

Completed acquisition by British Sky Broadcasting Limited of Be Un Limited

ME/5913/13

The OFT's decision on reference under section 22(1) given on 16 May 2013. Full text of decision published 29 May 2013.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. **British Sky Broadcasting Limited ('Sky')** is a wholly owned subsidiary of the British Sky Broadcasting Group plc (**BSkyB**), a public company, with turnover in the year ended June 2012 of £6,791 million. BSKyB is a holding company for a number of subsidiaries whose activities include: the creation, wholesale and retail distribution of television programming, and the provision of retail fixed broadband and telephone services. BSKyB also wholesales fixed broadband services in the UK, but this is limited to an agreement with Easynet Global Services ('Easynet') following the disposal of that business by Sky.
2. **Telefónica S.A.** ('Telefónica') is a global telecommunications operator, incorporated in Spain. In the UK, Telefónica operates through Telefónica UK Limited ('TUK'), trading primarily under the brand 'O2'. TUK is a subsidiary of Telefónica Europe plc. TUK provides mobile telecommunications and fixed broadband and telephone services to consumers and businesses. In terms of fixed broadband services provided to businesses, TUK, through O2 Business and O2 Wholesale, offers fixed broadband services on a direct wholesale or resale basis using its network infrastructure.
3. Be Un Limited (**the Target**) is made up of TUK's residential home phone and fixed broadband services under both the O2 Home Broadband and Be

brands. In the financial year ended December 2012, the combined UK turnover of O2 Home Broadband and Be Un Limited were approximately [].

TRANSACTION

4. Sky has acquired the entire issued share capital of the Target, comprising the relevant assets and resources that are currently used to provide fixed broadband and telephony services to residential subscribers under the Be and O2 Home Broadband brands, Currently, the Target is a wholly owned subsidiary of Telefónica Europe plc and provides broadband internet services to both consumers and businesses. As a result of the Transaction the relevant assets and resources currently used to provide fixed broadband and telephony services to residential subscribers under the O2 Home Broadband brand will be transferred from TUK into the Target, and certain assets and resources related to the provision of fixed broadband and telephony services to business customers will be transferred out of the Target to TUK to allow TUK to continue to provide those services to its business customers. Accordingly, business (wholesale and resale) customers are not included in the Target.
5. The parties provided a satisfactory submission on 18 March 2013 and the administrative deadline for a decision is therefore 16 May 2013. The transaction subsequently completed on 30 April 2013 and the statutory deadline is therefore 29 August 2013. The transaction was also notified in Ireland and received clearance from the Irish Competition Authority on 25 March 2013.

JURISDICTION

6. As a result of this transaction Sky and the Target have ceased to be distinct. The UK turnover of the Target exceeds £70 million, so the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is satisfied. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

MARKET DEFINITION

7. The parties overlap in the UK at the retail level in the provision of:

- a) **Fixed line rental ('access')**: the provision of lines into end users' homes which are used to make telephone calls and access internet based services.
- b) **Fixed line voice calls**: calls made from fixed line telephones.
- c) **Fixed line broadband services**: the provision of internet access via lines into end users' premises. The two main methods by which fixed line broadband services are offered are:
 - (i) Asynchronous Digital Subscriber Line ('ADSL') which is used on BT's copper telephone lines and
 - (ii) over a cable network (as in the case of Virgin Media).

Some providers also offer faster broadband speeds through the use of fibre optic cable. This is the case for Sky, but not the Target.

- 8. Providers of these three services use either their own infrastructure, infrastructure leased from BT, a combination of the previous two strategies, or use wholesale services provided by BT or a number of other operators.
- 9. Sky and TUK (but not the Target) overlap in the wholesaling of unregulated broadband services to intermediate resellers. While wholesale customers will not be transferred from TUK to Sky, some of the infrastructure used to provide these wholesale services is included in the Target. The OFT has therefore also considered this overlap.
- 10. The OFT's approach to product scope is generally to consider first if narrow candidate markets can be widened through substitution on the demand-side. In the case of both product scope and geographic scope,¹ the OFT uses the hypothetical monopolist test.²

¹ *Ibid*, paragraphs 5.2.21 to 5.2.27

² A set of substitute products (a 'candidate market') will satisfy hypothetical monopolist test if a hypothetical firm that was the only present and future seller of the products in the candidate market would find it profitable to raise prices. Under this framework, a candidate market will fail the hypothetical monopolist test, and will be too narrow to comprise the relevant market, if customers would respond to the price rise by switching to products outside the set to such an extent that the price increase by the hypothetical monopolist would not be profitable.

