A FURTHER SUPPLEMENTARY SUBMISSION TO OFCOM IN RESPECT OF NEW INFORMATION OBTAINED AND MATTERS ARISING SINCE SKY’S 18 SEPTEMBER 2009 RESPONSE TO OFCOM’S THIRD PAY TV CONSULTATION DOCUMENT

1 Introduction

1.1 On 25 January 2010, Sky provided a supplementary submission (the “January 2010 Submission”) to Ofcom in respect of new information obtained, and new matters arising, since 18 September 2009, when Sky submitted its response (“Sky’s Response”) to Ofcom’s third pay TV consultation document (the “Consultation Document”).

1.2 This submission, which supplements Sky’s Response and the January 2010 Submission, identifies further new information obtained and matters arising since the January 2010 Submission and explains their relevance to the submissions made in Sky’s Response and the January 2010 Submission (following the order in which those submissions were made in Sky’s Response).

2 Ofcom’s allegations regarding high wholesale prices are unfounded (Section 7 of Sky’s Response)

2.1 At paragraphs 7.105 to 7.115 of Sky’s Response, Sky addressed Ofcom’s argument in the Consultation Document that Sky’s wholesale pricing policy has the intention and likely effect of inhibiting the effectiveness of Virgin Media as a competitor to Sky’s DTH service.

2.2 At paragraphs 6.2 to 6.5 of the January 2010 Submission, Sky referred to various statements made by Virgin Media which indicate that:

- Virgin Media has not been deterred by Sky’s wholesale pricing policy from pursuing what it considers to be a successful competitive retailing strategy; and

- Virgin Media considers that it offers a compelling differentiated consumer proposition whose success does not depend in any way on Sky’s wholesale pricing policy.

2.3 Sky now submits to Ofcom an article from the 2 February 2010 edition of the “Financial Times”, reporting on an interview with Virgin Media’s Chief Executive, Neil Berkett, in which Mr Berkett refers to Virgin Media’s “Fix. Differentiate. Grow” strategy, based on differentiation through “UK industry-leading download speeds” and “innovation on the company’s TV platform”, in relation to which Mr Berkett foresees that Virgin Media will “offer a breadth of video content that rivals can’t match”. Accordingly, this article further confirms that Virgin Media has not been deterred by Sky’s wholesale pricing policy from pursuing a successful competitive retailing strategy based on differentiation and innovation.
3 Consumer effects do not justify Ofcom’s intervention (Section 8 of Sky’s Response)

3.1 At paragraphs 8.22 to 8.66 of Sky’s Response, Sky addressed Ofcom’s argument in the Consultation Document that lack of access to Sky’s premium channels will make it much less likely that there will be substantial innovation on new platforms.

3.2 At paragraph 7.3 of the January 2010 Submission, Sky noted that the BBC Trust’s provisional conclusions in relation to “Project Canvas” demonstrated that, in the BBC Trust’s view, the success of that project does not in any way depend upon access to Sky’s premium channels via Canvas being secured, let alone such access being on a mandatory wholesale basis on regulated terms. At footnote 8 of the January 2010 Submission, Sky also noted that the BBC Trust envisaged Sky being able to retail its services direct to consumers via Canvas under proposed conditions ensuring platform access for all content providers, without discrimination.

3.3 Notwithstanding these clear provisional conclusions on the part of the BBC Trust, there remains a public perception that Ofcom would nevertheless extend the scope of its proposed wholesale must offer obligation so as to oblige Sky to wholesale its premium channels to, potentially, any participant in the “Project Canvas” joint venture. Sky submits, for example, an analyst’s note published by MF Global on 17 February 2010 which states that:

“Combined with wholesale access to Sky’s premium content, Canvas will transform the likes of BT Retail and CPW into tough competitors in the market for triple-play services.”

3.4 Sky has the following observations in relation to the proposition that the scope of Ofcom’s proposed wholesale must offer obligation could be extended in this way.

3.5 First, to the extent that, as referred to in the MF Global note, Ofcom is concerned that “new platforms may not emerge at all, because of a dependence on access to premium content”, this concern is (as made clear by the BBC Trust) demonstrably inapplicable to Canvas.

3.6 Second, to the extent that, as suggested by the MF Global note, Ofcom were nevertheless to consider extending its proposed wholesale must offer obligation to Canvas in pursuance of a Governmental objective to promote investment in infrastructure, such an approach would be inconsistent with Ofcom’s role as an independent regulator, and beyond the scope of the powers in relation to fair and effective competition in the provision of licensed services that Ofcom proposes to use under section 316 Communications Act 2003.

3.7 Third, Sky refers Ofcom to paragraphs A8.11 and A8.12 of Annex 8 of Sky’s Response in relation to the scope of any wholesale must offer obligation, in which Sky noted that the extension of any such obligation to the open internet would be at odds with Ofcom’s analysis and proposals in the Consultation
Document, and with Ofcom’s rationale for not extending the obligation to Sky’s DTH satellite platform.

3.8 In essence, and as envisaged by the BBC Trust, Canvas is to be a means by which interested service providers may, without discrimination, make services available via the open internet for viewing on television sets. On the assumption that the BBC Trust’s proposed access condition operates effectively, Sky would be able to distribute its content via the open internet to Canvas devices through Sky Player in the same way that it delivers such content to PCs and (via devices such as games consoles or the Fetch TV STB) to television sets today. There is no justifiable basis upon which a wholesale must offer obligation could operate so as to deny Sky (uniquely) the very opportunity that the BBC Trust envisages for it in order to mitigate the impact on it of Canvas1.

3.9 Once Sky Player is available to Canvas devices in this way, there would equally be no justifiable basis for a wholesale must offer obligation to be extended to Canvas; it would give rise to a potentially limitless number of resellers of Sky’s content to Canvas devices, resulting in clear detriments (including consumer confusion, marketing inefficiency and the reduced infrastructure and content investment incentives identified by Ofcom itself in paragraph 8.45 of the Consultation Document), with no discernible benefits.

3.10 Moreover, potential absurdities could flow from such a proposal. It would be practically impossible to draw a line between those entitled to benefit from a wholesale must offer obligation that extends to the open internet, and those who are not. At the extreme, each individual owner of a PC could call for supply on wholesale terms and then onward retail to that same PC, in effect resulting in Ofcom regulating Sky’s retail prices (and eliminating any retail margin derived from the sale of Sky’s channels). 2

3.11 For all these reasons, even if, contrary to Sky’s submissions to Ofcom to date, Ofcom could properly justify the imposition of its proposed wholesale must offer obligation on Sky, there could be no justification for extending that obligation either to Canvas (or other “IP”) devices or to the open internet generally.

Sky

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1 See paragraph 7.4 of the January 2010 Submission.
2 [CONFIDENTIAL]