



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL IN CASE No. 1246/8/3/16

Pursuant to rule 14(2) of the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648 of 2015) (“the Rules”), the Registrar gives notice of the receipt of an appeal on 19 January 2016 by British Telecommunications Plc (“BT”) of 81 Newgate Street, London, EC1A 7AJ against a decision by the Office of Communications (“OFCOM”) contained in its statement entitled “*Review of the pay TV wholesale must-offer obligation*” dated 19 November 2015 (the “WMO Statement”). BT is represented by BT Legal at the above address (reference: Bruce Breckenridge / Beatrice Roxburgh / Louise Rason).

In the WMO Statement OFCOM reviewed the conditions in the broadcasting licences held by Sky for Sky Sports 1, Sky Sports 2, Sky Sports 1 HD and Sky Sports 2 HD, which OFCOM had imposed under section 316 of the Communications Act 2003 (the “Act”) in 2010 (the “WMO Remedy”). OFCOM considered whether Sky might limit wholesale distribution channels carrying key sports content to competing pay TV retailers and whether that would prejudice fair and effective competition. OFCOM identified that limited distribution might take two forms: (i) non-supply of key content to certain retailers and/or platforms (including failure to supply the channels at all to a rival platform or providing supply in a way that reduces its value to consumers, e.g. a lower quality or incomplete service); and (ii) providing supply on terms which would not enable rivals to compete effectively in pay TV retailing, or potentially other parts of the value chain. OFCOM concluded that further regulation was not appropriate and removed the WMO Remedy.

In summary, BT appeals against the WMO Statement on the following grounds:

1. OFCOM erred in law in its application of section 316 of the Act and acted in breach of its statutory duties under section 3 of the Act by adopting a “wait and see” approach based on an assessment of Sky’s current supply arrangements and the possibility of OFCOM being able to consider *ex ante* regulation if evidence emerged that Sky had actually engaged in harmful practices.
2. OFCOM erred in the exercise of its discretion in determining whether there was a risk of Sky engaging in wholesale distribution practices detrimental to the development of fair and effective competition, for the purposes of section 316, in particular by failing to appreciate that there was a continued significant risk of Sky engaging in wholesale distribution practices for its sports channels that would be detrimental to the emergence of fair and effective competition, and indeed that Sky was already engaging in, or threatening to engage in, such practices.
3. OFCOM erred in the exercise of its discretion by focusing its analysis on the distribution of key sports content, rather than on the product that consumers actually purchase and which is the focus of the statutory remedy under section 316, namely sports channels.
4. OFCOM erred in the exercise of its discretion and acted in breach of its statutory duties in concluding that there was sufficient evidence that Sky would not engage in a practice that would be prejudicial to fair and effective competition in the retail provision of pay TV services by offering its Sky Sports proposition only at wholesale prices which would not permit fair and effective competition.
5. OFCOM erred in the exercise of its discretion and acted in breach of its statutory duties by failing to identify, as a practice which is or would be prejudicial to fair and effective competition in the retail provision of pay TV services, demands by Sky for the wholesale provision to it of channels belonging to other pay TV retailers as a condition for the supply to such other retailers of its Sky Sports channels (or any of them), and failing to impose a licence condition appropriate for securing that Sky does not engage in such a practice.

As regards the relief sought, BT requests the Tribunal to:

- (a) uphold BT's appeal, on each of the grounds advanced;
- (b) decide what is the appropriate action for OFCOM to take;
- (c) remit the WMO Statement to OFCOM with such directions as the Tribunal considers appropriate for giving effect to its decision;
- (d) make such other provision for relief as may be appropriate; and
- (e) make such provision as may be appropriate for the payment of BT's costs of this appeal.

In particular, the Tribunal is requested to direct OFCOM to:

- (a) impose a licence condition, pursuant to section 316 of the Act, appropriate to ensure that Sky does not engage in a practice of limited distribution of its Sky Sports channels (which comprise a single Sky Sports proposition), and thereby prejudice fair and effective competition in the provision of retail pay TV services;
- (b) impose a licence condition pursuant to section 316 of the Act appropriate to ensure that Sky does not engage in the practice of demanding the wholesale provision of channels belonging to other pay TV retailers as a condition for the supply of its Sky Sports channels or any of them, or in any other form of limited distribution, as defined by OFCOM; and
- (c) undertake appropriate economic analysis in order to ascertain what prices Sky charges or would charge for the wholesale supply of its Sky Sports proposition that would be prejudicial to fair and effective competition in the retail provision of pay TV services, and to impose an appropriate licence condition to prevent Sky from charging such prices.

Any person who considers that they have 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, QC (Hon)
Registrar

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