Additional comments on specific arguments made by the Complainants in response to Ofcom’s Second Consultation Document of 30 September 2008

1. The Complainants’ argument that Ofcom’s proposed compulsory licensing regulation should apply to all Sky’s sports channels

1.1 In a rather confused section of their joint response to Ofcom’s Second Consultation Document, of 12 December 2008, the Complainants argue that Ofcom’s proposed compulsory licensing regulation should apply to any Sky sports channel (whether existing or prospective) that carries “important content”.

1.2 The Complainants’ proposal is based, in essence, on a concern that if Ofcom’s proposed regulation applied only to Sky’s “Core premium sports channels” – defined by Ofcom as pay TV channels that carry live coverage of Premier League football matches – Sky might respond by:

(a) moving all coverage of Premier League football to a single channel, and improving the quality of its other sports channels; and

(b) withholding such ‘non-Core sports channels’ from third parties.

1.3 The Complainants envisage a ‘non-Core sports channel’ that carried “Champions League matches, golf majors, rugby internationals, Test cricket” and ‘other’ unspecified events, which was retailed exclusively by Sky.

1.4 As Ofcom notes correctly in the Second Consultation Document, it is unlikely that Sky would act in the way suggested by the Complainants. Accordingly, a proposal to extend the scope of regulation in the way proposed by the Complainants would not be targeted only at cases in which action was necessary and proportionate.

1.5 Even if there was a realistic prospect of Sky acting in this way, however, it would still not be necessary or proportionate for Ofcom to extend the scope of its proposed regulation in the way proposed by the Complainants.

1.6 The Complainants’ proposal implicitly rests on two propositions, namely that:

(a) Sky would have significant market power in a relevant market in which the Complainants’ envisaged ‘non-Core sports channel’ is supplied; and

(b) the prospect of this significant market power is a sufficient condition for imposing intrusive compulsory licensing regulation on Sky in relation to ‘non-Core sports channels’.

1.7 Regardless of the merits of the first of these propositions (which in any case Sky considers to be erroneous), the second proposition is clearly fundamentally flawed.

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1 This proposition is set out in Section 4 of their response.
2 See c(ii) in paragraph 4.9.
3 See paragraph 4.9.
4 Paragraph 9.22 of the Second Consultation Document.
1.8 It is also wholly inconsistent with Ofcom’s own approach in the Second Consultation Document. Ofcom’s key reasons for proposing compulsory licensing regulation of Sky’s “Core premium sports channels” are that it believes that, in the absence of such a requirement, (a) there is a material risk that Sky would choose not to supply those channels to new third party retailers and/or platforms, and (b) that this would inhibit the development of such third party retailers and/or platforms. It is evident, therefore, that Ofcom does not regard significant market power in the supply of a particular pay TV channel, or type of pay TV channel, as a sufficient condition for imposing compulsory licensing obligations on the broadcaster of such channels.

1.9 This is demonstrated clearly by Ofcom’s consideration of Setanta’s “Core premium sports channels”. Ofcom states:

“even if we did believe Setanta to have market power, this would not necessarily lead us to extend a wholesale must-offer obligation to Setanta….“ ⁵ (Emphasis added.)

1.10 Ofcom then goes on to argue that “Setanta does not face the same incentives to restrict supply of its content as does Sky”⁶.

1.11 Accordingly, it is clear that Ofcom does not regard the possession of market power as a sufficient condition for the imposition of compulsory licensing obligations.

1.12 In relation to the Complainants’ proposal, therefore, even if the basis for imposing intrusive compulsory licensing regulation on Sky were limited to Ofcom’s own rationale, it would be necessary to show that there is compelling evidence that:

(a) Sky would withhold ‘non-Core sports channels’ from new third party distributors; and

(b) if such withholding occurred it would materially inhibit the development of new retailers and/or platforms.

1.13 In Sky’s Response to Ofcom’s Second Consultation Document, we argued that Ofcom’s own approach is too narrow a test for the imposition of new, intrusive compulsory licensing regulation. In addition to Ofcom’s criteria it must (among other things) be shown that:

(a) if the television channel in question were withheld, it would result in the likely elimination of effective competition on the downstream market; and

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⁵ Paragraph 8.39 of the Second Consultation Document.
⁶ Ibid.
the benefits of imposing compulsory licensing regulation outweigh the costs.

1.14 Nevertheless, as discussed below, it is evident that the Complainants’ proposal fails to meet even Ofcom’s own criteria and should therefore be rejected by Ofcom.

1.15 In relation to Ofcom’s first criterion, Ofcom’s proposition that Sky has an incentive to withhold “Core premium sports channels” from third party distributors rests on an argument that the gains, in terms of retail margin earned from additional Sky subscribers, outweigh wholesale revenues foregone by not supplying the relevant television channels to third parties. Such an effect arises (in Ofcom’s conception) because the programming carried on the withheld channel(s) is so important to consumers that they switch pay TV retailers (or take a Sky subscription rather than subscribe to an alternative pay TV retailer in future) in sufficiently large numbers. Ofcom takes the view that televised live coverage of Premier League football matches is of such importance to a sufficiently large number of people that it is capable of having such an effect.

