Neutral Citation: [2016] CAT 25

Case No: 1246/8/3/16

IN THE COMPETITION APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

21 December 2016

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
PROFESSOR COLIN MAYER
CLARE POTTER

Sitting as a Tribunal in England and Wales

B E T W E E N:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

SKY UK LIMITED

Intervener

Heard at Victoria House from 3 – 14 October 2016

JUDGMENT

Note: Excisions in this judgment (marked "✂ […]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

APPEARANCES

Mr Daniel Beard QC, Mr Gerry Facenna QC and Mr Nikolaus Grubeck (instructed by BT Legal) appeared for the Appellant.

Mr Josh Holmes, Ms Jessica Boyd and Mr Stefan Kuppen (instructed by OFCOM) appeared for the Respondent.

Mr James Flynn QC and Mr Meredith Pickford QC (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Intervener.

INTRODUCTION

Summary

1. This case is the most recent dispute arising from measures taken by the Office of Communications ("OFCOM") in 2010 to promote the supply of sports and movies on paid-for television (generally known as "pay TV"). OFCOM concluded its review of the pay TV market in 2010 and identified competition concerns in the supply of movies and premium sports content (the "2010 Statement"). It referred certain aspects of the supply of movies to the then Competition Commission for market investigation under the Enterprise Act 2002 ("the 2002 Act").

2. In relation to premium sports content, OFCOM imposed a new licence condition on Sky requiring it to wholesale certain sports channels to other pay TV retailers with prices and terms set by OFCOM (the so-called wholesale must-offer obligation, or "WMO"). It did this under licensing powers relating to competition contained in sections 316-318 of the Communications Act 2003 ("the 2003 Act"). The subsequent litigation involved appeals to this Tribunal, leading to a decision that the WMO was not justified, and a further appeal to the Court of Appeal.

3. In February 2014 the Court of Appeal confirmed OFCOM's power to apply section 316 but also upheld a claim by British Telecommunications PLC ("BT") that the Tribunal's judgment was incomplete and remitted the matter to it for further consideration. Meanwhile, later in 2014, OFCOM started a review to determine whether the WMO should be retained, modified or removed in the light of prevailing market conditions. As part of the remittal proceedings before this Tribunal, the parties' case against certain aspects of the 2010 Statement continued at the same time as OFCOM's review commenced.

4. After a consultation in December 2014, and a further one in July 2015, OFCOM published its decision in November 2015. In its statement of 19 November 2015 entitled "*Review of the pay TV wholesale must-offer obligation*" (the "2015

Statement"), OFCOM concluded that the retention of the WMO was no longer justified and that it should be removed from Sky's broadcast licences.

5. This is the Tribunal's judgment on an appeal under section 192 of the 2003 Act brought by BT against OFCOM's decision contained in the 2015 Statement to remove the WMO.

6. BT and Sky compete to acquire sports rights for broadcast and are also competitors in the retail pay TV market in the UK. BT is a customer of Sky at the wholesale level, buying certain sports content from Sky, and Sky is a (potential) customer of BT at the wholesale level, seeking to buy certain sports content that BT has acquired. The possible nature and terms of such supply or cross-supply inform the dispute in this case. BT and Sky have a number of other competitors in the retail pay TV market, notably Virgin Media and TalkTalk, both of which buy sports content from Sky.

7. In essence, BT claims that OFCOM has committed errors in its evaluation of the market and seeks to have the 2015 Statement remitted to OFCOM. It contends that OFCOM should be directed to impose a licence condition on Sky to distribute sports channels to other pay TV retailers without a requirement of reciprocal provision by other pay TV retailers as a condition for supply of Sky sports channels. BT also asks that OFCOM be directed to undertake analysis of the wholesale sports channel market to determine whether prices are prejudicial to fair and effective competition.

8. We have decided unanimously that BT's appeal fails. We find that OFCOM did not act in breach of its legal powers and did not exercise its discretion wrongly. We find that it was justified in deciding to remove the WMO and instead rely on a policy of monitoring behaviour and intervening swiftly should this become necessary.

Process

9. Sky was granted permission to intervene in these proceedings in support of OFCOM.[1] As is usual practice in this type of appeal, a confidentiality ring was established by

[1] Order of 25 February 2016.

order of the Tribunal to permit the exchange of relevant, commercially sensitive information.[2] The appeal was heard over nine days between 3 and 14 October 2016. The Tribunal had the benefit of extensive pleadings and written submissions by all parties, as well as oral opening and closing submissions.

10. We should like to thank Counsel for each party for the courteous manner in which the case was argued before us.

Evidence from witnesses

11. Between oral opening and closing submissions, the Tribunal heard evidence from a total of seven witnesses, both factual and expert. BT called two factual witnesses: Mr John Petter and Mr Sean Williams. Mr Petter is the Chief Executive Officer of BT's Consumer division, which is responsible for running BT's retail communications services, including its pay TV business. Mr Petter gave evidence on 5 October 2016 (Day 3). Mr Williams, who is BT Group Director of Strategy, Policy and Portfolio, gave evidence on 6 October 2016 (Day 4). Sky called one factual witness, Ms Mai Fyfield, the Chief Strategy and Commercial Officer at Sky. Ms Fyfield gave evidence on 6 October (Day 4). All these witnesses provided useful evidence. We found the evidence of Mr Petter refreshingly open and candid as to BT's interests and commercial intentions. We similarly found that Ms Fyfield gave a clear and convincing account of Sky's commercial policy and strategic interests. Mr Williams was similarly candid but his evidence was more directed towards offering an opinion on OFCOM's approach than giving evidence of fact.

12. The Tribunal heard evidence from four expert witnesses. Listing them in the order in which they were called, they were:

    (a) Dr Jorge Padilla, Senior Managing Director and the Head of Compass Lexecon Europe. Dr Padilla gave evidence for BT on 7 and 10 October 2016 (Days 5 and 6).

[2] Reasoned Order of 24 February 2016.

(b) Dr Cristina Caffarra, Vice President and Head of the European Competition Practice at Charles River Associates. Dr Caffarra gave evidence for Sky on 7 October 2016 (Day 5).

(c) Mr Greg Harman, Senior Managing Director in the Economic and Financial Consulting practice of FTI Consulting. Mr Harman gave evidence for BT on 10 and 11 October 2016 (Days 6 and 7).

(d) Mr David Matthew, an Economic Director in OFCOM's Competition Group. Mr Matthew gave evidence on 11 October (Day 7).

13. Mr Harman provided an assessment of OFCOM's evaluation of BT's cost stack analysis. His evidence suggested that Sky's wholesale pricing might not allow a hypothetical rival standalone pay TV retailer to compete effectively or operate in other parts of the value chain. Mr Harman gave useful evidence on the matters within his field, on which he is clearly very expert.

14. Dr Padilla provided four expert reports dealing with the evolution of competition in pay TV and OFCOM's analysis of the matter of reciprocal supply. These reports were titled as follows: (1) "*Evolution of competition in pay TV and its implications for the assessment of OFCOM's decision to remove the WMO obligation*" dated 19 January 2016; (2) "*OFCOM's analysis of the Grant Back Condition and dismissal of Compass Lexecon's Models*" dated 19 January 2016 ("Padilla 2"); (3) "*Response to Sky's factual evidence in relation to the evolution of pay TV*" dated 30 June 2016; and (4) "*Response to paragraph 182 of OFCOM's Defence and the First expert witness report of Dr Cristina Caffarra*" dated 30 June 2016. We found Dr Padilla clear, insightful and very knowledgeable in his area of expertise. His interaction with Dr Caffarra enabled the Tribunal to improve its understanding of the strengths and limitations of his modelling work.

15. Dr Caffarra considered whether the Compass Lexecon model in Padilla 2 supported BT's claim that Sky's insistence on a reciprocal wholesaling arrangement, whereby BT would only be supplied with Sky Sports 1 and 2 ("SS1&2", also referred to as Sky's core premium sports channels) in return for wholesaling its BT Sport to Sky, prevented a wholesale agreement for the supply of SS1&2 from being reached, and

thereby amounted to a restriction on supply. We found Dr Caffarra's contribution in the areas in which she opined very clear and helpful.

16. Mr Matthew's evidence addressed certain issues in Ground 4, namely whether OFCOM erred in its decision that there was sufficient basis on which to conclude that Sky would not engage in practices that were prejudicial to fair and effective competition. Mr Matthew was the only witness put forward by OFCOM. His evidence was clear and precise and clarified some of the economic thinking behind OFCOM's decision but he could not address the Tribunal on those aspects of the decision for which he did not have overall responsibility.

Concurrent expert evidence

17. At a case management conference on 7 July 2016, the Tribunal indicated that it would be assisted by hearing the expert evidence of Dr Padilla (for BT) and Dr Caffarra (for Sky) concurrently in respect of Ground 5. The parties were directed to file a list of matters relevant to the concurrent session by 16 September 2016.[3] Since there was some disagreement on this, the Tribunal subsequently provided the parties with a list of topics that would serve as an agenda for this part of the Hearing.

18. We found the concurrent expert session very useful. Whilst the submissions by the two parties prior to the Hearing did not identify material areas of agreement, the session itself enabled the Tribunal to hear Dr Padilla's explanation of his work, Dr Caffarra's criticisms of it and Dr Padilla's response in an open and accessible form. The Tribunal's ability to lead the examination with the expertise of Professor Colin Mayer enabled it to evaluate the issues effectively in a single morning instead of the one or two full days that might otherwise have been required.

Grounds of appeal

19. In summary, BT's grounds of appeal are as follows:

[3] See Order of 21 July 2016.

Ground 1: OFCOM erred in law in its application of section 316 of the 2003 Act and acted in breach of its statutory duties under the Act by adopting a "wait and see" approach.

Ground 2: OFCOM erred in the exercise of its discretion in failing to appreciate that there continued to be a significant risk of Sky engaging in wholesale distribution practices that would be detrimental to the emergence of fair and effective competition.

Ground 3: OFCOM erred in the exercise of its discretion by directing its analysis on the distribution of key sports content rather than on the product that customers purchase, and which is the focus of the statutory remedy under section 316 of the 2003 Act, namely sports channels.

Ground 4: OFCOM erred in concluding that there was sufficient evidence that Sky would not engage in practices prejudicial to fair and effective competition in pay TV by offering Sky sports channels only at wholesale prices that were too high to allow competition to emerge.

Ground 5: OFCOM erred in the exercise of its discretion and acted in breach of its statutory duties in sections 3 and 316 of the 2003 Act by failing to identify, as a practice which is or would be prejudicial to fair and effective competition in the retail provision of pay TV services, demands by Sky for the wholesale provision to it of channels belonging to other pay TV retailers as a condition for the supply to such other retailers of its Sky sports channels and failing to impose a licence condition appropriate for securing that Sky does not engage in such a practice.

Outline of judgment

20. The remainder of this judgment is structured as follows. We first summarise OFCOM's findings in 2010 (to the extent they are relevant to this dispute) and explain the interim relief order (the "IRO") that followed. We then give an outline of the judgments of this Tribunal and the Court of Appeal in the appeals against OFCOM's 2010 findings. We then summarise OFCOM's findings in the 2015 Statement and explain the different ways in which television content, particularly sports content, is

distributed, the regulatory framework governing OFCOM's actions and our role on appeal. We then consider each of BT's grounds of appeal in the order in which they were pleaded. There is substantial overlap between some of these grounds and the arguments advanced in support of them. We cross-refer where appropriate.

OFCOM's 2010 decision to impose the WMO

21. In March 2010 OFCOM published the 2010 Statement, concluding that Sky had market power in the wholesale supply of its core premium sports channels, SS1&2. OFCOM considered that these channels contained a large proportion of the most attractive live sports, in particular coverage of Premier League football. OFCOM found that Sky had engaged and continued to engage in conduct prejudicial to fair and effective competition, mainly by restricting the supply of these channels to other retailers, thereby reducing consumer choice and stifling innovation. In particular, OFCOM concluded that Sky had not engaged constructively with other retailers who wished to access its core premium sports channels:

> "Despite lengthy negotiations and the apparent opportunity for Sky to increase its revenues and profits, wholesale supply has not been agreed; nor does it appear that much meaningful progress has been made towards agreement."[4]

22. In addition to the concern relating to the restriction of supply, OFCOM identified concerns over the terms of Sky's supply:

(i) it found that the terms of supply (i.e. Sky's wholesale prices and the non-supply of, for example, the high definition version of Sky's core premium sports channels to Virgin Media) had "the effect of weakening Virgin Media's ability to compete with Sky";[5]

(ii) to the limited extent that Sky entered into discussions as to wholesale pricing, the discussions centred "on the prices which Sky currently sets to Virgin Media via the rate-card" and OFCOM did not believe that the rate-card prices

[4] 2010 Statement, paragraphs 7.1 and 7.4.
[5] 2010 Statement, paragraph 7.9.

for Sky's core premium sports channels allowed other retailers to compete effectively;[6] and

(iii) Sky's retail and wholesale prices were above the competitive level; this was the case to a greater extent for movies than for sports.[7]

23. OFCOM observed that while technological advances had created opportunities for fundamental changes in the delivery of pay TV services, the scope for successful new services to emerge depended not just on access to technology, but also on retailers being able to offer TV content that consumers want to watch. OFCOM concluded that: "restricted access to key content means that competition in pay TV is not fair and effective. This has a negative impact on choice, innovation and price".[8] OFCOM noted that consumers with a preference for platforms other than satellite or cable were unable to access Sky's core premium sports channels; consumers on cable could only access the channels on standard definition; reduced choice of platform would be likely in future to extend to bundles of TV and telecommunication services which OFCOM considered were becoming increasingly important; and to the extent that distribution focused on Sky's satellite platform, that would detrimentally affect the exploitation of new distribution technologies such as broadband networks.[9]

24. To remedy its concerns relating to non-supply at the wholesale level and the terms of supply, OFCOM decided to impose an obligation on Sky to offer to wholesale SS1&2, including the high definition versions of those channels. Given what it saw as the history of fruitless discussions between Sky and other retailers, OFCOM considered that the regulated offer should deal with contractual terms, in particular the prices for the standard definition versions of channels to be included in the remedy.[10] Sky was required to offer the high definition versions of the relevant channels on a fair, reasonable and non-discriminatory ("FRND") basis.[11] In section 10 of the 2010 Statement OFCOM included an overview of the analysis it had carried out to establish the level of the wholesale prices that would be included in the WMO.

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[6] 2010 Statement, paragraph 7.5.
[7] 2010 Statement, paragraph 7.365.
[8] 2010 Statement, paragraphs 8.3 and 8.5.
[9] 2010 Statement, paragraph 1.31.
[10] 2010 Statement, paragraphs 9.18 and 9.19.
[11] 2010 Statement, paragraph 10.14.

25. Thus, the licence conditions imposed on Sky by way of the WMO required Sky to: (i) offer the programme content of SS1&2 (and the high definition versions of the channels), that is to say Sky's core premium sports channels, to any person for retail to their residential consumers in the UK upon a reasonable request in writing, within a reasonable time, on a non-exclusive basis, on fair and reasonable terms and without undue discrimination; (ii) supply the programme content of the standard definition version of the core premium sports channels at charges not exceeding specified maximum prices (the "WMO Price"); and (iii) publish, by 14 May 2010, the standard terms and conditions under which it would offer to supply the programme content, including the minimum qualifying criteria for potential purchasers.

26. The WMO was imposed pursuant to section 316 of the 2003 Act. OFCOM decided to use its powers under section 316 rather than proceeding under the Competition Act 1998 ("the 1998 Act") "because of the need for a comprehensive solution to a general problem affecting the relevant markets".[12]

The Interim Relief Order

27. On 16 April 2010, on the basis that it would appeal against the 2010 Statement, Sky applied to the Tribunal for urgent interim relief pursuant to rule 61 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003).[13] The application was heard in late April 2010. In the course of the Hearing, agreement was reached between Sky, OFCOM, BT, Virgin Media and Top Up TV (also referred to as "TUTV") on a form of interim relief. The subsequent order of the Tribunal implemented an amended form of the WMO in relation to BT, Virgin Media and Top Up TV, but otherwise suspended it.[14] Sky was therefore required to supply SS1&2 to the "Qualifying Platforms" of those three operators. "Qualifying Platform" was defined as follows in paragraph 2 of the Schedule to the IRO:

[12] 2010 Statement, paragraph 9.8.
[13] Case 1152/8/3/10 (IR), *British Sky Broadcasting Limited v Office of Communications (Interim relief).*
[14] Order of 29 April 2010.

> "Qualifying platform means via DTT in the case of BT, Virgin and Top-Up TV and via its existing cable platform in the case of Virgin, with all parties having liberty to apply."

28. Implementation by Sky vis-à-vis the three operators was conditional on the latter undertaking to pay into escrow sums equivalent to the difference between the wholesale prices set by OFCOM as part of the WMO and Sky's rate-card prices (effectively the wholesale price that Sky charged Virgin Media)[15] for the same service.

29. The IRO was varied twice. On 23 November 2010, following a successful application by Real Digital EPG Services Ltd ("Real") to amend the IRO and be included within its scope, the President of this Tribunal made an order which identified Real's satellite platform as a Qualifying Platform.[16] The second variation was the result of an application made by BT to vary the IRO so that its customers with "YouView" set-top boxes[17] would be able to receive the SS1&2 channels distributed via internet protocol television ("IPTV") which at the time of the application was not a "qualifying platform" as defined in the order (see paragraph 27 above). On 13 November 2014 BT's application was granted.[18]

30. The President of the Tribunal considered the matter in the following terms:

> "60. Accordingly, I consider that the starting point is that the WMO remedy was imposed by OFCOM in order to ensure fair and effective competition pursuant to s.316 of the 2003 Act, in the public interest. Unless suspended, the WMO remedy covers any form of delivery of Sky's core premium sports channels, including via IPTV.
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> 61. A decision by OFCOM under s.316 regarding a licence condition will very often, if not always, be adverse to the commercial interest of the party on whom the condition is imposed.
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> 62. If such a decision is appealed, the decision is only suspended if the CAT so

[15] The rate-card arose from earlier proceedings between Sky and the Office of Fair Trading in which Sky agreed to publish a rate-card for wholesale supply, but was not obliged to set any particular price or supply at that price (see paragraph 511(a) of the Tribunal's 2012 Judgment). In the 2015 Statement, OFCOM notes that "'rate-card' refers to the wholesale prices set by Sky for access to its Sky Sports channels. Whilst this price was a published price which Sky charged to all platforms for the wholesale of Sky Sports channels, since September 2013 Sky has offered bespoke pricing […]". (2015 Statement, paragraph 6.40).

[16] See judgment [2010] CAT 29 and the Order of the President (Variation of Interim Order) of 23 November 2010.

[17] It is relevant to note that BT did not receive wholesale supply of SS1&2 from Sky pursuant to the IRO but pursuant to a separate commercial arrangement with Sky for its customers with a "Cardinal" set-top box, which at the time of BT's application to vary the IRO was regarded as a 'legacy platform'.

[18] See judgment [2014] CAT 17 and Order of the President of 13 November 2014 giving effect to that judgment.

orders. Such decisions by OFCOM are usually complex, and an appeal is therefore likely to involve complex issues and will frequently involve several parties, as was the case here. Although it is hoped that such appeals would not usually take anything like as long as the present case, final resolution of such an appeal may often take at least a year, and longer if the case proceeds to a second level appeal.

63. The complexity of such appeals means that it will usually be impossible for the Tribunal on an interim hearing to arrive at even a provisional view as to the prospect of the appeal succeeding. Certainly in the present case, it would be wholly inappropriate for me to reach any view as to the likely outcome of remittal to the Tribunal, as ordered by the Court of Appeal.

64. Accordingly, although there will no doubt be appropriate cases for suspension, the Tribunal should be cautious before suspending a decision regarding a licence condition pending appeal. Broadcasting markets, like telecommunications markets, are developing rapidly so that any suspension will potentially impair the effectiveness of the decision, and if such a decision could readily be suspended there would be an incentive to appeal simply to secure the benefit of delay.

65. In the present case, although the WMO remedy has been suspended by consent, I consider that the terms of the IRO, with the incorporated undertakings, were designed to ensure that meaningful use of SS1&2 could be made by other parties supplying *pay TV* services in the interim. This is supported by the submission from OFCOM on the present appeal, stating as follows:

> "OFCOM consented to the terms of the IRO, which exclude distribution of CPSCs by IPTV, because it was OFCOM's understanding in April 2010 that none of the parties present intended to distribute Sky's channels by IPTV in the short to medium term. OFCOM considered that the main parties would not therefore be prevented by the IRO from making meaningful use of the WMO Remedy during the expected currency of the appeals."

As the Tribunal observed in its judgment on Real's application to amend the IRO (see paragraph 7 above), the terms of the IRO meant that Sky would suffer the commercial disadvantage that it apprehended from the WMO:

> "By agreeing to these terms Sky was prepared to, and almost certainly will, suffer the very adverse effects which formed the main foundation for its application for interim relief should its appeal succeed and the supply of the channels to those companies be withdrawn."
>
> [2010] CAT 29 at [24].

