



Neutral citation [2010] CAT 29

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1152/8/3/10 (IR)

Victoria House  
Bloomsbury Place  
London WC1A 2EB

9 November 2010

Before:

THE HONOURABLE MR JUSTICE BARLING  
(President)

Sitting as a Tribunal in England and Wales

B E T W E E N :

**BRITISH SKY BROADCASTING LIMITED**

Appellant

- supported by -

**THE FOOTBALL ASSOCIATION PREMIER LEAGUE**

Intervener

-v-

**OFFICE OF COMMUNICATIONS**

Respondent

- supported by -

**BRITISH TELECOMMUNICATIONS PLC**  
**TOP UP TV EUROPE LIMITED**  
**VIRGIN MEDIA, INC.**  
**ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED**

Interveners

**DAVID HENRY**  
**REAL DIGITAL EPG SERVICES LIMITED**

Applicants

Mr. David Henry appeared in person and for REAL Digital EPG Services Ltd.

Mr. James Flynn QC, Mr. Meredith Pickford and Mr. David Scannell (instructed by Herbert Smith LLP) appeared for the Appellant.

Mr. Josh Holmes (instructed by the Office of Communications) appeared for the Respondent.

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**JUDGMENT (Application to Vary Interim Order)**

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1. In its decision taken on 31 March 2010 (“the Decision”) the Office of Communications (“OFCOM”) found British Sky Broadcasting Limited (“Sky”) to have market power in the wholesale of certain premium sports channels, namely Sky Sports 1, Sky Sports 2, Sky Sports 1 HD and Sky Sports 2 HD, and that Sky was exploiting its market power by limiting the wholesale distribution of these channels, with the result that fair and effective competition from retailers on other platforms was restricted, consumer choice was reduced, and innovation by companies other than Sky was being held back. With a view to remedying these effects and ensuring fair and effective competition OFCOM decided to impose on Sky certain obligations in relation to the wholesale supply of these channels.
  
2. The Decision, taken under sections 3(4)(b) of the Broadcasting Act 1990 (“the 1990 Act”) and 316(2) of the Communications Act 2003 (“the 2003 Act”), varied with effect from 31 March 2010 the licences granted to Sky under Part I of the 1990 Act for Sky’s pay television channels, (“the Licensed Services”). The variation was made through the imposition of conditions in relation to the supply by Sky of the programme content of the Licensed Services to other undertakings (“the Conditions”). The Conditions, amongst other matters, imposed a “wholesale must offer” (“WMO”) obligation compelling Sky to offer the Licensed Services to any person meeting minimum qualifying criteria (“MQC”) for retail by that person to residential consumers in the UK on qualifying platforms. Sky was required to supply the programme content within a reasonable time of receipt of a reasonable request in writing; the supply was to be on a non-exclusive basis, on fair and reasonable terms and without undue discrimination. Further, Sky Sports 1 and 2 (“SS 1 and 2”) were to be supplied at charges not exceeding specified maximum prices set by OFCOM. In the first instance the MQC were to be specified by Sky. The Decision required Sky to publish by 14 May 2010 a “reference offer” of standard terms and conditions on which the wholesale supply would be made.
  
3. By an application to the Tribunal dated 16 April 2010 Sky sought an order under rule 61 of the Competition Appeal Tribunal Rules (S.I. 1372 of 2003) suspending the Conditions, pending the hearing of an appeal (which at that stage had not yet been lodged) against the Decision. Sky requested the Tribunal to hear the application as a

matter of urgency given in particular the proximity of the 14 May deadline for publication of the reference offer. The respondent to the application was OFCOM.

