1. Introduction

1.1 In paragraph 9 of Part One of Sky’s submission of 11 April 2008 ("Original Submission") in response to Ofcom’s Pay TV market investigation consultation document of 18 December 2007 (the “Consultation Document”), Sky stated that:

“We fundamentally disagree with the markets that Ofcom has defined and with its attribution of market power to Sky. As part of this response, we provide both a detailed exposition of the material flaws in Ofcom’s approach to these areas and our views on the correct approach to identifying relevant markets and assessing whether market power exists.”

1.2 Sky has since become aware of the following developments that will be of assistance to Ofcom in its analysis of the relevant market:

(i) a shift in Ofcom’s position on market definition and market developments; and

(ii) increased competition from (a) content distributors via the internet, and (b) VOD services.

1.3 In the following sections of this Supplemental Submission, we discuss briefly the above developments.

2. A shift in Ofcom’s position on market definition and market developments

2.1 Ofcom purports to “take a forward-looking view” of market developments in the Consultation Document, yet it is quite clear that the analysis and market definition work conducted by Ofcom is backward-looking and does not take into account current and future developments (see, in particular, paragraphs 6.7 to 6.10 of Part 2 of the Original Submission).

2.2 Recent statements from Ofcom indicate that Ofcom’s position on and analytical approach to market definition, the assessment of market power and, more
generally, market developments has shifted since the publication of the Consultation Document. In particular, Sky refers to a recent Ofcom submission\(^3\) to the European Commission on the application of state aid rules to public service broadcasting and a statement by Ed Richards in relation to the BBC Worldwide, ITV plc and Channel 4 three-way joint venture with the working title ‘Kangaroo’\(^4\). We provide brief commentary on each of these in the following paragraphs.

2.3 As part of its submission to the European Commission, Ofcom provided the Commission with analysis in relation to “the UK audiovisual market”. It is clear from this submission that Ofcom’s understanding of the relevant market has developed since the publication of the Consultation Document. We set out below Ofcom’s revised view of the market:

> “The UK audiovisual market is today a very competitive one, with high levels of consumer choice thanks to the proliferation of new digital channels and services in a multitude of platforms. On-demand services are now offered alongside scheduled broadcasting, while the rapid growth of broadband is encouraging the development of new platforms and innovative services. Today, UK consumers can receive television and on-demand services (both free to air and pay-TV) over a variety of distribution technologies: cable, digital terrestrial television (DTT), satellite, TV over IP and mobile TV.” (emphasis added).

> The widespread deployment of new communications technologies has brought about a dramatic change in television consumption patterns and in consumer attitudes towards media more generally. This is fundamentally changing the audiovisual sector.

> These developments are making the broadcasting market increasingly competitive and the audiovisual sector more complex. Considering these, and particularly the emergence of new platforms, and the existence of a variety of new content providers and originators, it becomes clear to us that the future development of the audiovisual market cannot simply be projected forward from the past. (emphasis not added).”\(^5\)

2.4 Sky welcomes the fact that Ofcom now considers there to be a “UK audiovisual market” which includes “free to air and pay-TV”. It is clear from the above that Ofcom’s view of the market “today” is more in line with that expressed by the Competition Commission in the BSkyB/ITV case, namely “a UK market for all-TV

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\(^3\) [http://www.ofcom.org.uk/tv/ifi/stateaidrules/ofcomresponse.pdf](http://www.ofcom.org.uk/tv/ifi/stateaidrules/ofcomresponse.pdf)

\(^4\) [http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcumeds/uc494/uc49402.htm](http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcumeds/uc494/uc49402.htm)

\(^5\) Pages 2 and 5 of Ofcom’s response to the Commission’s consultation on the application of state aid rules to public service broadcasting.
which included both pay-TV and FTA services.”⁶ That said, it is notable that Ofcom goes further than the Competition Commission in its description of the market. Ofcom’s description of the market “today” encapsulates not only “television” services (we assume it is referring to linear services) but also “on-demand services” both of which UK consumers can receive over a “variety of distribution technologies”.

2.5 Ofcom’s discussion of “the UK audiovisual market” in its submission highlights a number of factors which accord with Sky’s view of the market (as set out in the Original Submission). We note that the following now appear to be common ground:

(i) there is a single “UK audiovisual market” which is currently very competitive and becoming increasingly more competitive thanks to new technologies and new services;

(ii) there are high levels of consumer choice on multiple platforms;

(iii) on-demand services form part of the “UK audiovisual market”;

(iv) new technologies are encouraging the development of new platforms and services that are making the market even more competitive (e.g. BlinkBox, PictureBox on BT Vision, and iPlayer on Virgin Media – see below for further discussion in relation to these services); and

(v) it is now clear to Ofcom that the future of the market “cannot simply be projected forward from the past” and therefore past cases, such as the OFT’s findings in 2002⁷, and especially older past cases, are likely to have little relevance either to today’s market or to future developments in the market.⁸

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⁶ Paragraph 14 of the Competition Commission’s report to the Secretary of State (BERR) on the Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc, 14 December 2007.

