropriate frame of reference

- 7.15 On the basis of these relevant market definitions, competition is appropriately assessed at the retail level as between all FTA broadcasters and providers of pay TV services, across the different delivery platforms. Accordingly, FTA broadcasters and pay TV retailers currently available via DTT already face competition for viewers/subscribers from FTA broadcasters and pay TV retailers on other platforms (including Sky on DSat).
- 7.16 Given the existence of such cross-platform competition, together with the established constraints that FTA services pose on pay TV services, the introduction of Sky’s pay TV channels to DTT would not significantly change the dynamics of competition.
- 7.17 Any arguments that competition concerns are of sufficient scale (and likelihood) that (only) *ex ante* intervention (rather than *ex post* enforcement) is appropriate are undermined where there is a broad relevant market in which FTA services compete with pay TV services, and where the base of Picnic-compatible set top boxes is small in comparison to existing populations of set top box.
- 7.18 In addition, Ofcom will appreciate the fact that the potential scale of any foreclosure concerns will necessarily influence the proportionality of any (demonstrably) necessary remedy. Ofcom considers that the opportunity for pay TV on DTT is likely to be small in the short term. However, it gives no explanation as to why, were this outcome to persist beyond the short term, its *ex post* enforcement powers would somehow become inadequate to deal with any hypothesised concerns.
- 7.19 A competitive assessment must also be made in the context of an appropriate counterfactual. The appropriate counterfactual, in the event that the Application is not approved, is that Sky’s existing FTA channel line-up is maintained, rather than one where Sky’s pay content is (despite rejection by Ofcom of the Application) available to DTT

⁹³ See paragraph 4.5 of the provisional findings.

⁹⁴ See paragraph 4.23 of the provisional findings.

viewers. An assessment based on this counterfactual will lead Ofcom to recognise the benefits that the Proposal will create.

- 7.20 As indicated in paragraphs 2.5–2.7 above, the removal of Sky’s current FTA channels cannot be expected to have a negative impact on competition or the range of content available (via DTT on a FTA basis), given the modest viewing these channels experience in comparison to other FTA channels on DTT, the existence of a wide range of other FTA services that will remain available to DTT viewers, and the lack of consumer concern about the loss of the Sky FTA channels from Freeview (as reflected by research undertaken on behalf of Picnic). In light of the appropriate counterfactual, the establishment of Picnic as a retailer of pay TV services on DTT cannot, itself, therefore be regarded as cause for concern; as set out in paragraphs 7.17 and 7.18 above, the lack of certainty and materiality about the competition issues reinforces the inappropriateness of *ex ante* intervention in the present case.

Role of ex post enforcement

- 7.21 As noted above, there appears to be a lack of due recognition by Ofcom in the consultation document of its ability to address any competition (or other) concerns on an *ex post* basis, were it demonstrated that there is an issue that requires regulatory intervention. In this regard it is, however, noted that Ofcom does recognise the fact that the Competition Act and sectoral regulation will act as a deterrent for an undertaking, to prevent it from engaging in conduct that could be considered adversely to affect competition.⁹⁵
- 7.22 Ofcom recognises and welcomes the competition and consumer benefits that the Proposal will bring; Ofcom also acknowledges the limited opportunity for pay TV on DTT, both only in the short term. These factors, in combination with Ofcom’s “*starting presumption*” that “*pay TV subscribers will form only a small proportion of DTT households in the short term*”,⁹⁶ reinforce the need for Ofcom positively to demonstrate that *ex ante* intervention is necessary, to the exclusion of the possibility (and suitability) of *ex post* enforcement.
- 7.23 In terms of the “*longer term concerns*”, the specific issues raised would appear to be susceptible to *ex post* enforcement, were that necessary, or are issues that are already being considered by Ofcom, for example under its pay TV investigation. It is imperative that Ofcom gives this ability due consideration, to ensure that its actions are appropriate and proportionate.

Existing reviews

- 7.24 Ofcom does not make specific reference to its powers under the Enterprise Act 2002, though it does make reference in a number of places in the consultation document to the fact that it is conducting the pay TV investigation. Ofcom expressly acknowledges, however, that (substantive) issues raised in the present consultation document are already being considered as part of the pay TV investigation.⁹⁷
- 7.25 Ofcom is also (separately) conducting a review of wholesale digital television broadcasting platforms, which could equally provide an appropriate forum in which to consider specific

⁹⁵ See paragraph 3.72.

⁹⁶ See paragraph 3.27.