4. On the 16 April the Registrar gave notice on the Tribunal's website of the receipt of Sky's application for interim relief. The Registrar indicated in the notice that the hearing of the application was provisionally fixed for 23 April. In response to this notice a number of interested parties requested permission to intervene. These included British Telecommunications plc ("BT"), Virgin Media, Inc. ("Virgin"), Top UP TV Europe Limited ("TUTV") and Orange Personal Communications Services Limited ("Orange"). On 19 April 2010 the Tribunal made directions as to the date for lodging skeleton arguments and supporting documents for the hearing due to begin on 23 April 2010.
5. In addition three applications to intervene were made by Mr. David Henry – two on behalf of a company called REAL Digital EPG Services Limited ("REAL") and one in his personal capacity. According to the applications Mr. Henry is the managing director of REAL. While the first two applications were deemed by the Registrar of the Tribunal to be inadmissible, the third application, in which Mr Henry requested permission to intervene in his own name, was served by the Registrar on the parties, who made no observations on it. In the request Mr. Henry claimed an interest in the outcome of Sky's interim relief application as the managing director of a company that "has recently set up in business and is [OFCOM] Licensed to provide a number of Digital Satellite technical services ..." He went on to indicate that REAL wished to take up the wholesale offer of the Sky premium sports channels and offer them to UK and Irish consumers at competitive prices. Mr. Henry wished to intervene in support of OFCOM and to oppose the interim relief sought by Sky.
6. The hearing of Sky's application for interim relief took place on 23, 26, 27, 28 and 29 April 2010. The Tribunal was not engaged for the whole of that period, as particularly on 28 and 29 April the parties were in discussions, reporting their progress to the Tribunal as they deemed appropriate. Mr. Henry and REAL were aware of the hearing date but did not attend at any stage (either in person or through solicitors or counsel) or otherwise pursue the application to intervene. Apart from certain brief comments contained in the request to intervene and the transmission to the Tribunal of a document

entitled “The Director General’s Review of BSkyB’s Position in the Wholesale Pay TV Market” dated December 1996, neither Mr Henry nor REAL made any written or oral submissions on Sky’s application for interim relief. According to Mr Henry, his non-attendance at the hearing was due to a combination of factors, including the air travel disruption caused by volcanic ash and his understanding that the hearing would last only one day.

7. The discussions between the parties in the course of the hearing ultimately bore fruit. Following the completion of their submissions on the issue of interim relief, but before I had given judgment, the parties<sup>1</sup> reached a consensus which was embodied in an order which I made on 29 April 2010 (“the Interim Order”). Under the Interim Order Sky undertook to appeal against the Decision, and BT, Virgin and TUTV undertook to pay into escrow in respect of each retail customer to whom they supplied SS 1 and/or 2 the difference between the wholesale price for those channels required under the Decision, and the wholesale price Sky would otherwise charge. They also undertook that Sky should be compensated out of the funds in escrow if and to the extent that the Tribunal so determined on resolving the proposed appeal. On the basis of these undertakings, the insertion of the Conditions (with certain modifications set out in a schedule attached to the Interim Order) into Sky’s relevant licences was ordered to be implemented in respect of BT, TUTV and Virgin. The Decision was otherwise suspended until further order and with liberty to apply.
8. The modifications contained in the schedule included a provision that BT, Virgin and TUTV were deemed to satisfy the MQC “save in respect of technical standards and standards of security and encryption.” Due to the suspension of the Decision, the details of the MQC have yet to be formulated by Sky.
9. On 7 May 2010 the Tribunal received an application (“the Application”) purporting to be on behalf of both Mr. Henry in his personal capacity and on behalf of REAL. Save where it is necessary to distinguish between them, I shall refer to Mr Henry and REAL as “REAL”. On its face the Application appears to seek amendments to the Interim Order to the effect that the Decision should be implemented in respect of “all other undertakings” as well as those interveners originally named in it, and the schedule to

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<sup>1</sup> Orange made no comments on the draft agreed order.

the Interim Order should include REAL Digital “as a Qualifying Platform via DTH and or Hybrid platform.”

10. On 21 May 2010 the Registrar wrote to the parties requesting written submissions in respect of the Application, with a view to listing an oral hearing. Thereafter, correspondence between the parties, which was copied to the Tribunal, indicated that the parties were in the process of entering into non-disclosure agreements with a view to exchanging confidential information. Accordingly, it appeared that appropriate time should be allowed for further information to be exchanged between REAL and Sky and for any consequent discussions to take place between them. So, on 30 July the Tribunal wrote to the parties informing them that an oral hearing would be listed for 29 October 2010, and giving directions for the filing of any further written submissions and/or evidence. No accommodation between the parties having been reached, I heard the Application on 29 October 2010. I should perhaps record that none of the interveners submitted any observations on the Application.
  
