



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

Case No: 1567/3/3/22

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 18 October 2022 under section 192 of the Communications Act 2003 (“the Act”), by Sky UK Limited (“Sky”) against a confirmation decision dated 19 August 2022 of the Office of Communications (“Ofcom”) under section 96C of the Act entitled *Investigation into Sky’s compliance with the obligation to provide end-of-contract notifications* (“the Decision”), by which Ofcom concluded that Sky has contravened, and continues to contravene, its obligations to provide end-of contract notifications under General Condition C1 in respect of its pay TV customers. Sky is represented by Herbert Smith Freehills LLP of Exchange House, Primrose Street, London EC2A 2EG (reference: Stephen Wisking / Phoebe Hirst).

Sky provides various services to retail consumers including a subscription pay TV service (“Sky TV”).

According to Sky’s Notice of Appeal (“NoA”), Sky TV comprises mainly the provision to consumers of TV content (such as Sky’s wholly owned linear television channels, linear television channels licensed from third parties, and content provided on an on-demand basis both from Sky and third parties) on a subscription basis and a range of other elements (such as hardware, software, conditional access services, customer service, installation and repair services and, in some cases, transmission of content). As regards content and transmission, Sky TV is a unified service of which transmission is an ancillary element. The elements of the unified service are fundamentally indissociable: with no content there would be nothing to transmit and with no satellite distribution there would be no means for the customer to access the content via their satellite dish (although Sky TV also includes access to content via the internet).

Sky contends that Sky TV is not a public electronic communications service (“ECS”) as it does not consist ‘wholly or mainly’ in the conveyance of signals. Therefore, the requirement under General Condition C1 that providers of an ECS must notify customers through end of contract notifications of when their minimum contract is coming to an end, together with other related contractual information, does not arise.

According to the NoA, there is a lack of clarity in the Decision as to whether Ofcom found Sky’s pay TV service (as a whole) an ECS, or merely that a discrete transmission service is an ECS such that Sky’s content service is not an ECS.

In summary, Sky’s ground of appeal is that Ofcom erred in law in its application to Sky TV of the test for an ECS by failing to properly ask whether Sky TV consisted ‘wholly or mainly’ in the conveyance of signals. Ofcom erred by:

1. inappropriately disaggregating Sky’s unified service into constituent elements for the purpose of applying the ‘wholly or mainly’ test to just one of them rather than to the whole service;
2. taking an inappropriate policy argument which undermines the exemptions from the scope of ECS regulation granted to services which do not wholly or mainly consist in transmission or do so but are content services;
3. introducing a competitive distortion between Sky and other competing content services;
4. failing to answer the obvious contradiction in the Decision between Ofcom’s finding that the transmission element is a separately regulable service and Ofcom’s remedy which applies to Sky TV as a whole; and

5. relying on either irrelevant or incorrect characterisation of Sky's case by claiming that Sky's approach requires that a service involving an ECS can never be subject to content regulation.

As regards the relief sought, Sky seeks:

- a) An order, pursuant to section 194A(3)(a) of the Act, quashing the Decision in its entirety without remitting the Decision to Ofcom; and
- b) Costs.

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, Salisbury Square House, 8 Salisbury Square, London, EC4Y 8AP, 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 email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, KC (Hon)
Registrar

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