Product scope

11. The parties noted that in recent UK and European merger control decisions, market definition in the communications sector had generally followed the market definitions established by Ofcom and the European Commission for telecommunications regulation. In the context of the current transaction Sky submitted that there was no reason to depart from this approach.

Fixed line rental - retail

12. The parties noted that Ofcom had previously defined³ 'residential fixed narrowband analogue access' as a relevant product market.' This includes fixed line rental services offered over BT lines⁴ and via cable networks. Third-party competitors in this case broadly supported Ofcom's market definition; some considered that it was a subset of the retail market for residential fixed voice calls since line rental was seldom sold without accompanying voice services.

Fixed line voice calls – retail

13. The parties submitted that Ofcom has previously defined a retail market for 'residential fixed narrowband calls.'⁵ Again, third-party competitors in this case broadly supported Ofcom's market definition. Some discussed whether it should include fixed line rental (as noted above) as well as voice calls bundled with other services such as broadband and pay TV.

Fixed line broadband – retail

14. The parties noted that the relevant product market defined by Ofcom in relation to the retail of fixed line broadband services is:

³ Paragraph 3.4, Review of the wholesale fixed analogue exchange lines markets statement, 20 December 2010 <http://stakeholders.ofcom.org.uk/binaries/consultations/review-wholesale-fixed-exchange/statement/statement.pdf>

⁴ Through BT's Wholesale Line Rental (WLR) and Metallic Path Facility (MPF) services.

⁵ See section 4 of the Fixed Narrowband Retail Services Markets statement, Ofcom, 15 September 2009

http://stakeholders.ofcom.org.uk/binaries/consultations/retail_markets/statement/statement.pdf. In Ofcom's 'Review of the fixed narrowband services markets consultation', 5 February 2013, it has not reached a formal market definition at the retail level, having fully deregulated this market in 2009.

'Asymmetric broadband internet access which as a minimum provides an always on capability, allows both voice and data services to be used simultaneously and provides data at speeds greater than a dial up connection.'⁶

15. This includes services provided over cable networks, ADSL and fibre based products but not mobile broadband, symmetric broadband (where upload and download speeds are the same), fixed wireless and satellite services. It also includes broadband services purchased in a bundle or as a stand-alone package, with business and residential customers in the same market.
16. Third-party competitors in this case broadly supported Ofcom's market definition. Two third parties referred to the constraint from mobile broadband, with one believing it posed no constraint on fixed line broadband due to cost and capability differences, whereas a second noted an increasing competitive constraint from mobile broadband.

Fixed line broadband – wholesale

17. The parties noted that Ofcom defined the relevant product market for the supply of wholesale broadband access (WBA) services as:

' Asymmetric broadband access and any backhaul as necessary to allow interconnection with other communications providers which provides an always on capability, allows both voice and data services to be used simultaneously and provides data at speeds greater than a dial up connection.'⁷

18. This market includes both business and residential customers. Ofcom has also included providers that use their own broadband access and network infrastructure to self-supply to their own retail arms such as Virgin Media. This was due to the indirect constraints that these providers exert at the retail level on wholesale providers.⁸ Third-party competitors in this case broadly supported Ofcom's market definition.

⁶ Wholesale Broadband Access Markets Statement, Ofcom, December 2010, paragraphs 3.8-3.29 available at

<http://stakeholders.ofcom.org.uk/binaries/consultations/wba/statement/wbastatement.pdf>

⁷ Ibid, paragraphs 3.30 to 3.64.

⁸ Ibid, paragraph 3.32 to 3.35, and 3.52 to 3.56.

