



COMPETITION APPEAL TRIBUNAL

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

**CASE: 1179/8/3/11**

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 Tribunal Rules"), the Registrar gives notice of the receipt of an appeal on 14 February 2011 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 on 13 December 2010 ("the 13 December Decision"). Sky is represented by Herbert Smith LLP of Exchange House, Primrose Street, London, EC2A 2HS (Reference: 2825/9491/30873711).

The 13 December Decision relates to Sky's agreement ("the Agreement") with Top Up TV Europe Limited ("Top Up TV") dated 15 July 2010 for the wholesale supply by Sky to Top Up TV of Sky's pay television channels, Sky Sports 1 and Sky Sports 2 in standard definition ("the Channels"). The Agreement contains a clause whereby distribution of the Channels via Conditional Access Modules ("CAMs") is excluded from Sky's grant of distribution rights to Top Up TV. Ofcom concluded in the 13 December 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 ("the 31 March Decision") which imposed a "wholesale must-offer obligation" ("WMO obligation") compelling Sky, *inter alia*, 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. By an Order dated 29 April 2010 in Case 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 Top Up TV.<sup>1</sup>

Sky contests the legality of the 31 March Decision by its appeal in Case 1158/8/3/10 *British Sky Broadcasting Limited v Office of Communications* ("the Main Appeal").<sup>2</sup> The present appeal of the 13 December Decision is an adjunct to and dependent on the Main Appeal.

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<sup>1</sup> See [www.catribunal.org.uk/237-6095/1152-8-3-10-IR-British-Sky-Broadcasting-Limited-.html](http://www.catribunal.org.uk/237-6095/1152-8-3-10-IR-British-Sky-Broadcasting-Limited-.html). A further order made and drawn by the President on 23 November 2010 extended the application of the WMO obligation to another platform operator subject to certain conditions.

<sup>2</sup> See [www.catribunal.org.uk/237-6549/1158-8-3-10-British-Sky-Broadcasting-Limited.html](http://www.catribunal.org.uk/237-6549/1158-8-3-10-British-Sky-Broadcasting-Limited.html). That appeal is being heard together with Case 1156/8/3/10 *Virgin Media, Inc. v Office of Communications*, Case 1157/8/3/10 *The Football Association Premier League Limited v Office of Communications* and Case 1159/8/3/10 *British Telecommunications plc v Office of Communications* each of which also challenged certain aspects of the 31 March Decision.

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 13 December Decision. Sky contends that if the 31 March Decision is set aside in the Main Appeal, the 13 December Decision will necessarily fall to be set aside as having been made *ultra vires*. Sky further contends that the 13 December Decision highlights deficiencies in the 31 March Decision.

Accordingly, Sky seeks an order that the Tribunal:

1. set aside the 13 December 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 Tribunal Rules.

A request for permission to intervene should be sent to the Registrar, 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](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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