⁹⁷ See, for example, paragraphs 1.12 and 3.37.

issues Ofcom considers to be raised by the Proposal, notably platform access issues.⁹⁸ The fact that the majority of digital television platforms in the UK remain “closed” (from a regulatory perspective) suggests that any issues raised by the nature of Picnic platform would be more appropriately addressed through such a comprehensive review, in order to ensure (i) a consistent and proportionate approach is taken to address any such concerns and (ii) any need for “TPS” regulation is addressed to all relevant platforms.

- 7.26 It is important for Ofcom to remember that the applications submitted by Sky and NGW only concerned a request for approval for (limited) necessary changes to their respective DPS and multiplex licences. These changes were limited to the range of content to be provided by Sky, under the Picnic brand, at the retail level to DTT viewers.
- 7.27 The concerns that Ofcom has raised relate, however, to “wider” issues, such as whether the changes to Sky’s channel line up on DTT will, for example, give rise to any changes to Sky’s current wholesaling arrangements, and the incentives that Sky has to make its content available to third party retailers (as part of some form of exclusionary strategy “*across multiple platforms and at multiple levels*”), as well as changes that “*vertical integration*” is considered to bring.⁹⁹
- 7.28 These issues are not directly related to the applications that have been submitted to Ofcom (and are not axiomatic to the launch of Picnic as a pay TV retailer on DTT); they are also issues that Ofcom is already considering as part of its pay TV investigation. Any assessment of such issues should be undertaken on the basis of a full competition assessment, based on a proper market definition to provide the appropriate frame of reference.
- 7.29 Ofcom will also recognise the risks and burdens that multiple reviews of the same issues can place on stakeholders. Not only is there the risk of inconsistent regulation (in light of the different remits of each review), but issues of proportionality could be raised where an undue review burden is placed on the companies under scrutiny. Subsequent or overlapping reviews into the same or similar issues also risk the need for alteration of any remedies that have only recently been imposed. The “*best regulatory practice*” aspects of the Act are intended to deal with exactly these sorts of concerns, to ensure that Ofcom acts in a consistent manner and in a way that minimises the impact of its regulatory activities to be the least intrusive.

⁹⁸ This appears to be acknowledged in footnote 44 of the consultation document. As indicated by Ofcom in its draft Annual Plan 2008/9, this review is actually now “on hold”, but is expected to be recommenced in late 2008. Of relevance is also the February 2007 consultation into the provision by Top Up TV of Technical Platform Services, in relation to which Ofcom is yet to publish a final statement.

⁹⁹ See paragraphs 3.67 and 3.70- 3.71.

8. Other issues

8.1 Ofcom raises a number of additional policy considerations in section 4 of the consultation document. These relate to:

- (i) the impact on FTA television and Freeview; and
- (ii) the marketing and availability of Picnic set top boxes, including the potential for customer confusion around set top box functionality.

Impact on FTA television and Freeview

8.2 Ofcom indicates that it considers the Proposal is unlikely to have a significant detrimental effect on the FTA channels (and thus, by analogy, Freeview) and that it would be unlikely materially to affect the take up of digital television as DSO proceeds. In this regard, Ofcom makes specific reference to “*the strong presence of the PSBs on the DTT platform*”.¹⁰⁰

8.3 Sky agrees that the Proposal is unlikely to have any negative effects in this regard. Sky presumes, however, that Ofcom means that the Proposal will not have a material adverse effect on the take up of digital television. Given that the Proposal is responding to demand for pay television services via DTT, the launch of Picnic will encourage homes to join the DTT platform (and should also assist with the deployment of DTT reception equipment on second and third televisions, as consumers decide to upgrade their reception equipment on their main television).

8.4 In addition, and as noted by Ofcom, the strong presence of the PSBs within Freeview (indicated, not least, by the scale of viewing of the PSB and sister channels in contrast to other channels in DTT homes) supports this lack of concern.

8.5 To the extent that the launch of Picnic could lead to a “*general migration towards pay services*” on the DTT platform,¹⁰¹ Sky does not consider this to be the case. As noted by Ofcom, the trend on DTT in recent years has, in fact, been towards FTA broadcasting¹⁰², not least due to the significant growth in the number of DTT homes in the UK, and thus the greater potential for advertising revenues this provides to support the FTA model.

8.6 The decision for a channel provider to choose between a pay and FTA model is a complex decision, weighing up the ability to encourage consumers to pay for content (particularly if previously that content has been available on a FTA basis) balanced against the scale of opportunity (given that the Picnic service will not launch with the benefit of a pre-existing base of set top boxes or in-built subscriber base). Ofcom will note that none of the channels that will be provided under the Picnic brand have previously been available on a FTA basis or available as part of Freeview.