66. The technical developments that have occurred over the wholly exceptional time that this appeal is taking have rendered the IRO largely ineffective as regards BT. It is not realistic to suggest that BT should maintain use of the Cardinal STB and deprive its customers of the improved technology and service of the YouView box simply to retain the delivery of SS1&2. This would frustrate the development of BT as a competitor on the pay TV market and cannot, in my view, be regarded as being in the public interest.

67. The main argument against making SS1&2 available to BT is that by reason of

> BT's acquisition of valuable football broadcasting rights, BT has now become a much more formidable competitor to Sky so that the addition of the SS1&2 channels would give BT an unfair advantage. I recognise that this development means that if Sky's appeal eventually succeeds, the obligation to supply BT with its CPSCs by IPTV over YouView may cause commercial damage in terms of the loss of actual or potential subscribers, for the various reasons articulated in Sky's evidence. But conversely, if the WMO remedy is eventually upheld, to deny BT access to those channels for it to supply on its YouView platform is likely to cause it commercial damage. I do not think it is any answer to say that BT could obtain SS1&2 if only it were prepared to offer reciprocal supply to Sky of the BT Sport channels. BT has spent some £1.5 billion acquiring football broadcasting rights in order to improve its position on the market and I do not see that BT should be required, in effect, to deprive itself of the competitive gain from that investment in order to achieve the benefit of the WMO remedy ordered by OFCOM.
>
> […]
>
> 69. It is not for the Tribunal on this application to consider whether, by reason of the change in commercial conditions as a result of BT's acquisition of football broadcasting rights, the WMO remedy continues to be appropriate, going forward. That will be under examination in the review announced by OFCOM, which I cannot prejudge." […]

31. We consider the significance of the President's comments at [67] of the Ruling, to which BT attached some importance in this appeal, at paragraph 227 below.

Appeals against the 2010 Statement - Overview

32. On 28 May 2010 Sky lodged its appeal against the 2010 Statement. BT, Virgin Media and The Football Association Premier League Ltd ("FAPL") also lodged appeals. The appeals were heard by the Tribunal between 9 May 2011 and 15 July 2011, and the Tribunal delivered its judgment on 8 August 2012: [2012] CAT 20 ("the 2012 Judgment"). The Tribunal dismissed Sky's and FAPL's challenges to OFCOM's jurisdiction to impose the WMO. However, the Tribunal concluded that OFCOM's core competition concern in the 2010 Statement was unfounded and that Sky's appeal should therefore be allowed. For that reason, the Tribunal did not determine Sky's and the other appellants' grounds of appeal relating to the validity, effectiveness and proportionality of the WMO remedy itself.[19]

33. The Tribunal refused permission to appeal but suspended the order giving effect to the

[19] 2012 Judgment at [833]-[835].

2012 Judgment until an application for permission to the Court of Appeal had been determined. On 26 April 2013, following an oral hearing, Lewison LJ gave BT permission to appeal on a limited basis. BT's application based on the Tribunal's reversal of OFCOM's principal conclusion on the facts was refused, but BT was allowed to argue that the Tribunal had not addressed a separate competition concern identified by OFCOM in the 2010 Statement, namely whether retailers could compete with Sky on the basis of Sky's offer to wholesale the sports channels at its rate-card price. When granting permission, Lewison LJ extended the suspension of the Tribunal's final order until the determination of BT's substantive appeal or further order. Sky and FAPL were subsequently granted permission to bring a cross-appeal in relation to the Tribunal's finding that OFCOM had no jurisdiction under section 316 of the 2003 Act to impose the WMO remedy.

34. The Court of Appeal gave its judgment on 17 February 2014: [2014] EWCA Civ 133 (the "Court of Appeal Judgment"). The Court dismissed Sky and FAPL's cross-appeal in relation to OFCOM's jurisdiction, but concluded that the Tribunal had failed to appreciate the importance of OFCOM's conclusion that Sky's rate-card price and the effect of the penetration discounts that were proposed by Sky gave rise to competition concerns in their own right. The Court therefore remitted to the Tribunal for further consideration, findings and conclusions the question of whether the WMO remedy was justified on the basis of such competition concerns (the "Remittal Proceedings").

35. Before any substantive hearing had taken place, the Remittal Proceedings came to an end in December 2015 when the appellants were granted permission to withdraw their appeals on the basis that – in light of OFCOM's 2015 Statement removing the WMO – they had become devoid of purpose. However, none of the appellants conceded that their respective appeals were unfounded; and OFCOM also did not concede that any of the appeals were well-founded.

36. The Tribunal's order granting permission for the appeals to be withdrawn also recorded the agreement reached between Sky and BT for the distribution of the funds paid by BT into escrow under the IRO.[20] A further order recorded the agreement

[20] Order (Withdrawal of appeals) of 18 December 2015.

between Sky and Top Up TV for distribution of funds paid by Top Up TV pursuant to the IRO.[21]

37. Although the interaction between the various appeals and cross appeals appears complex, in essence the matter boils down to this. OFCOM imposed a must-offer obligation on Sky that included a regulated wholesale price. Sky appealed against OFCOM's power to use section 316 of the 2003 Act for that purpose and lost. Sky also appealed against OFCOM's main finding that it was refusing to supply its premium sports channels and won. BT appealed OFCOM's decision about the price level and scope of the WMO, arguing that the WMO Price was too high and that a wider package of channels ought to be included. The Tribunal said that this did not need to be decided because the WMO was not justified. Similarly, Sky's appeal against OFCOM's finding that it would only supply at the rate-card price did not need to be determined since Sky *was* willing to negotiate with rival retailers and supply its core premium sports channels to them, and the rate-card price allowed Virgin Media to compete. The Court of Appeal disagreed and found that the Tribunal should have considered whether the WMO was justified because of Sky's rate-card pricing; it remitted this issue to the Tribunal. The Tribunal's consideration of this matter was overtaken by OFCOM's lifting of the WMO in November 2015 and the parties' withdrawal of the outstanding appeals, including the issue remitted by the Court of Appeal.

The 2012 Judgment

38. In view of the parties' reliance on various aspects of the 2012 Judgment in these proceedings, it is necessary to set out in more detail some of the grounds of appeal and the Tribunal's conclusions in respect of those grounds. We focus here on Sky's challenge to the findings on which OFCOM's competition concerns were based: Section VI of the 2012 Judgment at [159] – [832]. We then discuss BT's challenge and subsequent appeal to the Court of Appeal. We do not discuss the attack by Sky and others on OFCOM's use of section 316 in this context and its jurisdiction to impose the WMO save to note that the Tribunal dismissed this claim, and this ruling

[21] Order of 13 January 2016.

was confirmed by the Court of Appeal (see paragraph 34 above). It is not at issue in the present dispute.

39. As noted above, the main competition concern that OFCOM identified in the 2010 Statement was that Sky exploited its market power by limiting the wholesale distribution of its core premium sports channels to potential new retailers. OFCOM found that a number of companies had tried and failed to negotiate terms with Sky which would permit them to retail the core premium sports channels to their customers. OFCOM considered that the failure on the part of Sky to negotiate terms was due to the fact that it was acting on strategic incentives to protect its retail pay TV business and to reduce the risk of stronger competition for content rights. Sky's behaviour in negotiations was to respond to requests for wholesale supply with counter offers to retail its channels on behalf of other retailers. Where such a retail deal could not be negotiated, Sky appeared to prefer to be absent from the relevant platform rather than to pursue wholesale supply.

40. OFCOM also had concerns about the price at which Sky wholesaled standard definition versions of the core premium sports channels to Virgin Media and about Sky's refusal to supply high definition versions of the channels to Virgin Media. While the rate-card price did not constitute a margin squeeze, in OFCOM's view it did not enable Virgin Media to compete effectively, and this contributed to Virgin Media having little incentive to sell the core premium sports channels to its existing subscribers, which in turn contributed to low take-up of these channels. OFCOM had a further concern about the level of the rate-card price more generally.

41. Sky disputed OFCOM's interpretation of the evidence relating to various bilateral negotiations that took place in the years leading up to the 2010 Statement. It argued that it had incentives to distribute its core premium sports channels widely either by self-retail or through wholesale arrangements where satisfactory terms could be achieved and that OFCOM had failed to establish a credible basis for its finding with respect to Sky's strategic incentives.

42. OFCOM contended that its finding of strategic incentives was not essential to its conclusion that there were competition concerns: the evidence that it relied on in

finding a competition concern was the evidence of the history of failed negotiations, together with the immediate financial benefit of wholesale supply foregone. The Tribunal considered that, regardless of the relevance of the strategic incentives identified by OFCOM, in considering Sky's challenge, the primary focus should be on the evaluation of the evidence of Sky's behaviour with respect to the various bilateral negotiations that had taken place.[22]

43. The Tribunal examined the evidence of negotiations closely, considering contemporaneous documents and written and oral testimony and submissions relating to bilateral discussions between Sky and six principal counterparties, namely Top Up TV, BT and Orange/France Telecom, as well as three cable companies: Virgin Media, NTL and Telewest.

44. In respect of the negotiations with Top Up TV, BT and Orange/France Telecom, the Tribunal concluded as follows:

> "At this stage we have considered three out of the four sets of negotiations which together form the essential foundation of OFCOM's competition concerns and of the WMO. These three platforms, TUTV, BT and Orange, are in a different position from Virgin Media and its corporate predecessors, in that at the time the Statement was published Sky was not already supplying the premium channels to them, whereas the cable companies had been in receipt of wholesale supply for many years. As can be seen from our detailed conclusions earlier in the judgment, the evidence relating to the negotiations with TUTV, BT and Orange, far from providing support, shows that a significant number of OFCOM's pivotal findings in the Statement are wrong." (2012 Judgment at [496])

45. In respect of negotiations between Sky and the cable companies, the Tribunal concluded as follows:

> "The evidence relating to Sky's discussions and relations with the cable companies do not change the conclusions we reached after considering the negotiations with TUTV, BT and Orange. Indeed, we have found significant errors of assessment also in OFCOM's findings in the context of Sky's dealings with the cable companies." (2012 Judgment at [823], footnote omitted)

46. The Tribunal's overall conclusion on Sky's challenge to OFCOM's competition concerns was as follows:

[22] 2012 Judgment at [169].

> "824. In the light of our findings we have concluded that OFCOM's core competition concern is unfounded. That concern is that Sky has deliberately withheld from other retailers wholesale supply of its premium channels, preferring to be entirely absent from those retailers' platforms than to give them wholesale access, and that in doing so Sky has been acting on strategic incentives unrelated to normal commercial considerations of revenue/profit-maximisation. We have reached this conclusion having found a significant number of OFCOM's pivotal findings of fact in the Statement to be inconsistent with the evidence, including the contemporaneous documents. We do not repeat here all the respects in which we have found OFCOM's factual assessment to be erroneous. For this, reference should be made to the earlier parts of the judgment in which our conclusions on the individual negotiations are set out. Some of the most important issues on which we have differed from OFCOM relate to the respective conduct and motivation of Sky and its counterparties in the various negotiations.
>
> […]
>
> 828. Given these conclusions, there is no need for the Tribunal to resolve the issues debated before us at some length as to the plausibility or otherwise as a matter of economic theory of the alleged strategic incentives on which Sky was said by OFCOM to be acting in its conduct of the various negotiations. As we have said, OFCOM's position at the hearing was that its findings relating to the strategic incentives were not essential to the existence of its core competition concern. OFCOM submitted that the fact of Sky's acting upon these incentives would be revealed when we looked at the empirical evidence of Sky's conduct in the individual negotiations. Having examined that evidence we have formed a clear view that Sky was acting for ordinary profit/revenue-maximising commercial motives, and it cannot in our view be inferred from the material put before us that the alleged incentives were conditioning Sky's conduct." (2012 Judgment at [824] and [828], all footnotes omitted).

47. Sky also challenged OFCOM's findings about the effect on competition of Sky's supply arrangements to Virgin Media, in particular that the rate-card prices did not allow Virgin Media, or any other retailer that does not have Sky's scale, to compete effectively. Sky disputed that it had an incentive to weaken Virgin Media as an effective competitor, and that it set the rate-card prices just below the limits of the margin squeeze test rather than setting a profit-maximising price in accordance with normal commercial conduct. It was Sky's case that the rate-card prices were set so as to maximise profits, and although the prices were checked against the margin squeeze test to ensure that they were compliant they were not set by reference to it. Sky also disputed that its prices had the effect of limiting Virgin Media's incentives and rendering it unable to compete effectively with Sky in retailing those channels.[23]

[23] 2012 Judgment at [734].

48. The Tribunal's general conclusion on Virgin Media's incentives and ability to compete effectively at rate-card prices is set out in the 2012 Judgment at [809]-[815]. In summary, the Tribunal found that OFCOM's conclusion on the effect of the rate-card on Virgin Media's incentives and competitive effort was not justified. It found that the evidence overall demonstrated that Virgin Media was regarded by Sky as a serious, well-established rival that competed effectively with Sky in relation to the supply of packages which include the core premium sports channels.

49. Sky also challenged OFCOM's finding in the 2010 Statement that Sky's wholesale and retail prices in question were appreciably above competitive levels. The 2012 Judgment noted that these findings were mainly used by OFCOM to support its conclusion that Sky had market power in the wholesale supply of core premium sports channels. Sky, however, did not challenge OFCOM's definition of the relevant market or its finding of market power; it only challenged the finding of high prices. OFCOM did not defend this ground. In its reply, Sky noted that in light of this, OFCOM was not entitled to rely on any claims that the wholesale or retail prices for core premium sports channels were appreciably above the competitive level. In its written closing submissions, OFCOM explained its position as follows:

> "OFCOM concluded that Sky was earning returns above its cost of capital and that this implied that consumers were paying high prices. It decided, however, that it should not seek to address this finding, as to do so carried risks that were not justified by the level of harm to consumers that had been identified. Those risks included the risk that the remedy might artificially reduce the value of sports rights." (2012 Judgment at [818], footnote omitted)

50. The Tribunal therefore concluded as follows:

> "This statement appears to be directed at the level of Sky's retail prices. As far as wholesale prices are concerned, the procedural history outlined above, and the absence of any substantive response to the gauntlet thrown down by Sky in its Reply, appears to signal an acknowledgement by OFCOM that the issue will not fall to be determined by us. The fact that we do not have the benefit of counter submissions to those in Annex 1 of the amended notice of appeal or any reply to Sky's evidence in support of them, would make an attempt at such determination wholly unsatisfactory, and probably otiose in the light of our conclusion that the rate-card price is not an obstacle to effective competition on the part of Virgin Media." (2012 Judgment at [819])

51. The Tribunal's conclusions on Sky's grounds of appeal relating to OFCOM's

competition concerns were sufficient to dispose of Sky and other appellants' grounds challenging the need for and the terms of the WMO itself: 2012 Judgment [39]-[40]. In respect of contentions that retailers would not be able to compete effectively on the basis of Sky's rate-card price, the Tribunal stated:

> "We recognise that other retailers, and in particular BT, claim that they would not be able to compete effectively on the basis of Sky's rate-card price. We have not found it necessary or appropriate to reach any specific conclusion about this. Although in negotiations between Sky and BT, Sky was insistent that wholesale prices of CPSCs should be based on the rate-card prices, we have found that Sky was open to agreeing discounts from those prices, referable to penetration rates achieved by the retailer. We also found that the negotiations with BT were very significantly affected by the ongoing pay TV review, and by the prospect of OFCOM imposing a regulatory price lower than the rate-card. In these circumstances, when a favourable outcome of the pay TV review appeared imminent, BT indicated that it was prepared to agree to wholesale supply at the rate-card price provided that the agreed price would be changed in due course to reflect the regulatory price. In the event the regulatory outcome preceded the finalisation of the agreement with BT. There was therefore no negotiation on price between Sky and BT which was unclouded by likely regulatory action, and there is no way of knowing what the result of a genuinely commercial negotiation would have been. The same applies to negotiations with other retailers, actual or potential. The negotiations with TUTV and Orange did not founder because of the rate-card price, but for other reasons, as discussed at length earlier in this judgment. (2012 Judgment at [821], footnote omitted)

52. It was this conclusion that was subsequently challenged by BT and found to be in error by the Court of Appeal.

The Court of Appeal Judgment

53. The Court of Appeal analysed this ground of BT's appeal as follows. First it considered what OFCOM had concluded in the 2010 Statement concerning rate-card prices and penetration discounts and what the Tribunal should have considered on Sky's appeal. Aikens LJ explained the matter in the following terms:

> "94. The CAT had to deal with Sky's appeal "on the merits" of OFCOM's conclusions on what its competition concerns were and why those had led it to setting the WMO remedy and to setting specific prices for wholesaling the CPSCs to competitors of Sky in the standard definition versions. On my analysis, there can be no doubt that the rate-card price and penetration discount issues were part of OFCOM's competition concerns, even if they were not its "key" concern. The issues of rate-card price and penetration discounts were before the CAT on the parties' Notice of Appeal and Defence. As already noted, there were 18 reports or

statements relevant to the level of price fixed by the WMO remedy before the CAT. The fact that the CAT stated, at [821] of the judgment, that it did not find it necessary or appropriate to consider the rate-card price issue demonstrates that these were live issues before the tribunal at the hearing.

95. The CAT's conclusion that OFCOM was wrong, on the facts, to find that Sky was not prepared to negotiate for the wholesale of the CPSCs left open the issue of the price at which these channels could or would be supplied wholesale to competitors. Even though at [821] the CAT found, albeit in very general terms only, that Sky was open to agreeing discounts with competitors from the rate-card prices for the purpose of wholesale supply "referable to penetration rates achieved by the retailer", the CAT does not indicate what those prices might have been or, more importantly, what their effect might have been on competition. Indeed it emphasised that there was no way of knowing what the outcome of genuine commercial negotiations might be and regarded this as a good reason for it being unnecessary to make further conclusions on this issue. But the very fact that the CAT did not find what actual prices might have been agreed meant that it could not conclude whether or not the prices that might have been agreed would have impeded "fair and effective" competition

96. Thus, in my view, the CAT has not dealt with OFCOM's finding that the rate-card price is, in itself, an impediment to "fair and effective" competition. Furthermore, the CAT did not address at all the issue of whether OFCOM was right to conclude that the penetration discount method of lowering the price for the wholesale supply of CPSCs to competitors by Sky raised a "competition concern". OFCOM had spelt out its view clearly at §9.98. The fact that this conclusion appeared in the Section of the Statement headed "Remedies" cannot, in my view, detract from it being a clear finding by OFCOM that this was a "competition concern", as is stated at the outset of §9.98. There is nothing in the judgment that deals with OFCOM's statement in that paragraph. Nor is there anything in the judgment that explains why, even assuming that finding stood, there was no requirement for the imposition of the WMO prices that OFCOM proposed.

97. I accept, of course, that if the position is that Sky was prepared to negotiate for the wholesale supply of CPSCs and it was prepared to negotiate the price, then the fact that the discounts would have been based on penetration levels may not, of itself, have been sufficient of an independent "competition concern" to lead OFCOM to the conclusion that it had to impose a WMO remedy or some other remedy. But, in the absence of any analysis of this issue by the CAT in the judgment it is unclear whether there could be an independent "competition concern" based on the effect of penetration discounts or what the effect of that concern might be. Therefore, because the effect of these "competition concerns" is not dealt with by the CAT in the judgment, it is unknown whether there would still be any need for the WMO remedy or whether the CAT was correct to set it aside."

54. Aikens LJ then considered whether the reasons given by the CAT for not needing to deal further with the rate-card price and/or penetration discounts were adequate:

"98. Two reasons were given in [821]. In my view neither was satisfactory. First, as noted above, the CAT did not perform any analysis of what the discounts "referable to penetration rates achieved by the retailer" would have been. So, even

> assuming such discounts would have been available, the CAT did not and could not have made any conclusion on whether those discounts would not have given rise to any competition concern.
>
> 99. The second reason, viz. that there was no way of knowing what the outcome of "genuine commercial negotiations" would have been in the absence of likely regulatory action, is equally unsatisfactory. If such an outcome was unknown, then it cannot be said that this must remove the basis for a competition concern. The CAT therefore lacked any solid foundation for holding that OFCOM's concern on rate-card prices and penetration discounts was unsound. The CAT could only do so if it had analysed and reached conclusions on the expert evidence and submissions on price, penetration discounts and competition which, we understand, were before it.
>
> 100. […] In summary: (1) I am quite satisfied that in the judgment the CAT misconstrued the Statement by failing to appreciate the importance of OFCOM's conclusion that the rate-card price and the effect of the penetration discounts that were proposed by Sky themselves gave rise to "competition concerns". (2) This issue was before the CAT as is clear from the Notice of Appeal and Defence. Moreover, Miss Rose had made it clear during her submissions to the CAT that this was a separate, if supporting point that OFCOM was making. (3) Therefore, even if the "crucial finding of fact" was that Sky deliberately withheld wholesale supply of its premium channels, OFCOM had found this independent competition concern and that it had to be dealt with by the CAT on appeal. (4) The failure of the CAT correctly to interpret the Statement or to deal with the rate-card price and penetration discount issues has the consequence that it is unclear whether, despite the findings of fact that the CAT has made in favour of Sky, there remain significant, independent, competition concerns based on the rate-card price and penetration discount, as found by OFCOM in the Statement. (5) The reasons that the CAT gave for not considering that matter further were inadequate." (Court of Appeal Judgment, [98]-[100], footnotes omitted)

55. On this basis the Court of Appeal concluded that the Tribunal had failed to deal with the appeal to it 'on the merits' and that its conclusion and order that the WMO must be set aside were based on an incomplete set of conclusions. Since it had not adequately considered whether that remedy was justified on the basis of OFCOM's competition concerns arising out of the rate-card price and penetration discounts, those matters were remitted to the Tribunal for further consideration, findings and conclusions.

