



COMPETITION APPEAL TRIBUNAL

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

CASE NUMBER: 1157/8/3/10

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 section 317(6) of the Communications Act 2003 (“the 2003 Act”) by the Football Association Premier League Limited (“the Premier League”) of 30 Gloucester Place, London W1U 8PL against a decision made by the Office of Communications (“OFCOM”) of 2a Southwark Bridge Road, London SE1 9HA on 31 March 2010 (“the Decision”). The Premier League is represented by DLA Piper UK LLP, 3 Noble Street, London EC2V 7EE (reference KV/ALM/85207/120068).

The Decision was taken under sections 3(4)(b) of the Broadcasting Act 1990 (“the 1990 Act”) and 316(2) of the 2003 Act to vary, with effect from 31 March 2010, the licences granted to British Sky Broadcasting Limited (“Sky”) under Part I of the 1990 Act for Sky’s pay television channels, Sky Sports 1, Sky Sports 2, Sky Sports 1 HD and Sky Sports 2 HD (“the Licensed Services”) through the imposition of conditions concerning 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 obligation” (“WMO obligation”) which compelled Sky to offer the Licensed Services to any person meeting minimum qualifying criteria (to be specified in the first place by Sky) for retail by that person to residential consumers in the UK on qualifying platforms upon a reasonable request in writing; within a reasonable time; on a non-exclusive basis; on fair and reasonable terms and without undue discrimination; and to supply Sky Sports 1 and 2 at charges which do not exceed specified maximum prices set by OFCOM. The Decision further required Sky to wholesale HD services on fair, reasonable and non-discriminatory terms.

By an Order dated 29 April 2010 in Case No. 1152/8/3/10 (IR) *British Sky Broadcasting Limited v Office of Communications*, the President of the Tribunal varied the Conditions on an interim basis, suspending the operation of the Decision generally and modifying Sky’s obligations in respect of specified platform operators.

In summary, the principal grounds of appeal on which the Premier League relies are as follows:

1. OFCOM has misdirected itself in relation to its powers under section 316 of the 2003 Act. Section 316, properly construed, does not give OFCOM the jurisdiction or power to impose the WMO obligation on Sky.
2. There were fundamental errors in OFCOM’s assessment of the necessity, impact and proportionality of the WMO obligation, in particular:
 - (a) In concluding that the remedy is necessary, OFCOM failed to consider or apply the well established principles applicable to a refusal to supply or margin squeeze case, and applied an entirely novel theory of consumer harm that does not, on a proper analysis, justify the imposition of the remedy. OFCOM has in any event committed a number of errors in its approach to identifying the existence of such harm, and in its analysis of whether there were any less onerous ways of achieving its aims.
 - (b) OFCOM erred in its assessment of the effectiveness of the remedy. The remedy is ineffective in meeting OFCOM’s stated objectives of achieving market expansion and

minimising the risk to rights values. Moreover, in the absence of retail price reductions it will not achieve its aim of market expansion.

- (c) OFCOM erred in its consideration of the beneficial effects that will result from the remedy. Its approach to assessing likely demand and consumer surplus is fundamentally flawed, it has overestimated the extent to which dynamic benefits will flow from the introduction of the remedy, and it has erroneously concluded that Sky's revenues are likely to substantially increase as a result of the imposition of the remedy.
- (d) OFCOM has significantly understated the adverse affects of the remedy. In particular, OFCOM erred in considering that it was unlikely that its remedy would have any adverse effect on the value of sports media rights, or on the incentives of parties to bid for those rights, and its approach to assessing the producer surplus of producers other than Sky was flawed.

3. OFCOM's consultation process was flawed in that:

- (a) OFCOM did not provide the Premier League with either its impact assessment model or pricing model, on which OFCOM places central reliance to justify the Decision; and
- (b) OFCOM failed to consult at all on the WMO obligation set out in the Decision. It consulted instead on two different remedies, which would have imposed supply obligations on Sky in relation to premium movie channels, as well as premium sports channels.

Accordingly, the Premier League seeks the following relief from the Tribunal:

- 1. that the Decision be set aside;
- 2. that the matter be remitted to OFCOM with a direction requiring OFCOM to reconsider and make a new decision in accordance with the Tribunal's ruling;
- 3. that OFCOM be directed to pay the Premier League's costs of this appeal; and
- 4. such further or other relief as may be necessary or appropriate.

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. 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

Published 8 June 2010