11. The grounds of the Application, as set out in REAL’s original written submissions, are many and varied. Some of them may be described as somewhat extravagant. It is not necessary to set them out in any detail but broadly they may be summarised as follows:-
  - (a) Mr Henry in his personal capacity has the right to be able to receive Sky Sports 1 and 2 from any service provider;
  - (b) OFCOM has breached its principal duty in section 3(1) of the Communications Act 2003 by excluding innovation and competition from new entrants;
  - (c) The Interim Order restricts Mr. Henry’s ability to earn a living which is protected by the Human Rights Act 1998;
  - (d) The Interim Order involves a transgression of Article 101(1) TFEU in so far as it fixes selling prices and restricts choice;
  - (e) Sky has abused its dominant position by agreeing to the terms of the Interim Order, contrary to Article 102 TFEU; and
  - (f) The Interim Order involves the commission of the criminal cartel offence contained in section 188 of the Enterprise Act 2002.

12. In addition to repeating these contentions, in its subsequent written submissions of 16 June and 18 October 2010 REAL augmented the relief sought, asking in particular that the Tribunal should direct:
  - (a) that Sky remove its exclusivity in supply agreements with third party channel providers, including the BBC, ESPN and Eurosport;
  - (b) that OFCOM actively engage with Mr Henry/REAL to ensure that it has access to 'essential' Pay TV channels; and
  - (c) that OFCOM pay a reasonable sum of money in compensation for breaching Mr Henry/REAL's legal rights, reflecting in particular OFCOM's failure to enforce competition law.
  
13. In his written and oral submissions Mr Henry told me that REAL has been gearing up for some time to begin the supply of Pay-TV services to retail customers in the UK and Ireland, using REAL's set top boxes. The service is intended to be supplied on REAL's planned platform and to be delivered via the same satellites as are used for Sky's own platform. Broadcasters who want their channels to be made available on the REAL platform would be offered a range of services, such as Conditional Access ("CA"), ie an access system protected by encryption, under which access to programme services requires a subscription or authorisation, and Electronic Programme Guide services ("EPG"), namely a programme schedule, typically broadcast alongside digital television or radio services, which provides information on the content and scheduling of current and future programmes. It appears that in March 2010 OFCOM granted REAL a licence to operate an EPG. REAL apparently has a commercial arrangement with a well-known CA system supplier, and is also said to be in the process of acquiring set top boxes with features appropriate for the retail service it intends to supply. REAL's service has not yet been launched, and Mr Henry indicated at the hearing that the current expectation is of a launch at the end of January 2011.
  
14. Based on these assertions the essential thrust of the Application is quite simple: pending the resolution of Sky's appeal, the Interim Order suspends the potential benefits of the Decision save in respect of the three companies to whom Sky was, and is, willing in principle to make wholesale supply of SS 1 and 2 under the terms of the WMO. REAL wishes to have that exception extended to itself, on the ground that there is no

justification for refusing so to extend it, and that not to do so would be unfair and inconsistent with the purposes of the Decision.

15. In his oral argument Mr Henry, who appeared in person and on behalf of REAL, accepted that the same conditions as to payment of the wholesale price difference into escrow for the interim period should also apply to REAL if supply were to be made to it under the WMO; he also acknowledged that if the Tribunal varied the Interim Order so as to extend the exception to REAL, that did not mean that REAL would necessarily obtain the requested supply of SS 1 and/or 2; he recognised that there would still need to be negotiations between Sky and REAL with a view to REAL satisfying the MQC which, in the first instance, would be identified by Sky.
16. Sky, which is represented by Mr James Flynn QC, does not consent to the variation of the Interim Order sought by REAL. In June 2010 Sky indicated that it was prepared to discuss with REAL the possible distribution of Sky's channels on the proposed REAL platform. As part of those discussions (which Mr Flynn stated were entered into by Sky on a commercial basis and not by way of imposing MQC as such) Sky sought specific information about several matters which it considered relevant to making any supply to REAL. Sky's particular concerns included: the security and encryption of the REAL platform, REAL's financial standing, the nature of REAL's proposed service and, with a view to satisfying itself that the Sky brand would be protected, the manner in which REAL intended to promote SS 1 and 2.
17. The upshot of the correspondence and such exchange of information as has been accomplished up to the time of the hearing, is that Sky now states that REAL has simply failed to provide it with the information, particularly in relation to the matters identified above, which Sky requires in order to decide whether it would be willing to supply REAL with SS 1, 2, 3, or 4 for retail to residential customers in the UK or Ireland. Based on the information it has been given Sky submits that REAL offers at best a small and uncertain opportunity to grow the volume of subscribers to those channels; no evidence has been provided that REAL's proposed platform would be such as to access significant pockets of demand not already accessed by other retailers of the channels; indeed no indication of possible subscriber numbers has been provided. Further, Sky is of the view that supply to REAL would pose considerable risks. In this