56. As noted above, the remitted issue was not determined by the Tribunal (see paragraphs 35-36 above) as the case was discontinued after OFCOM issued the 2015 Statement.

BT's Competition Act complaint

57. On 24 May 2013 BT lodged a complaint under the 1998 Act with OFCOM against

Sky's insistence on the so-called "grant back condition" under which Sky would not, so BT said, give wholesale supply of its premium sports channels to BT for broadcast on its YouView service unless BT agreed to supply BT Sport at wholesale level to Sky. BT asked for interim measures. OFCOM declined that request on 31 July 2013, but continued to examine the substantive complaint alongside its review of the WMO. In the meantime, BT applied separately to this Tribunal for variation of the terms of interim supply under the IRO and the Tribunal decided to extend Sky's supply obligation to include YouView (see paragraph 29 above). On 16 February 2016 OFCOM closed its file on the complaint on administrative priority grounds.

OFCOM's 2015 decision to remove the WMO

58. In the 2010 Statement OFCOM indicated that it would review the WMO after three years. In February 2014 the Court of Appeal issued its decision on the 2010 Statement and the 2012 Judgment (in which it confirmed OFCOM's power to use section 316 in this context), and OFCOM announced its review on 16 April 2014. It issued a consultation document on 19 December 2014 (the "2014 Consultation"). In July 2015, OFCOM consulted further on whether Sky's insistence on reciprocal supply of key sports content (i.e. making supply of its key sports channels conditional on a rival supplying its own key sports content to Sky) is a practice which may be prejudicial to fair and effective competition (the "Reciprocal Supply Consultation"). The 2015 Statement was issued in November 2015.

59. The 2014 Consultation identified two types of practices which might give rise to concerns: (i) non-supply of channels containing key sports content; and (ii) distribution of channels containing key content on terms which would not enable retailers to compete effectively in pay TV retailing. The Reciprocal Supply Consultation focused on whether Sky's insistence on reciprocal supply could amount to non-supply or restricted supply and thereby prejudice fair and effective competition. OFCOM considered three main questions to determine the extent to which any of these three practices (non-supply, terms and reciprocal supply) might be prejudicial to fair and effective competition. First, what was key content, i.e. was there content which was important enough to influence the choice of pay TV provider for a significant number of consumers? Second, what was the impact of that content on the

ability of pay TV retailers to compete effectively (taking into account the amount of content held and the market position of content holders)? Third, what was the likelihood of content holders engaging in the practices identified taking into account their incentives and current supply arrangements?[24]

60. **Key content.** OFCOM found that live sports content continued to be an important driver in the choice of pay TV services. Key content was live Premier League coverage and to a lesser extent live Champions League content; other sports and sporting events were not key content.

61. **Impact of content.** Sky had exclusive rights to broadcast 116 (75%) of 154 Premier League matches (including for the 2016/17 season). Sky also held rights to other sporting competitions which OFCOM did not identify as key content but which were important to some customers. BT held the minority of Premier League matches (25%) that were broadcast live. It also had exclusive rights to broadcast live all 145 Champions League matches until 2017/18. BT also held rights to other sporting competitions not identified by OFCOM as being key content but which were important to some customers. Overall, OFCOM concluded that Sky held (and continued to hold) sports rights that were considered to be the most important to consumers and Sky had a "strong market position", both as a supplier of key sports channels and as a pay TV retailer. This meant that without access to Sky's key content, pay TV retailers would be unable to compete effectively for the sizeable and valuable proportion of pay TV subscribers that value Sky's key content and, in view of Sky's strong market position both at the retail and wholesale level, limited distribution of Sky Sports might prejudice fair and effective competition. In contrast, OFCOM did not find that the evidence showed that limited distribution of BT Sport would prejudice fair and effective competition between pay TV retailers.

62. **Likelihood of content holders engaging in detrimental practices.** OFCOM then assessed two practices which it thought might prejudice fair and effective competition. These were non-supply of key content and supply of key content on terms that did not allow fair and effective competition (including setting of too high prices and requiring

[24] 2015 Statement, paragraph 1.11.

reciprocal supply in return for the supply of key content). OFCOM concentrated on these practices as they might apply to Sky and did not pursue its consideration of supply by BT.

63. As regards **non-supply** by Sky, OFCOM confirmed its view that this would be harmful to competition and that Sky had incentives to withhold supply. OFCOM considered various stakeholder responses. OFCOM concluded that as regards supply to Virgin Media, Sky might have dynamic incentives to withdraw supply; for other pay TV platforms OFCOM said the static incentives would depend on the number of subscribers who might switch, the extra subscribers that Sky could not otherwise reach and the difference between retail and wholesale margins. As for dynamic incentives OFCOM repeated its concern over the possible strategic benefits to Sky of limiting distribution. These included possible harm to competition for future sports rights. Although platforms with fewer subscribers were less able to compete for such rights, OFCOM noted BT's recent rights acquisitions and its ability to monetise those rights by bundling BT Sport with broadband and retailing it over Sky's digital satellite ("DSat") platform.

64. OFCOM then considered the existing supply arrangements for Sky's key content and found that these did not suggest a practice of non-supply by Sky. All existing supply arrangements had been agreed outside the scope of the WMO save for Sky's supply to BT for its YouView platform, which had been ordered by the Tribunal under the IRO. OFCOM found no evidence of non-supply and no indication that supply was being withheld.

65. OFCOM examined the **terms of Sky's supply**, particularly pricing and reciprocity requirements. On pricing, OFCOM considered evidence supplied by BT to the effect that Sky's rate-card prices were too high to allow other retailers to compete effectively with Sky and that Sky was unwilling to depart from the rate-card. BT also submitted modelling evidence showing that a hypothetical standalone new retail pay TV entrant could not compete with Sky. OFCOM considered these points against evidence that Sky's current wholesale prices were ✂[…] below the price stipulated in the WMO and that neither Virgin Media nor TalkTalk had said that the prices they paid prevented them from competing. OFCOM concluded that Sky's pricing was not a

competition concern.

66. On reciprocal supply, OFCOM referred to the results of its Reciprocal Supply Consultation in July 2015 and noted that the evidence before it of the negotiations between BT and Sky did not show that they would not conclude a reciprocal agreement. OFCOM did not accept BT's view, based on modelling evidence it submitted, that BT could never accept a 'grant-back' or reciprocity condition and that Sky knew this. OFCOM referred to the concurrent competition complaint made by BT and noted that in practice Sky's conduct only had an impact on BT as it was the only other holder of key content. OFCOM did not find BT's modelling proved that a reciprocity requirement led either to non-supply, or supply on terms that would harm consumers. It noted that negotiations between Sky and BT had not concluded, and that in consequence the positions adopted by the parties were not conclusive as to the possible result of those negotiations.

67. OFCOM's overall conclusion was that whilst it retained concerns in principle, in practice it did not see these as being evident, and that in consequence the WMO was no longer appropriate and should be withdrawn. In view of its concerns in principle, however, OFCOM would monitor the market closely and intervene if it saw evidence of supply practices by Sky that might harm competition. OFCOM concluded that it expected that consumers should have access to a variety of packages containing Sky's key sports content and it would be concerned at either non-supply or the requiring of unreasonable supply terms by Sky. OFCOM said this market was important and any necessary intervention would be a priority.

Distribution arrangements

68. As part of its discussion of the 2015 Statement OFCOM explained that there were two means by which holders of key sports rights might make their sports channels available on rival pay TV platforms: wholesale and self-retail. Where a provider offered its channels on a wholesale basis to a rival retail platform, this allowed the rival retailer to enter into a contractual relationship with its customers for the retail supply of the sports channel. The retailer would be able to determine the price charged and might choose to bundle the channel with other pay TV services or other

communications services. Where a holder of key sports rights entered into a direct relationship with subscribers on a rival retailer's pay TV platform through self-retailing, the rival retailer would not control the supply of the channel and would not retain retail revenues for itself. However, the content would be available to subscribers of that platform.

THE REGULATORY FRAMEWORK

69. We now outline the regulatory framework to the extent that we consider that it is relevant to our determination of the grounds of appeal. The text of the relevant statutory provisions can be found in Annex 1.

70. **Section 3 of the 2003 Act** sets out the principal duties of OFCOM, the things which it is required to secure in carrying out its functions and the matters to which it must have regard in the performance of those duties. Of particular relevance to this case is the principal duty outlined in section 3(1)(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition; the requirement in section 3(3)(a)-(b) to have regard in all cases to the principles under which regulatory activities should be transparent, proportionate, consistent and targeted only at cases in which action is needed and any other principles appearing to OFCOM to represent the best regulatory practice; and the requirements in section 3(4)(b) and section 3(4)(d) respectively, in cases where it appears to OFCOM to be relevant in the circumstances, to have regard to the desirability of promoting competition and the desirability of encouraging investment and innovation.

71. **Section 6 of the 2003 Act** provides that OFCOM has a duty to review regulatory burdens with a view to securing that regulation by OFCOM does not involve the imposition of burdens which are unnecessary or the maintenance of burdens which have become unnecessary.

72. **Section 316 of the 2003 Act** provides for conditions that may be imposed in respect of services licenced by a Broadcasting Act licence for the purpose of ensuring fair and effective competition in the provision of licensed services or of connected services; this includes any conditions that OFCOM considers appropriate for securing that the

provider of the service does not enter into or maintain any arrangements, or engage in any practice which OFCOM considers, or would consider, to be prejudicial to fair and effective competition.

73. **Section 317 of the 2003 Act** relates to the exercise of OFCOM's Broadcasting Act powers for a competition purpose; it provides that before exercising such powers, OFCOM must consider whether a more appropriate way of proceeding in relation to a matter would be under the 1998 Act. The section also provides for appeal; a person affected by a decision by OFCOM to exercise any of its Broadcasting Act powers for a competition purpose may appeal to this Tribunal, in which case sections 192(3) to (8), 195 and 196 apply as they apply in the case of an appeal under section 192(2).

74. **Subsections 192(3)-(6) of the 2003 Act** set out the manner and time limit within which an appeal should be lodged with the Tribunal; **section 195(2)** provides that the Tribunal must decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.

75. The role of the Tribunal in considering grounds of appeal raising errors of judgment was described in the following terms in the 2012 Judgment at [84]:

> "…we consider that the following principles should inform our approach to disputed questions upon which Ofcom has exercised a judgment of the kind under discussion:
>
> (a) Since the Tribunal is exercising a jurisdiction "on the merits", its assessment is not limited to the classic heads of judicial review, and in particular it is not restricted to an investigation of whether Ofcom's determination of the particular issue was what is known as *Wednesbury* unreasonable or irrational or outside the range of reasonable responses.
>
> (b) Rather the Tribunal is called upon to consider whether, in the light of the grounds of appeal and the evidence before it, the determination was wrong. For this purpose it is not sufficient for the Tribunal simply to conclude that it would have reached a different decision had it been the designated decision-maker.
>
> (c) In considering whether the regulator's decision on the specific issue is wrong, the Tribunal should consider the decision carefully, and attach due weight to it, and to the reasons underlying it. This follows not least from the fact that this is an appeal from an administrative decision not a *de novo* rehearing of the matter, and from the fact that Parliament has chosen to place responsibility for making the decision on Ofcom."

> (d) When considering how much weight to place upon those matters, the specific language of section 316 to which we have referred, and the duration and intensity of the investigation carried out by Ofcom as a specialist regulator, are clearly important factors, along with the nature of the particular issue and decision, the fullness and clarity of the reasoning and the evidence given on appeal. Whether or not it is helpful to encapsulate the appropriate approach in the proposition that Ofcom enjoys a margin of appreciation on issues which entail the exercise of its judgment, the fact is that the Tribunal should apply appropriate restraint and should not interfere with Ofcom's exercise of a judgment unless satisfied that it was wrong."

76. The Court of Appeal Judgment endorsed this approach.[25] The matter was not in dispute in these proceedings and we have adopted the same approach in this case.

GROUND 1 - THE "WAIT AND SEE" APPROACH

The matters in dispute

77. Under Ground 1 as set out in its Amended Notice of Appeal, BT argues that OFCOM erred in law in its application of section 316 and acted in breach of its duties under section 3 of the 2003 Act by adopting a 'wait and see' approach based on an assessment of Sky's current supply agreements and the possibility of regulation if evidence subsequently were to emerge that Sky was engaging in harmful practices.

78. The first and most significant criticism that BT levels against OFCOM is that it failed to apply a forward-looking test, in keeping with its duty to include conditions for securing that a licence holder does not engage in any practice which is prejudicial to fair and effective competition. According to BT, since OFCOM had found that Sky continued to have both the market power and the ability and incentive to limit distribution of key content, OFCOM was under a duty to impose regulation to counter the risk of this occurring. BT contends that instead of identifying and addressing this risk, as it was required to do, OFCOM wrongly concluded that the WMO was no longer required having regard to the supply agreements which were in place and the possibility that OFCOM could impose *ex ante* regulation at some future date if evidence were to emerge that Sky was engaging in practices which were prejudicial to fair and effective competition.

[25] Court of Appeal Judgment at [88].

79. In the course of pleadings and oral argument BT advanced an additional argument that OFCOM had not properly considered the proportionality of the *removal* of the WMO. In its Reply, in response to the emphasis in the Defence and the Statement of Intervention on the need for proportionate regulation, BT suggested that where OFCOM identifies both the incentive and ability to engage in practices which impede fair and effective competition, there needs to be a solid explanation for why it is disproportionate to impose conditions to prevent an undertaking acting on its incentives. This argument formed part of an alternative construction of the legal test to be applied under section 316(2) but we consider it separately below because of the importance attached to it in oral argument.

80. The second element of Ground 1, which assumed less importance as the case progressed, is that OFCOM did not act in accordance with its general duties under the 2003 Act. Specifically BT argues that OFCOM acted in breach of its duty to further the interests of consumers by promoting competition, the need to have regard to promoting competition generally and encouraging investment and innovation. BT asserts that OFCOM's decision ignored the need to give other participants in the pay TV market sufficient certainty to allow them to invest in acquisition of content and in new technology without fear that Sky might act strategically to limit distribution of key sports content.

81. In its Defence, OFCOM contends that it correctly applied section 316(2) in deciding that the WMO was not appropriate or necessary to ensure fair and effective competition. According to OFCOM the main element of BT's case rests on a mistaken premise that OFCOM is required to impose a licence condition wherever a licensed entity has market power and there is some degree of risk that it might engage in practices prejudicial to fair and effective competition. OFCOM asserts that it assessed the likelihood of Sky engaging in limited distribution, taking account both of Sky's incentives and whether Sky was or was likely to act on those incentives, an assessment which was rightly informed by the current supply arrangements.

82. OFCOM notes that, contrary to BT's assertion, it was not inconsistent with the forward-looking purpose and intention of section 316 to find that *ex ante* regulation

was not currently justified but that it would keep matters under review. This is just a statement of good regulatory practice, not an indication that OFCOM was relying on the possibility of future intervention.

83. As regards the second limb of Ground 1, OFCOM emphasises that in making an assessment under section 316 it is required to balance theoretical risks against its duties to act proportionately and to ensure that intervention is targeted.

84. Sky submits that in order to act under section 316(2) OFCOM must first identify a practice or arrangement which is or would be prejudicial to fair and effective competition. It may then impose regulation only where it is proportionate to do so, taking account of its bias against regulation. Furthermore, before exercising its powers under section 316 OFCOM must have decided that it is not more appropriate to use its powers under the 1998 Act. Sky emphasises that although the regime is in part forward looking, OFCOM can properly rely on its ability to act quickly in the future and that BT as a sophisticated and well-resourced undertaking should be able to protect its own interests. Sky notes that OFCOM must consider the risks that are concomitant with interference in market mechanisms.

Discussion and conclusions

85. **The scope and effect of section 316.** The first question we need to address is the scope and effect of section 316, specifically of the mandatory wording in section 316(2). The relevant parts of section 316 state:

> "(1) The regulatory regime for every licensed service *includes* the conditions (if any) that OFCOM considers appropriate for ensuring fair and effective competition in the provision of licensed services.
>
> (2) Those conditions *must include* the conditions (if any) that OFCOM consider appropriate for securing that the provider of the service does not –
>
> (a) enter into or maintain any arrangements, or
>
> (b) engage in any practice, which OFCOM consider, or would consider, to be prejudicial to fair and effective competition in the provision of licensed services or connected services" (emphasis added).

86. Although section 316 was the subject of extensive scrutiny in the earlier proceedings

before the Tribunal and the Court of Appeal, the focus of consideration in those proceedings was first the meaning of "competition in provision of licensed services" and thus the scope of OFCOM's power to intervene and second whether OFCOM was required to adhere to an approach based on the prohibitions in EU and UK competition rules. There was no need for either the Tribunal or the Court of Appeal to consider how the mandatory and discretionary wording in the section should be interpreted, and none of the parties suggested to us that these judgments shed any light on the issues we are considering now.

87. At the Hearing BT drew our attention to case law in which the significance of the word "must" has been emphasised. BT argues that these cases show that the use of the word "must" signifies an imperative obligation to act. In the context of section 316(2) this mandatory language means that once a relevant and material risk has been identified a regulatory condition must be imposed as long as one can be identified and that the reference to "conditions (if any)" is simply to cover the possibility that there are no appropriate conditions.

88. We agree with BT that the use of the word "must" in the statutory language needs to be accorded some meaning. It is not equivalent to a power to act. We also note, however, that the 2003 Act accords a broad discretion to OFCOM to include the conditions (if any) that it considers appropriate for securing the stated aims. In order to reconcile these two elements Counsel for OFCOM, suggested that the requirement was for OFCOM to 'apply its mind' to the possible need for regulation and that the duty imposed on OFCOM by section 316, read as a whole, is a duty to impose the conditions, if any, which OFCOM considers appropriate for ensuring fair and effective competition and for securing that providers do not engage in practices prejudicial to fair and effective competition, the consideration implicit in the duty being exercised having regard to all relevant circumstances.

89. **Our conclusion.** We agree with OFCOM's interpretation of the duty imposed under section 316(2). It is clear that the provision does not merely confer a power but requires OFCOM to act, by including a condition in a provider's licence, if it considers that this is the appropriate way of securing that a provider does not engage in practices that are prejudicial to fair and effective competition. BT considers that if a

risk that a provider might engage in such conduct has been identified then the effect of the mandatory wording, notwithstanding the words "if any", is that OFCOM has no choice but to impose a condition unless no appropriate condition can be identified. However, in our view even where a risk of conduct prejudicial to fair and effective competition has been identified, OFCOM does have a broad discretion to determine whether one (or more) conditions are appropriate to address this risk, as well as discretion as to what the precise form of those conditions should be. The obligation is therefore best characterised as a duty to give full and proper consideration to the possible need for inclusion of conditions, rather than a duty to include a condition unless there is no possible condition that could remove or attenuate the risk. We therefore reject BT's claim on this point.

90. Our view is reinforced by the terms of section 317 of the 2003 Act. This requires OFCOM to consider, before imposing a condition under section 316, whether a more appropriate way of proceeding in relation to some or all of the matters in question would be under the 1998 Act, and it precludes OFCOM from imposing a condition under section 316 if and to the extent that it does decide that action under the 1998 Act is a more appropriate way of proceeding. BT suggested that the application of this provision is very limited: a specific carve-out under which OFCOM is relieved of its duty to act under the Broadcasting Act powers if and only if OFCOM has decided to act under the 1998 Act. At the Hearing, however, BT acknowledged at least one further circumstance where OFCOM might quite legitimately decide to take alternative action, namely where it decided to make a reference to the Competition and Markets Authority under the 2002 Act. We consider that section 317 is a specific example of the reason why OFCOM should be considered to have discretion to decide whether including a condition under section 316 is likely to be the most appropriate way of addressing the possibility of a provider engaging in conduct prejudicial to fair and effective competition.

