



## COMPETITION APPEAL TRIBUNAL

### **NOTICE OF APPEAL UNDER SECTION 317(6) OF THE COMMUNICATIONS ACT 2003**

**CASE No: 1159/8/3/10**

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, as amended by S.I. No. 2068 of 2004) (“the Rules”), the Registrar gives notice of the receipt of an appeal on 1 June 2010 under subsection 317(6) of the Communications Act 2003 (“the 2003 Act”) by British Telecommunications Plc (“BT”) of 81 Newgate Street, London, EC1A 7AJ against certain aspects of a decision (“the Decision”) made by the Office of Communications (“OFCOM”) contained in a document entitled “Pay TV statement. The Decision was published on 31 March 2010.

In the Decision OFCOM (among other things) found British Sky Broadcasting Limited (“Sky”) to have market power in the wholesale of certain premium sports channels; Sky to be exploiting its market power by limiting the wholesale distribution of its premium sports channels; and that this limiting of wholesale distribution had the effect of restricting competition from retailers on other platforms, which was prejudicial to fair and effective competition, reducing consumer choice and holding back innovation by companies other than Sky.

To remedy these effects and ensure fair and effective competition, OFCOM decided to impose on Sky a wholesale must-offer (“WMO”) obligation. In short, the WMO obligation comprises the following: Sky is required to offer the sports channels Sky Sports 1 and 2 (respectively “SS1” and “SS2”), in standard and high definition versions (respectively “SD” and “HD”) and including interactive services, to retailers on platforms other than those which it operates. Sky was originally obliged to publish, by 14 May 2010, a “reference offer” of standard terms and conditions on which it will supply retailers with SS1 and SS2, the terms of such offer to be fair, reasonable and non-discriminatory and, thereafter, supply SS1 and SS2 wholesale to any qualifying retailer seeking them. Following an application by Sky for interim relief, on 29 May 2010 the Tribunal ordered that this be implemented in respect of BT, Virgin Media, Inc. (“Virgin”), and Top Up TV Europe Limited (“TUTV”), but otherwise be suspended. OFCOM has set a maximum wholesale price of £10.63 per subscriber per month for the SD versions of each of SS1 and SS2, sold by themselves, and a maximum wholesale price of £17.14 per subscriber per month for a package comprising SD versions of both channels. OFCOM has not set a price for the HD versions of the channels. OFCOM has also provided guidance on non-price terms of the reference offer (such as security requirements for retailers).

BT considers the reasoning and the conclusions of the majority of the Decision to be sound. BT endorses, in particular, OFCOM’s findings as to Sky’s market power and as to consumer detriment and considers that OFCOM is correct in its view that intervention is required. However BT considers that the conditions imposed by OFCOM are vitiated by a number of errors of principle; and that accordingly, they fail to achieve the statutory purpose of ensuring fair and effective competition in the relevant retail pay TV market. Those errors, against each of which BT appeals, may be grouped under the following headings:

1. First ground of appeal: scope

OFCOM’s approach to market definition and market power, at both retail and wholesale levels, led it to focus only on those of Sky’s premium sports channels which are close substitutes for SS1 and therefore to exclude from its analysis Sky Sports 3 and 4 (respectively “SS3” and “SS4”). This was an incorrect approach which did not take into account the fact that SS3 is taken only as part of packages with SS1 and SS2, whilst SS4 is generally sold as part of such packages and is not actively marketed on a stand-alone basis. OFCOM therefore left these channels out of the WMO obligation without having considered properly whether they extend or reinforce Sky’s market power, even though it acknowledged that they contain some content that is important to consumers of premium sports channels.

2. Second ground of appeal: price

Having set out the principles which should govern the wholesale prices for SS1 and SS2, namely that the prices should be set at a level which would ensure fair and effective competition but discourage “inefficient entry”, OFCOM set the actual prices in a manner which was not consistent with those principles. In particular, OFCOM overlooked factors relevant to whether other retailers can compete effectively with Sky; conflated the concept of ‘efficiency’ with ‘ability to match Sky’; applied incorrect parameters in its financial modelling and ‘cherry-picked’ costs numbers. Furthermore, the remedy will allow Sky to offer subscribers lower retail prices in the future without a reduction in wholesale prices and has inconsistencies in the price adjustment mechanism.

BT believes that a consequence of the above errors will be to prevent other Pay TV retailers from providing effective and sustainable competition with Sky. It will also enable Sky to ‘game’ the remedy, manipulating which content is shown on which of its premium sports channels (all four of which are taken by almost all of its premium sports customers) and what price it sets for new bundles, making the remedy even less effective in future. The Tribunal is accordingly invited:

1. to uphold BT’s appeal, on each of the grounds advanced in its notice of appeal;
2. to decide what is the appropriate action for OFCOM to take;
3. to remit the Decision to OFCOM with such directions as the Tribunal considers appropriate for giving effect to its decision;
4. to make such other provision for relief as may be appropriate; and
5. to make such provision as may be appropriate for the payment of BT’s costs of this appeal.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received by **5pm** on **21 June 2010**.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at [www.catribunal.org.uk](http://www.catribunal.org.uk). Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

*Charles Dhanowa OBE*  
Registrar

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