Marketing of set top boxes

8.7 Ofcom also raises some specific concerns relating to the marketing of Picnic set top boxes. Ofcom notes that “*given the complexities of incorporating more than one CA system in a STB*”,

¹⁰⁰ See paragraphs 4.13 and 4.14.

¹⁰¹ See paragraph 4.5.

¹⁰² See paragraph 6.4.

consumers would need to buy a set top box specifically to receive Picnic services, on the one hand, and Top Up TV and Setanta services, on the other. This, Ofcom notes, may “*result in some consumer confusion over which services are available from which STBs*”.¹⁰³

- 8.8 Ofcom will be aware that such a situation already exists in relation to DTT services and thus, to the extent that there is consumer confusion, that will not be caused (or exacerbated) by the launch of Picnic. If a customer wishes to obtain Top Up TV’s services, it must buy a compatible set top box (indeed, existing Top Up TV customers were required to do this when, in 2004, it relaunched its service as a push VOD service requiring a PVR). If a customer wishes to obtain services from BT Vision, they need a different set top box (and are also required to take out a subscription to BT Broadband). If a Freeview viewer wishes to have PVR functionality, it will need to invest in a compatible PVR.
- 8.9 Future services, such as the proposed Kangaroo service or proposed HD services on DTT, may also require specific reception equipment, which is a natural consequence of the proliferation of different types of service available via DTT and the “evolution” of the platform. (An analogy could be made with mobile telephony services where the availability of a vast range of handsets in conjunction with different networks (but not necessarily all networks) does not appear to have raised such issues of “confusion”).
- 8.10 Ofcom notes that Picnic has adopted the “horizontal market” approach to the sourcing of set top boxes and, notwithstanding this approach, appears to consider that it is unlikely that more than one CA system will be incorporated into any set top box. As Ofcom is aware, Picnic does not oppose any manufacturer from designing such a set top box (or a set top box containing a common interface), and does not agree that any complexities in incorporating more than one CA system into a set top box will necessarily be insurmountable. If there is consumer demand for such set top boxes, manufacturers would be free to respond to it through the design of such equipment.
- 8.11 Ofcom notes that “*consumer choice is largely based on content rather than the characteristics of a particular CA technology*”, indicating that consumers will select the requisite reception equipment based on the services they wish to receive.¹⁰⁴ It will clearly be in the interests of the television service providers, and in particular those who wish to encourage consumers to purchase their services, to ensure that their marketing is sufficiently clear so that potential customers make correct purchasing decisions in relation to reception equipment. Sky notes that Ofcom recognises these “*strong incentives*” in relation to clarity of marketing, and considers that conditions (around marketing materials) to “*help to alleviate these concerns*” will be unnecessary.¹⁰⁵
- 8.12 Ofcom also makes reference in the consultation document to a number of other issues related to set top box supply:
- That Sky “*might benefit from economies of scope in terms of STB design or economies of scale in terms of volume of orders*”;¹⁰⁶

¹⁰³ See paragraph 4.8.

¹⁰⁴ See paragraph 3.46.

¹⁰⁵ See paragraph 4.8.

¹⁰⁶ See paragraph 3.60.

- “*there could be concerns about the impact on competition if there were incentive schemes*” to penalise retailers of competing STBs.¹⁰⁷

8.13 These points are entirely hypothetical and should not give rise to concerns such that they merit or warrant intervention by Ofcom:

- Ofcom has not explained why Sky should benefit from any economies of scope such that they could have an adverse effect on competition (particularly since distributors and retailers, rather than Picnic itself, will be ordering set top boxes from manufacturers) and provide Picnic with any form of competitive advantage.
- Picnic does not currently propose to subsidise reception equipment. Nor does it plan on operating any such “*incentive schemes*” (as referred to by Ofcom).

¹⁰⁷ See paragraph 3.62.

9. Additional factors relevant to the Proposal

- 9.1 The only appropriate outcome for this consultation is for Ofcom to opt for **Option 1** and approve the launch of Picnic. For Ofcom to act otherwise, either by continuing its review and continuing to defer approval of the Proposal, or imposing unwarranted conditions as part any approval, would not be consistent with its general duties.
- 9.2 It follows that requiring conditions as part of Ofcom's approval would in itself be inappropriate. In its discussion of Option 2, Ofcom raises a number of theoretical concerns: Sky has set out below two aspects of its plans that would be relevant to Ofcom's assessment of the materiality of those concerns, were they actually to arise.
- 9.3 These plans are consistent with Sky's ethos of providing customers with choice – to ensure that customers that acquire Picnic set top boxes can access third party services and to obtain as wide distribution and availability of Sky's channels as possible (consistent with Sky's incentives which are to seek to maximise the profits derived from the distribution of its channels across all available platforms).