91. **Lack of forward looking assessment.** The second element of BT's principal challenge under Ground 1 is that OFCOM failed to carry out a proper forward looking assessment. BT submits that even if the alternative interpretation of section 316 is adopted, OFCOM was required, and failed, to apply its mind to the risk of Sky acting in the future on its incentive and ability to behave anti-competitively. BT argues that

this failure to assess future risk is clear from the 2015 Statement. It points us to section 6 of the Statement, where it suggests that all of OFCOM's critical reasoning in support of the decision to remove the WMO is by reference to current conditions.

92. OFCOM, for its part, asserts that the 2015 Statement shows that it acknowledged that it was appropriate to consider both current and possible future prejudicial conduct and that it decided that it was not presently necessary to intervene having regard either to present conduct in the market or the realistic prospect of such conduct for the future.[26]

93. We agree with BT that the duty imposed on OFCOM by section 316(2) requires OFCOM to consider the risk or likelihood of possible future conduct as well as what is currently happening in the market. The subsection refers to conditions appropriate for securing that providers do not enter into or engage in practices or conduct which OFCOM "would consider" prejudicial. OFCOM's Counsel took us to paragraph 1.11(iii) of the 2015 Statement which indicates that one of the three main questions OFCOM considered was:

> "What is the likelihood of content holders engaging in the practices identified, taking into account their incentives and current supply arrangements?"

94. Given that both parties rely on the 2015 Statement to support their positions we have had to consider whether the 2015 Statement generally, and the specific passages to which we were referred by OFCOM, do show that OFCOM assessed the likelihood of holders engaging in the practices identified (by implication both currently and in the future).

95. There were two key sections to which we were taken. First, in paragraph 6.23 and following OFCOM sets out its continuing view that there are risks that Sky "might have incentives to not supply other retailers' platforms". This is obviously both a current and a forward looking conclusion. Then OFCOM notes that in considering the likelihood of Sky acting on those incentives it has considered the existing supply arrangements. In this introductory wording OFCOM makes clear that the existing supply arrangements are relevant to assessing the likelihood of future non-supply. In

[26] Transcript Day 8, pp124-125.

subsequent paragraphs OFCOM considers the static and dynamic incentives relevant to supply to various competitors of Sky before concluding, in paragraph 6.29, "We therefore consider that there may be a risk that Sky might not supply its key content to other pay TV retailers." This again appears to be a forward looking conclusion.

96. At the end of the same paragraph (6.29) OFCOM continues:

> "However, we have further considered the relevance of existing supply arrangements for Sky's key content in assessing whether Sky is engaging in a practice of non-supply."

97. This is followed by a description of current supply arrangements, which notes that the majority of these have been agreed outside the scope of the WMO and will remain in force for a period (in the case of Virgin Media, up to 2019) even if the WMO is removed.

98. In paragraph 6.31 there is a conclusion that:

> "This evidence suggests that whilst, in principle, there may be circumstances in which Sky has incentives to withhold supply, it is not currently engaging in such a practice."

99. The following paragraph (6.32) notes that the risk of Sky withdrawing supply from Virgin Media, TalkTalk and BT's Cardinal platform is limited by contractual provisions.

100. Finally, in a section entitled "We have not identified that Sky is engaging in non-supply of the key content" at paragraph 6.36, OFCOM concludes that: (i) with the exception of BT YouView, all of Sky's main competitors have current supply arrangements in place agreed outside the scope of the WMO; (ii) there is no evidence at this time to suggest that Sky will not be able to agree supply arrangements both in respect of new platforms and in the renewal of existing arrangements; and OFCOM "expect Sky to continue to supply its key content widely".[27]

101. **Our conclusion.** The reasoning in the 2015 Statement is telescoped in places and we can understand that parts of the Statement which we have quoted above, read in

[27] 2015 Statement, paragraph 6.37.

isolation, might give the impression that OFCOM had simply established that Sky was currently supplying (i.e. that there was no current non-supply) and concluded on this basis alone that no regulatory intervention was appropriate. Furthermore, it is not clear, even after hearing submissions from OFCOM, whether the statement that OFCOM "expects" Sky to continue to supply key content widely should be read as a conclusion on the basis of evidence or a statement of regulatory expectation. Nevertheless, it is our view that, read as a whole, the 2015 Statement does show both that OFCOM recognised that it should conduct a forward looking assessment as well as considering the current state of play and that it did in fact conduct such an assessment and reach the view that there was no evidence to suggest that Sky would not agree supply arrangements in the future. We therefore reject BT's claim on this point also.

102. The passages cited above relate to the issue of non-supply. The 2015 Statement identified and considered a further risk that distribution of content could be on terms that did not enable fair and effective competition. The specific issues identified in the Statement and in these proceedings are unfairly high wholesale pricing and the requirement for reciprocal supply. The question of whether OFCOM adopted an appropriate approach in assessing these issues is considered under Grounds 4 and 5. For completeness we note that we did not find, on these issues either, that OFCOM failed to adopt a forward looking approach.

103. **Proportionality.** The final aspect of BT's challenge under Ground 1, which assumed more importance as the case progressed, was OFCOM's alleged failure to carry out a proportionality assessment. In its written closing submissions, BT advanced the view that the appropriate way for OFCOM to apply its mind to the question whether to retain the WMO was to conduct what it described as a full proportionality assessment. It referred us to the test for proportionality set out in *Tesco plc v Competition Commission* [2009] CAT 6 at [137] (drawing on the formulation of the Court of Justice in Case C-331/88, *R v Ministry of Agriculture, Fisheries and Food, ex p. Fedesa* [1990] ECR I-4023, at [13]) ("*Fedesa*"):

> "…the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice

> of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued."

104. In our view, the *Fedesa* test is not relevant in the context of a decision to withdraw regulation. The only "proportionality" assessment which is appropriate in this context is one on the lines which BT itself describes in its closing submissions:

> "In order to decide whether regulation (and if so what remedy) should be imposed, OFCOM had to carry out a balancing exercise, properly and expressly considering the relevant risks, the hazards they pose, the benefits of different regulatory options available and the detriment of imposing or removing any particular regulation".

105. In our view the 2015 Statement clearly shows that OFCOM did indeed conduct such a balancing exercise, identifying the risks in the market and the benefits and burdens of regulation and concluding that it would not be appropriate to impose regulation at this time. Having established that regulation was not appropriate, it was not necessary (and it would have been odd) for OFCOM to seek to apply the *Fedesa* principles, identifying which of different possible regulatory measures was the least onerous or whether regulation – which it was not proposing to apply – would produce adverse effects.

106. Both OFCOM and Sky pointed us to OFCOM's general duty under section 3(3) of the 2003 Act to have regard in all cases to the principles under which regulatory activities should be 'transparent, accountable, proportionate, consistent and targeted at cases in which action is needed'. If OFCOM had concluded that the WMO should be retained it would have been required by section 3(3) to ensure that the condition it imposed was proportionate, having regard to the *Fedesa* principles. Where OFCOM is not imposing regulation or, as in this case, is deciding to remove something which is already in place, an assessment that it would not be proportionate to impose regulation is effectively implied by the decision not to impose or to remove regulation. We reject BT's claim here also.

107. **Promoting competition**. The second limb of BT's challenge under Ground 1 can be dealt with very shortly. BT argues that OFCOM did not have regard, in the exercise of its duties, to the requirement to have regard to the desirability of promoting competition and of encouraging investment and innovation (section 3(4)(b) and (d) of

the 2003 Act). OFCOM's response was that it took full account of all its relevant duties, including the duties referred to above, to ensure that regulatory activity is proportionate and targeted, and reached a decision that the WMO was no longer appropriate or necessary to ensure fair and effective competition. In our view, this was a decision which OFCOM was entitled to reach; we have seen no evidence that OFCOM failed to have due regard to any of its statutory duties and we should accord due deference to this exercise of regulatory discretion. We therefore dismiss this claim also.

108. For the reasons given, we find that BT's appeal under Ground 1 fails.

GROUND 2 - INADEQUATE ASSESSMENT OF THE MARKET

The matters in dispute

109. This Ground overlaps substantially with Grounds 3, 4 and 5, all of which rest on an alleged failure by OFCOM correctly to analyse the relevant market or markets and the state of competition in them. In its amended Notice of Appeal, BT argues that OFCOM erred in the exercise of its discretion in determining whether or not there was a risk of Sky engaging in wholesale distribution practices detrimental to the development of fair and effective competition for the purposes of section 316 of the 2003 Act. In particular, OFCOM failed to appreciate not only the existence of such a risk but that Sky was already engaging in such practices, or threatening to do so.

110. In its skeleton argument, BT describes the error as a failure by OFCOM to undertake an adequate assessment of the market upon which it could properly conclude that regulation was no longer required; BT further claims that the analysis that OFCOM had undertaken should have led it to conclude that regulation was still needed, and if anything, needed to be strengthened. Unlike in 2010, OFCOM failed to carry out an "orthodox" competition analysis; and it had exercised its discretion wrongly, taking irrelevant matters into account and ignoring relevant considerations. BT's own evidence and analysis confirmed that the competition concerns identified in 2010 still existed. This was the burden of Mr Williams' evidence on this aspect, echoed by Mr Petter and its expert witness, Dr Padilla. On the approach it adopted, OFCOM simply

did not and could not know whether the WMO had worked as intended as it had not tested its operation against what it was meant to do. Moreover, such findings as OFCOM had made showed that the WMO had not worked and that its earlier concerns about Sky's incentives and ability to harm competition were still present.

111. OFCOM in reply contends that BT has mistaken the nature and purpose of the WMO and the scope of OFCOM's review of it. Instead of being intended as a structural measure to address Sky's market power, it was behavioural in nature, directed at OFCOM's finding in 2010 that Sky had a practice of refusing to supply premium sports content to potentially competing retailers (a finding that was successfully challenged by Sky). Unlike the position in 2010, OFCOM found in 2015 that, despite possible contrary incentives, Sky was supplying widely on terms that allowed effective competition. OFCOM therefore concluded that the concerns it had in 2010 were not present, and the WMO was no longer appropriate. Furthermore, OFCOM contends that it could not take the 2010 Statement as its starting point partly because large parts of it had been found by this Tribunal to be mistaken. OFCOM's expert witness, Mr Matthew stressed in his oral evidence that OFCOM conducted a fresh analysis and did not start from its position in 2010.[28]

112. Sky says BT's complaint is that OFCOM should have started from the 2010 Statement and tested each conclusion to ascertain if there had been a material improvement in retail competition which would allow the WMO to be removed. This would be an incorrect approach and OFCOM was right not to adopt it. Sky disagrees with OFCOM's view that it still had market power, but it considers the method of analysis used by OFCOM to be satisfactory and agrees with the conclusion that it was supplying its content widely and that the WMO was no longer appropriate.

Discussion and conclusions

113. **Failure to take the findings in the 2010 Statement as the starting point.** BT places significant emphasis on OFCOM's statement in 2010 that it would only expect to remove the WMO if the circumstances had changed sufficiently such that there was

[28] Transcript Day 7, p61.

fair and effective competition and Sky no longer had market power. The relevant paragraphs from the 2010 Statement are as follows:

> "We remain of the view that we should review the remedy after three years. We would expect to commence the review three years from the remedy coming into effect. However, we would not automatically expect to remove the remedy after three years. Since our view is that the market power we have identified is enduring, we envisage the removal of the remedy as unlikely.
>
> We would only expect to remove the remedy if the circumstances at the time had changed sufficiently such that there was fair and effective competition. One way this could happen would be if Sky was no longer to have market power. However, the view from our market power assessment is that Sky's position is likely to be enduring, and the remedy is not designed in order to remove market power – rather it is designed to remove Sky's ability to act to exploit market power by restricting distribution channels." (2010 Statement paragraphs 9.299 – 9.300).

In BT's view OFCOM had not established that Sky no longer had market power, but had removed the WMO anyway. Had it worked from its 2010 findings OFCOM could not have come to such a conclusion.

114. At first sight it may seem odd that after the comprehensive and detailed exercise it had conducted in 2010, OFCOM did not use its previous work as the basis for its review.[29] As the 2015 Statement states:-

> "In 2014, we began a review to determine whether, in the light of today's market conditions, there are competition concerns such as to warrant the imposition of regulation."[30]

115. It might have been clearer to use the word "retention" rather than "imposition". It might also have been clearer if OFCOM had explained in more detail in the 2015 Statement why it was adopting a different approach. The 2014 Consultation told something of the story, section 2 of that document referring to the then ongoing litigation and stating that the focus of the review was on "whether the WMO remains (*sic*) appropriate".[31] The 2015 Statement also refers to the still current litigation in

[29] Despite what is said at paragraph 2.5 of the 2014 Consultation, OFCOM clarified at the Hearing that its review of the WMO did not take place pursuant to section 318 of the 2003 Act (which does not apply to licence conditions) but under its general powers (Transcript Day 2, p1).
[30] 2015 Statement, paragraph 1.3.
[31] 2014 Consultation, paragraph 2.8.

respect of the 2010 Statement[32] but this is not developed in the body of the 2015 Statement, which gives no clear explanation of why OFCOM did not use the 2010 Statement as its starting point.

116. OFCOM said in its Defence that the Tribunal's 2012 Judgment changed the backdrop to OFCOM's review and that its earlier view that regulation should only be removed "if there was a major change in the ownership of key rights"[33] was no longer sustainable. At the Hearing, OFCOM's Counsel told us that the impact of the 2012 Judgment and the ongoing litigation were major factors, but agreed that the 2015 Statement itself did not provide detail as to why OFCOM had changed its position on this point.[34] However, Mr Matthew in his evidence to the Tribunal on OFCOM's behalf, was very clear that the Tribunal's 2012 Judgment meant that OFCOM had to start afresh: "[W]e had a CAT finding that substantially removed the main pillar of the 2010 decision. So we started again."[35]

117. Although some further explanation in the 2015 Statement might have been useful, in our view nothing much turns on this. In Section 7 of the 2014 Consultation OFCOM stated that it thought keeping the WMO might be appropriate; by 2015 it had concluded that it was appropriate to remove it. Even BT accepts that OFCOM would be entitled to depart from its position in the 2010 Statement if it did find that there was fair and effective competition.

118. It is clear to us that OFCOM thought that the Tribunal's findings in the 2012 Judgment changed the backdrop to its review of the WMO and that in any case there was enough apparent change in market conduct and conditions to justify a fresh start. We consider OFCOM was entitled to review the operation and utility of the WMO from the starting point that it took.

119. **Lack of an orthodox competition analysis**. Similarly, we think there is little substance in the point that OFCOM failed to carry out an "orthodox" competition

[32] 2015 Statement, paragraph 1.7.
[33] 2010 Statement, paragraphs 1.56 and 9.21.
[34] Transcript Day 1, p156, Transcript Day 2, p43.
[35] Transcript Day 7, p61.

analysis. Whilst there is a certain degree of consensus about the appropriate form of competition analysis, this does not involve the mechanical application of a prescribed set of tests. Competition analyses should be appropriately fashioned to the issues in question and focus on the factors that are most relevant to an assessment of them. Mr Williams conceded in the Hearing that his real objection was not so much to any lack of "orthodoxy" but rather that in his opinion OFCOM had conducted no recognisable competition analysis at all.[36]

120. We think OFCOM conducted a sufficient analysis of competitive conditions to allow it to draw appropriate conclusions. In the 2015 Statement OFCOM described how it had looked carefully at developments in pay TV since 2010, particularly the increased popularity of so-called over-the-top ("OTT") on-demand services (such as Netflix, Amazon Prime and Sky's NOW TV) and more bundling of pay TV services with other communications services (paragraphs 3.5 and 3.13-3.22); it noted reducing barriers to entry for innovative forms of supply and new market entrants (such as EE and Vodafone) but nonetheless focused its attention on "traditional" pay TV retailers as they seemed still to be the most prevalent form of supply (paragraphs 5.48-5.68.). Within this segment of the market, OFCOM examined current market behaviour, noting that market structure and Sky's strategic incentives had changed little since 2010. However, the current situation of what OFCOM described as "wide supply" by Sky to its main pay TV competitors on commercially agreed terms outside of the WMO meant that its previous concerns about non-supply and supply on terms that prevented fair and effective competition were no longer justified.

121. **The extent of the dispute**. In some respects, BT's "orthodox" competition analysis produces similar results to those of the analysis that OFCOM did carry out. Both agree that Sky retains strong or significant market power and that Sky has incentives to withhold or limit supply. Both agree that Sky' premium sports content is an important factor for retail competition but that Sky is actually supplying this widely (although they disagree as to the significance of this supply for competition). They disagree over the purpose of the WMO, the unassailability of Sky's bidding advantages and the effectiveness of retail competition in 2015.

[36] Transcript Day 4, pp28-29.

122. OFCOM emphasises that the aim of the WMO was not to change the structure of the market but to address the concerns it had in 2010 about the limited supply of Sky's premium content, providing consumers with greater choice of provider, more price options and more innovation.[37] BT responds that the WMO was also intended to encourage new entry, to enable other competitors to expand and grow their offering and hence to make competition more effective. Whichever view of the WMO's purpose is correct, it is peripheral to the issue before us, as OFCOM had made it very clear that it did not start from its 2010 findings. Instead it looked at market conduct and conditions in 2015, albeit taking account of what had happened since 2010, including the implications of the Tribunal's 2012 Judgment. Whilst OFCOM agrees with BT that Sky still retains a strong market position, it has changed its view of Sky's behaviour.

123. BT's criticism of OFCOM's approach covers both the upstream and downstream aspects of the market.

124. **The upstream market.** In relation to the upstream market, BT argues that Sky retains an unshakeable advantage at rights auctions because of its superior ability subsequently to monetise any rights acquired. Dr Padilla, appearing as an expert witness for BT, emphasised Sky's strong competitive advantage through what he called the "vicious circle" theory, (whereby the more subscribers one has, the more rights one can acquire, the more one can attract subscribers, and so on).

125. In relation to this theory, we were told by Mr Petter and Mr Williams for BT about the important distinction between customers and subscribers,[38] and its effect on BT's ability to bid for sports rights. The argument they advanced was that it was only through having enough subscribers on its own platform (i.e. BT Sport, supplied by BT) that BT could ever outbid Sky at auction. Only by outbidding Sky in this way could BT build up enough premium sports content to acquire enough subscribers to enable it to compete effectively with Sky at the retail level. The key was BT's ability to "monetise" the content acquired over the short (three year) period before the next

[37] 2015 Statement, paragraph 3.4.
[38] See for example Transcript Day 3, pp164-165 (Petter) and Transcript Day 4, pp13-14 (Williams).

auction. Only paid-up subscribers provided the secure income stream that would enable that to happen.

126. On this view, self-retail was not a substitute for having paid up subscribers on one's own platform, as it did not offer sufficient certainty. BT self-retails BT Sport on Sky's DSat platform.[39] This was facilitated by regulation and in consequence could not be terminated unilaterally by Sky, making it a more certain source of revenue for BT.[40]

127. In fact, Dr Padilla also cast doubt on the proposition that it was only subscribers who mattered when considering whether to bid for rights. For him, both BT's platform subscribers and its retail customers on other platforms could contribute to the necessary monetisation and what mattered was the total number:

> "for the purposes of my analysis […] they are the same in the sense that they are committed customers that you can use to monetise your investment immediately."[41]

Mr Petter's views on BT's self-retail are not inconsistent with this view.

128. It follows from this that BT's ability to monetise its acquired rights may arise from not only a base of "reliable" subscribers but also from BT's self-retail on Sky's network. ✂ […] BT is further able to monetise its acquired rights indirectly through combining BT Sport with broadband and telephony. This was referred to by OFCOM in the 2015 Statement.[42] BT said OFCOM attached too much weight to indirect monetisation of this kind but did not deny that it took place. BT also makes BT Sport available separately to its broadband and mobile customers, as well as by wholesale to Virgin Media.[43] Taking together all the customers who view BT Sport one way or another, BT's sports customer base is arguably ✂ […].[44]

129. Of course, some customers will be more loyal to a particular supplier than others, but taken at its face value we are sympathetic to Dr Padilla's view set out at paragraph 127

[39] See the evidence of Mr Petter for BT, Petter 1, pp140-141, 150(b) and Transcript Day 3, pp151, 153-155.
[40] 2015 Statement, footnote 8.
[41] Transcript Day 5, pp152-153.
[42] See in particular paragraph 6.28 of the 2015 Statement.
[43] 2015 Statement paras 3.39-3.40.
[44] 2015 Statement, Table 3.8.

above. Counsel for BT, in written closing submissions, sought to explain the different approaches, referring to the need to attach different weight to different types of customer when considering bidding for rights, but the essential point about the cumulative effect of different means of monetisation when bidding for sports rights remains.

130. In response to a question from the Tribunal,[45] Dr Padilla considered whether, as in the re-allocation of a rail franchise, or slots at airports, customers would simply follow the rights that were acquired. He agreed this could be so but stressed the relatively short period over which the sums expended in bidding had to be recovered. Even within that short period, some customers would take time to transfer to the new rights owner, and this would affect the new owner's ability to monetise.

