



COMPETITION APPEAL TRIBUNAL

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

CASE No: 1170/8/3/10

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 11 October 2010 under section 317(6) of the Communications Act 2003 (the “2003 Act”) by British Sky Broadcasting Limited (“Sky”) of Grant Way, Isleworth, Middlesex TW7 5QD against a decision made by the Office of Communications (“Ofcom”) of 2a Southwark Bridge Road, London, SE1 9HA in a document entitled “Assessment of a complaint by Top Up TV alleging breach by Sky of Condition 14A of the TLCS licences for Sky Sports 1 and 2” dated 11 August 2010 (“the 11 August Decision”)¹. Sky is represented by Herbert Smith LLP of Exchange House, Primrose Street, London, EC2A 2HS (Reference: 2825/9491/30873711).

The 11 August Decision relates to Sky’s agreement (the “Agreement”) with Top Up TV Europe Limited (“TUTV”) for the wholesale supply by Sky to TUTV of Sky’s pay television channels, Sky Sports 1 and Sky Sports 2 in standard definition (the “Channels”). The Agreement contains a clause (the “Clause”) whereby Sky’s grant of distribution rights to TUTV is restricted (with exceptions) to devices providing customers with a range of services defined in the Agreement as the “TUTV Pay TV Service”. Ofcom concluded in the 11 August Decision that this clause breaches condition 14A of Sky’s Television Licensable Content Service licences for the Channels (“TLCS Licences”).

Condition 14A of the TLCS Licences was inserted pursuant to a decision of Ofcom dated 31 March 2010 (“31 March Decision”) which imposed a “wholesale must-offer obligation” (the “WMO obligation”) compelling Sky, among other things, to offer the Channels 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. Upon each of Sky, Ofcom, British Telecommunications plc, Virgin Media, Inc. and TUTV agreeing to the terms of 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 31 March Decision generally and modifying Sky’s obligations in respect of specified platform operators including TUTV.

Sky contests the legality of the 31 March Decision by its appeal in Case No. 1158/8/3/10 *British Sky Broadcasting Limited v Office of Communications* (the “Main Appeal”). The present appeal of the 11 August Decision is an adjunct to and dependent on the Main Appeal.

In the Main Appeal, Sky challenges Ofcom’s decision to impose the WMO obligation on multiple grounds. Sky relies on the pleas made in the Main Appeal in contesting the legality of the 11 August Decision. Sky contends that if the 31 March Decision is set aside on the Main Appeal, the 11 August Decision will necessarily fall to be set aside as having been made ultra vires. Sky further contends that the 11 August Decision highlights deficiencies in the 31 March Decision.

¹ <http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/764676/assessment.pdf>

Accordingly, Sky seeks an order that the Tribunal:

1. set aside the 11 August Decision;
2. direct that OFCOM pay Sky's costs of this appeal; and
3. grant 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 within three weeks of the publication of this notice.

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

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