Conclusion on product scope

19. While the OFT has assessed the Transaction under the product scopes, as defined previously by Ofcom and as set out above; it has not found it necessary to conclude on the precise product frame of reference in this case, as it does not materially impact the analysis.

Geographic scope

Retail of fixed line rental, fixed calls and fixed broadband

20. The parties noted that Ofcom had concluded that the relevant geographic markets for fixed line rental and voice calls, as defined above, are the UK excluding Hull, and Hull.^{9,10} The parties submitted that such an approach is consistent with past merger decisions in the sector.¹¹ The OFT has previously considered the UK to be an appropriate geographic frame of reference in relation to broadband services at the retail level.¹² The parties therefore submitted that there is no reason why a UK geographic scope should not be appropriate in the current case.
21. The parties have confirmed that neither party is active at the retail level in Hull and therefore this geographic area has not been considered further.
22. In its most recent Wholesale Broadband Access Review in 2010, Ofcom did not conclude on the precise scope of the geographic market for retail residential broadband. Ofcom, however, stated that 'developments in the [broadband] retail market suggested that different geographic markets may be emerging at the retail level, although many [retail broadband providers] are still maintaining a national pricing policy'.¹³ Ofcom referred to

⁹ Hull is distinct as KCOM is the owner of the copper access network in Hull, not BT, and the majority of Hull post codes are served exclusively by KCOM at the retail level.

¹⁰ 'Fixed Narrowband Retails Services Markets Statement', Ofcom, 15 September 2009, paragraph 4.35

¹¹ Including the OFT's decision of 23 January 2007 in BT Group plc.'s acquisition of PlusNet plc, ('BT/Plusnet'), the OFT's decision of 17 August 2007 in Tiscali UK Holdings Limited's acquisition of Pipex Communications plc ('Tiscali/Pipex'), and the European Commission's decisions in Carphone Warehouse/Tiscali UK (2009) (COMP/M.5532) ('CPW/Tiscali') and Vodafone/Cable & Wireless (2012) (COMP/M.6584).

¹² BT/Plusnet, paragraph 15, and Tiscali/Pipex, paragraphs 19 and 20.

¹³ Review of the wholesale broadband access markets 2010 Statement', Ofcom 3 December

differentiation in prices in different areas.

23. Third-parties broadly agree with Ofcom's retail geographic market definitions. Two noted that a key issue is whether there is a single national market or geographic markets split along the lines which Ofcom adopted in its 2010 Wholesale Broadband Access review (see paragraph 26 below).
24. The OFT notes that both Sky and O2 offer 'Sky Broadband Connect' and 'O2 Home Broadband Access' to residential customers outside of their network areas. These are areas where the parties use wholesale services provided by BT, rather than installing their own equipment in BT's local exchanges (known as Local Loop Unbundling or LLU). While these services fall within the broadband product market defined by Ofcom at the retail level, these products are typically more expensive compared to the parties' broadband services that use LLU. TalkTalk¹⁴ and Virgin Media¹⁵ also offer similar products in areas outside their networks. This differentiated pricing could suggest small differences in the conditions of retail competition in different areas in the UK. The conditions of competition could vary slightly between the wholesale broadband access geographic markets set out at paragraph 26 below or between local areas served by different telephone exchanges (depending on which providers use LLU in each local area).

Wholesale broadband

25. The parties note that Ofcom's approach to geographic market definition in relation to wholesale broadband access services is to identify geographic areas in which the conditions of competition are relatively similar. Ofcom undertakes this analysis by considering the number of 'Principal Operators' active in each geographic area served by a BT local exchange.
26. Principal operators are identified by Ofcom as operators 'capable of providing a material constraint in the market.'¹⁶ These are identified by Ofcom as 'operators that provide broadband services over their own access

2010, paragraphs 3.13, 3.14 and 3.27.