Access to Picnic set top boxes

- 9.4 Picnic proposes to implement the following measures in relation to Picnic set top boxes:
- Picnic will provide conditional access services (in relation to Picnic set-top boxes) to broadcasters on fair, reasonable and non-discriminatory terms, subject to the following:
 - To provide (pay) broadcasters with similar rights of access to all DTT platforms that support pay services, Ofcom should ensure that access to conditional access provided by other DTT platform operators is available on the same FRND basis.¹⁰⁸ Such an access obligation should therefore also apply, inter alia, to Top Up TV and BT Vision;
 - Any Guidelines published by Ofcom concerning the interpretation of the FRND principles relating to the provision of such CA services should be similar for all three providers of pay services on DTT.¹⁰⁹
 - Simulcrypting arrangements (whereby a single broadcast stream can support more than one CA stream) will therefore be possible, though such arrangements would need to be subject to any broadcaster's (reasonable) security concerns being satisfactorily addressed by the CA provider in question.¹¹⁰

¹⁰⁸ This is on the basis that these operators fall within the scope of s.75(2) of the Communications Act 2003.

¹⁰⁹ In its consultation on *The Setting of Access-Related Conditions on Top Up TV* (February 2007), Ofcom linked the basis of its proposed guidelines for Top Up TV to the fact that Top Up TV can still be considered to be in an early phase of its platform business lifecycle and its bargaining position with broadcasters, who want to gain access to its platform, is likely to be reasonably balanced and not weighted in favour of TUTV. Such an approach would also appear to be appropriate for Picnic and BT Vision.

¹¹⁰ As Ofcom acknowledges in paragraph 5.26, Sky has security concerns about the implementation of the MediaGuard CA system employed by Top Up TV which would currently preclude any simulcrypting arrangement with Top Up TV. These concerns relate to (i) the security that Top Up TV's MediaGuard system would provide for Sky's content and (ii) the steps that Top Up TV has indicated that it would be willing to take, were such a security breach to occur.

Retailing of Sky channels

- 9.5 In relation to the availability of Sky's channels on DTT, other than via the Picnic service:
- Sky plans to retail some or all of the Sky channels (namely *Sky Sports 1*, *Sky Movies Screen1* and *Sky One* and any other Sky channel that Picnic makes available in the future, for example *Sky News*) over third party compatible DTT platforms. In this case, "compatible" would mean, inter alia, that the other DTT platform could support the Sky channel in the format in which it is broadcast, e.g. in MPEG4.
 - Again, simulcrypting arrangements for Sky's channels would be feasible, so long as (i) Sky's reasonable security concerns by any third party CA system are satisfied, (ii) the third party DTT platform operator offers CA services on FRND terms to enable Sky or Picnic to access their platform and provide the Sky channels as retailer, and (iii) Sky has sufficient capacity available to support the transmission of multiple CA streams without adverse effects.

No basis for any further conditions

9.6 These plans are consistent with a number of the conditions that Ofcom has contemplated in section 5 of the consultation document, notably in paragraphs 5.18, 5.22, 5.26 and 5.28. As indicated in this response, Sky considers that Ofcom does not have an adequate basis for the imposition of *ex ante* regulation as condition of approval of the Proposal. The fact that Sky is planning to take the steps described in paragraphs 9.4 and 9.5 above means that there is even less need for Ofcom to apply further conditions to the approval of the Proposal, and to do so would not be appropriate or proportionate.

9.7 As part of its consideration of Option 2 in the consultation document, Ofcom has set out a number of other conditions to which consideration is being given as part of this consultation exercise. Sky has the following additional comments on these suggestions (the sequence of bullet points below refers to the corresponding bullet points under the paragraph in question in the Ofcom consultation document).

- 9.8 In relation to the suggestions set out in paragraph 5.18 of the consultation document:
- Sky would not seek to prevent (and would support) manufacturers incorporating a second CA system or common interface into Picnic compatible set top boxes;
 - Sky disputes the premise that customers will be (any more) confused about set top box functionality following the launch of Picnic, and considers that retailers will inherently seek to minimise any scope for confusion through clear marketing.
 - For example, whilst Picnic set top boxes will be MPEG4 compatible, their marketing will not be accompanied by unwarranted claims.
 - Further, Picnic's specifications will not be incompatible with the MPEG4 profile ultimately adopted in the UK. Picnic is working with the DTG to ensure that its set top boxes are fully compatible with the DTG D-Book. Picnic is also requesting that manufacturers test their reception equipment at the DTG Testing Laboratories in order to ensure that they are "fit for purpose" and comply,

where appropriate, with the Government *Digital Tick* requirements. These measures are designed to eliminate any such risk of incompatibility.