131. If customers quickly follow the rights (i.e. the content) that are acquired, Dr Padilla's point becomes irrelevant. Even if they do not, his point becomes weaker, as the "stickiness" of customers would make re-allocation following any future auction more difficult as well. It is not, in this sense, a one way street. Stickiness may reduce the initial gains to a new competitor, but preserves them thereafter. In essence, if customers follow content, then auctions make the market for sports channels contestable, and if they do not follow content then it is not contestable, although in BT's case, self-retailing on Sky's platform would mitigate this to some extent. In any event, both OFCOM and BT, albeit to differing extents, accept that Sky has an advantage in bidding for rights (BT describes this as ✂ […]), and it is this factor that appears to have led OFCOM to turn its attention from the upstream market aspect of auctions to the downstream market aspects of wholesaling and retailing of content.

132. At the Hearing we were referred by Counsel for BT to a Strategy Presentation given by Mr Petter himself in July 2015 which was annexed to Mr Petter's witness statement.[46] This was drawn to our attention both to emphasise the importance of BT's self-retail and to show that BT management had carried out a kind of modelling as part of their strategic thinking. The paper suggests a number of alternative strategies

[45] Transcript Day 6, pp 91-96.
[46] *Plc Board Update Content Strategy*, John Petter, CEO BT Consumer (27 July 2015), see Transcript Day 3 p156.

available to BT. It shows that BT ✂ […].

133. Whilst we do not base our view on one Strategy Presentation, the message it gives is consistent with other evidence as to possibilities of monetisation and of building a portfolio of sports content. We are therefore not entirely convinced by BT's argument that Sky's position as incumbent at rights auctions is ✂ […] and that the vicious circle cannot be broken. Whilst we accept, with OFCOM, that in principle there may be strategic incentives that might combine with features of auction practice to give advantages to the incumbent supplier, we think BT may have over-stated the limits on its ability to monetise the rights that it is able to acquire and its chance of acquiring them.

134. **The downstream market**. In relation to the downstream market, BT criticised OFCOM's finding that Sky was supplying its key sports content widely. It said that much of the alleged new supply was simply Sky self-retailing on new platforms. Sky's NOW TV offering was merely an emanation of Sky itself, despite its novel pass-based delivery model. Virgin Media was already a Sky customer in 2010, and TalkTalk's interest in sports was peripheral to its main operations. In addition, all of the commercial agreements that OFCOM observed had been concluded against the backdrop of the WMO and therefore were not a reliable guide to what would happen after its removal.

135. OFCOM considered the retail market at several points in the 2015 Statement. In section 3, OFCOM examined the operations of the four main pay TV retailers, Sky, Virgin Media, BT and TalkTalk and noted the entry or imminent entry of EE and Vodafone. It noted the increasing presence of standalone OTT services such as Netflix, Amazon Prime Instant Video and NOW TV. These services did not require any buy-through from a basic TV package and provided access to content either on a pay-per-view basis or by monthly subscription. OFCOM further noted the growth of internet enabled devices and the wide range of options now available to consumers to access sports content. OFCOM accepted that these services up to now focused on entertainment and film content rather than sport, and that the take-up of OTT standalone content offerings for sport remained small, but the potential for cross-entry was clear.

136. OFCOM found that Sky retained a strong market position in pay TV retailing, with a share of supply exceeding 50% on a revenue basis, with BT's relevant share below 30%.[47] It then assessed Sky's distribution practice with this background in mind and found that Sky had concluded broadly scoped commercial agreements with Virgin Media and with TalkTalk that went well beyond the confines, both in content and duration, of what the WMO would have required had it been invoked. In particular the agreement with Virgin Media runs until 2019, and that with TalkTalk until 2016.[48] OFCOM also noted the supply by Sky to BT's Cardinal Platform via IPTV and Sky's agreements with a number of companies to supply NOW TV over third party platforms. OFCOM concluded that Sky was not engaging in any practice of non-supply and found no evidence that it would not continue to supply, if necessary by wholesale. We discuss BT's related claim that the prices at which Sky was supplying other pay TV retailers were too high to allow fair and effective competition under Ground 4 below.

137. Dr Padilla and Mr Harman for BT told us that none of this alleged new supply altered the competitive landscape or weakened Sky's market power in any way.[49] But we also heard evidence from Ms Fyfield, Sky's Chief Strategy and Commercial Officer, responsible for its pay TV strategy, that Sky was not interested in denying premium content to any retailer, even actual or potential competitors such as BT. In the new, uncertain, broadcasting world, Sky was interested in earning as much revenue as possible to offset the immense cost of acquiring rights. Given the extent of its investment in football rights over many years it would expect to ensure reciprocal wholesale access to Premier League football rights (Ms Fyfield's evidence explained ✂ […]). But Ms Fyfield presented a credible picture of an extensive engagement by Sky with both Virgin and TalkTalk to conclude deals ✂ […].[50] We therefore accept OFCOM's position on this aspect of its assessment.

138. **The WMO as a backdrop**. On the question of the WMO acting as a regulatory

[47] 2015 Statement, paragraphs, 5.45 and 5.51-5.53.
[48] It was renewed in October 2016.
[49] Transcript Day 6, pp105-108, 18-19 and 23.
[50] Transcript Day 4, pp 113-115.

backdrop, we are also inclined to agree with OFCOM's overall judgement. The argument is not straightforward, however. First of all OFCOM itself warned against relying on the existence of commercial contracts negotiated whilst the WMO was in place (see 2014 Consultation at paragraph 7.32: "In the absence of the regulatory obligation the supply arrangements might have been different or not concluded at all" and, at paragraph 7.35: "We therefore consider that the existing supply arrangements may be of limited value in determining the extent to which Sky would or would not supply… in the absence of regulatory intervention"). Virgin Media ✂ […].[51]

139. Section 6 of the 2015 Statement, however, places extensive reliance on the observed agreements negotiated and in force between Sky and Virgin Media and Sky and TalkTalk, as well as other retailing initiatives and the launch of Sky's NOW TV service (obtainable by IPTV without the need for a Sky satellite dish). In this discussion, OFCOM noted that these agreements were broader in scope than was required by the WMO, were at prices that were lower than the WMO Price and were of a duration that was not linked to that of the WMO. OFCOM stated further that the only current arrangement agreed within the scope of the WMO was BT's YouView agreement with Sky. Mr Harman, as an expert on behalf of BT, opined strongly that the fall-back possibility of compulsory supply, albeit for a narrower range of content and at a higher price, was bound to affect the willingness of Sky to conclude a commercial deal, and that the resulting terms were not indicative of effective competition.[52]

140. OFCOM's Counsel and Counsel for Sky emphasised to the Tribunal[53] that, on the contrary, the existence and nature of these agreements showed that the WMO was no longer a significant factor. Sky was no longer refusing to supply; OFCOM's concern that Sky was not supplying had abated,[54] and in essence the market appeared to be working.

141. BT's Counsel disagreed and said that OFCOM was quite wrong to ignore the concerns

[51] 2015 Statement, paragraph 6.48.
[52] Transcript Day 6, p116.
[53] For Sky, see Transcript Day 9, pp43-44 and for OFCOM see paragraphs 66-68 of OFCOM's closing submissions.
[54] 2015 Statement, paragraphs 6.35-6.37.

it had in 2014 on this point. He referred in his closing submissions to paragraph 7.35 of the 2014 Consultation (see above) and said OFCOM could draw no comfort from the current supply arrangements it had observed[55] either as to pricing or in assessing the state of competition in the market. BT referred also to Virgin Media's and TalkTalk's views on this issue, which it said did not support OFCOM's approach.

142. It is hard to assess the precise effect of the WMO on the attitudes and behaviour of the parties to the supply agreements between Sky and, principally, Virgin Media, TalkTalk and BT. The WMO has never fully been "in force" (see paragraphs 27-29 above) and only the Sky-BT YouView supply takes place on its terms. Sky's agreement with Virgin Media was concluded, according to Ms Fyfield, at a time when Sky thought the WMO had been removed and covered a much wider range of content than the WMO stipulated. TalkTalk's agreement also differs substantially from the scope of the WMO and Ms Fyfield told us that she did not have the WMO in her mind when negotiating either with Virgin Media or with TalkTalk. Ms Fyfield also said that Sky's recent strategy was to promote and supply its sports content across a range of distribution channels, with the intention of maximising its financial returns from a range of sources, although she acknowledged that in relation to BT wider considerations (such as ✂ […]) also came into play.[56] However, we note that Sky has continued current supply arrangements despite the withdrawal of the WMO by OFCOM following the 2015 Statement.

143. It could be argued, as BT does under Ground 4, that OFCOM did not sufficiently examine the complexity of terms, particularly the balance of risk against incentive, of the commercial agreements between Sky and Virgin Media and TalkTalk, so that it could not know whether the WMO had influenced their terms. Moreover, there is a possibility that the mere existence of the WMO, even if no-one involved thought about it, provided a default outcome different from non-supply. Both these points are arguable, but we disagree with the former point when considering Ground 4 and we regard the latter point as, at best, speculative.

144. At the Hearing, and particularly in Mr Matthew's evidence, a more subtle view

[55] Transcript Day 9, pp80-81.
[56] Transcript Day 4, pp120-121.

emerged, namely that OFCOM considered that the WMO may indeed have had some initial effect on the basic incentives of Sky to supply. It may have operated to counter-act a preference on the part of Sky for self-retailing or a strategic desire to prevent competitors from bidding against it for sports rights. At some point, the WMO may have changed Sky's incentives so that non-supply was no longer a sensible or realistic strategy, and negotiations then took place on a willing party basis. In the context of negotiations with Ms Bushell of BT, Ms Fyfield stated that the existence of the WMO changed the starting point for negotiation so that, in her words, ✂ […].[57]

145. Mr Mathew described this as the "nuclear bomb" issue.[58] We take this to mean that the existence of the WMO deterred Sky from refusing to deal at all. We find this plausible but are also inclined to see the WMO as setting a threshold for negotiation. In this sense, once the threshold was crossed and negotiations were under way, attention from then on focused on commercial terms and not on supply or non-supply. It is very hard to be certain when any such change may have occurred, or that it was unambiguously attributable to the WMO. In the future, it would be a major step to terminate supply unilaterally and one that would be likely to attract the attention of the regulator.

146. In any event, OFCOM clearly considered that by the time of the 2015 Statement, Sky's approach had changed from one of limiting supply on strategic grounds, as it had found in 2010 (a view with which the Tribunal did not agree), to one of active promotion and supply of its content across a range of distribution channels. OFCOM also took the view that whatever may previously have been the case, by 2015 the WMO was not having any discernible effect on Sky's conduct. In these circumstances we think that OFCOM was quite justified in its assessment of the existence and terms of commercial agreements that Sky had concluded with other pay TV retailers and that it was correct to judge that the WMO was no longer needed and could be replaced by a policy of close monitoring. We return to this issue under Ground 4 in relation to how Sky's wholesale prices related to the WMO price and under Ground 5 in relation to whether the existence of the WMO affected Sky's willingness to supply on a non-reciprocal basis.

[57] Transcript Day 4, pp78-79.
[58] Transcript Day 7, pp164.

147. **Other questions.** There are three other points to address. These are: (i) how to measure retail competition; (ii) the disputes over what are the correct customer/subscriber numbers; and (iii) whether OFCOM came to a proper judgment on the state of retail competition in 2015. The first two points are closely related.

148. As to how to measure competition in the retail pay TV market, we have touched on this in assessing the vicious circle and bidding for sports rights. We also heard much evidence as to which customers or subscribers should be counted, what the correct figures were and how various competitors were faring. There were obviously some inconsistencies of counting related to including or excluding customers in the Republic of Ireland, the inclusion or exclusion of NOW TV customers in Sky's figures, and there was the question of how to separate out sports pay TV customers from other pay TV customers. These are important matters for market participants, but for our purposes the exact figures are not the point. What is significant in this instance are the overall picture and the overall trends.

149. From this point of view we cannot fault the assessment in the 2015 Statement, particularly the data set out in several tables in Section 3. These show a continued preponderance of Sky ownership of sports rights, and a strong Sky market position measured in revenue terms, but a much more fluid picture (compared to the position in 2010) in terms of numbers of subscribers and variations in how, and in what combinations, premium sports content is available to customers. On the whole we do not consider that the data support BT's view that Sky is pulling away from its competitors, rather the opposite.

150. As to whether OFCOM found that retail competition in 2015 was effective, BT argues strongly that OFCOM was mistaken to regard the wider supply of premium content by Sky as indicating more effective competition. As we have seen, Mr Harman was particularly emphatic on this point.[59] However, we have already found that OFCOM was entitled to adopt the approach to its assessment that was best suited to its regulatory purposes and was not obliged to follow any one particular methodology. In

[59] Transcript Day 6, pp105-8.

this case, OFCOM regarded new technical developments as providing opportunities for wider supply and new entry. Sky was observed to be supplying its key sports content to Virgin Media and TalkTalk on a broad commercial basis. OFCOM noted that none of these companies responded to its consultation in terms that it was unable to compete effectively with Sky and OFCOM accordingly took the view that these companies *were* competing effectively with Sky.[60] OFCOM also clearly took a more optimistic view of the competitive pressure on Sky provided by BT than did BT itself.

151. OFCOM expressed its findings in terms of Sky retaining a strong market position, with incentives to protect that position, but being observed not to be acting on those incentives. Instead the prevalence of wide supply of key sports content meant that Sky was neither withholding supply nor supplying on anti-competitive terms. OFCOM further found that the evidence it had seen did not show that pay TV retailers were unable to compete effectively on the terms of supply offered by Sky. We think that covers the ground of BT's objection and is a sufficient finding that competition was strong enough to justify OFCOM removing the WMO.

152. **Conclusion.** Drawing these considerations together, we find that OFCOM's principal concern in 2010 was the almost complete absence of supply of Sky's core premium sports content on any platform other than Sky's own, the exception being Virgin Media. It therefore devised the WMO remedy. This was attacked by Sky for being too harsh and by BT and others for being too lenient; although partially suspended, it remained available if needed. When it came to reviewing the market in 2014/5, however, OFCOM found that Sky's content was widely available to consumers and was being supplied without recourse to the WMO, with the exception of one supply agreement involving BT. The problem OFCOM had sought to correct was therefore far less apparent and the WMO was in OFCOM's view no longer needed.

153. BT's objection is that this apparent wide supply was deceptive, did not indicate that other retailers could compete effectively with Sky and was all concluded when the WMO was there as a backdrop. We have considered each of these objections and do not find them convincing. In our view, OFCOM is fully entitled to judge whether a

[60] 2015 Statement, paragraph 7.8.

remedy it has previously imposed is or is not justified. As we say in relation to Ground 5, OFCOM is if anything obliged *not* to keep in force a remedy that it considers has served its purpose and is no longer justified, to avoid the risk of unnecessary regulation distorting conditions of competition.

154. We therefore agree with OFCOM that whatever concerns it may have previously expressed, either in 2010 or in 2014, it was entitled to take the view by 2015 that market conditions and conduct had changed and that the wide supply of Sky's key sports content it observed justified the different approach it adopted to analysing the market and the conclusions it drew from that analysis.

155. We necessarily cover here some of the matters considered elsewhere in this judgment, but for the purpose of Ground 2 we do not consider that BT has shown that OFCOM erred in exercising its discretion in assessing competition in the pay TV market and we therefore dismiss BT's appeal on this Ground.

GROUND 3 – INCORRECT FOCUS ON "CONTENT" RATHER THAN ON PRODUCTS PURCHASED AND SOLD

156. This Ground of appeal by BT evolved over the course of the proceedings into a subset of Ground 2, that is to say a further instance of error in the exercise of discretion by OFCOM in its analysis of competition in the market.[61]

157. In its Amended Notice of Appeal, BT claims under this Ground that OFCOM erred in the exercise of its discretion by focusing its analysis on the distribution of "key sports content", rather than on the product that consumers actually purchase, namely sports channels. OFCOM therefore failed to consider properly the package of channels other retailers need in order to compete with Sky.

158. In its skeleton argument BT refers to OFCOM's failure to define the relevant market properly in the manner already considered under Ground 2; OFCOM did not carry out an orthodox competition assessment involving "proper" market definition; because of

[61] Transcript Day 8, pp108-9.

this error, BT claims, OFCOM did not properly assess how competing providers could assemble a sports proposition when faced with Sky's advantages in bidding for rights. BT did not pursue this Ground at the Hearing and described it as a "subset of Ground 2".[62]

159. OFCOM contends that this ground lacks any merit. It says it was not in dispute that Premier League content was very important to viewers and that this content was mainly carried on Sky sports channels. Its analysis took full account of the aggregation of content and its delivery through channels, but none of that denied the importance of content as the driver of competition for viewers. Effective competition with Sky did not require exact replication of Sky's content offering and OFCOM considered there was enough scope and variety in the rights available to allow Sky's competitors to develop.

160. In part this aspect of BT's claim reflects the different views of the likely success of BT's own proposition. Mr Petter, for BT, seemed ✂ […], despite what OFCOM saw as considerable progress since BT's initial acquisition of sports rights in 2012.[63] BT's position in broadband and telephony gave it considerable scope for offering customers attractive triple play packages, where BT Sport could be offered at low or no additional price to broadband subscribers (i.e. "indirect monetisation").[64]

161. In our consideration of Ground 2 we looked at BT's claim that OFCOM should have conducted an "orthodox" competition analysis. BT argues that such an analysis would have led OFCOM to conclude that the relevant product market for the assessment of competition was sports channels rather than key content. We decided (see in particular paragraph 120 above) there was no substance to this claim and that OFCOM understood what Sky's pay TV competitors needed to do in order to operate effectively. We considered OFCOM's assessment of Sky's position in the upstream market and the opportunities available to BT in particular. In addition, we agree with OFCOM's assessment of the significance of Premier League football content to viewers and the fact that this content is mainly carried on Sky's sports channels.

[62] Transcript Day 8, p108.
[63] See, for example, Transcript Day 3, pp131-132.
[64] Transcript Day 6, p97.

162. Sky offered no view on this Ground. We agree with BT's description of it as a subset of Ground 2. For the reasons given above and particularly in light of our findings under Ground 2 in relation to OFCOM's assessment of competitive conditions, we dismiss BT's appeal on this ground also.

GROUND 4 - PRICE

The matters in dispute

163. In its Amended Notice of Appeal BT claims that OFCOM failed to examine properly or at all whether Sky's wholesale pricing was, or risked being, too high to allow retailers to compete effectively. In consequence OFCOM's conclusion that Sky's current, commercially agreed, wholesale prices were not set at a level that prejudiced "fair and effective competition" was wrong and OFCOM had erred in the exercise of its discretion on this point.

164. More specifically, BT says that, in contrast to its approach in 2010, OFCOM had failed to gather the relevant evidence and had not undertaken an economic analysis to ascertain whether Sky's wholesale prices were prejudicial to fair and effective competition. Such analysis should have been based on economic and financial modelling adopting the modified margin squeeze approach used in 2010 and should have examined the position of an hypothetical standalone pay TV operator adjusted to reflect Sky's greater scale.

165. In its skeleton argument BT claims also that OFCOM had not followed up pricing concerns raised by consultees; it had placed unjustified reliance on two commercial deals and even these had not been fully investigated or their significance properly assessed; and it had rejected BT's own pricing analysis, taking the view that it did not raise sufficient concern to merit further inquiry. A further complaint is that the consultation process was itself flawed, with BT and others having been misled by OFCOM into thinking OFCOM would investigate Sky's pricing when it had in fact decided not to do so.

166. OFCOM denies all these claims, principally for the reason that, as with its other complaints, BT has misunderstood the nature of the exercise it was conducting in 2015, which was quite different from that undertaken in 2010. Much of BT's attack centred on OFCOM's failure to investigate in the same way as it had done previously; but OFCOM said it never intended to do this.

167. Sky agrees with OFCOM that it was right not to start from the 2010 Statement. Not only was the 2010 pricing analysis done to construct the WMO remedy (i.e. to determine the WMO Price), rather than to make a substantive finding, but the outcome of the subsequent legal challenge made it unsafe as a starting point for any review. The commercial agreements relied on by OFCOM were important indications that the market had moved on since 2010 and Sky's evidence of its current commercial policy confirmed this. BT's own modelling was unconvincing and irrelevant in the light of real market conditions.

168. The issues in dispute under this Ground overlap substantially with those raised in Grounds 2, 3 and 5. This applies particularly to OFCOM's starting point, its failure to follow the methodology adopted in 2010 and the weight to be attached to commercial terms negotiated "against the WMO backdrop". We refer elsewhere to our assessment of these points, but where it is necessary for the specific argument over Sky's pricing, we go over some of the same ground.

Discussion and conclusions

169. **Failure to take the 2010 findings as the starting point**. BT claims that OFCOM concluded in 2010 that Sky's wholesale prices did not permit fair and effective competition. This conclusion, they say, was based on "conscientious and thorough" economic and financial modelling unlike the "slapdash" approach in 2015. Had the 2010 methodology been applied in 2015, OFCOM could not have concluded there was no issue over Sky's wholesale pricing, and the fact that it had not explained or justified its slapdash approach meant that it was in error anyway. Dr Padilla's evidence[65] showed competition had not improved over the five years and that a

[65] Transcript Day 6, pp16-18 and 23.

regulatory *volte face* was not justified.