regard Sky refers to its concerns about REAL's financial resources for launching and marketing the platform, for payment for the channels in question, and for customer service support. In support of this Sky prays in aid the public records as indicating a lack of any real assets. In addition Sky contends that REAL's launch plans are vague, that no launch marketing has begun, and that REAL's set top boxes are not yet available in retail outlets. In these circumstances Sky submits that, although it remains open to the provision by REAL of supplementary information, the Application should be dealt with by the Tribunal at this stage without adjournment.

18. In relation to these alleged deficiencies in the information available from REAL, I should say that although Sky and REAL have been in contact fairly regularly throughout the period from June this year until the present, it does appear that the free flow of information from REAL has been hindered and delayed somewhat. This seems to have been due to an initial unwillingness on the part of REAL to provide technical and security information to anyone but OFCOM, and latterly to the time it has taken to put in place non-disclosure agreements between (1) SKY and REAL, and (2) Sky and REAL's third party CA system supplier. The latter agreement was only finally entered into very recently. There is much material in REAL's written submissions as to its concerns about releasing confidential security and technical information to Sky. Whilst taking issue with REAL's reasons for these concerns, Sky submits that it is nevertheless entitled to satisfy itself as to *inter alia* the security of REAL's proposed CA and encryption arrangements, and in this it is supported by OFCOM.
19. It is also apparent that information as to REAL's financial standing has to some extent been drip-fed to Sky and its advisers by REAL. Some documentary evidence and submissions were supplied to the Tribunal on the day before the hearing, but was not apparently supplied even in redacted form to Sky or its legal advisers in time to be considered for the hearing. Moreover, oral evidence about REAL's financial standing and commercial prospects was proffered to the Tribunal in the course of the hearing from REAL's chairman and shareholder, Mr Fred Perkins. Again, having had no notice of this Sky and its advisers were not in a position to respond to or comment on it. The attempt to introduce material of this kind at that stage was a breach of the directions which I gave on 30 July, whose purpose was to ensure that all submissions and evidence relied on by REAL were filed by 18 October, in good time for the hearing. If



the material in question had had a bearing on the matters which I need to decide it might well have been necessary for me to adjourn the hearing – probably at Mr Henry’s and REAL’s expense.

20. In the event, as I shall explain in due course, it is not necessary or appropriate for the purposes of this Application for me to express or reach any concluded view on this new financial material, nor on any of the following: the assertions of Sky and counter-assertions of REAL in connection with the alleged indebtedness to Sky of other companies with which Mr Henry is or has been associated as director and/or shareholder; the extent of REAL’s assets and financial status; whether the technical and security information thus far provided is insufficient for distribution of SS1 and 2 safely and securely via REAL’s proposed platform; nor whether or not REAL’s fears as to the risks of misuse of its CA security data are justified.
21. I turn now to the submissions made by Sky in opposing the variation sought by REAL. These are contained in three detailed documents, which have been supplemented by Mr Flynn’s submissions at the hearing.
22. First, Sky submits that the legal bases for the Application, as summarised earlier in this judgment, are unfounded. I have already referred to some of these as extravagant, and the points made by Sky have some force. In addition, the relief sought by REAL is in large measure beyond the powers of the Tribunal. However I do not need to deal with these allegations because, as I have said, the real basis of the Application is “Me too!” In other words, if BT, Virgin and TUTV have been put in a position where they can negotiate a wholesale supply agreement for the channels in question from Sky within the framework of the WMO, why should REAL not have the same opportunity? In my view REAL does not need to rely upon any cause of action separate from the Decision itself for this purpose: it is the Decision which gave rise to the WMO and which provides REAL with standing to seek a variation of the current suspension, as a potential retailer of Pay-TV services and beneficiary of the WMO.
23. Next, Sky submits that before the Tribunal can vary the Interim Order it should assess whether it would be appropriate to determine Sky’s original interim relief application in REAL’s favour; for it contends that would be the effect if the Application were to

succeed, and means that the Tribunal must consider all the arguments which Sky raised in that original application; in particular Sky submits that it has a strongly arguable case in its main appeal against the Decision, and that if it wins that appeal it will suffer the harm set out in its interim relief application, including the litigation risks and the damage to its brand and reputation associated with any withdrawal of wholesale supply to REAL at that stage. On the other hand, submits Sky, REAL has not suggested that the Interim Order as it stands does REAL any particular harm.

