



European Commission's draft "Regulation laying down measures to complete the European single market for electronic communications and to achieve a Connected Continent"

Sky - Preliminary Comments

1. British Sky Broadcasting Limited ("Sky") is the United Kingdom and Ireland's leading pay TV operator. Sky also provides broadband and talk services and is the UK's second largest and fastest growing broadband and telephony provider. In addition, Sky launched broadband and telephony services in the Republic of Ireland in February 2013 to further support organic growth.
2. Sky has had sight of the European Commission's draft proposal for a *"Regulation laying down measures to complete the European single market for electronic communications and to achieve a Connected Continent"* (the "Draft Regulation"). We have undertaken an initial review of the Draft Regulation and in the limited time available set out our preliminary thoughts below. These remarks are without prejudice to a more in-depth review of the Draft Regulation which we will endeavor to carry out in due course and any further comments we may seek to provide in the event that the Commission decides to conduct a formal public consultation on an issue of significant importance to communications providers across the EU as well as citizens and consumers.
3. Sky expresses one significant concern in relation to the process surrounding the possible adoption of the Draft Regulation before commenting on its substance. Sky notes and is concerned by the absence of any public consultation on the Draft Regulation given its potential wide-ranging impacts. Sky is a strong supporter of evidenced based policy making, but in this instance the Commission does not appear to have made its cost/benefit analysis available for public comment. This requirement is enshrined in the EU framework and we would expect and indeed call on the Commission to provide evidence that its proposals will not impose an undue burden on industry and hinder growth and choice in the communications sector.
4. Whilst the Draft Regulation contains some positive proposals, for example those relating to the EU passport, or to the deployment and operation of small area wireless access points, it raises a number of concerns, five of which could have a significant impact on the way we do business. These relate to:
 - the extension of consumer protection regulation, specifically targeted at electronic communications services, to pay TV;
 - the possible application of very prescriptive receiving provider led switching processes to all elements of bundled offers, including pay TV;
 - the development of a new European wholesale access product which could result in the removal/relaxation of existing wholesale remedies including LLU;
 - the potential withdrawal of access regulation in the presence of two NGA networks (i.e., cable + the national incumbent telephony provider), and
 - provisions relating to increased transparency in customer contracts with specific requirements in relation to broadband speeds, termination rights and



re-contracting, which could have significant cost implications for European businesses and unintended consequences for consumers.

Bundled Offers: Electronic Communications specific end user rights and switching should not extend to the pay TV element of bundled offers

5. Sky does not consider it necessary or proportionate to extend the regulation that currently applies to broadband and telephony services to pay TV in the absence of evidence of consumer harm or market failure. The provision of pay TV services is already regulated under extensive consumer protection laws deriving from various existing EU Directives (e.g. Unfair Consumer Contract Terms Directive, the Unfair Commercial Practices Directive, and the Consumer Rights Directive).
6. Our concern arises from the wording of Article 19 of the Draft Regulation, which refers to the application of Chapters 3 (“the rights of end-users”) and 4 (“facilitating change of providers”) of the Draft Regulation to “*all elements of the bundle*”. Notwithstanding that many of these requirements are already imposed on broadband and telephony services under the existing EU framework and other directives, we consider that duplication of “generic” consumer protection measures through slightly different obligations specific to electronic communications services is likely to introduce legal uncertainty and an added burden on communications providers which will likely lead to increased costs to consumers. Accordingly, we suggest deleting this provision. There has been no justification to support this proposal and to further extend these electronic communications specific regulations to other services, such as pay TV, is wholly disproportionate.
7. Moreover, Sky does not consider that there is a problem in relation to ease of switching television providers. In the UK, Ofcom’s consumer research shows that pay TV subscribers are largely satisfied with the experience of moving between providers. For example, pay TV switchers in the UK overwhelmingly do not find the current switching process for pay TV troublesome – 95% of consumers surveyed stated that they did not find switching pay TV services difficult (80% - totally easy, 3% don’t know, 12% neither difficult nor easy).
8. Pay TV displays completely different service characteristics to telecommunications products in that there is no possibility of slamming, it is not considered an essential service, nor is it a provided using a shared infrastructure like LLU-based broadband and telephony.
9. Intervening in switching among providers of audiovisual services would comprise a radical increase in the scale and scope of regulation in the audiovisual sector. Such an extension of regulation would be wrong at a time when the ability to retail pay TV services via the internet is significantly reducing the barriers to entry at the retail level, and there is ongoing entry by new pay TV retailers. Furthermore, it would be perverse, for example, to give regulators powers to regulate the retailing activities of some pay TV providers, but exclude providers of over-the-top IP-delivered pay TV services, such as Netflix and Amazon.

Switching: the receiving provider should not lead the switching process

10. It is imperative that any proposals for intervention in relation to switching are based on robust and reliable evidence about the problems faced by consumers in switching suppliers. In the UK Ofcom has been actively consulting on an appropriate switching process since 2010. Article 24(4) of the Draft Regulation appears to endorse a receiving provider led (or gaining provider led process as it is referred to by Ofcom) switching process in proposing that “*the receiving provider of electronic communications to the public shall lead the switching process*”. No evidence has been provided to support this proposed



policy position and it also would have the effect of pre-judging the outcome of the UK's current consultation process and combined with Article 19 of the Draft Regulation, as currently drafted would extend the broadband and telephony switching process to pay TV.