¹⁴ <http://sales.talktalk.co.uk/product/broadband/essentials>

¹⁵ <http://store.virginmedia.com/national-broadband.html>

¹⁶Ibid, footnote 7.

networks (BT or Virgin Media) or have deployed LLU.¹⁷ In 2010, these Principal Operators were BT, Cable and Wireless World Wide (now part of Vodafone), O2, Orange, Sky, TalkTalk and in those local exchange areas where cable coverage exceeded 65 per cent of delivery points, Virgin Media. Orange has subsequently exited LLU.

27. Taking this approach, Ofcom defined four separate geographic markets ('WBA geographic markets'), as follows:
- **The Hull Area:** (0.7 per cent of UK premises as at June 2010)
 - **Market 1:** exchanges where only BT is present or forecast to be present (11.7 per cent of premises as at June 2010)
 - **Market 2:** exchanges where two Principal Operators (POs); are present or forecast and exchanges where three POs are present or forecast but where BT's share is greater than or equal to 50 per cent (10.0 per cent of premises as at June 2010), and
 - **Market 3:** exchanges where four or more POs are present or forecast and exchanges where three POs are present or forecast but where BT's share is less than 50 per cent (77.6 per cent of premises as at June 2010).
28. Third-parties broadly supported Ofcom's market definition. Some wholesale customers noted a distinction between urban and rural areas. One noted that in some less populous areas the only supplier of wholesale services was BT, while another noted that the highest demand from its customers was concentrated in Wholesale Market 3.
29. As noted at paragraph 24 above, the conditions of retail broadband competition may differ between local areas served by different telephone exchanges depending on which providers use LLU in each local area. Similarly this could affect wholesale competition at the local level.

Conclusion on geographic scope

30. The OFT has not found it necessary to conclude on the precise geographic frames of reference in this case, as it is not determinative to the OFT's assessment. However, the OFT has taken a cautious approach and assessed the Transaction under the following geographic scopes:

¹⁷ Ibid, paragraph 3.6. Ofcom also notes that Principal Operators are 'relatively large operators with a substantial presence across the UK as a whole on the basis of network coverage (along with national market shares).' Ibid, paragraph, 3.81.

- The retail of fixed line rental and voice calls: the UK excluding Hull.
- The retail of fixed line (asymmetric) broadband, either UK wide, or the four separate geographic markets set out at 27 and defined by Ofcom, or at the local level (areas served by each local telephone exchange).
- The wholesale of fixed line (asymmetric) broadband, either UK wide, or the four separate geographic markets set out at paragraph 27 as defined by Ofcom, or at the local level (areas served by each local telephone exchange).

HORIZONTAL ISSUES

Counterfactual

31. Notwithstanding that TUK's stated rationale for the transaction is to exit the market [], Sky considered that it was appropriate for the Transaction to be assessed against the prevailing conditions of competition, that is where the Target business remains with TUK and continues to be active in the relevant markets. This is the general approach under the OFT's current guidelines.¹⁸ Therefore the OFT will assess the transaction under the prevailing conditions of competition.

Market shares

32. The parties have submitted that their combined market shares and the increment from the Target in all markets suggest that the transaction will make little if any difference to competition. Some of the parties' estimated market shares are set out at **Table 1** below. Ofcom has commented that these market share estimates are largely consistent with its own view.

¹⁸ Merger Assessment Guidelines, OFT/CC, September 2010, paragraph 4.3.5.

Table 1 – UK retail residential market shares (per cent)

	Fixed line rental	Fixed line calls	Fixed line broadband
Sky	[10-20]	[5-15]	[15-25]
Target	[0-10]	[0-10]	[0-10]
Combined	[10-20]	[5-15]	[15-25]
BT	[35-45]	[40-50]	[25-35]
Virgin Media	[15-25]	[10-20]	[15-25]
TalkTalk	[10-20]	-	[15-25]
Orange/EE	-	-	[0-10]
Other	[0-10]	[20-30] ¹⁹	[0-10]

Source: The parties' estimates.

Note: Fixed line rental by numbers, fixed line calls by revenues and fixed line (asymmetric) broadband by residential subscribers. All these measure give the highest combined shares of the parties in each frame of reference.