24. This argument has little force in the light of the Interim Order itself. The effect of that Order is that, pending final resolution of Sky's main appeal, a number of major and well-established competitor companies have been given the opportunity to take advantage of the WMO in order to obtain wholesale supply of the channels in question from Sky, subject to certain monetary safeguards to protect Sky against loss of the price differential should its appeal be successful. 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 supply of the channels to those companies be withdrawn. Given the size and nature of the companies which are already beneficiaries of the Interim Order compared with the status of REAL, and given the head-start in launching Pay-TV services which these undertakings now enjoy compared with any retail service REAL might ultimately be in a position to offer within the framework of the WMO, any incremental damage to Sky's brand and reputation in the event of its withdrawing supply from REAL is likely to be tiny in comparison with the implications of withdrawing services from any or all of the other three companies. The same applies to the risks associated with litigation.
25. Further, REAL accepts that if and when it commences its Pay-TV service retailing SS 1 and 2 REAL would have to pay the price differential into escrow, as the other companies are required to do under the current terms of the Interim Order.
26. In these circumstances it is artificial to suggest that the possible adverse effects for Sky have the force they may have had prior to the Interim Order. The position is fundamentally different now.

27. However, Sky has an additional argument. As already mentioned, Sky argues that on the information currently available from REAL the company would not meet the MQC that Sky would be likely to impose, including criteria relating to financial status and technical and security requirements. Thus, Sky would not in any event be obliged to make a reference offer to REAL even if the WMO were to apply as between Sky and REAL. Therefore, Sky submits, I should not exercise my discretion to make the variation requested, as to do so would serve no useful purpose. The variation should on that account be refused. Sky acknowledges that REAL may make a further application to vary, based perhaps on additional information which it might supply to Sky. If that were to happen the appropriate procedure, according to Sky, would be for the Tribunal to stay or dismiss the application, and REAL should provide the information to OFCOM and seek to persuade OFCOM to make the variation application itself.
28. OFCOM, which was a full participant in the interim relief proceedings which led to the Interim Order, as well as a respondent to the Application, generally supports Sky's position as to the lack of utility in the Tribunal granting the variation. In a letter to the Tribunal dated 23 July 2010 OFCOM made some brief general observations on REAL's request for a variation. These were to the effect that it was legitimate for Sky to seek to satisfy itself as to the security and other technical arrangements of a potential retailer of its channels before entering a supply agreement; that given the paucity of information which had apparently thus far been supplied by REAL, OFCOM was not in a position to make any assessment as to the arrangements envisaged by REAL; that the Tribunal did not therefore have sufficient information to amend the Interim Order as requested. I interject to recall that this letter did, of course, pre-date more hopeful developments, including the entering into non-disclosure agreements. In a further short letter dated 4 October 2010 OFCOM referred to the discussions which were then continuing between Sky and REAL, and indicated that the information being requested by Sky was "broadly reasonable in scope", but that not all of it had yet been provided: there had been delays involving REAL's third party CA provider, and certain information as to REAL's financial status, which was in OFCOM's view necessary, was outstanding. OFCOM went on to refer to Sky's comment to REAL in September 2010 that Sky would need to consider the extent of the opportunity offered by REAL of growing "the total base of subscribers to the channels"; OFCOM stated that, in the

context of MQC under Condition 14A of the WMO conditions, OFCOM would be concerned if this represented “an absolute requirement”.