11. Sky does not support the Commission's proposal that the receiving provider of electronic communications to the public should lead the switching process. Sky favours a process whereby the existing provider provides their customer with a code in order to unequivocally identify the asset to be switched (i.e. the phone line) and is able to properly advise the customer of the impacts of switching provider prior to the customer concluding their decision to switch. Sky considers that a receiving provider led process carries with it significant risks of actually making switching a longer process for consumers, involving greater hassle and opens the process to slamming.
12. There is a real risk that the prospect of new, intrusive and unnecessary regulation will further slow down or halt industry efforts to improve the process. The Commission needs to properly take this into account which further reinforces the importance of a rigorous cost/benefit analysis.

Consumer Provisions: a full impact assessment is required

13. Sky is concerned by a number of the Commission's proposals set out in Chapter 3 of the Draft Regulation – Rights of End Users - and considers that a full impact assessment is required to ensure that these proposals do not impose an undue burden on industry and hinder growth and choice in the communications sector. Sky does not consider that the Commission has approached this policy development in a targeted manner and has failed to fully explore existing powers before proposing to grant new rights that would interfere fundamentally with communications providers' and consumers' freedom of contract. For example, we are concerned by the Commission's proposal that contracts may be terminated after 6 months with no compensation due to the communications provider other than the residual value of subsidised equipment and we are also concerned by the proposed restrictions on re-contracting.
14. In addition, the increased transparency requirements over and above the current requirements may lead to "information overload" for consumers so that they "switch off" from other information provided which may be of considerably more importance than information about variables in broadband data speeds and latency. We also consider that requiring providers to advise customers of the cost of calls just prior to the call commencing "subject to particular pricing conditions" would be a significantly onerous obligation which could also have unintended consequences (e.g., causing telecare/panic alarm calls to "time-out" as a result of the recorded message. In the UK, this proposal would also cut across a significant piece of work that Ofcom is in the process of implementing which deals specifically with the transparency of non-geographic call charges.
15. It should be noted that a failure by Sky to refer to the other draft end-user measures outlined in the Draft Regulation should not be taken to mean that Sky agrees or supports the proposals. Sky has limited its comments to those of primary concern and our comments are without prejudice to any further comments we may wish to provide to the Commission on the draft measures.

New European wholesale access product: Virtual access must not take precedence over physical access



16. Article 14 of the Draft Regulation proposes to introduce a new European virtual broadband access product, EVBAP. Whilst we can see the value of an EVBAP with quality of service requirements to business providers and customers, we do not see it as being attractive or relevant to residential and SME consumers and their providers who purchase and are served nationally.
17. Sky questions the benefit of this proposal given that the imposition of virtual access remedies (e.g. Virtual Unbundled Local Access ("VULA") in the UK or Virtual Unbundled access ("VUA") in the Republic of Ireland) is already possible under the current EU framework (Framework and Better Regulation Directives).
18. Greater clarity on the nature of EVBAP and on whether its introduction would result in a removal of the requirement to provide LLU (see Article 28 and Recital 17 of the Draft Regulation) is required. In our view, an EVBAP must not be seen as an alternative to current copper based LLU access, but a complement. The physical – LLU - remedy has been the key wholesale remedy used by Sky to compete and innovate at the retail level.
19. Sky supports the need for operators with Significant Market Power (SMP) to offer a virtual access product which seeks to offer equivalent functionality to passive infrastructure access, particularly where it is economically and technically difficult to provide a physically unbundled product, but this should not be a substitute for access to passive infrastructure. Favouring virtual products over physical ones would run counter to the principle of promoting, where appropriate, infrastructure based competition (a principle enshrined in the Framework Directive). The greater opportunity afforded to access seekers to invest and innovate through passive infrastructure access drives competition deeper into the network to the significant benefit of consumers.
20. Finally, in our view a strengthening of the definition of a virtual broadband access product offering functionality equivalent to passive infrastructure access, beyond the parameters listed in Annex 1.1 of the Draft Regulation is desirable and in this respect we would recommend replicating the Active Line Access standard or Ofcom's VULA characteristics.

Withdrawal of access regulation: a duopoly of NGA infrastructures would not deliver competitive outcomes for consumers

21. The Draft Regulation suggests that NRAs may be permitted to withdraw access regulation "in the presence of two NGA networks", where "the market conditions are generally considered competitive enough to be able to evolve towards the provision of ultra-fast services" (see Recital 17 of the Draft Regulation). However, there is a lack of clarity on the intention behind this recital in the Draft Regulation's operative provisions. Greater clarity on this proposal is required.
22. In the UK, this could mean that physical access regulation on BT could be withdrawn in regions where Virgin Media operates. We are concerned that this may facilitate the emergence of a duopoly of NGA infrastructures in those regions, to the detriment of Sky and other alternative operators. We have seen no evidence or analysis that would support the conclusion that a duopoly of NGA infrastructures would deliver competitive outcomes for consumers, rather, we would expect to see a rise in retail prices and lower broadband speeds. Neither have we seen evidence that this could lead to additional infrastructure investment by incumbent operators.



23. Such an approach would also be inconsistent with the European principle of infrastructure and service based competition, which has delivered optimal outcomes for consumers: choice, innovation, affordable broadband prices and investments.

Sky

July 2013