Fixed line rental and fixed line calls

33. In the supply of fixed line rental and fixed voice calls in the UK, the parties' combined market share is [10-20] per cent (increment [0-10] per cent) and [five -15] per cent (increment [0-10] per cent) respectively. Although the OFT does not have recent data that separates out the Hull area, excluding the Hull area will make little difference to the estimated UK shares at **Table 1** above due to the small population of Hull relative to the rest of the UK. Due to the low shares of the parties (and increment), the OFT considers that there is no realistic prospect of a substantial lessening of competition in fixed line rental and fixed voice calls. These markets are therefore not considered further.

Fixed line broadband – retail

34. The parties' have a combined market share of [15-25] per cent; increment [0-10] per cent, in the supply of residential fixed line (asymmetric) broadband in the UK. Again, this suggests that the transaction would not give rise to competition concerns in the UK or in the UK excluding Hull. Nonetheless, the OFT has assessed the impact of the merger on competition in this market in more detail below.

¹⁹ This figure includes TalkTalk which is not separated out in published data. TalkTalk's share in fixed calls can be expected to be in line with its share in fixed line rental.

National effects

35. The parties submitted that the transaction would not give rise to horizontal unilateral effects in the retail supply of fixed line broadband services, since the competitive nature of the retail market will remain unchanged by the transaction due to the small increment to Sky's market share and Sky's relative position in the market vis-à-vis its competitors.
36. The majority of third-parties considered that the transaction did not raise horizontal competition concerns in retail fixed broadband. Only one individual respondent considered the parties to be close retail competitors.
37. Both parties carry out market research to track where new customers come from and where lost customers go to. O2 Home Broadband's switching data shows that around [] per cent of O2 Home Broadband's customers that switched provider went to Sky in 2012. This suggests that there may be lower constraints on the Target post-merger
38. However, Sky's market research suggests that the Target was not a significant constraint on Sky's broadband services. In the first quarter of 2010, [] per cent of Sky broadband's lost customers switched to O2. By the third quarter of 2010 this had dropped to [] per cent. Since 2010 the churn from Sky to O2/Be has been no higher than [] per cent.²⁰ From the figures provided by the parties it is clear that the Target had been growing up to [] its broadband subscriber numbers had declined. The majority of competitor responses confirmed the decline of the target in this area.
39. Moreover, Sky's customer switching data from its market research shows [], which supports the market share data in Table 1, and shows that post-merger Sky will continue to face significant constraints from these competitors.
40. The OFT queried whether there was a material difference in the switching data for those customers in areas where Sky has installed its own equipment in BT exchanges ('on-net') and those customers in areas where Sky resells a wholesale broadband service to residential customers ('off-net'). However the switching data showed no material differences between

²⁰ []

these areas. In either case, O2 appears to be a very weak competitive constraint on Sky broadband relative to Sky's other competitors.

41. On the basis of the parties' low market shares, small increment, limited switching from Sky broadband to O2 broadband, the stronger competitive constraint from four other broadband providers (BT, TalkTalk, Virgin Media, and EE/Orange) and the lack of third-party concerns in this area, all discussed above, the OFT has concluded that the transaction does not give rise to a realistic prospect of a substantial lessening of competition in the retail supply of fixed line broadband on a UK-wide basis.

Local effects

42. As explained above, Sky, O2 and other providers will offer more expensive broadband in areas where they resell a wholesale broadband service (off-net) compared to areas where they have installed their own equipment in a BT exchange (on-net). The parties submitted that the difference in pricing was due to the different cost structure in on-net and off-net areas.
43. A potential concern post-merger is that Sky will depart from this on-net/off-net pricing policy and charge higher prices in areas where it faces less local competition from broadband providers with their own equipment in local exchanges. Currently, in Sky's on-net areas, Sky does not charge higher prices where there are fewer broadband providers with their own local exchange equipment, and Sky's post-merger business plans give no indication that it would deviate from this current charging policy.
44. Less than [] per cent of BT's 5670 local telephone exchanges will see a reduction in broadband providers with their own exchange equipment.²¹ In each of these local areas there will be a sufficient number of competitors that will exert a competitive constraint on the parties, either through offering on-net or off-net broadband. As noted above, these 'off-net' packages fall within the retail broadband market definition previously defined by Ofcom. In the minimal number of areas where there is a reduction in providers with their own equipment from four-to-three, there will also be other significant 'off-net' competitors. The OFT therefore

²¹ Including the Cable & Wireless wholesale broadband access network, which Tesco retails to residential subscribers.

considers that there are no local competition concerns in each of these areas.