- As indicated in paragraph 9.4 above, Picnic plans to offer CA services (in relation to Picnic set top boxes) on FRND terms.

9.9 In relation to the suggestions set out in paragraph 5.22 of the consultation document:

- As indicated above in paragraph 9.5, Sky plans to retail some or all of the Sky channels over third party compatible DTT platforms, thus making this content available to viewers on these other platforms.

9.10 In relation to the suggestions set out in paragraph 5.26 of the consultation document:

- As indicated above in paragraphs 9.4 and 9.5, Sky would support simulcrypting so long as, in relation to Sky as broadcaster, its reasonable security concerns concerning any third party CA system are satisfactorily addressed and Sky has sufficient capacity available to support the transmission of multiple CA streams without adverse effect.
- On the basis that access can be obtained on FRND terms to all DTT platforms that support encryption, and in light of the possibility of simulcrypting, a condition requiring compatibility with MediaGuard-encrypted pay TV services would be unnecessary (and inappropriate and disproportionate as an alternative to the plans set out in paragraph 9.4 above).
- Similarly, the mandation of MediaGuard CA would be disproportionate, particularly since it appears this requirement would only be in relation to the implementation used by Top Up TV (with BT Vision seemingly being permitted to continue to employ its own, separate implementation). As Ofcom has noted, due to Sky's (reasonable and legitimate) security concerns about the implementation of MediaGuard CA used by Top Up TV, such a condition would in any case (currently) be unacceptable to Sky.
- Similarly, a prohibition on Picnic from deploying its own CA system would be entirely disproportionate, in light of (i) the lack of demonstrable, material concerns about the effects of a new CA technology being deployed via a DTT platform, and (ii) the plans set out in paragraph 9.4 above.

9.11 In relation to the suggestions set out in paragraph 5.22 of the consultation document:

- A proposal to limit Sky's ability to retail channels directly to DTT customers would be entirely disproportionate.
 - The Proposal is explicitly concerned with the establishment of Picnic as a retailer of Sky and third party channels; prohibition of this role (in whole or in part) would essentially amount to a rejection of the Proposal and conditions of this nature would be entirely unacceptable to Sky.
 - In any case, as indicated in paragraph 9.5 above, Sky plans to retail some or all of the Sky channels over third party compatible DTT platforms, thus making such content available to viewers on those platforms.

10. Conclusions

- 10.1 In order for Ofcom to regulate on an ex ante basis, it must discharge a burden of proof to the requisite standard. In Ofcom's own words, given its "*bias against intervention*", this means that "*a high standard of proof must be satisfied*".
- 10.2 This standard of proof has not been met by Ofcom. The concerns outlined by Ofcom in the consultation document, concerning competition, the impact on Freeview and marketing of set top boxes, are based on assumptions and hypotheses as to the possible impact, rather than the likely impact, of the Proposal. This lack of certainty, combined with the lack of materiality about these concerns, or clarity as to precise negative effects that require attention, make *ex ante* regulation not only inappropriate, but also unwarranted.
- 10.3 Ofcom does, on the other hand, recognise the benefits that Picnic will bring, in terms of greater choice, quality of service, innovation and competitive pressure on prices. These benefits are tangible and will be realised both in the short and longer term. Further, all Picnic customers will benefit from continued access to Freeview via Picnic reception equipment (be it via a set top box or, in due course, a PC); the DTT platform as a whole will benefit through the increased prominence for that platform that the promotion of Picnic will provide and the encouragement that Picnic will provide to manufacturers to innovate and ensure that the DTT platform enjoys technological developments, and does not stagnate.
- 10.4 The launch of a new provider of television, broadband and telephony services will be pro-competitive, is in the consumer interest, and so should be encouraged. Such a step would be consistent with Ofcom's general duties (considered as a whole) given that it will result in additional services being available to consumers, and so further strengthen competition in relation to those services.
- 10.5 To the extent that any competition concerns may be raised by Picnic, Ofcom will remain well equipped to address those concerns at the appropriate time, in light of an adequate evidence base, using its *ex post* enforcement powers.
- 10.6 On this basis, the only appropriate outcome for this consultation is for Ofcom to opt for **Option 1** and approve the launch of Picnic, to enable consumers of television, broadband and telephony to enjoy the competitive benefits that Picnic will create. For Ofcom to act otherwise, either by continuing its review and continuing to defer approval of the Proposal, or imposing unwarranted conditions as part of any approval, would not be consistent with its general duties.