170. We have already decided that OFCOM was justified in examining the market afresh and was not obliged to use the same methodology as it used in the earlier examination. We think BT's claim that regulatory consistency requires this is misplaced. OFCOM's powers (see Ground 1) allow it a substantial discretion as to whether and how it should intervene. It is not bound to use any particular analytical or evidential methodology, provided its method of analysis is logical and sound.

171. OFCOM was entitled to examine whether the practices which it was concerned about in 2010 were still present, and to assess their possible harmfulness to fair and effective competition. OFCOM set itself three tasks in the 2015 Statement.[66] These tasks were: (1) identifying key content; (2) assessing whether limited distribution of channels carrying key content could prejudice fair and effective competition; and (3) assessing the extent to which holders of key content were likely to engage in such limited distribution. We are satisfied that in doing so OFCOM put itself in a position to conduct a sufficient and appropriate examination and that in so doing it acted properly.

172. As we have already said, it might have been clearer if OFCOM had explained in more detail in the 2015 Statement why it was adopting a different approach. In essence, however, this is not a point of substance, and it is clear enough what OFCOM was seeking to do and how it approached that task.

173. We do not need to decide on the arguments between BT and Sky about whether OFCOM's assessment of Sky's pricing in the 2010 Statement was correct as those matters are not before us now. It is sufficient for our purposes in this case to decide, as we have done, that OFCOM was entitled to choose the starting point that it did for the review.

174. **OFCOM's assessment of commercial agreements**. It is not disputed that OFCOM placed considerable reliance on what it saw as current commercial deals negotiated between Sky and its retail competitors outside the scope of what the WMO required.

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[66] 2015 Statement, paragraphs 1.11 and 2.18.

BT says that at bottom there is only one new deal (with TalkTalk), as the Virgin Media agreement pre-dated the WMO. BT makes a number of criticisms of OFCOM's approach. First, even if those agreements contain more favourable terms than the WMO, this does not mean there is fair and effective competition; second that OFCOM has disregarded TalkTalk's and Virgin Media's concerns about those agreements; third that agreements concluded against the backdrop of the WMO are not a reliable indicator; fourth that OFCOM's consultation was flawed; and fifth that Virgin Media and TalkTalk are not effective retail competitors to Sky, probably because of the high prices they are paying.

175. BT's first and final points about Virgin Media and TalkTalk concern the conclusions OFCOM drew from its examination, not from its method. The fairness of OFCOM's consultation is a general objection, which we deal with below. The effect of the WMO on commercial negotiations was considered under Ground 2, but we discuss it further in this context.

176. At the heart of BT's complaint, and this was emphasised in evidence and argument at the Hearing, (particularly by Mr Harman, as expert on behalf of BT, and by Mr Matthew for OFCOM) is the question of how OFCOM assessed the relevant agreements and what conclusions it drew from them.

177. OFCOM maintains that its examination of these agreements was sufficient, appropriate and correct. Sky says that its own evidence about market developments means that OFCOM was right to look at market conduct rather than pricing theory, even though Sky disagrees with many of OFCOM's conclusions.

178. The 2015 Statement contains some discussion about the Virgin Media and TalkTalk agreements. This is mainly in section 6 (Assessment of Practices) where OFCOM first examines whether Sky is engaging in "non-supply" of its key content and then examines the terms on which such supply is taking place.

179. The discussion of non-supply centres on Sky's incentives to withhold supply of key content. This matter of Sky's incentives was not decided by this Tribunal in 2012 because it focused on an examination of Sky's actual behaviour. In the 2015 Statement

OFCOM concludes that Sky still has incentives not to supply and notes that in 2010 Sky and the Premier League disagreed with this conclusion (as did Sky in the present case). However, OFCOM found that Sky "is currently supplying" its key content.[67]

180. The 2015 Statement then considers Sky's terms of supply.[68] OFCOM first reviews comments received from BT and Sky but notes that no other consultee had commented directly on current wholesale prices.[69] We consider BT's objection to the consultation process on this point below. OFCOM framed its examination with some care; it referred to this Tribunal's finding in 2012 that Virgin Media's wholesale price did allow Virgin Media to be an effective retail competitor to Sky, and to the Court of Appeal Judgment that the Tribunal had not concluded separately on the question of Sky's wholesale prices in general, and in particular as to whether supply at Sky's "rate-card" price impeded fair and effective competition. The relevant background is set out in the Introduction at paragraphs 53-56 above.

181. This is an important clarification. The concern OFCOM had had in 2010 was in relation to Sky's apparent insistence on offering to supply at wholesale only at its rate-card price subject to discounts increasing with the degree of sales or "platform penetration". It was these related issues of the possible anti-competitive effect of the rate-card price and penetration discounts that the Court of Appeal remitted to the Tribunal for further examination. At the time of the 2015 Statement, this process was still underway.[70]

182. OFCOM then set out its findings on Sky's current wholesale pricing, which OFCOM had obtained from those companies OFCOM had observed to be receiving key content from Sky (2015 Statement, Table 6.1 - there had of course been none to observe in 2010, other than supply to Virgin Media at the rate-card price). OFCOM noted the current prices calculated under the WMO and observed that only the supply by Sky to

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[67] 2015 Statement, paragraphs 6.23ff. See also paragraph 6.31: "it is not currently engaging in such a practice" and the heading to paragraphs 6.35-6.36: "We have not identified that Sky is engaging in non-supply of its key content".
[68] OFCOM's consideration of pricing terms is at paragraphs 6.40-6.64. The remainder of the section examines reciprocal supply, which we consider under Ground 5 below.
[69] Virgin Media's letter of 2 November 2015 is considered at paragraph 191 below.
[70] 2015 Statement, paragraph 6.51.

BT YouView of the standard definition version of SS1&2 was at those prices.[71] The Statement then discusses Sky's current pricing practice ✂ […]. The key finding, which is apparent also from Table 6.1, is that all the prices listed (apart from those relating to supply by Sky to BT YouView) are below the WMO Price.

183. OFCOM further notes that neither Virgin Media nor TalkTalk suggested that the wholesale prices they were paying were at a level which did not enable them to compete, although Virgin Media ✂ […].

184. During the Hearing and in relation to the evidence of Mr Harman and Mr Matthew, BT developed its objection to encompass the extent to which OFCOM had actually investigated these prices and related terms. In particular BT said OFCOM had not properly considered whether ✂ […]. Similarly, said BT, ✂ […] had not been examined either. In consequence OFCOM's findings were superficial and probably wrong, giving no reliable basis for concluding that Sky was supplying at acceptable prices.

185. Mr Harman said that he would have expected OFCOM to examine the terms of these agreements in some detail to see how ✂ […].[72] Mr Matthew accepted in oral evidence to the Tribunal that whilst OFCOM had been aware of ✂ […] they had not done the detailed calculations Mr Harman had outlined.[73] Instead Mr Matthew referred to OFCOM's overall approach of observing commercially agreed contracts at ✂ […] prices below the WMO about which no-one was complaining. In answer to a question from the Tribunal (Ms Potter) about whether he was aware of ✂ […], he said:

> "Yes, we were, at a team level. I personally had not been through the contracts but my team had been through them, and they provided the material…that went into the Statement. They believed that the existence of ✂ […]".[74]

[71] 2015 Statement, paragraphs 6.53-6.54.
[72] Transcript Day 6, pp 140-141.
[73] Transcript Day 7, pp127-128 (Virgin Media) and pp137-139 (TalkTalk).
[74] Transcript Day 7, p133-134.

In explaining why his team had only done "back of the envelope" calculations, Mr Matthew emphasised that the precise ✂ […] prices were not OFCOM's main concern. Instead:

> "(W)e took the view that these looked like commercially negotiated contracts, as one would expect, in a situation where the supplier isn't seeking to withhold or distort supply to stop its rival platform from competing with it. That was the perspective. Within that, we did believe that the prices were ✂ […]."[75]

186. BT's objection is to the lack of rigour that it says this approach involves. Whilst BT would no doubt also dispute OFCOM's conclusion on this point it is by no means clear that the conclusion is wrong. We heard further evidence, mainly from Ms Fyfield on behalf of Sky, about the background to Sky's agreements with Virgin Media and TalkTalk. This showed that the commercial terms were complex and ✂ […]. BT does not allege specifically that the effect of these adjustments would be to take these wholesale prices above those of the WMO. BT's criticism is that OFCOM did not examine the detail with sufficient thoroughness, in particular that it had not fully analysed what prices would be paid in practice ✂ […].

187. We accept Mr Matthew's evidence on this point. Whilst it is true that OFCOM could have attempted to set out more detail on the actual average prices, it had done enough to satisfy itself that its overall conclusion was sound. Taken overall, our conclusion is that OFCOM was justified in concluding that there were at least two major commercial arrangements in the market, agreed between apparently willing parties, with terms and durations going beyond what was required by the WMO and at prices below those stipulated by the WMO.[76] OFCOM was fortified in its view by the lack of any significant comment from Virgin Media or TalkTalk in response to its 2014 Consultation that the prices they were paying did not allow them to compete with Sky.

188. **OFCOM's consultation.** BT further complains that the consultation process did not specifically highlight pricing issues (and so discouraged submissions on the subject) and, conversely, that OFCOM later promised to consult specifically on pricing but changed its mind (thus obtaining evidence too late or not at all).

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[75] Transcript Day 7, p134.
[76] Mr Williams, for BT, said in his first witness statement that ✂ […].

189. The first aspect turns on: (i) whether the 2014 Consultation made it sufficiently clear that OFCOM's concern over "terms which would not enable rivals to compete effectively..." (paragraph 1.6) included price; and (ii) the significance, if any, of the absence from section 7 of any specific question for response on price. OFCOM said that for sophisticated operators in this sector, against a background of a WMO containing a set price, the wording and intent of the consultation document were clear enough. We agree and think BT's point here is wrong.

190. On the second aspect, OFCOM through Mr Matthew and its Counsel admitted that at one stage in the early summer of 2015 a further consultation on reciprocity and on pricing was planned, but in the event the further consultation exercise did not extend to pricing. BT says OFCOM told it at a meeting that a further consultation on pricing was planned and that it was misled. But it was fairly soon apparent to BT (at latest by 28 July 2015) that no such consultation was happening. BT subsequently provided OFCOM with substantial material on how to construct a competitive wholesale price (see discussion below), which OFCOM declined to accept as convincing. We can understand BT's irritation at being kept outside the centre of OFCOM's developing assessment, but, as Mr Matthew explained in his oral evidence, OFCOM decided after its initial consultation that its earlier concerns about Sky's wholesale prices were no longer justified and that it did not need to repeat its 2010 assessment. We do not see that BT was prevented from submitting the evidence it wished to submit on this point. Whilst BT might have preferred to do this in response to a formal consultation, we cannot see that anything of substance turns on this. We do not think that OFCOM behaved unfairly, nor that the consultation process was thereby flawed as BT claims.[77]

191. BT further argued that Virgin Media wrote to OFCOM on 2 November 2015 saying that ✂ […]. Although there was some argument before us as to whether this letter was prompted by BT, in the end we think this does not matter. What does matter is whether OFCOM acted unfairly in regard to Virgin Media's observations. Unlike BT, Virgin Media had not prepared evidence on pricing and appears not to have sought any extension of OFCOM's review in order to submit any. Taken at its face value, Virgin Media's letter tells us merely that ✂ […]. We note the view OFCOM had by

[77] 2015 Statement, paragraphs 6.40-6.64.

then reached on its lower level of concern in relation to Sky's wholesale prices in its review of the WMO. We do not think OFCOM was under any obligation to seek further submissions from Virgin Media, as BT suggests, or from any other party, before reaching its overall conclusion and issuing the 2015 Statement. We understand that BT disagrees with OFCOM's findings on this point, but this is very different from finding that the consultation process was unfair. We note that Virgin Media did not appeal against the 2015 Statement and has not asked to intervene in the present proceedings.

192. **BT's Pricing Evidence.** The evidence BT submitted in October 2015, and which OFCOM declined to accept as convincing, was the modelling or "cost-stack" work described in Mr Harman's evidence. OFCOM's view of it is set out in the 2015 Statement at paragraphs 6.58 to 6.64. Its conclusion is in paragraph 6.62 where it states "We do not consider that the analysis which BT subsequently provided provides sufficient grounds to demonstrate that Sky's wholesale pricing amounts to a practice which is prejudicial to fair and effective competition". OFCOM's position is further elaborated in Mr Matthew's evidence.

193. We have to consider several related questions. First, was the material intrinsically useful and relevant to OFCOM's examination of Sky's wholesale prices? Second were OFCOM's criticisms of it justified? Third, even if insufficient to prove anything on its own, was the material nonetheless enough to put OFCOM on notice that further investigation was needed? We deal with each of these in turn.

194. As to intrinsic usefulness, BT's cost-stack analysis was directed towards showing that a rival hypothetical retailer of smaller scale to Sky would find it difficult to compete effectively. OFCOM's response to this was that it was examining actual competitors, which were not small-scale standalone entrants, but were established companies with multi-play products with which sports content purchased from Sky could be bundled. We note that OFCOM, according to Mr Matthew, had already decided that Sky's currently agreed prices were no longer a serious concern. On the other hand, BT's evidence seems more relevant to the former dispute about whether Sky's rate-card prices were too high and indeed attempts to replicate OFCOM's approach in the 2010 Statement. As we have observed, that case is closed, and OFCOM has now decided to

take a different approach to assessing Sky's pricing, and whether it impedes fair and effective competition. We think the regulator is fully entitled to come to that view.

195. We now turn to OFCOM's criticisms of the BT evidence. These were, first, that the adjustments made by BT were inappropriate to modern conditions, and may not be those of an efficient operator; second BT had used its own retail costs, which gave a misleading picture; third BT's other adjustments exaggerated the cost differences; and fourth that BT had used a higher wholesale price than was current. OFCOM had additional criticisms, but overall took the view that the model had too many defects to be useful and that even modest adjustments to reflect market reality which produced ✂ […] negated the position put forward by BT.

196. BT denied that these were valid criticisms; Mr Harman's evidence showed that BT had used the most comparable data available to it and in particular had made adjustments to allow for the retailer having a triple play operation. However, its main response was to say that the defects, if they were such, could easily be rectified by OFCOM, which had access to the necessary, relevant data.

197. BT's case is in effect that OFCOM did not conduct the same kind of price examination (in effect a "margin squeeze" analysis) as it had done in 2010. BT had attempted to do this with imperfect data; OFCOM had simply ducked the task. BT's point therefore turns on whether OFCOM was right to view market conditions, particularly pricing practices, as sufficiently different in 2015 to warrant a different approach to the one it took in 2010. OFCOM's response is that BT had simply failed to grapple with OFCOM's view that the market had changed so that it was no longer necessary for OFCOM to conduct a margin squeeze analysis, even one adapted to 2015 conditions. We think OFCOM was justified in taking that view.

198. BT's final argument is that even if it had obvious defects, what it showed should have put OFCOM on notice that Sky's wholesale pricing needed further investigation. BT said at the Hearing that whether or not it was complete or focussed its evidence should have been enough to suggest that OFCOM should make further inquiry. Counsel for

BT referred to the *Skyscanner* judgment of this Tribunal,[78] where the Office of Fair Trading was criticised for not following up a complaint submitted at a late stage in the relevant consultation. Counsel for OFCOM said that the *Skyscanner* case was one of judicial review, in which a procedural error in the consideration of evidence would vitiate the decision. In the present appeal on the merits, such a procedural error could be cured by considering the evidence in the course of the appeal itself. That may well be so, but we do not think that is the point.

199. It seems clear to us that OFCOM understood very well what BT's evidence was intended to show if it was validated and calibrated as BT demanded. This evidence was designed to answer the question OFCOM had asked in 2010 (and which had been remitted to the Tribunal by the Court of Appeal in the now discontinued litigation) namely whether a hypothetical, small scale, standalone new entrant buying content from Sky at rate-card prices, with discounts set according to platform penetration, could compete effectively. But, as we observed above, OFCOM was no longer asking that question. Instead, OFCOM in 2015 was examining how the market currently operated, whether (unlike in 2010) Sky's content was being supplied and whether the companies it could see operating on the market were able to compete effectively with Sky at the retail level.

200. In summary, BT submitted to OFCOM a piece of work, which in itself was fairly and honestly constructed, but which had significant limitations in terms of the data it was based on and what it could prove. BT's case is that the defects in it were easily apparent and could easily have been rectified by OFCOM with its access to the necessary data. Moreover, BT's case is that, if this had been done, it would have been obvious to OFCOM that Sky's wholesale prices were likely to be set at a level which would make it hard for a stand-alone small scale new entrant with a single play offering to enter the market and expand in it. But by 2015 this was not the issue that OFCOM was considering.

201. BT's claim here risks going back to the unresolved issues of the 2010 Statement and the subsequent litigation. As we have noted, the issue of Sky's rate-card price and

[78] *Skyscanner Limited v CMA* [2014] CAT 16.

associated discounts was before the Tribunal at the time BT submitted this evidence to OFCOM in October 2015. But OFCOM was by this time looking at the effects of the WMO and the market as a whole in a quite different way, as has been described earlier, that is to say observing commercially negotiated deals on terms going beyond the WMO and at prices which, even after adjustments, were clearly below the WMO Price.

202. Moreover, the companies that were in OFCOM's view providing competition to Sky at retail level were not small stand-alone operators and were all offering triple play propositions (enabling them to cross-subsidise, or "indirectly monetise", their TV offerings if they so wish). The calculations BT had originally provided were not directed towards that factual situation (although BT later added an adjustment for triple play), and would not when originally submitted in themselves have been particularly helpful to OFCOM. It is significant that, although requested to do so in July 2015,[79] BT did not provide OFCOM with details of how it itself was able or not to compete with Sky at the WMO Price it was paying. This would have been much more relevant to OFCOM's assessment of current market conditions.

203. **The WMO Backdrop**. The other complaint of BT under this Ground is again the fact that the prices and terms negotiated between Sky and Virgin Media and TalkTalk were against the backdrop of the WMO. BT pointed to Virgin Media's observation in response to consultation that ✂ […], and to similar observations by ✂ […]. BT said OFCOM had not given these enough weight. After all it had itself warned of this factor in the 2014 Consultation and then appeared to have forgotten all about it. OFCOM initially said that as it observed all the prices in the market to be below the WMO price, this could not be operating as a backstop. If it were, price levels would be expected to be at or just below the WMO price, which they were not. At the Hearing Counsel for OFCOM, in answer to a Tribunal question, explained OFCOM's view in greater detail but emphasised that the point was very simple – the commercial deals observed by OFCOM at prices below the WMO Price were not concluded with the

[79] According to Mr Williams' first witness statement, OFCOM asked BT to provide evidence as to why it was unable to compete at Sky's rate-card price in a telephone call on 28 July 2015 (paragraph 114(f)); the request was repeated at a meeting in October 2015.

WMO in mind.[80] In particular, TalkTalk, which had concluded an agreement with Sky, was not covered by the WMO as it was not a party to the IRO.

204. We discussed this issue under Ground 2 and concluded that OFCOM had properly appreciated the significance of the WMO as a possible backdrop to negotiation. We look at the issue again in relation to Ground 5, where we consider the possible harm to fair and effective competition of Sky's apparent preference for reciprocity in its dealings with BT. For the purposes of Ground 4, we find that OFCOM correctly assessed the possible effect of the existence of the WMO in its conclusions on Sky's wholesale prices.

205. **Fair and effective competition**. Despite BT's concerns about the rigour of OFCOM's analysis and the fairness of its consultation process, BT's main objection to OFCOM's findings on Sky's pricing is that they are in BT's view simply wrong. BT believes Sky's wholesale prices are too high and does not agree with the conclusions OFCOM draws from the examination of pricing it conducted. This belief underlies many of BT's complaints made against the process, and against what it saw as the lack of rigour with which OFCOM examined the pricing issue. As BT has said, Dr Padilla considers that competition in the market is as weak in 2015 as it was in 2010. Disagreement with the Regulator however is not a sufficient ground for a successful appeal. We have found that OFCOM examined the issue appropriately and drew conclusions which BT has not shown to be wrong.

206. **Conclusion**. In conclusion on Ground 4, we do not find that BT had made good its case that OFCOM wrongly assessed Sky's wholesale pricing and its appeal on this ground fails also.

GROUND 5 – GRANT-BACK CONDITION

The matters in dispute

207. In its Amended Notice of Appeal BT claims that OFCOM breached its statutory duties and erred in the exercise of its discretion (and also, in one specific respect, erred in

[80] Transcript Day 2, p61.

law) by not condemning as harmful to fair and effective competition Sky's practice of insisting on a "grant-back condition" – a demand by Sky that other pay TV retailers wholesale provision to it of sports channels belonging to them as a condition for the supply to them of Sky's sports channels – and by not imposing a suitable licence condition on Sky to stop that practice. In its skeleton argument, BT describes this ground of appeal as OFCOM's failure to find Sky's insistence on a grant-back condition as a practice that is prejudicial to fair and effective competition.