29. At the hearing Mr Josh Holmes, appearing for OFCOM, supported Sky’s argument that to grant the variation would serve no purpose; he submitted that in the light of the information thus far provided by REAL, if the WMO applied and Sky declined to enter into a wholesale agreement with REAL on the ground that the MQC were not satisfied, OFCOM would take the view that Sky was acting justifiably. OFCOM considered that the appropriate course, in the event that the Tribunal dismissed the Application and a another application to vary was made by REAL, was for the Tribunal to stay the application while OFCOM studied the information available from REAL at that stage and in due course provided its advice to the Tribunal as to its sufficiency; the Tribunal could then proceed to rule on the new application to vary.
30. In my view these arguments of Sky and OFCOM are misconceived. First of all it assumes that I am in a position to judge whether the information which REAL has so far provided to Sky, and which includes information of a technical nature, is or is not sufficient to satisfy Sky’s legitimate MQC relating to technical and security requirements as well as financial standing. This, one recalls, is in a context where Sky has not been required to formulate the MQC since OFCOM’s decision to insert the WMO into Sky’s broadcasting licences is suspended until further order, save as regards the three companies who intervened in these proceedings. Therefore the MQC do not as such exist. Even if they did exist the fact is that I am clearly not in a position to make an assessment of this kind without considerably more detailed submissions and evidence than have been put before me. For example, all I have from OFCOM are the two short letters to which I have referred, neither of which descends into any detail. In these circumstances what the argument made by Sky and supported by OFCOM really amounts to is a suggestion that I should take their word that as things stand REAL has not progressed from first base in providing reasonable information to Sky. This may indeed be the case but, as I say, I am not in a position properly to judge.
31. There is an even more fundamental objection to the argument. In my view an assessment of this kind is not an appropriate role for the Tribunal in the context of the Application. It would be inconsistent with the nature of the Decision and with the

WMO which the Decision has created through the insertion of Condition 14A into Sky's relevant licences. By way of example Condition 14A, as inserted into the Sky Sports 1 TLCS licence, so far as relevant, provides:

"14A Wholesale must-offer

(1) The Licensee shall offer the programme content of the Licensed *Service to any person for retail by that person to residential consumers in the United Kingdom on Qualifying Platforms*:

- (a) upon reasonable request in writing;
- (b) within a reasonable time;
- (c) on a non-exclusive basis;
- (d) on fair and reasonable terms;
- (e) without any undue discrimination; and
- (f) in accordance with the requirements of this Condition 14A *and any direction issued by Ofcom under this Licence*.

(2) The charges offered for supply under Condition 14A(1) shall not exceed the Maximum Prices.

(3) The Licensee shall publish by Friday 14 May 2010 standard terms and conditions under which offers shall be made further to Condition 14A(1), which shall include at least the following:

- (a) charges which do not exceed the Maximum Prices;
- (b) *the Minimum Qualifying Criteria for potential purchasers*;
- ...
- (e) *a dispute resolution procedure* to be used between the Parties;

...

(6) The Licensee shall comply with *any direction or request for information issued by Ofcom for the purpose of ensuring, monitoring or investigating compliance with this Condition 14A*.

(7) In the event that a person accepts an offer made pursuant to Condition 14(A)(1) the Licensee shall use its best endeavours to enable that person to commence retailing of the content of the Licensed Service.

(8) For the purposes of this Condition 14A:

...

*"Minimum Qualifying Criteria" means the minimum requirements that must be satisfied by a potential purchaser requesting supply under Condition 14(A)(1),*

*which may include requirements relating to: (a) financial standing; (b) technical standards for retail provision of content; (c) technical standards for securing wholesale supply of content; and (d) encryption and security (including allocation of liability)*

...

“Qualifying Platform” means any platform used for the distribution of programmes to residential consumers in the United Kingdom, other than a platform operated solely by the Licensee.”

(Emphasis added)

32. It was not disputed before me that under these arrangements the reasonableness or otherwise of any MQC stipulated by Sky, and any issue as to whether those criteria are or are not satisfied by a potential purchaser, falls to be decided, at least in the first instance, by OFCOM. The procedure for resolving such matters is helpfully described in the Decision itself at paragraph 10.358ff. Such a situation has already arisen in relation to TUTV, which is one of the beneficiaries of the Interim Order. A dispute arose as to the legitimacy of a contractual provision which Sky wished to insert into its supply agreement with TUTV made under the WMO; TUTV made a complaint to OFCOM which OFCOM resolved by way of a formal decision; that decision has now been appealed to the Tribunal by Sky pursuant to section 192 of the 2003 Act. (Case No 1170/8/3/10.)
33. By contrast, the negotiations and discussions between Sky and REAL have, of necessity, been conducted outside the framework of the WMO. So long as the Decision remains suspended in relation to REAL, OFCOM’s role seems to be, at best, an informal one; it can make no such direction as is envisaged by Condition 14A(1)(f) or 14A(6) in relation to a proposed supply under the WMO, and it would not appear to be in a position to resolve any dispute that has arisen or which may in the future arise as to the reasonableness of, for example, any proposed MQC, demands for information by Sky, or adequacy of REAL’s response. Mr Holmes did not suggest otherwise at the hearing, although he said that OFCOM would do what it could to facilitate discussions and assist wherever it felt it could make a contribution. It follows that REAL has no obvious means of requiring OFCOM to take a formal decision as to these matters.
34. In my judgment this situation is unacceptable. Neither OFCOM nor Sky has suggested that REAL is in principle outside the potential scope or contemplation of the WMO; for