Annex A

Description of the relevant markets

This submission was first made to the Competition Commission in June 2007 in relation to the investigation into Sky's acquisition of a 17.9% stake in ITV plc.

This submission is being provided to Ofcom as part of the present submission as further background on Sky's views on relevant market definition at both the retail and wholesale levels.

(Document attached.)

Sky

December 2007

ANNEX A

DESCRIPTION OF THE RELEVANT MARKETS

- 1.1 In this Annex Sky sets out its reasons for its views on definition of the relevant markets and analysis of competition in those markets. This Annex seeks only to provide a high-level overview of these issues.

The supply of audiovisual programming to end users

- 1.2 The relevant **retail** market comprises a **market for the supply of audiovisual programming to end users**. Such a market includes:
- (a) the supply of programming on television channels, both free to air and subscription, regardless of their method of distribution to end users;
 - (b) the supply of programmes and films on an individual basis, both free to air and on a paid-for basis, regardless of their method of distribution to end users; and
 - (c) the supply of programming on pre-recorded formats, such as DVD and video cassette (whether rented or purchased by consumers).
- 1.3 The starting point for market definition is the characteristics and intended use of the products in question. In relation to audiovisual programming, defining markets by reference to product characteristics alone is inappropriate, as product differentiation is a key aspect of competition between firms in this sector.
- 1.4 Audiovisual programming of all types fulfils a common intended use on the part of consumers of providing entertainment, education and information. From this point of view (and recognising that, in relation to market definition, it is the interests of marginal consumers that must be examined) programming in all genres is substitutable.
- 1.5 Clearly, an issue that has been central to the examination of television broadcasting in the UK from a competition policy perspective in the past is the extent to which pay television services and free to air television services are substitutes. Sky considers that, regardless of what competition authorities may have found in the past, there is now strong and compelling evidence that these services should be considered to be in the same relevant market.
- 1.6 The key reasons for considering that there is sufficient substitutability between free to air television services (taken as a whole) and subscriptions to pay television channel packages (which are the products offered to consumers at the retail level) in the past, rested on a number of propositions, which continue to apply, most notably:

- (a) it is widely acknowledged (including by the OFT¹ and more recently Ofcom²) that the availability of free to air television services diminishes consumers' willingness to pay for a subscription television service, which provides *a priori* evidence that the services are substitutes;
- (b) both pay television suppliers and free to air television suppliers regard themselves as being in competition with each other for audiences, albeit for different reasons;³
- (c) pay TV subscribers are highly "value sensitive" and the costs of switching between pay and free to air television services are negligible;⁴ and
- (d) there is no evidence that pay television retailers have been able to make profits at levels which are indicative of subscription charges being set above competitive levels.

1.7 It is also of critical importance to the definition of relevant markets in relation to these services to recognise that pay TV providers have the objectives of both acquiring new subscribers and retaining existing subscribers. This means that, in determining their pricing and product offerings it is imperative that they have regard not only to the preferences of the most marginal existing subscribers, but also potential future subscribers. A small but significant increase in charges for pay TV packages is unlikely to be profitable partly through the loss of existing subscribers, but also because it deters non-subscribers from taking up a subscription in the future.

1.8 The position taken by competition authorities in the past has been that there exists a single market for pay TV services. The argument has been that free to air television services exert some competitive constraint on the supply of such services, but not a *sufficient* constraint as to regard them as being in the same relevant market.

1.9 Given developments in the sector in the past five years, however, such a position is no longer tenable. Such findings were reached at points in time prior to the very significant expansion in the supply of multi-channel free to air services (both "Freeview" on the DTT platform, and the set of over 200 free to air channels available via DTH). The enormous growth and appeal of such services has very materially

¹ In his decision, *BSkyB Investigation: Alleged Infringement of the Chapter II Prohibition* of 17 December 2002, the DGFT stated at paragraph 161 "*Broadly speaking, the Director does not contest (and never has contested) the view that free-to-air channels constrain the prices of pay TV channel packages to some extent.*" See also the example of substitutability between pay TV and free to air programming provided in Annex 6 of the decision, which the DGFT states "*implies the presence of free TV constrains the price of pay TV*". See also paragraph 114, in which the DGFT states "*free-to-air channels might constrain the pricing of packages containing live FAPL: a subscriber to packages containing live FAPL football can cease subscribing and switch to viewing free-to-air channels.*"

² In its "*Statement on the review of the cross-promotion rules*" (dated 9 May 2006) Ofcom suggested at paragraph A2.18 that "*there is at least a subset of users of the Freeview platform for whom the entry level packages of pay-TV services might represent a sufficiently close demand-side substitute as to impose a competitive constraint*".