1.16 The Complainants’ argument is that, for a ‘non-Core sports channel’, although no single type of sports programming plays a similar role to live coverage of Premier League football matches, the observation that such a channel would carry a variety of “attractive sports content” means that the channel as a whole would be determinative of the choice of pay TV retailer of a large numbers of consumers.

1.17 Whether this number is sufficient to make withholding such a channel a profitable strategy, however, is an empirical question which cannot be resolved by reference to the type of evidence cited by the Complainants. The relevant question in this respect is how many potential future pay TV subscribers would choose Sky rather than an alternative new pay TV retailer if those retailers did not carry ‘non-Core sports channels’.

1.18 In Sky’s view, it is implausible that proper evidence on this issue would indicate that withholding ‘non-Core sports channels’ would be a profitable strategy.

1.19 The most significant reason that ‘non-Core sports channels’ are unlikely to be determinative of a sufficiently large number of consumers’ decisions about retailer choice to make such a strategy profitable is that they are not sufficiently differentiated from the portfolio of sports programming available free to air. It is somewhat odd that the Complainants overlook this point, because they cite (and “broadly agree with”) Ofcom’s proposition that there are:

“two key factors which will determine the value of … content as a driver of pay TV subscriptions”, namely:

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7 Heading prior to paragraph 4.13.
8 None of the research cited by the Complainants is sufficiently directed at the key questions as to be reliable indicators of the extent to which consumers would switch retailers if they were no longer able to receive specific Sky Sports channels (whether actual channels or hypothetical ones).
(a) “...the content must be sufficiently attractive that a large number of viewers are willing to pay a significant amount to watch it”; and

(b) “...the content must be available on an exclusive basis to pay TV providers, with limited substitutes available free to air”.\textsuperscript{10}

1.20 Other than live Premier League football matches, the only type of sports events that are not well represented on free to air television are cricket matches – and these are of interest to a relatively small minority of sports fans. The Complainants cite a statistic to the effect that the proportion of Sky Sports subscribers who spontaneously mention cricket as their main reason for subscribing to Sky Sports has “increased to...11%”\textsuperscript{11}. It is notable, for example, that there is a significant amount of coverage on free to air television of all but one of the types of events listed by the Complainants as being the types of “other attractive sports events”\textsuperscript{12} that would be available on their hypothetical ‘non-Core sports channel’ – namely Champions League matches, golf majors, and rugby internationals.

1.21 Accordingly, Ofcom’s own approach suggests that ‘non-Core sports channels’ should not be considered to be sufficiently significant drivers of pay TV subscriptions as to warrant the imposition of compulsory licensing on them, even under the type of scenario posed by the Complainants.

1.22 In relation to the second criterion – the effect on downstream competition if new pay TV retailers were not able to retail ‘non-Core sports channels’ – the Complainants’ arguments are wholly insufficient. The Complainants argue that:

“competing pay TV retailers must be able to offer a comparable portfolio of sports content to Sky in order to be able to attract customers and thereby compete effectively in the retail market.”\textsuperscript{13}

1.23 This is simply an assertion. Moreover, even on its own merits – and regardless of the view that is taken of the scope of the relevant downstream market – the Complainants’ proposition that new pay TV retailers can only compete effectively if they offer the same channel line-up as Sky is untenable. For example:

(a) Setanta has been able to attract over one million retail subscribers on Sky’s DTH satellite platform without retailing any of Sky’s premium sports channels; and

(b) Sky’s business plan for its Picnic service included only Sky Sports 1. While this was Sky Sports 1 as currently configured, the fact that Picnic’s business plan was profitable based on retailing a service that included only Sky Sports 1 is strongly indicative of the fact that it is not necessary to retail the full range of Sky’s sports channels in order to build a successful new retail pay TV business.

\textsuperscript{10} Ibid.
\textsuperscript{11} Paragraph 4.21.
\textsuperscript{12} Paragraph 4.9.
\textsuperscript{13} Paragraph 4.27.
2. The Complainants’ arguments in relation to market definition

2.1 The Complainants’ position their proposal as one related to market definition. In a somewhat tortuous discussion, they argue that, if Ofcom had defined the relevant upstream market more widely, Sky would have been found to have market power in that market, and therefore Ofcom’s compulsory licensing proposals should apply to more than ‘Core premium sports channels’.\(^{14}\)

2.2 In Sky’s view, this argument is obfuscatory and we trust that this should be self-evident to Ofcom. Adopting Ofcom’s own approach, even if the relevant upstream market were defined more widely, and Sky was found to have market power in that wider market (based on a proper examination of relevant evidence), it does not automatically follow that it would be necessary, proportionate or consistent to apply compulsory licensing regulation to all television channels supplied by Sky within that wider market.

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\(^{14}\) See paragraph 4.31.