45. The OFT has also considered whether the very small number of 'three-to-two' areas raise post merger competition concerns and has concluded that, again, these do not raise concerns due to the presence of the other significant 'off-net' competitors; and secondly, because these [] areas account for only [] per cent of BT's 5670 local exchanges.
46. Sky and O2's 'on-net'²² areas broadly correspond to Ofcom's geographic Markets Two and Three, whereas Market One broadly corresponds with their 'off-net'²³ areas. Sky estimates that in geographic Market Three (paragraph 27 above), it will on average compete post-merger with [] other Principal Operators²⁴ (see paragraph 13 to 26) in the exchange areas where both parties had their own exchange equipment installed. In Markets Two and One, the equivalent figures on average, as estimated by the Parties, are respectively [] and [] other Principal Operators. More generally, there is little overlap between the parties in the exchanges with installed exchange equipment in Market One ([] out of 3868 exchanges) and Market Two ([] out of 604 exchanges). Again, in each of these geographic markets Sky will compete with four significant competitors (BT, Talk Talk, Virgin Media and Orange/EE) when 'off-net' broadband providers are also included.
47. On the basis of the evidence above, including the fact that no third-parties raised local competition concerns, the OFT considers that the transaction does not give rise to a realistic prospect of a substantial lessening of competition in retail broadband on a local or less than national geographic basis.

Fixed line broadband – wholesale

48. The OFT does not have market share data for (unregulated) wholesale broadband access services. If self-supply is included, the parties' shares could be expected to be broadly in line with the parties' retail fixed

²² On-net – where the provider has installed its own equipment in BT exchanges.

²³ Off-net – where the provider resells a wholesale broadband service to residential customers.

²⁴ Principal operators are defined by Ofcom as operators 'capable of providing a material constraint in the market'.

broadband market shares above. This is because most of the wholesale broadband market is taken up by self-supply. The OFT considers the impact of the merger on competition in this market in more detail below.

Retail competition – conglomerate effects

49. The parties submitted that the transaction would not result in conglomerate effects since the small increment will not alter any ability on the part of Sky to engage in any exclusionary behaviour.
50. A third party raised a concern that Sky was currently leveraging its 'dominance' in pay TV into the provision of triple play bundles (telephone, broadband and TV). Its specific concern was that post-merger Sky's rivals would find it increasingly difficult to offer the Target's customers pay TV (or to convert the Target's customers to their triple-play offers) and as result would substantially lessen competition in these areas. It contends that by 'locking' the Target's subscribers into Sky's broadband services, the transaction reduces the likelihood that this subscriber base will take pay TV services from other sources. This concern was not shared by other competitors with a pay TV service.
51. The OFT considers that the Transaction will not make it significantly more difficult for competitors to offer pay TV/triple play services given the small increment from the Target. In addition, the OFT considers that this small increment will not significantly change Sky's incentives to create barriers to a competitor's expansion into pay TV.
52. In relation to the third party's concern about 'locking' in the Target's subscribers such that it reduces their likelihood of taking pay TV services from other sources, the OFT notes that there will be little change between the situation before and after the merger. Since in both situations before the Target's customers would have to switch from the Target or Sky broadband to the competitor's broadband to get the competitor's pay TV services. This is because these competitors in general only offer their pay TV services to customers taking their respective broadband services.

Wholesale broadband competition

53. Both parties are active at the wholesale level, although both predominantly self-supply. The parties submitted that, to the limited extent that they

supply wholesale broadband access services to third-parties for on-supply to business customers, these customers are outside the scope of the Transaction. As noted above, TUK retained its wholesale customers, and neither Sky nor the Target supply wholesale broadband access services to third-parties for on-supply to residential subscribers.