example there is no suggestion that REAL is not now genuinely and in good faith interested in obtaining a wholesale supply of the channels in question from Sky for a retail Pay-TV service it wishes to offer to residential customers in the UK. If such a suggestion were to be made I cannot see how it could have any substance in the light of REAL's submissions. Why then should I not exercise my discretion by lifting the current suspension of the Decision in REAL's case? To lift it would not in any way pre-judge the issues which already exist as to the reasonableness of the information requested by Sky, and the adequacy of REAL's response. On the contrary, that would be the effect of refusing the variation. It is possible, indeed likely, that more information will be forthcoming from REAL and its CA supplier. If the variation is granted Sky would no doubt assess all such information by reference to the criteria it is currently applying, and if REAL is dissatisfied and makes a complaint to OFCOM, the latter may make a formal decision, as it has done in the case of TUTV. This is the procedure envisaged by the Decision. The alternative approaches advocated by Sky and OFCOM in the course of the hearing would, in effect, place the Tribunal in the position of the regulator and primary decision-maker, albeit perhaps with the benefit of the considered advice of OFCOM in the event of a further variation application by REAL. In my view those alternative approaches are wrong in principle.

35. I have reached the conclusion that if the balance of convenience or balance of injustice or balance of interests is applied, in all the circumstances the balance lies strongly in favour of varying the Interim Order so as to put REAL in the same position *mutatis mutandis* as the other three companies who have been brought within the exception to the general suspension of the Decision. In weighing that balance significant weight needs to be given to the factors of fairness and equal treatment. Denying REAL the variation it seeks would not just preclude any possibility of wholesale supply to it under the WMO during the period of suspension, but would also deny it certain procedural advantages which it would have if it were brought within the scope of the WMO, and which, in the present situation, it is desirable that REAL should have. As against this there appears to be no significant incremental harm likely to be caused to Sky if REAL is admitted to the exception and Sky ultimately succeeds in its challenge to the Decision. As to the effect on competition to which the Tribunal has regard pursuant to rule 61(3)(c) of the Tribunal's rules, the grant of the variation sought (and the *pro tanto*

relaxation of the existing interim suspension of the Decision) is unlikely to have any significant adverse effect.

36. I therefore propose to exercise my discretion to vary the Interim Order by lifting the suspension of the Decision in respect of REAL. I have no concluded view on whether the variation should be effected by way of an amendment to the Interim Order itself or by a separate order dealing specifically with REAL's position. The effect of the variation will be to extend the terms of the Interim Order to REAL, including so much of the schedule thereto as is applicable, and the undertaking to pay the price differential into escrow. However, I do not consider that in REAL's case Sky should be held to the deeming provision in paragraph 1 of the schedule. Sky should not be deprived of its right to seek to rely upon criteria where it has not willingly conceded that right, and where there are genuine issues in relation to such criteria, save by a decision of OFCOM taken under or pursuant to the relevant licence conditions.
37. The precise terms of an order giving effect to this judgment should be agreed between Sky, REAL and OFCOM, and an agreed draft submitted to me for approval. Should total agreement not be reached, rival drafts should be submitted by 5pm on 16 November 2010.
38. Finally, I do not know why it is that Mr Henry and REAL do not have the benefit of legal representation, but if it is possible for them to do so from now onwards I believe that it would be in everyone's interest, not least REAL's. While Mr Henry's oral submissions at the hearing were helpful and to the point, some of the contentions in the written material presented to the Tribunal on behalf of Mr Henry and REAL were very wide of the mark.

President

Charles Dhanowa  
Registrar

Date: 9 November 2010