208. BT placed emphasis on this Ground at the Hearing, presenting it before its other grounds of appeal and saying it was independent of them and in particular of Ground 1. BT was at the same time keen to confine its objection to a narrow course of conduct, which it characterised as the refusal by an undertaking with market power at wholesale and retail level to supply an input that was essential for other retailers, unless it received supply of a non-essential input in return. BT was not asking OFCOM to condemn what it called "truly reciprocal supply deals" but objected to the element of conditionality or compulsion in Sky's practice, which it said could lead either to non-supply of Sky's channels or the expropriation of the competing retailer's investment. At the Hearing, BT's Counsel emphasised this meant in BT's case losing the means of differentiating its pay TV offering from that of Sky by which it was seeking to close the gap between them.

209. OFCOM denies any error, pointing to the discussion in the 2015 Statement of what it characterised as Sky's "requirement for reciprocal supply", and its conclusions that what was a concern in principle was not borne out in practice. It had examined documents provided to it by BT and Sky about the negotiations between them and decided that BT was not in principle opposed to ✂ […], that negotiations were continuing with the outcome still uncertain and that Sky's alleged insistence on reciprocity had not apparently so far affected BT's ability to differentiate its offering (for example by reference to the exclusive Champions League rights that it acquired) or its commercial strategy generally. Having already decided to lift the WMO, OFCOM had specifically examined the issue of reciprocal conditions and concluded the matter was specific to BT and not suitable for a general licence condition under

section 316.[81] It would keep the market under review and intervene if necessary.

210. Sky argues that BT's claim has narrowed during the case from a broad objection to one that was narrowly focussed on a particular aspect of the current negotiations between it and Sky. As such, BT's final claim is at odds with the plain facts of the negotiations; in particular BT clearly was willing to conclude a reciprocal deal that would include *inter alia* BT Sport on one side and SS1&2 on the other. Sky denies any element of compulsion or conditionality and says BT is simply trying to improve its negotiating position through regulatory intervention.

211. BT advances a number of arguments in support of its claim. It says that: (a) the offensive nature of grant back conditions was accepted by OFCOM in principle; (b) the issue was not confined to BT but extended to other recipients of Sky's key content, in particular ✂ […]; (c) OFCOM could not in law rely on the possible outcome of current negotiations, but had to decide the issue; (d) in any case OFCOM had misunderstood what was happening in the negotiations; and (e) OFCOM had ignored economic modelling evidence put forward by BT which proved that Sky's insistence on grant back was purely tactical and that BT could never rationally agree to supply its own sports channels as a condition for receiving Sky's key content.

212. The emphasis placed on these different arguments changed in the course of the proceedings. By the end, the economic modelling had receded a little from the limelight, but the alleged error of law in awaiting the outcome of negotiations was stressed by BT, and OFCOM's decision to "wait and see" was subject to particularly strong criticism. We consider each argument in turn.

Discussion and conclusions

213. **OFCOM's "acceptance in principle"**. BT's first claim is that OFCOM accepted in principle that Sky's practice was offensive. The starting point here is what OFCOM said in the 2015 Statement. OFCOM first referred to BT and Sky's negotiations after

[81] BT also complained in May 2015 to OFCOM under the 1998 Act against Sky's practice of requiring a grant back of rights. OFCOM refused to grant interim relief and the file was closed on administrative priority grounds early in 2016; see paragraph 57 above.

the 2012 Premier League auction (in which BT won two blocks of Premier League rights).[82] In response to the 2014 Consultation, BT told OFCOM that Sky's conduct was anti-competitive. Sky said its requirement for reciprocal supply was reasonable as between two vertically integrated holders of key sports rights and the reciprocity requirement was not targeted only at BT.[83]

214. OFCOM issued a supplementary consultation on reciprocal supply in July 2015. This asked whether requiring reciprocal supply could amount to non-supply, or whether it would neutralise competitive differentiators of other pay TV retailers, undermine their incentives to compete in, e.g. channel development or affect their willingness to bid for sports rights.[84]

215. In relation to possible non-supply, BT's response was similar to its current claim, and included the modelling evidence that we consider below. Sky's response also reflected the position it has taken before us and referred to BT's then current complaint under the 1998 Act as a more appropriate way to proceed. ✂ […], which also responded to the Reciprocal Supply Consultation said that ✂ […].[85]

216. In relation to possible effect on fair and effective competition, BT referred to appropriation of its investment, preventing it from "catching up with Sky" and harm to consumers from Sky paying BT to compensate for its losses leading to higher prices. Sky said BT could not expect to have access to all Premier League matches when Sky would not have this (which would be the effect of non-reciprocal supply of Sky's key content to BT). It could differentiate its product in other ways. Virgin Media was an effective competitor to Sky despite having similar Premier League football content; and BT would not be dis-incentivised from bidding for sports rights as wholesaling any rights won to Sky was a good way of monetising the rights.[86] Many of these arguments have been put to us in this case in very similar terms.

[82] 2015 Statement, paragraph 6.65.
[83] 2015 Statement, paragraphs 6.66-6.68.
[84] 2015 Statement, paragraphs 6.69-6.70.
[85] 2015 Statement: BT at paragraphs 6.71-6.73; Sky at paragraphs 6.74 and 6.76-6.78 and TalkTalk at paragraph 6.75.
[86] 2015 Statement: BT at paragraphs 6.79-6.80 and Sky at paragraph 6.81.

217. OFCOM's assessment of the issue was that it found Sky had a strong market position at wholesale and retail level in pay TV and that Sky's key content was an important factor in that position. There was in principle a potential concern in this situation as a competitor might change how it supplied its own content to the possible detriment of competition. OFCOM referred to the concerns set out in its Reciprocal Supply Consultation, which we described earlier.[87]

218. OFCOM also noted in its 2015 Statement that in practice this was an issue specific to BT. In deciding that it was not clear that its concerns were borne out in practice OFCOM took account of a range of factors as follows:

(i) BT's behaviour during its negotiations with Sky in 2012-2013, before BT acquired rights to broadcast Champions League football, in particular that BT had not ruled out ✂ […];[88]

(ii) BT apparently not ruling out ✂ […]; now that it had Champions League rights, which would reduce any harmful effect on BT of a reciprocal deal;[89]

(iii) BT continuing to invest heavily in bidding for sports rights despite not having access to SS1&2 on its YouView platform until granted by this Tribunal in November 2014;[90]

(iv) BT's continued policy of monetising its sports investment (for example by bundling BT Sport with its broadband service on Sky's DSat platform, to which it had access by regulation) despite Sky's continued requirement for reciprocity;[91]

(v) the then current negotiations between BT and Sky being on-going, so that positions adopted in negotiation could not reliably show whether any deal that resulted would be harmful to competition;[92]

[87] 2015 Statement, paragraphs 6.82-6.84.
[88] 2015 Statement, paragraph 6.85.
[89] 2015 Statement, paragraph 6.88.
[90] 2015 Statement, paragraph 6.89.
[91] 2015 Statement, paragraph 6.89.
[92] 2015 Statement, paragraph 6.90.

(vi) the economic modelling submitted by BT not being reliable evidence that Sky's requirement of reciprocal supply amounted to non-supply or that reciprocal supply would lead to consumer harm.[93]

219. Whatever is made of these factors, and BT disputes most of them, it is clear to us that OFCOM's judgement that its concerns did not at that point require the WMO to be retained, or any other intervention to be imposed, was clearly based on its observations of the facts and evidence it had gathered during its consultation process and not on some arbitrary judgement.

220. We deal with OFCOM's assessment of the negotiations between BT and Sky and of BT's modelling evidence later. As regards OFCOM's findings on BT's continued investment in sports rights and its various means of monetising them, we found Mr Petter's evidence, which we considered in some detail under Ground 2, to be helpful here also.

221. **BT and sports rights**. Mr Petter described BT's experience in bidding for sports rights, in 2012 and later up to 2015. BT had spent nearly £1.5 billion, ✂ […]. Mr Petter also described BT's self-retail arrangements with Sky and TalkTalk[94] and its wholesale arrangement with Virgin Media. He accepted that most of these customers were triple play, i.e. receiving broadband and telephony also from BT, although, in the case of Sky, they were, he said, strictly speaking dual play customers who received BT sports content delivered on "someone else's pay TV platform".[95] He agreed that most of Virgin Media's customers would receive BT Sport in a Virgin Media triple play bundle. Mr Petter agreed with Counsel for OFCOM that BT had nearly ✂ […] sports pay TV customers, although he stressed that some were more valuable to BT than others.

222. Mr Petter described the value to BT of being able to self-retail BT Sport on Sky's DSat platform. In answer to a question from the Tribunal as to what BT would have done if it had obtained all rights to broadcast Premier League football, he said:-

[93] 2015 Statement, paragraphs 6.86-6.87.
[94] Transcript Day 3, pp28-29.
[95] Transcript Day 3, p59.

"✂ […]"[96]

223. We consider the significance of this later in relation to the value of BT's modelling evidence and what it meant for BT's negotiations with Sky. We merely note here that over the period that is relevant for OFCOM's consideration for the purposes of the 2015 Statement, it appears that BT was indeed adding significantly to its sports rights portfolio, investing heavily in that task, and had built up a very substantial number of customers, many on a double or triple play basis, from which it could monetise that investment. We can find little to fault in OFCOM's assessment of these matters.

224. **Whether the issue was confined to BT**. Before considering the negotiations between BT and Sky and BT's economic modelling evidence, we deal briefly with Ofcom's view that the issue of reciprocity was confined to BT. The arguments here are not always consistent. BT argues that the issue of unacceptable grant back requirement was not confined to it but was a general practice by Sky. BT also submitted a complaint under the 1998 Act on this issue to OFCOM, suggesting that it was the victim of an illegal abuse of dominant position. Sky appears to admit freely that requirements of reciprocity are not confined to BT, ✂ […] . OFCOM takes the view that the issue was confined in practice to BT, yet it has closed the Competition Act investigation and promised future action, if necessary, under the generally applicable licence provisions of section 316.[97]

225. The main effect of a requirement of grant back or reciprocity arises if the subject of the requirement has rights to give. In practice only BT has significant sports rights in which Sky might have any interest in receiving, namely the 25% of Premier League football rights that it acquired at the most recent auction, so it is only BT to which the issue currently applies. We think therefore that OFCOM is justified in considering that this is the relevant issue.

226. **OFCOM's assessment of negotiations.** We now consider OFCOM's assessment of the negotiations that were current in 2015. We heard much evidence as to the

[96] Transcript Day 3, p151.
[97] Transcript Day 1, pp143-144; transcript Day 2, p51; transcript Day 9, pp30-31.

negotiations in progress between Sky and BT and the current state of supply between them. Since the lifting of the WMO following the 2015 Statement, ✂ […]. That is all interesting factual background but it is strictly irrelevant to the question we have to decide, which is whether OFCOM's assessment in the 2015 Statement of Sky's requirement of reciprocal supply was correct or was an error either of law or discretion. We first address some particular points raised by BT.

227. **The Tribunal's IRO Ruling**. BT's first point is that this Tribunal, in ruling in November 2014 on its request to extend the terms of the IRO to BT's YouView platform, said, in terms, that Sky's reciprocity requirement should not be used by Sky to deprive BT of the fruits of its large investment in football broadcasting rights and of the competitive gain from that investment.[98] We refer to this judgment in the Introduction (see paragraphs 27-30 above). We have considered what the President said and are of the view that, in the context of the Tribunal's consideration of whether the then existing IRO should be extended to BT's IPTV offering, it is an understandable comment, but one which tells us little about whether OFCOM should regulate to prohibit a particular requirement of reciprocal supply by Sky vis-à-vis BT. At the Hearing, Counsel for BT referred to the President's statement as "indicative of an instinctive analysis".[99] We consider that this is an accurate characterisation and the context indicates that no more should be read into it.

228. **The Court of Appeal Judgment**. The second point is put by BT as an error of law, and as such was emphasised by BT as the case proceeded. BT claimed that by basing its decision to withdraw the WMO, and not to intervene in any other way against the "grant-back condition", on the fact that negotiations were continuing between the parties, OFCOM was acting contrary to the decision of the Court of Appeal in BT's appeal against the Tribunal's 2012 Judgment. The Court of Appeal, in finding that the Tribunal had failed to decide the issue of whether OFCOM's concern about whether Sky's prices to BT were harmful to competition because it found that negotiations had not concluded, said:

> "If such an outcome was unknown, then it cannot be said that this must remove

[98] Decision of 14 November 2014 at [67], per the President.
[99] Transcript Day 8, p7.

the basis for a competition concern."[100]

229. BT said that this finding applied just as much to a regulator as it did to a tribunal. OFCOM said that on the contrary, as a regulator, it had continuing duties to monitor competitive activity and to act as needed. It could not be bound to act when action was inappropriate and was fully entitled to await the outcome of negotiations. Sky naturally agreed with this view.

230. In so far as relevant to these proceedings, we describe this judgment in the Introduction (see paragraphs 53-55 above) and have considered carefully what the Court of Appeal said. In the case in question, essentially, the Tribunal, after considering at length the actual conduct of Sky with regard to possible restriction of supply, had observed that BT and Sky were still negotiating a possible supply agreement and had taken the view that it was not necessary for it to decide on the correctness of OFCOM's concern about Sky's price terms, as the terms of supply had not been finally settled between the parties. The Court of Appeal found that the Tribunal ought to have decided whether Sky's prices to BT were too high to allow it to compete effectively, as well as the more general questions concerning the level of Sky's rate-card prices and the effect of its associated discounting practices. This was in the context of an appeal against OFCOM's decision to impose the WMO because of its main concern about non-supply of key content, and its other concerns about price levels.

231. In the case before us, we have a different issue, which is whether OFCOM, as a regulator, is entitled to decide that the fact that negotiations had not concluded meant that the positions taken by the parties in negotiation are a poor guide to the final outcome, which may yet prove benign in competition terms. In other words, either Sky's insistence on reciprocity may not be maintained, or BT and Sky may agree a reciprocal deal that is not harmful to competition. In these circumstances, can the regulator reasonably and legally "wait and see"? We do not think that the Court of Appeal intended to lay down a general principle that a regulator in OFCOM's position is not permitted to judge whether or not continuing negotiations between major

[100] Court of Appeal Judgment at [99] cited at paragraph 54 above.

commercial parties would render intervention premature or misguided. We think that in this case, its decision to do so is well within OFCOM's regulatory discretion.

232. **Crystallisation**. A closely related issue is BT's claim that Sky's requirement for reciprocity is a practice that has "crystallised", that is to say it is already a clear and established practice which is prejudicing fair and effective competition. OFCOM and Sky take the opposite view, namely that it is instead something which might lead to such a practice if the negotiations result in either non-supply or supply to BT on terms harmful to competition. OFCOM pointed to a link between BT's argument that Sky's tactic was already a crystallised practice requiring action under section 316 and its argument under Ground 1 that it must intervene if there was a risk of harm to competition. We are not persuaded by BT on either point.

233. We found Sky's observations helpful in considering this question. Sky pointed out that all negotiation involves the putting forward of positions involving "conditionality" or even "compulsion". What matters, however, is not the posture adopted in negotiation but the result. Ms Fyfield for Sky freely admitted that requiring reciprocity of supply was a standard "practice" for Sky. However, we think Sky's general point that this is essentially a negotiating position remains valid.

234. We therefore agree with OFCOM that the issue of Sky requiring reciprocity as a condition for wholesale supply had not "crystallised" at the time of the 2015 Statement.

235. **What the negotiations showed**. We heard much evidence of what had, and what had not, been the subject of negotiation between BT and Sky from 2010 and before, down to the present. The various offers and counter-offers were considerably affected by the timing and outcomes of various rights auctions. Thus negotiations re-started after BT gained some Premier League rights in 2012. BT's success in obtaining Champions League rights also contributed. Clearly there was some interruption in May 2013, when negotiations appear to have ceased and BT submitted its complaint under the 1998 Act to OFCOM. ✂ […]

236. Ms Fyfield, for Sky, gave evidence that, at least since she had taken over

responsibility for Sky's conduct in this area, Sky had wished for ✂ […] To restart discussions Sky would consider ✂ […]. Ms Fyfield had met her newly appointed opposite number at BT (Ms D. Bushell) on 3 July 2015 (we were shown both attendees' differing notes of that meeting) and Sky expected ✂ […].. OFCOM had seen at least one of the notes of this meeting before the 2015 Statement was issued.[101] We have referred previously to Mr Petter's Strategy Paper to BT's Board of 27 July 2015. It is not clear to us whether or not OFCOM had seen this prior to the 2015 Statement, which does not refer to it. If it had, OFCOM would have been confirmed in its view that the outcome of the negotiations was still uncertain.

237. From this consideration of the negotiations between Sky and BT up to the date of the 2015 Statement, and from what has occurred subsequently, we are inclined to accept OFCOM's view. We do not think that BT is right to say that a deal between the parties was unattainable, and what we see is two major companies, each with something to offer the other, working towards an agreement of some kind. We do not therefore accept BT's case that these negotiations had already failed and that Sky's behaviour in some way constituted a relevant practice for the purposes of section 316.

238. It is not for us to consider, down to the last commercial detail, who had offered what to whom. In any event, a major problem in assessing the conduct of such discussions is their interplay with actual or possible regulation. It would be reasonable to assume that at least in the second part of 2015, BT thought it had a reasonable chance of securing a renewed or even a strengthened WMO enabling it to obtain supply at least of SS1&2 without any grant-back. That may explain the failure of the parties to reach any agreement at that time. Accordingly, we find that OFCOM is entitled to note that each party may adopt particular positions in negotiation, but that these are not a reliable guide to whether the final outcome of the negotiations will be acceptable in competition terms.

239. Since November 2015, the situation has changed. Putting it bluntly, BT's attitude to current negotiations is bound to be affected by how it rates its chances of success in the case before us. The same must go, at least to some extent, for Sky. This situation is

[101] Transcript Day 9, p21.

an inevitable consequence of the possibility of regulatory intervention.

240. **The Dryden-Padilla Models and the Caffarra critique**. We now examine the view OFCOM took of BT's modelling evidence. BT argued that it had, during the course of OFCOM's review, and in preparing its complaint under the 1998 Act, commissioned detailed modelling work from Dr Padilla (involving also his colleague, Neil Dryden), which resulted in a range of exercises modelling static and dynamic incentives with specific reference to the grant back condition. These had been provided to OFCOM; but OFCOM was not persuaded that further work was warranted.

241. The models demonstrated, so BT said, that it would never be profitable for BT to accept supply of Sky's key sports channels on condition of granting back to Sky its own sports rights, and that Sky knew this to be the case. The models further showed that the "vicious circle" theory was correct and that BT would be unable to bid successfully against Sky in rights auctions if it accepted the grant back terms.

242. OFCOM's view of this evidence is set out in the 2015 Statement at paragraphs 6.86-6.87. OFCOM made a number of specific criticisms and concluded that the models were not reliable or helpful for its present purpose. In this appeal, Mr Matthew, one of OFCOM's economic directors, gave further evidence of OFCOM's criticisms of these models, and why OFCOM had not used them in its assessment.

243. If what BT claims is right, this evidence would be compelling as it would confirm BT's claim that the current negotiations are bound to fail and that the insistence by Sky on grant back amounts to a refusal to supply. We should note, at least in passing, that however compelling the models may or may not be they appear to have played little or no part in informing BT's actual negotiating position with Sky. When asked by the Tribunal whether he was aware of the models when negotiating, Mr Petter for BT said:-

> "This is a regulatory topic and therefore, being frank, it is not something I would consider because my remit is commercial. Therefore it played no part in the negotiations at all."[102]

[102] Transcript Day 3, p150.

244. Sky put forward as an expert witness Dr Cristina Caffarra, who provided a detailed critique of Dr Padilla's models. Our consideration of these two expert opinions, including what we gained from the concurrent examination of expert witnesses (see Introduction, paragraphs 17-18 above) led by Professor Colin Mayer of the Tribunal, tells us the following.

245. There were two key assumptions in Dr Padilla's static model. The first was that everyone was in the market and there was no outside margin in aggregate. The second was no wholesale payments and in particular no per-subscriber fees. Dr Padilla had done some further modelling to look at the effect of introducing a market elasticity in the context of a "choice model" but he concluded this did not materially affect his results.

246. Dr Padilla also modelled the effect of including wholesale payments but concluded they raised problems about consumer responses and consumer welfare. In particular, based on the assumptions he made about the amounts that would be paid to BT to induce it to accept the grant back condition (and the corresponding amounts that BT would have to pay to Sky), the welfare losses would be very substantial. Essentially, retail prices would be higher than consumers should be expected to pay. Furthermore, sensitivity analyses suggested there would also be consumer losses for a wide range of assumptions about the cost to BT of accepting reciprocal wholesaling generally.