54. Third-parties on the whole did not consider that Sky was active in the provision of wholesale broadband with the exception of Easynet to whom Sky supplies wholesale broadband access services.²⁵ Other wholesale broadband access suppliers that third-parties noted included BT, TalkTalk, Cable & Wireless and Telefónica UK (TUK).
55. Two wholesale customer respondents considered that TUK (the parent of the Target) would not be an effective competitor post transaction and they would face a reduced choice of wholesale providers as a result. .
56. However, the OFT considers that the transaction has a minimal effect on wholesale services to third-parties since Sky currently does not, with the exception of Easynet, provide wholesaling broadband access to resellers.
57. As part of a transitional arrangement []. [].
58. Given Sky's limited wholesale activities, the continuing post-merger supply of TUK's wholesale services and the presence of other wholesalers (BT, Cable & Wireless and TalkTalk), the OFT considers that the transaction does not give rise to a realistic prospect of a lessening of competition in the supply of wholesale broadband access services to third-parties.

BARRIERS TO ENTRY

59. Sky submitted that entry and expansion by firms such as Sky and TalkTalk has, in part, been underpinned by wholesale regulation. Third-parties considered that significant entry would be difficult at the wholesale and retail level. However, given the lack of competition concerns arising from this transaction, the OFT has not found it necessary to conclude on the extent of barriers to entry or expansion.

²⁵ In 2010 Sky divested its Easynet business-to-business division to focus on the UK residential broadband and telephony business. Since divestment, Sky has supplied a managed wholesale broadband service to Easynet under a long term supply agreement.

THIRD-PARTY COMMENTS

60. As a result of the Invitation to Comment issued by the OFT, it received responses from three individuals. A further eight responses were received from wholesale customers, and competitors. Ofcom, the sectoral regulator also provided comments to the OFT. All comments have been taken into account in the analysis above.

ASSESSMENT

61. The parties' overlap in the retail supply to residential customers of fixed line rental, fixed line voice calls and fixed line broadband. There is also a small overlap in the supply of wholesale broadband access services between Sky and TUK, the parent of the Target.

62. Although the OFT has not found it necessary to conclude on the precise product and geographic scope, it has taken a cautious approach and assessed the Transaction on the basis of Ofcom's product and geographic definitions as set out in paragraphs 7 and 26 above.

63. In the retail of fixed line rental, and fixed line voice calls, the parties' combined market shares are [10-20] per cent, increment [0-10] per cent and [five-15] per cent, increment [0-10] per cent respectively. For the retail of fixed line broadband the parties' combined market share is [15-25] per cent, increment [0-10] per cent. No third-parties concerns were received in respect of these markets, and Sky's market surveys suggest that it currently faces little competitive constraint from the Target and that post-merger it will continue to face stronger competition from BT, TalkTalk, Virgin Media and EE/Orange. Therefore, the OFT has concluded that the transaction does not give rise to a realistic prospect of a substantial lessening of competition in fixed line rental retail, fixed line voice calls, and the supply of fixed line broadband on a UK-wide basis.

64. The OFT also considered the impact of the transaction at the sub-national and local level. However, due to the presence of four other significant competitors, and the lack of third party concerns the OFT considers that the transaction does not give rise to a realistic prospect of a substantial lessening of competition in retail broadband on a local or less than national geographic basis.

65. A third party raised concerns about conglomerate effects arising from the transaction, however, the OFT considers that the Transaction will not make it significantly more difficult for competitors to offer pay TV/triple play services given the small increments in retail broadband and telephone services. This includes any conduct that would make it more difficult for competitors to continue to expand into pay TV.
66. Finally, given Sky's limited wholesale activities and TUK's continuing post-merger supply of wholesale services, the OFT considers that the transaction does not give rise to a realistic prospect of a lessening of competition in the supply of wholesale broadband access services to third-parties.
67. Consequently, the OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

68. This merger will therefore **not be referred** to the Competition Commission under section 22(1) of the Act.