⁷ Case CA98/20/2002.

⁸ In this context, we note the comment by Tim Gardam and David Levy in the introduction to Ofcom’s recent publication entitled “The Price of Plurality Choice, Diversity and Broadcasting Institutions in the Digital Age”, that: “so swift has been the rate of technological change since the last Communication Act in 2003 – the rapid take-up of broadband, the success of digital terrestrial television, DTT, the introduction of video on demand, the exploitation of TV formats and the consolidation of the independent production sector into a number of major international businesses – that the television landscape has already changed fundamentally long before the moment when the last analogue television set is consigned to history.” It is notable that the period they are writing about is a period that post-dates the OFT’s 2002 Decision.
2.6 On 22 April 2008, Ed Richards and Lord Currie of Marylebone provided evidence to a House of Commons Select Committee in relation to the Ofcom Annual Plan.⁹ Part of the evidence referred to the BBC Worldwide, ITV plc and Channel 4 three-way joint venture to launch an on-demand content service with the working title ‘Kangaroo’. In response to a question about potential complaints about the Kangaroo service, Ed Richards stated as follows:

“It is possible that we will [receive competition complaints about the Kangaroo service]. We have to look at which economic market it is relating to and whether that economic market is actually very, very broad, in which case you might be less concerned about it and also look at the arrangements made between the parties. We are aware of the issue, we are aware of the question; we have not actually had any complaints in relation to it yet.” (emphasis added)

2.7 The above statement demonstrates that Ofcom rightly no longer considers it appropriate to commence analysis of competition issues on the basis of preconceived views as to the scope and breadth of relevant markets.

2.8 In summary, Sky welcomes these developments in Ofcom’s understanding and analytical approach, though we reiterate our view that the market is wider than Ofcom’s developed understanding. Accordingly, we refer Ofcom to Annex 2 of the Original Submission for Sky’s definition of the relevant market.

3. Increased competition from (a) content distributors via the internet and (b) VOD services

3.1 As Ofcom itself acknowledges “developments are making the broadcasting market increasingly competitive and the audiovisual sector more complex.”¹⁰ We agree with this assessment. Since Sky submitted the Original Submission, we have become aware of three services that will further increase competition in the relevant market. The first is called Blinkbox, which is an online distributor of TV and film content on both a rental and download-to-own basis. Blinkbox currently carries film content from Paramount, Universal and Warner Bros (including new releases) as well as TV content from a number of sources including the BBC.

3.2 By way of an example, using Blinkbox a customer can rent the film *The Assassination of Jesse James by the Coward Robert Ford* at the cost of £3.49 and may view the film an unlimited number of times in 24 hours from first play. In comparison, a Sky Box Office customer may view the same film as often as they like on the day of purchase from 6am until 5.59am the following morning at the cost of £3.95.

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⁹ As set out in the recital to the Uncorrected Transcript to the Oral Evidence, it is noted that neither the witnesses nor the Members of the Select Committee have had the opportunity to correct and approve the record.

¹⁰ Page 5 of Ofcom’s response to the Commission’s consultation on the application of state aid rules to public service broadcasting.
3.3 A further notable development, that will provide additional competition in the market, is BT Vision’s decision to carry Universal’s PictureBox service. PictureBox is now available to TUTV, Tiscali and BT Vision subscribers. The service was made available to BT Vision subscribers on 5 May 2008 and provides them with access to 28 different movies. (PictureBox refreshes its movie catalogue with 7 new movies each week.) The service costs £5 per month and the minimum subscription period is one month.\textsuperscript{11}

3.4 Finally, on 30 April 2008, Virgin Media announced that the BBC iPlayer service would be available to its digital TV customers. According to the press release, Virgin Media’s digital TV customers are able to “\textit{watch full screen pictures at full quality on their television set without the need for downloading.}”\textsuperscript{12}

3.5 All of the above developments further support both Sky’s view on market definition (as set out in \textbf{Annex 2} of the \textbf{Original Submission}) and Ofcom’s recent statements on the market (as set out in Section 2 of this \textbf{Supplemental Submission}).

Sky
May 2008

\textsuperscript{11} http://www.picturebox.tv/btvision/
\textsuperscript{12} http://www.bbc.co.uk/pressoffice/pressreleases/stories/2008/04_april/30/iplayer.shtml