³ In the case of commercial free to air operators, audiences are determinative of their advertising revenues; in the case of suppliers of pay television suppliers, having attractive programming that is watched by subscribers is determinative of their ability to attract subscribers; and in the case of the BBC, attracting audiences contributes significantly to the BBC's public and political support, which is essential to retention of its licence fee funding.

⁴ In its "*Statement on the review of the cross-promotion rules*" (dated 9 May 2006), Ofcom stated at paragraph A2.24 that high rates of churn over non-trivial numbers of consumers suggested that even if switching costs were non-trivial, "*they do not represent a sufficient barrier to switching to prevent it from occurring at significant levels*".

increased the constraint posed by free to air services on the suppliers of pay TV – particularly as against the “basic” packages supplied by pay TV retailers.

- 1.10 There are two compelling types of evidence that this is the case:
- (a) a study undertaken by Sky shows that demand for basic pay TV packages is significantly negatively affected by the availability of DTT services in a geographic area. In the past, the universal availability of analogue terrestrial television meant that it was impossible to test this effect. The (current) differences in the geographic availability of DTT services now enables the extent of the reduction in demand for pay TV services caused by the availability of free to air services to be demonstrated; and
 - (b) both Sky and Virgin Media have had to respond to the growth of multi-channel free to air television through actions such as (i) Sky’s large advertising campaign entitled “*What Do You Want To Watch*”, which emphasised the range of high quality content other than sports and films carried in Sky’s pay TV packages, and (ii) revisions to the packaging and pricing of basic pay TV services. Sky, in particular, introduced in September 2005 a range of new basic packages based on genre themes, and at significantly lower price points.
- 1.11 We note that Ofcom appears to take the view that free to air services should be regarded as being in the same relevant market as basic pay TV services, citing as evidence point (b) above.⁵
- 1.12 Accordingly, given that it has always been accepted that basic pay TV packages and packages that include both basic channels and premium pay TV services are in the same relevant market, Sky’s view is that there is now good evidence that means that pay TV packages and free to air television services should be regarded as being in the same relevant market.
- 1.13 The above analysis considers the substitutability between free to air television services and subscriptions to pay television channel packages. In Sky’s view, the same types of consideration apply to other ways of providing audiovisual programming to consumers – such as sales of films and other programming on DVD, DVD rental, pay per view sports and film services, and VOD services. Such products and services provide a constraint on the suppliers of both pay TV and free to air television services which is increasing in strength and importance over time as a result of factors such as: (i) the additional control and choice offered to consumers (for example, the ability to access films and programmes that better match individuals’ preferences from libraries of content available on an on-demand basis); and (ii) increasing consumer demand for portability of content which, with increasing availability of portable DVD players and the ability to play DVDs on portable computers, makes DVD sales and rental increasingly attractive. DVD sales and rentals are, in addition, highly attractive to consumers as a result of factors such as: (i) their picture and sound quality relative to most television broadcasts of films and programmes; and (ii) additional material

⁵ Ofcom states at Paragraph A2.19 of its “*Statement on the review of the cross-promotion rules*” that “*it might be possible to construct an argument that the cable companies and Sky face competition from Freeview/Sky Freesat for subscribers that are currently only subscribing to the basic subscription packages. They thus face the risk that subscribers taking only a limited number of channels might switch to the Freeview service instead. The recent restructuring and re-pricing of their access packages by ntl, Telewest and Sky might represent a strategic reaction to this in order to retain these subscribers*”.

provided in relation to films and programmes offered on DVD.