247. The main conclusion to emerge is that there are different underlying concepts behind Dr Padilla's model and Dr Caffarra's criticism. Dr Caffarra's approach was one in which, in the absence of transaction costs, there would be efficient outcomes from negotiation.[103] The implication of this was that there was no explanation for the existence of the grant back condition in Dr Padilla's model. Dr Padilla's starting point was that because of mistrust between the parties and the possible intervention of regulation, negotiations would not result in efficient outcomes and Sky was justified in requiring a grant back condition.

248. Dr Caffarra argued that Dr Padilla should have derived the grant back condition from

[103] Referred to as a "Coasian" approach after its originator Professor Coase.

the market imperfections instead of assuming it arose from tactical considerations. Once the grant back condition was assumed, in the way Dr Padilla did in his model, then the fact that BT would reject it and there would be no wholesaling of Sky Sports followed immediately. These results were not therefore intrinsic features of the model as it was formulated but followed from arbitrary assumptions made by Dr Padilla. Without these assumptions, according to Dr Caffarra, negotiations would yield the efficient outcomes predicted by efficient negotiation. Put simply, Dr Padilla's conclusion follows from his assumptions and is not an inherent characteristic of the market.[104]

249. We note that despite Dr Padilla's model predicting that negotiations between BT and Sky are hopeless, they are nonetheless continuing. This may be because the parties are simply unaware, as was Mr Petter, of the predictions of Dr Padilla's modelling (although if nothing else, the present litigation should have brought it to their attention) or because they choose to act inconsistently with the model. However, we prefer the view that agreement with or without an element of reciprocity, or grant back of some kind, is not inconceivable and Sky's requirement of grant back is neither irreversible nor impossible. In this sense it is not a "take it or leave it offer" but one of many terms that are currently under consideration. We consider below whether any resulting agreement might or might not prejudice fair and effective competition.

250. In summary, we find that OFCOM was fully entitled to give little weight to the results of Dr Padilla's modelling in the 2015 Statement and that BT's claim to the contrary fails.

251. **OFCOM's decision to "wait and see"**. We turn finally to OFCOM's decision to "wait and see". We considered the legality of this decision under Ground 1 and concluded in favour of OFCOM. The question we now consider is whether, having regard to all the work done and the assessments undertaken, and noting the substantial measure of agreement between OFCOM and BT (although not with Sky) as to the

[104] We have not seen the need to deal specifically with the content and conclusions of Dr Padilla's dynamic effects model, which were not addressed by Dr Caffarra and did not form part of the "hot tub" exercise. We have considered BT's incentives to invest in sports rights and its behaviour in doing so, together with the possible effects of the "vicious circle theory" elsewhere in this judgement (paragraph 148 *et seq*.) and believe that is sufficient for our purposes.

state of competition in the market, OFCOM was nonetheless right, as a matter of discretion (and in one additional respect as a matter of law) to withdraw the WMO and to adopt a "wait and see" approach as regards Sky's behaviour on key content supply generally and its requirement for reciprocity in particular.

252. We start with what OFCOM said in the 2015 Statement. The conclusion on this aspect is in section 7.[105] The essential finding is at paragraph 7.10, where OFCOM states:

> "Whilst we recognise that there may be concerns in principle given Sky's strong position in the market, in practice the evidence shows that Sky is supplying widely…".

The decision to "wait and see" is contained in paragraphs 7.16 and 7.17.

> "Should evidence emerge that Sky was engaging in practices which are prejudicial to fair and effective competition, we will re-assess the need for ex ante regulation. […] Similarly we would be concerned if there was evidence of Sky introducing unreasonable terms into its supply contracts […]"

253. These findings clearly extend either to the situation where negotiations failed and Sky was in effect not supplying key content, or to one where its insistence on reciprocity was restricting a competitor's ability to compete as hard as it otherwise would. Before setting out our conclusion, we deal with three further arguments raised by BT against OFCOM's decision not to intervene against the grant back condition and also set out some broader considerations.

254. **Supply of an essential input**. BT argued that for a company in a strong or dominant position to refuse to offer a key input to a competitor unless it was offered a non-essential input in return was straightforwardly anti-competitive, whether under Article 102 TFEU, Chapter 2 of the 1998 Act or section 316 of the 2003 Act. In BT's view it is the conditionality or compulsion that gives rise to the mischief. BT would either give up something it needs in order to compete, or lose its ability to differentiate and the benefits of its investment in sports rights. BT said this was akin to an abuse of dominance.

[105] See also the summary in paragraph 1.25 of the 2015 Statement: "We will continue to monitor Sky's practices to determine whether regulation might be appropriate in future."

255. OFCOM disagreed fundamentally with this approach, as predictably did Sky. OFCOM, although it had found Sky's key sports content to be a major contributor to its market power,[106] preferred to assess whether in fact and in context Sky's insistence on reciprocal supply would harm competition. Whether a reciprocity requirement harmed competition depended on a complex assessment of the reasonableness of each party's position, the nature of the key content in question and what content each party actually holds.[107] Sky said the input in question was not necessarily essential, and if BT had a complaint it should take individual action rather than seeking a general licence condition.

256. We prefer OFCOM's approach. BT's conclusion, rather like Dr Padilla's modelling, is the inevitable result of its assumptions. It is in our view more sensible to assess the economic significance of a particular practice in the light of all the circumstances rather than to condemn by characterisation.

257. **Assessment of harm to competition**. BT's argument described above assumes that non-supply of Sky Sports channels would harm competition. A related question is whether any reciprocal deal that might result would harm competition. Again, BT argued that it should already be obvious to OFCOM that a requirement of reciprocal supply would be harmful to competition as it would deprive BT of a key differentiator, and weaken its competitive offering. OFCOM said this was essentially the same question as how it should assess the risk of damage to competition, and that there were no hard and fast answers in advance of proper assessment. We agree. All these points are part of the question of whether, having decided to lift the WMO on the basis that it was no longer justified in the present circumstances, OFCOM was right not to regulate immediately to prohibit Sky's requirement of reciprocity of supply. We do not see how it can be said as a matter of theory that reciprocal supply of Sky's sports channels would necessarily damage competition; it depends on the circumstances, which must be assessed, as OFCOM says it will do as required.

258. **Monitoring**. OFCOM's Counsel emphasised at the Hearing that OFCOM was monitoring the market on a frequent basis and the threat to intervene if required was a

[106] 2015 Statement, paragraph 1.19.
[107] Transcript Day 2, p51.

serious one.[108] BT expressed some scepticism as to whether any intervention would be swift or timely enough to avoid harm to competition. Sky's views predictably were that no intervention would be needed anyway in this case, so the point was moot.

259. We accept that the vision of a regulator acting swiftly and decisively may not always in practice accord with reality. However, we see no reason to doubt the earnestness with which OFCOM has put this point forward, or the seriousness with which it takes the possibility of players in the market not behaving as it would wish. OFCOM pointed to the speed with which it answered BT's request for interim measures in its complaint under the 1998 Act in 2013. The fact that the response was negative does not belie the point about speed of response. So we do not think OFCOM's undertaking to monitor the market closely and to intervene as necessary can be idly dismissed.

260. It is true that the section 316 procedure is not inherently swift as there is normally a need to consult and consider the impact of possible measures on the relevant sector as a whole. However, we think OFCOM is sufficiently focused on the relevant issue in this instance and would in any case, before using its section 316 powers, have to consider under section 317 whether action under the 1998 Act would be more appropriate.[109]

261. **Broader considerations.** There are also some wider points to take into account. OFCOM's emphasis on close monitoring of the market to see if further intervention is needed is to some extent just a statement of the obvious; OFCOM should always be ready to intervene if it judges it to be necessary to prevent harm to competition. BT argues that if OFCOM can see the problem, namely that a reciprocity requirement is not welcomed by BT and so far has not been agreed, it should act now to take the implied threat of non-supply out of the equation. BT accordingly asks for an order targeted at Sky's insistence on a grant-back condition as a term of supply. We make the following observations.

262. First, the decision by OFCOM to withdraw the WMO and to monitor Sky's behaviour is an exercise of its regulatory judgment. As noted at paragraph 75 above, we should

[108] Transcript Day 9, p30.
[109] Transcript Day 1, pp143-144.

not interfere with Ofcom's exercise of judgment unless we are satisfied that it is wrong, which is not the case here. Second, a "targeted" measure may sound superficially attractive but regulatory experience suggests that such a measure itself rapidly becomes a target for evasion, and leads to the need for further, less targeted, regulation to deal with loopholes and anomalies. It is not in our view wise to start such a process.

263. Finally, and perhaps most importantly, we find that OFCOM's overall assessment of the market situation is perfectly plausible. The market does seem to be changing rapidly. There is much innovation and the well-established pay TV supply model and the position of the players in it may not be as secure as it now appears. We note Sky's evidence that in the next Premier League auctions Sky or BT may be joined by other companies such as ✂ […].[110] Viewed in this light, it appears entirely justified for OFCOM to adopt a cautious, non-interventionist approach. BT would say caution requires intervention, but we disagree and in any case that is for OFCOM to judge, not BT.

264. It is a unifying theme of BT's complaints under all of its grounds of appeal in these proceedings that OFCOM ought to be intervening to regulate this sector. But it is important to remember that regulation is not a "one way street", and it is not only failure to intervene that can be problematic. There may be danger also in wrongly based intervention. We have already pointed to the effect that the possibility of regulatory intervention may have had, and may still be having, on the course of negotiations between BT and Sky. We would expect OFCOM to take into account both the advantages and disadvantages of continuing to regulate the wholesale supply of key sports content in any decision to intervene once again in this market.

Tribunal conclusion on Ground 5

265. We now set out our overall view of BT's Ground 5. We have examined each of the arguments put forward by BT and the evidence advanced in support and conclude as follows.

[110] Transcript Day 4, pp114-115.

266. First, we think OFCOM is justified in its assessment that, whilst a grant back requirement might raise concerns in principle, in practice these were not evident. We find that OFCOM examined the state of the market and conduct of parties with some care, and BT has not persuaded us that OFCOM's conclusion is wrong.

267. Second, whilst Sky freely admits that its practice of seeking reciprocity in respect of Premier League football rights applies generally, OFCOM is correct that the only company for whom this presently raises an issue is BT, which itself holds such rights.

268. Third, we think OFCOM was entitled to examine the course of negotiations between Sky and BT and to draw conclusions as to what might or might not be agreed. We also concur with OFCOM's view that no relevant issue had yet "crystallised" and that positions adopted in negotiation were not a reliable guide to what might be the outcome. We further find that OFCOM was entitled to observe that negotiations were currently under way and that intervention did not have to anticipate their failure or unsatisfactory resolution. We find no error of law or in the exercise of discretion in that approach.

269. Fourth, we have examined the modelling evidence put forward by BT and conclude that it was at best of limited assistance and that OFCOM was entitled not to regard it as conclusive, or even of great relevance. We note in particular that it did not inform BT's actual stance in negotiation.

270. Finally, we see nothing unreasonable or wrong in OFCOM's decision to monitor the market closely and intervene when it considers it necessary.

271. We therefore find that BT's claim under Ground 5 fails.

CONCLUSION

272. For these reasons we unanimously conclude that BT's appeal fails on all grounds.

Peter Freeman CBE QC *(Hon)* Clare Potter Prof. Colin Mayer

Charles Dhanowa OBE, QC
(Hon) 21 December 2016
Registrar

Annex 1 – Statutory provisions

This annex sets out the text of the statutory provisions referred to in the part of this judgment dealing with The Regulatory Framework, namely sections 3, 6, 316 and 317 of the 2003 Act.

3 General duties of OFCOM

(1) It shall be the principal duty of OFCOM, in carrying out their functions—

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

(2) The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, each of the following—

(a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;

(b) the availability throughout the United Kingdom of a wide range of electronic communications services;

(c) the availability throughout the United Kingdom of a wide 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;

(d) the maintenance of a sufficient plurality of providers of different television and radio services;

(e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;

(f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both—

(i) unfair treatment in programmes included in such services; and

(ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.

(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and

(b) any other principles appearing to OFCOM to represent the best regulatory practice.

(4) OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances—

(a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;

(b) the desirability of promoting competition in relevant markets;

(c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;

(d) the desirability of encouraging investment and innovation in relevant markets;

(e) the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom;

(f) the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it;

(g) the need to secure that the application in the case of television and radio services of standards falling within subsection (2)(e) and (f) is in the manner that best guarantees an appropriate level of freedom of expression;

(h) the vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;

(i) the needs of persons with disabilities, of the elderly and of those on low incomes;

(j) the desirability of preventing crime and disorder;

(k) the opinions of consumers in relevant markets and of members of the public generally;

(l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas;

(m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.

(5) In performing their duty under this section of furthering the interests of consumers, OFCOM must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

(6) Where it appears to OFCOM, in relation to the carrying out of any of the functions mentioned in section 4(1), that any of their general duties conflict with one or more of their duties under sections 4, 24 and 25, priority must be given to their duties under those sections.

(6A) Where it appears to OFCOM, in relation to the carrying out of any of their functions in relation to postal services, that any of their general duties conflict with their duty under section 29 of the Postal Services Act 2011 (duty to secure provision of universal postal service), priority must be given to their duty under that section.

(7) 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.

(8) Where OFCOM resolve a conflict in an important case between their duties under paragraphs (a) and (b) of subsection (1), they must publish a statement setting out—

(a) the nature of the conflict;

(b) the manner in which they have decided to resolve it; and

(c) the reasons for their decision to resolve it in that manner.

(9) Where OFCOM are required to publish a statement under subsection (8), they must—

(a) publish it as soon as possible after making their decision but not while they would (apart from a statutory requirement to publish) be subject to an obligation not to publish a matter that needs to be included in the statement; and

(b) so publish it in such manner as they consider appropriate for bringing it to the attention of the persons who, in OFCOM's opinion, are likely to be affected by the matters to which the decision relates.

(10) Every report under paragraph 12 of the Schedule to the Office of Communications Act 2002 (c 11) (OFCOM's annual report) for a financial year must contain a summary of the manner in which, in that year, OFCOM resolved conflicts arising in important cases between their general duties.

(11) A case is an important case for the purposes of subsection (8) or (10) only if—

(a) it involved one or more of the matters mentioned in subsection (12); or

(b) it otherwise appears to OFCOM to have been of unusual importance.

(12) Those matters are—

(a) a major change in the activities carried on by OFCOM;

(b) matters likely to have a significant impact on persons carrying on businesses in any of the relevant markets; or

(c) matters likely to have a significant impact on the general public in the United Kingdom or in a part of the United Kingdom.

(13) This section is subject to sections 370(11) and 371(11) of this Act and to section 119A(4) of the Enterprise Act 2002 (c 40) (which applies to functions conferred on OFCOM by Chapter 2 of Part 5 of this Act).

(14) In this section—

"citizens" means all members of the public in the United Kingdom;

"communications matters" means the matters in relation to which OFCOM have functions;

"general duties", in relation to OFCOM, means—

(a) their duties under subsections (1) to (5); and

(b) the duty which, under section 107(5), is to rank equally for the purposes of subsections (6) and (7) with their duties under this section;

"relevant markets" means markets for any of the services, facilities, apparatus or directories in relation to which OFCOM have functions."

6 Duties to review regulatory burdens

(1) OFCOM must keep the carrying out of their functions under review with a view to securing that regulation by OFCOM does not involve—

(a) the imposition of burdens which are unnecessary; or

(b) the maintenance of burdens which have become unnecessary.

(2) In reviewing their functions under this section it shall be the duty of OFCOM—

(a) to have regard to the extent to which the matters which they are required under section 3 to further or to secure are already furthered or secured, or are likely to be furthered or secured, by effective self-regulation; and

(b) in the light of that, to consider to what extent it would be appropriate to remove or reduce regulatory burdens imposed by OFCOM.

(3) In determining for the purposes of this section whether procedures for self-regulation are effective OFCOM must consider, in particular—

(a) whether those procedures are administered by a person who is sufficiently independent of the persons who may be subjected to the procedures; and

(b) whether adequate arrangements are in force for funding the activities of that person in relation to those procedures.

(4) OFCOM must, from time to time, publish a statement setting out how they propose, during the period for which the statement is made, to secure that regulation by OFCOM does not involve the imposition or maintenance of unnecessary burdens.

(5) The first statement to be published under this section—

(a) must be published as soon as practicable after the commencement of this section; and

(b) shall be a statement for the period of twelve months beginning with the day of its publication.

(6) A subsequent statement—

(a) must be published during the period to which the previous statement related; and

(b) must be a statement for the period of twelve months beginning with the end of the previous period.

(7) It shall be the duty of OFCOM, in carrying out their functions at times during a period for which a statement is in force under this section, to have regard to that statement.

(8) OFCOM may, if they think fit, revise a statement under this section at any time before or during the period for which it is made.

(9) Where OFCOM revise a statement, they must publish the revision as soon as practicable.

(10) The publication under this section of a statement, or of a revision of a statement, must be in such manner as OFCOM consider appropriate for bringing it to the attention of the persons who, in their opinion, are likely to be affected by the matters to which it relates.

316 Conditions relating to competition matters

(1) The regulatory regime for every licensed service includes the conditions (if any) that OFCOM consider appropriate for ensuring fair and effective competition in the provision of licensed services or of connected services.

(2) Those conditions must include the conditions (if any) that OFCOM consider appropriate for securing that the provider of the service does not—

(a) enter into or maintain any arrangements, or

(b) engage in any practice,

which OFCOM consider, or would consider, to be prejudicial to fair and effective competition in the provision of licensed services or of connected services.

(3) A condition imposed under this section may require a licence holder to comply with one or both of the following—

(a) a code for the time being approved by OFCOM for the purposes of the conditions; and

(b) directions given to him by OFCOM for those purposes.

(4) In this section—

"connected services", in relation to licensed services, means the provision of programmes for inclusion in licensed services and any other services provided for purposes connected with, or with the provision of, licensed services; and

"licensed service" means a service licensed by a Broadcasting Act licence.

317 Exercise of Broadcasting Act powers for a competition purpose

(1) This section applies to the following powers of OFCOM (their "Broadcasting Act powers") —

(a) their powers under this Part of this Act and under the 1990 Act and the 1996 Act to impose or vary the conditions of a Broadcasting Act licence;

(b) every power of theirs to give an approval for the purposes of provision contained in the conditions of such a licence;

(c) every power of theirs to give a direction to a person who is required to comply with it by the conditions of such a licence; and

(d) every power of theirs that is exercisable for the purpose of enforcing an obligation imposed by the conditions of such a licence.

(2) Before exercising any of their Broadcasting Act powers for a competition purpose, OFCOM must consider whether a more appropriate way of proceeding in relation to some or all of the matters in question would be under the Competition Act 1998 (c 41).

(3) If OFCOM decide that a more appropriate way of proceeding in relation to a matter would be under the Competition Act 1998, they are not, to the extent of that decision, to exercise their Broadcasting Act powers in relation to that matter.

(4) If OFCOM have decided to exercise any of their Broadcasting Act powers for a competition purpose, they must, on or before doing so, give a notification of their decision.

(5) A notification under subsection (4) must—

(a) be given to such persons, or published in such manner, as appears to OFCOM to be appropriate for bringing it to the attention of the persons who, in OFCOM's opinion, are likely to be affected by their decision; and

(b) must describe the rights conferred by subsection (6) on the persons affected by that decision.

(6) A person affected by a decision by OFCOM to exercise any of their Broadcasting Act powers for a competition purpose may appeal to the Competition Appeal Tribunal against so much of that decision as relates to the exercise of that power for that purpose.

(7) Sections 192(3) to (8), 195 and 196 apply in the case of an appeal under subsection (6) as they apply in the case of an appeal under section 192(2).

(8) The jurisdiction of the Competition Appeal Tribunal on an appeal under subsection (6) excludes—

(a) whether OFCOM have complied with subsection (2); and

(b) whether any of OFCOM's Broadcasting Act powers have been exercised in contravention of subsection (3);

and, accordingly, those decisions by OFCOM on those matters fall to be questioned only in proceedings for judicial review.

(9) For the purposes of this section a power is exercised by OFCOM for a competition purpose if the only or main reason for exercising it is to secure that the holder of a Broadcasting Act licence does not—

(a) enter into or maintain arrangements, or

(b) engage in a practice,

which OFCOM consider, or would consider, to be prejudicial to fair and effective competition in the provision of licensed services or of connected services.

(10) Nothing in this section applies to—

(a) the exercise by OFCOM of any of their powers under sections 290 to 294 or Schedule 11;

(b) the exercise by them of any power for the purposes of any provision of a condition included in a licence in accordance with any of those sections;

(c) the exercise by them of any power for the purpose of enforcing such a condition.

(11) In subsection (9) “connected services” and “licensed service” each has the same meaning as in section 316.

(12) References in this section to the exercise of a power include references to an exercise of a power in pursuance of a duty imposed on OFCOM by or under an enactment.