The production and supply of television channels

- 1.14 In Sky's view, there is a relevant **wholesale** market for *at least* the production and supply of television channels. In principle, the market may be defined to be wider than this – for example, including also the supply of individual programmes and films at the wholesale level (which are then distributed to end users – for example via pay per view and on demand services, or via DVD sale and rental). In practice, however, we consider that it is clearer to focus the analysis on the supply of television channels, while recognising that the relevant market could in principle be wider than this.
- 1.15 The principal mode of competition in the production and supply of television channels is via product differentiation - a channel supplier must offer content that is different in some way⁶ to that carried on other channels in order to succeed. This feature of the sector makes definition of the relevant market by reference to the characteristics of the products concerned entirely spurious, particularly when it comes to “specialist” channels. Taken to its logical conclusion, such an approach would mean that every television programme comprised a separate relevant product market.
- 1.16 Producers of television channels are able to choose to develop them based on two principal business models – either entirely advertising funded, or funded through a mix of advertising revenues and carriage fees paid by the licensing of television channels by distributors for inclusion in pay TV packages.
- 1.17 In Sky's view there is compelling evidence to support a view that the producers of television channels – whether free to air television channels or pay TV channels – compete in a single relevant product market. In particular we cite the following factors:
- (a) such channels are in competition with each other in a number of different ways - for audiences and advertising revenues, for programming and programming rights, and for a range of other inputs such as managerial staff and on screen “talent”. There are numerous examples of television series, for example, switching between free to air television channels and pay TV channels. A recent prominent example has been the purchase of “*Heroes*” by the BBC, a series that had been popularised by the Sci-Fi channel;
 - (b) it is relatively rare to find a broadcaster that is entirely a pay TV channel producer or a free to air television producer; the skills, assets and attributes required to produce a free to air television channel are exactly the same as those required to produce a pay television channel;
 - (c) the barriers to switching between the two types of television channels are low. This is evidenced both by the previous observation, and by the fact that broadcasters such as ITV and Channel 4 have repositioned pay TV channels as free to air channels, for example, in response to changing profit opportunities; and

⁶ Although content may be different, it may still be within the same genre – few channels have genres of content that are not also covered on other television channels.

- (d) the intensity of competition in the relevant downstream market, which includes both pay TV and free to air services, constrains the amounts that the suppliers of pay TV channels can charge retailers of pay TV services for the right to distribute their channels. Accordingly, there is an indirect – though very significant – constraint on the pricing of pay TV channels arising from the supply of free to air television services.

The acquisition of rights to audiovisual programming

- 1.18 The demand for rights to audiovisual programming derives from the demand on the part of operators in the market for the supply of audiovisual programming to distributors (which includes the production and supply of television channels referred to as above) – i.e. it is an activity upstream of their operations. Buyers in the upstream market include all suppliers of audiovisual programming, whether in the form of television channels or single programmes and films provided on a free or pay basis or the supply of programming on pre-recorded formats. This is because in competing to acquire audiovisual programming, suppliers of such programming to end users have the same objective, namely to produce attractive programming which will attract audiences. This is true even where the acquirer of rights supplies its channel or programming to a distributor rather than directly to consumers since the price that the provider will be able to charge the distributor will depend upon the appeal of the channel or programming to viewers.
- 1.19 The demand for audiovisual programming can be satisfied by a number of means: (i) programming can be produced in-house; (ii) programming can be commissioned from independent sources; (iii) or the rights to completed programmes or those which can be used to make new programmes can be acquired from independent sources. A vast array of material can be used to satisfy the demand for programming, ranging from rights to completed programmes (whether sport, drama, comedy, film or documentaries etc); rights which enable the making of programmes, such as the rights to film sports events; book rights and film scripts etc.
- 1.20 From the perspective of the audiovisual programming provider all those "inputs" that are capable of producing attractive programming are substitutable. The market is not confined to the licensing of rights. Although Sky almost entirely purchases rights or commissions or acquires programming for its channels, many of its competitors undertake their production in-house and face "make or buy" decisions. The market will therefore also include the broader set of inputs such as actors, writers etc. that enable the in-house production of attractive programming. The owners of these rights all compete to supply the providers of audiovisual programming.

The supply of advertising airtime

- 1.21 In Sky's view, the alleged effects of the Transaction might also be assessed in relation to a market for the **supply of advertising airtime**. Television broadcasters compete amongst each other to supply advertising airtime to a range of advertisers directly or to advertising agencies which place advertisements for their clients.
- 1.22 The existence of such a market is relatively non-contentious; it has been accepted by competition authorities as recently as 2003 in the Competition Commission's *Carlton/Granada* merger report. It is Sky's view that the extent of competition between television advertising and other media has increased significantly since that inquiry. In particular, the increased penetration in broadband internet connections in the UK is

driving advertising spend online, where the opportunities for delivering more creative and engaging (e.g. interactive) communications are encouraging consumers to spend more time online than ever before. Nevertheless, Sky considers that it is not unreasonable to examine the effects of the Transaction in relation to a relevant market for television advertising while taking into account the increasing competition arising from other media such as online advertising.

Sky

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